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DOG LAWS, OLD AND NEW

Pennsylvania dog laws begin with the Act of March 23, 1809, 5 Sm. L. 36. This act was followed by innumerable local statutes and numerous general laws. Pepper & Lewis' Digest, 2d Ed., at p. 2994, gives a list of local acts which shows such acts enacted for forty-eight counties and as many as thirty-five different local acts relating to dogs in a single county. Few were the legislatures that did not enact dog laws. The general borough act of 1851, Sec. 2, cl. XXV empowered boroughs to levy annual dog taxes, prohibit the running at large of dogs and provide for their killing or seizure and sale. The Borough Code of 1915 continued this power. Ch. V, Art. 1, Sec. 2, cl. XXVIII. Like powers are given townships of the first class by the Act of May 15, 1915, P. L. 520. All cities were given this power by the Act of June

10, 1881, P. L. 119. It is little wonder that the legislature has declared dogs to be both a public nuisance and under certain circumstances a private nuisance. The demand for legislation appears to have made them a continuing nuisance to the legislature.

In 1917 the first attempt to establish a "uniform system throughout the commonwealth for the licensing of dogs and the protection of live-stock and poultry from injury by dogs" was enacted. Act of July 11, P. L. 818. It directs that it be known as "The Dog Law of 1917." It however leaves unaffected acts relating to mad dogs, dogs affected with any disease, and acts for the protection of game. This act still leaves the amount of the dog tax in each county to be fixed by the county commissioners and in cities of the first and second class by the city councils. It specifically repeals fifteen other acts and all other inconsistent acts, general and local.

In 1921 a second uniform dog act was passed, required to be known and cited as the "Dog Law of 1921." Act of May 11, 1921, P. L. 522. It repeals the "Dog Law of 1917" except in so far as it provides for the licensing of dogs and the payment of damages inflicted by dogs and damages for the illegal killing of dogs in cities of the first and second class. Sec. 39, and Sec. 43. The Act of 1917 is accordingly operative in the cities named and that of 1921 throughout the rest of the state. In 1923 five sections of the Dog Law of 1921 relating to the determination of damage claims and their payment and the disposition of the excess of the proceeds of dog licenses not needed to pay damage claims were amended but the Dog Law of 1917 was not amended. Act of March 19, 1923, P. L. 16.

It is proposed to call attention to the origin of many provisions of these recent acts, point out wherein they differ from each other and to consider briefly whether they involve taxation offending the constitutional requirement of uniformity and whether the prohibition of local legislation

has been violated in preserving the Act of 1917 as the law operative in cities of the first and second class, while the rest of the Commonwealth is governed by the provisions of the Acts of 1921 and 1923.

Sec. 2 of both uniform acts supply definitions of the terms used therein. They disclose that "confined domesticated hares and rabbits" are protected as "live-stock" outside of the named cities but not therein.

The license fees payable by dog owners outside of the named cities are definitely fixed by the Act of 1921 but larger fees may be required in such cities in the discretion of their councils, the Act of 1917 merely fixing minimum and maximum fees. The Act of May 15, 1889, P. L. 222, provided for a definite license fee in boroughs and townships. This act was supplied by the Act of May 25, 1893, P. L. 136, which left the amount of the license fee to be fixed by the local taxing authorities and was declared applicable in cities, boroughs and townships, the act merely naming a maximum fee. In counties the commissioners fixed the rate and in cities the councilmen. The act of June 3, 1915, P. L. 791, empowered the councilmen of boroughs to fix the rate therein. The Dog Law of 1917 vests this power exclusively in the county commissioners and in the councilmen of cities of the first and second class. The Dog Law of 1921 reverts to the policy of the act of 1889 in fixing a definite fee outside of the two classes of cities named.

THE SUMMARY KILLING OF DOGS

The Act of March 23, 1809, supra, seeks to promote the growing of sheep in two ways. First, it provides a progressive dog tax, the proceeds of which were appropriated to remunerate the owners of sheep destroyed by dogs. Second, it authorized anyone to kill dogs caught chasing or worrying sheep or accustomed so to do. The act originally applied only to Philadelphia and four adjoining counties. But the

section providing for summary killing was extended throughout the state by the Act of March 29, 1813. The same provision is supplied by the 7th section of the Act of April 14, 1851, P. L. 712, and the 8th section of this act imposes absolute liability for injury to sheep upon the owner of the offending dog, proof of his knowledge of its propensity to do so being dispensed with. Both the recent acts require every police officer to kill every dog found running at large which does not bear a proper license tag. The first act to require that all dogs wear collars and tax tags is that of June 1, 1907, P. L. 362. The requirement is repeated in the Acts of June 15, 1911, P. L. 968; May 20, 1913, P. L. 259; and June 3, 1915, P. L. 791. The Act of 1907 required tax collectors to notify dog owners to comply with this requirement within ten days or kill their dogs. Upon noncompliance with this notice, constables were required to kill untagged dogs. Any citizen could give the notice with like effect. Sec. 7 of the Act of 1911, now supplied by Sec. 21 of the Dog Law of 1917 and Sec. 22 of the Dog Law of 1921, declared all dogs not wearing tax tags to be a public nuisance and authorized the owner or tenant of any land on which such a dog entered to kill it without liability to its owner. The killing of tagged dogs on sight by the owner of sheep or his employee, if the dog was found in a field where there were sheep, unless the dog was accompanied by its owner, was authorized by the Act of June 3, 1915, P. L. 790. Another act passed the same date, P. L. 791, required thirty days' notice by the county commissioners of their intention to have all dogs killed which did not wear tags. After notice they are authorized to call on the state constabulary to aid in killing dogs. The recent acts protect licensed dogs when accompanied by their owner or handler, unless caught in the act of worrying, wounding, or killing any live stock, or attacking human beings. Under these circumstances anyone may kill any dog without liability for so doing. There can be no doubt as to the constitutionality of legislation providing for the summary killing of

