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Dog Laws, Old and New

(Continued from June Issue)

The origin of most of the provisions of the uniform dog laws of 1917 and 1921 was traced in the first section of this article[1] and it is now proposed to consider whether they may be unconstitutional in whole or in part.

Section 38 of the Act of 1917 provides that should one or more of its provisions be decided to be unconstitutional, such decision shall not affect the validity of the remaining provisions of the act, it being the intention of the Legislature that the provisions of the act are severable. The last section of the Act of 1921 provides that its provisions shall be severable and that a decision holding any provision unconstitutional shall not affect or impair any of the others, it being the declared legislative intent that the act would have been adopted had any unconstitutional provisions not been included therein.

[1]See 29 Dick. L. Rev. 261.

A like provision found in Sec. 34 of the "Securities Act" of June 14, 1923, P. L. 779, is discussed in Bagley Co., Inc. vs. Cameron, 282 Pa. 84 at page 89 and its effectiveness is conceded unless the unconstitutional portion cannot be severed from the rest of the statute without destroying its "entirety of thought" or unless the statute in its reduced form is no longer a workable piece of legislation.

Section 39 of the Dog Law of 1921 declares that it shall not apply to cities of the first and second class in so far as it provides for the licensing of dogs and the payment of damages for livestock or poultry injured by dogs or for licensed dogs illegally killed; but that these matters in the cities named shall be carried on under the provisions of existing laws.

Section 15 of the Dog Law of 1917 requires that all license fees collected under it shall be turned into the county funds, that all bills incurred under the act shall be paid out of such funds and that excess moneys collected under the act shall be used for other county purposes.

Section 16 of the Dog Law of 1921 requires the State Treasurer to establish a "Dog Fund" into which all moneys collected under that act are to be paid and from which expenditures under the act are to be paid and all such moneys are specifically appropriated to the Department of Agriculture for the purpose of carrying the act into effect. It further provided for the annual transfer of all over $25,000 in the dog fund into the general fund of the State Treasury. An amendment of March 19, 1923, P. L. 16, substitutes, for this annual transfer of surplus funds, a provision making the fund avaidable for indemnities to owners of certain diseased animals and for certain expenses of the Bureau of Animal Industry and for the enforcement of Acts of Assembly charged to said bureau. Both these provisions were further amended by the Act of May 6, 1925, P. L. 532, by making the fund further available for "such other purposes as the General Assembly may from time to

time direct." The second section of this Act of 1925 appropriates $1,500,000 to the Department of Agriculture out of the "Dog Fund" for the two fiscal years commencing June 1, 1925, for the following purposes, to carry the act into effect, not over $45,000, to cover expenses "of any kind or description which may be necessary." For the administration and enforcement of four Acts of Assembly named which provide for the suppression of diseases of animals, to protect milk supplies from contamination, to encourage the breeding of horses, to require the licensing of stallions and jacks, to improve the quality of poultry and eradicating diseases thereof, regulating the manufacture, sale, etc. of biological products for use with domestic animals and of meat and meat-food products, and finally for the development and improvement of the site purchased for the Department of Agriculture for conducing research work with relation to the diseases of animals and poultry and for the erection, equipment and maintenance of buildings and laboratories thereon and to purchase and maintain animals required for experimental purposes, a sum not to exceed $750,000 is appropriated. For indemnities to owners of diseased animals, a sum not to exceed $300,000 is appropriated.

The foregoing naturally suggests two questions. First, is legislation constitutional which leaves the proceeds of dog licenses collected in first and second class cities in the county funds of the counties in which such cities are situated and makes the excess of such funds after the payment of indemnities available for other county purposes, while the proceeds of dog licenses collected elsewhere throughout the state are paid into the State Treasury and such excess moneys collected are used for the variety of state purposes just indicated? Second, are the sums collected from dog licenses, taxes proper or merely license fees, and must legislation on this subject conform to the requirement of Art. IX, Sec. 1 of the State Constitution, which provides that:

> "All taxes shall be uniform upon the **same class** of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

It is universally recognized that the object of a statute requiring one who keeps a dog to procure a license is to have some person responsible for every animal of that kind that is protected by law.[2] The license fee is imposed in the exercise of the police power and it not a tax.[3] Taxes proper to be uniform should be based upon a just valuation of the property taxed. The dog license fee is levied per capita and not ad valorem but is not for this reason objectionable, since the purpose is the restriction and suppression of the dog evil rather than the incidental production of revenue.[4] Even in jurisdictions where it is termed a kind of tax, it is declared not to be of the kind contemplated in a constitutional requirement of uniformity in taxation.[5] In the constitutions of some states dogs are made the subject of taxation by value but even in these jurisdictions the evil may still be regulated by a per capita tax.[6] "In the exercise of the police power the legislation is not hampered by any limitations placed by the Constitution upon the exercise of the taxing power of the legislature."[7] Tiedeman in his exhaustive work on State and Federal Control

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[2]Cooley's Taxation, 4th Ed.. Vol 4, p. 3547, citing Mitchell vs. Williams, 27 Ind. 62; Blair vs. Forehand, 100 Mass. 136; City of Carthage vs. Rhodes, 101 Mo. 175, 9 L. R. A. 352; Morey vs. Brown, 42 N. H. 373; Carter vs. Dow, 16 Wis. 298; Tenney vs. Lenz, 16 Wis. 567.

[3]Litchville vs. Hanson, 19 N. D. 672, 124 N. W. 1119; Robberson vs. Gibson, 62 Okla. 306; 162 Pac. 1120; Hofer vs. Carson, 102 Ore. 545, 203 Pac. 323; STATE VS. ANDERSON, 144 Tenn. 564, 234 S. W. 768, and 19 A, L. R. 180 AND NOTE; State vs. Erwin, 139 Tenn. 341, 200 S. W. 973.

[4]State vs. Doe, 79 Ind. 9, 41 Am. Reps. at page 601.

[5]State vs. City of Topeka, 36 Kas. 76, 12 Pac. 310, 59 Am. Reps. 529.

[6]Woolf vs. Chalker, 31 Conn. 121; Cole vs. Hall, 103 Ill. 30; Van Horn vs. People, 46 Mich. 183, 9 N. W. 246, 41 Am. Reps. 159; Holst vs. Roe. 39 Ohio St. 340; Ex parte Cooper, 3 Tex. App. 489.

