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THE JUSTICE OF THE PEACE AND TRESPASS

The office of Justice of the Peace is a most ancient and honorable one. Its history can be traced to remote periods of antiquity. In the early periods of English history the officers were called Conservators of the Peace and Wardens of the Peace. They were common law officers who, as their titles suggest, were peace officers and responsible for the preservation of the peace and tranquility of the communities in which they resided. The Statute of 1 Edward III is probably the first statute recognizing the office. The unsettled condition of the country at that time made necessary increased precaution against violence and riots and was a substantial reason for the passage of the act, which from that time placed the control of these officers in the hands of the Crown by whom they were commissioned.

The nature of the office was purely ministerial and of very limited scope. Later statutes, however, extended their duties from time to time, although the inherent nature of their jurisdiction remained purely governmental and without the usual judicial powers we see exercised by them.

The office of Justice of the Peace was brought to America with the colonists and a large part of the English Statute Law controlling them became a part of the common law of the States. In Pennsylvania the office is elective, the commission is granted by the Governor and the power to remove is in the Legislature. The common law functions of the office have been much enlarged by statute, so that a Justice of the Peace is now a court performing both ministerial and judicial functions, and with jurisdiction over both criminal and civil disputes.

Politically speaking, a Justice of the Peace is a county officer.[1] Although for election purposes the office is a township or borough office.[2] And the office has been held to be a state office.[3] We have seen that from an historical view-point it is a common law office. Art. V, Sec. 11 of the Constitution of Pennsylvania, declares it to be a constitutional office and as such cannot be abolished by the Legislature.[4] We are most concerned, however, with the office as a judicial office. The broad jurisdiction given a Justice of the Peace by statutes makes him one of the most important judicial officers. Although a court of so-called subordinate jurisdiction, a Justice of the Peace is nevertheless in every sense of the word a court. He performs purely ministerial acts in entertaining suits and complaints, in issuing writs, and in keeping his docket, but in passing upon the questions of fact and law presented to him he performs a most important judicial function.

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[1]Commonwealth ex rel. Graham vs. Cameron, 259 Pa. 209.
[2]Reed's Case, 10 D. R. 210.
[3]Comm. vs. Snyder, 5 D. R. 121.
[4]Republica vs. McLean, 4 Yeatts 399.

The judgments of Justices of the Peace in Pennsylvania are not judgments of courts of record within the provisions of the Constitution of the United States, but, when duly proven, such judgments are within the provisions as to each state, giving full faith and credit to the judgments of other states.[5] The mere filing of a judgment of a Justice of the Peace in the Court of Common Pleas of the county makes it a judgment of the latter court.[6]

The civil jurisdiction of Justices of the Peace having no existence at common law is conferred by statute[7]. In this sense a Justice's Court is an inferior court and the statutes which confer this civil jurisdiction must be strictly complied with. The statutes themselves are strictly construed and are not to be extended by implication if they can otherwise be reasonably construed and given effect. There being, therefore, no general presumption in favor of the proceedings of a Justice of the Peace it is necessary that the docket or record thereof show affirmatively that the acts conferring the jurisdiction in the case have been complied with.[8] In Bright vs. Morefield it is held, "That the jurisdiction of a Justice of the Peace is limited and therefore that the record should show his jurisdiction to render a judgment in the case exhibited in the transcript, is a proposition that no one will deny."[9]

In Pennsylvania, Justices of the Peace have jurisdiction in civil cases arising ex contractu and ex delicto wherein the sum demanded does not exceed $300. This jurisdiction is further limited so that a Justice has no authority to entertain actions where the title to lands may become involved, or ·s based upon a promise to marry. Actions of trover

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[5]Silver Lake Bank vs. Harding, 5 Oh. 545.

[6]Act 24th June 1885, P. L. 160. Rowley vs. Carron, 117 Pa. 52.

[7]Elsing vs. Long, 39 Pa. C. C. 533. Myers vs. Lackawanna Co. 17 D. R. 317.

[8]Miller vs. Ross, 1 Justice Law Reporter 101. Camp vs. Woods, 10 Watts 118.

[9]Bright vs. Morefield, 29 D. R. 547.

and conversion and of trespass to recover damages for injury done or committed to real and personal estates constitute the limited jurisdiction in actions ex delicto.[10]

Jurisdiction over actions based on contracts was the earliest conferred upon Justices and it is by far the most extensive in civil cases.[11] It depends upon the subject matter upon which the action is based rather than upon the form of action itself. The action, if founded upon contractual relations between the parties, although the breach involves a tortious or negligent act, may be brought before a Justice of the Peace.[12] Thus where the plaintiff may elect to sue either in assumpsit on implied contract or in tort, he may give jurisdiction to a Justice of the Peace by waiving the tort and suing in assumpsit.[13] Even though the form of action be trespass if it is founded on contractual relations between the parties the Justice of the Peace has jurisdiction.[14] Where the action is on case for breach of contractual obligation or duty the Justice of the Peace has jurisdiction.[15] But if the action is based, not upon a breach of the contract itself, but upon a breach of a collateral duty, the Justice has no jurisdiction.[16]

A number of acts, notably the Act of March 22, 1814, 6 Sm. L. 182, extended the jurisdiction of Justices of the Peace to actions ex delicto, limiting that jurisdiction, however, to "actions of trover and conversion and of trespass, brought for the recovery of damages for injury done or committed on real and personal estates, where the value of the property

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[10]Acts, 20th March 1810, 5 Sm. L. 161; 22nd March 1814, 6 Sm. L. 182. 7th July 1879, P. L. 194.

[11]Comm. vs. Strum, 31 Pa. 14. Zell vs. Arnold, 2 P. & W. 292.

[12]McCahan vs. Hirst, 7 Watts 175. Todd vs. Figley, 7 Watts 542. Livingston vs. Cox 6 Pa. 360.

[13]Thompson vs. Chambers, 13 Superior Ct. 213. Croskey vs. Wallace, 22 Superior Ct. 112.

[14]Murphey vs. Thall, 17 Superior Ct. 500.

