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Undue Influence and Wills in Pennsylvania

"Undue influence exists wherever through weakness, ignorance, dependence or implicit reliance of one on the good faith of another, the latter obtains an ascendency which prevents the former from exercising an unbiased judgment. To affect a will, it must, in a measure at least, destroy free agency, and operate on the mind of the testator at the time of making the will;" by Justice Clark in Herster vs. Herster, 122 Pa. 239, 252; Douglass's Estate 162 Pa. 567, 569; Caven vs. Agnew, 186 Pa. 314, 328. It is frequently referred to as a subjugation of the mind and it exists not only when fraud has been practiced, threats or misrepresentations made, but also when through undue flattery or physical or moral coercion the free agency of the testator is destroyed.

"What constitutes undue influence can never be precisely defined. It must necessarily depend in each case, on the means of coercion or influence possessed by one

party over the other; upon the power, authority or control of the one, the age, sex, the temper, the mental and physical condition and the dependence of the other." 31 Am. St. Reps. 671. Hence it is always important to ascertain the quality and condition of the testator's mind and whether he possessed the power to withstand all direction and control. Public policy demands that he enjoy full liberty and freedom in the making of his will, one of the most important acts in the life of any man. No objective test is possible, for what one may be too weak to resist might be quite harmless and permissible in the case of another. The loss of free agency in fact is the determining factor. (See the charge of Judge Allison in Yardley vs. Cuthbertson, 108 Pa. 395, a leading case).

Accordingly, the circumstances attending the preparation and execution of the will are of the greatest importance. Girard Trust Co. vs. Page, 282 Pa. 174; Warton's Estate, 256 Pa. 201. Was it drawn by the testator himself or his regular counsel or was it drawn by the beneficiary or one procured by the beneficiary and in the absence of anyone to give independent advice, that is, one solely interested in safeguarding the testator from interference with the free exercise of his will? (See Uhler's Estate, 29 D. R. 736.) The rule that no presumption of undue influence arises from a confidential relationship is limited to cases in which the beneficiary did not take any part in making or procuring the making of the will. Yorke's Estate, 185 Pa. 61, 69; Chidester's Estate, 227 Pa. 560; Herster vs. Herster, 122 Pa. 259. 1 Page on Wills 1233. The disposition, opportunity and power to influence may all appear, if the beneficiary invokes the aid of one allied with him to draft the will and, under the guise of advice, in effect dictates its terms. Iddings vs. Iddings, 7 S. & R. 111, 115.

Again, the character of the will as unnatural, in view of the relations existing between the testator and those included or excluded from the will, is always important.

Patterson vs. Patterson, 6 S. & R. 54. Particularly, if the intentions of the testator can be definitely ascertained from the provisions of a recent will executed without outside interference and the later will radically changes the earlier will without a change in the relations to the testator of those affected, the change of purpose has a strong corroborative bearing, when there is some evidence of undue influence. The mere change of mind is not enough when the will is drawn and executed in the absence of the beneficiary and no confidential relation exists between the testator and beneficiary. When the new beneficiary is a returned prodigal son, while the one eliminated has himself become a thief of the property of the testator, a change of the will calls for no further explanation. Slater vs. Slater, 209 Pa. 194.

Declarations of the testator, e. g., showing fear of the beneficiary, while not evidence of the fact of undue influence, may be proven to "show such a state of weakness or vacillation of mind, as rendered the testator an easy victim either of artifice, force or fraud. Such declarations afford most satisfactory evidence, not only of the strength of mind, but often exhibit those peculiar phases of the mind, and of the affections, which especially expose the testator to be overcome by the terror of threats or the seductions of flattery." Thus they may show that there are grounds for apprehending and an opportunity for exercising undue influence. How near to the date of the will such declarations should have been made to be admissible cannot be the subject of any rule. Herster vs. Herster, 122 Pa. 239, 256; Henry's Pa. Trial Ev. Sec. 278; Robinson vs. Robinson, 203 Pa. 425.

The existence of confidential relations between the testator and the person alleged to have exerted the undue influence is always an important fact and when coupled with other facts often shifts the burden of proof. "Whenever one occupying a confidential relation to a testator writes or procures to be written the will of such testator,

and thereunder takes a substantial legacy, and the mental faculties of such testator were at the time of making such will, by reason of great sorrow, advanced age or ill health impaired, although not to the point of lacking testamentary capacity, there is a presumption of fact that undue influence was brought to bear on the mind of the testator in the execution of the will, and the burden is on the beneficiary to rebut this presumption . . . . . Where a confidential relation exists, the party in whom confidence is placed is held to the strictest accountability, and the burden is upon him to show that a transaction between himself and his principal by which he derives a benefit, was fair and conscientious and beyond the reach of suspicion." The Supreme Court commended this as a clear statement of the law in Caven vs. Agnew, 186 Pa. 314, 328. The testatrix was an old maid eighty-nine years of age. Her vision had been impaired by the grippe but aside from a pain in her toe, she was normal at the time she executed her will. The contestant was one who took under a will make over fourteen months before the last will, under which she took nothing. But the evidence indicated that undue influence was exerted in behalf of the contestant, when the original provision was made for her and subsequent events supplied ample explanation for the change. The one charged with the undue influence had taken the precaution, after he had conferred with the testatrix as to the items in her will, to have a servant make a copy of the draft and reputable counsel put it into formal shape. He absented himself when the will was executed and thus qualified the lawyer and the subscribing witnesses to testify as to the apparent comprehension and purposes of the testatrix. The Supreme Court held that the burden of proof as to undue influence was shifted by the fact that under the first will the contestant was a large beneficiary and the confidential adviser was not, while under the later will the positions were reversed. Neither had any claim upon the bounty of the testatrix. The appearances to

those present at the time of the execution of the will were conceded to be far from conclusive. These may be artfully contrived.

On the other hand, though the chief beneficiaries may have sustained very close relations with the testatrix, this fact alone will not shift the burden of proof to them, if it definitely appears that testatrix sought out her own attorney, gave him private instructions and executed the will without the knowledge of the beneficiaries. Chidester's Estate, 227 Pa. 560, 563. Gongaware vs. Donahoe, 255 Pa. 502. Thus, binding instructions to a jury were held proper, when it appeared that testatrix, a strong minded woman of business experience and unimpaired mental faculties, procured the title officer of a trust company to draft her will and the beneficiaries were not only absent when it was drawn and executed but knew nothing of its contents until after testatrix's death. Eble vs. Trust Co., 238 Pa. 585. And the burden of proof is not shifted to a mere employee, though he be named executor and is made a large beneficiary, if he had nothing to do with the making of the will. Douglass' Estate, 162 Pa. 567.