[7]State vs. Anderson, supra, and 1 R. C. L. 1128.

of Persons and Property, Vol. 2, Sec. 176, p. 839, quotes at length the interesting account of dog legislation in Massachusetts contained in Blair vs. Forehand, supra. That case declares that, "There is no kind of property over which the exercise of this power (of police regulation) is more frequent or necessary." The Massachusetts statutes underwent much the same development as have the statutes in Pennsylvania, becoming more stringent as the State developed. "These statutes have been administered by the courts according to the fair construction of their terms, and without a doubt of their constitutionality." Tiedeman then says: "And conceding the right of the State to require a license fee for the keeping of a dog, which is intended to operate as a check upon the keeping of dogs, the amount of the license is not open to judicial revision. It cannot be confined by judicial intervention to the mere expense of issuing the license. In order to operate as a restraint upon keeping of dogs, the amount of license must be large enough to make it burdensome to keep dogs, and as has been fully explained in connection with the discussion of licenses in general, the imposition of such licenses, as a restraint upon the doing of something which inflicts or threatens to inflict injury on the public, is free from all constitutional objections."[8]

One of the best illustrations of a charge primarily imposed for the purpose of regulation and therefore not subject to the constitutional limitations upon the taxing power is found in the high liquor licenses required in Pennsylvania until recently. Our Act of 1887 provided different rates for licenses in cities, boroughs and in townships but it was held that it violated no provision either of the Constitution of the United States or of the Constitution of Pennsylvania.[9] Judge McPherson went further and decided specifically that: "Assuming a fee for a liquor license

[8]Quoting at length from Tenny vs. Lenz, 16 Wis. 567, supra.

[9]Gregg's License, 36 Super. 633.

to be a tax—a matter we do not now decide—the legislature may classify for this purpose, and the present classification is valid; Kittaning Coal Co. vs. Com., 79 Pa. 100; Germania Life Ins. Co. vs. Com. 85 Pa. 513." This was said in disposing of the contention that the Act imposed taxes which were not uniform and so violated Art. IX sec. 1 of the Constitution. So likewise, if we should assume a fee for a dog license to be a tax, which it is not, a classification which makes a distinction between dogs in the cities of the first and second classes and dogs in the country and in smaller municipalities rests upon a reasonable basis, since in populous communities the danger to live-stock and poultry is practically nonexistent.[10] Since the Act of June 10, 1881, P. L. 119, the licensing of dogs and the regulation of the dog evil in cities has been delegated to the authorities of the cities, and the legislature may reasonably exercise its police power over dogs elsewhere by direct legislation, while permitting cities of the larger classes to continue to exercise this delegated power, if it be conceived that this is the most effective way to handle the evil. The fact that the danger to be guarded against has relation to local conditions justifies restricting legislation in its operation to certain classes of cities.[11]

In City of Carthage vs. Rhodes, 101 Mo. 175, 14 S. W. 181, 9 L. R. A. 352, Rhodes was fined for keeping a dog without a license. He appealed and contended that the law made him a culprit for owning that which the law recognizes as property and that it was unconstitutional to require him to pay for the privilege. The Missouri constitution required that all property be taxed according to

[10]Kinsely vs. Cotterel, 196 Pa. 614 sustains the constitutionality of the Mercantile License Act of 1899, a revenue measure, though it taxed retailers and wholesalers at different rates and provided different machinery for applying the act in cities and elsewhere in the State. "If the distinctions are genuine, the courts cannot declare the classification void, though they may not consider it on a sound basis. The test is not wisdom but good faith in classification," at p. 631.

[11]Com. vs. Hospital, 198 Pa. 270, at page 274.

its value. On appeal the Court said: "Taxation may be for the purpose of raising revenue, or for the purpose of regulation. Where for the purpose of regulation, it is an exercise of the police power of the State. They are both distinct co-existent powers in the State, and either or both may be exercised through a municipal corporation. In this case, by the terms of the charter, both powers are granted to the City of Carthage as to the dogs of that City. The dog-license tax required by its ordinance is easily referable to the exercise of the police power granted. While, in a sense, dogs are property, and the owner may invoke the aid of the law for their protection as property by civil action, and by statute they have been made the subject of larceny, yet they are a base sort of property, having no market or assessable value, do not enter into the estimate of the appreciable wealth of the State, and never have been considered proper subjects of taxation for revenue. On the other hand, their almost utter worthlessness in a crowded city for any purpose except to please the whim or caprice of their owners, the half savage nature and predatory disposition of so many of them, rendering them destructive of animals of real value, and their liability to the fatal malady of hydrophobia, which in so many instances has sent them abroad as messengers of death to man and beast, point them out as subjects particularly fit for police regulation. The ordinances in question, being an exercise of the police power granted by the State, are not obnoxious to the constitutional provision quoted, which is not a limitation upon the police power, but upon the taxing power, of the State."[12]

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[12]Citing Holst vs. Roe, 39 Ohio St. 340; Van Horn vs. People, 46 Mich. 183; Cole vs. Hall, 103 Ill. 30; Ex parte Cooper, 3 Tex. App. 489; Tenney vs. Lenz, 16 Wis. 566; Blair vs. Forehand, 100 Mass. 136; Mitchell vs. Williams, 27 Ind. 62; Faribault vs. Wilson, 34 Minn. 254. To which the editor adds: Woolf vs. Chalker, 31 Conn. 121; Hendrie vs. Kalthoff, 48 Mich. 306; Morey vs. Brown, 42 N. H. 373; Carter vs. Dow, 16 Wis. 317; People vs. Salem, 20 Mich. 452; and 2 Desty, Taxn. 1040

THE DOG FUND

The Dog Law of 1917 abolished "Dog Funds" and section 15 provided for the payment of claims out of the county funds into which all fees were paid. The Dog Law of 1921, section 16, however, created a state "Dog Fund," of which the State Treasurer was made the custodian. The uses to which this fund is being put under the Acts of 1923 and 1925 have already been mentioned. Does the insertion in the act of a specific appropriation of the moneys derived from its operation to the Department of Agricultrue violate sections, 3, 15 or 16 of article III of the Constitution? All of these questions were raised and fully answered by the Supreme Court in meeting an attack upon similar legislation creating the motor vehicle fund out of the proceeds of automobile licenses.[13] Section 3 requires bills to be confined to one subject, clearly expressed in its title. "The suggestion that provisions in the statute for granting licenses, and for disposing of the money received from the grant, are not germane to each other, seems to us to be without force," said the Supreme Court in this case. At the conclusion of its opinion in the case of Com. vs. Frieberthauser, 263 Pa. 211, at p. 216, the Supreme Court in sustaining the sufficiency of the title of the Dog Law of 1917, said: "As the Act of 1917 requires the payment of license fees, the disposition of such fees follows as a natural and necessary incident to its enforcement; Com. ex rel. vs. Powell, 249 Pa. 144, 152-3." Cases from other jurisdictions to the same effect may be found collected in the note in 24 A. L. R. at page 940.