dogs. As is said in Monroe Boro. vs. Walborn, 17 D. D. 1053, "Dogs are peculiarly the subject of police regulations of the most stringent character and the most summary proceedings for the destruction of these animals, kept contrary to such regulations, are entirely within legislative power and free from constitutional objection, though the property of the owner is destroyed without notice or hearing in the execution of the law." Citing numerous cases. The constitutionality of the Dog Law of 1917 was questioned in Com. vs. Fribertshauser, 263 Pa. 211 but only on the ground of an alleged insufficiency of title. It was held that the title gave notice of an intent to deal with the whole subject of taxing or licensing dogs and that accordingly no express mention of the disposition made of such taxes was necessary, and that such a general act, complete in itself and intended to create a new system, need not contain in its title notice of an intent to repeal earlier laws on the same subject. In fact only one of the innumerable dog acts appears to have been declared unconstitutional on any ground. The Act of June 12, 1878, P. L. 198, provided that it should take effect in each county only after a majority in each county had voted in its favor. Frost vs. Cherry, 122 Pa. 417, had held a like provision to invalidate another act as calculated to produce local laws and this was held to be controlling in the attack on this dog law. Bowen vs. Tioga County, 6 C. C. 613.

THE REGISTRATION OF DOGS

The registration of dogs begins with the Act of April 6, 1854, P. L. 286, originally applicable in but five counties but extended throughout the state by the Act of May 18, 1878, P. L. 72. It authorized owners of dogs to register a description of each dog with the clerk of the court of quarter sessions and receive a certificate which was transferrable on a sale of the dog. Registered dogs were declared to be personal property and the subject of larceny. The Act of May 25, 1893, P. L. 136, made a like provision as to all dogs,

though its title merely indicates that it is a taxing statute. The provision was held to be germane to the subject of the act and the provision not unconstitutional in Com. vs. Depuy, 148 Pa. 201. The Act of May 15, 1889, P. L. 222, which imposed a uniform dog tax in boroughs and townships had contained a like provision. Such a provision is found in sec. 22 of the Dog Law of 1917 and in sec. 23 of the Dog Law of 1921. Under both acts one applying for a dog license must state the breed, sex, age, color, and markings of his dog and the name and address of the last previous owner. The license given must contain this description of the dog. Sec. 9 of each act permits the transfer of licenses when the ownership or possession of a dog is permanently transferred from one person to another within the same county, merely upon notice given to the county treasurer.

DAMAGE CLAIMS

The propriety of indemnifying the owners of useful animals against loss and damage by dogs, and the necessity that this be done in the case of sheep, has been recognized since the date of our earliest legislation on this subject. The Act of 1809, supra, appropriated the entire proceeds of dog licenses to the reimbursement of sheep owners, except in Philadelphia, in which, no doubt, there was no sheep industry to encourage. In Philadelphia the proceeds went to the guardians of the poor. In the various local acts the proceeds ot dog licenses have been made available for a variety of purposes but the usual appropriation is first to the payment of damage claims. The Act of April 11, 1901, P. L. 73, made dog funds available for the payment of losses sustained when horses, mules, cattle and swine were bitten by mad dogs but limits the amount payable in each case. The recent acts make the dog funds available for payment of losses to all animals within the statutory definition of "livestock or poultry" and also to indemnify the owners of licensed dogs

illegally killed, when the one so killing fails to pay the value of the dog killed. $100 is the limit recoverable for any dog so killed.

SWOLLEN DOG FUNDS

Dog funds often exceed the demands of damage claimants and the disposition directed to be made of the surplus has varied from time to time. The Act of 1809, supra, applied this surplus to the improvement of the breed of sheep and cattle in each county. The Act of May 15, 1889, P. L. 222, directed the transfer to the school fund of all over $100 in the dog fund at the end of each year. The Act of May 25, 1893, P. L. 136, directed the transfer into the general county or city funds of all over $200 in the dog fund at the end of each year. The Act of April 23, 1901, P. L. 92, directed that such surplus over $200 should be transferred at the end of each year to the townships, boroughs and cities in the proportion in which such fees had been collected in each. Sec. 15 of the Dog Law of 1917 directs that any excess moneys collected should be available for general county purposes. Sec. 16 of the Dog Law of 1921 creates a state dog fund in the hands of the State Treasurer and all moneys therein are appropriated to the Department of Agriculture but it directs that on Nov. 30th of each year all over $25,000 in this fund should be transferred into the general fund of the State Treasury. This last provision is stricken out by the 1923 amendments and the fund is now made available not only to pay damage claims but also "for the payment of indemnities for animals afflicted with dangerous, contagious or infectious diseases as provided by law, and for the payment of the salaries and expenses of the Director" and other employees of the Bureau of Animal Industry of the Department of Agriculture. Act of March 19, 1923, P. L. 16.