In Miller's Estate, 256 Pa. 315, a physician wrote his patient's will and it named him as executor and residuary legatee. Not long **after** the will was written the testator suffered a stroke of paralysis. The testator was shown to have been mentally alert when the will was written and that he was able to look after ordinary matters even after the stroke. It was held that the burden rested upon the physician to show both testamentary capacity and the absence of undue influence. The general rule was stated to be that the mere fact that one occupying a confidential relationship is a legatee of a substantial part of the estate will not in itself shift the burden of proof but if it also appears that our having undoubted testamentary capacity is so weak physically or mentally as to be susceptible to undue influence, then the burden is shifted to the proponent to show that no improper influence was exerted. It was

said to be the trial court's duty "to consider all the circumstances entering into the life of the deceased at or about the time of the acts complained of as they relate to the duties of and association with his physician . . . . . The patient is unconsciously subjected to a feeling of dependency on his physician; his reluctance to make any change, and his desire to cause the doctor to exert extraordinary effort in his behalf, may be seized upon by one whose professional honor is at low ebb, to create a condition of undue influence to effect a testamentary disposition of property . . . . . The mere denial of the physician is not enough." The burden of proof was cast upon this physician, not so much because of the weakness of the testator but because of the rule that, "where a will is drawn in favor of one occupying a confidential relation, who either writes it, or procures it to be written, or whose advice is sought and taken, the burden rests on such beneficiary to disprove undue influence. Especially is this so, where the testator, though possessing testamentary capacity, is of weak mind; Boyd vs. Boyd, 66 Pa. 283; Cuthbertson's Ap., 97 Pa. 163; Arl mor's Estate, 154 Pa. 517; Wilson vs. Mitchell, 101 Pa. 495." Douglass's Estate, 162 Pa. 567; Walton's Estate, 194 Pa. 529, 533.

In Phillips' Estate, 244 Pa. 35, a leading case, it was held to have been proper to dismiss the petition for an issue. One in a confidential relation was named residuary legatee and executor but testatrix managed her own business affairs and was above the average in her knowledge of affairs and business. A lawyer of high standing drew the will. Testatrix spent the greater part of a day with him and without memoranda gave directions for eighty-nine bequests. She insisted upon certain provisions against the advice of her lawyer. The residuary legatee was not present when the residuary clause was dictated and he knew nothing of the provision, though he happened to be present when the will was executed. The case is not one of an extraordinary strong mentality, proven and

conceded, dictating a will to her own lawyer and a will the very character of which made it apparent that she was her own master. Small bequests, dear to the heart of a testatrix for reasons all her own, are apt to be ruthlessly eliminated when the cupidity of a stronger will becomes dominant, and the presence or absence of such provisions in a will is a significant fact.

So too, while the mere fact that a stranger to the blood actively participated in the preparation and execution of a will largely benefiting him places upon him the burden of proof; a near relative, who is not found to have sustained any confidential relationship to the testator, does not incur this burden, particularly if the testator lives for many years and keeps the will in his personal possession unaltered. White's Estate, 262 Pa. 356, 360. Lawrence's Estate, 286 Pa. 58; Ahlberg vs. Gurley, 284 Pa. 491. So a husband may write his wife's will, in which he is the sole beneficiary, without having cast upon him the burden of disproving undue influence. Spence's Estate, 258 Pa. 542.

NEAR RELATIONS

A father may repose such trust and confidence in his own son as to bring even a son within the class of those who must assume the burden of disproving undue influence. In Miller vs. Miller, 179 Pa. 645 and 187 Pa. 572, they lived together in the same house. The son was his father's helper in his physical infirmities as well as his adviser in his business affairs. The rule was accordingly applied that, "where a testator, although possessed of testamentary capacity, is aged, infirm bodily, with mental faculties impaired, if a confidential adviser be largely a beneficiary under the will, there is a presumption of fact that undue influence was brought to bear on the mind of the testator, and the burden is upon him to rebut the presumption." The son was not present when the will was executed. The court below treated this as most conclusive evidence in favor of the will. But the Supreme Court declared that

"this fact of itself has no such significance." The court below committed the common error of weighing the evidence and trying to determine the truth of the matter, as if he were a juror. It was held that his function was limited to determining whether there was a substantial dispute. To credit and discredit witnesses is peculiarly and exclusively the province of the jury, and an issue was accordingly awarded. But see Tetlow's Estate, 269 Pa. 486, 494.

In Robinson vs. Robinson, 203 Pa. 400, 440, a will was set aside for the undue influence of a favorite son upon his mother. The opinion contains an extended review of the cases.

Large transfers by the decedent in his lifetime to the one charged with undue influence may be shown, as bearing upon the relations existing between the parties and as tending to show the power of the donee over the donor generally. Herster vs. Herster, 116 Pa. 612, 627.

Where a collateral relative comes to live with testatrix within the last year of her life, becomes her companion and immediately assumes the control of the house and servants—takes charge of her money and claims it as a gift and has a will written by her own lawyer in her favor, the burden is upon the proponent to satisfy a jury that the testatrix fully understood the nature of her act, and that it was the result of her own purpose and not that of her confidential adviser and that testatrix had independent advice. Scattergood vs. Kirk, 192 Pa. 263. "Where the party to be benefited by the will has a controlling agency in procuring its formal execution, it is universally regarded as a very suspicious circumstance, and one requiring the fullest explanation." Id. at p. 267.

When the facts of a case disclose both confidential relationship and activity in having the will drawn for a testator enfeebled in mind, the burden of proof is imposed on one whose interest might otherwise be deemed too small to raise a suspicion. For example one named only as

executor and trustee must prove "deliberation, volition and understanding" on the part of the maker of the will, if the circumstances are as stated. Adams' Estate, 220 Pa. 531. "In no case has the court undertaken to exactly define the character of benefit or the extent of interest the confidential adviser must receive in order to shift the burden of proof, and indeed, it may be said no hard and fast rule can be laid down." Of course, the greater the benefit received, the clearer should be the proof demanded of the proponent. This case approved the doctrine of Boyd vs. Boyd, 66 Pa. 283, that an issue must be awarded, if the contestant shows conditions which shift the onus to the proponent. In Wilson's App., 99 Pa. 545, a similar case, the facts which the proponent is bound to prove affirmatively are said to be, (a) all the curcumstances connected with the drawing of the will, (b) no misapprehension of the value of her property and the amount given to the confidential adviser, (c) that the gift was the **free,** intelligent act of the testatrix.

