Volume 12 | Issue 1

1-1908

# The Forum - Volume 12, Issue 4

# THE FORUM.

VOL. XII. JANUARY, 1908. No. 4

EDITORS
WALTER H. COURSEN
JACOB E. ATKINS
JOHN T. OLMSTED

BUSINESS MANAGERS
THADDEUS S. SMITH
KENNETH MAGO
JAMES F. SHIPMAN

*Subscription $1.25 per annum, payable in advance.*

## LATERAL SUPPORT,

Soil of various sorts, sand, pebbles, clay, asphalt, retains its place, in part, because of its solid state, the immobility of its molecules, relatively to each other, and in part because of the resistance opposed to lateral motion by the adjacent soil. When A owns a lot 40 feet by 100 feet, he owns an inverted pyramid, whose apex is the center of the earth. The distance however from the earth's surface to its centre is so great that the convergence of the lines forming the edges of the pyramid may be ignored, and the pyramid may be treated as a paralellopiped. Let us suppose the earth which touches this paralellopiped on all sides excavated to the depth of 200 feet. The case would be extraordinary in which after such excavation, the upright walls of the solid should remain intact. Ordinarily through wind, rain, frost, vibrations variously caused, they would break and the earth composing the solid would fall over into the excavation. Let us suppose that B owns all the land around A's land. May he scoop, dig or otherwise excavate it if the effect will be the toppling and precipitation of A's land, or portions of it? The answer given to this question is reasonably distinct by the Anglo-American law. We shall consider in this paper however chiefly, what the courts of Pennsylvania have said upon it.

An analysis of the decisions will reveal that A has a right as against B, not that B shall not excavate his soil as much as he chooses but that his own land or portions of it shall not fall in or over, in consequence of B's excavations, and shall not be put in danger of falling in or over, by reason of such excavation and the omission to furnish adequate substitutes for the pressure of the removed soil.

DANGER OF FALLING IN.

Excavations may create a danger that the adjoining soil will fall in, even before it has fallen in, and this danger may be sufficiently visible, before any falling in has occurred. Or a partial falling in may admonish that it will be followed by a still greater. The preventive remedy of injunction may in such cases be resorted to. Thus even before there has been any falling in of A's land, the character of the soil and of the excavation and its effect on the immediately neighboring soil may convince the court of the extreme probability that, if the operation of digging is continued, A's land will slide over. The court will enjoin against the prosecution of the excavation, unless effective substitute for the pressure of the removed soil are furnished.[1] In the case referred to, B was excavating his lot adjacent to A's to the depth of 20 to 30 feet for the purpose of taking the sand. The excavation was so near to A's land that B's adjacent soil caved in, at one point to within 4 feet of A's line, thus making probable the caving in of part of A's land, should the digging continue. An injunction was the proper remedy. In Wier's Appeal,[2] A owned land on the top of a hill, whose side had an inclination of 45 to 55 degrees. B owned land on the side, contiguous to A's and was quarrying from it stones, of which there was a large quantity, constituting A's principal value. The quarrying had reached a point about 13 feet from A's line and had already resulted in the slipping over upon B's side, of a portion of A's land which he had converted into a driveway. The supreme court enjoined B, "from quarrying, excavating and stripping his land so near to A's as to take away its natural lateral support and cause his land to slide or fall, but with the proviso that B might make any nearer approach to A's line than 40 feet, [the distance which the decree of the court below prescribed] upon protecting A's land by means of a substantial stone wall built by B at his own expense along the boundary of A's land. Doubtless, if some other substitute for the support furnished by B's soil to A's land had seemed feasible, the court would have allowed the excavation to proceed upon the adoption of it. The falling or sliding of the plaintiff's land in consequence of the operations of the defendant is the effect which the injunction is designed to prevent. It prevents excavation, only because the process makes probable that

[1] Ganley v. Kirst, 7 Lack L. N. 172.

[2] 81½ Pa. 203; Bell v. Reed, 1 W. N. C. 70.

effect. If devices may be employed which will avert the sliding or falling in, notwithstanding the continuance of the exfodiation, it will be permitted on condition that such devices are adopted.

It will appear later, that the duty of B to refrain from causing the caving in of A's land, by excavation on his own, is not limited to negligent excavations. However careful he may be, in method, however anxious he may be to avoid injury to A's land, his work will be so far illegal if it in fact seriously endangers A's land, that the court will enjoin it.

DANGER OF FALLING IN—DAMAGES.

No money compensation has been given in any case, for the exposedness of the plaintiff's land to sliding or falling. If the natural supports to A's land have been taken away by his neighbor, it will be only a question of time when its falling over will occur. The comfort of the ownership of it will meantime be reduced. Its market value will be impaired. An injury plainly measurable in damages will have occurred. When the courts prevent, as they do, the fodient process, if it endangers a falling over of a neighbor's land, they recognize his right to be exempt from the *danger*. There is no good reason for refusing to recognize it in a different form, by allowing a recovery of damages for the danger, when it apparently affects the value of the property, even in advance of any actual caving in or falling over. There is no adjudication however that recognizes a right to damages for the mere withdrawal of support, without sequent falling over of the soil.

Were a right to damages from the mere withdrawal of support allowed, the damages recoverable might be less than compensation for injury that later follows from an actual subsidence. The courts might not absurdly give to the owner of land the option either to treat the ablation of the support the wrong or the subsequent resulting falling in, and thus avoid on one hand the absolute refusal to give compensation for the mere removal of support, with its attendant effect on value, and on the other permission to bring two suits arising out of the same act, or founded on two degrees of damages flowing from it. If the removal of the support is regarded as the only cause of action, and suit must be brought within six years therefrom, the damages ultimately to flow from it may not have been developed, and the appraisement of it will involve a speculation upon probabilities. If, on the other hand the actual falling in is the cause of action,

it may not happen for years after the withdrawal of the support, nor till some other than the owner at the time of the latter has become the owner, nor till the remover of the support has ceased to be the owner of the land on which the removal occurred. It would be absurd to hold as Professor Joseph P. McKeehan has ably shown in THE FORUM for March and April, 1907, that the cause of action is the removal of support, and that the statute of limitations runs from that time, and yet that there is no right to sue upon this cause, until there has been an actual subsidence.

ACTUAL FALLING IN.

The ground of the action for damages, so far as existing adjudications enable us to discover it, is, not the removal of the supports which eventuates in the falling in, but the actual falling in. In Backhouse v. Bonomi, 9 H. Lords Cases, 502, mining under B's land, which was adjacent to A's, occurred without leaving sufficient support to B's land. Later B's surface fell in, and in consequence A's fell over towards B's. It was held that the cause of A's action was not the mining process which had happened more than six years before the bringing of the suit, but the falling over. In a somewhat similar case[3] where mining under B's land had caused the surface of B's land to fall in and this had caused the cracking of the surface of A's land, the court says "The plaintiff was entitled to the natural lateral supports of her land, and if the same was withdrawn by her neighbor in mining operations, on its own land, for any injury to her lots *resulting* from the withdrawal of such support compensation must be made," and by injury it means, as do the cases from which it quotes, not the depreciation of value from the *fact* that lateral support has been taken away, but the harmful dislocation of the land resulting therefrom. In Gilmore v. Driscoll[4] one of these cases, the right to support is thus defined by Gray, C. J., "each owner has the absolute right to have his land remain in its natural condition unaffected by any act of his neighbor, and if the neighbor digs upon or improves his own land so as to injure this right [i.e. that one's land shall "remain in its natural condition"] may maintain an action against him without proof of negligence."

[3]Matulys v. Coal & Iron Co. 201 Pa. 70.

[4]122 Mass. 199.

THE RIGHT NOT LIMITED TO NEGLIGENT CAUSATION.

The right of one man to the immunity of his land from changes of place of its constituents, flowing from withdrawal of lateral support, is not a right to such immunity only when the withdrawal has been negligent. The act of withdrawal is per se a negligence. The law gives to A the absolute right to exemption from the consequence of the taking away by B of support. If takes the support away, he knows that he by that act violates B A's right, should a falling over or a disturbance of his soil occur. It matters not whether he seeks or deprecates the result, nor whether he tries as earnestly and skilfully as possible to prevent the result, by furnishing substitute supports or otherwise. If the result follows, he is liable.[5]

WHAT RESULT?

A may have changed his soil by artificial translations of soil from its original place to another as in the making of a road, or by the accumulation of stones in the form of a wall; or by the erection of buildings. If the falling over of his land would not have occurred, notwithstanding B's excavations, but for this increase of the weight of the soil, or for the alteration of the surface, B will not be responsible merely because he removed the lateral support. In other words he owes an absolute duty to A, with respect to A's land only when it has not been weighted by artificial means, which has cooperated with the removal of the support in producing the falling over.[6]

Hence, although there has been an alteration of the soil, by the planting of trees, the building of walls, houses, factories or other buildings, by filling up and levelling the surface, the owner may recover damages even for a non-negligent removal of lateral support, when the land would have fallen in, even had it been in its original condition. In Wier's Appeal[7] A, owning land on the top of a steep hill, had levelled it next to the lower property of B, by hauling stones and soil, and had built a retaining wall. The

[5]Altwater v. Woods, 1 W. N. C. 23. Matulys v. Coal & Iron Co., 201 Pa. 70; McGettigan v. Potts, 149 Pa. 155; Wier's Appeal, 81½ Pa. 203; Crown v. McKee, 23 Pittsb. L. J. 137.

[6]In Crown v. McKee, 23 Pittsb. L. J., 137, the defendant's liability for the sliding in of A's land on which was a house and walls, was affirmed, in the absence of negligence, and was made to include the injury to the buildings.