Sec. 15 requires appropriation bills other than for the ordinary expenses of government, etc., "to be made by separate bills, each embracing but one subject." The motor vehicle fund was made available for the use of the State Highway Department, upon requisition of the

[13]Com. ex rel. Bell vs. Powell, 249 Pa. 144, pp. 152 to 156.

State Highway Commissioner. It was contended that this offended the clause quoted. Said the Court: "There are two answers to this contention, each equally persuasive and both conclusive of the question involved. The first is that the Act of 1913 was a separate bill when it was considered by the legislature and it contains only one subject within the meaning of the organic law as we have already pointed out in this opinion; the second is that this provision of the Constitution was only intended to apply to the biennial appropriations made by the legislature out of the general revenues of the Commonwealth. It has no application to a fund created for a special purpose and dedicated by the act under which such fund is to be created to a particular use. The appropriation of the fund so created continues as long as the act which dedicates it to a particular use remains in force."

Sec. 16 requires not only an appropriation but a warrant drawn by the proper officer in pursuance thereof before any money shall be paid out of the treasury. Sec. 16 of the Dog Law of 1921 provides that all payments from the dog fund shall be made by the State Treasurer upon warrants of the Auditor General upon filing of itemized vouchers by the Secretary of Agriculture. The first section of the Act of March 19, 1923, P. L. 16, amends this by providing that, "The money in the dog fund shall be paid to the use of the Department of Agriculture, in advance, from time to time, as the same is required, upon requisition by the Secretary of Agriculture. The Auditor General shall, upon requisition from time to time, of the Secretary of Agriculture, and the proper accounting for moneys already advanced from the fund draw his warrant upon the State Treasurer for the amount specified in such requisition, not exceeding, however, the amount in such fund available for the purposes herein specified at the time such requisition is made."

The Powell case, (pp. 154-156), decides that the Constitution does not define the duties of the auditor general and state treasurer and that the legislature has the power from time to time to alter those duties, particularly when the restriction upon their powers is confined in its operation to a particular fund over which they had no previous control and which the state treasury holds merely for safe keeping. It also holds that it is no valid objection to the appropriation that no specific amount of money is named, it being sufficient that the maximum is fixed by the amount in the separate fund at the time money is withdrawn. Section 16 "simply means that the public funds are not to be expended in any way except as directed by the law-making power." If the practice of making payments to the departments of the state government upon "advance requisitions" by the heads of those departments is found to be a dangerous practice, it is a matter to be corrected by the legislature rather than by the courts. The 29th section of the Dog Law of 1921 required that the Secretary draw his requisition upon the Auditor General and State Treasurer in favor of each damage claimant. The present practice of payment by the Secretary of Agriculture by his own check from the "advance requisition on the Dog Fund" is authorized by the 5th section of the Act of March 19, 1923, supra. The greater efficiency of this method of handling small claims is the obvious justification for the trust imposed in the Secretary of Agriculture. In any event, it is clear that the dog acts cannot be successfully attacked because of these provisions.

Art. III, section 18 provides that, "No appropriations, except for pensions, or gratuities for military services, shall be made for charitable, education, or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association." The immediate appropriation of the dog fund is to the Department of Agriculture but the Secretary of Agriculture

is required by the act to pay out of the funds received damage claims for live-stock and poultry killed by dogs, for dogs illegally killed, etc. If this is charity or benevolence, it is within the prohibition of this section. In Busser vs. Snyder, 282 Pa. 440, the appropriation to the "old-age assistance commission" was held unconstitutional as an attempt to do indirectly what could not be done directly. The fact that the imposition of dog taxes for the promotion of the sheep industry has been practiced in Pennsylvania for over a century would seem to relieve of the necessity of justification at this late date. However, courts are still dividing on the question, the majority holding that this is a valid exercise of the police power and the dissenting judges claiming that is is a simple case of applying public funds in aid of private industry. The question is exhaustively discussed pro and con in the majority and dissenting opinions in the cases of McGlone vs. Womack, 129 Ky. 274; 17 L. R. A. N. S. 855, 111 S. W. 688 and State vs. Anderson, 144 Tenn. 564, 19 A. L. R. 180, 234 S. W. 768. Perhaps the latest case in point is that of Hofer vs. Carson, 203 Pac. 323, (1922) in which there is a full collection of the cases and such use of the dog fund is sustained as proper.[14]

It has been suggested that the Dog Law of 1921 violates Art. III, sec. 7, of the constitution forbidding local or special laws, regulationg the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding, etc. or exempting property from taxation.

The Act provides a summary method for determining the amount of indemnity to be paid to the owners of ani-

[14]Van Horn vs. People, 46 Mich. 183, 41 Am. Reps. 159, 9 N. W. 246; Longyear vs. Buck, 83 Mich. 236, 10 L. R. A. 43, 47 N. W. 234; Hendrie vs. Kalthoff, 48 Mich. 236, 10 L. R. A. 43, 47 N. W. 234; liams, 27 Ind. 62; Cole vs. Hall, 103 Ill. 30; State vs. Cornnall, 27 Ind. 120; Holst vs. Roe, 39 Ohio St. 340, 48 Am. Rep. 459; Thorpe vs. R. & B. R. Co., 27 Vt. 140. Cole vs. Hall, supra, holds it immaterial what disposition is made of the license fee, when collected; and Longyear vs. Buck, supra, holds that license fees raised in cities may be paid to sheep owners, though there are no sheep killed in cities.

mals killed by dogs and in sec. 29 and its amendment of March 19, 1923, P. L. 16, sec. 5, it is provided that upon payment by the State of such sum, the owner's right against the owner of the dog shall inure to the State to the extent of the indemnity paid. But the Act does not purport to make the conclusions reached by the appraisers a final adjudication of the liability of the dog owner. In fact, both the 26th section of the Dog Law of 1921 and its amendment of 1923, supra, sec. 2, provide that the owner or keeper of the dog shall be liable to the owner of the injured animals **in a civil action,** for all damages and costs, or to the Commonwealth to the extent that it has indemnified the owner of the injured animals. The work of the appraisers is in no sense a judicial proceeding but is a mere administrative measure adopted to insure an honest administration of the State's money. The dog owner has his day in court in the necessary civil action, which must follow to fix his liability and the amount of it. The Act accordingly does not change the practice or jurisdiction of any court.