CIRCUMSTANCES AFTER EXECUTION

After a will is executed it is relevant to consider who was its custodian. If it is in the personal possession of the testator and he does nothing to cancel it for a considerable period, this suggests satisfaction with its provisions, particularly, if he is in good health and free from the influence of the one under suspicion; (Warton's Estate, 256 Pa. 201) but if the will is kept by the latter or one identified with him and his power of control over the testator is continuous from the date of the will to the date of the death, no such inference is justified. And if, in addition to physical control of the instrument, efforts are apparent to prevent the testator from seeing other confidential advisors or possible beneficiaries, this conduct of a principal beneficiary under the will may amount to a tacit admission of guilt. Hence the frequent reference in the cases to what was done with the will after its execution, the period

that elapsed after this date until the time of death and the physical and mental condition of the testator during this period. See Phillips' Estate, supra; Kelsler vs. Hugus, 271 Pa. 513, 517. Of course repeated republication of a will is strong evidence of satisfaction with its contents. Kelsler vs. Hugus. Evidence that others are excluded from the presence of a testator who was under the physical control of the beneficiary has been held to be enough in itself to raise a presumption of undue influence. Chappell vs. Trent, 19 S. E. 314.

The mere existence of a confidential relation between the testator and a substantial beneficiary under his will may place the burden on the latter to show that no improper influences controlled the making of the will but this is true only when there has been proof of extreme infirmity or mental weakness. Lawrence's Estate, 286 Pa. 58; Buechley's Estate, 278 Pa. 277; Gongaware vs. Donahoo, 255 Pa. 502; Phillips' Estate, 244 Pa. 44. Of course, if the beneficiary is also shown to have participated in the preparation of the will, no such exacting condition of extreme weakness is required to shift the burden of proof.

THE CONFIDENTIAL RELATION

The confidential relationship which has such an important bearing upon the burden of proof is not confined to any specific associations. It embraces all persons associated by any relation of trust and confidence. It means merely that the testator has regularly taken the beneficiary into his confidence in his intimate personal affairs, so that his confidant might have had the opportunity to improperly influence him in the making of his will. He need not have been his attorney either in fact or at law. Miller vs. Miller, 187 Pa. 572, 591. One acting as caretaker of an old, infirm person may fall within the rules. Scattergood vs. Kirk, 192 Pa. 263.

Of course, proof that his advice was in fact sought and taken in the very matter of the will and particularly at the very time the will was drawn and executed establishes the relationship in the clearest manner.

The mental weakness which creates that susceptibility to undue influence which must sometime appear to shift the burden of proof is often due to Bright's disease. "This disease in its progress tends to weaken and impair the mental faculties and physical action and to break down the nervous system, and causes a degeneration and hardening of the arteries." Allen vs. Allen, 64 Atl. 1110. It reduces the activity of the mind and renders one more susceptable to undue influence. Becker vs. Becker, 238 Mass. 362. Uhler's Estate, 29 D. R. 736.

THE SOURCE OF THE ESTATE

Husbands frequently leave their entire estates to their wives. When the wife in turn disposes of an estate so derived, she is apt to seek to carry out her deceased husband's wishes or such understanding as they may have had. Accordingly, if it appears that the will in question was made to carry out his wishes, this fact strongly rebuts the idea of undue influence. Gongaware vs. Donahue, 255 Pa. 502. On the other hand, the fact that a will shows a disregard of such wishes, particularly if it shows an abandonment of an intention to regard them, evidenced by an earlier will, may reasonably create a suspicion of undue influence by the new beneficiary.

CHARACTER OF PROOF REQUIRED

Where it is shown that the testator had "a strong and free mind, nothing short of direct, clear and convincing proof of fraud or coercion will prevail." Eble vs. Trust Co., 238 Pa. 585; Phillips' Estate, 244 Pa. 35.

But, "it is perhaps well to say that undue influence may be exercised secretly as well as openly, and this is

especially possible where a confidential relation exists between the principal devisee and the testator and they dwell together in the same house. In such cases it is not easy to make out an allegation of undue influence by proof which is direct or positive, nor is it necessary to do so." Herster vs. Herster, 116 Pa. 612; Miller vs. Miller, 179 Pa. 645, 652; Yardley vs. Cuthbertson, 108 Pa. 395; Boyd vs. Boyd, 66 Pa. 283; Reichenbach vs. Ruddach, 127 Pa. 564. If a stranger to the blood be the scrivener of the will and a substantial beneficiary thereunder, direct proof of influence exerted at the time the will is drawn is not required. General evidence of the power exercised over the testator is enough to raise a presumption, especially when his mind is weakened by age or bodily infirmity. Boyd vs. Boyd, supra.

So also weakness of mind short of testamentary incapacity, as a basis for the exercise of undue influence by another, may be shown by any lawful evidence, direct or indirect, tending to establish the fact. Robinson vs. Robinson, 203 Pa. 400.

AWARDING AN ISSUE

In Cross' Estate, 278 Pa. 170, the Chief Justice laid down seven rules relating to issues of fact in will cases and appeals therefrom. He had previously reiterated what has been stated in many cases: "An issue is a matter of right where a material question of fact is in substantial dispute. When upon a review of all the proofs a verdict against the will could be properly sustained by a trial judge, an issue should be awarded, even though the judge should feel that, were he sitting as a juror, he would not draw the inference or reach the conclusions contended for by the contestants." Phillips' Estate, 244 Pa. 35. The refusal of an issue in such cases is ground for reversal on appeal. If the issue is awarded in such cases and judgment is entered on the verdict, so long as the judgment stands undisturbed, the orphans' court is

bound by the jury's findings. But if the orphans' court exercises its rights to send an issue to the cómmon pleas of its own violition, when the evidence was not of the probative value which would have required it to do so, but because it desires advice as to some fact, while it is not bound by the verdict, if, after judgment on the verdict, not appealed from, it adopts the jury's findings, these findings cannot be attacked on appeal. One must appeal within six months from a judgment on a verdict which the orphans' court must accept but when the judgment is advisory only, the six-months period runs only from the date of the final decree in the orphans' court. The appeal in the latter type of cases should be both to the decree of the orphans' court and the judgment of the common pleas.