PROCEDURE TO RECOVER DAMAGES

The procedure to recover damages for losses caused by dogs is now as set forth in the act of March 19, 1923, P. L.

16, except in cities of the first and second class, in which the procedure is as set forth in the Dog Law of 1917. Under the 1923 act the complaint must be made immediately after the damage is done. Under both the complaint is made to a township auditor, justice of the peace, magistrate or alderman in writing signed by the complainant, stating when, where, and how the damage was done, and by whose dog or dogs, if known. The officer receiving the complaint is sole appraiser under the 1917 act. Under the 1923 act he must at once notify an auditor of the district and if there be none, then the controller and at once examine the injured animals and the place of injury. The appraiser or appraisers examine, under oath or affirmation, any witnesses called before them, make diligent inquiry, fix the amount of the damage, if any, and the ownership of the guilty dog or dogs, if possible. Such owner is declared by both acts to be liable to the owner of the injured animals for all damages and costs or to the Commonwealth to the extent it pays such damages and costs to the owner of the injured animals. The claim of the Commonwealth is created by the act of 1921. Under the 1917 act the liability was to the "county" but as this act is now in force only in cities of the first and second class, "county" must be read "city." If the two appraisers provided by the 1923 act cannot agree, "the Secretary of Agriculture through his officers or agents may appoint a disinterested citizen to assist in determining the amount of damage sustained." Under the 1917 act the report of the appraiser was delivered to the claimant upon his payment of costs and by him delivered to the "county commissioners," now to the city council. Under the 1923 act the report goes to the Secretary of Agriculture. County commissioners are required to immediately draw their order upon the county treasurer for payment under the 1917 act, and this is now the law in the excepted classes of cities. But under the 1923 act the Secretary of Agriculture need not approve the report and he may make further investigation of the amount of damage sustained. Both acts

require the appraisers to certify that due diligence was used to determine the ownership of the guilty dog, that the carcasses of animals killed were buried within twenty-four hours after the assessment of damages, and that no payment has already been made by the owner of the dog to the owner of the injured animal. The act of 1917 did not require the certificate to cover the matter of non-payment of damages but it was amended by the act of April 13, 1921, P. L. 130.

Township auditors have been sheep viewers since the act of 1809. The necessity of prompt burial of the animals killed and the importance that the information to be gained by an inspection of the animals and the place are so obvious that a summary and immediate proceeding is of obvious propriety. The act of May 25, 1893, P. L. 136, names township, borough or city auditors or controllers as appraisers and these continue to be the appraisers together with the justice of the peace, the magistrate or the alderman before whom the complaint is made under the recent acts as stated above.

The payment of claims for losses suffered outside the limits of the excepted classes of cities is governed by section 29 of the 1921 law as amended by the 5th section of the act of March 19, 1923, P. L. 16. If the Secretary of Agriculture approves the report of the appraisers, "he shall immediately draw his check in favor of the claimant for the amount of loss or damage such claimant has sustained according to such report, together with necessary and proper costs incurred. Such amount shall be paid from the advance requisition on the 'Dog Fund'."

ENFORCEMENT OF DOG LAWS

Under sections 16 and 39 of the Dog Law of 1917 assessors report at the end of each year the number, sex, etc. of all dogs with the names of those owning or harboring them, to the councilmen of cities of the first and second class, who under section 34 are charged jointly with the Secretary of Agriculture with the enforcement of the act. But

under the 17th section of the Dog Law of 1921 the assessors must make their reports to the Secretary of Agriculture, who under section 35 is solely charged "through his officers and agents" with enforcement of the act. All other departments, bureaus and commissions of the Government of the Commonwealth "shall, on request of the Secretary of Agriculture, assist in the enforcement of the provisions of the act." The like provision in section 34 of the Dog Law of 1917 used the word "may" instead of the word "shall."

PENALTIES

Failure to comply with the Dog Law of 1917 is a misdemeanor punishable by a fine of not exceeding $100 or imprisonment not exceeding three months. Section 36 of the Dog Law of 1921 provides for "conviction in a summary proceeding" and a fine of not less than $5 nor more than $100 or imprisonment not exceeding thirty days or both. Fines under the former act go to the county treasurer but under the 1921 act the county treasurer must forthwith pay the same into the State Treasury.

