Volume 31
Issue 1 *Dickinson Law Review - Volume 31, 1926-1927*

6-1-1927

Dickinson Law Review - Volume 31, Issue 9

Dickinson Law Review

Vol. XXXI **June, 1927** **No. 9**

Subscription Price, $1.50 Per Year

SOME POINTS OF PRACTICE

Prior to the passage of the Act of March 5, 1925, P. L. 23, the law of Pennsylvania in regard to the procedure for raising objections to the jurisdiction of a court over the person of the defendant or of the subject matter of a suit pending in the court was in considerable confusion. The early practice was to raise all such questions by a plea in abatement. Later an accepted and efficient method of questioning the validity of process or of service of process apparently defective or incomplete on the face of the record, was a motion to quash or set aside. The Practice Act of nineteen hundred fifteen abolished all pleas including pleas in abatement and all questions of jurisdiction which could be properly raised by such pleas were to be raised by the affidavit of defense. The Act of March 5, 1925, P. L. 23, now gives a form of relief which eliminates

most if not all of the embarassment experienced under the former practices.

Pleas In Abatement

Pleas in abatement were dilatory pleas and were not favored at Common Pleas. They were originally divided into three classes: (1) pleas to the jurisdiction of the court; (2) pleas in suspension of the action; (3) pleas in abatement of the writ. Such a plea was the proper practice to put in issue the jurisdiction of the court. Street Railway Publishing Co. vs. Conner, 13 Dist. R. 186. However, such a plea did not deny the validity of the claim. It merely raised a question as to the jurisdiction of the particular court to entertain a suit thereon. Smith vs. Peoples Mutual Ins. Co., 173 Pa. 15. Pleas in suspension were practically unknown to our practice. Pleas in abatement of the writ were founded upon an objection to the writ itself for example non joinder of all joint obligors.

Time For Filing the Plea

Rules of court in most counties required the pleas in abatement to be filed within four days after service of the copy of the declaration. A plea filed later could be disregarded or stricken off. The regular order of pleading required the plea in abatement to be filed in limine and before the pleas on the merits of the case known as pleas in bar. The defects to be questioned by a plea in abatement would be waived by any step going to the merit of the case as a plea in bar or to the general issue.

The effect of all pleas in abatement, if successful, was that the particular action be defeated. The right of action was not lost and the plaintiff might profit by the experience and bring a new action. However, if the plea was not successful, judgment of respondeat ouster was

entered against the defendant. Thus the unsuccessful defendant must either waive the defect of which he complains and plead over or suffer a final judgment by default and assign as error the order of the court overruling the plea.

Motion to Quash the Writ or Set Aside Service

When the writ was irregular upon its face or where the service thereof was irregular upon the face of the return, the defendant might have moved to quash the writ or set aside the service. If the irregularity did not appear upon the face of the record the usual practice was to attack by using the plea in abatement.

Appearance De Bene Esse

A matter of very serious concern to the defendant in these cases was his position in case he was unsuccessful in his attack upon the writ. It being a well settled rule of practice in our courts that an appearance by the defendant cures any defect in the service of the writ, great care had to be exercised in order that the steps taken to attack the writ should not defeat their very purpose by waiving the irregularity complained of. The practice, therefore, grew up of permitting the defendant to appear for the restricted purpose of attacking the writ. Such an appearance came to be known as an appearance de bene esse. The sole purpose of this conditional or limited appearance was to allow the defendant to appear and state his objection to the jurisdiction of the court without thereby waiving it.

If the court ruled on the motion adversely to the defendant, he had one of two courses open to him. He might defend the action on its merits, thereby waiving the defect. Or he might rely upon the objection he had raised, allow judgment to be entered against him by default and appeal to the proper appellate court. In the latter case he could not appeal from the refusal of the court to quash

the writ or set aside the service in the first instance. That was a mere interlocutory order. He had to suffer a final judgment against himself and take his appeal from that judgment. Phila. and R. Ry. Co. vs. Snowden, 161 Pa. 121.

Affidavit of Defense

The Act of May 25, 1887, P. L. 271, abolished special pleading but in that respect referred only to pleas in bar. A plea in abatement could still be used after that act went into effect. The Practice Act of 1915, however, expressly abolished pleas in abatement. Steel vs. Levy, 282 Pa. 338. The act provides that defenses heretofore raised by these pleas shall be made in the affidavit of defense. Miller Paper Co. vs. Keystone Coal & Coke Co., 267 Pa. 180.

The procedure of raising questions of jurisdiction in the affidavit of defense presented serious difficulties. Under the Practice Act there are two forms of affidavits of defense. The first raises questions of law and attacks the sufficiency of the statement as a demurrer. The second raises issues of fact as the former pleas in bar. A supplemental affidavit of defense is provided for only where the affidavit in the nature of a demurrer is not sustained. Therefore it may be said to have been the clear intention of legislature to require the defendant to raise all defenses except as to the sufficiency of the statement in one and only one affidavit of defense. Was the defendant then required to join in one affidavit of defense the matter he would plead in abatement as well as what he would plead in bar of the action. That could not be done under the old pleading. Yet it is difficult to say just what was intended by legislature in such cases. If that was indeed the intention of the act, it would be logical to assume that it would be more clearly expressed in the act. The old rules of pleading hold that matter in abatement and in bar cannot be pleaded together and if pleaded together the matter in

abatement is waived. Surely the defendant is not to be thus denied his right to secure a determination of whether the court has jurisdiction in advance of a trial on the merits of the case. In the case of Durlsin et al vs. Beshlin et al, 1 D. & C., 649, the court said:

> In our opinion, the plain intention of the act (Practice Act of 1915) is to deal only with matters of form; matters of substance and the fundamental privileges of pleading are in nowise affected thereby. It follows that a dilatory plea may be interposed in exactly the same way and with exactly the same force and effect as before the act . . . . . It it suggested that in the same way as it has become the practice to style an affidavit of defense raising questions of law a "statutory demurrer" to distinguish it from the affidavit of defense on the merits, so it would be proper to style the affidavit of defense setting up a dilatory plea "an affidavit in abatement" or "an affffidavit to the jurisdiction."