[7]81½ Pa. 203.

master found a liability on B's part, although he was free from negligence, because he was not "able to find from the evidence, that the weight of the wall and roadway had any direct agency in bringing it [the fall] about." He found that the fall "was caused, not by plaintiff's wall and roadway but by the act of the defendants in digging and excavating the soil for their quarry too near the line of plaintiff's land."

INJURY TO WHAT?

When there have been artificial changes of the surface of A's land, and notwithstanding, B though free from negligence is responsible for injury to A, from the caving in or falling over of his land, no damages can be recovered for injury to the artificial constructions, e. g., to a house,[8] a fence, a chicken house,[9] to a building,[10] "to a wall.[11] "When an owner makes an excavation upon his land" says Orlady, J., "in a manner free from negligence, and so deprives a neighbor's property of lateral support, his liability for damages is limited to the injury to the land without regard to the buildings."[12]

NEGLIGENCE NECESSARY TO LIABILITY.

For the falling or sliding over of A's land in consequence of B's withdrawal of the lateral support of his land, B is we have seen liable, notwithstanding his desire to avoid that result, and the carefulness and skill with which he may have adopted precautions to prevent it. If this land was caused to fall in by weights artifically put on it, e. g. by walls, heaped stones, piles of soil, houses, cooperating with the removal of the lateral support, B's liability will depend on his having been malicious, reckless, careless or unskilful. He is under a duty, in withdrawing support, to take reasonable precautions to prevent the

[8]Richart v. Scott, 7 W. 460; McGettigan v. Potts, 149 Pa. 155. In Altwater v. Woods the excavation caused the lot to fall in along with the fence, shrubbery and a chicken house. No distinction is made between the injury to these and the injury to the lot.

[9]McGettigan v. Potts, 149 Pa. 155.

[10]Matulys v. Coal & Iron Co. 201 Pa. 70. The parties having agreed that $2000 were the damages to the land, and $500 to the building, a judgment for $2,000 only was proper.

[11]Jones v. Greenfield, 25 Super. 315. Cf. Witherow v. Tannehill. 194 Pa. 121; Fife v. Turtle Creek Borough, 22 Super. 292; Thurston v. Hancock, 12 Mass. 220; Gilmore v. Griscoll, 122 Mass. 199; McGuire v. Grant, 1 Dutcher, 356.

[12]Jones v. Greenfield, 25 Super. 315.

sliding or falling of A's land, although that land would not have slidden or fallen but for the added structures. And when B is thus negligent he becomes liable to compensate A for the injury not only to the land but also to the buildings and other structures upon it.[13] In Neissinger v. Stillwell[14] B, in building his house, next to A's, dug down for a foundation along A's wall to a depth of 2 feet below its base, and then, by direction of the building inspectors, in order to strengthen A's wall, dug under it, and built a foundation under it, on which he also built his own wall. The result was that A's wall caved in, and the house was greatly injured. Briggs, J., charged that negligence was the pivotal point of the case. If the injury resulted from B's use of defective material and from his unskilfulness, A could recover; otherwise not. The verdict was for B. Contractors with the city of Philadelphia made excavations for a subway along the line of A's building, to a depth of 30 to 35 feet, and within 20 inches of it. The building cracked, sank, and became out of plumb. The contractors were liable, if they did not use the usual and ordinary methods adopted in order to protect the foundations of adjacent buildings.[15] The excavation may be not close to the line of the plaintiff, but twenty feet away. The defendant will be nevertheless liable.[16] The surface belonging to plaintiff and the coal below to another person the defendant may withdraw the lateral support from the coal below, and thus cause a falling in of the surface and be liable.[17]

### THE DEGREE OF CARE.

The degree of care required must doubtless be proportional to the gravity of the possible results of the excavation. But, the person who is excavating, is not bound to employ unusual means, or extraordinary precautions, but only such as are ordinary under similar circumstances.[18] In an endeavor to be clear, it has

[13]Witherow v. Tannehill, 194 Pa. 21.

[14]I W. N. C. 269. Briggs, J, said that because the action was case and not trespass, recovery depended on negligence. B had apparently committed trespass q. c. f. on A's lot, and for this would have been liable unconditionally.

[15]Witherow v. Tannehill, 194 Pa. 21; Irvine v. Smith, 204 Pa. 58; Richart v. Scott, 7 W. 460; McGettigan v. Potts, 149 Pa. 155; Ward v. Cowperthwaite, 16 L. I. 85; Strong, P. J., Spohn v. Dives, 174 Pa. 474.

[16]Witherow v. Tannehill, 194 Pa. 21; Wier's Appeal 81 1/2 Pa. 203.

[17]Noonan v. Pardee, 200 Pa. 474.

[18]Richart v. Scott, 7 W. 460; Dunlap v. Wallingford, 1 Pitts. 127; Ward v. Cowperthwaite, 16 L. J. 85; Irvine v. Smith, 204 Pa. 58.

been said[19] "Negligence or want of due care in withdrawing lateral support in excavating or mining on adjoining land, for which there is liability for injury to a neighbor's buildings, means *positive* negligence, or *manifest* want of due care in the excavations or mining so far as they affect, or are likely to affect adjoining improvements." Want of due care means manifest want of due care. Manifest to whom? Can any want of care—that is not manifest ever have results? Or can it even be affirmed to exist? Positive negligence. And what is negative negligence? Is positive negligence the doing of acts, negligently, and is the other sort of negligence, the negligent omission to act at all? According to the case in view, reference must be had to the object of negligence. The negligence must be "towards" the plaintiff, and apparently this means that the negligent party "should reasonably have anticipated what happened" to the plaintiff. Hence, B owning land in which was coal, and which was contiguous to A's land, if B's mining operations are so conducted that the surface of his land not being properly supported falls in, and in so doing, causes A's land to fall over, B is not liable to A for injuries, a liability for which presupposes negligence, i. e. for injuries to A's buildings. If the first builder, in the construction of his wall, use materials unfit for the purpose; or the materials though suitable, are so unskilfully built in the wall, that it cannot be preserved and supported with ordinary care and diligence, with the use of the usual and ordinary means resorted to in practice for that purpose, when the second builder comes to dig out the foundation for his house, but notwithstanding the use of such care, diligence and means by the latter to prevent it, the wall gives way and with it a part or the whole of the first building falls, occasioning small or great loss to the owner thereof, it must be regarded as *damnum sine injuria*, for which the second builder is in no wise responsible.[20] The care required will depend on the circumstances of each case; the character of the surface or soil, the location of the lots, the probability of improvement of that neighborhood, the character and purpose of the building likely to be erected.[21]

[19]Matulys v. Coal & Iron Co. 201 Pa. 70.

[20]Richart v. Scott, 7. W. 460.

[21]Dunlap v. Wallingford, 1 Pittsb. 127. If B, the second builder, says Hampton, P. J., wishes to sink his foundation deeper than that of A, the first, he should give A notice of his intention, and permission to come on his B's land to underpin, shore up, or employ other means. If this is done, and B uses ordinary care and skill in digging and removing the soil from his own lot to the necessary and proper depth for his building, he is not responsible for injury to A's house. But if he neglects to give notice, and undertakes to secure the building himself, and does it unskillfully or negligently he will be responsible for the damages.

CONTRIBUTORY NEGLIGENCE.

As in other relations the doctrine is here applicable that a plaintiff cannot recover damages caused by the negligence of the defendant if his own negligence has contributed to the production of the result, that is, if the result would not have occurred, although the defendant was negligent, unless the plaintiff had been negligent also. The manner in which the plaintiff's wall, house, etc., that may have been injured, has been put up, may have been improper, careless. The plaintiff when building near the boundary of his lot in a city or borough, is bound to foresee that his neighbor will desire also to build, and in building to excavate, and he must build his house with a view to this future fact.[22]

He must so build that his neighbor if he desires, may with ordinary care dig deeper than the foundation of his walls. If he is negligent in this regard, and this negligence is one of the causes of his building giving way, the negligence of the defendant will not entitle him to damages.[23] The plaintiff was negligent if he did not sink the foundation of his building to the proper depth, in view of the character of the surface and soil of the lots; or if he did not give his walls sufficient dimensions and materials nor build them in a workmanlike manner. He is negligent if, receiving notice of the excavation, he fails to take steps to preserve his walls. The defendant is then not bound to underpin the building at his own risk and expense. Care and caution will not require this. But if defendant undertakes to underpin thus putting the plaintiff off his guard, the former must use ordinary skill and prudence.[24]

WHO JUDGES NEGLIGENCE.

When there is sufficient evidence of negligence, the existence of negligence on the part of the defendant[a] or of contributory

[22]Richart v. Scott, 7 W. 460. The defendant in this case however, had used ordinary care and diligence in the excavation of his lot. Cf. Irvine v. Smith, 204 Pa. 58. In Jones v. Greenfield, 25 Super. 315, there could be no recovery for the destruction of a privy, if it would not have been destroyed had it been well built.

[23]Ward v. Cowperthwaite, 16 L. J. 85; Dunlap v. Wallingford, 1 Pittsb 127.

[24]Dunlap v. Wallingford, 1 Pittsb. 127. If plaintiff joins with the defendant in the precautions, approving them, he cannot afterwards allege that they were unskillful or improper.

[a]Dunlap v. Wallingford, 1 Pittsb. 127; Irvine v. Smith, 204 Pa. 58.

negligence on the part of the plaintiff, must be decided by the jury; or in equity cases, by the master or court?[25]

PRIORITY OF PLAINTIFF'S STRUCTURE.