[15]Hunt vs. Wyn. 6 Watts 47. Zell vs. Dunkle, 156 Pa. 355.

[16]Montgomery vs. Poorman, 6 Watts 389. Schaffer vs. McNamee, 13 S. & R. 44.

claimed or the damages alleged to have been sustained shall not exceed $100." Section 5 of this act expressly excepts actions of ejectment, replevin, or slander, actions for damages in personal assault and battery, wounding or maiming and actions for false imprisonment. Later this jurisdiction was extended to be concurrent with Courts of Common Pleas in actions of trespass and of trover and conversion, wherein the sum demanded does not exceed $300.[17]

The Act of 1814, supra, in conferring jurisdiction in tort uses the phrase "action of trespass." These words must be strictly construed in light of the meaning attached to them at the time they were used. The action of trespass at that time was the common law form of action, and is used in that limited sense as designating an injury to the person, property or rights of another, which is the immediate result of some wrongful act committed with force either actual or implied. Such an act was a trespass vi et armis. Consequently the jurisdiction of a Justice of the Peace is limited to actions in trespass vi et armis. The act of May 25, 1887, P. L. 271, abolishing the distinctions existing between actions ex delicto and providing "all damages, heretofore recoverable in trespass, trover or trespass on the case, shall be sued for and recovered in one form of action to be called an action of trespass," applies only to matters of procedure, and does not extend the jurisdiction of Justices of the Peace to causes of action not theretofore embraced therein.[18]

Force is an essential element of a trespass of which a Justice of the Peace has jurisdiction. As for example in killing the horse of another, injuring his wagon or beating his slave. Yet actual force is not required for in many cases where the injury is immediate and direct the law will imply force. Thus for example the law imputes force to one who breaks the close of another, no matter how peaceably or thoughtfully. Nor is any intent or motive material. In manv

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[17]Act July 7, 1879, P. L. 194.

[18]Conaghan vs. Rudolph, 6 D. R. 225.

cases the injury being direct and immediate, trespass has been held to lie though the injury was not intentional. It is not necessary that the action be wilful for a party may be liable in trespass for injuries arising from accident and mistake. Yet it is necessary that the defendant act consciously.[19]

Liability for negligence in so far as it arises out of misfeasance is imposed in an action of trespass and a Justice of the Peace has jurisdiction. In such case there is an act from which force may be implied, if not present, to support the action. So it is held that whenever the injury is direct and immediate, whether it proceed from design or negligence, trespass will lie.[20] Thus a Justice has jurisdiction of an action for damages to the plaintiff by running into and breaking his buggy while defendant was recklessly driving a fast race on a public road.[21] But where the plaintiff elects to sue for consequential damages rather than those arising immediately from the injury, the Justice has no jurisdiction.[22] A Justice of the Peace has jurisdiction of a cause of action in a suit for damages sustained by reason of injuries inflicted upon plaintiff's cow while defendant was unlawfully chasing it.[23] A suit for damages to crops caused by defendant's cows may be entertained by a Justice of the Peace.[24] But the contrary has been held and probably more correctly.[25]

If the injury is attributable to negligence and is immediate, the party injured has an election either to treat the negligence of the defendant as the cause of action and to declare on case, or to consider the act itself as the injury and to declare in trespass.[26] Accordingly it is generally and properly

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[19]Brooks vs. Olmstead, 17 Pa. 24.

[20]McCahan vs. Hirst, 7 Watts 175. Thompson, Commentaries on the Law of Negligence, Section 7455.

[21]Becher vs. Palm, 20 D. R. 51.

[22]Grosley vs. Wright, 2 Kulp 415.

[23]Krebs vs. Wettig, 24 D. R. 1082. In this case it is held that the expenses of having the cow treated by a veterinary surgeon are recoverable as part of damages.

[24]Leonard vs. Shultz, 22 D. R. 104.

[25]Smith vs. Walker, 21 D. R. 707.

[26]Thompson, Commentaries on the Law of Negligence Sec. 7455.

held that a Justice of the Peace has jurisdiction of actions arising out of automobile collisions where the plaintiff sues, not upon the negligence of the defendant, but upon his act of injuring the plaintiff's property.[27] Thus our courts have always held that when it appears on the docket of the Justice that the basis of the action is the defendant's negligence rather than the act itself, the want of jurisdiction is apparent.[28] This has lead to confusion so that the mere use of the word "negligence" in the docket of the Justice of the Peace has been an excuse for dismissing the action for want of jurisdiction.[29]

On the other hand a mere non-feasance will not support an action of trespass vi et armis such as would be within the jurisdiction of a Justice of the Peace, for non-feasance is merely failure to perform a duty or do an act, and in the absence of a positive act there can be no force.[30] It is necessary to note a broad distinction between a failure to have due regard for the rights of others while doing an act and a passive failure to do an act which duty to another may require. The former is misfeasance and trespass vi et armis; the latter nonfeasance and trespass on the case. The principal is well stated in 3 Blackstone's Commentaries 122, as follows: "It is a settled distinction that where an act is done which is in itself an immediate injury to another's per-

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[27]Guth vs. Stein, 29 D. R. 669. It may be noted here that the Legislature of Pennsylvania by Act of 14 June 1923, P. L. 718, Sec. 30, amending Sec. 36 of Act of 30 June 1919, P. L. 678 expressly provides "all civil actions for damages arising from the use and operation of any motor vehicle may at the discretion of the plaintiff be brought before any Alderman, Magistrate or Justice of the Peace in the county, where the alleged damages were sustained * * * * —: Provided, that no action involving more than $100 shall be brought before any Alderman, Magistrate or Justice of the Peace."

[28]Riggle vs. Keast, 5 D. R. 31.

[29]Strasser vs. Seaman, 28 D. R. 506. Thelow vs. Phila. Gro. Co. 4 D. R. 83. In this case it should be noted the proper basis for the dismissal of the action should have been the fact that the act complained of was done by a servant of the defendant, there being no evidence of the defendant directing, advising or encouraging the act.

