> While we were impressed from the record with the careful and considerate treatment the parties received from the hearing court, we realize that the court was then proceeding under the former decisions of this jurisdiction. There is serious question what, if any, effect the fact of the mother's income had upon the decision. Combining the decrease in the father's income along with the additional income resulting from the mother's recently acquired employment provides a sufficient change in circumstances to warrant a modification of the original order.

See also *Kaper v. Kaper*, 227 Pa. Super 377, 323 A.2d 222 (1974).

Knowing that a mother is equally responsible with the father, do we determine her obligation to support the children from her income or from her earning capacity? In *White vs. White*, 226 Pa. Super 499, 313 A.2d 776 (1973), our Superior Court said:

> In the interest of fairness and with consistency in mind, we see no reason why, in this day and age, a court must limit its inquiry to the wife's earnings. Under the appropriate circumstances a wife's "earning capacity" may be a material factor in arriving at a reasonable support order. Id 504.

In footnote No. 5, Id. pg. 505, the court discusses the factors to be considered to determine the wife's employability. These include her work record, availability for work, relative skills, health, stamina, and presence or absence of children in the home for which she would have responsibility. See also Commonwealth ex. rel. *Kaplan v. Kaplan*, 236 Pa. Super 26, 344 A.2d 578 (1975).

That brings us to a consideration of footnote No. 4 on page 504 where the court expresses the view that there are strong moral reasons and public policy considerations why the law should not by implication force a wife to seek employment when there are minor children in the home, saying a mother has a moral, if not a legal right, to choose to remain in the home with these children to provide the constant presence of a parental figure. In this case, the children are eight, six, four, and two years old. As indicated, there was evidence that prior to her re-marriage, the mother was employed at $70.00 per week. At that time apparently she had chosen to make other arrangements for the care of the children, other than looking after them herself during her working hours. Had she not remarried, we would have considered her weekly income to be $80.00, $70.00 from employment and $10.00 from rent. Under these circumstances a fair amount for the father to

pay would have been $66.00 weekly.

We are now faced with the question whether the mother should be required to contribute to the support of the children. After all, she is not employed at the present time. We hold that where a woman who is employed and who removes herself from the employment market, not because of the need to be with her children, but because she has remarried, retains the "earning capacity" she had before she gave up her job. It follows that in this case the mother's earning capacity will be considered in arriving at the amount the father must pay for child support. We have already indicated that we feel $66.00 per week would be a fair amount.

We started with the proposition that the father had shown no changes in his circumstances except improvements in his earnings. He has shown, however, that the mother has an "earning capacity", that since the order in this case was made the courts have changed the law, the father is no longer primarily responsible for child support, that duty is now to be borne equally by both parents. Thus the changes required in *Luongo* that would justify a modification in this court order have occurred.

ORDER OF COURT

NOW, January 26, 1977, the prayer of the petition to modify the support order is granted and it is ordered that the respondent, William E. Robertson, shall pay to his former wife, Beverly Baughman, the sum of $66.00 per week, beginning Monday, January 31, 1977, for the support of his four minor children, Keith Robertson, born January 14, 1968, Heather Robertson, born July 16, 1969, William Robertson, born October 7, 1971, and Jeffrey Robertson, born May 7, 1973. In all other respects, the order of March 13, 1974, shall remain in full force and effect.

The respondent, William E. Robertson, shall pay the costs of these proceedings.

BROWN'S SUCCESSOR TRUSTEE v. THIBAULT, et. Ux., C.P. Franklin County Branch, Ex. No. 6, February Term 1969

Single Bill - Principal-Surety Relation - Tenants by the Entireties - Right of Subrogation - Marshalling - Bankruptcy.

1. Where tenants by the entireties co-sign a note, it may be shown by way of defense to an action upon the note that one co-signer was solely a surety on the obligation.

2. Where husband and wife co-sign a note in order to obtain a business operating loan, and the wife is not an active entrepreneur in the business and derives no personal benefit from the loan, she signs as surety only.

3. The fact that co-signers of a note are husband and wife does not negate the existence of a principal-surety relationship as between the co-signers.

4. A surety's claim against its principal is secured by its right of subrogation to the remedies of the creditor it was compelled to pay.

5. The equitable doctrine of marshalling does not apply where the two claims at issue are in the hands of a single person, as where a trustee in bankruptcy holds both claims.

6. The general rule of marshalling is that, where one creditor has a lien upon two properties of one debtor and a second creditor has a lien upon only one of these properties, the first may be compelled in equity to levy upon the property to which the other has no claim.

Kenneth F. Lee, Esq., Attorney for Plaintiff

Thomas M. Painter, Esq., Attorney for Defendants

EPPINGER, P.J., May 9, 1975:

OPINION AND ORDER

Margot E. Thibault is the wife of Louis G. Thibault. The husband was engaged in the home building business. In March of 1966 the husband and wife signed a note in favor of the First National Bank of Greencastle (bank). In April a tract of land was conveyed to the husband and wife and then in May they signed another note to the bank. Then the husband and wife executed a mortgage in favor of the bank. This was recorded on August 24, 1966. On September 6, 1966, judgment was entered on the notes. All of the money received from the bank in connection with these transactions was used in the husband's building business.