CONFINEMENT OF DOGS

Both acts aim to end the public nuisance involved in permitting dogs to run at large. Unlicensed dogs, as has been stated, are to be killed and dogs without tags are presumed to be unlicensed. Tagged dogs are to be detained for ten days, when, if not redeemed by the owner after notice, they are to be sold or killed but sales are not to be made for the purpose of vivisection. Proceeds of dogs sold go to the county under the 1917 act but to the State Treasurer under the 1921 act. Under the Dog Law of 1921 an officer may enter any premises or building to capture a dog found running at large and which has been pursued into such building. There is no house of refuge for any dog. Interference with an officer and neglect of duty by an officer are both offenses under this act. At night a dog must be "(a) con-

fined within an enclosure from which it cannot escape, or (b) be firmly secured by means of a collar and chain, or (c) under the reasonable control of some person or be engaged in lawful hunting accompanied by an owner or handler."

GUILTY DOGS TO BE KILLED

The act of 1893, P. L. 136, relieved of liability those who killed their dogs when they were found guilty of causing damage to sheep. The provision was embodied in section 31 of the Dog Law of 1917. Section 32 of the Dog Law of 1921 expressly provides that the killing of guilty dogs by their owners shall not remove their liability for damage caused by them. However, the Secretary of Agriculture may notify the owner to immediately kill such dogs and if he fail to do so for ten days, the Secretary of Agriculture may notify the chief of police to kill the dogs wherever found. Since provisions of the Dog Law of 1921 relating to the payment of damages are not operative in cities of the first and second class, it may be contended that dog owners may still procure exemption from personal liability by killing their dogs. But the reasonable construction of section 39 of the law is to construe the phrase "payment of damages" as referring only to such payment out of the local dog fund. All the provisions of the act of 1921 are operative in the excepted cities except those governing the licensing of dogs and the payment of damages. Sections 22, 23, 24 and 25, which provide for killing all dogs caught in the act of pursuing or wounding livestock, poultry or human beings, prohibit the poisoning of dogs, make dogs the subject of larceny, provide for their confinement, etc. are as operative in the excepted cities as elsewhere.

Section 38 of the 1917 act and 41 of the 1921 act provide that their provisions shall be deemed severable and that the unconstitutionality of one or more provisions shall not affect the validity of the remaining provisions.

J. P. McKEEHAN

TO BE CONTINUED

MOOT COURT

BONNER VS. SCHUYLER

Assignment of Debts—Partial Assignment—Consent of Debtor—5 Wheaton 277 and 75 Pa. 399 Cited.

STATEMENT OF FACTS

Schuyler was in debt to X for $1500, X was in debt to Bonner for $1000. When this debt was created X promised Bonner that Schuyler would pay it out of the money he owed X. X is now dead. No notice was given to Schuyler of the agreement between X and Bonner for four months. No other person claimed payment from Schuyler for any part of his debt to X. This is an action of assumpsit for the $1000.

Best, for Plaintiff.

Bobick, for Defendant.

OPINION OF THE COURT

Carriggs, J. The plaintiff has come to this court seeking to enforce, as he claims, a contract of novation.

To constitute a novation whereby a new creditor is substituted for the original one, there must be a mutual agreement among three or more parties, whereby a debtor, in consideration of being discharged from his liability to his original creditor, contracts a new obligation in favor of a new creditor. So a verbal assignment of a chose in action, not evidenced by a note or any other writing, assented to by the debtor who promises to pay the debt to the assignee, constitutes a complete novation. 29 Cyc. 1137.

Testing the above state of facts by this definition we find that it is lacking in one of the essential elements, that of the mutual assent of the three parties.

A contract of novation is never presumed, and he who alleges it must establish it by proper proof. 171 Pa. 644; 255 Pa. 573. The plaintiff is this case in no way attempts to prove the novation. We do not see how he possibly could prove it, there being no witnesses to the transaction. Under the Acts of May 3, 1887, and June 11,

1891, where one of the parties to an agreement is dead, and no living witness has been called to testify in regard to any matter relative to the agreement that occurred prior to the death of the decedent, the surviving party is not competent to testify as to what took place, so the testimony of Bonner as to what occurred between himself and X is inadmissible.

On the theory of a novation contract the plaintiff cannot recover. Could the plaintiff succeed on the theory of an assignment? We think not. It has been held in 75 Pa. 399, that where an order is drawn for the whole of a particular fund, and after notice to the drawee, it binds the funds in his hands. Where, however, the assignment is for part only the law seems otherwise.

In 5 Wheat. 277, Justice Story has laid down the rule, which seems to be accepted in Pennsylvania, that when an order is drawn on a general or particular fund for a part only, it does not amount to an assignment of that part or give a lien as against drawee, unless he consents. The reason for the rule is that it would break up a single cause of action into many actions.

In the base at bar, X was endeavoring to assign part of his claim against Schuyler to the plaintiff Bonner, and under the rule laid down above such assignment would fail.

Judgment for defendant.

OPINION OF SUPREME COURT

The question here, as we conceive it, is, not whether there was a novation but whether there was an obligation put on the debtor of B, who was debtor of A, to pay a portion of the debt owed to B, to A, in satisfaction of B's debt to A.

That X may assign his money claim against Y so as to impose on Y the duty of paying the assignee of X there can be no doubt. Nor is Y's consent necessary. Notice of the assignment would be necessary to give validity to it, should Y, in ignorance of it, make a payment to X, or otherwise alter his position in such way, that, to enforce the assignment would be injurious to him.