[30]Burkhead vs. Ward, 35 Sup. 235.

son or property, there the remedy is usually by an action of trespass vi et armis; but where there is no act done but only a culpable omission, or where the act is not immediately injurious but only so by consequence and collaterally, there no action of trespass vi et armis will lie but an action on the case for damages consequent to such omission or act."

The action of trespass on the case was introduced to give relief in cases which could not be brought in trespass vi et armis or the other then established forms of action. Under the early common law only those injuries for which could be brought an action of trespass vi et armis were actionable. This deficiency, however, was remedied by the invention of a writ or action for each special case which was not trespass, and this new form of action was known as trespass on the case. There is, therefore, a well defined distinction between the action of trespass and the action of trespass on the case. This distinction has not always been observed; and much confusion has resulted from the failure of the courts as well as the bar to keep in view the fundamental difference.

The presence or lack of jurisdiction of a Justice of the Peace over a particular cause of action in cases arising ex delicto is absolutely determined by the question,—Is this cause of action such as would have been the basis for an action of trespass at common law, or would case be the proper remedy? If trespass would lie at common law, the Justice of the Peace has jurisdiction, otherwise he has not. The rule is generally stated about as follows: "Where the injury resulting from a particular act is direct and immediate, trespass is the proper remedy, but where it is not direct but merely consequential the proper remedy is case."[31] The terms "immediate" and "consequential" should be understood not in reference to the time which the act occupies, or the space through which it passes, or the place from which it is done, or the instrument or agent employed, or the lawfulness or

[31]Cotteral vs. Cummins, 6 S. & R. 347.

unlawfulness of the act, but in reference to the progress and termination of the act, to its being done on the one hand and its having been done on the other. If the injury is inflicted by the act, at any moment of its progress from the commencement to the termination thereof, the injury is direct and immediate, but if it arises after the act has been completed, though occasioned by the act, then it is consequential or collateral, or, more exactly, a collateral consequence.[32] The distinction may be observed by answering the questions: Did the injury result from a force set in motion by the defendant? If so, did it result before that force came to rest? If these questions are answered in the affirmative the appropriate action would be trespass and not case.

Thus the acts of a servant within the scope of his employment may be the basis of an action of trespass against him; but the master's liability must be tested in an action of case, unless the master was present and consented to the act, or encouraged or directed it, in which case trespass vi et armis would lie against the master also[33] and a Justice of the Peace has jurisdiction to entertain the suit.[34] In actions brought to recover for injuries caused by defendant's domestic animals, unless the owner was present or had notice of their evil propensities or is expressly charged by statute with their confinement, the Justice has no jurisdiction, for the action is substantially on case.[35] Nor is an action against the owner of a dog which bit the plaintiff on a public highway within the jurisdiction of a Justice of the Peace.[36]

This question of jurisdiction over the subject matter of the action is fundamental. Upon it depends absolutely the authority of a Justice of the Peace to proceed with the case and consequently upon it depends the effect and force of

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[32]Jordan vs. Wyatt, 4 Grat (45 Va.) 151.
[33]Rhodes vs. Roberts, 1 Stew. (Ala.) 146.
[34]Kockendarfer vs. Altoona Ry. Co. 19 D. R. 859.
[35]Buick vs. Reismiller, 18 D. R. 732.
[36]Becher vs. Weaver, 15 D. R. 799.

the judgments of the court. While jurisdiction over parties may be waived by the appearance and acquiescence of the defendant, the want of jurisdiction over the subject matter in dispute cannot be waived either expressly or by acquiescence, but may be raised at any time and at any stage of the proceedings.[37]

ROBERT L. MYERS, Jr.

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[37]Goldsmith Bros. vs. Mechley, 20 D. R. 614. Gingrich vs. Sheaffer, 16 Superior Ct. 299. Collins vs. Collins, 37 Pa. 387.

MOOT COURT

SARTAIN VS. R. R. CO.

Negligence—Obstruction of Crossing by Trains—Proximate Cause of Injury—Independent Causes of Injury—Burden of Showing Causation on Plaintiff—65 Super. 416 Cited.

STATEMENT OF FACTS

Sartain, a physician, was called to the house of X, who was seriously ill. In order to reach X's house it was necessary to use a road that crossed the defendant's tracks. The night was very cold and the plaintiff, when he reached the house of X, was benumbed by the cold. But, after five or ten minutes he felt as well as ever. He prescribed for X, and at one o'clock in the morning he started back for home feeling quite normal. At the crossing of the R. R. he found a train standing and was compelled to wait a full hour sitting in the buggy. The next day he was afflicted with pneumonia which his physician witnesses said was the result of the exposure. The court told the jury that the blocking of the road by the train was negligence. It allowed the jury to say whether the pneumonia was caused by the enforced exposure of the plaintiff.

Singer, for Plaintiff.

Ward, for Defendant.

OPINION OF THE COURT

Schiavo, J. The questions which present themselves for our solution are as follows:—

1. Was the defendant R. R. Co. negligent?

2. Was the negligence of the defendant R. R. the proximate cause of the plaintiff's injury?

As to the first issue:

The obstruction of a street crossing by a railroad company, in unnecessarily stopping its cars upon it, is unlawful.

In plain terms, the Act of March 20, 1845, P. L. 191, as amended by the Act of June 9, 1911, P. L. 726, declares the blocking of a public crossing with locomotives or cars to be illegal, and prohibits it under a penalty. The obstruction complained of in this case was prima facie evidence that the defendant R. R. Co. was guilty of

negligence, and to establish its innocence, the burden was upon it to satisfy a jury that the obstruction had not been continued for an unreasonable length of time, and could not have been avoided by the exercise of proper care and diligence. In the case at bar, the delay of one hour could not by any means be deemed a reasonable length of time.

In other words, the burden was upon the company to prove that, under all the circumstances, there had not been an absence of care on its part.

