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HOW RAISE THE STANDARD OF MORALS FOR THE LEGAL PROFESSION.

Two Irishmen were strolling through a cemetery. They chanced upon a tombstone with this inscription carved upon it, "Here lies Joseph Good, a lawyer and an honest man." Pat said to Mike, "Faith and there must be two men buried in one grave." Such was Pat's conception of the legal profession and in large measure it is the conception of the world. David, in his haste, said, "All men are liars." The world has modified or revised David's declaration and says, "All lawyers are liars. Whatever the old notion was as to the legal profession, we are persuaded that such is not the holding of the public today of our honorable profession. The number of honorable, straightforward, upright men in the profession today is legion and is increasing rapidly. Even though this be true, there is room for improvement.

The rapid progress in this direction is due in no small degree to the activities of the bar associations, high class legal publications and the courts the world over in demanding that the bar shall "tone up" morally and fill the place it should rightfully fill in the body politic.

Why select such a topic for discussion in this magazine? Is it a live, up-to-date subject? One cannot read the legal periodicals of the country, the proceedings of bar associations, and the doings of the bar examiners and the courts which they represent and not come to the conclusion that this is a very much alive and up-to-the-minute topic or subject and entitled to a place in this Review.

No farther back than the December number of the American Law School Review there is reprinted from the October Journal of the American Bar Association an article bearing on a kindred topic covering seven double column pages. This article was prepared by the Hon. George W. Wickersham, ex-Attorney General of the United States, and delivered before the American Bar Association.

Mr. Wickersham begins his address to the Association with this paragraph:—"The fundamental requirement of a good moral character on the part of persons seeking admission to the bar is assumed in all regulations, whether by statute or rule of court, in every state of the American Union. It hardly could be otherwise. The very nature of the relation of practitioners of law to the courts before which they practice, to the clients whose most important interests are entrusted to them, and to the public to which their obligations increasingly are being recognized, requires sound moral character and an instinctive recognition of proper ethical standards. The regulations for admission to the bar in practically every state begin by providing that a person of good moral character, possessing other qualifications specified, may be admitted to the practice of law upon compliance with the specific regulations."

Mr. Wickersham in this address practically takes as his text the first paragraph from an article read before the

American Bar Association in 1913, by Mr. Clarence A. Lightner, of the Michigan bar, entitled, "A More Complete Inquiry Into the Moral Character of Applicants for Admission to the Bar." In this paragraph Mr. Lightner made these observations:—"The banking and business worlds have learned that for true success, character counts. Lawyers of intelligence know that this is equally true of the legal profession, and yet with a sense of helpless indifference or with no sense at all, they, for the most part, neglect character as an element in legal education, and take no pains to exclude the ethically unfit from admission to the profession. The evils resulting from admitting a morally unfit applicant are not confined to the case in question. The admission to the bar of one having a low moral standard tends to lower the character of other practitioners and of the bar in general. Not altogether unlike the 'gang' in juvenile experience, the bar of any community has an ethical standard which fairly represents the average of its membership."

Mr. Wickersham, one of the highest types of representatives of the American bar and American Bar Association recommends the careful reading of Mr. Lightner's paper by every member of the profession.

Both Mr. Wickersham and Mr. Lightner discuss the "toning up" of the bar but both fail in laying down a good workable method whereby this "devoutly to be wished" result may be attained. We do not claim to be able to supply in this paper a fully developed plan for obtaining this result, but hope to supply a few hints or suggestions which may help on toward the desired goal.

This goal will never be reached until the importance of character is placed upon an equal footing with the knowledge of the law. Morals and brains must be estimated "fifty-fifty." Then why not put the morals through as rigid a test as the brains? From five to seven men are designated by the law of the various states to examine candidates. These candidates go through four sessions of three

hours each, answering one hundred to one hundred and fifty questions on sixteen or eighteen subjects in the law. The examiners devote from three to six weeks reading over the answers to these questions to test the intelligence, knowledge and education of these candidates, and they give six or eight seconds to test the moral status of each one of them. Is not Mr. Lightner right when he says, "Those examiners act with a sense of helpless indifference, or with no sense at all?"

However, some one says that the fault is not with the examiners but with the law which requires so little. With this objection we are little concerned. The vital thing is to find the weakness, then correct it, no matter on whom or how many the fault lies. We are most decided in our opinion that the general method of most states which require two or three affidavits from as many citizens, two of whom must be members of the bar, setting forth the fact that the candidate is of good moral character, is most flimsy, weak and non-effective.

Every one knows that almost any one can find two or three persons who will make affidavits or write letters of "good moral character," thus arming such candidates with the required evidence. Not only is this true, but such letters or affidavits may be secured from ordinarily conscientious and well meaning people—people who do not purpose to lie or perjure themselves. Their sympathies and charitable natures are played upon and abused by the persons applying to them. The writer has been imposed upon in this manner when he was compelled to throw the mantle of charity over the faults of the applicants and with words of advice and hopes of reform, sent them away with the necessary documents. In doing so he felt like doing as a certain professor in a college did when he came to sign the diploma of one of the graduates. He signed with his eyes shut.

Two years ago in Ohio the Supreme Court and the board of examiners besides using the old system noted

above, resorted to a new and somewhat extempore expedient to get better results. Their plan failed as it might have been expected. The court was spurred on in its course by some incidents that took place in the state within five weeks previous to the bar examination. In that time five lawyers were disbarred, one of them a woman, and two others' cases were pending for a hearing. These events took place at the psychological moment to arouse the ire of the examining board. The Court determined to remedy this state of affairs by guarding the portals of the profession at the entrance end. This was the method adopted; viz, a week or ten days before the examination, three letters of inquiry were sent out regarding the history, character and conduct of each of the five hundred and three applicants for examination. These letters were sent to attorneys, ministers, teachers and business men with a questionaire as to the desirability of these five hundred and three men and women. Among this great number of applicants one-half were from Cleveland alone, and of this quota from Cleveland the majority were foreigners. The court decided that on the face of things many of them were undesirable. Numbers had been assigned to the applicants in advance of the examination. On the morning of the first day each was given a card and told to put his name and number on it. Such a thing had not been heard of for forty years in Ohio; numbers alone went on the papers of each applicant. These cards and the letters to match were brought together for comparison. As a consequence many of the 60% of failures for that year were the result of those fifteen hundred and nine letters. Some were failed even before their papers containing answers to questions were looked over. The letters in these instances did not contain information satisfactory to the committee. One man who failed protested and wanted to know whether he answered the questions correctly. He was told that his papers were well up near the top in excellence. He asked why he was not passed, and was told that his character was too poor.