It is ordinarily said that without the debtor's consent a debt cannot be broken into parts by the creditor, by an assignment of a part of it. The debtor cannot be subjected to a servitude to two or more persons instead of one. He cannot be made liable to two suits by two persons, with the attendant costs and inconvenience.

The debtor may however consent to the partition of the debt and thus deprive himself of the right to object to the partialness of the assignment. He consented apparently in Lamponi vs. Barri, 65 Super. 576. "A representative of the defendant, agreed with the plain-

tiff," says the opinion, "that the defendants would pay the amount of the loan (of the plaintiff) to the plaintiff, out of moneys in hand, or presently to become due." Here there is no consent.

In the case before us, the debt of the defendant was $1500. The assignment was of $1000 of this sum, to the plaintiff. We think the learned court below has properly disallowed the claim. The debtor should not be inconvenienced, without his consent, by having to adjust claims with two creditors instead of one. It is said that no notice of the assignment of $1000 of the $1500 debt was given to Schuyler, for 4 months. This delay we think immaterial inasmuch as it does not appear that during those months, Schuyler made payments to his original creditor or to anyone.

If Schuyler is compelled to pay $1000 to Bonner, he may still be sued by X, or X's executor, for the debt, and be troubled with finding proof of his having made the partial payment, or of his authority to make it.

The doctrine of Mandeville vs. Welch, 5 Wheaton 277, has been accepted on more than one occasion by the courts of Pennsylvania, that an assignment of part of a debt cannot bind the debtor, unless he has consented; Jermyn vs. Moffit, 75 Pa. 399; Geist's Appeal, 104 Pa. 351.

The decision of the learned court below is affirmed.

COMMONWEALTH VS. SPENCER

Criminal Law—Evidence—Cross-Examination of Defendant—Prior Similar Offenses as Evidence—Creditability of Defendant—Act of March 15, 1911, P. L. 20—225 Pa. 113 and 74 Super. 320 Cited.

STATEMENT OF FACTS

Indictment for statutory rape. Spencer, as a witness, denies his guilt. He called witnesses to testify to his good character and reputation. Later, he was recalled and asked by the Commonwealth whether he had ever been similarly accused. He said he had not been. A Justice of the Peace was then called who swore that two years before the prisoner was accused before him of a similar act, and, that he admitted the truth of the charge. A conviction has followed. The prisoner alleges that the cross-examination was improper in view of the Act of March 15, 1911, P. L. 20, and appeals.

Schiavo, for Plaintiff.

Shenkman, for Defendant.

OPINION OF THE COURT

Singer, J. The Act of March 15, 1911, P. L. 20, entitled "An act regulating in criminal trials the cross-examination of a defendant when testifying in his own behalf," provides as follows:—"Hereafter any person charged with any crime, and called as a witness in his own behalf, shall not be asked, and if asked, shall not be required to answer any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation, unless—1, He shall have at such trial, personally or by his advocate, asked questions of the witnesses for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation or:—2. He shall have testified at such trial against a co-defendant charged with the same offense.

The Act forbids cross-examination with reference to the commission of other acts unless the case falls within the first or second exceptions mentioned therein. While the defendant did not ask questions of witnesses for the Commonwealth with a view to establish his own good reputation or character, he called a number of character witnesses and thus brought himself within the provisions of the act, providing for an exception in those cases where the defendant has given evidence tending to prove his own good character or reputation. In other words, where it appears from the record, that the appellant's case was entirely outside of the operation of the statute, it must be governed by the law as it existed before the enactment of the statute, 251 Pa. 247.

What was the law before the enactment of the statute? The case of Commonwealth vs. Racco in 225 Pa. 113, furnishes the answer. Therein it was held that where the accused takes the stand in his own behalf, he may be asked on cross-examination, in order to test his creditibility, whether he had not been convicted and sent to prison for other similar offenses; and if he answers no, it may be shown for the purpose of contradicting him and impeaching his credibility, that he made declarations to the effect that he had been convicted and sentenced for such crime.

The cross-examination of the defendant was therefore proper and the truth of his answers to the questions asked was material in the consideration by the jury of the credibility of the whole of his testimony. If it was proper for the Commonwealth to ask him questions on his cross-examination, it was certainly not concluded by his answers and could not be denied the right to contradict him by evidence tending to show he was an untruthful witness. It is

understood that this evidence was neither offered nor admitted for the purpose of attacking the previous good reputation of the defendant as shown by the evidence, but for the purpose of contradicting him on a material matter and thus destroy in whole or in part his claim to be a credible witness, 65 Super. 599.

In the case of Commonwealth vs. Garanchoske, 251 Pa. 247, the idea is further brought out in the following language of the opinion. "In the third, fourth, and fifth assignments, the Commonwealth was permitted to show by other witnesses, that the defendant had committed other offenses for the purpose of showing his bad reputation. This evidence does not come within the Act of 1911, since the Act applies exclusively to the cross-examination of the defendant. The general rule therefore applies that proof of character must be limited to the general reputation with respect to the particular offense charged and that evidence of particular acts cannot be given."