In Tetlow's Estate, 269 Pa. 486, 494, the Chief Justice discusses at length the duty of the trial court, in deciding whether he will permit the case to go to the jury after the whole evidence is in. He should not do so, if he is satisfied that he would have to set aside the verdict, if it should be against the validity of the will, otherwise he should submit the case to the jury.

The elaborate opinions in the three cases last mentioned are all by the present Chief Justice and they have gone far toward clarifying the law on a subject on which the law has not been clear and for this service the profession owes him a debt of gratitude.

JOSEPH P. McKEEHAN.

MOOT COURT

RYAN VS. INSURANCE CO.

Insurance—Automobiles—Accident—Recovery vs. Plaintiff—Indemnity

STATEMENT OF FACTS

The plaintiff sues upon the defendant's policy of insurance indemnifying him against liability for injuries accidentally suffered by any one through the maintenance or use of his automobile. While driving carelessly on a public highway, another machine negligently swerved directly into the path of Ryan's machine. In order to minimize the effects of hitting this machine, Ryan swerved to the right and injured a bystander who has recovered against Ryan for his injuries. Ryan seeks to recover this amount.

Dougherty, for Plaintiff.

Fox, for Defendant

OPINION OF THE COURT

P. Johnston, J. If the circumstances of the case fall within the terms of the policy of insurance and if Ryan complied with the requirements of the policy, he is entitled to recover the amount sued for.

The court is of the opinion that the injuries were accidentally suffered by the bystander. In Pennsylvania, "accident" is construed in a very liberal sense; in Hey vs. Liability Co., 181 Pa. 220, an accident was defined as an unusual or unexpected result attending operation or performance of a usual or necessary act or event; and in McCarty vs. New York & Erie R. R. Co., 30 Pa. 251, it was said: "Accident, and its synonyms casualty and misfortune, may proceed or result from negligence or other cause known, or unknown."

The defendant contends that notice of the accident and the right of the Insurance Co., to defend in an action against insured,

may be assumed because most policies contain provisions to that effect. While it is true that many policies so provide, no evidence has been produced showing that the policy in question contained any provisions or stipulations, and from this fact we will assume that there was no stipulation in the policy, exempting the Insurance Co., if insured was negligent, requiring that notice and proof of loss be given within certain time, nor relating to the right of the Co., to defend in an action against the insured. An insurance contract must be construed favorably to the insured, and all doubts resolved in his favor; Norlund vs. Reliance Life Ins. Co., 282 Pa. 389; and Hillman Transportation Co. vs. Home Ins. Co., 268 Pa. 547. Therefore, admitting that Ryan was negligent, although the facts show that he is not so chargeable, his negligence will not affect the liability of the insurer, nor bar his recovery; Beihl vs. General Accident Assurance Co., 38 Super. 110. Also the insured or claimant under the policy need not give the Insurance Co. notice or proofs of loss, unless so required by statute or stipulation in the policy; 33 C. J. 7. While the statutes of Pennsylvania require that policies of fire insurance, and policies which insure aganst loss from sickness or accident to insured, shall contain provisions as to notice and proof of loss within specified time, the Act of May 17, 1921, P. L. 682 specifically states that these requirements shall not apply to or affect any policy of liability insurance.

It is true that the Insurance Co. had a right to defend in the action against Ryan, but their policy does not show any clause which prohibits Ryan from defending an action brought against him. Neither is there any clause prohibiting an action on the policy before payment of judgment, so plaintiff's cause of action is complete when liability for loss attaches; the amount due being fixed by the judgment against the insured; Feutress vs. Rutledge, 125 S. E. 668.

The injured person has recovered against Ryan for accidental injuries, thus constituting a liability for which defendant Co. agreed to indemnify. In view of the fact that no proof has been shown that Ryan failed to perform his part of the insurance contract, but on the other hand has complied with its requirements, judgment is entered for him in the amount of the judgment against him.

OPINION OF SUPREME COURT

The opinion of the learned court below, in a concise and lucid manner, has correctly disposed of the present case. In addition to the cited cases is Messersmith vs. Amer. Fidelity Co., 232 N. Y.

161; 133 N. E. 432 in which may be found an adequate exposition of the law arising on facts somewhat analogous to our own.

The judgment of the learned court below is affirmed.

ARNOLD VS. N. Y. SURETY CO.

Bond—Bonding Contract—Waiver of Notice—Parol Evidence—Statute of Frauds—Consideration

STATEMENT OF FACTS

The Surety Company gave a bond for Jones concerning the construction of a hospital. The bond was conditioned on the completion of it within a year according to specifications. It provided for written notices for any default by Jones. When sued for certain defaults, its defense is lack of written notices. Arnold attempted to show oral waivers of this condition, but the court held that since the contract fell within the Statute of Frauds, there could be no parol evidence of a waiver of condition.

Hubley, for Plaintiff.

Lavery, for Defendant.

OPINION OF THE COURT

Rahn, J. The question is whether there can be an oral waiver of a condition in a bond. It is stated in 9 C. J. 74, Sec. 128, that "performance of the conditions of a bond may be waived by the obligee, but it has been held that the conditions of a bond can not be released or waived by a parol executory agreement." Although there are no Penna. cases cited under this principle it applies directly to the case under consideration.

In 13 C. J. 595, Sec. 612, it is stated that "a new agreement to discharge the old must be in the same form or at least in as high a form as the old, and hence a sealed executory agreement cannot be modified or discharged by a parol agreement or understanding." This rule is the common law rule and is also followed rather extensively in the U. S. Both counsels have cited this rule to support their respective contentions but the counsel for the defendant has failed to note that it is expressly stated that this rule is not followed in Penna. The case of the Tobyhanna Creek Ice Co., 240 Pa. 61,

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(1913), is about the only case decided in later years supporting the above contention.

In 22 C. J. 1097, Sec. 1455, it is stated, "the execution of a bond merges all prior agreements or understandings with reference to the subject matter, and the instrument is not subject to be waived or contradicted as to either its terms or conditions by parol or extrinsic evidence." The case of Lowry vs. Roy, 238 Pa. 9, (1913), somewhat analogous to the case at bar, comes under this rule. In that case the court said, "the parol agreement was inadmissible when it was inconsistent with the written contract." In the recent case of Halcomb and Hoke Mfg. Co. vs. Gamba, 80 Super. 191, (1922), the court said, "when a contract contains a stipulation against agreements or representations not contained therein, evidence of parol agreements are not admissible." The case of Sullivan vs. Embrick, 86 Super. 195, (1922), states a principle similar to Halcomb and Hoke Mfg. Co. vs. Gamba. Both of these very recent cases make reference to and adhere to the rule of Lowry vs. Roy, which has been cited by the defendant in support of his contention.