The fact that A has erected his house before, even more than twenty-one years before[26] the excavation by his neighbor B, does not make B liable for a non-negligent injury to the house, or deprive B of immunity if A's negligence in the construction of his house or at the time of the excavation, has contributed with B's own negligence to the injury. Though A has a right to build to the verge of his lot, he must do it so as not to create unnecessary labor and expense to B, when B builds upon his lot.

WHO LIABLE.

The one who excavates a lot, with the result that the neighbor lot in part falls or slides over, may be its owner. He may also be an occupier, or tenant. But he need have no interest in the land on which he excavates. Thus contractors for the construction of a subway[27] or for the erection of a house[28] upon it may become liable. A borough which in building a sewer, removes the lateral support to a lot abutting on the street will be responsible for injury.[29]

THE INTEREST OF THE PLAINTIFF.

The plaintiff may own the land which suffers injury from the excavation in fee simple.[30] He may also be a mere tenant.[31]

LIABILITY FOR INJURY TO BUILDINGS WITHOUT NEGLIGENCE.

Although ordinarily there is no liability for the removal of lateral support, so far as injury to buildings is concerned, in the absence of negligence, the 8th section of Article 16 of the Constitution of 1874 provides that "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement

[25]Wier's Appeal 81 1/2 Pa.

[26]Richart v. Scott, 7 W. 460; Dunlap v. Wallingford, 1 Pittsb. 127; Ward v. Cowperthwaite, 16 L. J. 85. Cf. Gilmore v. Driscoll, 122 Mass. 199.

[27]Irvine v. Smith, 204 Pa. 58.

[28]Richart v. Scott, 7 W. 460; Cf. Gilmore v. Driscoll, 122 Mass. 199.

[29]Fife v. Turtle Creek Borough, 22 Super. 292.

[30]Matulys v. Coal & Iron Co. 101 Pa. 70.

[31]Richart v. Scott, 7 W. 460; Ward v. Cowperthwaite, 16 L. I. 85.

of their works, highways or improvements." Hence, when a borough constructing a sewer in a street, causes, even without negligence, injury to the buildings upon an abutting lot by the withdrawal of lateral support to the soil, the borough is bound to make compensation.[32]

THE ACTION.

The remedy for damages for injury from the removal of lateral support was formerly trespass on the case in the absence of a trespass upon the plaintiff's land. It is now the action of trespass.[33] If the injury results from the non-negligent construction of a sewer, or other improvements by a municipality, the damages must be awarded by viewers under the appropriate act of assembly[34]. For the prevention of the threatened injury, the remedy is injunction.[35]

PRECAUTION BY PLAINTIFF AT DEFENDANT'S EXPENSE.

Although the plaintiff whose land is in its natural state is entitled that it shall not be caused to fall or slide over, by the excavation, even with care by the defendant, of his adjoining lot, and therefore has a right that, in order to neutralize the excavation, the defendant shall build a retaining wall, if the defendant fails to do so, the plaintiff may erect such a wall if the expense thereof will not be greater than the damages which he would have a right to recover, in case no such wall being there the land slid over, and he may compel the defendant to reimburse to him the costs of the wall. In Weightman v. Ruffner[36] B dug down his lot to below the grade of the street, and in order to prevent A's ground from falling into his lot, erected a stone retaining wall along the division line. Later this wall fell for want of repair. After requests from A to repair, and B neglecting to do so, A repaired it at a cost of $24.08. He was permitted to recover this amount.

THE DAMAGES.

No rule which is clear seems to have been adhered to in the adjudications, for ascertaining the damages. When the parties

[32]Fife v. Turtle Creek Borough, 22 Super. 292.

[33]McGettigan v. Potts, 149 Pa. 155; Matulys v. Coal & Iron Co. 201 Pa. 70; Jones v. Greenfield, 25 Super. 315.

[34]Fife v. Turtle Creek Borough, 22 Super. 291.

[35]Weir's Appeal 81 1/2 Pa; Ganley v. Kirst, 7 Lack. L. N. 172.

[36]22 W. N. C. 36.

agree, as they sometimes do,[37] the definition of such a rule is unnecessary. The sliding or falling of the soil may in some cases be actually beneficial to the owner of the lot. It may, e.g. be a city lot, whose surface is far above the grade of the street, so that a reduction of its height in order to adapt it to a house, would be necessary. The gratuitous removal of a part of the soil in such a case would be advantageous. If the effect of it on the market value of the lot is considered, it will be found to have enhanced that value. Should the owner be allowed for the cost of putting back upon the land, the amount of soil that has been removed? That would be absurd. Such replacement would be foolish, and if the calculated cost of it were paid the plaintiff, he would probably keep the money in his pocket,[38] and besides enjoy the increased value of his lot springing from its less expensive adaptation to building. On the other hand, although the loss of the soil, or the altered form of the surface may be a detriment, the cost of the replacement of the soil, and the restoration of the form of the surface might be greatly in excess of the depreciation of the value of the lot.[39] It may here be remarked that the cost of restoration has been repudiated, in McGuire v. Grant[40] where the taking of gravel from adjoining land caused the falling in of A's land, over a space eighty-four feet long, from two to eight feet wide. There was no mode of supporting the earth except by a perpendicular or slope wall, or by sodding. The wall would need to be eighty-four feet long, twenty-two feet high, and two feet thick, and would cost $333. Including the filling in, the entire cost would be $450. The court said "The measure of damages in such case is not what it will cost to restore the lot to its former condition, or to build a wall to support it, but what is the lot diminished in value, by reason of the acts of the defendant. It will frequently happen that the subsidence

[37]Matulys v. Coal & Iron Co. 201, Pa. 70.

[38]See similar suggestion in Jones v. Greenfield, 25 Super, 315.

[39]In Jones v. Greenfield 25 Super. 315, the plaintiff sought to recover damages sufficient to restore the property to its former grade, and the court seems to assume the correctness of this test. "The estimate of the necessary support [expense?] to restore the lot to its natural state" says Orlady, J, "should have been confined to the conditions as they existed when the wall fell and not extended to the speculative cost of an entirely different kind of structure." The court complains that the plaintiff, instead of showing the cost of replacing the retaining wall, which had fallen, had been allowed to prove the cost of a much larger and more expensive one.

[40]1 Dutcher, 356.

of land in a city occasioned by the grading of adjoining lots, thus bringing the surface nearer to the grade of the street, will but slightly diminish its real value. The only true criterion of damages, therefore, is the diminution in the value of the lot." The cost of restoration of the land to its former state is rejected as the measure of damages, by Gilmore v. Driscoll[41] which follows in this respect, McGuire v. Grant, and which is quoted with appropriation by Green, J., in McGettigan v. Potts.[42]

THE MEASURE OF DAMAGES.

In the case just cited, Green, J., rejects the diminution of the value of the land as the measure of damages, evidently as a result of a misinterpretation of Gilmore v. Driscoll. In the last case, the parties had agreed that the damages occasioned by the loss of and injury to the plaintiff's soil alone, were $95; that to restore its former condition and maintain it by a retaining wall, would cost $575, and that to replace the fence and shrubs, would cost $45. They had also agreed that $575 + $45, was the diminution of the market value of the land. The court rejected the second and third measures (producing the same sum) and adopted the first. But why did the court reject the diminution of value? The case was one in which the plaintiff had no right to recover for injury to the buildings, fences or shrubbery, because there was no negligence. The agreement as to diminution of value, did not distinguish between the value of the land, unmodified by the fences, buildings and shrubbery, and the value of the land *with* all that was on it. Said Gray, C. J., referring to the plaintiff, "She cannot recover the difference in market value, because it does not appear that that difference is wholly due to the injury to her natural right in the land; it may depend upon the present shape of the lot, upon the improvements thereon, or upon other artificial circumstances which have nothing to do with the natural condition of the soil." Green, J., failed to distinguish between the diminution of the value of the actual lot, with all the improvements, and the diminution of the lot independent of its improvements. The court below had taken special pains to impress this distinction on the mind of the jury. He said, instructing them as to the measure of damages: "It is

[41] 122 Mass. 199.

[42] 149 Pa. 155. The inanities of this case are repeated by Dean, J., in Noonan v. Pardee, 200 Pa., 474, notwithstanding the cases laying down a different rule.

the injury to the lot, the diminution of the value of the lot, outside of and unaffected by any of the improvements that may be upon the lot. How much has that lot been injured in dollars and cents, by reason of the slide that may have been occasioned and by reason of the cracking? * * * But it is not the difference in the market value of the property as a whole; of the house and lot." So clearly expressed and so obvious a distinction seems to have eluded the writer of the opinion on the appeal.

But, the measure adopted by Gray, C. J., in Gilmore v. Driscoll was that of the "loss and injury to her soil alone," that is, to the land conceived as in its natural state. Had it had no improvements on it, the defendant's act would have caused a loss of $95. But what warrant has Green, J., to say that this loss was not, in the mind of the parties who agreed upon it, the difference between what would have been the market value of the unimproved lot, before, and after the acts of the defendant? There is nothing in the report to suggest that they meant or could have meant anything else. What can be the loss and injury to the soil, if it is not the less value of what remains to the plaintiff in comparison with the value of what he had before? And what is value but the price that may be got in exchange?