So far our findings have been governed by dicta and the doctrine of Stare Decisis, and now we feel that the circumstances are worthy of some comment and criticism.

It cannot be denied that the cross-examination of a defendant as to a former conviction, although intended merely to test his credibility, has a more far-reaching effect. Namely, that the jury of twelve laymen, untrained in legal discrimination, become undoubtedly prejudiced, be it consciously or unconsciously, against the defendant upon the introduction of such evidence. The courts realize fully the inevitable result of the admission of such evidence, but fearing to face the issue squarely lest it upset their dearly beloved, "Precedents," loudly repeat so that the din raised shall cover the fallacy of their reasoning, that this evidence is not offered nor admitted for the purpose of attacking the previous good reputation of the defendant, but for the purpose of contradicting him on a material matter.

It is not for us to attempt to suggest a solution to the unfortunate situation mentioned, but merely to bring attention to it, that wiser heads may settle it.

Still more inequitable does the present situation become when the defendant has not been convicted of a former offense but has merely been accused of it. For though the defendant may have been innocent in the former charge yet the effect on the jury is unfortunately far from being in favor of the defendant but inversely, shifts a rather heavy burden upon him to regain at least their impartial attitude. For this inequitable result the courts are not to blame. It is our learned legislature alone who have the power to amend the situation and that can be done by obliterating the words "or has been charged with" in the statute referred to and discussed herein.

Counsel for the defense contends that the evidence of the Justice of the Peace was not the best evidence and therefore should not have been allowed, but since that objection is not contained in the assignments of error we will not comment upon it.

For the various reasons given, the objections are overruled and the judgment of the learned court below is affirmed.

OPINION OF SUPREME COURT

Commonwealth vs. Racco, 225 Pa. 113, is authority for the questions put to the defendant by the Commonwealth, unless the act of March 13th, 1911, P. L. 30, prevents. That act allows such questions when the defendant "has given evidence tending to prove his own good character or reputation." The defendant has called witnesses, who have testified to his good reputation. The case is then where it would have been if the act of 1911 had not been enacted. Commonwealth vs. Burke, 74 Super, 320; Commonwealth vs. Dietrich, 65 Super. 599. We affirm the judgment of the learned court below for the reasons stated in its opinion. The principle that when a man is on trial for a crime, he cannot be shown to have committed another crime, is subject to this exception, that the reputation may be refuted, as evidence of innocence, by proof that it did not tally with the facts.

Affirmed.

BAKER VS. COULBER

Wills—Revocation by Birth of Children After Execution—Provision for After-Born Child—Sufficiency of Provision Non-Essential—Wills Act of 1917, P. L. 403.

STATEMENT OF FACTS

Mary Baker left a will in which she devised her land to her husband, but if he should die before her, then to their children whether then living or thereafter to be born. The husband survived the wife, and contracted to sell the land to Coulber. Coulber objected to the title because two children now living were born after the will was written, and as to whom the will was inoperative. The court has held that the mention of unborn children satisfies the statute and made the will valid as against them.

Gottlieb, for Plaintiff.

King, for Defendant.

OPINION OF THE COURT

J. Kirk J. In order to render a proper decision in this case it will be necessary for us to go back and trace the law as to after-born children, from the common law of England up to the present law. The will of a feme sole was revoked by her marriage, while marriage and the birth of a child conjointly revoked the will of a man. Where there was a provision made for the wife and children the birth of a child did not produce revocation. In Pennsylvania this was changed by an act passed the 4th of February 1749, which provided that when a testator should afterwards marry or have a child or children not named in any such will the testator should, so far as regards such children, be deemed to die intestate. This act was repealed by the Act of theh 23d of March 1764, which substituted for the words "not named in any such will," the words, " not provided for in any such will," and this act was substantially re-enacted by the Acts of April 19, 1794 and April 3, 1833 which continue this language as does the present Wills Act. However under the Wills Act the language is general and without distinction to sex.

The question which arises is whether the provision in the will constitutes a sufficient provision for a child born after the execution of a will to prevent intestacy as to such children in accordance with section 21 of the Wills Act.

In Newlin's Estate 209 Pa. 456, Chief Justice Mitchell states, "It appears to have been universally conceded that an actual provision clearly intended for the after-born child will satisfy the statute, no matter how small the provision is."

It was held in Randall vs. Dunlap, 218 Pa. 210, that all the act of April 8, 1833 requires relative to the provision for an unborn child, is that the testator shall have the child in mind and shall make clear that the will was to apply to it. Any provision which does that is sufficient, and the inquiry whether large or small, vested or contingent, present or future, is irrelevant and outside the jurisdiction of the courts. In this case the testator made no express or material provision for any after-born children, but merely said, "I declare this to be my last will and testament, and that after-born children are herein provided for."

In Schaper vs. Pitts. Coal Co., 266 Pa. 154, it was held "that where a testator gave and bequeathed to his wife, 'all my remaining property so long as she remains my widow, to have and to hold for her own, but if she should choose to marry again, then she is to have one-third, the other two-thirds to be held by her in trust for their children until the youngest becomes of age,' this was a sufficient provision to satisfy the statute as to that child."