The obstruction which the jury have found in this case was then without authority of law, and therefore illegal. But it was also in plain violation of the act mentioned above, which was a general law and applicable to the defendant Railroad Co. Obstructions were correctly defined to consist not in the stopping of transit across the intersecting road, for that is expressly legalized, but in stopping upon it unnecessarily. And though the act mentioned above imposes a specific penalty, this does not affect the question that is presented by this case, this action being for damages arising out of a tort.

Such obstruction being unlawful the company are liable for any damages occasioned thereby; although the act imposes a specific penalty. Pa. R. R. Co. vs. Kelly, 31 Pa. 372. Todd vs. P. & R. Railway Co. 201 Pa. 558.

The fact that a R. R. Co. obstructs a street or highway at a public crossing, as by letting a train or cars stand thereon for a reasonable or lawful length of time, and for proper purposes, is not negligence, and the Company is not responsible for injuries caused thereby. But, a R. R. Co. is liable for injuries caused by reason of such obstruction, where it amounts to negligence, as where it allows its trains or cars to remain on the crossing unnecessarily, or for an unreasonable length of time, by reason of which injuries are caused. 33 Cyc. 931.

As previously stated, in the case at bar, the delay of one hour could not by any means be deemed a reasonable length of time.

As to the second issue:—

The case at bar is directly on point with the case in 65 Pa. Superior Court 416. Cowdrick vs. N. Y. C. R. R. Co., where it was held that in driving a horse and buggy over a more or less rough road on a cold evening there was involved a sufficient muscular exertion on the part of the plaintiff to keep his blood in circulation and enable him to resist any undue effects from the cold. It cannot be denied that such facts are stamped with every appearance of probability. The plaintiff reached the obstructed road crossing and was compelled to sit in his buggy for a full hour on a very cold

night, and it was proper for the jury to conclude that such exposure was the proximate cause of the injury to the plaintiff.

The case relied upon by the counsel for the defendant, in 257 Pa. 192, Kirstein vs. P. & R. Railway Co., is not relevant to the case at bar, for in that case there was no violation of the Act of March 20, 1845, P. L. 191, as amended by the Act of June 9, 1911, P. L. 726.

In the trial of civil cases the law does not require that the material facts of the plaintiff's case be proved beyond a reasonable doubt. It is sufficient if they be supported by the fair weight of the evidence.

We are of the opinion therefore, that the plaintiff presented substantial evidence calculated to remove that burden of proof placed on him by the law, and that the verdict should, therefore, be in favor of the plaintiff.

OPINION OF SUPREME COURT

The act of June 9, 1911, P. L. 726, did not create the duty of a railroad company not unnecessarily to hinder the use of a crossing. The public is composed of many people. The railroad serves some and the crossing roads serve others. The former owes a duty not unnecessarily to hinder the use of the latter. People are travelling on various missions at all hours, and the defendant should have considered that some one, (or more) would be prevented from continuing his journey by the extension of a standing train across the road. It is not necessary that it should know that X or Y, or Z was on the road and being impeded by its obstruction.

That the court may declare some acts to be negligent, that is, at times, not permissible and liable to be injurious to the public, is not a novelty. It has invented the rule concerning stopping, looking, and listening; it has declared that leaving a horse unhitched and unguarded on a street, on which are many people, is a negligent act. It has said that the breach of a mandate of the legislature, in respect to machinery, the employment of minors, etc., is negligent. The word may be mischosen. Enough that the act is improper and for its results, the doer of the act may be held responsible. We do not determine that a man is negligent by determining that he is under a duty towards A or B which he has not performed. If he is under a duty not to do, or to do, enough; it matters not whether he has been negligent in doing or not doing. He may very carefully do acts, which he should not do. He will be responsible to those whom he injures, simply because he has not been deterred from doing what he has done, by a reflection on the possibility or the probability that such injuries would result. The R. R. Co. should have imagined that some on was on the road, waiting for a chance

to cross the tracks. It should have imagined that one or more of several kinds of mishaps might or would result. We think it was proper for the court to tell the jury that the R. R. did wrong in obstructing the road (whether the term negligent be employed to characterize it or not) and is responsible for the injuries to anybody, resulting.

But, was the pneumonia the result, the not too remote result? The cause alleged was exposure for over an hour to extreme cold and damp. The plaintiff tendered expert testimony on this question. The witnesses, physicians, all thought the long stop under the circumstances, the cause. We cannot say that the court should have forbidden acceptance of this view by the jury. They had a right to believe as the doctors believed, and because the doctors believed.

If the opinion of the physicians was correct, there was a sufficient propinquity between the enforced arrest at the crossing and the disease.

We see no error in the opinion of the learned court below. Affirmed.

SPRINGER VS. MAC DONALD

Justices of the Peace—Jurisdiction of the Justice of the Peace—Trespass Vi Et Armis—Consequential Damage—Act of 1879, P. L. 194—80 Super. 514 Approved.

STATEMENT OF FACTS

Springer was driving an automobile on the proper side of the street. Coming in the opposite direction Mac Donald was also driving a car but he allowed it to get too far to the left of the road and a collision ensued. Springer claims $100 as damages for the injury to his machine. He brings action of trespass before a justice of the peace, who gave judgment for $100. On the appeal the jurisdiction of the justice of the peace is denied.

Snavely, for Plaintiff.

Lessel, for Defendant.

OPINION OF THE COURT

Templeton, J. It has often been decided and it is here agreed by counsel for both parties, that the Act of 1879, P .L. 194, giving

jurisdiction to justices of the peace in actions for trespass to personal property, means such trespass as would have been considered trespass vi et armis at common law, and not trespass on the case.

We must therefore consider which of the two classes of trespass this case falls within. To constitute trespass vi et armis at common law it was necessary that the defendant should set in motion a force, which before coming to rest ,should cause plaintiff an immediate injury. Trespass on the case was a remedy provided to redress injuries not falling within the above definition. In the case at bar, defendant set the automobile in motion, and before it had come to rest it collided with plaintiff's car, injuring it without the intervention or added causation of any other agency. This was clearly trespass vi et armis, and we so find.