Whether this construction put upon sec. 3 of the Practice Act is correct is now a matter of slight concern. The Act of March 5, 1925, P. L. 23, provides a method of procedure in raising preliminary questions of jurisdiction that eliminates most of the embarassment and uncertainty that attended all the prior practice.

Act of March 5, 1925, P. L. 23

Sec. 1 of the act provides:

> Whenever in any proceeding at law or in equity the question of jurisdiction over the defendant or of the cause of action for which suit is brought is raised in the court of first instance, it shall be preliminarily determined by the court upon the pleading or with depositions as the case may

require; and the decision may be appealed to the Supreme Court or the Superior Court as in cases of final judgments.

The act provides relief in the cases where heretofore the law of this state has been in almost hopeless confusion. It applies to all proceedings in law or equity, thereby including every phase of litigation. The questions to be raised are those same questions of jurisdiction over the person of the defendant and of the cause of action which were formerly the bases of pleas in abatement and rules to quash writs and set aside service. The act has already been construed and applied by the courts to both classes of cases. Kraus vs. American Tobacco Co., 184 Pa. 569; Kraus vs. American Tobacco Co., 283 Pa. 146; Frey Exec. vs. Long et al, 8 D. & C. 121.

The procedure is available in the court of first instance and then only when the question is raised preliminarily. Thus relief under the act was not granted to an appellee whose petition to vacate an order in equity, appointing a receiver made more than 5 years prior, had been dismissed. The court held that the act "is not designed to cover generally all judgments on questions of jurisdiction, but must be confined to such as are provided for by the act i. e. those entered in preliminary proceeding." Wilson vs. Garland, 287 Pa. 291.

The case will be determined upon the pleadings where there are no disputed questions of fact. Thus where the defects of service appear upon the face of the record or where the facts set forth in the petition asking relief are not denied, depositions will be of little assistance. But where there is an issue of fact, depositions become necessary and may be submitted. The word "depositions" is used in the act in its accepted technical meaning and signiffes the testimony of a witness reduced to writing in due form of law by virtue of a commission or other au-

thority of a competent tribunal, or according to the provisions of some statute law, to be used on the trial. It does not mean "depositions" as restricted to the oral examination of a witness without written interrogatories, and reducing his testimony to writing in contradistinction to a commission where the questions are proposed by written interrogatories. Chicago Coliseum Club vs. Dempsey, 8 D. & C. 420.

Appeals

Probably the most important change wrought by the act is the granting of an appeal from the decision of the court in which the question is raised. Heretofore such decisions have been considered merely interlocutory orders from which no appeal will lie. Miller Paper Co. vs. Keystone Coay & Coke Co., 275 Pa. 40; American Trust Co. vs. Kaufman, 279 Pa. 230, where formerly the defendant was required to set idley by until a final judgment was entered against him, an appeal may be taken and the question of jurisdiction determined before the case is considered on its merits. That this appeal may not have the effect of delaying the trial of the case, it is required that the appeal shall be taken and perfected within fifteen days from the date the decision is rendered, shall be returnable the third Monday after it is taken and shall be placed by the appellate court at the head of its argument list for civil cases to be heard at the earliest date consistent with its rules governing the presentation of appeals. Sec. 3, of the act.

The failure of the defendant to appeal within the time specified will be deemed a waiver of all objections. The defendant is given fifteen days within which to secure a review of the decision of the court. Unless he moves toward that end within that time, he is presumed to acquiesce in the decision and he is bound thereby. An appeal taken

after fifteen days will be quashed. Polokoff vs. College, 287 Pa. 28. Furthermore, his failure to appeal after having raised a preliminary question of jurisdiction is a waiver of all objections to jurisdiction over the defendant personally. His de bene esse appearance which enabled him to appear and raise the question without thereby waiving the defect complained of becomes a general appearance and he must defend upon the merits. It must be noted, however, that this waiver applies only to objections to jurisdiction over the defendant personally. A want of jurisdiction of the subject matter is an inherent and uncurable defect which cannot be waived by any agreement or acquiescence of the parties. No change in this regard is made by the act.

> Sec. 2. All such preliminary questions shall be raised by a petition setting forth the facts relied upon, whereupon a rule to show cause shall be granted and such preliminary question disposed of by the court.

The act recognizes and calls into use the petition and rules as the means of bringing the defects complained of before the court. The petition is in writing and must give the facts showing the irregularity complained of. There is no form prescribed. In fact the courts have been quite liberal in granting the relief provided by the act. Kraus vs. American Tobacco Co., 283 Pa. 146. Whether this liberality will continue is a matter of conjecture. See Stamper vs. Kogleschatz, 289 Pa. 95. It is safe to assume, however, that the courts will not be stinting with the relief granted by this remedial legislation. Careful practice would suggest that the petition be a concise and summary statement of the facts relied upon, divided into numbered paragraphs, each setting forth but one material allegation of fact. The rule used is the usual rule to show cause and calls for an answer to the facts which are to be de-

nied. No time for filing the answer is prescribed, but as in other cases where such rules are used, the court has power to fix the time for filing the answer.