Judge Sharswood in Willard's Appeal, 78 Pa. 327, says the statute makes no qualification as to the fullness and equality of the provision. All that it requires is that the parent shall have the unborn child in mind and shall make clear an intention that the will should apply to it. In this case after a devise to the wife for life, there was a remainder "over to my heirs at law, share and share alike, to those heirs who shall be living or entitled to be represented in said estate." it was held that this was not a sufficient provision for an after-born child, but it will be noted that there was no evidence whatsoever that the testator ever had this child in contemplation when he spoke of his heirs.

There can be no doubt that Mary Baker had the after-born children in mind and intended the will to apply to them. Hence there can be no argument as to the husband's ability to convey a good title.

Courts of other jurisdictions, interpreting similar acts have unanimously held the rule to be that if a provision be made in the will for an after-born child and equal to that made for other children, in being at the time of the testator's death, then the posthumous child cannot take against the will, provided—that the birth of the said child was contemplated by testator when he executed the will. 137 Mass. 527, 164 Wis. 527, 164 Mass. 527. Judgment for plaintiff affirmed.

OPINION OF SUPREME COURT

The Wills Act of 1917, P. L. 403, 410, speaks of a child or children, born after the making of a will by its parent, "and not provided for in such will."

This phrase awakens queries. To what extent must the child be provided for? An after-born child is no more meritorious than a previously born child. A previously born child may be entirely pretermitted in its parent's will. There seems no reason for denying to the parent the right to deal in the same way with the after-born child. The question then has become, not one of power to deny to the after-born, a share of the estate. That is conceded. It is one of intention. From the non-existence of the child may be suspected that his future existence was not in the thought of the testator, and that the omission to name him was not due to the purpose that he should take nothing, but to the oversight of his possible arrival.

Where it is clear that there was no such oversight, the will will be valid even as against an after-born child for whom there is no provision. Such is the conclusion reached by the reflections of the courts.

The gift to the husband was contingent on his surviving his wife. He has survived her. The gift to him is therefore absolute. He can make a good title. There is no reason for excusing the vendee from payment of the purchase money.

The judgment of the learned court below is affirmed.

TAYLOR VS. HOPEWELL AND WIFE

Practise, C. P.—Opening of Judgments—Right of Married Woman to Open Judgment Entered on Note—Laches of Petitioner—Equitable or Positive Right—64 Super. 350 and 236 Pa. 26 Distinguished.

STATEMENT OF FACTS

A note for $500 was made by the defendants in 1902. Four years later a judgment was entered on the warrant of attorney. In 1910 a scire facias to revive and an alias scire facias were issued, both returned nihil. A judgment was entered. Four years after this judgment of revival a scire facias and an alias were returned nihil and a judgment was entered. Four years after this judgment was entered, Mrs. Hopewell, wishing to defend on the ground that she was a surety for her husband, asks the court to open the judgments and allow her to make this defense. The court refused. Appeal.

Angle, for Plaintiff.

Gunnett, for Defendant.

OPINION OF THE COURT

Heller, J. We are called upon in this case to answer the question whether the defendant, Mrs. Hopewell, is barred from presenting the defense that she was a surety for her husband on the note given to the plaintiff after she allowed the judgment to be entered and stand against her for the period of time as stated in the facts of the case.

If the petition for opening judgment entered on a note shows good grounds, the judgment will be opened, Little vs. Jeffers, 42 Super 519. Thus we are not concerned whether or not a wife will be presumed to be a surety when she signs a note with her husband. The judgment must be opened before a defense or any evidence can be presented for the purpose of showing whether or not the wife was a surety, Dikeman vs. Butterfield, 35 Pa. 236. Generally there is no limitation of time for exercising the equitable power of the

court to open or set aside a confessed judgment; but such applications when made after such an unreasonable delay on defendant's part as to make him chargeable with laches are viewed with great disfavor and will not be granted except on very strong grounds, 23 Cyc. 722.

A judgment entered against a married woman on a note which she signed as surety for her husband will be opened because the signing of such a note by the wife not only contravenes public policy but offends against a positive statute. The wife is not estopped from asserting her right to have the judgment opened by the fact that she took no steps to have the judgment opened until four years after its entry." This decision, held in Murray vs. McDonald, 236 Pa. 26, presents the application of the defendant to have judgment opened with sufficiently strong grounds for its opening.

We are of the opinion that the court erred in refusing to open the judgment to take testimony to determine whether the defendant Mrs. Hopewell was a surety.

The assignments of error are sustained and the record is remitted wih the direction that the defendant be permitted to file her defense.

OPINION OF SUPREME COURT

The statute gives to married women, power, generally, to make contracts. It excepts contracts for money, made for accomodation, or as surety, or guarantor. The giving of a warrant of attorney to confess judgment does not preclude the woman's alleging, if judgment is entered on the warrant, that she executed the note as surety, guarantor, or for accomodation, and procuring the opening of the judgment on such allegation, Murray vs. McDonald, 236 Pa. 26.