An examination of the facts in the case at bar reveals clearly that the terms of the bond required written notice of any defaults by Jones. This bond was a contract between the parties and as such was a meeting of and an expression of their minds. It was intended and so stated by the terms of the bond that notices of default were to be given by written notice and not orally. Allowing the bond to speak for itself there can be but one plausible conclusion—that notices of defaults by Jones had to be written and since such was the unmistakable intention of the parties they must follow it and no subsequent oral agreement can change the bond unless there is a consideration. There was none in the present case.

In view of the recent decisions on the subject in question, and the fact that the bond speaks for itself in regard to the performance of the conditions under it, we are of the opinion that there can be no oral waiver of the conditions in a bond in Penna. and direct that the judgment be affirmed.

OPINION OF SUPREME COURT

It is axiomatic that parties to a contract can later change that contract by agreement. Equally applicable is the principle that a party who dispenses with performance cannot take advantage of the non-performance by the other. Cf. Groves vs. Donaldson, 15 Pa. 128. And this is so even though the prior agreement was of necessity in writing and the subsequent dispensation is parol only. See Producer's Coke Co. vs. Hoover, 268 Pa. 104.

Nor is consideration necessary to make the waiver of performance binding on the party waiving. For courts to sanction a waiver of written notice, an acting on this waiver by the other, and then enforce a claim of breach would be gross injustice. Surely the surety is estopped now to deny the validity of his oral waiver. Again the detriment suffered may be considered the consideration, if one be needed. Cf. also, Hudson vs. Hyman, 85 Super. 245. Young vs. Amer. Bond Co. 228 Pa. 373, 383.

The cases cited by the learned court below deal not with subsequent oral waivers of performance before breach but with contemporaneous or prior oral agreements.

The judgment of the learned court below is reversed and a v. f. d. n. is awarded.

FYE VS. OLNEY

Contracts—Parital Performance—Impossibility of Continuance—Rule of Law—Recovery in Quasi-Contract Not Permitted

STATEMENT OF FACTS

Fye contracted with Olney to erect a garage for him. Olney agreed to pay Fye $10,000 for the job. When partially completed, work was stopped by an injunction secured by neighboring owners. Fye sued Olney in assumpsit seeking to recover $7,000 for the value of the work done by him although it would have cost him $5,000 to complete the job.

Stadler, for Plaintiff.

Crisman, for Defendant.

OPINION OF THE COURT

Earnest, J. It is unfortunate that the plaintiff's citations are all cases in which the defendant is in default and breaches the contract. His main case of Philadelphia vs. Tripple, 230 Pa. 480 is such a case. The plaintiff contractor is allowed in quantum meruit a recovery greater than the contract price for the work completed. His remedy is optional, on the contract or in quantum meruit for work and labor. If the defendant claims it will cost him more to complete the work than the difference between the contract price and the amount of recovery, whose fault is it? Had he not stopped the work he could have had completion at the contract price.

Nor is consideration necessary to make the waiver of performance binding on the party waiving. For courts to sanction a waiver of written notice, an acting on this waiver by the other, and then enforce a claim of breach would be gross injustice. Surely the surety is estopped now to deny the validity of his oral waiver. Again the detriment suffered may be considered the consideration, if one be needed. Cf. also, Hudson vs. Hyman, 85 Super. 245. Young vs. Amer. Bond Co. 228 Pa. 373, 383.

The cases cited by the learned court below deal not with subsequent oral waivers of performance before breach but with contemporaneous or prior oral agreements.

The judgment of the learned court below is reversed and a v. f. d. n. is awarded.

FYE VS. OLNEY

Contracts—Parital Performance—Impossibility of Continuance—Rule of Law—Recovery in Quasi-Contract Not Permitted

STATEMENT OF FACTS

Fye contracted with Olney to erect a garage for him. Olney agreed to pay Fye $10,000 for the job. When partially completed, work was stopped by an injunction secured by neighboring owners. Fye sued Olney in assumpsit seeking to recover $7,000 for the value of the work done by him although it would have cost him $5,000 to complete the job.

Stadler, for Plaintiff.

Crisman, for Defendant.

OPINION OF THE COURT

Earnest, J. It is unfortunate that the plaintiff's citations are all cases in which the defendant is in default and breaches the contract. His main case of Philadelphia vs. Tripple, 230 Pa. 480 is such a case. The plaintiff contractor is allowed in quantum meruit a recovery greater than the contract price for the work completed. His remedy is optional, on the contract or in quantum meruit for work and labor. If the defendant claims it will cost him more to complete the work than the difference between the contract price and the amount of recovery, whose fault is it? Had he not stopped the work he could have had completion at the contract price.

Assuming in the absence of proof to the contrary, that the fault for which the injunction is granted is equal, for if the defendant tried to have a building erected contrary to a rule of law, the plaintiff is equally at fault in attempting to erect such a building, for he too is presumed to know the law, the case then resolves itself into two questions:

Can there be any recovery for work done on a contract made impossible to complete by law?

If so, what form may such recovery take?

Harlow vs. Beaver Falls, 188 Pa. 263 and the case cited by the defendant Sauer vs. School Dist., 243 Pa. 294 both admit recovery.

On the second point Harlow vs. Beaver Falls, 188 Pa. 243 says "he may recover on the contract and the measure of his damages is the contract price less the cost of completing the work." Sauer vs. School Dist. says "the contract is the foundation of the action," and allows similar recovery. Both plaintiffs sued on the contract and both recover on the contract. What if they had not relied on the contract but had sued for work and labor? The cases are silent on the point.

Harris vs. Liggit 1 W. & S. 301 holds, "where there is a true contract no action can be brought on an implied contract," with certain exceptions none of which are embraced in these facts.

A contract afterwards made unenforceable by a rule of law is not void at its inception. Sauer vs. School Dist., 243 Pa. 294.

That case also says "the recovery is based on the contract, implying that the contract is still in existence. Where a rule of law stops the operation of a contract it does not and can not affect the obligations under the contract. It merely makes the remainder of the contract unenforceable. A contract still exists and this court does not see that an action in quantum meruit can lie in the face of such contract. Recovery must be under the rule of Harlow vs. Beaver Falls and Sauer vs. School Dist. The contract price less the cost of completion, i. e. $5,000.