The committee apparently graded character on the basis of 100%. No improvement will be made in the profession and no check on undesirables will ever be accomplished until character is placed on an equal footing with intelligence and ascertained by as rigid a test.

The objection to the spasmodic effort of the Ohio board was that it began at the wrong time. It was unfair to the applicants to suffer them to go to law schools or study under attorneys for three years and then turn them down in the end. The time to do this is at the beginning when they first register. When they know what will be required of them, they will have at least a chance to mend their ways.

Churches have adopted methods of ascertaining the character and fitness of candidates for the ministry far more searching than has the bar in getting its recruits. They have one committee or board of examiners to hold tests on educational qualifications, another committee on ministerial relations, or conference relations. This latter committee makes no farce of its proceedings. The candidate comes before this committee and is subjected to a long, grueling questionaire, something like the following:—What is your full name? What was your father's name—mother's maiden name—parent's nationality? What is your age? Have you any brothers or sisters? Are you married? How many are there in your family? Where were you educated? Do you use tobacco? Do you use intoxicating liquor? Have you ever used intoxicating liquor? Dou you play cards? Have you ever played for money? Do you gamble in any manner? How is your health? Have you ever been arrested? What for, if so? Are you in harmony with the doctrines and polity of this church? Will you preach and adhere to them, or withdraw if ever you get out of harmony with them? Are you in debt so as to embarrass you in the work of the ministry? Will you abstain from the use of tobacco and intoxicating liquors if received as a minister in this church? Have you ever experienced conversion? Do you use profane language? Can you give names of sev-

eral references? What has been your occupation? Give names of last three employers. What diversions do you take? Why are you seeking admission to the ministry? Have or do you feel that you have been called to preach?

These and many others to the same purpose are asked; besides the committee notes the candor or lack of candor in the applicant's answers to these questions. His general demeanor toward the committee, his dress and general appearance all are noted in the committee's report. In short this committee has compelled the candidate to unfold his life history and it is now ready to report to the main body. Then the candidate is introduced to the main body to be given the "once over," and he must run the gauntlet of ballots of the conference or assembly. The report of the committee ends with some kind of recommendation either favorable or unfavorable.

If any member knows the candidate better than any one else and wishes to divulge things not brought out by the committee, he has that privilege. So the candidate who has an unsavory record has a rough road to travel to get into the ministry. A few get by, however.

Many of the above questions are suitable for applicants to the bar. In addition, the following should be added; viz, Are you a church member? Do you attend church? Have you ever attended Sunday School, or any school where they give religious instructions? Have you made a study of the Bible? To what extent have you made this study, if any? Were you ever expelled from school or college? If so, what for? Are you in harmony with the laws and institutions of this country? Will you gladly and whole-heartedly take the oath to support the constitutions of your state and nation? Why are you seeking admission to the bar? This last question no doubt will bother the applicant for a while. It is a thought provoker.

Why propound any more of a questionaire? Enough has been given to indicate the manner of making the test.

The method is workable, and all that is needed is the right kind of committees to execute it. Men imbued with the spirit to uplift and advance the profession of the law, we think, can get splendid results.

One of the states which is among the more progressive in guarding the doors of the profession is New York, and well it may because of the complexity of the candidates. The New York rules require a "committee of practicing attorneys to inquire into the character and fitness of every applicant for admission to the bar, and make detailed provision for proof to the satisfaction of the committee." These rules provide that "no person shall be admitted to the bar without a certificate from the proper committee, that it has carefully investigated the character and fitness of the applicant and that in such respect he is entitled to admission." This committee is different from the one that examines on the law. Kentucky has a rule similar to that of New York and "all candidates must appear before this separate committee and satisfy it of the character and fitness for admission to the bar." The state which has perhaps made the greatest progress in this direction and is most effective is New Jersey. The rules of this state require a separate committee on character and fitness which must be satisfied that the candidate is a person of good character and fitted for the profession, and this committee must certify the same to the court. There is a committee for each county and the several committees must keep tab on the candidates in their respective counties from the time they register for the study of law until the time of their admission to the bar. If any candidate goes wrong between the time of the bar examination and the time for swearing him in, the court may decline to administer him the oath, thus keeping out one more undesirable. This drastic change in the New Jersey rules was made only recently June 5, 1923. New Jersey thus comes the nearest to using methods adopted and in use by the church demoninations noted above.

Some one objects to the religious test of the questionaire on the ground of being contrary to the constitution and the policy of this country. The objection is untenable. It is not a religious test within the meaning of the constitution, neither is it contrary to the policy of the nation. The constitution forbids discrimmination against religions. A person who boasts of having no religion is a fit person for the state to refuse admission to one of the learned professions where moral character is held at a premium or should be. One who cares so little for the high ideals inculcated by religion as not to accept and practice them is an unsafe person to put as a leader in society. He might be able to surmount the handicap and make good as a leader, but he would succeed not because of want of religious ideals but in spite of it. Such a one no doubt is impelled in his course and succeeds more from a subconscious or unconscious reflexive influence of parental training or an aggregate of influences that operated on his life; influences of the church, schools, religious associations and literature. Society would be injured less by refusing admission of the non-religious to the learned professions than it is in admitting them. Mr. Wickersham refers to the ethical canons adopted by the American Bar Association and observes that many states require the reading and study of these canons by applicants for the bar. He says that it would be of greater importance to have a knowledge of the Ten Commandments. A college professor writing for some magazine makes the statement that, "20% of the college student body today do not know there is an Old Testament and a New Testament constituting the Bible." An Iowa University professor by test found that only 2% of the freshman and sophomore classes, men and women, knew who Saul was. If applicants for admission to the bar are that ignorant of the Bible, the source of all ethical, moral and religious principles, they had better be put to work at the beginning of their course of study, at registration, and be required to undergo a severe test and the profession in a short time will be reaping

the benefits in a higher standard in morals, and less frequent disbarment proceedings. It would be better to have the front door more rigidly guarded than have the back door clogged trying to get them out. It is much easier to refuse the unethical and unmoral admission to the bar than to get them out once they are in.

E. A. HARPER

MOOT COURT

EVANS VS. PENNSYLVANIA R. R. CO.

Negligence—Proof of Negligence Necessary to hold R. R. Co. Liable for Fires Caused by its Engines—Duty of Crew to Assist in Extinguishment—Liability Attaching from Work of Supererogation.