In this case, judgment was entered on the warrant. That judgment was revived; this latter judgment was also revived. Twelve years after the giving of the note and after two revivals, the application to open is made. We might follow the opinion in Steltzer vs. Beatty, 64 Super. 350, and think that the delay in applying to the court for relief was too great to justify the grant of the relief sought. But, according to Murray vs. McDonald, supra, the ground for opening the judgment is not an alleged equity, the right to urge which is lost by laches, but the fact that the giving of the note contravened public policy, and offended against a positive statute. If this is so, the lapse of twelve years before challenging it should not give a virtual validity to the note. We therefore affirm the judgment of the learned court below.

WAHL'S ESTATE

Bills and Notes—Consideration for Promisory Notes—Notes Given to Children—Revocation by Death—Presumption in Case of Checks—Gift of Check to Children—64 Super. 141 and 192 Pa. 117 Cited.

STATEMENT OF FACTS

Wahl gave to his son, Henry, a note for $1000, payable at his (the maker's) death, negotiable in form, and not under seal, intending it to be instead of a will. Wahl has died. Objection is made by the widow to the payment because there was no consideration. Another son, James, presented a check on a bank in which the deceased kept a deposit, which by its terms was payable at once. It was not presented until ten days after the death of the deceased. The auditor has refused payment on both check and note.

Stickler, for Plaintiff.

Stoner, for Defendant.

OPINION OF THE COURT

P. Smith, J. A promissory note for $1000, was given by the decedent to his son Henry, negotiable in form, and payable at the maker's death. The instrument was not under seal. The writing thus given was presented for allowance as a debt of the decedent. An objection was made thereto by the widow on the ground that there was no consideration. As the paper relied on is not under seal, it is not enforceable against the promisor or his estate unless supported by a valuable consideration: (No such consideration is evident in this case.)

Natural love and affection are not sufficient to support a promise to make a gift. These are a good consideration for an executed contract or gift, and in Pennsylvania a moral obligation is a good consideration for an express promise, but natural love and affection are not moral obligations in such a sense as will support an express promise to make a gift. A consideration founded on mere love and affection is not sufficient to sustain a suit on a bill or note, Daniel on Negotiable Instruments Sec. 179; Byles on Bills page 144.

In Snayberger's Estate, 62 Sup. 390, the facts are almost identical. The appellant was one of nine children to each of whom the decedent gave a negotiable promise in writing to pay $600 six months after the maker's death. The instruments were not under seal. The writing were presented as debts of the decedent. An objection

was made by the widow that payment should not be made on the grounds that they were not under seal, and supported by no valuable consideration. The court held that the notes were voluntary promises merely and revocable at the death of the maker. If the claims had been evidenced by sealed instruments, the situation would have been different for the seals would have implied a sufficient consideration. The doctrine applicable in such cases has been held in Kern's Est., 171 Pa. 55, Luebbe's Est., 178 Pa. 447.

The courts have steadfastly held that the delivery of a promissory note is not an executed gift of the money and is revocable at the death of the maker, before actual payment, 14 American and Eng. Ency. 1030; Commey vs. MacFarland, 97 Pa. 361; Kennedy vs. Ware, 1 Pa. 445; Crawford's Appeal, 61 Pa. 52. In view of the foregoing we are of the opinion that the auditor was justified in refusing payment on the note.

As to the check presented by decedent's son James, and payable at once, we can see no reason for considering this as a gift. The check itself is evidence of indebtedness from the maker to the payee and implies that the maker owes that much money to the payee. In 13 Pa. 176, it was held that a check of itself is not evidence of a debt or loan of money. Prima facia however the presumption is that it is given either in payment of a debt or that cash was given for it at the time, 1 Pa. C. C. 184; 13 Pa. 177. In Wilkinson's Estate, 192 Pa. 117, a check drawn by the husband to the order of his wife was found among the wife's papers a month after both had died. The court held that the check was a valid obligation in favor of the wife's estate against her husband's estate.

The non-payment or delay in presenting the check does not excuse payment. The only effect the laches of the drawee could have, would be damages suffered by the drawee by reason of the delay in presenting the check. We are of the opinion that the auditor erred in refusing payment of the check.

OPINION OF SUPREME COURT

The note was not sealed. To make it binding, a consideration was necessary. None such appears. The burden of showing that there was no consideration is on the party who made the note. But it is shown that there was no consideration. The learned court below has properly decided that payment of the note cannot be enforced. Tissue's Estate, 64 Super. 141, Kern's Estate, 171 Pa. 55.

Another son presents a check on the bank in which the drawer of it had a deposit. That might have been a gift; it might have been payment of a debt previously existent, or arising at the time

of the making of the check. If it was a gift, it would be no more enforceable than would the note. But, if it was in payment of a debt, it would be enforceable. In the absence of evidence as to the reason of the check, may we presume anything, and if so, what?

We do not presume a loan or a gift. We do presume that the check is payment of a debt. Until this presumption is overcome, it must prevail. It is proper, then, to allow payment of the check from the estate, the bank on which it was drawn not having paid it. Cutler's Appeal, 192 Pa. 117; Flemming's Exec. vs. McClain 13 Pa. 177.

The judgment of the learned court below is affirmed.