The equity of the case would seem to favor this interpretation of the law also. The plaintiff calculated he could do the work for $10,000 and so contracted. That he miscalculated is his error. Had there been no injunction it would have been his loss. Why should the injunction with no more fault on the defendant than on the plaintiff affect the fact that it was the plaintiff's miscalculation.

Judgment for $5,000.

OPINION OF SUPREME COURT

A principle of law applicable to this case is that there can be no reliance on an implied promise where recovery might be had on an

express one. This rule has certain exceptions; but the instant case does not present one of these. The most frequently applied exception is where the defendant is at fault for the non-performance. The court has correctly decided that in this case neither party can be regarded as at fault. Nor does the impossibility of performance discharge the contract but rather gives a valid reason for non-performance of the remainder.

While the cases of Harlow vs. Beaver Falls, 188 Pa. 243 and Sauer vs. School District, 243 Pa. 294, do not expressly so state, there is a strong intimation that recovery in such a case can be had on the contract only and that the measure of damage is the difference between the contract price and the cost of the part yet to be performed. Such also is the interpretation of these cases by Thurston, Cases on Quasi-Contract, p. 255.

In the instant case, this would seem to work a hardship on the plaintiff. But if such a hardship be present it is due rather to the making of an improvident contract than any unjustness in the law. No adequate reason can be shown for transferring to the defendant the burden of an injudicious contract.

The judgment of the learned court below has correctly interpreted the law and must be affirmed.

ANSON VS. ROBERTS

Equity—Jurisdiction—Adequate Remedy at Law—Failure to Demur—Act of 1907 P. L. 440.

STATEMENT OF FACTS

On January 1, 1920, Roberts bought a property, paid the consideration and took the deed in his own name. In 1923, while insolvent, he had the title conveyed to himself and wife as tenants by the entireties by means of a third person. Anson was a creditor for $5,000. He obtained judgment and on execution issued thereon against the property, bought Roberts' interest therein. He then filed a bill in equity to set aside the conveyance from Roberts and to Roberts and wife. The conveyance was set aside and on appeal Roberts claims there was an adequate remedy at law.

Royal, for Plaintiff.

Sheaffer, for Defendant.

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Royal, for Plaintiff.

Sheaffer, for Defendant.

OPINION OF THE COURT

Swaboski, J. The question in this case is whether an appeal can be taken from a court of equity, after a cause has been tried on its merits, the ground of the appeal being that plaintiff had an adequate remedy at law, although this question was not raised at the time of trial.

By an Act of June 7, 1907, P. L. 440, it is provided that: "When a defendant goes on trial on the merits of a cause and alleges that the plaintiff has an adequate remedy at law, defendant must raise the question in limine, if he does not do so, the objection to equity jurisdiction is waived;" McConville vs. Ingham, 268 Pa. 507; Tidewater Paper Co. vs. Bell, 280 Pa. 104, and Lauderbaugh Zerby Co. vs. Lewis, 283 Pa. 250, so holding.

The same act further provides that objection to the jurisdiction of the court must be taken, either by demurrer, or plea, before answer. By demurring and answering, defendant waives the objection of jurisdiction, Onorato vs. Carlini, 272 Pa. 489.

Moreover a court of equity will treat a case as entirely within equity jurisdiction, when it appears that at no time during the trial did defendant ask the court to certify the case to the law side to be tried as an action of law under the Act of June 7, 1907, supra; Freidline vs. Hoffman, 271 Pa. 530.

In a very recent case, Bank of Pittsburgh vs. Purcell, et ux., 286 Pa. 114, wherein the facts were analogous to those of the case at bar, the court reiterated the holdings as set forth above and further held; where equity has jurisdiction of the subject matter (as in the case of a fraudulent conveyance and a bill for the cancellation thereof) it is not vital upon which side of the court the question shall be determined, and unless defendant sued in equity insists before trial that the case be certified to the law side of the court, the right of trial by jury is waived and the case properly heard and determined as though one in Chancery.

Defendant raised the question in his answer and since he went to trial on the merits of the case, he cannot raise the question on appeal. In N. Y. & Pa. Co. vs. N. Y. C. R. A., 280 Pa. 297, it was held: an allegation in an answer in equity that plaintiff has an adequate remedy at law will be deemed waived, if it is not required to be decided in limine as provided by the Act of June 7, 1907, supra.

Thus since the question was not properly raised and since a question not raised in the court below will not be considered on appeal, St. Joseph's R. C. Church Petition, 273 Pa. 486, the court will not now consider it.

The court is of the opinion that the decree of the lower court was correct and the decree is affirmed.

OPINION OF SUPREME COURT

The case falls clearly within the Act of June 7, 1907, P. L. 440, which provides that an objection to the jurisdiction of equity, upon the ground that the suit should have been brought at law must be made by demurrer or answer so stating or praying to award an issue to try questions of facts. No such action was taken here nor any jurisdictional objection made until the appeal. The objection comes too late. The proper procedure and the usual one is to test the purchased title by ejectment but it is not necessary to do so; at least in the absence of objection by the defendant.

The case of Bank of Pittsburgh vs. Purcell, 286 Pa. 114, furnishes ample authority.

The opinion of the learned court below is affirmed.

STRAIN VS. FORCE, ET AL.

Specific Performance—Fraud by Agent of Plaintiff—Evidence—88 Super. 516.

STATEMENT OF FACTS

The defendants agreed to sell a lot the plaintiff for $1,000. At the date of settlement the defendant Force refused to convey. The plaintiff brought a bill for specific performance. The defense was that Force was in New York when he agreed to sell and that he had been induced to sell by misrepresentations of Morse, agent of the defendant; as to the value of the lot. He offered to prove that the lot was worth $5000 at the time of the agreement. The evidence was excluded, specific performance decreed and the defendant appeals.

DiMona, for Plaintiff.

Sobel, for Defendant.

OPINION OF THE COURT

Horuvitz, J. A perusal of the facts calls for the determination of the court, the effect of the misrepresentation of the vendor's agent to the vendor as against the vendee, in a bill for specific performance by the vendee.

Force desired to sell the property in controversy and constituted Morse as his agent for that purpose. Morse negotiated with Strain and consummated the sale. The vendor seeks to avoid the

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DiMona, for Plaintiff.