STATEMENT OF FACTS

Evans owned a house on land 200 feet from the defendant's tracks. Between his land and the tracks, was a tract belonging to one Blight on which was some combustible material which sparks from a passing engine, set on fire. The train, running on schedule time, delayed five minutes and all the hands assisted in fighting the fire. They might have succeeded had they persisted ten or fifteen minutes longer. After their departure the fire spread to Evan's land causing a loss of $2000. The plaintiff alleges negligence (a) in causing the fire (b) in not persisting in the combat against it.

Schneck, for plaintiff.

OPINION OF THE COURT

Heller, J. We are called upon in this case to answer two questions, first, whether the railroad company was negligent as to the cause of the fire, and, second, whether the crew of the train were negligent in not putting the fire out, after they had once started to combat it. Also, coextensive with the second question, we are to decide, whether or not the negligence of the crew, if any existed, could be imputed to the railroad company.

We are of the opinion that there was no negligence on the part of the railroad company in causing the fire. At least the evidence does not show nor can we infer from it any negligence on the part of the defendant. In an action for loss by fire caused by sparks from a locomotive engine of a railroad company, the burden is on the plaintiff to prove that the fire was communicated by some engine of the defendant company and also to prove negligence in the construction or management of the engine. Henderson vs. R. R. 144 Pa. 461.

The facts of the case prove that a spark from the defendant's engine was the cause of the fire, but there is not one iota of evidence to show that there was negligence in the construction or management of the engine. The plaintiff does not show that the engine did not have a spark arrester, nor does he prove that the engine was in any way defective. The negligence or misconduct on the part of the defendant must be shown in order to render the railroad company liable to one whose property has been destroyed, 29 Cyc. 462. The plaintiff having the burden of proof, must prove that the railroad company was negligent, and, in this, he has failed.

The allegation by the plaintiff that the crew was negligent in not putting out the fire after they had started to fight the fire, is baseless. Fighting fires is wholly without the scope of employment existing between a railroad train crew and their employer. An employer is not liable for any act or omission of an employee that is not within the scope of his employment. It would indeed be disastrous to passengers, if the crew on passenger trains were under a duty to fight fires caused by the trains of their employer. There is no duty on a railroad company to render aid in putting out fires, even though the sparks from the railroad's engine has set property adjacent to their tracks, on fire. Nor can the railroad company be held liable for a refusal of the crew to aid in preventing the spread of such fires, because the extinguishment offered is not within the scope of their employment 262 Pa. 474.

Since a railroad company cannot be held liable for a refusal by the crew to fight fires, they cannot be held liable for spread of fires when the crew cease to fight the fires before they are extinguished. Even if the crew were negligent in fighting the fire, this negligence could not be imputed to the railroad company because the acts were not done within the scope of the crew's employment. The duty of the crew is to run the train and not to fight fires. Therefore, since no negligence on the part of the railroad company was proved, and the crew were under no duty to fight the fire, the railroad company is entirely without liability and we must give judgment for the defendant.

OPINION OF SUPREME COURT

That sparks escaped from a passing engine was not sufficient evidence of the want of a proper spark arrester or of the improper management of the engine.

The fire was not caused by the negligence of the defendant. It was not at all accountable for its existence. There was no more of a duty on it to extinguish a fire caused without fault by its engine than to extinguish one caused by an utterly alien agency.

If the train was delayed to enable the hands to assist in the extinction of the fire, a work of supererogation was done. It could not create a duty to continue the effort at extinguishment until success was attained.

The decision of the learned court below is affirmed.

RICHARDS VS. TOME

Bills and Notes—Notice of Protest Sent to Endorser—Efficacy of Affidavit of Protest of Notary—Credit to be Given Bald Denial of Receipt of Notice by Endorser—277 Pa. 27 Approved.

STATEMENT OF FACTS

Tome endorsed a note for $1000, drawn by Jackson, and payable to Richards. The note was not paid and this is a suit against the endorser. The defense is that he received no notice of the maker's failure to pay. The plaintiff put in evidence the certificate of the notary, averring that he had duly sent notice to Tome. Tome denied that he had ever received notice and insists that in the face of his denial, the jury cannot be allowed to infer that the notice was sent.

OPINION OF THE COURT

Schneck, J. As it appears, the note in controversy is a non-negotiable paper. The payee of the same is sueing the endorser, Tome. The plaintiff has put in evidence the certificate of the notary averring that notice was sent to Tome and the defence is a bald denial of his ever having received notice.

It is a general rule of law that no notice need be given to the endorser of a non-negotiable instrument, to charge the endorser with his liability on his endorsement. The rules of demand, presentment and notice apply strictly to commercial paper. Jordan vs. Hurst 12 Pa. 269; Cromwell vs. Hewett 40 N. Y. 491; 7 Cyc. 1066.

However we shall assume that the instrument is negotiable and decide the sufficiency of the defendant's affidavit of defense. By the Negotiable Instrument Act, 1901, Sec. 89, "When a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each endorser, and any drawer or endorser to whom such notice is not given is discharged."

The defendant in this case insists that no notice was given to him of the maker's non-payment. Plaintiff has introduced in evidence the notary's certificate—which is prima facie evidence of notice—but which may be contradicted or rebutted.

Under our law a notary's certificate of protest is prima facie evidence of the facts stated therein. The Act of Jan. 2, 1815, 6 Smith's Laws 238, which made the certificate of a notary prima facie evidence of the facts therein, was extended by the Act of Dec. 14, 1854 P. L. 724 so as to include notice to drawers, acceptors, and endorsers in respect to dishonor of bills and promissory notes.

It is necessary then to prove demand, presentment and notice, and to do this the plaintiff puts in evidence the notary's certificate that notice was sent of the dishonor.

Notice of dishonor or sending of protest was construed under the Act of Jan. 2, 1815. Sec. 1, 3 Purdon's 3326, to be an official act and was expressly included in the next legislation; Act of Dec. 14, 1854, 2 Purdon's 3327, making all notary's certificates prima facie evidence. The question now is whether the defendant can overcome or rebut this presumption by a mere denial.

The courts in this state have uniformly held that a bald denial of receipt of notice is negative testimony of a very low probative value at best. Zollner vs. Moffitt 222 Pa. 644; Cook vs. Forker 193 Pa. 461; Bittenbender vs. Berger 277 Pa. 29; Moore vs. Somerset 6 Nas. 262.

It is not sufficient for the defendant to say that he had not received notice. He must state such facts as will justify the inference that there was no notice sent. McConeghy vs. Kirk 68 Pa. 200.