The proper amount of damages, says Green, J., is not the number of dollars by which the selling value of the land has been lessened, but "the amount of the injury actually done" to the land! How admirable! What other injury than "injury actually done" is there? And what is the amount of the injury? The number of cubical yards of displaced soil? Or the price in money, of these yards? No one has yet suggested that the price which these yards would command in the market, is the measure. The mere unintentional dislocation of them has not caused the plaintiff's property in them to cease. He may demand the right to take them back, and can allege a conversion of them only when the defendant denies him the opportunity to retake them. Is it the value in money of the same amount of soil, and of the labor involved in replacing it? This as we have seen has been rejected.[43] Is it not plain that the amount of the injury actually done to the land is the amount of money which spans the difference between the money which the land in its unimproved state, would have brought if sold, had the sliding and falling not oc-

[43]Except when it is less than the diminution of the market value of the land. See below.

curred and the money it would bring just after the occurrence of this sliding and falling? Green, J., proceeds to say that, as there was no loss of timber, nor removal of any mineral, and no liability for injury to buildings and fences, "it would seem that the only element of damage appearing in the testimony is the loss of the soil." But how is this loss to be appraised? Surely in terms of money? Will it then be the value of this amount of soil, as an article of sale? Absurd! Or will it be the money by which the land after this loss, is worth less, i.e. will sell for less, than it would have sold for, before this loss? The futility of saying that "the amount of injury actually done" is the measure of damages is recognized in Rabe v. Shoenberger Coal Co.,[44] where Potter, J., remarks criticizing the trial judge for telling the jury that the plaintiff had a right to recover his "actual loss," that they "were not told how that actual loss was to be estimated."

Injury arising from the withdrawal of subjacent support, is similar in kind to injury arising from the ablation of lateral support. It has been said, in the former case, that when the injury is reparable at a cost less than the diminution of market value of the land, that cost will be the damages recoverable, but if the cost of repairing is greater than the diminution the diminution will be the damages.[45] It is in truth difficult to see how the difference in the values of the land before and after the abstraction of the support can be greater than the cost of restoration. If in a given state, a lot is worth $1000, and it can be put in that state for $200, it must in its present state be able to sell for $800; that is the difference of value willnot exceed the cost of reparation. It is quite possible however, that the cost of reparation added to the present value of the land will exceed its former value.

It may be well to advert to the statements found in the other cases as to the measure of damages. The proper measure says the court, in Irvine v. Smith[46] was the actual damage done to the property. But what is the money measure of this damage is not disclosed. The verdict, says Orlady J., should give "compensation for actual injuries sustained, and not as punitive damages."[47]

[44]213 Pa. 252.

[45]Weaver v. Berwind White Coal Co., 216 Pa. 195; Rabe v. Shoenberger Coal Co., 213 Pa. 252. Cf. Lucot v. Rodgers, 159 Pa. 58; Thompson v. Traction Co., 181 Pa. 131; Williams v. Fulmer, 151 Pa. 405; Gift v. Reading, 3 Super. 359; Vanderslice v. Philadelphia, 103 Pa. 102.

[46]204 Pa. 58.

[47]Jones v. Greenfield, 25 Super. 315.

In Matulys v. Coal & Iron Co.,[48] the parties agreed that $2000 measured the damages done the lots, and $500 that done the buildings, but on what principle this estimation was does not appear. Porter J. said, in a case[49] in which damages for injury to the house and for injury to the land were recoverable, "the land, with the improvements upon it, and the uses to which it may be devoted must all be considered, not as independent claims, but as elements affecting the *market value and the increase or decrease thereof*, resulting from the public improvement." In Ward v. Cowperthwaite,[50] Strong, P. J., said the measure of damages was the difference between the value of the term [the plaintiff was a tenant] immediately before and immediately after the damage. No speculative damages were to be allowed; nor what the plaintiff would have made; nor the value of the building; because that belonged, not to him but to the landlord.

INTEREST.

The plaintiff is not entitled to interest upon the sum of money which the jury finds to measure the damages suffered, but the jury may add to that sum compensation for the delay in the payment of the same,[51] and, when the supreme court on appeal reduces the judgment interest may be allowed from the date of the vedrict.[52]

[48]201 Pa. 70.

[49]Fife v. Turtle Creek Borough, 22 Super. 292.

[50]16 L. J. 85.

[51]Irvine v. Smith, 204 Pa. 58. In Scranton v. Phillips, 94 Pa. 15, Harding, J., said to the jury that if B, owning coal below tract *a* and adjoining tracts, so mined in the adjoining tracts as to cause their surface to fall in, and thus withdraw lateral support from *a*, so that *a* also fell in, he would be liable independently of negligence, for injury to a church on *a*. In Hill v. Pardee, 143 Pa. 98 there was a mine under tract *a* and the land contiguous to it. A gangway 250 feet from *a* was made. By reason of the removal of pillars in the mine, there was a "squeeze" or crush in the gangway, which caused a crack in the surface extending several hundred feet and across *a*. This was considered by the court below as a case of removal of vertical support. In Noonan v. Pardee, 200 Pa. 474, it was held that there could be a recovery for a subsidence of the surface, caused by mining in land not under the surface which caved in but which removes the lateral support to the mine below this surface and thus causes it to cave in. But intimation is made that there could be no recovery for injury to the buildings unless there was negligence shown. But, if the declaration does not claim for damages from the removal of lateral support, it is error to receive evidence of it and permit a recovery.

[52]Matulys v. Coal & Iron Co., 201 Pa. 70.

# MOOT COURT.

## WILLIAM TEPLITZ vs. JOHN SOVAROFF.

**Mortgage of Leasehold—Priority of Lien of Mortgage and Judgment—Estoppel—Adverse Possession.**

### STATEMENT OF FACTS.

In 1792 the then owner of a tract of land made a lease of it to X for 200 years. From X the lease passed by devise, assignment, etc., to several persons in succession until it became the property of Sam Romanoff. He, calling himself the owner in fee, made a mortgage to Sovaroff in 1897 for $4000. This mortgage was foreclosed and judgment rendered in 1901. Before sale thereupon Teplitz, a creditor of Romanoff obtained a judgment, issued *fi. fa.* and *vend. ex.* and sold the interest of Romanoff in the premises. A *lev. fa.* then issued on judgment sur mortgage and at the sale Sovaroff became the purchaser and retained possession. No rent had been paid by Romanoff or predecessor for 30 years prior to the sheriff's sale. Who the present owner of the lessor's title is does not appear.

Prokopovitsh for Plaintiff.

A non-compliance with the Acts of 1855 & 1876 (P. L. 100 & P. & L. Dig. 1612 respectively) divests the lien of a leasehold mortgage as against subsequent judgment creditors, who comply with the procedure and law. Hilton's Appeal, 116 Pa. 351; Lefever v. Armstrong, 15 Sup. Ct. 57.

Ulrich for Defendant.

Romanoff had a chattel interest. Brown v. Beecher, 120 Pa. 590; 22 W. N. C. 325.

If possession is given the mortagee of a chattel interest, the lien of the mortgage is not divested by a sale by a judgment creditor. Bldg. & Loan Ass'n v. Bolster, 92 Pa. 123.

### OPINION OF THE COURT.

SHIPMAN, J. This is an action of ejectment, and it is a well settled rule of common law that the plaintiff in such case must recover on the strength of his own title, and not on the weakness of the defendant's title. Therefore we must investigate the grounds upon which Teplitz claims possession, and determine if they are sufficient.

Both the plaintiff and defendant appear to have bought at their respective sales. The defendant had possession both before and after his sale. Teplitz claims the right of possession by having been a creditor of Romanoff and issuing a *fieri facias* and *venditioni exponas* and buying the interest at the sale. He bought only Romanoff's interest, which was a leasehold. Romanoff, when he mortgaged to Sovaroff, claimed he had a fee simple, but the law is too well settled in Pennsylvania that "a lessee is estopped to deny his lessor's title" to enable us to conclude that he has anything more than a leasehold interest. Further, Romanoff had a chattel

interest. Brown v. Beecher, 120 Pa. 590, holds "that a lease is a chattel interest in land; the lease is a chattel real, but none the less a chattel." Kile, Sheriff v. Giebner, 114 Pa. 381, also holds "that a lease of lands for a term of years may be sold on a *fieri facias* as *personal*, and not real property."

Therefore, all the plaintiff has upon which to rest his claim is a judgment upon a chattel interest, which had been previously mortgaged to the defendant, and such mortgage foreclosed and purchase made of the interest by the defendant.

As a general rule, a mortgage of personal property, like a sale, is void as against creditors, if a corresponding change of possession does not accompany the same. Trickett on Law of Liens, Vol. 1, Sec. 81. But here such a corresponding change did accompany the mortgage. The defendant had possession both before and after his purchase. If possession be given the mortgagee may hold it until his debt is satisfied. Bismarck Building & Loan Association v. Bolster et al, 92 Pa. 123. If the mortgagee take and retain possession of the property, as in this case, it will be as free from liability to answer an execution against the mortgagor as would any other personal estate, and once free, because under his dominion, it would continue so.

Defendant's mortgage also has priority over plaintiff's lien because a long term of years, of very great value, is not such an interest in land as is subject to the lien of a judgment. See 92 Pa. 123 supra.

As to the non-payment of rent to Romanoff or his predecessors, it makes no difference whether defendant held adversely. As between the parties to this action the defendant's possession is good.

In regard to the failure to record the mortgage, argued so ably by the counsel for plaintiff, we would state that we are of the opinion that the Acts of Sept. 23, 1873, March 28, 1820, and April 6, 1830, relating to the recording of mortgages, do not include leaseholds in the words properly signifying freeholds. These acts relate exclusively to mortgages of "real estate." This case is one of *personal* property.