The Act of 1923 P. L, 718, requires the production of a sworn receipted bill from the repairman before plaintiff can recover the amount paid thereon, before a justice. This act was necessary because the Courts have unanimously held that money expended on repairs is a consequential damage, and therefore not recoverable before a justice, while if the claim represents the difference in value of the chattel immediately before the accident and the value after it, the injury is direct and so recoverable. A rather fine distinction, but one well established. Gurich vs. Sheaffer, 16 Superior 299, Sheirer vs. Gross, 30 York Co. 77.

The case at bar falling within the latter class, the plaintiff's remedy is as before the act.

The learned counsel for the defense has so ably and so earnestly contended to the contrary, that his arguments deserve a brief mention.

There has been great conflict among the lower courts in deciding cases similar or parallel to the case at bar.

Accord; Porter vs. Butchers Ice Co., 1 D. R. 275. Becker vs Palm, 20 D. R. 51. Morrison vs. LeFevre, 40 C. C. 210. Contra: Forbes vs. Bucker, 19 D. R. 841. Thilow vs. Traction Co., 4 D. R. 83. Lynch vs. Alderfer, 6 Montg. Co. 108. Therefore, we cannot be guided by the cases cited by him, altho admittedly in point.

It is particularly urged upon us that the remedy here would have been trespass on the case at common law; 1st., because the damage is consequential, and 2nd., because due to negligence. As to the first, we can see no basis for that assumption, the transcript showing the claim as "damages for the injury to his machine." As to the second, it is error to assume that every case of negligence is trespass on the case alone. It is only a negligent omission to perform a duty that is so limited. A negligent affirmative act may as well constitute trespass vi et armis. If a defendant hurl a missile

which strikes the plaintiff, or his property, causing direct injury, it would be clearly trespass vi et armis, even tho the result were due to negligence. The case at bar is closely parallel. It is true the defendant committed no wrong by setting the car in motion, but so long as it remained in motion, his act is considered by law to have continued.

One further point remains, Mr. Patton remarks that in negligence cases if the damage is unliquidated, the case is for the jury. Pract. p. 8. If he refers to cases involving the negligent doing of an act amounting to trespass vi et armis, as noted above, we cannot agree with him as to the necessity that the damage be liquidated. The justice is qualified to fix the amount of damage in all cases of trespass and if either party is dissatisfied therewith, appeal is proper. Nor can we be guided by the case cited by him as authority (Thilow vs. Traction, cited supra) for reasons already explained.

The judgment of the Justice of the Peace is affirmed.

OPINION OF SUPREME COURT

The act of the defendant, in driving a car too far to the left of the road, might well be found to be negligent, in the absence of exculpating circumstances.

The justice has found that the act was negligent. The question discussed by the learned court below, concerns the jurisdiction of the justice. Nothing additional to that which it has said on this subject, need be said by us. Corroboration of its doctrine may be found in Sprout vs. Kirk, 80 Super. 514; Zinarich vs. Sheaffer, 16 Super. 299. The collision was an act of force and a trespass vi et amis. The justice had jurisdiction.

The lucid opinion of the learned court below renders further discussion by us unnecessary. Judgment affirmed.

HILL VS. HALL

Landlord and Tenant—Trespass for Abuse of Lawul Process—Power to Confess Judgment in Ejectment in Lease—Malicious Object Essential—111 Pa. 42 Cited.

STATEMENT OF FACTS

Hall leased a house to Hill for one year at a monthly rental of $10. The lease authorized a confession of judgment in ejectment after two weeks' failure to pay any installment. The rent of two

months was overdue. Hall, irritated by promises to pay which had not been kept, entered a judgment in ejectment. Hill then tendered the rent due, but Hall refused to receive it. The sheriff ejected Hill, who, alleging abuse of process, brings this trespass.

Salvadore, for Plaintiff.
Scott, for Defendant.

OPINION OF THE COURT

Sheely, J. The validity of the lease, and the clause in the lease authorizing confession of judgment in ejectment after two weeks failure to pay any installment of rent, is not questioned in this case. Nor is the regularity of the judgment entered by the defendant, Hall, questioned. They were perfectly valid and according to law.

Braddee vs. Brownfiled, 4 Watts 474; Newman vs. Rutter, 8 Watts, 51; Fahey vs. Hawley, 22 Super. 472; Yanko vs. Leizerowitz, 18 Lanc. 1; Hageman vs. Salisberry, 74 Pa. 280; Secrist vs. Zimmerman, 55 Pa. 446; Montague vs. McDonnel, 99 Pa. 268.

There are two questions to be decided. First, did the delay of two months before entering judgment defeat the right of the lessor to take advantage of that clause in the lease? Second, did the tender of the rent due by the lessee defeat the right of the lessor to issue execution on the judgment? If either of these questions be answered in the affirmative, this action of trespass for abuse of process can be maintained.

In Mayer vs. Walter, 64 Pa. 283, Justice Sharswood says, "There is a distinction between a malicious use and a malicious abuse of the legal process. An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words a perversion of it." And, again," As every man has a legal power to prosecute his claims in a court of law and justice, no matter by what motives of malice he may be actuated in doing so, it is necessary in this class (i. e., where a process is used maliciously to gain its proper effect) to aver and prove that he acted not only maliciously, but without reasonable or probable cause."

See also: Emerson vs. Cochran, 111 Pa. 619; Prough vs. Entriken, 11 Pa. 81; Whelan vs. Miller, 49 Super. 92; Kramer vs. Stock, 10 Watts, 115.

The lessor was not bound to enter judgment immediately upon default in the payment of rent by the lessee. He was justified in attempting to collect the amount due him by other means before relying upon the drastic action provided for in the lease. The fact that the delay was occasioned by repeated promises of the lessee to

pay would seem to be sufficient justification for the delay. Nor was the lessor bound to give notice to the lessee before entering judgment. Busch vs. Groswith, 159 Pa. 623. The delay clearly did not defeat the right of the lessor to enter judgment.