If the defendant had offered to prove some direct fact which would have tended to show that the essential requirements of the act of assembly had not been performed either in protesting the note or the giving of notice, the controverted facts might be left to the jury but the condition which confronts the court is nothing but a bald statement to prove that the defendant did not receive the notice. There was no fact offered which tended to show that the notice was not duly received or that the notary or plaintiff had neglected to do anything which the law required them to do, which resulted in defendant not receiving notice. We therefore think that the proof of notice to defendants of non-payment was not sufficiently overcome or contradicted.

Then again, if the defendant assumes to contradict the presumption which was established, it would be a question of fact for the jury to decide whether or not the defendant has contradicted the plaintiff's evidence.

In Zollner vs. Moffitt, 226 Pa. 40, Justice McElvaine stated that it is not for the court but for the jury to say when a presumption arising from a certificate is completely rebutted.

Therefore from either angle, whether the note be non-negotiable or in considering the note negotiable, the defendant has no standing.

In passing we may remark that the defendant has labored under a misconception of the facts of the case.

Judgment for the plaintiff.

OPINION OF SUPREME COURT

We have read the almost illegible opinion of the learned court below with extreme difficulty.

The question is agitated, whether the note in controversy was negotiable. If it was not negotiable, proof of the meaning of the indorsement would have been necessary. The law merchant has defined the obligation assumed by the endorsement of a negotiable bill or note, in the absence of evidence of a varying undertaking. The endorser promises to pay the amount in the instrument, not if the maker or acceptor cannot, not if he does not, but if, demand on him being made on the day of maturity, he does not pay, and further, if notice of the non-payment is promptly given to the endorser.

No such interpretation can be put on the endorsement of a non-negotiable instrument. It may mean a suretyship or a guaranty, or something else and what it means would have to be shown. Cf. Shaffstall vs. McDaniel, 152 Pa. 598; Leech vs. Hill, 4 W. N. C. 448. No interpretation is offered in this case. No recovery therefore could be had were the note non-negotiable. Ineffectually making demand on the maker on the maturing day, and instant notice to the endorser would create no liability.

The note in question must be taken to be negotiable. The defendant is liable, as endorser, only if demand was made on the maturity of this note, and notice of non-payment was immediately transmitted. A notary has been employed to make the demand and to give the notice. He has prepared a certificate of protest, affirming such demand and notice. The act of assembly constitutes this certificate prima facie evidence, without the sworn testimony in court of the notary.

It is susceptible of contradiction. That the things alleged by the officer to have been done by him, were not done, there is no direct proof. The defendant, arguing that if the notice had been sent by the mails, it would have reached him, proves that it did not reach him, and insists on the inference by the jury that it was not sent, or, if sent, was not properly stamped, or was not properly addressed.

The failure of the addressee to receive, thru the mails, a letter is some evidence that it was not sent. However it is not deemed enough to nullify the explicit and official averment of the officer, charged with the duty of notification and of proof of the notification. A highly creditable testimony is opposed by a less highly creditable testimony to a fact, supposedly inconsistent with the fact averred by the officer, but which fact is not certainly inconsistent with the fact averred the officer. A bald denial of receipt of notice of protest is not sufficient to overcome the direct positive testimony, in the certificate, that notice was sent. Bittenbender vs. Berger, 277 Pa. 27.

The judgment of the learned court below is affirmed.

HAMMETT VS. TURNER

Landlord and Tenant—Remedy of Wrongfully Dispossessed Tenant—Acts of March 21, 1772, December 14, 1863, March 31, 1905—236 Pa. 61 Approved.

STATEMENT OF FACTS

Turner let a house to Hammett for one year in 1912. Hammett remained in possession for four years. One month before the expiration of the fourth year he was notified by Turner to vacate the house at the end of the fourth year. Hammett not doing so, Turner began proceedings before a justice of the peace to eject him, and the justice rendered judgment against Hammett and issued a writ of possession by which he was expelled from the house. He did not appeal. He brings this action of trespass alleging that he was improperly dispossessed because he did not receive the requisite notice to quit.

Lieberman, for Plaintiff.

Handler, for Defendant.

OPINION OF THE COURT

Miss Stroh, J. According to the great weight of authority, where a tenant under a devise for a year or more, holds over at the end of his term without any new agreement with his landlord, he may be treated as a tenant from year to year. As authority for this proposition in Pennsylvania, we have the case of Phoenixville Boro. vs. Walters, 147 Pa. 501, cited by counsel for plaintiff, which holds that a tenant who holds over becomes a tenant from year to year, and cannot be required to quit at any time before the end of the current year.

It is also a fixed rule that to terminate a tenancy from year to year, three months notice to quit before the end of the term, must be given to the tenant. 122 Pa. 272; Trickett on "Landlord and Tenant," page 304; 54 Pa. 186.

It is contended by counsel for plaintiff, and admitted by counsel for defendant, (1) that Hammett became a tenant from year to year on his holding over after the first year; and (2) that the notice given to him by Turner was insufficient. The quesction then, of sufficient notice, is undisputed, and we turn to the real question that this case presents, viz,; Was Hammett's action of trespass for the alleged wrongful eviction by Turner properly brought?

The defendant could have commenced the proceedings to recover possession of his land under any one of three acts providing for dispossessory proceedings by landlords, viz.; the Act of March 21, 1772; the Act of December 14, 1863; or the Act of March 21, 1905. We will summarize briefly each of these acts in order to determine under which he did proceed.

The Act of December 14, 1863, 2 Purdon 2194, provides, "When any person, having leased or demised any lands or tenements for a term of one or more years, or at will, shall be desirous of terminating the same, having given three months notice of such intention to his lessee or tenant, and said lessee or tenant shall refuse to surrender up the said premises at the expiration of said term, it shall be lawful for such lessor to complain to any justice, who shall summon the defendant to appear on a day certain_____provided, that the defendant may, within ten days from the judgment, appeal to the common pleas."

The Act of March 21, 1772, 2 Purdon 2189, differs from the act of 1863, in that in the former, the proceedings are brought before two justices and twelve jurors; and it does not give the right of appeal to the common pleas, as does the other act.

The Act of March 31, 1905, 5 Purdon 5632, applies only to tenancies for less than one year, or for an indeterminate term.

Upon a careful review of these three acts, it will appear clearly that the defendant Turner must have proceeded under the act of 1863. It is evident that he did not proceed under the act of 1772, because he began his proceedings before one justice, not two; and the justice himself rendered a judgment, instead of its having been rendered by a jury. Unless mistakenly, he would not have proceeded under the act of 1905, which does not apply to tenancies from year to year.