Therefore, the plaintiff, who was a creditor of the mortgagor, could only sell the leasehold interest subject to the claim of the defendant mortgagee, whose lien is not divested by the sale, and the purchaser at sheriff's sale takes just the interest which was left in the mortgagor. Here the entire interest was mortgaged to defendant, and the plaintiff's remaining interest as a purchaser was nil.

The case of Bismarck Building & Loan Association v. Bolster et al, 92 Pa. 123, is directly in line with, and, we think, governs the facts and situations in the present case.

Judgment for Defendant.

OPINION OF THE SUPREME COURT.

We reach the result attained by the learned court below, but by a different route.

Romanoff acquired the leasehold, having yet about 100 years to run. He however claimed to own a fee. He undertook to mortgage this fee. The mortgage must be dealt with, as if a mortgage of a fee. Had Romanoff had no right but that of possession, his mortgage, purporting to be in fee, would, so far as the recording acts, exemption from dives-

titure by judicial sales on later lien, etc., are concerned, necessarily be treated as were the title good. Romanoff's title is not a merely possessory one. He *has* a right to retain possession for 100 years. We must treat the mortgage as one of a fee simple.

Teplitz obtained a judgment. This judgment became a lien on Romanoff's fee, whether it was real or supposititous. If A has possession of land, claiming a fee, a judgment against him will bind the imaginary fee, however unsubstantial it in fact is. But it is unimportant to decide whether Teplitz's judgment became a lien or not. A *fi. fa.* was issued upon it, under which the land was levied upon and, in due course, sold. Even had the judgment been a lien since, so far as appears, it was recovered after the execution of the mortgage, that lien would have been posterior to the mortgage. The mortgage was the first, the judgment the second, lien. Although then, the sale on the judgment was earlier than that upon the mortgage, it was subject to the mortgage. The purchaser at the judgment sale bought the land subject to the mortgage debt, and the mortgagee could cause a second sale for the purpose of coercing payment of his debt. It follows that Sovaroff is the owner of the interest of Romanoff, and that Teplitz, although for a brief period the owner of that interest, charged with the mortgage, has lost it to Sovaroff.

In order to avoid erroneous inferences from the decision reached it is proper to observe that the original ownership of the lessor, of 1792 is not in question. It is true that nothing has happened to divest that estate. Since the lease entitled the lessee and his assigns to possession for 200 years, it is difficult to discover how the possession actually had, could be deemed adverse to the lessor. Whether he or his heirs ever learned of the arrogation by the tenant of a fee, does not appear, and how long it is, since the commencement of this claim, does not appear.

Although the denial of the title of the lessor works, at his option, a forfeiture of the lease, he does not seem ever to have learned of this denial. At all events, 21 years since the commencement of the denial have not, so far as we see, run. The statute of limitations has barred no right.

The learned court below invokes the principle that the tenant is estopped to deny the title of his lessor. That is true, but the estoppel operates as between the lessor and those deriving the reversion from him, on one side, and the lessee, and those on whom his interest has devolved, on the other side. The controversy here is not between such parties, but between rival claimants of the lessee's interest, both averring that it is a fee.

The learned court below not discovering that the plaintiff has shown a better right than the defendant, has given judgment for the latter. In this there is no error.

Judgment affirmed.

## COMMONWEALTH vs. DONOVAN.

### Evidence—What is Perjury.

STATEMENT OF FACTS.

Indictment for perjury. At the trial of a case Donovan testified. At the time he testified, he believed he was testifying falsely. It afterwards turned out that what he testified to was true. His testimony was material.

O'Dea for the Plaintiff.

Testimony given with the specific intent to swear falsely is perjury. Bishop on Criminal Law 1009.

Gardner for the Defendant.

To commit perjury there must be an overt act coupled with the intent to swear falsely.

OPINION OF THE COURT.

ATKINS, J.—The Act of Assembly which provides a penalty for the crime of perjury, does not define it, and in the absence of such statutory definition, we will have to look to the common law for a suitable definition, and especially for one which covers the case at hand. In looking over the earlier cases and authorities we find that, to constitute an act of perjury, the oath must be false, the intention wilful, the party lawfully sworn, the assertion absolute and material. These elements applied to the facts of this case leave no doubt as to its decision unless the fact that Donovan's testimony turned out to be true should strip the oath of its falsity which is the only contention of defendant's counsel.

In our search for a parallel case, we have found very few which bear directly on the facts as presented in the case at hand. However in the Gurneiss case, decided in the State Chamber in 1611 and reported in Mikell's cases on Criminal Law, we find that damages were awarded to plaintiff according to the value of goods riotously taken away by the defendant. Plaintiff then caused two men to swear to the value of the goods who never saw them, and though that which they swore was true, yet because they knew not, it was a false oath in them, for which both the procurer and witnesses were sentenced. In Steven's History of Criminal Law, vol. iii, p. 245, we find the following statement: "The present law on the subject of perjury originated entirely as far as I can judge in decisions by the court of Star Chamber."

The best Pennsylvania case is Commonwealth v. Cornish, 6 Binney, 249, where Tilghman, C. J. said, "If a man undertakes to swear to a matter of which he has no knowledge, he is perjured although what he has sworn turns out to be true." The exact point was not involved in this case but the dictum is approved in Steinman v. McWilliams, 6 Barr 178, Brooks v. Olmstead, 5 Harris 29, and Page v. Allen, 58 Pa. 352.

A review of the different works on criminal law shows abundance of authority for this principle. In Clark and Marshal p. 656 we find this statement: "To constitute perjury the testimony or statement must be false, or the party must believe it to be false," and the following cases are cited: State v. Trask, 42 Vt. 152, State v. Gates, 17 N. H. 373;

People v. McKinney, 3 Park, Cr. R. (N.Y.) 510. May in his work, p. 136 says, "Swearing that a certain fact is true according to the affiant's knowledge and belief, is perjury, if he knows to the contrary, or if he believes to the contrary, even though the fact be true," and cites numerous cases to which we have no access at present. The same doctrine is approved in Clark's Criminal Law, p. 387 Wharton's Am. Crim. Law, p. 747, Robinson's Elementary Law, p. 287.

A further review of the authorities is unnecessary, as we think those cited fully justify the decision that Donovan is guilty of perjury even though his testimony turned out to be true. The crime was not against the one whom he intended to injure by testifying falsely, but against the public, and the public are affected by the false oath just as much as it would have been, had the testimony been false. The falsity of the oath is all we are concerned with, and we thoroughly believe that Donovan's oath was false, and therefore that he was guilty of the crime of perjury.

## OPINION OF SUPREME COURT.

Donovan, in his testimony, testified that certain things had happened. They had in fact happened, but he believed that they had not happened. That he was morally guilty of falsehood, there is no question. But, is it the aim of the law to criminalize all moral falsehood? or all moral falsehood which is made the more impressive, and effectual, by being accompanied by an oath or affirmation, and by being delivered in a judicial proceeding?

One of the prerequisites to criminal responsibility for a false oath is, that it be material. Yet the moral guilt of saying, under oath, what is known to be untrue, cannot be less, when the thing said is immaterial, than when it is material. The witness may not know what is material, and what is not. He may think the false statement material, and make it because he believes it material, and yet if in the judgment of the court, it is not material, he will commitț no perjury. His moral guilt is not coincident with legal guilt.

If the officer has no legal authority to administer the oath, upon which the falsehood is uttered, there is no perjury, although the swearer's intention is as bad as if the officer had the authority.

If the statement is made necessary by the law in order to effect an object, but the law does not require that it be made under oath, the prefixing of an oath to it, will not make it, if false, perjury. But the moral guilt of the swearer is not less than in perjury.

If a promissory oath is taken, it is not perjury, although the promissor at the time, intends not to keep the promise; 2 McClain, Criminal Law, p. 90; 2 Wharton, Criminal Law, 138.

In some of the above mentioned cases, the law may regard the swearer as guilty, not of perjury, but of an attempt to commit it. One who falsely swears before an officer who is incompetent to administer the oath, may be guilty of an attempt to commit perjury; 2 Wharton, Criminal Law, p. 170, but possibly the false swearing to an immaterial fact, though believed material; the false swearing when the law does not require swearing, although it is believed to require it, would not be punishable even as attempts. At least no case is now recalled, in which these acts have been so punished.

The law might have contented itself with criminalizing objective falsehood, i. e. the want of correspondence between the assertion and the fact, when this divergence was believed by the swearer. The cases cited by the learned court below indicate that it has gone further. It embraces within its definition of perjury the non-comformity of the assertion with the belief of the asserter, even when the assertion conforms with the outward fact. Despite the contrary indication of Commonwealth v. Clark, 157 Pa. 257, the courts of Pennsylvania may probably be expected to adopt this view. At all events the judgment is affirmed.

## BROWN vs. GRIFFIN.

**Bailment—Recovery of article from possession of a third person.**

STATEMENT OF FACTS.

Brown was the owner of a threshing machine. He made an oral agreement with one Miller, to loan the machine to him for the purpose of threshing his (Miller's) grain. There was no stipulation as to the time when the machine was to be returned.

Miller, having thus secured possession of the machine entered into a written agreement with Griffin, whereby it is agreed that Griffin is to take the machine and thresh Miller's grain for him, receiving a stated compensation for his services. Griffin performs his part of the agreement and threshes the grain. Miller now declines to make payment and Griffin continues to hold the grain and the machine.

Brown now brings replevin for the recovery of the machine.

Jacobs for the Plaintiff.

A bailee can have no better title than his bailor, for the bailor can give no better title than he himself has. Robinson v. Hodgson, 73 Pa. 202; King v. Richards, 6 Wharton, 408.

Olmsted for the Defendant.