Sobel, for Defendant.

OPINION OF THE COURT

Horuvitz, J. A perusal of the facts calls for the determination of the court, the effect of the misrepresentation of the vendor's agent to the vendor as against the vendee, in a bill for specific performance by the vendee.

Force desired to sell the property in controversy and constituted Morse as his agent for that purpose. Morse negotiated with Strain and consummated the sale. The vendor seeks to avoid the

transfer assigning as his reason that he had been induced to sell by the misrepresentations of Morse.

That the relationship between Force and Morse was that of Principal and Agent, there can be no doubt; it being admitted in the facts. In 31 Cyc. 1566, on the Liability of a Principal to a third person on a contract where the Principal is disclosed and the contract authorized, it is stated in unequivocal language that a Principal is generally bound by the contracts made for him by his agent, and acts of the agent in connection therewith while acting in the course of his employment and within the scope of his actual authority.

As stated Morse was designated as agent for the express purpose of selling the property. His only deviation from acting within the scope of his actual authority was the alleged misrepresentation to his Principal. This alone does not warrant a recission, as a vendor of real estate cannot complain of the acts of his own agent in mistating to him the value of the land, Welsh vs. Ford, 282 Pa. 96.

Counsel for the defendant in citing this case states that the evidence to prove the lot was worth an amount over and above the selling price was excluded, and that no rules of evidence in that respect have been passed since this case has been decided, yet he contents that evidence to prove the real value of the lot was admissable. This is a striking refutation.

Force's objections are based on a poor bargain. This affords no defense, as where the transaction is obviously speculative, the mere fact that it turns out badly for the defendant, is no bar to specific performance. 11 Mich. Law 147.

The lower court properly excluded the defendants testimony which tended to show the actual value of the land at the time of the agreement. He attempted, we must assume, to prove that the consideration agreed upon was inadequate, and that to enforce the sale of a lot which was alleged to be worth $5000, for $1000, would create such a hardship as to make it inequitable to compell specific performance. Even if such evidence did prove that the consideration was inadequate, it would not have been a good defense in as much as there was insufficient testimony to establish fraud. The generally accepted rule both in England and in this country at the present time is that mere inadequacy of consideration does not in and of itself constitute a sufficient reason for a court of equity to withhold specific performance of a contract, Jackson's Estate, 203 Pa. 33.

We find nothing in the circumstances of this case indicating either that the contract was procured by fraud or misrepresentation or that it was so improvident that a Chancellor ought not to enforce

it according to its terms, and we find no abuse of discretion on the part of the court below. The parties considered the deal as closed when the agreement was made and specific performance was properly decreed. The decree is affirmed.

OPINION OF SUPREME COURT

The opinion of the learned court correctly disposes of the issues involved. The latest case, analogous to the instant one, is Nunge vs. Crawford et al, 88 Super. 516. The doctrines of Welsh vs. Ford, 282 Pa. 96 and Frey's Estate, 223 Pa. 61 are there reaffirmed and strengthened.

The opinion of the learned court below is accordingly affirmed.

PA. R. R. VS. COBB

Railroads—Eminent Domain—Width Aquired—Quantum of Estate—Declaratory Judgments Act.

STATEMENT OF FACTS

The Pa. R. R. bought a certain tract of land from the defendant for a right of way. In the deed to the railroad the quantum of estate was not set out nor the width of the land so purchased. The R. R. brings this action under the Uniform Declaratory Judgments Act. It claims to have a fee in a strip 60 feet wide.

Bickel, for Plaintiff.

Tompkins, for Defendant.

OPINION OF THE COURT

Allman, J. This is a proceeding under the Uniform Declaratory Judgments Act of June 18, 1923, P. L. 840.

Section 1. Be it enacted, Etc.—Scope.—That courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.

Section 2. Power to Construe, Etc.—Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a

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declaration of rights, status, or other legal relations thereunder.

The questions to be decided in this case are: (1st) whether the Pa. R. R., under a deed which failed to set out the width of land so purchased is entitled to have a fee in a strip 60 feet wide; (2nd) what quantum is the Pa. R. R. entitled to?

Counsel for the plaintiff contends that they are entitled to a fee 60 feet in width.

Counsel for the defendant, on the other hand, contends that the court cannot declare that the railroad has a right to a strip 60 feet in width, but that it has a right only to declare what quantum the railroad received under the deed be it 10, 60, or 100 feet; and that the railroad has other specific statutory remedies to obtain a strip 60 feet in width, therefore, taking the case out of the operation of the Declaratory Judgments Act.

We are of the opinion that the plaintiff's contention is well founded. It would seem that the railroad in exercising its discretion as to the width of land to which it was entitled under the statute had not the least iota of an intention to take less than that amount expressly given to them by the statute.

In the deed of Cobb, he granted to the railroad "a right of way" for its railroad purposes. With the grant indefinite as to the width of the right of way, what did the railroad company take under it? It clearly had the right to appropriate land of such width as the president and directors ,in the exercise of their honest judgment,, deemed necessary for the future as well as for then existing railroad purposes.

We also are of the opinion that as between the parties the railroad acquires a fee in the land; especially as by the original agreement it was never to be used for railroad purposes without the consent of the owner of the fee.

Section 10 of the Act of February 19, 1849, P. L. 79-83 provides "that the president and directors . . . . . shall have power and authority by themselves, their engineers, ... to survey . . . . . fix, mark and determine such route for a railroad as they may deem expedient . . . . . ., and not, except in the neighborhood of deep cuttings, or high embankments . . . . . to exceed sixty feet in width, and thereon to . . . . . construct and establish a railroad, with one or more tracks."

The Supreme Court of Pa., in Foley vs. Beach Creek R. R. Co., 283 Pa. 588, has held "The president and directors of such company shall have authority to construct a railroad," contemplates corporate action by the adoption of a resolution and does not mean the president alone or the directors individually. Also that "If no width is designated in the resolution the full width permitted by the Act

will be presumed to have been taken, that is 60 feet for roadbed, with such additional ground as is necessary for deep cuts, fills, stations, etc."

In Williams vs. D. L. & W. R. R. Co., 255 Pa. 133, the court held "It was not material that the resolution did not designate the width of the strip to be appropriated by the railroad company; in the absence of any designation of width at the time of entry the presumption, under the General Railroad Act of February 19, 1849, P. L. 79, is that a width of sixty feet was intended.