Since, then, we see that the defendant proceeded under the act of 1863, it is for us to decide whether Hammett could properly bring trespass under that act.

Sharswood, J., in the case of Koontz vs. Hammond, 62 Pa. 177, cited by counsel for the defendant here, said that the only remedy provided for the tenant under the act of 1863 is that of appeal generally. The court in Leese vs. Horne, 47 Pittsburgh Legal Journal, also cited by counsel for the defendant, said, "The act of 1863 provides for an appeal, and if upon appeal the jury shall find for the defendant, they shall also assess the damages which he shall have sustained by removal from the premises. If the tenant wishes to claim damages, his remedy is by appeal."

It was held in McClelland vs. Patterson 10 Atl. Rep. 475, that a judgment of possession in favor of the landlord is conclusive and a defense to an action of trespass based on the execution of the writ of possession.

We are of the opinion then, that Hammett's remedy is exclusively by appeal from the judgment of the justice, and that his action of trespass for the alleged wrongful eviction by Turner was improper.

Judgment for Defendant.

OPINION OF SUPREME COURT

The judgment of the learned court below is affirmed. Cf. Schwab vs. Schneider, 236 Pa. 61, with the other cases cited.

COMMONWEALTH VS. MULFORD

Constitutional Law—Murder and Involuntary Manslaughter—Conviction of Involuntary Manslaughter After Acquittal of Murder for Same Killing—271 Pa. 95 Approved.

STATEMENT OF FACTS

Mulford was indicted for murdering X, and was acquitted. He was then indicted for involuntary manslaughter of X, the same killing being intended, as in the earlier case. He pleaded "autrefois" acquittal and exhibited the record and furnished proof that the killing now alleged was the same killing. The Court allowed the jury to convict of involuntary manslaughter.

OPINION OF THE COURT

Barrata, J.

" No person shall, for the same offense, be twice put in jeopardy of life or limb," Article 5, U. S. Constitution. Authorities seem agreed that the meaning of this clause at common law was that a man once tried and acquitted could not be retried for the same

offense. Cooley, 325; Kent, Vol. 2, P. 112; Wharton, Commentaries of Am. Law, 562. Both reason and authority dictate that the incorporators of this clause into the U. S. Constitution used it with this meaning. Kepner vs. U. S., 195 U. S. 100. The Pennsylvania State Constitution contains the same clause. Article 1, Sec. 10. It seems to have been copied verbatim. If the framers of the U. S. Constitution are chargeable with having used the clause with the above meaning, then a fortiori the framers of the Pennsylvania Constitution are so chargeable since the state document came several years later than the U. S. document.

Counsel have taken issue on the clause in the State Constitution discussed above. Irrespective of any questions of pleading or practice that may have arisen at the trial or in the submission of their briefs, and which may be contained therein, we shall consider the case in the light of the point raised in their argument, namely, whether in the face of Article 1, Sec. 10, State Constitution, the conviction of Mulford of involuntary manslaughter can be sustained. We have shown the meaning intended by the framers of Article 1, Sec. 10, Pennsylvania Constitution was that a person once tried and acquitted could not be tried again for the same offense. The defendant was tried twice for the same offense, for the killing is the offense whether we call the killing murder or involuntary manslaughter. The attendant circumstances of the killing determine its punishment, and the names, murder and involuntary manslaughter, are merely labels for the punishment to be meted out. Basically and fundamentally the killing always remains the offense, and the offense here is one and the same killing. Irrespective of any rulings to the contrary which may have been made heretofore, where a man has been tried and acquitted on an indictment for murder, he cannot be proceeded against again on an indictment for involuntary manslaughter where the killing in the murder indictment and in the involuntary manslaughter indictment are one and the same.

The argument contained in this opinion seems to us sufficient reason for so holding.

Other collateral reasons urge us to this view. The State is a great and powerful institution. The individual is comparatively weak. Why should an individual have to be subjected to two trials growing out of one basic fact? Why should he be made to bear the additional expense of another trial? Why should he have to keep his evidence and witnesses ever ready to answer the whim of the State which may bring the second trial at any time within the statuatory period of limitations for bringing such second action? Why cannot

the whole controversy be settled in the one action? It is no defense to the State to say that certain technicalities prevent such a course. That is the State's problem and it knows where the remedy lies.

The prisoner is accordingly discharged.

OPINION OF SUPREME COURT

"No person shall, for the same offence, be twice put in jeopardy of life or limb," says the Constitution of Pennsylvania, Art. 1, sec. 10.

A crime does not consist of the physical act but of this act and circumstances, motives, etc. A kills B by accident. No punishable homicide has occurred. A kills B with intention, but in self-defence. Again no punishable act has occurred. A kills B with malice and with intention to kill. He is a murderer. A kills without malice but with attendant circumstances which make the act involuntary manslaughter. The crime is not the killing but the killing with circumstances a, b and c, or the killing with circumstances d, e and f.

The defendant has killed but has been accused, not simply of killing, but of killing with malice and with intention to kill. These circumstances are a part of the crime. He has been acquitted not because he has not killed, but because he had no malice in doing the act.

But, the killing may have been accompanied by other circumstances which turn it into something other than murder; into involuntary manslaughter.

In the trial for murder, the accused was in no danger of being found guilty of involuntary manslaughter. Had he been, the failure to convict him of that offence would have been a virtual acquittal, and a trial for the involuntary manslaughter would have been prohibited.

The question before the court has been considered in Commonwealth vs. Greenz, 75 Super 116, where the court decided that an acquittal of murder precluded a later trial for involuntary manslaughter. The decision was reversed by the Supreme Court in 271 Pa. 95, and for reasons that we deem adequate.

The decision of the learned court below is reversed.

CHASE VS. CARR

Statute of Frauds—Act of April 23d, 1909, P. L. 137—Defeasance to Deeds Required to be in Writing—Criticism of the Act—271 Pa. 117, 230 Pa. 475 Followed.

STATEMENT OF FACTS

Chase, borrowing $2,000 from Carr, executed a conveyance of his farm, worth $8,000, to Carr. It was orally agreed that the land should be held by Carr as security for the repayment of the loan, within five years. The debt was not repaid till eight years after when the $2,000 and interest, were tendered to Carr and a demand was made for a reconveyance. There was no deception or fraud in the making of the conveyance. The only fraud alleged is the refusal of Carr to make the reconveyance.

Einhorn, for Plaintiff.

Bielchowsky, for Defendant.