The act does not fix the time within which the petition must be presented. Proceedings which are analogous must be studied in this connection. In some counties it was provided by rule of court that no dilatory plea should be received unless the same be filed within four days after service of the copy of the declaration. In such counties, therefore there was a definite time limit for filing a plea in abatement. There seems to have been no fixed time for moving to quash a writ or set aside service thereof. Under the Practice Act the affidavit of defense must be filed within fifteen days after service of the plaintiff's statement but not before the return day of the writ. This precise question was considered by the Supreme Court in the case of Selmer vs. Smith, 285 Pa. 67. Mr. Justice Simpson, speaking for the court said inter alia:

> "As there is no statute determining what shall constitute a reasonable time for moving to set aside service of a writ, the courts, in solving the question, proceed, by analogy, to apply other limitations expressed in such statutes as deal generally with the subject matter of the litigation. From this standpoint the applicable rule is plain. Under the Practice Act of May 14, 1915, P. L. 483, pleas in abatement are abolished and all such defenses must be raised by an affidavit of defense filed within fifteen days after service of the statement of claim and notice to file such affidavit. Under the Act of March 5, 1925, P. L. 23, the appeals must be taken in this kind of proceeding within fifteen days after the order below is entered, and a failure to appeal within the time specified will be deemed a waiver of all objections to jurisdiction over the de-

> fendant personally. These several limitations wisely suggest that usually only fifteen days should be allowed in moving to set aside a defendant who believes he has been fraudulently enticed within the jurisdiction of the court, for the purpose of being served with its process, moves to set aside the service within that period of time, he will be deemed to have waived his right so to do, if by reason of his failure to act thus promptly, the rights, interests or obligations of the plaintiff have been altered for the worse."

The court does not say from what day the fifteen days shall be counted. Presumably the date of service is meant. That probably would satisfy the exigencies of the particular case in which the rule was stated. But must a defendant ordinarily move against the writ or the service thereof within fifteen days after service. To require that might defeat the very object of the proceeding for the objection might have to be raised before the writ was returned. In this connection it may be well to note the act of March 10, 1921, P. L. 16, amending the Practice Act by providing that "no affidavit of defense shall be required to be filed under the provisions of the act in any case before the return of the writ of summons." It should be observed further that the basis of the rule is the laches of the defendant and that laches will not be imputed to the defendant where his delay has not resulted in injury to his adversary.

ROBERT L. MYERS, Jr.

MOOT COURT

FAWCETT VS. JAMES

Courts—Withdrawal of Juror—Jurors Reading Newspapers Adverse To Plaintiff—Discretion of Court

STATEMENT OF FACTS

During the deliberations of the jury in an action for slander, several of the jurors read a newspaper containing an article completely adverse to the plaintiff. The plaintiff moved for the withdrawal of a juror and a continuance of the cause, which was refused. Verdict and judgment thereon for the defendant and the plaintiff appeals alleging the action of the court as error.

Hricko, for Plaintiff.

Tripician, for Defendant.

OPINION OF THE COURT

Kunkel, J. The sole question to be answered by us is whether the learned court below exceeded its discretionary power in refusing to grant a rule for the withdrawal of a juror and continuance of the case. We answer this in the affirmative for the reason that such a refusal does not permit a fair trial. Article 1, section 6 of the Constitution of Pennsylvania.

From the standpoint of psychology, it would seem reasonable to us that the average juror would be influenced by reading such an article. It is common knowledge that any information we receive on a fact or question will have its weight to some extent when we form our conclusion. Especially would this be the case where the data upon which we base our conclusion is of an illusive and opinionated character. The evidence in slander cases is of this type, as the punitive damages or the mitigation of damages is largely dependent on malice in fact, which is difficult to prove clearly. Psychologically, under the present circumstances, the article would have its effect on the minds of the jury, or those who might read it.

That counsel are desirous of obtaining jurymen who have not read articles in newspapers prejudicial to their cause prior to the trial and have expended challenges to keep them off the jury is self-explanatory to us, even though the juryman on examination says that he will not be influenced by them in the light of sworn evidence. When newspapers are read after the case has gone to the jury, counsel is deprived of this privilege.

In Fisher vs. Fisher, 20 Dist. 56, the court granted a new trial where prejudicial articles were read by the jury during the trial. And see Morse vs. Montana Ore Co., 105 Fed. 337; Meyers vs. Cadwallader, (Pa.) 49 Fed. 32.

The case of Alleson vs. Commonwealth, 99 Pa. 17, cited by counsel for defendant, is not in point; there the reading complained of occurred prior to the trial.

For the reasons and authorities cited, we remit the cause to the lower court for a new trial.

OPINION OF SUPREME COURT

The case came before the learned court below on appeal from the refusal of the Court of Common Pleas to withdraw a juror and continue the cause. The question is not, whether, were we sitting as Common Pleas Court, we would grant the motion or refuse it; but rather, since it was refused below, shall this refusal be held reversible error.

That this is a matter within the discretion of the court of first instance and will be reversed only on clear proof of abuse of discretion, is aximoatic. Comm. vs. Balderdi, 32 Sup. 241. Not having before us the reasons given by the court for the refusal, are there any such as would justify that court's action?