On October 3, 1966, the real estate was conveyed by the defendants to the husband. In April of 1967, he went into bankruptcy. The real estate was sold at public sale by the trustee in bankruptcy for $24,000.00. The referee, who confirmed the sale, ordered the notes and the mortgage debt paid. The trustee paid the bank $6,100.00 and the bank assigned the judgment debts (on the notes) to the trustee.

The husband and wife petitioned the court to open the

judgments and the court granted the petition so that they could enter a defense. We now find that the wife was a surety on the husband's obligation, that she was not a co-maker and that she derived no benefit from the loans personally. The business practices support this conclusion. While she occasionally did some work in connection with the business, there is nothing to indicate that she was an active entrepeneur with her husband. She signed the notes only because the bank required it for her husband to get the loans necessary to operate the business.

Where tenants by the entireties co-sign a note it may be shown that the debt, though joint in form, ought to be paid by one of the debtors only, or that there is some other supervening equity. Cf. *Dunn v. Alney*, 14 Pa. 219, 222 (1850). As stated in *Algeo v. Fries*, 24 Pa. Super. 427, 428 (1904):

> "Prima facie, when husband and wife join in the execution of an obligation, they are joint debtors, and subject to all the legal incidents of joint indebtedness. There is no presumption that either is surety. This is a matter of defense; and, like other joint debtors, either may show, as against any party to be affected, in law, by such proof, that he or she is in fact a surety for the other."

In the presentation of the case, the trustee in bankruptcy argued strongly that the wife was more than a surety and suggested that the very fact that they were husband and wife negated the principal-surety relationship. In *Stewart v. Stewart*, 207 Pa. 59, 56 A. 323 (1903), where the debtor's wife made out a note with her bank stock as collateral and a joint bond of herself and her husband, the latter to be secured by a mortgage on her separate real estate, and the proceeds were applied to the husband's indebtedness, and the issue was whether the wife was a principal or surety, the court said:

> "While there is a strong sentiment of affection, growing out of the marital relation, which would induce a wife to do that for her husband which she would do for no other, yet her acts, as between her and his creditors, are governed by the same rules of evidence that operate in transactions between others. She stands on exactly the same footing as all the other creditors of her husband. The same evidence which would establish a stranger's right will establish hers, . . . In the case before us, the question is was she surety to Fulmer for the husband's debt? Suppose, instead of the wife, a mere friend had come to the help of the husband in his extremity; had joined the husband in a bond; had mortgaged his own land to secure the bond; then this money had been handed to the husband, and

> he, with the money, had paid his debt, of which his friend owed nothing. From these facts, without more, the presumption would be that the friend was a surety. It would require very strong evidence to rebut the presumption. The wife is in no less favorable position, so far as concerns proof, than the friend. The motive to impel her to become surety to the husband's creditors may be stronger, but the rules of evidence impose upon her no heavier burden in establishing her suretyship than upon any other creditor."

It is apparent that the trustee in bankruptcy paid off a preferred claim in the bankruptcy proceedings when it paid the bank. Had the bank itself gone to the wife to be paid on its claim, the wife as a surety on the husband's obligation would have been subrogated to the bank's position and herself would have been a preferred creditor in the bankruptcy proceeding. *Appeal of Owen*, 11 W.N.C. 488; *Kirby v. Coolbaugh*, 7 Pa. Super. 91; *Appeal of Cottrell*, 23 Pa. 294.

In *U. S. Fidelity & Guaranty Co. v. Quinn*, 223 Pa. Super. 285, 299 A.2d 338 (1972), the court said;

> "A surety is entitled to every remedy that the creditor has against the principal and he is entitled to enforce every remedy and stand in his shoes where he has been compelled to pay a loss on his behalf (citations omitted).

Citing *American Surety Co. of New York v. Bethlehem National Bank*, 314 U.S. 314, 317, 62 S. Ct. 226, 228 (1941), the court also said:

> "Succeeding to the creditor's right, the surety also succeeds to the creditor's means for enforcing it. The surety is a special kind of secured creditor. For its claim against the principal is secured by its right of subrogation to the remedies of the creditor which it has been compelled to pay.' "

Going on, the court said:

> "This rule has been the law in Pennsylvania for many years. The case of *Hess's Estate*, 69 Pa. 272 (1871) held that a surety who pays the principal's debt is entitled to all the rights and remedies of the creditor in the same manner as the principal."

It follows therefore that if the defendant Margot E. Thibault was compelled to pay the trustee the amount of the debt due from her principal, she would in turn be permitted to proceed against the trustee, as a preferred creditor, for the same amount.

Moreover, our courts have held that where a wife's land is mortgaged for the husband's debt, a subsequent judgment creditor of the husband cannot claim that the mortgagee shall proceed first against the property of the wife, nor can he claim to be subrogated to the mortgagee's security against the wife; in such case the wife is but a surety for the mortgagee of the husband. *Zeller v. Henry*, 157 Pa. 1, 33 W.N.C. 433, 27 A. 559; *Stewart v. Stewart*, supra.