OPINION OF THE COURT

Gans, J. The oral agreement between the plaintiff and the defendant was that the land in question should be held by the defendant as security for the repayment of the money loaned by the defendant to the plaintiff. This of course means that upon the contingency of the plaintiff repaying the loan, the sum of $2,000, within five years of the date of the agreement, that the defendant would in turn execute a reconveyance of the land to the plaintiff. This parole agreement contemplates a reversion of the property to the plaintiff and so it may properly be said that the parties contemplated that the agreement should be a defeasance.

A defeasance is thus defined by Blackstone, 3 Commentaries 227, "A collateral deed made at the same time with the feofment or conveyance containing certain conditions upon the performance of which the estate then created may be defeated or undone, totally."

It has thus been decided that the transaction could not be anything other than a defeasance. The question now arises whether this oral defeasance has the effect of reducing the deed from the plaintiff to the defendant, to a mortgage in view of the Act of June 8, 1881 P. L. 84, as amended by the Act of April 23, 1909. P. L. 137.

"No defeasance to any deed for real estate regular and absolute upon its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance

is in writing, signed and delivered by the grantee, in the deed, to the grantor."

There are many cases before the acts as well as after it deciding the same as the cases later, a few of which we have perused.

46 Pennsylvania 331, Guthrie vs. Kahle. The defeasance in this case was in writing but it had not been recorded and it was decided that this would not reduce the deed to a mortgage.

7Watts and Sargent 335, Manufactures and Mechanics Bank vs. Bank of Pennsylvania, decided in 1844. Here the defeasance was also written but not recorded and it was held the same way.

17 Sargent and Rawle 70, Freidly vs. Hamilton. The facts were similar to those at bar and in this case the learned court held that the defeasance would not reduce the deed to a mortgage.

Since the acts and relying on the acts are the following:—

Sankey vs. Hawley, 118 Pennsylvania 30. Here the defeasance was written but not recorded and it was decided that the deed was valid.

133 Pennsylvania 41, Molly vs. Ulrich, decided in 1890. The case was very similar to the case in question, the contract being parole, and the plaintiff was denied relief, the court relying on the Act of 1881.

213 Pennsylvania 551, O'Donnell vs. Vandersal. There was an agreement established, though not in writing, and it was held that a reconveyance could not be enforced. This case was decided in 1906.

Dismissing the possibility of laches on the part of the plaintiff, it is the judgment of this court that the defeasance does not reduce the deed to a mortgage in-as-much as there is no compliance with the Act of 1881.

195 Pennsylvania 648, McDonald vs. Sturtevant. A bill in equity for the recoverance of the land on the ground that the deed was in fact a mortgage, was dismissed where there was no satisfactory evidence to show that there was any written defeasance against the absolute deed.

It is the judgment of this court that the deed executed by the plaintiff to the defendant vested in the said defendant all the interest of the plaintiff and that even conceding that there was a defeasance as claimed by the plaintiff it would not now change the legal right of the parties as such defeasance would be inoperative under the Act of June 8, 1881, Pamphlet Laws 84.

The plaintiffs then are not entitled to the relief prayed for, and their bill is dismissed.

OPINION OF SUPREME COURT

The act of April 23, 1909; P. L. 137, enacts that no defeasance to any deed, regular and absolute on its face, shall have the effect of reducing it to a mortgage, unless the said defeasance is in writing and delivered to the grantor by the grantee.

It has sometimes been said that statutes requiring certain agreements to be in writing and making them void if not written, accomplish frauds, as well as prevent fraud. This is true of the act of 1909. The land conveyed was worth $8,000. It was conveyed for the purpose of securing payment of a debt of one-fourth that amount, $2,000, within five years. Eight years have elapsed and the debtor is now tendering the $2,000 with interest. The act of 1909 makes it impossible for him to compel a reconveyance. The defeasance was oral, not written; it was then not signed signed and delivered to the grantor by the grantee.

To permit enforcement of the defeasance would be to refuse submission to the will of the legislature. A huge inequity is being perpetrated but the court is constitutionally bound to execute the legislative will. Cf. Rhoades vs. Good, 271 Pa. 117; Stewart vs. Stewart, 230 Pa. 475. However reluctantly we must assist in the perpetration of a gross injustice because Chase did not know of, or did not remember the act of 1909, or did not take pains to insist on a compliance with its terms.

The judgment of the learned court below is affirmed.

COMMONWEALTH VS. COLLINS

Obtaining a Check by False Pretense—Act of May 31, 1860, P. L. 382—Exercise of Prudence by the Deceived not Essential —69 Super. 176, 78 Super. 176, 22 Pa. 176 Approved.

STATEMENT OF FACTS

Collins, acting for Z, owner of an automobile, induced X to purchase it by falsely representing that it had travelled only 100 miles, and was in good working condition. X did not inspect the car, and being entirely inexpert, would not have relied upon his own judgment. The car was in fact much worn and had travelled 500 miles. In payment of this, X was induced to give a check for $500.00, payable to Z. X has stopped the payment of the check. This is an indictment for obtaining the check by false pretenses.

Bittle, for Commonwealth.

Hoerle, for Defendant.

OPINION OF THE COURT

Mundy, J. The act of May 31, 1860, P. L. 382, provides that, "If any person shall, by any false pretense, obtain the signature of any person to any written instrument—with intent to cheat and defraud any person of the same, every such offender shall be guilty of a misdemeanor, etc."

There can be no doubt that Collins made a false assertion of an existing fact, with knowledge at the time that it was untrue, intending to defraud X by means of it. Any person, excepting one entirely inexpert in the matter of automobiles, would have perceived that the car was not worth $500.00, that it had travelled more than 100 miles and that it was not only not in "good working condition" but was in fact "much worn."

X was under no duty to inspect the car. Had he done so, being so ignorant of the worth of automobiles, he would not have relied upon his own judgment; and since he solicited the opinion of no third person concerning the car, we are to presume that he confided in the representations of his vendor.

It matters not that the check that Collins induced X to give him in payment of the car was payable to Z. "The person making the representation may obtain the money or other thing not for himself but for a principal." Trickett, Law on Crimes in Pennsylvania, Vol. 1, P. 53; 66 Pac. 1005.

Nor is the fact that payment on the check was stopped vital. Its mere obtainment was sufficient to bring the defendant within the terms of the act, the offense being accomplished at that point, 157 Pac. 412.

No reason for quashing the indictment is known to us. The motion is dismissed.

OPINION OF SUPREME COURT

The statute which the defendant is alleged to have violated states, "If any peron shall, by any false pretense, obtain the signature of any person to any written instrument, (or shall obtain from any other person, any chattel, money, or valuable security with intent to cheat and defraud any person of the same), such offender shall be guilty of a misdemeanor etc. 1 Purdon 949.

