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NEGLIGENCE and PROXIMATE CAUSE

Some Elementary Observations

There has been noted among students, and even among members of the bar, a lack of lucidity in the expression of the principles of law applicable to liability for negligence. Sometimes the statements of the courts themselves have been confusing, contradictory and ill-considered and have thus been readily misunderstood, misused and misinterpreted.

Much has been written about negligence and legal cause,[1] especially the latter. Criticisms of the rules used to establish negligence and to determine legal cause have been frequent, and perhaps well warranted.[2] Attempts,

[1]See, especially, articles in 25 H. L. R. 103, 223, 303 (Jeremiah Smith); 9 Col. L. R. 16, 136 (Joseph W. Bingham); 40 Am. L. Reg. (n. s.) 80, and 41 Am. L. Reg. (n. s.) 141 (Professor Bohlen); Beven on Negligence (3rd Ed.); 1 Street, Foundations of Legal Liability.

[2]25 H. L. R. 103, 223, 303; 40 Am. L. Reg. (n. s.) 80; see, e. g., Professor Beale, in 9 H. L. R. 80, "Four or five rules have been proposed, discussed, and found inadequate; all of them, in difficult cases, fail even to guide a jury, and no one has prevailed over the others." See also Goode, J., in Lawrence vs. Heidbreder Ice Co., 119 Mo. App. 316, 330 (1906), "Several rules of liability have been prescribed, only to be shattered by novel accidents, thus demonstrating that the mind is unable to conjecture all the harmful results which may flow from a delinquent act and flow from it in such natural sequence that, on a presented case, it can be pronounced the wrongdoer was to blame."

varying in the degree of success attained thereby, have been made to formulate simpler and more comprehensive rules.[3] On the ground that no rule is better than a poor one, it has been urged[4] that all the rules used in determining legal cause be "scrapped," and each case be decided by the jury without the aid of allegedly meaningless definitions.[5]

But the courts always have used, and will continue to use, some principles by which may be solved the vexatious problems of negligence and legal cause. Perhaps, then, it would not be a wasted effort to offer a succinct and concise recapitulation of these principles, which may serve as an elaboration of the statements found in the usual text book, as a digest of the treatment accorded by treatises and encyclopedias, and as an introduction or stepping stone to the lengthy discussions of critics, constructive and destructive.

It must be remembered that in the beginnings of our system of law there was no negligence. The writ of trespass provided the only action ex delicto. If a defendant set in motion some force which, before it came to rest, injured the plaintiff or his property, the latter could recover damages in trespass. A man was absolutely liable for all the immediate consequences of the direct application of force to the person or property of another, and that without regard to the degree of care used, inevitable accident, or the lawfulness of the act.[6]

Gradually this absolute liability was lessened by the discovery that the degree of care used by the defendant was important. It then came to be settled law that a defendant was liable in trespass, i. e. for the immediate consequences

[3]25 H. L. R. 303, 309; 9 Col. L. R. 16, 136.

[4]8 Am. L. Rev. 518-519.

[5]See note 34, infra.

[6]Weaver vs. Ward, Hobart (Eng.), 134 (1616). It was not finally settled in England until 1891 that if defendant was free from negligence or fault he was not liable. See Stanley vs. Powell, (1891) L. R. 1 Q. B. (Eng.) 86 (1891).

of some act of force, only if he had a wrongful intent or if he was at fault. The defendant had a wrongful intent if the act which he intended to do was unlawful or wrongful.[7] If the act which he intended to do was lawful, then he was liable for its immediate consequences only if he was negligent in doing the act.[8]

Until the introduction of the form of action known as trespass on the case, there was no liability for consequential or indirect injurious results. Later, in this form of action, a defendant was held liable if he did a lawful act negligently and indirect or consequential harm to the plaintiff resulted therefrom. Because it was involved more frequently and more prominently in actions on the case than in actions in trespass, negligence came to be treated as a distinct ground of liability as a distinct tort in itself. In reality, it was an ingredient or element of liability in both trespass and trespass on the case, the form of action to be properly employed depending on whether the harmful results were direct and immediate, or indirect and consequential.

To make out a prima facie cause of action against a defendant on the ground of negligence (whatever the form of the action), it is submitted that the plaintiff must produce evidence sufficient to permit the following questions to be

[7]If A is wrongfully beating B's dog, and, as he raises the stick, unintentionally hits C in the eye, he is liable to C. The act which A intended to do, namely, hit the dog, was wrongful; therefore, he intended a wrongful act (though not the specific harm which followed), and in the eyes of the law, had a wrongful intent. See, e. g., Peterson vs. Haffner, 59 Ind. 130 (1877); Corning vs. Corning, 6 N. Y. 97 (1851); Carmichael vs. Dolen, 25 Nebr. 335 (1899).

[8]Brown vs. Kendall, 60 Mass. 292 (1850), where defendant while beating two fighting dogs in an attempt to separate them, a lawful act, struck the plaintiff in the eye with a stick. The court held that since defendant was not doing an unlawful act he had no wrongful intent, and could only be liable for doing a lawful act if he did it negligently. See, in accord, Morris vs. Platt, 32 Conn. 75 (1864); Brown vs. Collins, 53 N. H. 442 (1873).

answered in the affirmative: (1) was the defendant "negligent?" (2) did the plaintiff suffer damage for which the law will give redress? and (3) was the defendant's negligence the "legal" or "proximate"[9] cause of the plaintiff's injury? This is simply applying to cases of negligence the three elements of liability in any tort action, viz., defendant's wrongdoing, plaintiff's legal harm and the connection of the two by legal cause. It is purposed only to deal with the principles which govern the establishment of the first and third elements, assuming that the plaintiff has suffered legal harm.

The first question in determining the defendant's liability is "Was the defendant negligent?" A defendant is liable in a tort action if he has invaded a right or rights of the plaintiff, or in other words, if he has failed to perform the correlative duty which he owed the plaintiff. Everyone has certain "legal" rights, and everyone else is under correlative duties not to invade those rights. So in ascertaining a defendant s liability for negligence, it must be found that plaintiff's rights have been invaded and that defendant has not performed the correlative duty imposed by law upon him. To the laiety, negligence means a failure to use care.[10] Thus a defendant is legally negligent only when the plaintiff had a legal right to care and caution on the part of the defendant and the latter has violated that right to care and caution on the part of the defendant and the latter has violated that right to the plaintiff's damage, or in other words, only when the defendant has failed to perform the duty of care which he owed to the plaintiff. Briefly then, legal negligence is the violation by a defendant

[9]"Proximate" is generally used as a synonym of "legal." The term "proximate cause" is literally a misnomer, because proximate means nearest, and nearness in time or space is not an exclusive test in determining legal cause. See 1 Street, Foundations of Legal Liability, p. 122.

[10]Negligence is lack of due diligence or care,—Webster's Dictionary (1920 Ed.), p. 1446.

of the duty to use care which he owes to the plaintiff. Such expressions as "until the duty to use care arises, a man may be as negligent as he pleases"[11] are confusing. This may be so in a lay sense, but not in a legal sense. A man cannot be legally negligent unless he violates a duty. Therefore, until the duty arises, he cannot be negligent.