Does it change the rules of evidence in a judicial proceeding? Sec. 34 provides: "In any proceedings under this act, the burden of proof of the fact, that a dog has been licensed, or has been imported for breeding, trial, or show purposes, or that a dog is under the age of six months, shall be on the owner of such dog. Any dog not bearing a license tag shall prima facie be deemed to be unlicensed."

The Woner Act, Act of May 5, 1921, P. L. 407, provides that the possession of liquor should imply that it was used for beverage purposes. When Com. vs. Alderman, 79 Super. 277, 275 Pa. 483, was in the Superior Court, that court said that the act undoubtedy undertook to change the rules of evidence, "but it is not a special law for it operates upon all of a class and the making of a separate class of those manufacturing, selling and using liquors is justifiable and is well recognized in the law." (p. 283)

"Liquor has been recognized as a special subject of legislation for many years and the provisions that its possession should imply that it was used for beverage purposes does not offend against article III, section 7, of the Constitution." Dogs have been recognized as a special subject for legislation for a longer period than has liquor. Dogs have always been treated as an evil needing control. This view of liquor has been slowly developed. All assignments of error were overruled by the Supreme Court but this specific question was met with the observation that since it did not appear that the defendant had been prejudiced by the statutory rule of evidence attacked, he was not in a position to complain of it. The testimony was not brought up on the appeal but it was agreed that the facts set forth in the charge of the court "should stand as the proved facts in the case." "No one is entitled to be heard on a constitutional point which does not prejudicially affect him in the case under view."[15]

In excluding from its operation cities of the first and second class, is the Dog Act of 1921, a special act exempting property from taxation? That this constitutional prohibition is applicable only to ordinary taxation for the maintenance of government was settled in Pittsburgh vs. Calvary Cem. Asso., 44 Super. 289, at p. 292, followed in Schuylkill Haven Boro. vs. Trinity Church, 62 Super. 413, p. 416. Dog license fees are further removed from taxes of the character mentioned than are assessments for street improvements, liability for which was the subject of the exemption in the cases cited.

An act almost identical in its provisions with our act of 1921 was attacked as unconstitutional in McQueen vs. Kittitas Co., (Wash.) 198 Pac. 394, (1921) but all five of the grounds of attack were held untenable. The exemption of dogs in cities of the first and second class was held to be

[15]275 Pa. 483, Syllabus, Par. 5. See also Com. vs. Amato, 82 Super 149, at p. 153; and Mesta Machine Co. vs. Dunbar Furnace Co. 250 Pa. 472.

valid as based upon a reasonable distinction in a statute whose aim is protection.

JOSEPH P. McKEEHAN

N. B.—The articles appearing in last month's issue entitled, "Recession of the Supernatural in Judicial Investigation," and "Purchasability of Expert Testimony" were written by Dean William Trickett.

MOOT COURT

THROOP VS. X BANK

Assignments for Benefit of Creditors—Actions by Assignees—Set-off by Debtor Against Suit—Rights of Parties at Time of Assignment—120 Pa. 86 and 248 Pa. 148 Approved.

STATEMENT OF FACTS

Atkins had notes equalling $2,000, payable to himself, discounted by the X bank. Before these notes became payable Atkins failed and made an assignment to Throop for the benefit of his creditors. At the time of the assignment Atkins had a deposit in the bank of over $2,000. Throop's demand for this deposit was refused by the bank which claimed that it had a right to retain enough thereof to cover the notes.

Sollway, for Plaintiff.

Uman, for Defendant.

OPINION OF THE COURT

McInroy, J. The question before us is a very practical one. We will first consider the general character of an assignee. Bouvier defines an assignee as "one to whom an assignment is made." He defines assignment as a "transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein." An assignee is said to take the place of the assignor with all the rights and privileges of the assignor.

The counsel for the defendant relies mainly on **In Re Fulton's** Estate, 51 Pa. 204. It was held in this case that, "a judgment debtor having assigned his land for the benefit of creditors, such an estate in land did not pass to the assignee as would continue the lien of judgment for five years after the assignee's death, without regular revival." We do not see that this helps much in settling the case at bar. He further cites Jordan vs. Sharlock, 84 Pa. 366. It was held in this case that, "in a suit by assignees under voluntary assignment for the benefit of creditors, upon note to assignor which did

not fall due until after assignment, the creditor may set off a debt due to him by the assignor at the time of assignment." Here the facts are reversed. The debt is due which is not true in our case.

We will now consider the other side of the question. The general principal as stated in Burril on Assignments, par. 403, appears to be that "a claim acquired after the assignment cannot be set off at the time of the assignment, even if it becomes due before suit is commenced." Now the assignor clearly could have withdrawn his money from the bank at the time of the assignment. Since the assignee takes the place of the assignor, he could recover the money, since the note was not due. This is the very question we have to determine in the case before us.

In Chipman and Hold vs. 9th Nat. Bank, 120 Pa. 86, the facts are practically the same. The court held that, "in an action by an assignee for the benefit of creditors, to recover from a bank a balance to the credit and subject to the check of the assignor at the date of assignment, the bank cannot set off notes or drafts indorsed by and discounted for the assignor but maturing after the assignment." Further search of authorities fails to find where this has been overruled. It was held in Marks' Appeal, 85 Pa. 231, that, "such assignee by virtue of the assignment and as trustee for the creditors, has the right to assert his claim to any property of the assignor which passed by assignment against any person claiming by subsequent transfer, attachment, judgment, execution or any other lien." The following cases cited by the plaintiff do not seem to help us in settling our question: Reading Brick and Shale Co., 228 Pa. 81; Fogarthy vs. Trust Co., 75 Pa. 125; and D. C. Oyster vs. Short, 177 Pa. 589. In Blum Bros. vs. Girard Nat. Bank, 248 Pa. 148, the court said, "Banks who hold deposits of the corporation at the date of the appointment of receivers cannot set off deposits against the amount of notes of the corporation held by them, which were discounted before the appointment of the receivers, but did not mature until afterwards. We further cite for the same proposition: Farmers and Mechanics Bank, 48 Pa. 57; Hatchkiss vs. Roehm, 181 Pa. 65; Sennett vs. Johnson, 9 Pa. 335; Beckwith vs. Union Bank, 9 N. Y. 211.