Replevin will not lie except in a tort action, and then only after a demand is made. Payne v. Gardiner, 29 N. Y. 146. A bailee for hire who bestows services on the thing bailed, has a lien upon it for the amount due him. Pierce v. Sweet, 33 Pa. 151.

OPINION OF THE COURT.

JONES J.—Miller having possession of the threshing machine for the purpose of threshing his grain, he agrees with Griffin that Griffin shall take the machine and thresh Miller's grain for him. By this agreement, as between Miller and Griffin, we have the relation of (1) bailor and bailee, or (2) employer and employee; whether the one or the other depending upon facts which do not appear, and which are not sufficiently defined by the word take.

However in whatever relation they may be deemed the result must be the same.

1. The said agreement appears to be a bailment. The machine was loaned to Miller by Brown, the plaintiff in this action for the sole benefit of Miller without any consideration to the lender. It was consequently a gratuitous bailment, loaned for the sole purpose of

threshing his, Miller's. grain. It is a rule of law that the receipt of personal property by a bailee for a special purpose amounts to an agreement not to apply it to any other purpose. P & L. Digest of Decisions, Col. 1965. Consequently if Miller has disposed of the article by bailment to Griffin he has done an unlawful act which amounts to a conversion and a breach of the previous contract of bailment with Brown. Persch vs. Quiggle, 57 Pa. 27.

Though Miller had no authorlty to loan or otherwise dispose of the machine, he however had the actual possession, and for aught appearing in the facts of the case the defendant may have believed him to be the owner, and to have the right of loaning and disposing of the machine. But as Miller had no authority to loan or dispose of it, the taking was in fact without authority. And if the defendant was innocent of any fraudulent intent that fact does not alter the rights or liabilities of the parties to each other. Therefore Brown is entitled to the immediate possession of the machine and may maintain replevin. Gallagher vs. Cohen, 1 Brown 43; Hildeburn vs. Natham, 1 Phila. 567;.Rowe vs. Sharp, 51 Pa. 26.

Whether or not a demand was made upon defendant does not appear from the facts. Nevertheless, were the question in dispute, we think a sufficient demand was made by the commencement of this action.

Where a bailee sells the goods in his possession or they are sold under execution by his creditors the bailor may replevy them. P. & L. D. of D. Col. 2000; Main vs. English, 7 Pa. C. Ct. 377; Miller Piano Co. vs. Parker, 155 Pa. 208; Rowe vs. Sharp, 51 Pa. 26.

In King vs. Richards, 6 Wharton 422, the Court said, "Would it not be singularly strange and unreasonable to hold that a bailee, a mere depositary for instance, who has given no consideration and parted with nothing for the goods, stands in a more favored situation than an innocent vendee who has paid a full price for them?" Inn keepers, common carriers and other bailees who are compelled by law to perform services are entitled to a lien but where there is no compulsion and the chattel has been delivered to the bailee's bailee by the bailee, the bailee's bailee is in no better position than a vendee of such bailee. King vs. Richards (supra); Rowe vs. Sharp (supra).

2. If by said agreement between Miller and Gaiffin he was a mere employee—then no possession of the machine was ever delivered to Griffin. Such was the rule at common law. Vol. I Ames & Smith. Regina vs. Halloway; Regina vs. Hall. He was a mere custodian.

Therefore since Griffin takes possession of the machine by retaining it because Miller will not pay him for his services, he does an unlawful act and interferes with the owner's possession. Brown is entitled to immediate possession because the purpose for which the bailment was made has been fulfilled and he may bring replevin. Am. & Eng. Ency. Vol. III p. 764.

The possession of goods of their employer by a mere servant, laborer or journeyman is simply that of their employer, and consequently no lien can arise in their favor. Trickett on Liens, p. 733.

Judgment for the Plaintiff.

OPINION OF SUPRFME COURT.

The threshing machine was loaned to Miller for the purpose of threshing his grain. It was not necessary that Miller should use it for this purpose, himself. He might contract with Griffin to do the work for him, authorizing Griffin to use the machine. It is not necessary to consider whether Brown could have recalled the machine, before the completion of the threshing. The threshing was completed by Griffin. It was then the duty of Miller to return the machine to Brown. Was its Griffin's duty to oppose no abstacle to its return?

Griffin asserts a lien on the machine for his compensation. We think he has no such lien. Had the machine been Miller's, he would have acquired no lien upon it, because he had used it, in the effecting of the separation of the grain, even if he acquired a lien upon the grain itself. But, the machine was not Miller's. Had Miller sold it to a *bona fide* purchaser for value, the purchaser would have acquired no title. A may bail his personal property to B without exposing himself to the loss of his ownership, in case B should improperly sell it to C, who thinks it is B's. Miller Piano Co. v. Parker, 155 Pa. 208; 2 P. & L. Dig. Dec. 1999. Why should C, if, instead of becoming a buyer, he does acts for B which would entitle him to a lien on B's property, acquire a lien enforceable against A?

It is true that Miller was found by Griffin in possession of the machine, and that possession is an ordinary indicium of ownership. Nevertheless a bailment may be safely made. The bailor will not expose himself to the risk of losing his property if X innocently buys it from the bailee. Nor would the bailor lose the right to the possession of the property because X had innocently done acts which would have given him a lien upon it, had it been the bailee's.

The conclusion reached by the learned court below is correct and the judgment is affirmed.

## HARRIS v. ARCANUM.

### Suicide—Its Effect upon Life Insurance.

STATEMENT OF FACTS.

The Arcanum is a society with benefit features. Its members are entitled to death benefits, payable either to administrator or executor. Harris becoming a member designated his mother Rebecca as the beneficiary. She was entitled at his death to $1,000.00. Nothing was said in the by-laws or agreement, as to the effect of suicide. Harris, sane, and for the purpose of securing the $1,000 to his mother asphyxiated himself with coal gas. The Arcanum refuses to pay plaintiff, who brings assumpsit.

Mulhearn for the Plaintiff.

A policy which contains no provision, stipulation or condition in regard to suicide will not be avoided as against a nominated beneficiary. Morris v. Life Assurance Co., 183 Pa. 563.

Replogle, for the Defendant.

A policy of life insurance silent on the subject of suicide can not be collected or enforced by the assigns or personal representatives of the one who committed suicide. Ritter v. Mutual Life Insurance Co. 169 U.S. 132.

OPINION OF THE COURT.

OLMSTED, J.:—This case arises from the attempt of the insurance company, the Royal Arcanum, to withhold payment of the benefits due under a policy of insurance because the insured came to his death by suicide.

The facts set forth show: (1) A properly executed policy payable to a nominated beneficiary, who has an insurable interest, viz. the mother of the insured; (2) No stipulation in the policy or other articles of agreement as to the effect of suicide by the insured upon the policy; (3) Suicide committed by the insured while sane.

Under such circumstances can the beneficiary obtain the amount of the policy? After a careful examination of the law and decisions on this subject it clearly appears that the answer to this question must be in the affirmative.

It must be observed that the facts as presented to this court do not warrant the assumption that suicide was contemplated when the policy was obtained, in which latter case it would be vitiated for fraud; hence this phase of the subject is not to be regarded in the discussion. For a similar reason it is not necessary to consider cases in which the policy or by-laws of the insurance companies have contained clauses relating to suicide, saving only as to their indications of the prevailing opinions with respect to suicide and its efficiency as a defense *generally* to actions on policies.

There appears to be a definite distinction drawn by the courts, in such cases as the one at hand, as between policies made payable to the *estate or personal representatives* of the insured and those in favor of a *nominated beneficiary*. The former class of cases is one in which suicide avoids the policy, and it is upon such cases that the defendant has mainly relied. But in these very decisions the judges have distinguished the cases from those of the second class above mentioned. Thus in Ritter v. Mutual Life Insurance Co. of New York, 17 C.C.A. 537, Acheson, J., says: "In the cases brought to our attention where suicide, during sanity by the person whose life was insured was held not to be a valid defense the policy was issued for the benefit of some other person——." This case was decided for the insurance company because the insurance was payable to the *estate* of the insured. It was cited for the defendant company in Morris v. Life Assurance Co. 183 Pa. 563, when the court distinguished it from the cause then trying by saying: "We are not called upon to decide what would have been the effect on the contract if the policy itself had been payable to the *insured or to his personal representatives.*" And the court then decided the case at issue in favor of the beneficiary, who was wife of the insured, on the ground that she was not bound nor the policy affected by the acts of the insured done after issuance of the policy, when such acts were not in violation of any stipulations of the contract of insurance.

The case now to be decided is fully in line with that of Morris v. Life Assurance Co. and in the absence of statute must be subject to the same judgment. The fact that here the beneficiary is the mother, while in the other case it was the wife, of the insured is immaterial as either has an unquestioned insurable interest. The same doctrine as is ennunciated in this Penhsylvania case is held in other states and the apparent correctness of the principle is strengthened thereby. Among the cases in other states may be cited Fitch v. American Popular Life Ins. Co., 59 N.Y. 557; Darron v. Family Fund Society, 116 N.Y. 537, and Patterson v. Natural Premium Mutual Life Ins. Co. 100 Wis. 118.

The argument that to allow recovery here is against public policy is of little weight. That it is so is evidenced by the fact that in Missouri a statute has been enacted to the effect that suicide shall only avoid a policy when it was contemplated at the time of application for the policy, —this whether the policy contains a stipulation as to suicide or not. Then in all states it is permitted to insurance companies to stipulate against suicide in the policy, or to mutual benefit societies, to include in the by-laws a clause regarding it which shall be binding upon the policy holders. If the Royal Arcanum intended that suicide should avoid its policies it should have so provided.