This leads us to another question: "When is the defendant under a duty to use care?" Assume that plaintiff is about to cross a crowded street and that defendant is driving an automobile along the same street. Manifestly the plaintiff has the legal right to cross the street without having his arm broken. The defendant also has the legal right to drive the automobile along the street, operating it with one hand and gazing at store windows, if he sees fit. If plaintiff is struck and his arm broken, although both were exercising legal rights, the scales of justice tip in favor of the plaintiff, because defendant ought to have known that, if he drove thus, he would be likely to hit persons crossing the street, a class of persons to which plaintiff belonged. As between the parties, it is just that defendant should suffer, inasmuch as he failed to take steps to avert foreseeable harm. Further, if defendant foresaw in the exercise of his right danger to another, then defendant should use care in the exercise of his right to prevent invasion of the rights of the other. To do so then is his legal duty.

To insure, in some measure, uniformity of decisions on similar facts, the defendant should be held to that degree of care which an ordinary man of reasonable prudence would use in averting the danger which the ordinary man would foresee.[12] The plaintiff should be permitted to feel

[11]E. g., see LeLievre vs. Gould, L. R. (1893) 1 Q. B. (Eng.) 491.

[12]"Instead of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." Tindal, C. J., in Vaughan vs. Menlove, 3 Bingham's New Cases (Eng.), 468 (1837).

that all persons in their conduct will foresee the dangers to him that an ordinary man would foresee and will use toward him to avert those dangers the care of an ordinary man. The plaintiff should not be restricted in the exercise of his rights by the knowledge or fear that each person is bound only to use his own individual judgment and intelligence in foreseeing danger to the plaintiff and in taking care to avoid it.

This, then, brings us to a statement of the principle used in determining when the duty to use care arises. It is well stated in an English case,[13] in substance, thus: Whenever the defendant is by circumstances so placed with regard to the person or property of a determinate person or of a determinate class of persons, that an ordinary, prudent man would foresee, that, unless he used ordinary, reasonable care in his own conduct under those circumstances, he would cause injury to such other person or to members of such class of persons, a duty on the part of the defendant arises to use the ordinary, reasonable care which such a man of ordinary prudence would have used to avoid such danger.[14] The violation of this duty to use care is negli-

In this connection, is it not curious that the law should compel a man to pay damages for failing to use his mental powers in foreseeing harm and in determining due care, and, if his mental powers are inferior, mulct him in damages because he hasn't done what the brain of an ordinary man would dictate? An answer to this is that as between the parties, plaintiff, at least, should not suffer.

[13]Heaven vs. Pender, L. R. (1883) 11 Q. B. D. (Eng.) 503.

[14]See similar language in Hydraulic Works vs. Orr, 83 Pa. 332 (1877); Kay vs. Pa. R. R. Co., 65 Pa. 269 (1870); Wittenberg vs. Seitz, 8 App. Div. (N. Y.) 439.

Negligence is the absence of care according to the circumstances, and must be measured by the apparent danger." Ellis vs. Railroad Co., 138 Pa. 506, 519 (1890).

In this connection, it is important to distinguish between legal duty and moral duty. There is a legal duty to use care toward plaintiff, when defendant should reasonably have foreseen in his conduct danger to plaintiff, unless reasonable care was used in that conduct. Defendant owes plaintiff only a moral duty (and

gence. To state the principle in other words: if under all the circumstances surrounding the defendant, a man of ordinary prudence would have foreseen harm to the plaintiff or to a class of persons to which plaintiff belonged, then defendant is under a duty to the plaintiff to use the care of a man of ordinary prudence to avert such harm. It is seen, then, that the criterion by which negligence (the breach of the duty to the plaintiff to use care) is generally established is the foreseeability of harm of some kind to the person or property of the plaintiff or of a class of persons of which the plaintiff is a member.[15]

is not liable for its non-performance), when he foresees danger to plaintiff from the conduct of a third person, or where plaintiff has been endangered by defendant's non-culpable conduct, i. e., reasonably careful conduct. See Buch vs. Amory Mfg. Co., 69 N. H. 257 (1897); Union Pacific Ry. Co. vs. Cappier, 66 Kans. 649 (1903); Ollet vs. Pa. R. R. Co., 201 Pa. 361 (1902). If defendant elects to perform his moral duty to plaintiff, he is liable if he fails to use due care in so doing, for he can reasonably foresee danger in his own conduct, unless he uses due care. See King vs. R. R. Co., 23 R. I. 583 (1902); Dyche vs. R. R. Co., 79 Miss. 361 (1901).

[15]It must appear that defendant owed plaintiff a duty of care, i. e., there was a reasonable foreseeability of harm to the plaintiff or a class of persons to which plaintiff belongs. "Even if the defendant owes a duty of care to some one else, but does not owe it to the person injured, no action will lie. The duty must be due to the person injured." Mitchell, C. J., in Akers vs. Chicago, etc., R. R. Co., 58 Minn. 540, 544 (1894), and see Morris vs. Brown, 111 N. Y. 318, 326 (1888). The duty to use care toward a class of persons of which plaintiff is a member may be imposed by statute or municipal ordinance. Non-compliance with the statute or ordinance is usually held to be negligence per se. Bott vs. Pratt, 33 Minn. 323 (1885); U. S. Brewing Co. vs. Stottenberg, 211 Ill. 531 (1904); but in the following cases it was held that the violation of an ordinance of such a character is only admissible with other facts as evidence tending to prove negligence; Knupfle vs. Knickerbocker Ice Co., 84 N. Y. 488 (1881); P. & R. R. Co. vs. Ervin, 89 Pa. 71 (1879); Lederman vs. Pa. R. R. Co., 165 Pa. 118 (1895); Ubelman vs. American Ice Co., 209 Pa. 398 (1904); Riegert vs. Thackery, 212 Pa. 86 (1905). Violation of a state statute imposing a duty of care toward a class of persons of

It may be argued that, although negligence is the violation of the duty to use care and the principle just stated determines when the duty to use care arises, there is still vagueness, inasmuch as questions arise as to what constitutes a man of ordinary prudence and what harms would he foresee and what would he do under like circumstances. In using this standard to judge the conduct of the defendant, as negligent or non-negligent, the question of negligence is usually one for the jury. It is, and must be, assumed that the twelve jurors, believing themselves to be men of ordinary prudence, will exercise their judgment as such in any unanimous answer to the above mentioned inquiries.[16] It may then be urged that the standard becomes indefinite and variable. But variableness and indefiniteness due to differences in judgment of jurymen is a necessary evil to which all juridical determinations of disputed fact are subject.

As seen above, there are two questions in the establishing of negligence; would a man of ordinary prudence have foreseen harm to the plaintiff, and, has the defendant failed to use the care of a man of ordinary prudence to avert the harm. In a great many cases, however, it is unnecessary for the jury to ascertain whether under all the circumstances a man of ordinary prudence would have foreseen harm to the plaintiff and thus find that the defendant owed him a duty of care. In such cases the foreseeability of harm is admitted, or so apparent, or identical circumstances and sit-

which plaintiff is a member is negligence per se. Marino vs. Lehmaier, 173 N. Y. 530 (1903); Westervelt vs. Dives, 231 Pa. 548 (1911).

If defendant owed plaintiff no duty of care, he is not liable. See Landell vs. Lybrand, 264 Pa. 406 (1919); Moore vs. Lancaster, 212 Pa. 642 (1915).