Several can readily be imagined. Possibly the court was convinced that although the paper itself was seen, the article in question was not read by the jurors. Again, the losing plaintiff may have instigated the publishing of the article in order to bring about a desired continuance and the securing of another jury. Again, the case of the defendant may have been so strong that even in the absence of the reading of the article, the court would have had to render judgment n. o. v. had a verdit for the plaintiff resulted. It is suggested in Comm. vs. Chauncey, 2 Ashland (Pa.) 90, that approval of the verdict is sufficient ground for the refusal of such a motion as is here presented.

Any one of the above reasons or a concurrence of two or all would have justified the court below in its refusal to withdraw a

juror. That being the case we may not hold that its discretion has been abused.

The judgment of the learned court below is reversed and the judgment of Common Pleas is reinstated.

WESTBROOKE VS. HITCHENER

Wills—Estates—Cross Remainders—Acceleration—Disclaimer of Estate

STATEMENT OF FACTS

J. Hitchener by his will left a life estate in certain realty to Conn, and "after the death of Conn, remainder in fee to Westbrooke; but if Westbrooke should die before Conn, then over to Jones." Conn has disclaimed and refused to accept the life estate given him. The heir at law of J. Hitchener is in possession claiming to be entitled to the land until the death of Conn. This is ejectment by Westbrooke who claims an indefeasible fee in the land.

Boyer, for Plaintiff.

Stone, for Defendant.

OPINION OF THE COURT

Berkowitz, J. We are called upon to construe the intention of the testator from those provisions of the will stated above. If we find that the intent of the testator was to accelerate the estate upon the disclaimer of Conn, then we must find for the plaintiff. But, if we feel that acceleration was not intended by the testator upon the reunuciation of Conn, then we must find for the defendant.

In determining the intention of the testator we would first look for assistance to those cases with facts directly on point. Finding no Pa. cases with facts exactly like those facts at bar, we are forced to consider cases with analogous facts, general rules as laid down by most American courts, common sense and logical reasoning.

The authorities seem unanimous that in the absence of a controlling equity or an express or implied provision in the will to the contrary, the renunciation of a life estate accelerates the remainder. 24 R. C. L. Sec. 103, p. 557.

Pa. has applied this general rule in cases where the widow of a testator has been left a life estate, with remainder over, the remainder being accelerated, vesting the remainder upon the widow's

juror. That being the case we may not hold that its discretion has been abused.

The judgment of the learned court below is reversed and the judgment of Common Pleas is reinstated.

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STATEMENT OF FACTS

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Boyer, for Plaintiff.

Stone, for Defendant.

OPINION OF THE COURT

Berkowitz, J. We are called upon to construe the intention of the testator from those provisions of the will stated above. If we find that the intent of the testator was to accelerate the estate upon the disclaimer of Conn, then we must find for the plaintiff. But, if we feel that acceleration was not intended by the testator upon the reunuciation of Conn, then we must find for the defendant.

In determining the intention of the testator we would first look for assistance to those cases with facts directly on point. Finding no Pa. cases with facts exactly like those facts at bar, we are forced to consider cases with analogous facts, general rules as laid down by most American courts, common sense and logical reasoning.

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Pa. has applied this general rule in cases where the widow of a testator has been left a life estate, with remainder over, the remainder being accelerated, vesting the remainder upon the widow's

election to take under the intestate act, rather than under the will. The cases intimate, though not saying so expressly, that in Pa. the general rule, allowing acceleration in cases in which the facts are analogous to those of the case at bar, would be followed: Disston's Estate, 157 Pa. 537, Fletcher vs. Hoblitzell, 209 Pa. 337.

In the last cited case the court said that a remainder may be accelerated where the devisee of a life estate refuses to accept it. The court also said that the testator's intent is to be gathered from the whole will.

Exceptions to this rule must depend upon the expression or unavoidable implication of a contrary intent of the testator. An express intent against acceleration is clearly not manifested in the will. Counsel for the defendant depends then upon implied manifestation of a contrary intent. We must keep in mind that there must be an unavoidable implication of a contrary intent on the part of the testator. Certainly then, unsupported arguments and inferences drawn from the facts are not sufficient to influence us in deciding whether acceleration took place.

Counsel for the defendant contends that the words "after the death of Conn, remainder in fee to Westbrooke," clear shows that the intention of the testator was against acceleration. We cannot agree with the learned counsel, for the clause, "after the death of the life tenant, remainder to someone else in fee," is simply the ordinary way of creating a remainder or remainders in a will. We cannot construe these words as manifesting a different intention because of the further fact that in at least one or more of the list of cases cited above, the clause, "after the death of the life tenant, etc." was used, and the court found the intent of the testator to be as we construe the intent of the testator to be in the case at bar, namely as being explanatory of his intention to create a rem'd in Westbrooke.

The second argument of the defendant's counsel is that the provision, "if Westbrooke should die before Conn, then over to Jones," shows the intention of the testator to be against acceleration, but this is subject to a fallacy.

By this argument defendant's counsel tries to prove that upon Conn's disclaimer, the heirs of the testator are entitled to hold the land until Conn's death, but he simply argues, not in favor of the heirs, but in favor of Jones, the elternative remainderman.

The ordinary rule is that when a testator creates a life estate, and remainder in fee over, by his will, if the remaindermen die before the life tenant, the remainder will go to the heirs of the testator. In order to defeat that turn of events, the testator usually provides that upon the death of the remainderman before the life tenant, the remainder to go to an alternative remainderman. The testa-

tor in the case at bar did this very thing. His intention was undoubtedly to cut his heirs off. We feel constrained to carry out his intention as closely as possible and not defeat it by allowing the heirs of the testator to hold the land until the death of the life tenant, Conn. We therefore find that the intention of the testator was not expressly or impliedly against acceleration of the estate in this case, and accordingly find for the plaintiff.