In view of the foregoing cases and uniform decisions, we direct a verdict for the plaintiff.

OPINION OF SUPREME COURT

When the assignment was made by Atkins, the bank had no debt which it could set off against his claim. His claim, then, passed to his assignee for the benefit of creditors, free from any set-off by the bank. The fact that his debt to it matured subsequently did

not confer on it a right to set off which did not exist at the time of the assignment. It follows that the deposit of over $2,000 in the bank can be recovered by Throop. Cf. Chipman vs. 9th Nat. Bank, 120 Pa. 86; Blum Bros. vs. Girard Nat. Bank, 248 Pa. 148, 156, 157.

The judgment is affirmed.

BURNETT VS. HIGGINSON

Judgments—Opening of Judgments—Married Women as Accomodation Makers of Notes—Women's Primary Obligations.

STATEMENT OF FACTS

Burnett owned a store and grocery which he desired to sell. Mrs. Higginson had a son William, whom she desired to set up in business, and who had no money. She negotiated with Burnett for his business and agreed to pay $1500 for it, paying $500 in cash and giving a note for $1000. As soon as the transfer was made Mrs. Higginson made a bill of sale of the business to her son who paid nothing, and never expected to pay anything. This is the suit on the note for $1000. The defense is that the defendant, a married woman attempted by the transaction to become surety or guarantor for her son, and that the note is void.

Anschelevitz, for Plaintiff.

Beckley, for Defendant.

OPINION OF THE COURT

Bernstein, J. The facts of this case substantially present the question whether Mrs. Higginson executed the promissory note as a surety or guarantor for her son, or as the sole purchaser of the grocery store, thereby making her the principal debtor.

There can be no recovery if the defendant gave the note as a surety or guarantor. The Act of June 8, 1893, P. L. 344 is quite explicit; Sibley vs. Robertson, 212 Pa. 24.

If however, the defendant is the principal debtor, she is liable since the credit was extended to her, 20 C. J. p. 743 (b). As Justice Dean said: "Formerly her (married woman's) capacity to contract was exceptional and her disability general; now the disability is exceptional, and her capacity general."

That the mother is the principal debtor is inexpugnable, for this conclusion is an obvious presumption shown by the facts.

To be a guarantor or surety, the defendant must have promised to pay if another as principal debtor could not or would not pay. What other? Surely the son was not the other for the son was not a party to the note. The son, in fact, was not even a party to the transaction. The plaintiff did not know the son nor that the property was purchased by Mrs. Higginson with the intention of giving it to her son. Since Burnett had no action against the son, the latter was not a principal debtor. The defendant's promise to pay was an original undertaking, all the credit being extended to her. Every indebtedness has a principal debtor, and here it must be Mrs. Higgison, for there was no other. She knew that her son had no property, no credit, and that he did not ever expect to pay anything. She did all the contracting and dealing with Burnett and the fact that the bill of sale was given to her in her name shows that the title to the property was vested in her, the full consideration thereby passing to her. She then made a gift of the grocery store to her son desiring him to be in business, but she could have done with it whatever she so pleased. The defendant did not have to turn over the property to her son. He could not have compelled her to do so, and she could have given it gratutiously to anyone else. It was not of any concern to the plaintiff to know for whom the grocery was bought, 240 Pa. 468, 473; Spott's Estate, 156 Pa. 281. The fact that as soon as the transfer of the business was made to Mrs. Higginson, she immediately made a bill of sale to her son, does impair her legal right to contract or make the undertaking one for her son. There is no law which prevents a married woman from buying a business for her son or even giving him money to use in the business, Scott vs. Bedell, 269 Pa. 167. A married woman can purchase what she will.

Since the proposition was entirely between the plaintiff and the defendant, the latter is prima facie liable. Upon the face of the note she was liable as principal, Gaston vs. White, 67 Super. 483. Where there is a sale to a married woman on her credit on her request accompanied by delivery of the property to her, a prima facie liability is made out, Hagedorn vs. Haber, 65 Super. 179. The promissory note is presumed to be valid and bids the defendant to show that she was a surety or guarantor, not a principal debtor, Farmers & Merchants Bank vs. Donnelly, 247 Pa. 518.

The provision in the Act of 1893, which forbids a married woman from becoming "accomodation indorser, maker, guarantor, or surety for another" applies only to the technical contract of endorsement, guaranty, or suretyship included in the words of the act, Herr vs. Reinoehl, 209 Pa. 483.

The able counsel for the defendant contends that we should look at the substance of the transaction and not to the form. There is nothing to indicate that Burnett was endeavoring to evade the provisions of the statute. That the transaction was a devise to evade the statute has no application to the facts before us, Wynn vs. Duve, 74 Super. 432.

The cases upon which the defendant relies are distinguishable from the case at bar.

If we were to decide in favor of the defendant, it would open the door to fraud. Any married woman could buy merchandise, giving a promissory note for such, immediately turn the personalty over to some friend. The promissee could not sue such 3rd person and the promissor could excuse her liability on the contention that she was a surety or guarantor.

The case of Wynn vs. Duve, 74 Super. 432 contains facts almost analogous to the case at bar and the court held that a married woman who gave notes to purchase the stock of a store which she subsequently turned over to her son is not a surety.

We must therefore render judgment for the plaintiff.

OPINION OF SUPREME COURT

A mother can give by bill of sale or deed, her personal or real property to her son. She may even borrow money for the son (or indeed anybody) by means of a mortgage, and thus risk the ownership of her mortgageable property. Precisely why these powers should be left in her, but not that of becoming "accomodation maker, guarantor, or surety" for him on a promissory note is not as easily discerned as it might be. Why the motherly impulses to help the son in one way should be opposed and thwarted and not in the other, does any one clearly see? It might be better to allow the maternal affection full sway, than to check it by the indiscriminate prohibitions of a body of legislators, among whom is not a single mother.

But, we see here no accomodation act (in, as we conceive the sense of that word in the statute). There is no endorsement, no guaranty, no suretyship, of any sort. A making there is, but it was not at the request of anyone. It was not known to the plaintiff to be intended, by the maker, to accomodate anyone but herself. A law would be intolerable, that allowed money or goods to be procured from one, on a promise to pay a price and made the recovery of the price impossible, when neither word nor circumstance warned the vendor, that his vendee was going to indulge in a maternal generosity toward a son, by a gratuitious transfer of the thing sold. The plain-

tiff knew not the purpose of the buyer, was under no obligation to know. The law should not compel the vendor to make a contribution of the property to the son, in relief of the mother, as it would virtually do, if it annulled the mother's promise (the buyer's promise), to pay the price.