[16]Although the jurors will usually judge defendant's conduct by what they would have foreseen and done, it would be improper to instruct them that they might do so. The court should submit to them the standard of the man of ordinary prudence. See Louisville & N. R. R. Co. vs. Gower, 85 Tenn. 465.

uations have arisen so often, the jury each time finding foreseeability of harm by a man of ordinary prudence, that the court will say as a matter of law that the defendant owed a duty of care to the plaintiff. Illustrative are the principles that an occupant of land usually owes no duty of care to trespassers,[17] but does owe a duty of care to an invitee[18] and to persons outside the land[19] to have the premises in a safe condition; the duties on the part of lessors and lessees of real property to use care in the maintenance of the premises toward each other and third persons;[20] the duty of care owed by a manufacturer, vendor or lender of chattels to those not in privity of contract with them;[21] and the duty of care owed by bailees to their bailors.[22] In all these cases, simply upon showing whether or not certain facts or relationships existed, the court can state as a matter of law whether the defendant owed the plaintiff a duty of care. Then the jury must determine whether the duty has been violated, i. e., whether the defendant has used the care a man of ordinary prudence would have used under like circumstances. The determination of negligence in such cases is a mixed question of law and fact.

Again, the court in a given case may, as a matter of law, find that the defendant owed a duty of care to the plaintiff, as above, and also by a standard fixed by law in

[17]E. g., see Mager vs. Hammond, 183 N. Y. 387 (1906); P. & R. R. Co. vs. Spearen, 47 Pa. 300 (1864); Thompson vs. R. R., 218 Pa. 444 (1907); Walsh vs. Railroad, 145 N. Y. 301 (1895); Terletski vs. P. & R. R. Co., 264 Pa. 35 (1919).

[18]Davis vs. Ferris, 53 N. Y. Supp. 571 (1898); Reid vs. Linck, 206 Pa. 109 (1903); Larmore vs. Crown Point Iron Co., 101 N. Y. 391 (1886); Newingham vs. Blair Co., 232 Pa. 511 (1911).

[19]Mintzer vs. Hogg, 192 Pa. 137 (1899).

[20]See 24 Cyc., 1114, et seq.

[21]Thomas vs. Winchester, 6 N. Y. 397 (1852); Elkins vs. McKean, 79 Pa. 493 (1875); see cases cited in 29 Cyc., 479, et seq.

[22]Bailments, 6 Corpus Juris, 1118.

previous like cases determine whether the defendant's conduct amounted to performance of the duty to use care.[23] In such cases, the only real function of the jury is to ascertain the true facts and circumstances, if they are in dispute. The establishing of negligence on those facts is a question of law.

Whether the establishing of negligence is a question of fact, or of law, or of both law and fact, the ultimate criterion is the foreseeability of harm in the abstract to the plaintiff. If this appears as a matter of law or fact, there is a duty to use due care, the violation of which is negligence, whether the defendant's "violating" conduct be compared with and judged by a standard fixed by law or the standard of the man of ordinary prudence.

Having thus determined defendant's negligence, and assuming that plaintiff suffered legal harm, but one question remains. Was the defendant's negligence the legal or proximate cause of the plaintiff's injury? Logicians say that the cause of a given event (the plaintiff's injury) is the sum of all its antecedents,[24] or in other words, that no one antecedent can be singled out as the cause. Laymen may say that a given event has many antecedent causes, or that a given cause may have many subsequent results. But it is the problem of the law to determine whether the negligence of the defendant (or other wrongdoing on his part) is predominating, substantial or effective enough as a cause to be the legal cause of the plaintiff's injury.

To determine the existence of legal causal relation and to define legal cause, many tests and rules have been used. Some of them cannot be universally applied satisfactorily.

[23]"There are cases in which a court can determine that omissions constitute negligence; but, they are exceptional—those in which the precise measure is determinate, the same under all circumstances. When the duty is defined, a failure to perform it is, of course, negligence and may be so declared by the court: Schum vs. Pa. R. R. Co., 107 Pa. 8, and cases there cited." Pa. R. R. Co. vs. Coon, 111 Pa. 430, 440 (1886).

[24]Mill, Logic, (9th Eng. Ed.), 378-383.

Others do not purport to cover all cases. Others do not guarantee justice in all cases. Some of these tests have been rejected by the courts, others destroyed by writers. But the courts continue to use some test, however imperfect it may be. It is therefore interesting and instructive to note briefly the tests which have been used and rejected, those now in accepted use, and those formulated and proposed by able writers.

The test or rule of legal cause which is most frequently quoted is "Lord Bacon's maxim," which, with his accompanying comment, says: "In iure non remota causa, sed proxima, spectatur." "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause; and judgeth acts by that, without looking to any further degree."[25] If taken literally, the maxim is incorrect, for the proximate, in the sense of nearness, is not necessarily the legal cause. Neither contiguity in space nor nearness in time is a legal test of causal relation. The cause nearest in time or space to plaintiff's injury is not necessarily the legal cause thereof. In the true interpretation of the maxim, however, "proximate" has a different meaning. It is used as a synonym of "most efficient producing cause,"[26] or "most predominating cause" in defining legal cause. We have substituted for "legal cause" another term which is just as needful of explanation. Bacon's maxim has been severely criticized and rejected.[27] Certainly it does not convey any very clear idea of legal cause.

[25]Bacon's Maxims of the Law, Regula 1.

[26]Marble vs. Worcester, 4 Gray (Mass.) 395, 406 (1855).

[27]See, e. g., Louisville, etc., Ry. Co. vs. Nitsche, 126 Ind. 229, 238 (1890); Bigelow on Torts (7th Ed.), sec. 98; 1 Street, Foundations of Legal Liability, p. 122.

At an early day[28] there prevailed another test of the existence of causal relation known as the "But for Rule," which affirmed that the defendant's tort is the legal cause of plaintiff's damage if, but for the commission of defendant's tort, the damage would not have happened. This statement in negative form could generally be applied as a test of what is not the cause of an event, for, if the damage would have occurred without defendant's tort, the defendant is not liable. The "but for" requirement is indispensable in determining whether a given antecedent is a cause at all. But finding that defendant's wrongdoing was a cause is not necessarily a determination that it was the legal cause. A given event would not occur but for all of its antecedents, and every antecedent cannot be the legal cause. This test or rule has been universally rejected, and is admittedly inadequate to be used as a guide in all cases to determine legal cause.[29]

There is another alleged rule known as the "Last Human Wrongdoer Rule,"[30] which is, in substance, as fol-

[28]2 Pollock & Maitland, History of the Common Law (2d Ed.), 470.

[29]Gilman vs. Noyes, 57 N. H. 627 (1876), is most frequently cited in connection with the "but for rule." The lower court instructed the jury that "if the plaintiff's sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed by bears, but for the act of the defendant," he was liable. The upper court reversed the judgment below on the ground that the destruction by bears was unforeseeable. Judge Ladd, dissenting, urged that the defendant should be held liable. He seems to have thought the application of the "but for rule" was not unjust, but admitted that the rule could not be universally applied as the sole test for determining legal cause.

