# OPINIONS IN EIGHT CASES

## RESPONSIBILITY OF MUNICIPAL AUTHORITIES.

**Interesting Decision by Judge Edwards in the Damage Case of Pickrell Against Old Forge—Judge Kelly Lays Down a New Rule of Law—No Device, However Ingenious, Can Secure a Liquor Bill—Divorces Granted in Six Cases—Other Matters in the Courts.**

Seven opinions from President Judge Edwards and one from Judge Kelly were handed down at the opening of court yesterday morning.

Two of them are given below in full. In the first, Judge Edwards passes upon a matter which has been the basis of many damage suits. In the second, Judge Kelly makes a decision that a case stated can not be submitted in equity proceedings.

Thomas Pickerell vs. Borough of Old Forge. Exceptions to report of referee.

While the exceptions in this case are numerous, there are only two that require our consideration and they were the only exceptions pressed by counsel at the argument. The first relates to the referee's refusal to affirm defendant's first law point which was as follows: "That the time and manner of draining the streets of the municipality requires the exercise of judgment, and by law municipal authorities are vested with the power of exercising their own judgment. The duty of exercising is of a judicial and not of an administrative character. Therefore, the insufficiency of drainpipe to carry off on all occasions the water flowing towards it will not give the owner the right of action against the municipality, as it only was a mistake in judgment and not negligence on the part of the municipality."

As a proposition of law, where the facts justify the application of it, the point is well stated and is sustained by abundant authority: Fair vs. Philadelphia, 88 Pa. 308; Pressman vs. Dickson City, 13 Sup. Ct. 236; and other cases. But in the case at bar the point is not well taken, because of the difference in the facts and circumstances of the case. The evidence shows that the improvement complained of was an obstruction to the flow of water in a natural water course resulting in the flooding of the plaintiff's land after every storm. This is the finding of the referee and it is supported by abundant testimony. Such being the fact the case is in the line of King vs. Boro., 152 Pa. 50, and Riddle vs. Del. Co., 156 Pa. 643.

The other exception argued concerns the assessment of damages against the borough of Old Forge. It seems that the borough was incorporated May 2, 1889. It was formerly in the township of Old Forge. Evidence was admitted as to the overflowing of defendant's land since 1896; but the referee disallows all damage claimed before the organization of the borough. He distinctly finds the amount of damage suffered by the plaintiff since the township became a borough. We cannot say, as contended by defendant's counsel, that the evidence was not sufficient to enable the referee to ascertain the amount of damages assessable against the borough. It seems that he has been careful on this point and he has been conservative in his estimate of the amount the plaintiff is entitled to recover. We need not discuss the other exceptions. The matters already considered seem to raise the only material questions in the case.

Now, March 3, 1902, all the exceptions are overruled and the prothonotary is directed to enter judgment in accordance with the recommendation of the referee.

H. M. Edwards, P. J.

Michael Collins vs. Hymon Stone. In Equity. Bill for specific performance.

The parties to this action have filed an agreement in the form of a case stated, in which the facts are agreed to. We can find no authority for the practice of submitting a case stated in equity proceedings, and we therefore refuse to decide the question submitted as upon a case stated. However, we have before us the plaintiff's bill and the defendant's answer, together with an agreement on the facts as set forth in the so-called case stated, and we are therefore in a position to dispose of the matter upon the undisputed facts, which are:

1. On the 22d day of February, 1807, Hymon Stone, by articles of agreement agreed to convey to James W. Gilligan, a lot of land in the township of Carbondale, Pennsylvania, for the price or consideration of $400, payable $50 in cash, and the balance in installments of $25 or more every three months, with interest.

2. James Gilligan died, intestate, on the 7th day of June, 1900, leaving to survive him a minor child, Mary Gilligan. At the time of his death there was a balance of purchase money due on the contract of $25.

3. On or about the 1st day of December, 1900, Ellen Collins, the mother of James Gilligan deceased, paid the said balance due upon the contract to Hymon Stone, and thereupon Hymon Stone, joined by his wife, by consent of Ellen Collins, executed a deed for the property described in the contract, to Mary Gilligan, minor child and heir of James Gilligan, deceased, and delivered the same to Ellen Gilligan.

4. On the 12th day of December, 1900, letters of administration up on the estate of James Gilligan, deceased, were granted to Josephine Gilligan. On the 13th day of February, 1901, Josephine Gilligan, administratrix, presented her petition to the orphans' court praying for an order to make private sale of the interest of James Gilligan, deceased, in the property in question for the purpose of paying debts of the decedent, and on the same day the order was made as prayed for and the property sold to Michael Collins, the plaintiff, for $375, which sale was duly confirmed and deed delivered to purchaser by the administratrix.

5. Michael Collins, the purchaser, thereupon demanded a deed from Hymon Stone which Stone refused to execute and deliver to him.