The pretense here alleged is the assertion that the automobile had travelled only 100 miles whereas it had travelled 500 miles; that it was in good working condition, whereas it was much worn.

The thing induced by the pretense, was the execution by the prosecutor, of a check, with his signature, and the delivery of the check to the defendant. We think the act is within the definition of the statute.

That the defendant was acting for another, who was possibly the only person to be benefited by the fradulent representation, is immaterial. A man, A, may defraud X, for the purpose of benefiting Y, and such fraud is within the scope of the statute, Commonwealth vs. Altieri, 78 Super. 80; Commonwealth vs. KoEune, 69 Super. 176.

We attribute no force to the suggestion that the false pretense alleged should not have deceived the prosecutor. He did not inspect the car. His complete inexpertness in respect to automobiles would have made inspection by him useless. As Henderson, J. says in Commonwealth vs. KoEune, 69 Super. 176, in a case in which the prosecutor signed a paper without reading it, "The statute was not enacted for the protection of the shrewd and capable only." It is no less a false pretense because the party imposed on, by the exercise of common prudence, might have avoided the imposition. Cf. Commonwealth vs. Henry, 22 Pa. 253.

The judgment of the learned court below is affirmed.

VANDERBILT VS. NEVILLE

Promissory Note—Duty of Payee to Realize on Collateral Security Before Sueing on Note—Pleading—Contract as to Collateral Security as a Defence—271 Pa. 145 Approved

STATEMENT OF FACTS

Neville borrowed $1700 from the plaintiff and gave him a note for repayment in six months from April 17, 1923. On the same paper and following the note, was a statement that a bond of the State of Pennsylvania for $1000 had been deposited with Vanderbilt as collateral security. The plaintiff gave no evidence respecting this bond. Neville argued that it was Vanderbilt's duty to obtain what he could for the bond and to sue only for the balance of the debt. The court allowed the recovery of $1700.

Auker, for Plaintiff.

Halliday, for Defendant.

OPINION OF THE COURT

Irwin, J. The case as presented is that of the payee of a promissory note, with whom has been deposited as collateral security, a bond, sueing on the note, having failed to realize first on the bond and failing to give any evidence at all concerning it. Is such procedure proper in Pennsylvania?

In the absence of express agreement, what is the legal effect of the giving of collateral security in addition to a promissory note? Is it a course pursued by the debtor in order to protect himself from suit on the note or is it, in reality, a measure of self-protection insisted upon by the payee when accepting the note? Unquestionably it is the latter. By taking collateral security the payee does not bind himself to realize first on it and then sue for the balance. As a pre-condition to the lending of the money he impliedly says, "Your personal promise to repay is not sufficient and in addition thereto, as another remedy in case of need, I will require additional security." He does not, by accepting such additional protection, bind himself to realize first on the collateral and then sue on the note. His remedies are cumulative, and he may choose either to sue directly on the note or to sell first the collateral and hold the maker for any deficiency. Suppose the bond, after pledging, became practically worthless and not readily marketable. Must the payee incur the inconvenience and expense of realizing on the bond before sueing? We think not.

The parties may, by express agreement, bind the payee to sell the collateral before sueing the maker but in this case we find no such agreement. Mere acceptance of collateral security does not create any such duty.

The case in 211 Pa. 148, cited by the counsel for the defendant as a case affirming his argument, does not so decide. It holds that the payee may first sell the collateral and sue for the balance, not that he must first sell it.

The plaintiff has cited several cases upholding his contention, We find them to be correctly stated. Our courts have from earliest times held the doctrine to be as we have stated. See 1 W. N. C. 330, 2 W. N. C. 67, 3 W. N. C. 94, 262 Pa. 28, 87 Pa 394. See also Jones, Collateral Security (3rd) Sec. 685, 686.

Nor is the plaintiff bound to put in evidence any collateral agreement as to holding of the bond. He makes out a prima facie case by showing the note and non-payment thereof. If there has been any express agreement that the collateral be held in such a way as to prevent a prior recovery on the note, that is purely a matter of defence and must be pleaded and proved by the defendant. The recently decided case of Harper vs. Lukens in 271 Pa. 145 is the latest expression of the law on this subject.

This holding is not unduly harsh nor inequitable to the defendant. If the plaintif attempts to enforce his judgment for the amount of the note without first relinguishing the bond held as collateral, the defendant may apply to the court for a stay of exe-

cution which would doubtless be granted were the plaintiff unjustly harassing the defendant.

Thus the law laid down above is sanctioned both by the previous decisions of the state and by the principles of justice.

We, therefore, remit the case to the learned court below and affirm its judgment.

OPINION OF SUPREME COURT

The judgment of the learned court below is affirmed.

SNYDER VS. HENDERSON

Act of January 2, 1815, 3 Pur. 3326—Certificate of Acknowledgment of Notary as Evidence—Evidence of Fraud—Refutation of Notary's Certificate—224 Pa. 455 Approved.

STATEMENT OF FACTS

Scire facias sur mortgage. The defense is that the mortgage is a forgery. Henderson denied that he had executed it. Three persons testified that they saw the mortgage signed and that the defendant was not the signer, but that the brother-in-law of the defendant was the real signer. The wife of the defendant testified that she had induced her brother to personate her husband in executing the mortgage. The mortgage had the certificate of a notary that the named mortgager, Henderson, had appeared before him and acknowledged the instrument. The court below refused to charge that this certificate was sufficient evidence of the actual execution of the mortgage by Henderson (1). Verdict for Henderson. The plaintiffs assign (1) as error.

OPINION OF THE COURT

Wollen, J. The sole question to be decided here is whether the certificate of the notary was sufficient or conclusive evidence of the actual execution of the mortgage.

The counsel for plaintiff relies upon the Act of January 2, 1815, 3 Pur. 3326 which provides that the official acts of a notary may be read and received in evidence, to prove the facts certified to by the notary. The act further provides, however, that any party may contradict, by other evidence, any such certificate.

Numerous Pennsylvania cases have held that the acknowledgement of a deed or mortgage is a judicial act and the certificate of it, in the absence of fraud, is conclusive as to the facts

stated therein. It is prima facie evidence of the due execution of the instrument, but may be rebutted, however.

Parole evidence may be introduced to show that fraud was practised, both in the execution of the deed or mortgage and in the acknowledgment of it. Pusic vs. Solak 261 Pa. 512; Cover vs. Manaway 115 Pa. 338; Hecter vs. Glassglow 79 Pa. 83; Williams vs. Baker 71 Pa. 476.