[30]In Clifford vs. Atlantic Cotton Mills, 146 Mass. 47 (1888), Mr. Justice Holmes said "the general tendency has been to look no further back than the last wrongdoer." See for an application of the rule, unjust to plaintiff, in Wood vs. Pa. R. R. Co., 177 Pa. 306, 310 (1896). Dr. Wharton is a vigorous advocate of this rule. See Wharton, Negligence (1st Ed.), appendix, bottom paging 823, et seq., also in text, secs. 85-99, and secs. 134-145. Vicars vs. Wilcocks, 8 East (Eng.), 1 (1806), is also frequent authority for the rule.

lows: the legal cause is the last (or nearest) culpable human actor to be found in the chain of antecedents; i. e., the one acting last before, or nearest to, the happening of the damage to the plaintiff. This rule is easy and mechanical in its application. It is only necessary to trace back the links in the chain of antecedents and pick out the wrongful act of a free human agent nearest the plaintiff's damage. The rule is a good one to use in a hurry, but it is hardly discriminating enough to decide liability in all cases, for sometimes the act of the last human wrongdoer is so remote as to have entirely spent its force before the happening of the damage, and, therefore, cannot be the legal cause.[31] At other times a wrongdoer, prior to the last in chronological order, may also be held liable at the election of the plaintiff.[32] If such person's act is held to be a legal cause, it is not because he was the last human wrongdoer. Again, when the damage results from the simultaneous concurrent acts of two independent wrongdoers, neither could escape liability on the ground that he was not the last human wrongdoer.[33]

Continued in February Issue FRED S. REESE

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[31]9 H. L. R. 84-85; B. & O. R. R. Co. vs. School District, 96 Pa. 65 (1880); Laidlaw vs. Sage, 158 N. Y. 73 (1899).

[32]See, e. g., Lane vs. Atlantic Works, 111 Mass. 136 (1872); Wallace vs. P. R. R. Co., 222 Pa. 556 (1909); Williams vs. Koehler Co., 41 App. Div. (N. Y.) 426 (1899).

[33]W. & G. R. R. Co. vs. Hickey, 166 U. S. 521 (1897); Burrell Township vs. Uncapher, 117 Pa. 353 (1887); Sheridan vs. R. R. 36 N. Y. 39 (1867).

MOOT COURT

BRANDT vs. SEMPEL

Assignment of Mortgage—Constructive Trust—Disposition of Personal Estate—Rights of Wife

STATEMENT OF FACTS

Brandt, owning a mortgage of $8,000, assigned it in writing to the defendant, his daughter. Five years later, he prays this bill in Equity to have Sempel declared, a trustee for him, and to compel her to reassign the mortgage. Proof is that the assignment was made with the intention that the assignee should hold the mortgage until requested to reassign it, and that the request has been refused. The defense is that: (1) The assignment was an absolute gift, if not it was made as a result of temporary estrangement of Brandt, from his wife. The plaintiff seeks to have Sempel declared a trustee on the ground that a constructive trust existed.

OPINION OF THE COURT

FORTNEY, J.—This is a bill in Equity to have Sempel declared a trustee for Brandt. The facts are not in dispute.

When Brandt assigned the mortgage to his daughter presumably he made her a gift of the same. A parent may make a gift to his child and it will not be presumed to be invalid unless a confidential relationship existed between them.—42 Pacific 343, 30 L. R. A. 243.

After a lapse of five years he now endeavors to have this assignment declared a trust and his daughter a trustee. The question now is therefore raised whether upon the facts set forth any intent appears to warrant the proceedings on the part of Brandt to compel Sempel to be held as a trustee.

It is plainly evident that this is not the case of an express trust, contained in the instrument or acknowledged by the acts of the trustee. The assignment by Brandt to Sempel carried with it entire ownership leaving in Brandt no apparent legal title or equitable interest. It was evidence of a gift not of a trust reposed in Sempel and accepted by her. This so remained for five years without any assertion of a trust (without) by Sempel, or even a recognition of it by Brandt. Technically continuing trusts and constructive trusts will not be enforced by Equity un-

der the circumstances. Evidence has been offered that the motive for the assignment of this mortgage was a most ignoble one, namely a temporary estrangement from his wife. The Court of Equity is primarily a Court of Conscience functioning on certain maxims among them this one. He who comes into Equity must come with clean hands. It is our opinion that the plaintiff's hands were unclean. When one attempts to hide the title of his property—during a period of temporary estrangement from his wife—in his daughter thereby attempting to defraud the said wife of the property justly due her, Equity will not when the trick has served its purpose search out the property from its hiding place and return it to him on a silver platter in the form of a judicial declaration of a trust in his favor. It will rather like the Judges of old take water and wash its hands in token of its innocense of the terrible thing about to happen.

The Bill is accordingly Dismissed.

The following authorities are cited by the Court: Lyon vs. Marclay—1 Watts 271; Finney vs. Cochran—1 Watts 118; Halsey vs. Tate—52 Pa. 311; Dalzell vs. Lewis—252 Pa. 287.

OPINION OF SUPREME COURT

The mortgage was personalty. It could be assigned orally. It was, however, assigned in writing. It might have been assigned to become the absolute property of the daughter, Sempel. It might have been assigned to be held by her for the benefit of the assignor, Brandt, and to be reassigned on his demand. That this was the purpose manifested to Sempel, and assented to by her, could be proved by parol evidence. It was in fact so proved. It follows that Sempel, refusing to perform the act of reassignment, can be compelled to do so by a Court of Equity unless some obstacle presents itself.

The defense that the mortgage was a gift is refuted by the evidence. That it was assigned otherwise than as a gift is the "proof."

The other defense is that its making was a species of fraud upon Brandt's wife, from whom, for the time, he was estranged. But there is no substance in this charge. A wife has, during the husband's life, no estate in, no lien upon, his personal property. He may waste it is unprofitable and absurd speculation. He may give it outright to others, knowing and intending that his wife shall thus be rendered incapable of ever sharing in it. "It is the settled law of this state," said PAXSON, J., "that a man may do what he pleases with his personal estate during his life. He may even beggar himself and his family [including his wife] if he chooses to commit such an act of folly. When he dies, and then

only, does the right of his wife attach to his personal estate." Lines vs. Lines—142 Pa. 149; Ellmaker vs. Ellmaker—4 W 91; Mandel vs. Bron—113 Atl. Rep., (July 7th, 1921), p. 834.

Brandt did not divest himself of the mortgage. He retained an equitable interest in it, which would have been as useful to his wife as the legal interest. The purpose of the bill is, if an injury was done to the wife by the assignment, to undo the wrong, by enforcing the trust.

We are obliged, then, to come to a result different from that reached by the learned court below. The decree dismissing the bill is reversed, with a procedendo.

BOROUGH OF CARLISLE vs. PHILLIPS

Action for Personal Injuries—Negligence—Liability of Municipal Corporation—Liability of Property Holder

STATEMENT OF FACTS

Ice and snow accumulated on the sidewalk in front of Phillips' home throughout a whole month. X, a pedestrian, in attempting to traverse the pavement, fell and his leg was broken. He sued Carlisle and recovered $600 damages. The borough notified Phillips and allowed him to intervene at the trial. He did not deny the liability of the borough.

In this suit by the borough it contends: (a) That the judgment against it is conclusive of its liability to pay the $600; (b) That Phillips was liable to pedestrians for not cleaning the pavement of ice and snow; (c) That he is bound to pay the $600 to it.

Gallagher for the Plaintiff.

Bloom for Defendant.

OPINION OF THE COURT

GARBER, J.—Phillips, the defendant in the case at bar, allowed snow and ice to accumulate on his sidewalk throughout a whole month. X slipped, fell, and was injured. He sued the Borough of Carlisle and recovered $600 damages. Phillips had intervened in the trial for the protection of his interests. In this case the Borough of Carlisle seeks reimbursement for the damages it has had to pay X under the decree of the court in X vs. Borough of Carlisle.