Nor did the tender of rent after judgment of ejectment was entered defeat the right to issue execution thereon. Default in payment of rent was to work a forfeiture of the term, and tender made after the forfeiture and the lessor's election to take advantage of it by entering judgment in ejectment was too late, as the term had ended; and a tender of the rent would not revive it. Evans vs. Fries, 9 W. N. C. 462; Reams vs. Fye, 10 D. R. 242.

The act of 3 April, 1830, P. L. 187, on which counsel for the plaintiff relies, clearly does not apply to judgments entered by confession in the Court of Common Pleas on authority contained in a lease. The statute deals with actions by a landlord before a Justice of the Peace to regain possession of the premises for non-payment of rent. This cannot possibly be construed to apply to judgments by confession.

There was no evidence of malicious use or abuse of civil process. The lease contained a clause authorizing a confession of judgment in ejectment for non-payment of rent. The rent was in arrears; a judgment was entered; a writ of habere facias possessionem was issued, and under it the sheriff ejected the plaintiff, and delivered possession to the defendant. All this was done according to law. Reams vs. Pancoast, 111 Pa. 42; Kramer vs. Stock, 10 Watts, 115; Sacchetti vs. Sandt, 64 Super. 315.

For these reasons we must hold that this action of trespass cannot be maintained.

OPINION OF SUPREME COURT

Nothing remains to be said in defence of the judgment of the learned court below. Affirmed.

SUMMERFIELD VS. THOMPSON

Trespass for Conversion of Timber—Ratification of Torts—Virtual Repeal of Earlier Act By a Later Act—Treble Damages—Act of March 29, 1824, P. L. 52—64 Super 354 Cited

STATEMENT OF FACTS

Action of trespass for cutting down and converting trees on plaintiff's land. Plaintiff and defendant owned contiguous tracts

of timber lands. Thompson made a contract with X to cut down the timber on his tract. In doing so, X exceeded the boundary and cut down trees on Summerfield's tract. Thompson did not know of the trespass when it was committed, but subsequently had his attention called to it. He never-the-less appropriated the timber which had been taken from the plaintiff's land. In this action, treble damages under the Act of March 29th, 1824 are claimed and allowed by court. Motion for a new trial.

Pottash, for Plaintiff.
Rubin, for Defendant.

OPINION OF THE COURT

Reiter, J. This is an appeal by the defendant from a judgment in an action of trespass, brought under the Act of March 29th, 1824, P. L. 152, and the case as presented involves the question of damages.

The appellant contends that the Act of March 29th, 1824, P. L. 152, Sec. 3, which provides, "That in all cases where any person, after the said first day of September, shall cut down or fell, or employ any person or persons to cut down or fell, any timber tree or trees, growing upon the lands of another, without the consent of the owner, thereof, he, she or they, so offending shall be liable to pay to such owner, double the value of such tree or trees, so cut down or felled or in case of the conversion thereof to the use of such offender or offenders treble the value thereof," has been repealed by Act of June 9th, 1911, P. L. 861.

The act of June 9, 1911. P. L. 861, Sec. 4, provides, "If any person shall **willfully, negligently,** or **maliciously** cut down or fell, or employ any person to cut down or fell a tree or trees growing upon the land of another, without the consent of the owner, such person shall be liable to pay to the owner double the value of such trees so cut down or felled and in case of a removal from the land where grown, and a conversion thereof, treble the value."

Although the act of June 9, 1911 P. L. 861 does not express any words of repealing, it was stated in the opinion of the court in 33 Pa. 511, "That a subsequent statute revising the whole subject matter of the former one and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law as well as in reason and common sense, operate to repeal the former." See also 159 Pa. 308 and 171 Pa. 221. Of like import is Endlich in Interpretation of Statutes, Sec. 241—" A statute is impliedly repealed by a subsequent one, revising the whole subject matter of the first."

The act of 1824 subjected the trespasser to the penalty of double or treble damages regardless of blame on his part, 76 Pa. 59. The act of 1911, restricts the penalty to those cases where the trespass was willful, negligent or malicious. Therefore to recover double or treble damages it is now necessary to aver and prove that the act was done either willfully, negligently or maliciously; to hold otherwise would render meaningless those words in the revised statutes. As this phase of the case was not considered by the lower court or passed upon by the jury, the award of treble damages cannot be sustained. So held in 269 Pa. 577.

The judgment is reversed and a new trial is awarded.

OPINION OF SUPREME COURT

The trial court was doubtless correct in thinking that the Act of June 9, 1911 has taken the place of that of March 29, 1824, and that the doubling or tripling of damages depends on the wilfullness, negligence, or malice, with which the trespass has been done.

The trespass was committed by X, whether with negligence, malice, or wilfullness does not appear. We cannot assume that one or all these states of mind accompanied his act or not. He could be liable, even in their absence, for damages, single damages.

Thompson did not know of the trespass until later, but he was subsequently apprised of it. He notwithstanding this knowledge, converted the timber thus wrongfully out down. A tort can be ratified by the acceptance of its fruits with knowledge that they are the fruits of a trespass, Olson vs. McLaughlin 64 Super. 354, 358.

By accepting the fruits of the trespass with knowledge that it was a trespass, we think Thompson has made himself liable for the treble damages. His ratification relates back to the time of the cutting, and the motive of the ratifier must be imputed to the agent whose deed is ratified. We are constrained to reach a result different from that of the learned court below, whose judgment is therefore reversed.

MOORE'S ESTATE

Wills—Canon of Construction of a Will—"Surviving Children"—Intention of Testator—Morris' Estate, 270 Pa. 120 Approved.

STATEMENT OF FACTS

The testator, John Moore, was survived by his wife and his two sons, Jacob and Henry. He had devised "his personal property to

his widow for her life and at her death to his surviving children." When the widow died Henry was the only son living, and claimed, under his father's will, the entire personal property, on the assumption that the testator meant, by the words "surviving children," those children, or that child, alive at the time of the death of the widow. The issue of Jacob, two daughters, claimed that the testator meant by "surviving children" those children living at the death of the testator. The Court whose judgment is here for review followed the contention of Jacob's daughters, and awarded them one-half of the personal property, and the other half to Henry.