On the refusal of Stone to make a deed to him plaintiff filed this bill, praying for a decree of specific performance, etc.

From the facts as above stated it appears that Mary Gilligan is now vested with the legal title to the lot in question. She is not a party to this bill. This fact, in our opinion, stands in the way of our granting a decree of specific performance. In 20 Amer. & Eng. Encyc. of Pleading & Prac., 412, the general rule is stated that all persons interested in the enforcement of a contract must be made parties, and that the general rule of equity pleading that all persons whose interests are to be affected by the suit are necessary parties to it applies to suits for specific performance. In the same volume, at pages 415-416, we find the proposition stated: "Where one agrees by written contract to sell land, and afterwards conveys to a different person who has knowledge of the previous contract, the latter holds the legal title as trustee of the first purchaser, and a court of equity will compel him to convey; and in a bill by the first purchaser for specific performance against his vender, the second purchaser is a necessary party. Persons, who, after the making of a contract for the conveyance of lands, acquire interests in the lands derived from the vender are necessary parties to a bill for specific performance of the contract."

By virtue of the orphans' court sale the plaintiff succeeded to the rights of the decedent, under the contract, and no doubt has the right to enforce the specific performance, but under the rules above stated he must make the subsequent purchaser a party. We therefore hold as a matter of law: 1. That before the plaintiff is entitled to a decree of specific performance he must make Mary Gilligan a party defendant. 2. That the plaintiff's bill should be dismissed.

And now, March 3, 1902, it is ordered that a decree be prepared by the defendant's solicitor, a copy served upon the plaintiff's solicitor, with notice, etc., as required by rule 84 of the equity rules.

John P. Kelly, A. L. J.

In the case of Owen Biglin against William Zarn, Judge Edwards dismissed the defendant's exceptions to the finding of the referee.

Biglin worked for Zarn in the mines and traded with Zarn in his liquor store. When they came to make a settlement, Biglin agreed that his liquor bill of $6.85 should be deducted from what was owing him in wages. His wife wouldn't hear to this and compelled her husband to sue for the whole amount.

Referee T. P. Duffy decided that it was illegal for Zarn to deduct the liquor bill from the wages, even admitting that Biglin agreed that it might be done.

In supporting the finding of the referee, Judge Edwards says: "The allowance of such an account in a settlement is no bar to an action. We know of no device, however ingenious, by which such an account can be collected or secured."

In the case of Frank Pierce against George Cowperthwaite, Judge Edwards overruled the demurrer. The rule to set aside the award of the arbitrators in the case of B. F. Williams against Theodore Wachna and wife was discharged by Judge Edwards. He also dismissed the exceptions to the report of the referee in the case of the Second National bank of Winona against F. H. Clemons, et al.

Judge Edwards recommitted the report of the referee in the case of Elizabeth Wallace, administratrix, against W. W. Simrell, et al., that a correction might be made in the manner of directing judgment. The exceptions were all overruled.

Judge Edwards wrote the opinion refusing a new trial in the case of Spruks Bros. against Patrick Lally. It was a case tried before Judge Carpenter.

### Six Divorces Granted.

Half a dozen more divorce decrees were handed down yesterday, by Judge Kelly.

Lillian Whitbeck was freed from William G. Whitbeck, on the ground of cruelty. One of the incidental allegations against him was that he married her when he knew there were reasons why he should not get married. They lived together in this city, Lancaster and Franklin from May 29, 1900, until the latter part of June, 1901. J. E. Watkins was the libellant's attorney.

Catharine Watkins, of Capouse, was granted a divorce on the ground of cruelty. They were married April 4, 1900, and lived together a year. D. L. Fickes represented the libellant.

Max Spiegel's story, which secured for him a divorce, was to the effect that his wife, Regina, who was nearly twice his size, beat him every time he entered the house. They lived together four years. J. F. Murphy was attorney for Mr. Spiegel.

Desertion was the ground for Glenna Terwilliger's divorce from Warren S. Terwilliger. They were married five years ago and lived together for three years. She now lives in Clark's Summit.

Nina Petherick secured a divorce from William Petherick, by showing that he beat her almost constantly during their six months of married life. Their home was on Everett avenue. Frank E. Boyle represented the libellant.

M. Agatha Fitch was granted a divorce from T. B. Fitch on the ground of desertion. They were married in Lemon, Wyoming county, in 1899, and lived together in Elmira for five years. He is now living in Elmira, it is alleged, with another woman. She resides in Clark's Green. C. S. Woodruff was attorney for Mrs. Fitch.

### Marriage Licenses.

Abe Freedman ..... Peckville
Sarah Schener ..... Peckville
Elmer Traver ..... New Berlin, N. Y.
Helen Mai Sarle ..... New Berlin, N. Y.