The case of X vs. Borough of Carlisle concludes Phillips in this action as to the existence of the defect, the liability of the borough to X in consequence thereof, and as to the amount of damages the injury had occasioned. Phillips is not stopped from

showing that he was not under any obligation to keep the sidewalk in a safe condition. Brookville Borough vs. Arthurs—152 Pa. 334; Reading City vs. Reiner—167 Pa. 41.

The able counsel for the defendant advances the legal proposition that an abutting owner is not liable to one injured on a sidewalk from failure to keep the same in repair or free from ice and snow. In support of this proposition cases from a number of States are cited. We are directed to no Pennsylvania cases. In Pennsylvania it is the primary duty of property owners along a street to keep in proper repair the sidewalk in front of their respective properties. Mintzer vs. Hogg—192 Pa. 137; Reading City vs. Reiner—167 Pa. 41. There is also a duty upon a municipality to exercise a reasonable supervision over its sidewalk. Duncan vs. City of Philadelphia—173 Pa. 559; Yohn vs. Phillipsburg Borough—156 Pa. 246. Therefore one who sustains injuries from an accident caused by a defective sidewalk may have two sources of recovery. The first is the owner of the abutting property, who is liable for his neglect to keep the sidewalk in a safe condition. The second is the borough, the liability of which arises from its negligent failure to compel the property owner to keep his sidewalk in repair. Brookville vs. Arthurs—152 Pa. 334.

Phillips was primarily liable to X, because he was negligent in the case of his sidewalk. The Borough of Carlisle was accordingly liable to X because it was negligent in the exercise of its duty of supervision. The Borough of Carlisle has been compelled to pay X $600 damages. Phillips' negligence in the case of his sidewalk was the real or proximate cause of the accident to X. Therefore he must reimburse the Borough of Carlisle. Brookville Borough vs. Arthurs—152 Pa. 334.

Judgment entered for Plaintiff for $600. Reading City vs. Reiner—167 Pa. 41; Pittsburgh vs. Reed—74 Pa. Sup Ct. 44.

OPINION OF THE SUPREME COURT

It was the duty of Phillips to keep his pavement safe for pedestrians. For not doing it, the person injured by his neglect could recover compensation from him.

The borough had also a liability, not exactly like that of Phillips. According to the letter of Lehr vs. Phillipsburg—156 Pa. 246, its duty was not to make the repair, but to "compel the owner" to make it. The accuracy of this may be questioned. We prefer to say that it was the duty of the borough, not to compel the owner to make it, but to make it, after a certain neglect of the owner, with a right to recoupment from him, of the expense.

In this case, the borough did not remove the ice and snow, at a time when it should have done so, and therefore at a time somewhat later than that at which Phillips should have done so. A judgment for $600 has been recovered against it. The propriety of this judgment cannot be contested by Phillips, for he was allowed to participate in the defense. The borough's liability was for not correcting the defect which Phillips should have corrected. It has a right to be indemnified by Phillips for what it has been compelled to pay in reparation of an injury caused by his omission to perform his duty.

The opinion of the learned trial court amply justifies its decision. Pittsburgh vs. Reed—74 Supr. 444.

JUDGMENT AFFIRMED.

TOLAND'S ESTATE

Executor's Sale—Confirmation—Rescission—Orphans' Court

STATEMENT OF FACTS

The executors of Toland have, authorized by Orphans' Court, sold the land to Hammond for $3000. He has paid $750. The sale is reported to the court and confirmed. Hammond fails to pay the rest of the price according to the contract. The executors ask the court to annul its confirmation, and to authorize a resale. The court so orders, but makes no provision for the repayment of the $750. Hammond argues that the sale to him having been rescinded, he is entitled to a return of the $750.

Polisher for the Petitioner.

Wilks—Contra.

OPINION OF THE COURT

SHAPIRO, J.—Petition to vacate and set aside an order of sale and to authorize a resale.

The executors present this petition praying the court to make an order vacating the former confirmation due to the failure of the first purchaser to pay the balance of the purchase price. Hammond, the first purchaser, opposes this petition on the ground that no provision is made as to the return of $750, hand money paid by him; and contends that if the former confirmation is vacated and a resale ordered, it is in effect rescinding the former sale to him and consequently relieving him from all liability. The questions therefore presented for the determination of the court are as follows:

(1) Must the Orphans' Court on vacating and setting aside a confirmation of a sale of real estate and ordering a resale, due to the neglect of the purchaser to pay the balance of the purchase price, decree the return to the said purchaser of the hand money he paid?

(2) Is such an order the equivalent to the rescinding the contract of sale?

Both of these questions must be answered in the negative.

Presupposing for the time being that the sale was one in which the Orphans' Court had no jurisdiction, what would be the effect of Hammond's neglect to pay? If X would enter into a valid and binding contract for the sale of real estate with Hammond, and then Hammond, after paying him some hand money would refuse to pay the balance of the purchase price, could Hammond demand a return of the hand money? Clearly not, until X's loss would have been determined and ascertained.

It is settled that where one has entered into an agreement to purchase land and makes default, the vendor may subsequently sell the property, after proper notice, upon the same or as advantageous terms as of the first sale, and if there is a loss he may recover such a loss from him who made the default under the earlier contract. Brown vs. Cessna—62 Pa. 148; Pepper vs. Deakefne—212 Pa. 181.

The only limitation to the above rule is that the terms of the first sale must not be more advantageous than that of the second sale, nor must it appear that a more valuable title could have been acquired by the purchaser of the first sale than that which passed to the purchaser at the last sale.

There is no difference in effect of a sale made by an executor with the approval of the Orphans' Court, than there is in a sale made by one in his own individual capacity. The sanction of the Orphans' Court gives the purchaser no greater rights, and the vacating of an order of sale and ordering a resale, should not give the purchaser at the first sale rights which he cannot assert against the vendor, when not acting under the supervision of the Orphans' Court.

After the confirmation of the sale and failure on the part of the purchaser to comply with the conditions, the executor had two courses to pursue—either to compel the payment of the balance by an action at law, or to have the confirmation of the sale set aside and proceed to re-sell the property. Having adopted the latter method, as unquestionably he had a right to do, then he has a right to hold the $750 and out of it, reimburse the estate to the amount of damages actually sustained by Hammond's failure to execute the contract. The order of the Orphans' Court did not

have the effect of rescinding the contract and relieving the purchaser from liability for the difference between his bid and the price for which the property might subsequently be sold. Banes vs. Gordon—9 Pa. 428; Ludwig's Estate—74 Super. 250.

It is therefore ordered and decreed that the order ratifying the sale of real estate of the above named decedent to Hammond is hereby vacated and set aside, and it is further ordered and decreed by and is hereby awarded, the executor to hold the $750 so far paid in by Hammond so as to adjust any loss which might occur at the second sale.

OPINION OF SUPREME COURT

Hammond, after paying $750 on his purchase, has failed to complete the payment of the remainder of the $3,000. The Orphans' Court has annulled the confirmation of the sale, thus removing an obstacle to a resale by the executor. The Hammond contract still continues. The executor has the right to resell, and if he does, and for a less price than the $3,000, he will have the right to retain all or some of the $750. He must be allowed to retain that sum in order that the results of a resale may be realized. The learned court below has properly found in Ludwig's Estate—74 Pa. 25 O., authority for its decision.

The appeal is dismissed.

WHIPPLE vs. RAILROAD CO.