OPINION OF SUPREME COURT

The learned court below has clearly demonstrated that where a life estate is given to a widow, and remainders or cross remainders, contingent or vested, thereafter to others, and the widow elects to take against the will, the remainders are accelerated and become vested in possession, indefeasibly. This, of course, will not occur in the presence of a manifest contrary intent. What was the primary intent in this case? Clearly to provide for Conn, the life tenant. His secondary intent was to give the estate to Westbrooke and in the event of his death before the ending of Conn's estate, then to Jones. The cases uniformly interpret phrases such as "die before Conn," to mean die before the expiration of Conn's estate. Westbrooke, not having died, is clearly entitled to the present indefeasible estate. See Wylner's Estate, 65 Super. 396, for an able review of the authorities on this subject.

The judgment of the court below is affirmed.

BEAUMONT VS. RUSKIN

Specific Performance—Fraud—Representation as to Agency—Fictitious Principal—Personal Liability of Agent

STATEMENT OF FACTS

This is an action to enforce the performance of a contract to buy real estate by recovery of the purchase price. Ruskin at the time of the making of the contract, had falsely represented to the plaintiff that a corporation called the Realty Co. was then being formed. The contract was signed by the plaintiff and by the "Realty Co. by Ruskin." The corporation was not formed, the defendant denied any liability on the contract, and the plaintiff sues the defendant.

Engelbach, for Plaintiff.

Abromson, for Defendant.

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OPINION OF SUPREME COURT

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Engelbach, for Plaintiff.

Abromson, for Defendant.

OPINION OF THE COURT

Feinberg, J. The questions of the case at bar are (1)—whether, the plaintiff can enforce the contract, by means of recovery of the purchase price and thereby hold the alleged agent, who is the defendant, liable on the contract, (2), was there in law a contract.

In dealing with the first question, we, after reviewing the facts of the case, and after hearing the arguments of the learned counsel of the respective parties, have come to the conclusion, that the defendant is not liable for the enforcement of the specific contract, and the plaintiff therefore, cannot recover the purchase price whereby he would be enforcing such contract. However, there is no doubt in our minds that the defendant has created and brought upon himself a liability to the plaintiff. It is our opinion that the defendant is merely liable to the plaintiff in damages for the injuries suffered by the plaintiff. Thus the plaintiff would have no difficulty whatsoever recovering such damages in an action for breach of warranty, or an action of deceit.

In considering the second question it is our opinion that there was no contract. It is stated in 2 C. J. 806 to be the weight of authority—"that an agent is not liable upon the contract which he enters into without or in excess of his authority unless it contains apt words to bind him personally. The reason assigned for this view is that it is not the contract of the principal as the assumed agent has no power to bind him and it is not the contract of the agent, for in making it he did not attempt to bind himself, (as is illustrated by this case, no apt words being present to bind the defendant) and where no contract has been entered into, the law will not undertake to create one."

The learned counsel for the defendant has ably brought out the distinction between this case at bar, and that class of cases in which the agent has used apt words to bind himself. He has cited the following cases: McCoon vs. Lady, 10 W. N. C. 493; Kroeger vs. Pitcairn, 101 Pa. 311; and Hopkins vs. Mehaffy, 11 S. & R. 126. In these cases cited the defendant had apt words to bind himself. In Hopkins vs. Mehaffy, supra, Gibson C. J. laid down the general rule that an agent is not liable personally on the contract unless he has used apt words to bind himself. In discussing the case he said, "But there is a striking difference between the covenant of an agent who describes himself as acting for his principal, and the covenant of a principal through the means and by the instrumentality of an agent." This distinction is clearly brought out in this case for here it is the contract of the alleged Realty Co. and the defendant is merely the instrumentality or means by which the contract is brought about.

We find that the case of Kroeger vs. Pitcairn, supra, has been cited by both counsel, but upon close observation of this case we find another distinction arising, other than that of "apt words" being present; and that distinction is as to the specific liability of the defendant. The defendant in that case was held liable, but not to enforce or carry out the contract, not liable as a party to a contract, but liable for deceit or in other words personal liability, and the plaintiff was allowed to recover damages in an action of trespass on the case. Therefore we think that the plaintiff in the case at bar, brought the wrong kind of action, and cannot enforce the contract by means of recovery of the purchase price, but could recover damages for the injury he suffered, because of the false representation made by the defendant, in an action for breach of warranty, or in an action of deceit.

It is stated in 2 C. J. 804, "The position of an unauthorized agent, who undertakes to act, or contract on behalf of his principal in excess of the authority conferred upon him, differs only from that of one who acts with knowledge that he has no authority, only in the degree of moral wrong, and not in the degree of injury, as the agent's warranty of authority embraces not only the existence of the authority, but also its sufficiency to cover the contract which he attempts to make, and if, whether in good faith or otherwise, he acts in excess of authority actually possessed, he renders himself personally liable."

Thus it states that one who exceeds an existing authority is liable to the same extent as one who acted with no authority. (As illustrated in this case.)