# COURT PASSING ON LICENSES

[Concluded from Page 3.]

license. Mr. Holgate said he was not informed as to that, but thought it might be true. The revocation matter was appealed to the superior court, and when the superior court refused to interfere with the action of the local court, a further appeal was taken to the Supreme court. The appeal was not permitted to act as a supersedeas, Mr. Holgate admitted, but he felt that while the appeal was pending his client was entitled to continue selling on the principle that execution shall not precede a final judgment.

Judge Kelly called Mr. Holgate's attention to the act of 1897, which specifically provides that an appeal shall not stay execution of an order revoking a liquor license. Mr. Holgate admitted he had not read the law.

"Suppose you took an appeal," remarked Judge Edwards, "and it was not finally adjudicated for a year, could you keep on selling under the license for the year?"

"Why, yes, of course," replied Mr. Holgate, smiling.

BRINK MADE DENIAL.

Mr. Brink was called to the stand and denied he sold any drink to the league detectives. M. J. Healey was called as a character witness for Mr. Brink, and in answer to Mr. Holgate's question as to whether or not Mr. Brink was a fit person to conduct a hotel, Mr. Healey answered that he was.

On cross-examination, Mr. Beers asked the witness if he had frequented the hotel lately. The witness said he had, and in answer to a further question, admitted hesitatingly that he had been served with drink there since the license was revoked.

As Mr. Healey was leaving the stand, Attorney Holgate called out "Of course, Mr. Brink never served you with drink?"

"I wouldn't say as to that," candidly declared Mr. Healey.

Everybody joined in the laugh. Mr. Holgate allowed the witness to go without further questioning.

Mr. J. Horan testified to having known Mr. Brink for many years and gave it as his opinion that he was in every way fit to conduct a hotel.

Anthony McDonald testified similarly. On cross-examination Mr. Beers asked:

"Didn't you sit in at a little poker game at Brink's place last Saturday night?"

The witnessed colored up and got a bit nervous and after a wait of some moments answered by saying, "Me?"

"Yes, you," rejoined Mr. Beers.

"Do you mean in the bar room?" came from the witness after another long wait.

"Any place in the hotel?"

"Why—er—" and for fully half a minute the witness looked sheepishly at the sea of faces in front of him.

DIDN'T KNOW IT.

"I didn't know that I was a poker player," he finally managed to say.

"I guess you needn't answer the question," Mr. Beers charitably remarked.

The witness lost no time in getting down from the stand and going way back.

The case of Lewis Barrett, of Glenburn, whose place was burned out, Sunday night, was continued until today. There are two remonstrances against him.

Fell Township, had among its new applicants the Fell Brewing company. Attorney Edwards explained that an $80,000 brewing plant is to be constructed there. John Keller, of the Milford-Owego turnpike; Jacob Heath, of the same thoroughfare, and Martin F. Healey, of Dundaff street, are the other new applicants.

When Lackawanna township was reached it was disclosed that three of the four new applicants from Lincoln Heights, John O'Malley, Patrick McNally and John B. McDermott had advertised in their petitions that they were in Lackawanna township when in fact they are in Taylor borough. It was only last Friday that the mistake was discovered. All the residents of the locality in which they propose to locate, the extreme end of Lincoln Heights, on the easterly side of Main street, have been erroneously voting in Lackawanna township since the recent Taylor annexation. They properly belong in the Sixth ward of Taylor. The fourth of the Lincoln Heights' applicants, Patrick Connell, being on the opposite side of the street, is in the township.

Court said it would consider what would be done about straightening out the mistake when it came to pass on the applications.

All four were remonstrated against by thirty-five residents of Lincoln Heights and the Keystone Land company. The remonstrants were represented by Attorney W. N. Curry. O'Brien & Martin, John R. Edwards, John J. Murphy, Colonel F. J. Fitzsimmons and Hon. C. P. O'Malley represented the applicants. Mr. O'Malley argued that the women want a few hotels down there so that the men will not go to town.

Other new applicants from Lackawanna township are Jacob Barbowski, of Pittston avenue, and John Mertjewski of Prospect street. Patrick J. Sullivan's application was withdrawn. A remonstrance was filed against Martin P. Judge's application. This is one of the cases heard in the morning on a rule to revoke the license.

ONE FROM MAYFIELD.

A remonstrance represented by Attorney H. D. Carey was filed against the application of John Medan, of May street, Mayfield. Mr. O'Brien, for the applicant, pointed out that Mr. Carey is attorney for Bellahigi Burian, of May street.

Michael Dzonczyk is another new applicant from Mayfield.

Two new applicants from Moosic are Frank Gorgal, of Pine street; Sylvester Kochnofska, of Greenwood street, and John Moran, of Main street.

Old Forge had fewer applicants this year than for many years. Only three new petitions were received. These were from Guseppi Sarocirro, of Geage street; Catherine Burke, of Main street, and Emie Mulleman, of Maple street, and Max Rosenfluth, of Maple street. The last named was formerly a retailer and wants now to be a wholesaler.

The Scranton list will be reached early this morning.