Negligence—Proximate Cause—Evidence

STATEMENT OF FACTS

The plaintiff owned land on both sides of a road forty feet wide. On the east of this road was the track of the defendant. On the other side was a field at one point in which was a barn, which was 400 feet from the railroad.

Shortly after a train passed in the afternoon of an August day, a fire was seen at several places in the field, contiguous to the track. This was put out, but immediately thereafter a fire was discovered upon the barn.

Nobody saw sparks from the locomotive. In this suit, for the destruction of the barn, the defendant alleges: (a) Not sufficient evidence that the locomotive caused the fire; (b) The fire in the barn was not the proximate effect.

Scheufele for the Plaintiff.

Smith for the Defendant.

OPINION OF THE COURT

SCHNEE, J.—There was no affirmative evidence that the fire from the field was communicated to the barn. All that appears is that shortly after a train passed, in the afternoon of an August day, a fire was discovered at several places in a field, contiguous to the tracks.

Bearing in mind the short interval of time which elapsed between the passing of the train and the appearances of the fire at several places in the field it is reasonable to presume that the fires in the field, were caused by the passing engine. Henderson et al vs. Phila. Elec. R. R. Co.—144 Pa. 461. So was held that: "In view of the circumstances of the case, the loss by fire, was fairly attributed to sparks from the railroad company's engine or the locomotive."

We cannot therefore sustain the defendant's first objection, viz: That there was not sufficient evidence that the locomotive caused the fire.

The court will now consider objection B of the defendant which is—the fire in the barn was not the proximate effect.

With the proposition that the engine's sparks fired the grass continguous to the tracks, as first presumed, can it not be also presumed that the fire in the barn was communicated by the fires in the grass?

The Supreme Court of the Dickinson School of Law has held that a presumption can be based on a presumption. Just as reasonable and logical as this rule is, yet the courts in Pennsylvania have always held, that a presumption cannot be based on a presumption, but must always be based on a fact, and such presumption should be a reasonable and natural deduction from that fact. Railway vs. Henrice—92 Pa. 431; Welch vs. The R. R. Co. —181 Pa. 461.

Since it can be presumed that, in view of the authorities cited, that sparks from the passing engine, fired the grass contiguous to the track, it can also be presumed that other sparks of the engine, also fell upon the barn, thereby igniting it. However, the plaintiff does not contend this to be the case, and it is not within the province of the court, to find or hold, what the plaintiff has failed to allege.

Instead of contending that the sparks from the engine directly caused the firing of the barn, the plaintiff contends that the engine's sparks first caused fire to the field, and the field in turn, caused fire to the barn, by sparks that came from the field, across the road, to the barn.

In our opinion, this is entirely too remote, and we must hold that the fire in the barn, was not the proximate effect, thus upholding contention B of the defendant.

In conclusion we cite Bartolet vs. McAdoo, Director General of R. R's.—74 Superior 29, a case which is exactly on point with the case at bar.

Judgment for Defendant.

OPINION OF THE SUPREME COURT

Let us suppose that it was clear that sparks from the defendant s engine directly and proximately caused the burning of the plaintiff's barn. The defendant would not be liable unless the escape of the sparks that caused the fire was the result of its negligence. But sparks of any size may have caused the fire; sparks so small that the most improved spark arrester could not have prevented their escape. From the size of the escaping sparks an inference may be drawn as to the quality of the spark arrester, but this case is devoid of all evidence on that subject. So far as we know, the tiniest sparks, passing the best spark arrester, may have caused the fire. Since then the fire may have been caused, with as well as without, a poor spark arrester, we cannot infer that the arrester was unfit.

That the fire was caused by the sparks, we think a jury might legitimately infer. Shortly after the passing of the train, several fires were seen in the field, and on the barn. Such a fire is explicable by the hypothesis that sparks from the locomotive caused it. There was no other supposable cause.

Unnecessary trouble has been taken, with respect to the proximity of the fire on the barn, to the emitted sparks. The evidence is not that a spark from the field caused the barn to burn. Immediately after the putting out of the fires in the field, fire was seen on the barn; but that is not equivalent to saying that the barn fire was caused by a spark not from the engine, but from the field. Many sparks were emitted, several falling on the field at different parts. One or more, may have fallen on the barn. The fact that the discovery of the barn fire was later, by a brief space, than the discovery of the field fire, does not warrant the inference that it was caused later than the field fire; nor if it did, that the spark causing it, emanated from the field, and not the stack.

If we might infer that the barn fire was caused by the field fire, it would not follow that the former was not sufficiently near to the emission of sparks from the engine to make the defendant liable. A fire falls on a door step. The ignited step ignites the near wood. This ignites the remoter and this the still remoter, un-

til the whole building is destroyed. It would be foolish to say that the fire which caused the ignition of the step, did not cause, sufficiently nearly to be compensable, the ignition of the house. Cf. Pa. R. R. vs. Hope, 80 Pa. 373, 24 Dickinson Law Review 18.

Had there been adequate evidence that the escape of the noxious sparks was caused by the defendant's negligence, there should, we think, have been a verdict and a judgment for the plaintiff. In the absence of that evidence, it was proper to enter judgment for the defendant.

AFFIRMED.

JACKSON'S ESTATE

Validity of Marriage—Dower

STATEMENT OF FACTS

John Jackson married in Idaho deserted his wife and came to Pennsylvania. Here he married to Sarah, the claimant. They lived together as husband and wife. Four years after the marriage the legal wife died in Idaho. Jackson and Sarah continued as before to live together, and to recognize each other as husband and wife. Their friends and neighbors regarded them as such. Sarah claims a widow's share of Jackson's estate.

Delesantro for the Plaintiff.

Dively for the Defendant.

OPINION OF THE COURT

DOUGLAS, J.—The question for consideration is, whether after the death of Jackson's wife in Idaho he became married to Sarah?

Prior to the death there could have been no marriage but, because of the well established rule that death of one party to a contract revokes the contract it is possible that there could have been a common law marriage. However, it is well to make obsolete this common law rule in every feasible instance to comply with the intention of the legislature.

They have passed statutes setting forth the necessary requisites for marriage such as, procuring a license, obtaining the consent of the parents and the formalities, so as, there will be conclusive evidence of the marriage. In the case at bar none of these requisites were complied with. Nor it is alleged that words in the present or future tense were used, but they attempt to prove the allegation of marriage wholly upon cohabitation and reputation. There is nothing to indicate an intention of marriage, other than the speaking of each other as husband and wife. To permit the

marriage by cohabitation and reputation is only allowing persons to evade the law as made by the legislature. For instance persons who were refused a license for some reason can live together

So far as can be learned this common law rule is upheld in but two instances that is, to permit a legal conveyance and to avoid illegitimate children. Neither of these exceptions are present.

More than this, it is well founded that cohabitation and reputation was illicit for a period of four years. Upon this the Pennsylvania Courts have numerious times repeated that, "where the relation of a man and woman living together, is illicit in its commencement it is presumed to continue as such until a changed relation is proved; without proof of a subsequent actual marriage it will not be presumed from cohabitation and reputation, of a relation between them which was of illicit origin. 20 C. C. 577; 113 Pa. 208; 131 Pa. 202; 237 Pa. 24; 250 Pa. 78; 266 Pa. 530; 10 Supr. 127; 17 Supr. 546.

Here the case establishes with sufficient certainty that in its inception the relation between Jackson and Sarah was illicit, and that there is not sufficient evidence to presume a subsequent marriage. Nor is there sufficient evidence to satisfy the mind that there was an agreement to form the relation of husband and wife, and that there was not a marriage between the death of the Idaho wife, and to be regarded by friends and neighbors as such.