As to the meaning of personal liability, the inference that we have drawn is not liability to enforce and carry out a specific contract, which the agent purported to enter, but liability, pecuniary in nature, in other words damages to the plaintiff for the injury he suffered, because of the defendant's false representation. And this personal liability exists in this case as is shown in the rule stated in 2 C. J. 808, "An agent will be held personally liable where he professes to enter into a contract for a principal who is at the time non-existent or legally incompetent, or irresponsible even though in thus entering into the contract he acts in good faith as an agent assuming to contract for a principal or else he himself is liable." In accordance with this rule it has been held, "that an agent is personally liable where he professes to enter into a contract on behalf of a corporation before it is incorporated even though the contract is entered into under the seal of the corporation." Thus we have shown the personal liability existing in this case.

As for the plaintiff's contention that the defendant is a promoter, we think this is not so. Because under the definition of a promoter as stated in 10 Cyc. 262, we find it impossible to include the defendant in such a class of persons. It states, "A promoter is one who takes it upon himself, to organize a corporation; to procure the necessary legislation where that is necessary; to procure the necessary subscribers to articles of incorporation where the corporation is organized under general laws; to see that the necessary document is presented to the proper officer of the state; to be recorded and the certificate of incorporation issued; and generally, to float the company'." The defendant having done none of these acts cannot be considered a promoter.

Therefore, because the defendant is merely personally liable and not liable to carry out and enforce the specific contract, and in view of the fact that there was no contract in law, we feel that the plaintiff has brought the wrong kind of action, and we are bound to find for the defendant.

OPINION OF SUPREME COURT

The learned court below has incorrectly interpreted "personal liability." A clear perusal of the cases will disclose that the plaintiff has the choice of holding the agent liable on the contract or in trespass for the injury caused. The court appears to have relied too heavily on cyclopedias and too lightly on the decided cases. The case of O'Rocks vs. Geary, 207 Pa. 240 is analogous. In a similar situation the purported agent was held liable on the contract. And this should be the result. In legal contemplation, the parties intended to make a binding contract, not merely an offer. Both knowing that no principal existed at that time, they must have intended that Ruskin should be at least temporarily liable until the contract was assumed by the corporation and Ruskin relieved. This being impossible because no corporation was formed, Ruskin's provisional liability became absolute and specific performance may be secured. Cf. also Stiteler vs. Ditzenberger, 45 Super. 266 for the law as to an agent's liability.

The judgment of the learned court below is reversed.

SAYERS VS. AUTO CO.

Contracts—Restraint of Trade—Validity—Creditor Beneficiaries of Contracts—Right to Sue.

STATEMENT OF FACTS

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STATEMENT OF FACTS

The Regal Automobile Co. concluded with all Regal dealers contracts identical except for the territory alloted, which were part

of a projected system of uniform contracts for the entire U. S. In the territorial infringement clause each dealer promised that, if he sold a car in any other's territory, he would pay that other 10 per cent. of the list price. The plaintiff's contract was concluded first He now sues the defendant in assumpsit for having sold a car in his territory and having refused to pay the plaintiff the agreed 10 per cent.

Allen, for Plaintiff.

Boyer, for Defendant.

OPINION OF THE COURT

Biener, J. This is an action of assumpsit brought by the plaintiff on the contract stated in the above facts.

The question to be decided in this case is, whether the plaintiff may maintain this action in his own name.

In answer to the above question, the learned counsel for the plaintiff has cited the case of Brill vs. Brill, 282 Pa. 276, in which it was stated, "That if the promise to pay to a third person is not primarily made for the benefit of the other contracting party, but for the third person himself, the latter has a legal or equitable interest in the contract, which enables him to enforce his rights thereunder, even if he himself was not a party to the consideration paid to the promisor."

The case at bar falls within the doctrine of Brill vs. Brill, for there is no doubt that there existed a valid binding contract between the Regal Automobile Co. and the defendant, which was supported by consideration and that according to the terms of this contract the plaintiff although not a party to it was nevertheless a beneficiary. For it was specificially agreed that if the defendant should sell a car in another's territory, (and in this case it happened to be the plaintiff's territory) he would pay to him 10 per cent. of its list price.

The learned counsel for the plaintiff speaks of other principles of law, such as contracts against public policy, contracts in restraint of trade, and also about the sum set aside in the contract being liquidated damages and not a penalty. As the learned counsel for the defense does not consider any of these principles in his brief, it will suffice to say that this court after due investigation and consideration in regard to the above contentions of the plaintiff, has come to the conclusion that this case does not fall within any of those principles of law.

In view of the foregoing facts and conclusions, judgment is rendered for the plaintiff.

OPINION OF SUPREME COURT

The case presents two main issues:—whether the plaintiff has a right to sue on the contract and whether the agreement was void as in restraint of trade.

The plaintiff here would seem to be a creditor beneficiary of the contract. The contract made by the Regal Co. with the defendant was a discharge of the implied obligation of the Co. to secure from all dealers agreements to restrain their sales to certain territory.

May a creditor beneficiary sue on the contract? The test now appears to be that he who is intended to be primarily interested or benefitted by the contract may sue thereon, Brill vs. Brill, 282 Pa. 276 and Tasin et. al. vs. Bastress, 184 Pa. 47. Surely the plaintiff was intended to be primarily benefitted by the present contract and may sue thereon.

Is the contract void as in restraint of trade? To be void it must be unreasonable and injurious to the public. No such result can be seen here. See Johnston vs. Franklin Kirk Co., (Ind. 1925) 148 N. E. 177.

The judgment of the learned court below is affirmed.

GOODWIN VS. GROVE

Insurance Cos.—Judgments—Compromise and Settlement—Garnishment—Fraudulent Release—Act of May 21, 1921, P. L. 1046.