There are some generous instincts in human beings which it would be poor policy to circumvent. It is better that a mother should be allowed to make motherly sacrifices, than to allow her to transfer the loss, if such there is, to one whom she has beguiled into conveying to her the means of benefaction.

The learned court below has reached a sane conclusion, and its judgment is affirmed.

ABBOTT VS. ABBOTT

Trusts and Trustees—Education of Beneficiaries—Reinbursement of Parent for Education—74 Super. 181 and 277 Pa. 165 Cited.

STATEMENT OF FACTS

John Abbott died leaving a son, James, and two grandchildren, children of James, and his wife, Sarah. John Abbott left a large estate and appointed trustees to administer it. They were to use it in securing a good preparatory education and ultimately a college training for the grandchildren. One of the trustees was the testator's son, James. Domestic dissension arose which resulted in his wife, Sarah, obtaining a divorce; "a mensa et thoro," and the two children were taken by the mother, James, discontented with this arrangement, sullenly refused to pay anything toward their education. Their mother paid on account of it, $2500. She is now asking that the trustees be compelled to reimburse her and to provide for the future education of the children.

Frankel, for Plaintiff.

Whitten, for Defendant.

OPINION OF THE COURT

Angle, J. The court is of the opinion that there was an express trust with definite beneficiaries, the grandchildren of the testator. When once a trust has been established, the duty to carry out the provisions of trust attaches immediately to the trustees and they are bound to perform such duties diligently.

It seems that the only reason why the trustee, James Abbott, refused to continue the performance of his trust obligations, was for merely personal feeling against the mother of the beneficiaries, from whom he was divorced, and who was the custodian of the beneficiarises. The court cannot see any reason why mere sullenness on the part of the trustee should be any excuse whatever for a refusal to carry out the testator's desires and therefore is of the same opinion as the court in the case which has been cited by the counsel for the plaintiff, that of Hill vs. Clark in 277 Pa. 165.

The judge said in this case, "the fact that the children were living with the mother and in her custody, did not relieve the trustees of the duty or responsibility to them which they had assumed. Their education was not a matter of grace which the father could furnish or withhold, depending on his feelings to his wife or the custody of the children; it was a matter of right which the trustees were bound to see to and which could not be defeated or frustrated by the individual prejudices or dislikes of either of them."

The facts in the above mentioned case were almost identical with the facts in this case and as the court wisely ordered that the mother be reimbursed for her expenditures, we can see no reason for deciding differently in the present case.

The contention of the defendant that a discretionary power is vested in the trustee by the will of the testator seems to be groundless, as this trust was most certainly express and the trustees were bound absolutely to use the trust property for the education of these children and it made no difference whether they saw fit to use it in this way or not. They had no alternative, but to pay as they were bound to do and as they had obligated themselves to do.

For the foregoing reasons, we decree that the trustees, reimburse Mrs. Abbott for the amount expended by her in the education of the children and further order that the trustees provide for their future education.

OPINION OF SUPREME COURT

The trustees were, by the terms of John Abbott's will, appointed to administer a fund in furnishing a good preparatory, and, finally, a collegiate education to his two grandchildren. One of the trustees, husband of the mother of the children, angered by her obtaining a divorce "a mensa et thoro" has refused to pay anything towards their education. The mother has intervened, and expended money in obtaining this education for them. Is she to be reimbursed from the income of the trust?

We see not why she should not be. She is a natural guardian of the children. She was not obliged to allow their time to be wasted in idleness because the trustees were unwilling to do their duty. That she had been divorced was no justification. That their object was to coerce the mother into surrendering control of the children, is no palliation of their conduct. The mother purposely undertook to provide for their training, trusting to her ability to secure reimbursement from the trustees.

This is not a case in which the trustees "bona fide" selected schools at which the mother opposed the attendance of the children, for no adequate reason. The trustees sullenly refused to pay anything, because, apparently, they had not custody of the children, and could not supersede the influence of the mother by their own. This was no excuse for refusing to make the application of the funds in their hands, to the objects of the grandfather.

No objection to the reasonableness of the selection of schools made by the mother, or of the school charges, appears. In paying these charges, the mother, under a species of moral compulsion, has done what the trustees should have done. It is proper, then, that they reimburse her from the trust fund, and that they be ordered to make provision for the future education of the children.

Hill vs. Clark, 74 Super. 181; and Hill vs. Hill, 277 Pa. 165 are sufficient authority. The decree of the learned court below is approved.

Appeal dismissed.

X VS. JACOB'S ESTATE

Decedents' Estate—Insolvency of Decedent—Proof of Secured Claim Against Estate—Dividend Obtainable After Partial Satisfaction by Sale of Collateral—Interest Allowable.

STATEMENT OF FACTS

Jacobs died insolvent having assets of $20,000 and debts of $40-000. One of his creditors X had received from him certain shares of stock as collateral security for a debt of $2000. After his death he sold this stock, realizing enough thereby to pay the principal of $1500, plus interest on the whole debt to the date of sale. The executor has collected the assets and they are being distributed among the creditors. X claims a dividend on the $2000, plus interest to the date of death, or as much thereof as added to what he has real-

ized by the sale of the security, will equal the $2000, and interest to the date of death.

Groff, for Plaintiff.

Geistwhite, for Defendant.

OPINION OF THE COURT

Frankel, J. The question which comes before this court is whether X, a secured creditor, who held collateral for a $2000 debt, and after decedent debtor's death sold this stock, realizing by the sale $1500 of the principal plus interest on the whole debt, to the date of the sale, can claim a dividend on the $2000 plus interest to the date of death, or is he pro-rated with the other unsecured creditors as to the residue only.

The law is well settled as to unsecured creditors. They take pro-rata a proportionate share of the assets. But what we have to consider here is, the status of the secured creditor, who has parted with his collateral but has not realized the full amount of the debt.

In Gralf's Appeal, 79 Pa. 146, the case was analogous to the one at bar and there the court held that the creditor, having three judgments as collateral, two of which were fully satisfied, and the third one only partially satisfied, could claim a dividend on all three judgments, so that the dividend he received on his three judgments could fully pay his third judgment which was only partially satisfied and that which he received in excess, he held in trust for the assignee.