Since Sarah cannot establish her claim as widow she has no right to participate in the distribution of the estate of decedent.

OPINION OF SUPREME COURT

Jackson's marriage to Sarah was invalid because he had already been married in Idaho, and had not been divorced. But Sarah and he underwent the ceremony of a marriage, and have lived together as man and wife. The legal wife died, and they continued to live together; to recognize each other as man and wife, and to be regarded by friends and neighbors as such.

That the relation was originally illicit is no obstacle to its becoming lawful. The parties intended to be man and wife at a time when they could legally have been such. They virtually contracted, then, to be such. They had the reputation of being such by friends and neighbors.

Harmonizing all dicta and decisions on the subject is not possible. Nor is it necessary. Nor would it be profitable to accomplish it, were it possible.

We prefer the mode of thought indicated in Thewliss' Estate —217 Pa. 307, and Knecht vs. Knecht—261 Pa. 410, and conclude that the evidence is ample to show a contractual purpose to

be husband and wife, after all legal obstacles to the marriage contract had been removed. Hence we think Sarah is entitled to a widow's share in Jackson's estate.

The decree of the learned court below is

REVERSED.

FRAME vs. HAPGOOD

Trespass—Negligence—Master and Servant

STATEMENT OF FACTS

Hapgood's employee ran an automobile of Hapgood at his direction, but after finishing the task set him, decided to go to a point four miles distant, for an object of his own, and in doing so negligently ran into Frame's vehicle, damaging it and Frame himself. This is an action for damages against Hapgood. The evidence left doubtful whether he had consented to the employee's using the automobile for his own purpose.

Surran for the Plaintiff.

Stone for the Defendant.

OPINION OF THE COURT

STEVENS, J.—This is an action for damages brought by one Frame who was injured by reason of the negligent driving of an automobile by an alleged employee of the defendant. It appears from the evidence submitted that the employee, at the time the assault was committed, was engaged in the performance of an act, solely for the employee's own benefit and solely for his own purpose. Whether or not the master, Hapgood, consented to the performance of the act is left doubtful.

That the master is liable for the act of his servant while he is engaged in the masters business, and that the burden of proving the relationship of master and servant is generally upon the party alleging it, consequently upon the plaintiff in this case, can admit of no argument.

Under the particular circumstances of the case at bar, in order for the plaintiff to recover, it is incumbent upon him to show by a fair preponderance of evidence that the true relationship of master and servant was then existing, at the time of the infliction of the injury. The whole question is built around this primary relationship, and we will proceed to consider it.

We think that there can be no presumption that the relationship continued by reason of the fact that some time preceeding the accident there was existing such a relationship. Because I am a servant today is no reason to suppose I will occupy that

position tomorrow, next week, or a year from now. If there is no continuing relationship, and we think there can be no presumption of one, the plaintiff must show that at the time the tortious act was committed, the servant was engaged in the masters business. Scheel vs. Shaw—60 Superior 73; 252 Pa. 451.

Another point relied upon is that if the master consented to the using of the machine, he virtually ratified the acts of the servant and is liable therefor. We think the question of consent is immaterial. Even if he did consent, it amounted to no more than the owner's lending the car.

The weight of authority clearly is in favor of exempting automobile owners from liability for damages caused by a collision due to the negligence of an employee, while the employee is using the machine for a purpose of his own, whether the owner knew that the car was being so used or not. Beatty vs. Firestone Tire and Rubber Co.—263 Pa. 271, and cases therein cited.

In order to hold the owner of an automobile liable for the negligence of his chauffeur, it is incumbent to show by direct or circumstantial evidence not only that the driver was the servant of the defendant, but that he was on the defendant's errand or engaged in his business at the time of the accident. Solomon vs. Commonwealth Trust Co., of Pittsburgh—256 Pa. 55.

The cases on this point are numerous. Lotz vs. Hanlon—217 Pa. 339; Scheel vs. Shaw—Supra; Doran vs. Thomsen—76 N. J. L. 754; Cronecker vs. Hall, N. J. Errors and Appeals—1918, 105 Atl. 213; Eldredge et al vs. Calhoun N. J. Errors and Appears—1920, 112 Atl. 340.

The vicarious responsibility of a master is legally predicated upon the presumed or proved existence of the relationship of master and servant. If the relationship cannot be shown to have existed at the time of the occurrence of the damage complained of, responsibility does not exist and the doctrine of respondeat superior cannot operate.

On the whole we are of the opinion that the plaintiff has failed to show a very material part of his cause. He has failed to make out a case and the verdict must be for the defendant. It is hereby ordered that a verdict be given for the defendant.

OPINION OF SUPREME COURT

The defendant is not liable because the instrument of the injury was his automobile. A might use B's property in inflicting an injury on C, and B would not be liable.

Nor would the owner be liable because he consented to the use of the automobile by X for X's purposes. If he were liable, it would be necessary for the plaintiff to establish this consent.

This he has not done. "The evidence left doubtful whether he had consented to the employee's using the automobile for his own purposes."

Hapgood can be liable only if the chauffeur was acting for him when the negligent act occurred. He had "finished the task set him." He went four miles further for "an object of his own." At this time he had suspended the relation of master and servant, and his act could not, except with gross injustice, be attributed to Hapgood. The doctrine of "respondeat superior" often works great hardship. Nothing justifies it except the consideration that the injury has occurred in the prosecution of the aims and purposes of the principal. It would be a serious perversion of the principle to apply it to cases in which the injury is not an incident in the promotion of the master's aims.

Sheel vs. Shaw—252 Pa. 451, and Beatty vs. Tire and Rubber Co.—263 Pa. 271, and numerous other decisions sufficiently support the decision of the learned court below, and its decision is

AFFIRMED.

SLOAN vs. McCOY

Conditional Sale—Contracts—Suit by Third Party

STATEMENT OF FACTS

McCoy leased certain machinery to X, with the right of becoming owner on the payment of certain installments. He agreed with X that if X made default in payment, Sloan should be notified and have the option of taking X's place. X made default but Sloan was not notified nor permitted to complete X's payments, and to become the owner. Sloan sues in Assumpsit for breach of this contract, and recovers the value of the machinery minus the money still unpaid on the lease, which X had undertaken to pay.

Doehne for the Plaintiff.

Duall for the Defendant.

OPINION OF THE COURT

DOYLE, J.—The Defendant, Appellant in this case, contends that the Court below erred in permitting Sloan to maintain an action in his own name against him, claiming that as Sloan was not a party to the contract, he should not have been permitted to bring the action in his own name.

In support of this contention the Appellant cited Elliot on Contracts, par. 1411, "No one can sue on a contract to which he is not a party."

Our interpretation of the above quotation from Elliott is that it was used by the author mostly to state what the old Common Law used to be in England. For in the very next paragraph (Par. 1412) it is stated by Elliot that at the present time a great majority of the courts in the United States uphold the doctrine "That a third person who is a beneficiary of though not a party to a contract, may maintain an action directly in his own name against the promisor, when such promise between the promisor and promisee is supported by a sufficient consideration and was made for the benefit of such third party."

We think the case before us should be decided according to this doctrine. For there is no doubt in our mind that there existed a valid binding contract between X and McCoy, which was supported by consideration, and that according to the terms of this contract Sloan although not a party to it was nevertheless a beneficiary. For it was specificially agreed that if X should default, then his interest was to pass to Sloan.