Cohen, for Plaintiff.

Carrigg, for Defendant.

OPINION OF THE COURT

Curtze, J. To determine this case, a study is necessary of the construction which the law puts upon certain words of a will and the application of these words to other words in that same will.

For a period of time there was a confusion in the cases in regard to the question as to whether the exact words of a testator's will should be used in determining how the will should be enforced, or whether the intention of the testator as drawn from the words should be the decisive factor. The present law of Pennsylvania on this subject is that the intention of the testator must be ascertained and given effect, unless this ascertained intention is in contravention of some rule of law or public policy. The intention to be determined, is not that which existed in the mind of the testator, but that intention which is expressed by the language of the will. 40 Cyc 1386; 28 R. C. L. 211.

Hence, to arrive at a proper adjudication of this case it is indispensable that the following questions be answered. What was the intention of the testator which he expressed by the words "'surviving children?" Do these words mean the children living at the time of his, the testator's death; or do they mean those of his children living at the time of the widow's death? If his intention was the former, then the judgment of the Court being reviewed must be affirmed; if the latter, then the award must be set aside.

A number of cases have arisen in which this question has been presented, and it has been decided that words of survivorship in a will, particularly when used in connection with an immediate gift, refer to the time of the death of the testator, unless it clearly appear that the testator intended them to refer to another time after his death. Woelpper's Appeal, 126 Pa. 562; Shallcross' Appeal, 200 Pa. 122.

The rule as stated in the case of Black vs. Woods, 213 Pa. 583, is, "The general rule in Pennsylvania is and always has been that the words "survivor" or "surviving" following a prior gift are understood as referring to the death of the testator, unless an intent of the testator to refer them to some other time is plainly and manifestly shown, and this has become a rule of property. Mining vs. Batdorff, 5 Pa. 503; Johnson vs. Morton, 10 Pa. 245; Ross vs. Drake, 37 Pa. 373."

In the case of Groninger's Estate, 268 Pa. 184, the court stated the rule in the following manner: "It is established with us that, when a remainder following a life estate is given to one's heirs, the heirs living at the death of the testator, take, unless the will itself contains convincing evidence of a contrary intent."

In order to employ the proviso of this general rule, it must clearly appear, that is, there must be plain, manifest, and convincing proof, that the testator meant the words to refer to a different time. In the cases of Mulliken vs. Earnshaw, 209 Pa. 226, and in Bennett's Estate, 279 Pa. 397, the words, "as shall then be living" and "unto my children then living," respectively, were held to be of such proof as to come within the proviso.

This general rule is applicable to our case, as there are no words showing any clear intent of the testator that he wished the words "surviving children" to mean those of his children living at the time of his wife's death.

Thus the words "surviving children" refer to those children living at the time of the testator's death. As both Jacob and Henry were living at that time, the court being reviewed correctly awarded one-half of the personal property to Henry, and the other half to the two daughters of Jacob; and therefore the award must be affirmed.

OPINION OF SUPREME COURT

The learned court below has well said that the only question here is what is meant by "surviving children." Does the will mean chidren surviving the testator's death, or children surviving the death of his widow?

There is a tendency to adhere to the dispositions of the intestate law, as closely as possible, since they express the desires of the ordinary man. The ordinary testator would, in giving an estate to children, intend that if the death of a child should prevent the vesting, his issue, if any, should take. It is improbable that John Moore giving a life estate to his widow, and, at her death, the estate to "surviving children" should intend, that, should one of these children die before the widow, but leaving issue, this issue should take nothing, and that the still living son should take every-

thing. Grandparents generally wish the children of children to take what, had their parents continued in life, those parents would have taken.

"It is the general canon of construction that words of survivorship in a will refer to the death of the testator" observes Mestrezat, J., Anderson's Estate, 243 Pa. 34. This principle of interpretation is recognized in Morris' Estate, 270 Pa. 120. The learned court below has applied it. The appeal is therefore dismissed.

HUMBERT'S ESTATE

Wills—Application of the "Cy Pres" Doctrine—Legacy to a Church Which Later Mergers With Another—Acts of May 9, 1889, P. L. 173 and May 23, 1895, P. L. 114.

STATEMENT OF FACTS

Humbert, a member of the A Reformed Church, made a will in which he gave $1000 to the A Reformed Church. Two years after the will was written the A Reformed Church was combined with another church in the neighborhood. The joint church took the name of C Reformed Church. The will remained unaltered; Humbert dying, his brothers disputed the right of the church to take the money, alleging that he had died intestate since the A Reformed Church had gone out of existence. The C Church claims the gift.

OPINION OF THE COURT

Whitten, J. The question before the court is the application of the "cy pres" doctrine to the above set of facts. The learned counsel for both the plaintiff and defendant agree and admit that the "cy pres" doctrine is now in force in Pennsylvania by virtue of the Act of May 23, 1895, P. L. 114, which reads, "That no disposition of property heretofore or hereafter made for any religious or charitable use shall fail * * * * by reason of the object ceasing * * * * or being given in perpetuity * * * * but it shall be the duty of any court * * * * by its decrees to carry into effect the intent of the donor or testator so far as the same can be ascertained and carried into effect consistently with law and equity."

The dispute is, then, as to whether or not the object of the trust has failed because of the merger of the two churches under another name. The main case cited by the plaintiff to prove his contention that the object of the trust has not failed is McCulley's Estate 269 Pa. 122. This case is almost identical with the present case in facts.

In that case Simpson J., says:—"It is certain the church did then cease to exist; but it is clear, it is the object of the trust and not merely the beneficialy must cease to exist before the next of kin can claim the property." Under these facts certainly the intent of the testator was to aid the advancement of the Reformed religion. This decision is sustained by the previous decisions of Kortright's Estate 237 Pa. 143 and Toner's Estate 260 Pa. 49. Therefore, we believe that the bequest of the testator to the above church comes within the Act of May 23, 1895 and therefore the next of kin have no interest in the fund and so no standing in this court. Judgment for the plaintiff.