In view of these points and the decisions in the cases above cited we hereby render judgment for the Plaintiff.

OPINION OF SUPREME COURT.

The able opinion of the learned court below sufficiently vindicates the judgment for the plaintiff. Judgment affirmed.

## TREBOHN vs. JENKINS.

**Sale of impure meats. Responsibility in damages for illness caused thereby.**

STATEMENT OF FACTS.

Jenkins a wholesaler, sold hams to a grocer, Thorpe, which were diseased, although he did not know this fact. Thorpe sold two of these hams to Trebohn, who with his family was made sick by eating a portion thereof. He was compelled to throw the hams away, Thorpe refusing to take them back. This is trespass for the sickness.

Ambrose for Plaintiff.

One who is negligent in selling meat that is dangerous to those who eat it is liable for the consequences of his act. Craft v. Parker, Webber & Co. 21 L. R. A. 139.

Burgess for Defendant.

The vendor must be proven to have known the article was unfit for use and consumption, before he can be made liable. Elkin v. McKean, 79 Pa. 493.

OPINION OF THE COURT.

BRACKEN, J.—The plaintiff, Trebohm, undertakes to bring an action for damages against Jenkins, a wholesaler for sickness caused by eating

hams, which one, Thorpe, plaintiff's immediate vendor; had purchased from defendant.

This action is brought against Jenkins as a wholesale dealer. There is nothing in the statement of facts to indicate that he is a packer, nor are we at liberty to assume that he is such, as the universal custom in trade is to designate the person who prepares the meat and first puts them upon the market as a packer.

The earlier decisions in Pennsylvania hold that in order that a manufacturer, who puts on the market a dangerous article, designed to be used for a particular purpose—shall be liable for any damages which may result from his act, to persons, who in due course of trade purchase and use his commodity, it must be shown that he *knew* it to be unfit for the purpose for which it was designed. Elkins v. McKean, 79 Pa. St. 493.

It was, however, a question for the jury, whether a manufacturer had such knowledge, or had the means of acquiring such knowledge of the dangerous qualities of the article, before liability for negligence would attach.

But our Legislature, evidently realizing the importance of more stringent measures for the protection of the health of the people, enacted May 4, 1889 (P. L. 87) that thereafter, in ever sale of green, salted, pickled or smoked meats, lard and other articles of merchandise, used wholly or in part for food, there shall be an implied contract or undertaking that the goods or merchandise are sound and fit for household consumption. In view of this Act, it is therefore no longer necessary to prove knowledge of the dangerous qualities of the article before liability can attach to vendor, and in Elkins v. McKean, above cited, Chief Justice Agnew holds, that "the fact that a dangerous chattel had passed through the hands of a number of intervening vendors, before it was procured by the party injured, will not prevent a recovery against the party putting such chattel in motion; although the length of its passage may create a doubt of its identity."

The identity of the hams, however, in the case before us, could be easily established, as it is the universal custom, for all meats put upon the market, to bear the stamp of the packer.

We are, therefore, of the opinion, that plaintiff cannot recover in this action, his remedy being against the packer and not the wholesaler.

## OPINION OF THE SUPREME COURT.

There was no contract relation between the plaintiff and the defendant. Jenkins sold the hams, not to Trebohm but to Thorpe. If there was any warranty, express or implied, it was to Thorpe, who alone, could sue upon it. The warranty did not attach to the hams, and pass with them to any successive purchasers of them.

There was a duty however, on the part of Jenkins, in disposing of the hams, a duty towards not merely the first buyer from him, but towards any subsequent buyers from this buyer. The duty was, not unconditionally to abstain from selling hams, the eating of which would produce sickness, but to abstain from selling such hams, with knowledge of their poisonous quality, or with ignorance of such quality, due to negligence. Had he negligently sold them to Thorpe, he would be liable to Trebohm;

Had he wilfully done so, he would be similarly liable. Elkins v. McKean, 79 Pa, 493.

But there is no evidence that Jenkins knew, or ought to have known, that the hams were diseased. "Poisons, spoiled food, or materials, otherwise mischievous or dangerous, which do damage to innocent third persons, attach liability to the vendor or manufacturer only when he has been guilty of negligence;" 2 Jaggard, Torts, 907; or wilfulness.

The act of May 4th, 1889, cited by the learned court below is not decisive of this case. It creates a warranty on the part of the vendor, towards the vendee; but such warranty does not inure to the use of later purchasers, and, if it did, the action upon it would need to be assumpsit and not trespass.

Had there been any absolute duty on the part of Jenkins to refrain from selling diseased hams, a duty owed, not merely to his vendee, but to any vendee of this vendee, the damage would properly embrace compensation for the sickness arising from the consumption of the hams. Such a result of eating them is not too remote, too unlikely, to require the vendor to anticipate it as a consequence.

Judgment affirmed.

## COMMONWEALTH v. DAVIS.

### Larceny of a Check.

STATEMENT OF FACTS.

One, Brown, was seated in a railroad train with one, Smith, a stranger. Davis who was also a stranger to Brown, entered wearing a badge and falsely pretended to be an express agent and told Smith that he must pay some charges on his luggage. Smith offered him a check. Davis said he could not cash it and asked Brown to cash it and hold it until they reached Baltimore, promising to cash it there for him. Brown gave Davis the money and Smith and Davis rushed from the train taking both the money and the check.

Johnson for Plaintiff.

Where an owner is induced by any trick to part with the possession of property, meaning to retain the right of property, the taking is larceny. Russell on crimes, 5th Ed. 28; Com. v. Yerkes, 119 Pa. 266; Com. v. Eichelberger, 119 Pa. 254.

Miss Bracken for Defendant.

Citing Com. v. Lovell, 2 Phila. 383; Bassett v. Shofford, 45 N.Y. 392.

OPINION OF THE COURT.

PROKOPOVITSH, J.:—The check was cashed by Brown upon the consideration that Davis would cash it for Brown upon their arriving at Baltimore. "Promising to cash it there for him" imports to us that the property in the check was in Brown, therefor Brown must have intended to retain such property in himself till such time as Davis would cash it, upon their arriving at Baltimore.

The correct distinction in cases of this kind seems to be, that if by means of any trick or artifice, the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; on the other hand if the owner part with not only the possession of the goods but the right of property therein, the offense of the party obtaining them will not be larceny, but the offense of obtaining goods by false pretense. Com. v. Eichelberger, 119 Pa. 254. This rule itself is distinct and clear cut; the difficulty consists in its application to the facts of each particular case. Its application to the case in hand is so clear that any distinction by the court would be a departure.

The whole transaction indicates to the court that Brown intended to part with his money and with that for which he parted with it, therefore the taking was animo furandi.

There was no such thing known to the common law as the larceny of a check, qua check; i.e. larceny of property representing the dollars which it named. To remedy this evil our criminal code 104—also P. & L. D. of L. Sec. 366 has expressly made it larceny to steal checks, and other securities. Therefore a check is treated not as a mere piece of paper, but as representative of the money which it calls for, and of a corresponding value.

It is immaterial what became of the check after it reached the possession of the defendant. If it was obtained feloniously as is the case, the offense was complete the moment it was thus obtained.

Larceny may be committed of goods obtained from the owner by delivery if it be done animo furandi. The case of hiring a horse on pretense of making a journey and immediately selling it, illustrates this principle sufficiently.

Davis throughout intended to deprive Brown of the check. Upon Brown's cashing the check, the property vested in him, and the act of Davis in rushing away with it, made him guilty of larceny. The *animus furandi* clearly appearing on the face of the facts, and this essential under the facts is all that needs consideration, the court clearly thinks that the act of Davis amounts to a larceny.

## OPINION OF SUPERIOR COURT.

The defendant has been convicted of the larceny of the check. The obstacle to such a conviction is that the check was never in Brown's possession, was indeed, so far as appears, never out of the possession of Smith or of Davis. Although by Brown's advancing the money, the check became his, he never had it. It was never delivered to him by its vendor. On the contrary, the vendor ran away with it, after obtaining the money which was the price of it.

That a crime was committed, is apparent, but it was not larceny of the check. Certain representations were made to Brown to induce him to part with the money. Some of these were of existing facts; others were promissory. Of the former was the pretense by Davis that he was an express agent; and that Smith was indebted to him on account of some luggage. The offer of the check, not completed by delivery, was a species of pretense but it was a pretense as to a future fact, viz., that the check would be delivered to Brown. The further statement that, if

Brown would cash the check, it should be in turn cashed for him in Baltimore was likewise promissory.

The false representation of existing facts probably would not alone, have induced the advance of money by Brown. His belief of the promissory representations induced him to do that, but a jury might readily have found that the assertive declarations caused credence of the promissory, which in turn, caused the volition to advance the money. They might therefore have found that the assertive pretenses persuaded the prosecutor to part with his money; 1 McClain, Crim. Law, 684; 2 Wharton Crim. Law, p. 79.

The crime was not larceny of the money for, although a trick was employed to induce Brown to part with it, the defendant intended to induce him, and he was induced, to part not barely with the possession of it, but with the ownership of it. He was made to expect, not the return of the very money which he was giving, but of an equivalent sum from some person in Baltimore.

Judgment reversed.

## SOLES vs. THRIPP.

**Statute of Limitations—The exception as to merchants.**

STATEMENT OF FACTS.