STATEMENT OF FACTS

The plaintiff obtained a judgment against the defendant for $4000.00 for injuries due to the negligent operation of the latter's auto. Thereafter the Insurance Company which had insured the defendant to the extent of $5000.00, knowing the defendant to be insolvent paid him $2000.00 and obtained from him a discharge from all liability. The plaintiff then garnished the Insurance Co. which pleaded the discharge. The court held that the discharge was fraudulent as to the plaintiff and gave judgment for the plaintiff of $4000.00. The Insurance Co. appeals.

Hyett, for Plaintiff.

Cantor, for Defendant.

OPINION OF THE COURT

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Hyett, for Plaintiff.

Cantor, for Defendant.

OPINION OF THE COURT

Goodman, J. A carefuly study of the facts in this case discloses two questions for the determination of this court. The first of which

is, upon what ground is the liability of the insurance company based. Is its liability based upon the theory of indemnification or is it based upon the recovery of judgment against the insured and his inability to pay the judgment?

Although the defendant has not presented the first argument in his brief, the case cannot be decided with any degree of certainty without considering whether or not the insurance company's liability is based upon the theory of indemnification. The defense therefore to this garnishment proceeding should be that there is no liability incurred by the insurance company until the insured has suffered damages by being required to pay something. Since the principle debtor in this case is insolvent and has paid nothing, the insurance company is not liable and therefore is not subject to garnishment. This argument would be very forcible in many instances, but we are of the opinion that the true rule would be that the insurance company's liability is based upon the recovery of judgment against the insured and his inability to pay the judgment. Fritchie vs. Miller Extract Co., 197 Pa. 401; Schambs vs. Fidelity and Casualty Co. of N. Y., 259 Fed. 61. We would hesitate to deviate from this principle unless it were expressly provided in the insurance policy that the company's liability would be based upon the prior ground. This proposition is supported in toto in 37 A. L. R. 645, and it is said in 28 C. J. 166, "Where the plaintiff in an action for damages has recovered judgment he may garnish the defendant's claim under a policy insuring him against liability for damages of the kind recovered by the plaintiff against him."

Having determined that the insurance company is liable to the plaintiff since the latter has recovered a judgment against the insured, and the insured is unable to pay this judgment, we are next confronted with the defense that the insurance company has paid the insured $2000.00 and has obtained from him a discharge from all liability. This precipitates the second question. Is the discharge of the insurance company by the insured from all liability a valid defense to the garnishment proceedings since the garnishee know that the defendant was insolvent? It is a general rule of law that an insurance company and the insured may amicably settle their claim. But we do not understand the law to be that an insurance company may discharge itself of liability to the plaintiff by a collusive settlement with the insured. This proposition is not acceded to by our law and is expressly forbidden by the Uniform Fraudulent Conveyance Act, May 21, 1921, P. L. 1046. That the payment of the $2000.00 to the insured was a conveyance and that the plaintiff is a creditor is clearly set forth in Sec. 1 of the Act, wherein it is stated that a "conveyance includes every payment of money" and "a creditor

is any person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." Section 7 provides, "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors." That the garnishee had the actual intent to defraud is perfectly evidenced from the facts which clearly state "the insurance company knowing the defendant to be insolvent." This is as clear a case as we can possibly comprehend in which the insurance company and the insured colluded to prevent the plaintiff from recovering that which is justly due him.

It has been conceded by both counsel that a case similar to this one has never been determined in our court. But a somewhat analagous case was considered in West Virginia, that of Combs vs. Hunt, reported in 3E A. L. R. 629, and the court there held "An unsatisfied claim against the insured for a collision to an automobile which to the knowledge of the insurer has been impounded to satisfy a claim against its owner for injury inflicted by him upon a third persons is bound by an execution so as to render the insurer liable to such third person in case it pays the claim to the insured."

Since we have determined that the insurance company is liable to the plaintiff, and because we are of the opinion that the discharge was fraudulent as to the plaintiff, we therefore affirm the decision of the learned court below.

OPINION OF SUPREME COURT

The learned court below was correct in holding that the liability of the insurance company attached on entry of the judgment against the defendant. This is so unless the proof clearly shows that the contract was against loss from liability rather than against liability itself. That in such a case the judgment creditor may summon the insurance company as garnishee is clearly shown in Fritchie vs. Miller Extra Co., 197 Pa. 401. Under the Act of May 21, 1921, P. L. 1046, the release was a conveyance, it was made without a fair consideration, and was made with actual intent to defraud the plaintiff. In such a case, the creditor may treat the release as never having been made. This he has done and the insurance company cannot set up the release nor the payment made. Cf. Am. T. Co., vs. Kauffman, 276 Pa. 35 and Leary vs. Schmen, 280 Pa. 435.

The judgment of the court below is affirmed.

MOSS VS. DELANEY

Lease—Knowledge of Lessor—Intention To Use For Illegal Purposes—Rent—Illegality

STATEMENT OF FACTS

The plaintiff leased a building to the defendant knowing that the latter intended to use it for the illegal making of intoxicating liquor. The defendant has defaulted in his payment of the rent, after being arrested for the violation of the law. The plaintiff sues to recover the rent due.

Coover, for Plaintiff.

Crabtree, for Defendant.

OPINION OF THE COURT

Cobb, J. The question in this case is: "That where a person has leased a building to another with the full knowledge that the premises are to be used for an illegal purpose can the owner of the premises recover in an action for unpaid rent."

Now as our first proposition it may be stated that as a general rule the courts will not enforce the terms of a lease where the subject matter of the lease, with full knowledge of both parties, was intended to be used in an illegal manner. Waugh vs. Beck, 114 Pa. 422, also Safe Deposit Bank vs. Helner, 190 Pa. 276.