It seems a fair and reasonable interpretation of the contract that when X defaulted, his interest in the lease passed to Sloan, and that Sloan ought to be allowed to enforce his rights against McCoy.

The cases cited by the Defendant, in our opinion, do not justify his contention, but on the contrary they all illustrate the principle stated in Paragraph 1412 of Elliot on Contracts; and as before stated we think this doctrine should be applied in the present case. We also consider the case, (Depuy vs. Loamis—74 Pa. Sup. 497), cited by the able attorney for the Plaintiff, to be directly on point and in accord with the principle of law set forth in Par. 1412 of Elliot on Contracts. In Depuy vs. Loamis, supra., it was held that a beneficiary third party to a contract similar to the one in the case at bar, could bring action in his own name.

For the reasons given above the judgment of the learned court below is

AFFIRMED.

OPINION OF THE SUPREME COURT

That only the party to a contract may enforce it against the other party is a general principle. There are well recognized exceptions to it, some of which are enumerated in Adams Kuehn—118 Pa. 76; Edmundson's Estate—259 Pa. 49. A may make a contract that something be done by B for the benefit of C. C is the only person who will be benefitted by the performance. Nevertheless, A has a right to nominal damages because his contract has been broken. Nevertheless, since real and substantial

damages are suffered by C only, they can be sued for and recovered by C. He may enforce a right which he did not purchase, but which A bought for him.

Here the lease of machinery was made to X with right to become the owner upon payment of certain sums of money. But if X made default, Sloan was to have the right to complete the payments, and become the owner. McCoy, ignoring the right of Sloan to become the owner, is retaining the machinery. Sloan may enforce the contract, though not a party to it.

He is enforcing the contract not specifically by replevin, but by a suit for damages. The damages are the value of the machinery less the amount of money that Sloan would have to pay under the contract to perfect his right to it. He has recovered those damages. Depuy vs. Loamis—74 Supr. 497, is sufficient authority.

The judgment of the learned court below is

AFFIRMED.

McKINLEY'S ESTATE

Wills—Bar to Claim

STATEMENT OF FACTS

His will directed that though he had been indebted to some of his children his debts had been paid, and that no child who claimed against his estate on an alleged debt, should share in his estate as legatee. He then directed his estate to be equally divided among the children that refrain from claiming as creditors. His son, John, having a note for $400 of his father's, presented it for payment before the auditor who was making distribution. The note's genuiness being undisputed and no evidence of payment appearing save the testamentary declaration of the decedent payment was allowed. John also claimed along with his three brothers an equal share of the estate. The auditor has allowed his claim. The residue for distribution is $4000. To John is awarded $1000.

Fox for the Plaintiff.

Stevens for the Defendant.

OPINION OF THE COURT

DURNIN, J.—The only question to be decided in this case is: Whether the son of the testator who has claimed and been paid $400 on a note of his father's, can share in the residue of the estate contrary to the provisions of his father's will?

The will was certainly a valid one. Hence it is needless for us to dwell on that phase of the case. By claiming on the note, John was virtually electing to take against the will, since its very provisions directed, that no child who claimed against his estate on an alleged debt should share in his estate as legatee. Unfortunately, John claimed against the estate thereby removing himself from the position of legatee to the class of a creditor. However, his foolishness is not for us to lament.

The testator evidently had no rational motive nor malice toward his son in his so willing. Even if he had had the will would stand due to its clear and unambiguous terms. It is the testator's right and privilege to dispose of his property as he sees fit, so long as he complies with the law. The terms of the will admit the testator had at some time or other been indebted to his children. Such is the case in life with most father and children. But the methods employed in such dealings are usually of a different nature from those of debtor and creditor.

The law as laid down in Friend's Estate—209 Pa. 442; that a provision in a will declaring the forfeiture of a legacy if the legatee contests the validity of the will is valid, and to go further, as held in 5 Dist. Reports 739, Wesco's Appeal—52 Pa. 195; Horner vs. McGaughey—62 Pa. 189, a legacy in a will is presumed to be payment of a debt.

The basic ground for our decision is to be found in Berlin's Estate—74 Superior 455. This is a most recent case and holds: That a provision in a will declaring the forfeiture of a legacy in case the legatee, a child of the testator, shall present a claim against his estate, is valid and does not violate any rule of law or public policy. Such a condition is lawful and one which the testator had a right to annex, in the disposition of his property.

The testator has indicated his belief he has been discharged of all indebtedness. The will was clear and concise on that point and under its terms John can show no title in himself to the legacy he claims.

Judgment for the Defendant.

OPINION OF SUPERIOR COURT

The court below has properly decided that the son, John, has lost the right to claim as legatee by having claimed payment on the $400 note. The $4000 is divisible between the three brothers, each receiving $1,333.33.

The appeal is dismissed.

BOOK REVIEW

Handbook of the Law of Trusts, by George Gleason Bogert, Professor of Law in the Cornell University College of Law. The Hornbook Series. St. Paul, West Publishing Co., 1921 Pp. XIII., 675.

This book has no competitors. There is no other textbook which purports "to give to practitioners and students a compact summary of the fundamental principles of the American law relating to trusteeships." Indeed, in view of its importance, the subject of trusts has been very inadequately treated by text writers.

American law is pervaded on every hand by the idea of relation and of the legal consequences flowing therefrom. The original type of relation was the feudal relation of lord and man. This furnished the analogy for other relations, and suggested the juristic conception of rights, duties, and liabilities arising, not from express undertaking, the terms of any transaction, voluntary wrongdoing or culpable action, but simply and solely as incidents of a relation, and this conception as applied by courts of equity, has resulted in a great category of fiduciary relations, of which trustee and beneficiary is the type.

A text book which treats this relation—the largest and most difficult of equity—with thoroughness and accuracy was much needed, and Professor Bogert's book admirably supplies the need.

Commendable features of the book are: The use which it makes of articles in leading law periodicals; the proportion observed in treating of the history of the law and the law itself; the discussion of the powers and duties of a trustee and of the remedies of the cestui; its treatment of savings bank trust; and its excellent analysis of the nature of the cestui's rights.

The book has some shortcomings due doubtless to its brevity, but its general excellence is such as to render it a necessary part of the office equipment of every lawyer who is called upon to solve questions of law arising out of the relation of trustee and beneficiary.

Cases on the Law of Domestic Relations and Persons, by Edwin H. Woodruff. Baker, Voorhis & Co., 1920.

This compilation of cases, has been made by the recent dean of the College of Law of Cornell University. The book contains 753 pages. Particular attention is limited to the fact that the book is of such a size as will make it practicable to cover its contents in the time usually allotted to the subject. The book is distributed into parts, viz: Marriage, Parent and Child, Infancy, Insanity, Drunkenness, Aliens. Appendix I treats

of common law marriages in the United States, and Appendix II gives the draft of the proposed uniform divorce act. Apropos of this last, it may be questioned why, save for the benefit of lawyers, the effort should be made to unify the law in the several states on so many topics not embraced in those mentioned in the federal constitution. If it is really desirable to have the same law in all the states on negotiable paper, warehouse receipts, divorce, etc., etc., why is not an effort made to enlarge the powers of Congress so as to embrace these topics?

An examination of Prof. Woodruff's book has convinced us of its very great utility. The cases have been well selected, and not a few very instructive notes have been inserted. The book will be found extremely valuable for use in law schools.