Soles and Thripp were merchants in Harrisburg, Soles selling hardware and Thripp dry goods. They made purchases from each other from time to time over a course of twenty years, and at intervals of varying lengths, rendered accounts to each other, and struck a balance which was paid by the debtor in cash. Since the last account in February, 1900, Soles furnished goods at various times to Thripp. The average intervals between these furnishings was four months. Thripp, however, has sold no goods and made no payments to Soles since 1900. Thripp is now indebted to the extent of $327. In this assumpsit he sets up the Statute of Limitations to $250, of this amount, because the purchases were made by him more than six years before suit. Sales were made: June, 1900, $500; September, 1900, $25; April, 1901, $75; June, 1901, $40; October, 1901, $60.

Moran for Plaintiff.

Time no bar to merchants' accounts. Jayne vs. Mickey, 55 Pa. 260. There must have been an account stated before the Statute begins to run. Bevan vs. Culler, 7 Pa. 281; Thompson vs. Fisher, 13 Pa. 310.

Shipman for Defendant.

Action on an open account is barred as to all items not charged within six years, there being neither mutual dealings nor payments on an account within six years. Linn's Estate, 2 Pearson 487. Mutual account defined. Ingram et al Exrs. vs. Sherard, 17 S. & R. 347; Butterweek's Estate, 4 D. R. 563; Lowber vs. Smith, 7 Pa. 381; Adams vs. Carrol & Co, 85 Pa. 209.

OPINION OF THE COURT.

GRAYBILL, J.—The question to be decided in this case is, whether it comes within the exception of the Act of March 27, 1713. P. &. L. Digest of Laws, Col. 2666, Sec. 1, known as the Statute of Limitations,

which provides that all actions upon account (other than such accounts as concern the trade of merchandise, between merchant and merchant, their factors and servants,) shall be commenced and sued within six years next after the cause of such actions or suits, and not after.

In Hay vs. Kramer, 2 W. & S. 137, Sergeant, J,, said: "How far the case would be within the saving clause of the statute, though the items are all on one side, if they were merchants' accounts, seems a vexed question." It seems no case is reported where this question has been decided by the Pennsylvania courts.

The courts of Pennsylvania have held that cases where there are mutual accounts between two persons and an item on either side charged within six years are within the saving clause of the statute. The persons need not be merchants. Van Swearingen vs. Harris's Admrs., 1 W. & S. 356; Thompson vs. Hopper, 1 W. & S. 467; Chambers vs. Marks, 25 Pa. 296; Trickett on Limitations, 361.

Accounts are mutual when each party makes charges against the other in his books for property sold, or labor performed, or where each makes sales to the other on account, thus giving each a reciprocal demand or right of action against the other. McFarland vs. O'Neil, 155 Pa. 260. But the exception will not apply where the account is altogether on one side, though a cash payment has been made on it, even conceding that it is such an account as concerns the trade of merchandise: Ingram vs. Sherard, 17 S. & R. 347 or where payment has been made in other goods: Lowber vs. Smith, 7 Pa. 381; or where a loan of money has been made: Hudson vs. Hudson, 31 Pa. Super. Ct. 92; Clark vs. Maguire's Admrs. 35 Pa. 259. *A fortiori*, would it not apply in this case where no sale or payment has been made in return.

Soles cannot found his claim on the theory that there were mutual accounts, for Thripp had no claim against him. Unless Soles can bring his account within the exception as being between merchants, he must fail for all goods sold more than six years ago. Mattern vs. McDivitt, Admr., 113 Pa. 402.

The exemption is not attached to a merchant because he is such nor as a personal privilege, but it is conferred on the business which must concern the trade of merchandise, and upon persons between whom such business is carried on. Spring vs. Gray's Exrs., 6 Peters 151. Therefore, the fact that Thripp was a merchant does not bring the case within the exception, but leaves Soles in the position of a merchant selling to an ordinary customer.

It may be argued that the manner of dealing during previous years raises a presumption that when settlement was last made, the transactions after that time were to be considered of the same nature. 1 Greenleaf on Evidence, Sec. 14n. But there is no evidence that at the last settlement there was an agreement or understanding that there should be any transactions after that time, and if so, of what nature they should be. We think the presumption that Soles meant to continue mutual accounts as before, is not strong enough to overcome the presumption that in the course of business or trade, men are usually vigilant in guarding their property, prompt in asserting their rights, and diligent in claiming and collecting their dues, (1 Greenleaf on Evidence, Sec. 38,) and that

Soles would not jeopardize his accounts for a period beyond six years when Thripp was not making any sales as he had done before. Surely such unprecedented action on Thripp's part in their business relations for six years was enough to make Soles cautious and put him on his guard. We think there was a beginning of a new transaction as if between strangers after settlement in February, 1900, (See Peters vs. Grim, 149 Pa. 163,) and if Soles thought he was protected by the exception in the statute, we think he was mistaken in its application to this case as "such accounts as concern the trade of merchandise between merchant and merchant."

We conclude that all claims for sales made by Soles to Thripp more than six years before bringing this suit are barred by the statute and judgment is hereby rendered for Soles for $77., the amount of sales made within the last six years.

OPINION OF SUPERIOR COURT.

A and B, merchants, dealing in different sorts of goods, might explicitly agree to deal with each other, and from time to time, settle the account, and pay the balance found due by him thus ascertained to be the debtor, to the creditor. So long as this agreement operated, the statute of limitations would be in abeyance. Only when a balance was struck, would it begin to run against the creditor's claim for such balance.

Without such explicit agreement as we have just imagined, A might from time to time sell to B, and B to A, understanding that at convenient times there should be settlements. So long as dealings continued with this understanding, the statute of limitations would not operate. A let us suppose sells to B articles of varying values at irregular intervals, within two, four, six, eight years, and B sells to A other articles at intervals within this time. When each sale is made by A, to B he expects soon to become a buyer from B, and thus to satisfy in part or altogether, his demand against B. B likewise expects A to do this. The contracts of sale, made from time te time, are not contracts for instant payment, but for payments by means of cross-dealings. They are not contracts to pay severally, the prices of the goods bought from time to time, but to pay any balance. The statute of limitations could not properly begin to run, upon each purchase, at the time it was made.

But, after A and B have, as in the case before us, thus dealt with each other for 20 years, making settlements from time to time, and each paying the other what by such settlements, he was found to owe, it is possible for A to continue to make sales to B, without at the same time making any purchases. If after a reasonable interval since A's sale to B, A makes no purchase from B, B would have reason to believe that A did not intend to continue to make such purchases, and to allow him, B, to pay what he owed A, in that way. He would then understand that he would have to pay in cash, and at once. In this case, the last account was struck in February, 1900. Thripp continued to sell goods to Soles during 1900. He has sold none since; that is, Soles has bought none from him since. But, for two or three months, at least, this omission of Soles to buy, would not indicate to Thripp, that he had formed the purpose not to buy any more, and to look for payment in cash, for each sale that he had made or should make to Thripp. If Soles' omission to buy anything

continued beyond this period, it would indicate probably, that he had formed the intention to be paid by Thripp in cash. The tacit understanding that balances only should be paid, would come to an end. In six years after the end of a period of Soles' abstinence from purchases from Thripp sufficiently long to justify the inference that the intention to continue mutual dealings had lapsed, the statute of limitations would complete a bar, as to the prices of all articles sold by Soles before or within that period.

Inasmuch as Soles has chosen not to buy from Thripp since 1900, we think that he is not entitled to any suspension of the running of the statute even for two or three months. He only was aware of his own purpose. He only knew whether he had definitively resolved to break off the mutual dealings with Thripp. We think it convenient, then, to hold that when Soles refrained for six years from making any purchases, he converted all the sales made by him even before that period, into sales for cash, and that the statute bars suit for their several prices in six years from their several makings. Such is in substance the decision of the learned court below.

Judgment affirmed.

## BOOK REVIEWS.

**Supplement to a Treatise on the System of Evidence in Trials at Common Law,** by JOHN HENRY WIGMORE; Little, Brown & Co., 1907.

It is three years since Prof. Wigmore's monumental work on Evidence was given to the public. It has already become an authority, not merely for practitioners, but for learned courts, both Federal and State. More philosophical than Greenleaf, and completely exhaustive of the available decisions, it is destined with the lapse of every year to a constantly enhancing influence over the development of the law. This Supplement contains decisions that have been published during the last three years. It is so arranged that any matter embraced in it may be quickly discovered and read in conjunction with the appropriate original text. By the periodic publication of the Supplement, the issue of new editions of the main work will be rendered unnecessary for a long time. The plan is a good one, and every owner of the original work will feel the possesion of the Supplements indispensable.

## THE FORUM.

THE FORUM is already influencing the literature of the law. Prof Williston, in his edition of Pollock on Contracts, refers in his discussion of Moral Obligation as a consideration, to the article by Prof. McKeehan in 9 Forum 1, as a valuable contribution.

Prof. Wigmore's Fifth Volume on Evidence, p. 268, thus refers to the subject of measure of persuasion: "The best exposure of the doctrine's vagaries is found in an article by Professor Wm. Trickett, of the Dickinson School of Law; 'Preponderance of Evidence and Reasonable Doubt.'" On page 12 of the same work, speaking of the doctrine that a presumption cannot be founded on a presumption, Prof. Wigmore observes, "For an acute analysis of this fallacy, and a demonstration of its unsoundness, with citations of additional rulings involving it, see an article 'Presumptions built on Presumptions' by Professor Wm. Trickett," in 10 FORUM p. 123.

The case of Martin v. Douglas, 10 FORUM 159, decision by Prof. McKeehan, is cited in Trickett on the Law of Crimes, p. 400.

The other law journals which f om time time furnish lists of legal articles not seldom mention articles that have appeared in THE FORUM.