The law seems to be well settled in Pennsylvania, and the courts of New York, New Hampshire, Connecticut and Illinois hold that one who has a claim against an insolvent estate of a decedent, for which claim he holds collateral security in some form, which has not been paid in whole or in part, may be allowed to prove his whole claim as a debt against the estate on which he will be allowed a dividend, pro-rata with the others not merely on his unpaid residue but on the entire debt, 18 Southern Reporter 43.

In the case at bar X held securities for his $2000 debt and by the sale thereof realized only $1500. Were he to come in pro-rata with the other unsecured creditors surely he would suffer some loss, but being secured by his collaterals, he should be protected to the fullest extent by the law.

Fulton's Estate, 65 Super. 437, has very well settled this same question. Here the exceptant held a note of the decedent's and was allowed a dividend on the full debt. Justice Head says, "But the creditor was entitled to his pro-rata share of that fund based on his debt as it existed at the time of the death of the debtor." In other words no matter what the amount of the residue, a secured creditor

can claim a dividend on the full amount of the debt, upto the death of the debtor, but what he receives in excess he holds in trust for the executor, the courts not allowing unjust enrichment.

The learned counsel for the defense cites Iowa, Alabama and other various foreign decisions. The court is sorry to say but we hold contra.

In view of the above and previous citations and arguments, and of the established law on the point, the court finds for the plaintiff.

OPINION OF SUPREME COURT

Interest is computed on all debts owed by the decedents until the day of his death. On the debts, plus this interest, all creditors are entitled to share in the estate which is administered by the executor, in proportion to these debts and interest.

This is true, though one of them has collateral security, from which he has realized a part of the debt, save that he can get only such dividends as, with the collateral, will equal the debt and interest; interest to the date of the application of the collateral, so far as its proceeds are concerned, and, as to the residue of the claim, interest to the death of the debtor.

The amount on which his share of the decedent's estate in the hands of the executor in computed is not reduced by any payments derived from other sources, provided that when, from both sources, a sum greater than the debt and interest is obtained, the excess must be relinguished to the executor, for distribution among other claimants. See, the Law of Assignments, 208, 209, etc.

The judgment of the learned court below is affirmed.

IN RE BROCK'S ESTATE

Wills—Validity of Provisions Against Contest of Will—Provision for Forfeiture—74 Super. 455 Cited.

STATEMENT OF FACTS

John Brock left to survive him four children. His will said, "To all my children I give equal parts of my estate, except such of them as may allege that I am indebted to them on account of any transaction prior to the making of this will. He or they that so allege receive nothing." One of them, Henry, sued the executor and obtained judgment for $400. The estate amounted to $16,000. The other three children claimed it to the exclusion of Henry. The court awarded the whole to the other three.

D. Smith, for Plaintiff.
Sonnenfeld, for Defendant.

OPINION OF THE COURT

Stoner, J. This case comes to us on appeal from the lower court and the only question raised is whether or not the court was correct in ruling that the entire amount of the estate should go to the three children other than Henry. This question in turn resolves itself into the question whether the condition in the will, excluding any child from taking under the will who should present a claim against the estate, was valid.

The courts in this Commonwealth have always done everything reasonably possible to see that the wishes of the testator are carried out. Accordingly a bequest will not be declared invalid merely because it seems unjust or unreasonable. The reports are full of cases holding the most eccentric bequests valid. As long as there is no fraud or undue influence and the person has testamentary capacity the bequest will be upheld unless it is opposed to the policy of the law.

What is true of a bequest is also true of a condition in the bequest. Within the past year the Supreme Court has twice declared the law concerning conditions in a will. In the very recent case of Baughman's Estate, 281 Pa. 23, (p. 40) the court said, "So long as a devisor or settlor, where no policy of the law is infringed, may do as he please with his own, so long, with like restrictions, he may condition or limit his gift and so long also his conditions or limitations must be carried into effect, unless they transcend that policy, or his purpose has otherwise been fully conserved." In another late case, that of Scott's Estate, 289 Pa. 9, (p. 12), the court held, "The testator had a right to impose such conditions as he saw fit so long as he violated no law, and those who desire to accept the benefits of his bounty should not be heard to complain of the burdens attached to his stipulations."

Since there is no allegation of undue influence or lack of testamentary capacity in the case before us, the solution of the question hinges on whether or not the condition was an infringement of the policy of the law. The learned counsel for the appellant claims it it "against public policy." In support of his contention he cites Dale vs. Dale, 241 Pa. 234, and Horner's Executors vs. McGaughy, 62 Pa. 189. The exact question before the court at present was not involved in these cases, however, as the question which the court decided there was that a bequest in a will to a creditor of the testator did not extinguish the debt.

The appellant also bases his contention on the holding of the court in Chew's Appeal, 45 Pa. 228. The court there held that a condition in a will which divested estates made in favor of children should be construed strictly and that in that particular case the provision was to be considered in terrorem as it merely denounced against disputing the will. It can easily be seen in that case the condition was a condition subsequent and the divesting of an estate would be involved if any disputed the will. In the case before us, however, the condition is one precedent and no divesting is involved. The testator said, "He or they that so allege shall receive nothing." There is nothing ambiguous about the statement. It is a condition precedent to the vesting of the estate and by electing to claim against the estate Henry put himself outside the class to receive under the will and was never vested with an estate. A case in point is Berlin's Estate, 75 Super. 455. There the facts were practically the same as the present case and the court said, "If the intention of the testator be expressed in clear and unambiguous terms, it must stand and be regarded as his will." This case also held that the case reported in 17 N. Y. Super. 316 and cited by the appellant is not the law in Pennsylvania.

Drace vs. Klindist, 275 Pa. 266, is also cited by the appellant. That case held that a condition that the children be faithful to a certain religion was against the poicy of the law, dating back to 1682 when it was declared that all had the freedom of conscience and worship. By no stretch of the imagination, however, can we see how this case is analogous as being opposed to the policy of the law.

What reason the testator had for making such a condition in his will is best known to him and it is not for us to inquire as to his motive. It is frequently the case that loans are made between various members of the family and rarely is there any record of the loan by note or otherwise. Every parent is presumed to know his children better than any one else knows them. It may be that the father in this case was never indebted to any of the children; or he may have been indebted and paid the debt before his death; or at the time of his death he may have been indebted to all in a like amount and made this condition in his will with the thought that it would be the best way of seeing that all received equally. He may have known the tendency of certain of his children to be grasping and made the condition for that reason. Whatever, the father's motive, we find nothing in the condition that is ambiguous or opposed to the policy of the law and the finding of the learned court below allowing the three children to take the exclusion of Henry is hereby affirmed.