The trustee in bankruptcy claimed to be entitled to the exercise of the equitable doctrine of marshalling in order to recover from the joint property. In *Lloyd v. Galbraith*, 32 Pa. 103, 108 (1858), the court said:

> ". . . when a creditor has a lien on two funds in the hands of the same debtor, and another creditor has a lien upon only one of the funds, the first may be compelled in equity to levy his debt out of the fund to which the other cannot resort."

The argument is made that the bank could have recovered its debt from the joint property. Since the bank could have, the trustee now contends that his ownership of the bank's debt gives him the right to recover from the joint property to the extent of that debt.

We hold that the doctrine of marshalling does not apply here. In *Blasser's use v. Smith*, 11 York 121 (1898), the debtor owned two tracts of land when a building and loan association entered a judgment against him. Thereafter he conveyed one of the tracts to a third party. Later several other judgments were entered against the debtor, including one in favor of the defendants. The debtor and his wife executed and delivered to the plaintiff a deed of assignment for the benefit of creditors. The next day the building and loan association assigned its judgment to the plaintiff. The sheriff levied on the property conveyed to the third party, claiming the benefits of the doctrine of marshalling.

The court held that the building and loan association might have been required to go against the property conveyed to the third party, though that was doubtful; since the subsequent conveyance to the third party may have created two funds in the hands of a common debtor and another. But as the plaintiff was the junior creditor and held the judgment in question, and was the plaintiff in execution, he could not invoke the equity in his favor. Simply stated the court held that the rule that where one creditor has a lien upon two properties and another creditor has but one, the former must exhaust the fund upon which the latter has no claim is not

applicable where the two claims are in the hands of the same person, citing *Lloyd v. Galbraith*, 32 Pa. 103, and *Kendig v. Landis*, 135 Pa. 612.

In the present case, the trustee in bankruptcy holds both claims of the creditors upon which the request for marshalling is premised. The trustee in bankruptcy is not entitled to the equity in his favor.

ORDER OF COURT

NOW, May 9, 1975, a verdict is entered in favor of the plaintiff-trustee in bankruptcy and against the defendant, Louis G. Thibault, in the amount of the judgment that was confessed, interest and costs, and in favor of the defendant, Margot E. Thibault.

AUGHINBAUGH v. SHOCKEY, et al., C.P. Franklin County Branch, E.D. Vol 7, Page 8

Equity - Injunction of Ordinance Violation - Township Junkyard Ordinance - Private Nuisance - Special and Peculiar Injury - Depreciation in Property Value - Change in Neighborhood - Nuisance in Fact.

1. Equity will not act solely to enjoin the violation of an ordinance.

2. A violation of a township junkyard ordinance may constitute a private nuisance with respect to one who sufferes special and peculiar injury of an irreparable nature therefrom.

3. An individual has standing to sue for the injunction of a nuisance if he suffers damage which is different in character from that sustained by the public at large.

4. Mere depreciation in the value of property adjoining an alleged private nuisance is not sufficient to justify injunction.

5. A change in the character of the neighborhood as a result of an alleged nuisance constitutes a public effect rather than a private one.

6. Whether or not the operation of a business lawful in itself constitutes a nuisance in fact is determined by the reasonableness of conducting the business complained of in the particular locality, in the particular manner, and under the circumstances of the case.

7. Equity will not act unless its right to do so is free from doubt.

Roy S. F. Angle, Esq., Counsel for Plaintiff.

E. Franklin Martin, Esq., Counsel for Defendants.

OPINION AND ORDER

Heard before Eppinger, P. J., Keller, J.
Opinion by Keller, J., May 2, 1977:

This aciton in equity was commenced by the filing of a complaint on January 8, 1976, and service of the same upon the defendants of January 17, 1976. The plaintiff seeks a decree enjoining the defendants from operating a junk yard, storing junk and used cars on their premises; enjoining the defendants from violating the Washington Township Junk Yard Ordinance, and for general relief. Preliminary objections were filed on behalf of the defendants on February 17, 1976, and served upon the plaintiff by delivery to her attorney of record. The preliminary objections are in the nature of a demurrer, a motion to strike, a motion for a more specific pleading and on the grounds that the plaintiff has a full, adequate and complete remedy in trespass. The matter was argued before the Court en banc and is ripe for disposition.

The defendants' demurrers are predicated on the grounds that:

1. The court sitting in equity has no authority to enjoin the violation of an ordinance as prayed for.

2. The plaintiff has alleged a public nuisance, but failed to allege any injuries suffered by the public in general and, therefore, has failed to state a cause of action.

3. Only the Washington Township Supervisors have the authority to seek to abate a public nuisance and, therefore, the plaintiff has failed to state a cause of action.

The two areas of law raised by the defendants' demurrer involved an alleged violation of a Township ordinance and the law governing public and private nuisances. For convenience in discussing these two areas, we will subdivide them.

I

ORDINANCE VIOLATION

Preliminarily, we note that the plaintiff has failed to attach a copy of the "Junk Yard Ordinance" or "the applicable sections" to its complaint for the information and guidance of the defendants and the Court. While the Court may take