In this case, the lease was made for the renting of a certain building, the intended use of which, known to both parties, was the manufacture of intoxicating liquor, an act expressly forbidden by a statutory law, namely, the third section of the twenty-fifth Act of the year, one thousand nine hundred twenty-three. This act does not pertain to the leasing of buildings for the manufacture of intoxicating liquor but it does forbid the manufacture of intoxicating liquor as is the particular object of this lease.

Now it is a well-known rule of law that lease for the use of certain premises for an illegal purpose, and of which both parties have knowledge, is an illegal contract, and is therefore unenforceable in Penna. Waugh vs. Beck, 114 Pa. 422.

The object of the lease was purely illegal, the facts of the case show that without a doubt. The lessor by entering into this lease which had for its object the violation of a positive law, with the knowledge which he possessed, may be said to have sanctioned such purpose, and by so doing, he made himself a party to an illegal contract, and this court will give him no aid, when he is in such a position. It is a reasonable inference that his intentions were tainted with illegal tendencies.

In this case, the facts making the lease unlawful were well known to the parties to the lease and the parties are deemed to be chargeable with knowledge of the law. It is a well established fact that no recovery can be had by either party to such a lease. The court refuses to aid the plaintiff in this case, not out of regard or because of his adversary, but because such relief would be contrary to public policy. Homead vs. Maddox, 13 Fed. Case 391.

This suit is based solely upon a lease, which is invalid and where the cause fails, the action fails with it.

OPINION OF SUPREME COURT

No direct case involving the question, whether knowledge by the lessor that the lessee intended using the leased premises for an illegal purpose prevents the recovery of rent for those premises, has been found in Pennsylvania. The issue has been presented in other jurisdictions with varying results.

Certain general principle governing illegality of contracts have been enunciated, however, Waugh vs. Beck, 114 Pa. 422 holds that it is not enough to defeat recovery by the lender, that he knew of the borrower's intention to use it in a gambling transaction. Judge Kephart, in Sonemaugh Co. vs. Bennett, 60 Super. 543 says, "The mere knowledge by the vendor that the vendee intended to use the goods sold contrary to law, will not of itself be sufficient to invalidate the contract." Judge Sadler in N. Y. and Pa. Co. vs. Cunard Co., 286 Pa. 72, 81 says, "Where the claim of the plaintiff can be made out without showing any wrong doing, **even though the transaction may have had such a basis,** a suit may be successfully maintained." Applying these principles we find that all that here appears is that the lessor had knowledge of the lessee's intention. It is not even averred that he desired the consumation of that intention nor leased to aid it. He clearly can show his claim without disclosing illegality.

We accordingly reverse the judgment of the learned court below.

BOOK REVIEWS

The Elements of a Contract, Victor Morawetz. Columbia University Press, 1926. I Vol., 167 pages—Price $2.00.

The author is a member of the Council of the American Law Institute, which was organized and endowed to prepare scientific restatement of the common law. A draft restatement dealing with part of the law of Contracts has been prepared by the Institute and submitted for criticism to the bar generally. The above book is

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the contribution of its author by way of criticism of this draft restatement. The author feels that much of the law is expressed in language intelligible only to lawyers and often confusing even to them, amounting to mere jargon to the lay man. "This is not due merely to the use of technical terms, but it is due mainly to the use of artificial conceptions, theories and forms of statement." He advocates that in the proposed restatement these artificialities be avoided, thus clarifying the law, rendering it more simple and certain, and easier for students to master. Instead of research into the history of the law, he urges an analysis of current legal conceptions and a "restatement of the existing law according to fact and reason." The author does not attempt a complete statement, often stating general principles, without their limitations, and referring to no authorities, his purpose being only to clarify fundamental conceptions and indicate a method of statement.

The six chapters relate to, I, Fundamental Conceptions; II, The Foundation of Contracts; III, Specification of Terms of a Promise or an Offer or an Agreement; IV, Intent and Understanding and Expression of Intent as Elements of a Contract; V, Effect of Erroneous Belief or Ignorance of Facts or of Impossibility or Illegality of Performance; IV. Consideration for a Promise.

The author's work on the law of corporations published in 1882 established his reputation as an original thinker of the highest rank and it is fortunate that his interest has now been directed to making the proposed restatement of the law something that will serve a useful purpose.

Pennsylvania Trial Evidence, Second Edition, 1927. By George W. Henry, Esq., of the Philadelphia Bar. Published by Soney & Sage Co., Newark, N. J.

In 1914 the first edition of this work was published. In the preface of that edition the author referred to the fact that it is impossible to forsee all questions of evidence which may arise and call for immediate decision in the course of a trial, and to the fact that there are many instances where the decisions of different states vary in the application of the general principles of evidence and where statutory enactments have made material changes therein, as in Pennsylvania. The best general text-books on evidence are in numerous volumes and digests of local statutes and decisions are not convenient for quick reference. The Pennsylvania bar accordingly welcomed a local work not only for its convenience and practical usefulness but because it was found with use to be eminently reliable. The exhaustion of the first edition gave the author the opportunity to make such changes therein as recent decisions and statutes required and to add to the late cases reaffirming established principles. The new edition gives the page of the report where the point is found decided and this feature will save much time in many cases in which delays are embarrassing. Over one hundred pages have been added. The reception given the first edition is proof enough that the publishers have given a useful, practical and valuable book to the bench and bar of the state.