OPINION OF SUPREME COURT

The gift of the estate was to such of the children as should abstain from alleging that the testator was indebted to him. Why this limitation we may surmise only. Perhaps he disputed a claim which one or more of them were making. Perhaps he wished such child as was a creditor, to abstain from urging his claim, to the injury of the amicable feeling that ought to exist between brothers. Whatever the reason, the testator has excluded from participation in his estate, such child as should ignore his irenic wish. He had a right to do so. He could have passed by all of them, for no appreciable reason. It is enough that he has made his purpose clear. Henry has alleged that he is a creditor of his father, and has sued the executor, obtaining judgment. Possibly the father, if alive, could have furnished evidence that would have refuted the demand. At all events, the father has confined the devolution of his estate to such children as should abstain from alleging debts of the father to them.

The judgment of the learned court below is affirmed.

JONES VS. HARRITY

Malicious Prosecution—Want of Probable Cause—Acquittal of Criminal Charge as Evidence—Advice of Counsel as Defence—75 Super. 7 Approved.

STATEMENT OF FACTS

Jones entered into an agreement with Harrity whereby Jones was to place a chandelier in Harrity's house for $100. Jones alleges that he was to have the old one; Harrity denies this fact. Some weeks later Jones visited Harrity's house and took the old chandelier. Harrity, indignant, consulted an attorney and told him everything but the dispute. Counsel told Harrity he had a good case of larceny. Jones was prosecuted and acquitted. In the suit of malicious prosecution by Jones vs. Harrity, the court charged the jury to the effect, that the advice of the attorney was no protection to Harrity, unless he fully stated the matter pertaining to the dispute. Judgment for $500 for the plaintiff.

Vaxmonsky, for Plaintiff.

Sonnenfeld, for Defendant.

OPINION OF THE COURT

Shenkman, J. The sole question to be decided is whether the dispute which arose between Harrity and Jones over the old chande-

lier was of such importance that it should have been stated by the defendant to his counsel.

The learned counsel for the plaintiff contends that the dispute was of a material matter; that the defendant in order to make the advice of counsel a defense should have disclosed said dispute to his attorney. He cites the case of Humphreys vs. Neads, 26 Super. 415, which holds that advice of counsel will constitute a defence to an action of malicious prosecution, only where it appears that the prosecutor in good faith, sought, obtained and honestly followed the advice of a competent counsel, on a full and fair statement of all the facts within his knowledge or which he had reason to believe he was able to prove and omitted none which, with reasonable diligence, he could have ascertained. The court is of the opinion that the defendant in the case at bar honestly believed that the facts which he stated to his attorney were full and fair and that the matter pertaining to the dispute was not material, and that it was an extraneous matter, that had arisen between the parties after they had entered into their agreement.

The dispute was of such a nature that it was not capable of being proved. It was one of fact and not a conclusion of law.

The counsel for the plaintiff also cites Alland vs. Phyle, 263 Pa. 254, and Smith vs. Walder, 125 Pa. 254, which holds that the mere fact that a prosecution is instituted upon advice of counsel after a fair statement of the facts, is not conclusive in the absence of malice since it is the innocence of the defendant's conduct and not the advice that rebuts the presumption of malice. Whether advice is a good defence depends upon the good faith with which it is sought and followed, which is a question for the jury. The court is of the opinion that the defendant acted in good faith upon the advice of competent counsel. The counsel for the defense cites 273 Pa. 231, in which the Supreme Court of Pennsylvania laid down the rule that where a prosecutor submits the facts to his attorney, who advises that they are sufficient, and the prosecutor acts thereon in good faith, such advice is a defense to an action of malicious prosecution. Strictly speaking, taking advice of counsel and acting thereon, rebuts the inference of malice arising from want of probable cause. If the advice of an attorney, acted upon in good faith, will rebut malice where there is want of probable cause, the action of malicious prosecution will not lie because malice is inferred from want of probable cause.

Counsel for the plaintiff, argues that the acquittal of the plaintiff is evidence of want of probable cause from which fact the existence of malice can be inferred. This argument is very ably overcome by counsel for the defence in 33 Pa. 501, which holds that a

prosecutor acting in good faith upon the advice of counsel is proof of probable cause. The defendant in this case, acting upon the advice, had the probable cause for bringing the prosecution that eradicates any inference of malice whatsoever.

We are of the opinion that the lower court erred in its charge to the jury when it asserted that advice of counsel was of no protection to the defendant unless he fully stated the matter pertaining to the dispute.

Since we came to the conclusion that the matter pertaining to the dispute was immaterial and was an extraneous fact outside of the agreement, the lower court by so charging the jury created such a doubt in their minds that they were prejudiced and practically gave binding instructions to the jury to find for the plaintiff.

In view of the facts as presented in this case, we after looking into the arguments of the able counsel, reverse the decision of the learned court below and find for the defendant.

OPINION OF SUPREME COURT

The failure of the learned judge to prefix to his opinion an exact statement of the facts, is regrettable. Variation from the statements submitted is not permissible.

The chandelier had been Harrity's, while it was in use in his home. It continued to be his, unless some fact ended his ownership. Jones alleges that it was agreed by Harrity, that as part of his compensation for installing a new chandelier, he, Jones, should have the old one. If this agreement was actually made, Jones was within his right, and Harrity knew that he was, when Jones took the chandelier. At least, the taking of it was not a theft.

Had Harrity, before prosecuting for larceny told the counsel of their agreement, or of the contention of Jones, he would probably have received different advice from his counsel. We do not see how advice procured on an imperfect statement of essential facts, can be any defence against the accusation of instituting a prosecution with malice and without probable cause. Jones was acquitted; that is, he apparently satisfied the jury that he reasonably believed that he had a right to take the old chandelier.

We see no reason for holding that Harrity, by unjustly prosecuting for larceny, did not expose himself to an action for compensation, by the person whom he thus improperly stigmatized, disgraced, and in various ways incommoded. No error is suggested in the estimate of the degree of injury endured by Jones, made by the verdict of the jury. Cf. Herscovitz vs. Linder, 75 Super. 7.

The order of the learned court below entering judgment notwithstanding the verdict, is not approved.

Judgment for the plaintiff, Jones, upon the verdict.