In view of the above authorities, we therefore hold that the deed to the railroad conveyed to them a fee in a strip 60 feet wide.

OPINION OF SUPREME COURT

The proceeding is rightfully brought under the Uniform Declaratory Judgments Act of 1923. This is a case of construction of a deed, which is expressly covered by the Act, and replaces the cumbersome and expansive remedy of ejectment.

Did the R. R. Co. take a fee by the deed which said nothing as to the quantum of estate granted? No decided case can be found expressly deciding this mooted question. We feel that Sec. 1, Act of April 30th, 1925 answers this question. It states that the granting words of a deed shall be taken to pass the entire interest of the grantor without words of inheritance or perpetuity unless the contrary intent is manifested. The section manifestly applies to deeds to a corporation. No contrary intention is shown. The deed must be taken to have granted a fee to the R. R. Co.

But the judgment of the court must be reversed in its determination that the plaintiff took a strip 60 feet wide.

The lower court evidently based its conclusion on a presumption that the deed conveyed 60 feet. But on what is such a presumption based? There are no facts present on which to hypothecate such a grant. The Court was evidently relying on Foley vs. Beach Creek R. R. Co., 283 Pa. 588 and Williams vs. D. L. & W. R. R., 255 Pa. 133. But those cases dealt with the width taken by condemnation proceedings and not with grants The principles are not the same. In such a case the Act of February 19, 1849, P. L. 10 has an important effect in construing the width taken. Here that Act has no bearing on the question. There the resolution of the directors of the company has evidential value. Here no such resolution is present.

The instant case falls clearly within Phila. and Reading R. R. Co. vs. Obert, 109 Pa. 193, p. 203, "No presumption arises in absence of proof, that the taking was to the full extent allowed by law." Again, "In contests involving its lines, the company must establish the extent of its ownership in the same manner and according to the same

measure of proof as others." There can be no question that the "others" could not have been a deed construed as passing 60 feet with the entire lack of proof that is present here. This view is impliedly sanctioned in Rodgers vs. Pgh., F. W. & C. Rwy. Co., 255 Pa. 462 (1917) . See also Elliot on Railroads, Sec. 1158, p. 629.

The case is remanded to the learned court below for further hearing.

NIGH VS. YORK COUNTY

Statutes—Commissioners—Contracts By—Change in Plans—Liability for Extra Work.

STATEMENT OF FACTS

An Act of Assembly was passed authorizing the construction of a bridge. It provided that the site, plans and specifications were to be submitted to the county court and approved by it before the county commissioners were to advertise for bids. It also provided that the bids were to be opened before the court and that its consent must be given before the letting of the contract. This was done. A change in plans was made by the county commissioners after the work was started. The contractor objected but finally acquiesced and made the changes. He now sues the county for the extra work done.

Schechter, for Plaintiff.

Gluckman, for Defendant.

OPINION OF THE COURT

Miss Rubin, J. The main question to be decided in the case at bar is whether county commissioners acting under a special act of assembly restricting their rights expressly, have the power to act in violation of such restrictions to such an extent as to permit the contractor to sue the county for such extra work.

The counsel for the plaintiff claims to recover for the extra work since he was acting non-officiously and failure to allow recovery would unjustly enrich the county. True, we admit that the extra work performed on the part of the plaintiff does enrich the county, but we fail to see that it was unjust. The fact that the plaintiff had at least constructive notice of the special statue under which the county commissioners had power to contract with him is

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sufficient to take away from him his plea of non-officiousness. All persons dealing with commissioners of a county are bound to ascertain the limits of their authority as fixed by statute and are chargeable with knowledge of such limits, 15 C. J. 541.

By the Act of April 11, 1848, P. L. 506, there could be a recovery for additions or alterations, provided that they were made by the direction of county commissioners. This statute is recognized as the existing law of today in so far as concerns the cases which it covers, White Clay Creek Bridge, 5 C. C. 366. But, this act bears no relationship whatsoever to the case at bar, since the act of 1848 refers to general statutes while the plaintiff receives all of his rights under one specific statute. Commissioners appointed to superintend the erection of county bridges have no power to modify the contract in any respect, 15 C. J. 555.

In Hague vs. City of Philadelphia, 48 Pa. 527, it was held: where the act is special and restricts the powers of the commissioners to the mere performance of a ministerial duty and guards the contracts by provisions which operate directly upon the actions of the commissions and notifies the contractor of his own duty, the act of 1848, has no reference and therefore cannot help the contractor, 15 C. J. 541.

Upon the authority of this case and the conclusions of law mentioned above we feel bound to hold that the contractor is not entitled to recover for the additional work done and therefore give judgment for the defendant.

OPINION OF SUPREME COURT

The learned court below has correctly disposed of the only issue in the case. No hardship is worked thereby for the plaintiff must have had actual notice of the limited and restricted powers of the commissioners. They were really in the position of agents with a limited power of which the one dealt with is cognizant. Under such circumstances no recovery will or should be allowed.

The case of Hague vs. Phila., 48 Pa. 527, and the other cases cited by counsel for the defendant are ample justification for the learned court's holding.

Affirmed.

BOOK REVIEW

The State as a Party Litigant, by Robert Dorsey Watkins, Ph. D., of the Johns Hopkins University Series.

The suability of a state has been a recurring theme of discussion, among politicians and statesmen. In the Virginia Convention that ratified the Constitution, John Marshall, who was in a few years to become Chief Justice of the United States, defended the Constitution from the attack that, under it, a state would be liable to suit by an individual. The defence was very simple, and as unsatisfactory. "I hope," said Marshall, "that no gentleman will think that a state will be called at the bar of a federal court * * * It is not rational to suppose that the sovereign power should be dragged before a court." The prevision of even the greatest men, is not infallible. Within five years after the beginning of the new government, an individual of one state was allowed to sue another state, even in the Supreme Court. That subjection to suit in a court implies a certain subordination to it, is unquestionable, unless it is the result of the will of the state itself. The work, whose title is above given, is exceedingly interesting and able. The chapters deal with the doctrine of non-suability of the state in England; the petition of right; the state as plaintiff; suits against officers; the doctrine of non-suability in the United States; the United States before its own courts; the United States as defendant; suits against officers in the United States, State Property in domestic courts of Admiralty, in England and the United States; Administrative Law and State responsibility in France; the State before foreign courts; Theories on the subject.

This book is well worth a careful study, and it can be cordially commended to the notice of those who are interested in juristic speculation.