It seems quite clear to us that fraud was resorted to in order to secure the execution of the mortgage and the acknowledgment of it. The very testimony of Mrs. Henderson, that she induced her brother to personate her husband, is sufficient proof of that fraud.

If that is not enough, however, there is the testimony of the three witnesses. They, having seen the person sign and knowing that he was not Henderson, who was the right person to sign, testified so. This raises a quite clear and sufficient presumption of fraud, which is enough of itself to uphold the defense of forgery. The witnesses knew both the defendant and his brother-in-law and could therefore testify competently to facts distinctly remembered. In an action to set aside an instrument for fraud, a witness is competent if he testifies to facts distinctly remembered and accurately stated, 221 Pa. 171.

In view of the facts as presented in this case, this court is clearly of the opinion that the lower court did not err in refusing to charge as the plaintiff requested.

Judgment affirmed.

OPINION OF SUPREME COURT

The sole question is, did Henderson execute the mortgage. He denies that he did. Three others who saw the mortgage signed say that the signer was not Henderson and identified him as a brother-in-law of Henderson. The wife of the latter admits that she induced her brother to personate Henderson.

Against this evidence is the implied declaration in the certificate of the notary, that Henderson was the acknowledger, and hence, the signer.

How can we hold the certificate conclusive of its averment? It is doubtless prima facie evidence. Perhaps it is strong evidence. It is not necessary to concede that it is. In any case it must be susceptible of refutation. It is possible for a personation to take place before the notary and for him to be unacquainted with the personator or the person personated. Hence his certificate may be erroneous. Justice forbids the making of the fraud successful

because of the ignorance of the notary. It was then for the jury to decide on the evidence, whether Henderson, in fact, acknowledged the mortgage. Cf. Gustave vs. Westenberger, 224 Pa. 455.

The judgment of the learned court below is affirmed.

AMOS VS. KUNKLE

Married Women—Married Women's Contractual Capacity—Surety for Her Husband—Act of June 8, 1893, 3 Pur. 2451—236 Pa. and 254 Pa. 32 Distinguished.

STATEMENT OF FACTS

Kunkle gave a note for $1,000, which contained the statement that it was for a loan of $1,000 made to Mary Kunkle which she was intending to use in improving her separate estate. She owned a town lot. on which, she told Amos, she was about to erect a house. Amos lent the money in reliance on this statement. In fact Mrs. Kunkle did not intend to build a house. She gave the money borrowed to her husband as a loan. Judgment has been entered on the warrant of attorney in the note. This is an application to the court to open the judgment and set it aside, since she was a mere surety for her husband.

OPINION OF THE COURT

Kernan, J. The question to be determined in the case is whether Mrs. Kunkle was a surety for her husband or whether she was a principal debtor on this note. The answer is to be determined by the construction which is placed upon Sections One and Two of the Act of June 8, 1893 know as the Married Woman's Act; which provides—Section 1—"Hereafter a married woman shall have the same right as an unmarried person to acquire, own, possess, control, use, lease, sell etc. but she may not mortgage or convey her real property unless her husband join in such mortgaging or conveyancing." The obvious intent of this section was to give a femme covert the same rights and control over her property, as though she were a femme sole, with the exception of mortgaging or conveyancing.

Section 2—She may not become an accomodation endorser, maker, guarantor or surety for another, and she may not execute or acknowledge a deed or other written instrument, conveying or mortgaging her real property unless her husband join in such mortgage or conveyance.

The defendant's case is centered upon one of the enumerated defenses in Section 2, namely, that a wife cannot be surety for her husband.

He also cites the case of Keystone Brewery Co. vs. Verzally, 39 Sup. 155, in which it was held, "where the object of the instrument is to obtain money for the use of another person, it is not binding on the maker who is a married woman, notwithstanding it may appear on its face to be her note for the payment of money."

Were that all that appeared in this case there is no doubt but that the defendant would be entitled to have this judgment opened.

In Oswald vs. Jones, 254 Pa. 42, cited by the defendant it was held—"When the wife receives no benefit whatever from the money borrowed she is under no obligation to pay, either moral or legal." This we think is a very erroneous decision, because, there would be numerous cases of deceit and fraud arising since there would be nothing to prevent her from saying "I received no benefit. Why should I pay?" Such, we think, is not the law.

At the inception of this note Mrs. Kunkle stated that it was for the purpose of building a home upon property which she owned and upon those representations, received a loan.

She now asserts that she never had such an intention. We think she should not be permitted to do this, and therefore we find that she is estopped to deny that she was a principal debtor.

Judgment for the plaintiff affirmed.

OPINION OF SUPREME COURT

The act of June 8, 1893, 3 Purd. 2451, declares that "a married woman may, in the same manner and to the same extent, as an unmarried person, make any contract, etc, but she may not become accomodation indorser, maker, guarantor, or surety for another." The note made by her is binding, unless, in making it, she was a guarantor or surety.

What is a surety? We may adopt, as the appropriate definition, that of 32 Cyc., p. 14. "Suretyship is a legal relation based upon contract between competent parties, in which one person undertakes, as the object of such contract, to answer to another, for the debt, default or miscarriage of a third person; the third person's liability to the second person being thus similar to that of such first person. A surety is the person collaterally liable for the payment or performance by another."

The case before us discloses no liability of the husband of defendant, or of any other person, to which that of the defendant

is collateral. The wife did not become bound to pay if he made default. She was not a surety, nor was she a guarantor.

She borrowed the $1,000, not the husband. She alone was responsible for its repayment. When she got the money she could do with it what she chose to do. She could give it or lend it to her husband. Such use of it could not retroact on the transaction, so as to transform it from what it was, a simple borrowing by the woman alone, into a suretyship for the husband.

The fact that she misrepresented to the loaner her purpose as to the use she would make of the money, has no significance. She could not refuse to repay it because she did not use it, as she said she would.

The suggestion of Justice Stewart, in Murray vs. McDonald, 236 Pa. 26, that, if a married woman is in fact a surety, she contracts no liability by falsely saying to the creditor that she is not, has no relevancy here. In that case, the single bill was that of both husband and wife. She was in fact a surety. Her liability, if such there were, would be collateral to his.

Oswald vs. Jones, 254 Pa. 32, is a judicial extension of the legislative prohibition. The wife was not a surety or guarantor, but she was declared unable to bind herself, because the money lent to her was intended to be given or lent by her, to her husband, and the lender had notice of the intention. This case does not contain those elements.

The judgment of the learned court below is affirmed.