OPINION OF SUPREME COURT

It would be questionable whether the merger of the A and the B churches, both probably Reformed, would prevent the gift to it from vesting in the C church, the result of the fusion, and also a Reformed church. The testator's purpose was, we may suspect, mainly to promote the Reformed religion; that of assisting the A church was because that church was known by him to maintain the Reformed creed, polity, forms of worship and spiritual characteristics. That he would desire his bequest to become null, because the 100 or 200 members of the A church, commingled with, possibly the 30 or 40 members of the B church, and called themselves the C church, is very improbable. The failure to change the will is some indication that the decedent did not intend to avert the more or less probable bestowal of the bequest, upon the Church.

The Acts of May 9, 1889 and of May 23, 1895 preserve gifts to religious uses despite the objects' ceasing and direct that the testator's intent shall be carried out, as far as ascertainable. The large object was to advance the Reformed religion. The subsidiary object was to aid the A church. If the latter object cannot be realized, the larger object is still attainable. The learned court below has so decided.

The exceptions to its decree are dismissed.

ROBERTS VS. KNIGHTS OF AMERICA

Beneficial Associations—Death Proved by Absence from Home—Right to Pass By-Laws After Membership Acquired—Unreasonable By-Laws—Retroactive By-Laws—269 Pa. 139 Approved.

STATEMENT OF FACTS

Roberts became a member of defendant association. The certificate issued to him entitled his beneficiary to $2,000 on his death. He

then disappeared from home and was never heard of again. His wife the plaintiff, continued to pay his dues until 1916, when she obtained a decree from the Orphan's Court adjudging her husband dead and appointing an administrator. In 1912 a by-law was passed declaring "That the death of a member should not be inferred from an absence from home." The certificate of membership had provided that the Knights could pass by-laws, which should be binding on members. Another by-law passed in 1912 provided "That if any member departed from home and remained away one year or longer and had not communicated with the order, he should cease to be a member and a certificate should be void."

S. Kirk, for Plaintiff.
Zeigler, for Defendant.

OPINION OF THE COURT

Mirken, J. We find no error in the record. When a man has been absent and unheard of for seven years it raises the presumption of death, on which payment of his life insurance may be demanded; Groner vs. Knights of Maccabees, 265 Pa. 129. However, the defendant order in 1912 passed a by-law declaring, "That the death of a member should not be inferred from an absence from home." A by-law to be valid must be reasonable in character, (19 R. C. L. 1195). Here it is not, as affecting outstanding certificates; Samburg vs. Knights of Modern Maccabees, 158 Mich. 568; Roblins vs. Supreme Tent Knights of Maccabees, 269 Pa. 139. True, the certificate provides a member shall abide by by-laws thereafter enacted, and that is valid in so far as his rights depend upon by-laws but substantial rights which rest upon the contract cannot be abrogated by new by-laws, even where the power to make them is reserved; Sheets vs. Protected Home Circle, 256 Pa. 172. Hayes vs. German Beneficial Union, 35 Super. Ct. 142; Supreme Council of American Legion of Honor vs. Getz, 112 Fed. 119.

Defendant relies upon another by-law made in the same year (1912) as follows, viz; "Any member who departed from home and remained away one year or longer and had not communicated with the order, should cease to be a member and certificate should be void." This by-law is drawn in the future tense and manifestly cannot be applied to Roberts' case for admittedly he had disappeared three years before its passage. By-laws never operate retroactively unless the language is such as to admit no other reasonable construction; Knights Templar's Indemnity Company vs. Jarman, 104 Fed. 638; 19 R. C. L. 1214. Wolpert vs. Knights of Birmingham, 2 Super. 564.

Defendant has not shown to the satisfaction of the court that this is an unincorporated beneficial association. Therefore we have not considered his plea for a non-suit.

The assignments of error are overruled and judgment of the court below is affirmed.

OPINION OF SUPREME COURT

The insured left home in 1909 and has not since been heard from . In 1912 a by-law was passed which declared that if any member departed from home and remained away one year or longer, not communication with the order, his membership therein should cease and the certificate become void. But Roberts did not depart from home after the passage of this by-law. By-laws do not operate retroactively unless they plainly purport to do so. Roblin vs. Knights, etc., 269 Pa. 139.

In 1912 another by-law was passed, declaring that the death of a member should not be inferred from an absence from home. Roblin vs. Knights, supra., holds that such a by-law as affecting one who is already absent from home, without explanation of his locality, is unreasonable. Roberts had already been lost to his friends for three years. The power to make such by-laws after the membership of a man had begun, was expressly reserved by the Knights. The case cited holds that even then, a new by-law cannot abrogate a substantial right; eg. the right to prove death by absence and obtain the insurance.

The learned court below has properly accepted the doctrines of the case cited. Affirmed.

BOOK REVIEW

Cases on Private Corporations, selected from decisions of English and American Courts, by Harry Sanger Richards, Dean of the Law School of the University of Wisconsin. 2nd Edition. West Publishing Co., St. Paul, Minnesota.

The contents of this volume embracing over 1000 pages, are divided into eight chapters, and an appendix. The classification is indicated by the titles of these chapters: Characteristics of a Corporation, Formation, Powers and Liabilities, Directors, Rights of Stockholders, Dissolution, Creditors of the Corporation, and Legislative Control.

The Appendix contains forms of minutes of the first meeting of incorporators and subscribers; waiver of notice of first meeting of directors; minutes of the first meeting of the board of directors; the form of a voting trust; of a trust deed; the by-laws of the United States Steel Corporation; the certificate of incorporation of the General Motors Corporation; the object clause of the certificate of incorporation of the Bethlehem Steel Corporation; and the certificate of amendment of certificate of incorporation of the Bethlehem Steel Corporation.

A very large proportion of important American and English decisions on Corporations may be found in this volume, ready access to which is a boon to the busy lawyer and to the student of law. The book may be unhesitatingly commended to those who are interested in corporation law.