1333 of the Public School Code of 1949:

(a) as to Dorothy Everts for illegal absences from school on February 9, 10 and 21, 1978;

(b) as to Kimberly Everts for illegal absences from school on February 9 and 10, 1978.

Defendants shall appear before the Court on the call of the District Attorney for sentencing.

MOUSE v. VALLEY BANK AND TRUST COMPANY, C. P. Franklin County Branch, Eq. D. Vol. 7, Page 193

Equity - Consideration for Agreement - Adequate Remedy at Law - PA. R.C.P. 3118(a)

1. Where a bank agrees to release lien on a car title in exchange for lien placed on another car, the dealer in placing the lien on the second car suffered a detriment which can be consideration for a contract.

2. While replevin lies for a title to an automobile, a law court cannot also order specific performance of the satisfaction of a lien noted on the title.

3. Pa. R.C.P. 3118(a)(6) gives the court the right, after judgment has been entered, to grant such relief as is necessary to aid in execution. However, the rule aims to preserve the status quo for the judgment creditor.

4. Where the status quo is a certificate of title encumbered by a lien, removal of the lien requires affirmative action to change the status quo and equity is the appropriate forum.

Barbara B. Townsend, Esq., Attorney for Plaintiff

Jan G. Sulcove, Esq., Attorney for Defendant

OPINION AND ORDER

EPPINGER, P.J., October 23, 1979:

Plaintiff, William M. Mouse, is a used car dealer (dealer). A customer wanted to buy a 1973 Grand Prix from him. The customer was going to trade a 1976 Fiat even up but there was an encumbrance on the Fiat in favor of the Valley Bank & Trust Company, defendant (bank). The dealer spoke to a representative of the bank and received a promise that the bank would release the lien on the customer's Fiat in exchange for a lien on the Grand Prix.

The certificate of title to the Grand Prix was transferred to the customer and an encumbrance was placed on it by the bank, but then the bank never released the lien on the Fiat. Subsequently the dealer sold the Fiat, agreeing that a title to the Fiat free of any encumbrance would be given to the buyer. And now the buyer of the Fiat is insisting on the title and the bank refused to satisfy the lien and surrender the title. This is an action in equity to compel the bank to do so. The Grand Prix has already been sold at sheriff sale and apparently the bank is trying to recoup a loss out of the Fiat.

The bank demurred to the dealer's complaint, contending (1) that the agreement that the bank would release the lien on the Fiat is unenforceable for want of consideration and (2) that the dealer has an adequate remedy at law, suggesting that the remedy is replevin.

There are two agreements here. One is the agreement between the customer and the bank that he would pay the bank the loan for which the encumbrance was entered on the title to the Fiat. The other was between the dealer and the bank and that was that in exchange for the dealer's entering an encumbrance on the Grand Prix, the bank would release the lien on the Fiat. In this latter agreement the dealer entered the lien on the Grand Prix and thereby suffered a detriment. Consideration may be a detriment to the promisee as well as a benefit to the promisor. *Third National Bank and Trust Company of Scranton v. Rodgers*, 330 Pa. 523, 198 A. 320 (1938).

If, as the bank contends, there was no contract, the substance of which was that the bank would have a valid lien on the Grand Prix, then by what authority did the bank sell the Grand Prix? The bank cannot acknowledge the agreement to the extent that it is benefitted and then decline to perform on its promise. See, e.g., *Orndoff et al. v. Consumers Fuel Co., et al.*, 308 Pa. 165, 172-73, 162 A. 431, 433 (1932). See generally P.L.E. Estoppel Sect. 84.

"Replevin lies for personal property only. It may be used for such items of personalty as stock certificates, papers, deeds, or insurance policies, and money, if it can be specifically identified." P.L.E. Replevin Sect. 2. We conclude, therefore, that replevin lies for a title to an automobile. If that was the sole issue, obtaining the certificate of title, then the dealer would have an adequate remedy at law. But ultimately the dealer wants the title transferred to him free and clear of all encumbrances. The least the bank would be required to do, in addition to surrendering the title, would be to satisfy the lien. The

vania 17201. The names and addresses of all persons owning or interesetd in said business are Joseph C. Reisher, 2285 Ivan Road, Chambersburg, Pennsylvania 17201 and Ray S. Earnest III, R. D. #5, SME Lot 115, Shippensburg, Pennsylvania 17257.

Richard K. Hoskinson, Attorney
of MOWER AND HOSKINSON
232 Lincoln Way East
Chambersburg, Pennsylvania 17201

(1-18)

LEGAL NOTICES, cont.

question is: Can the law court compel the bank to satisfy the lien?

The concluding provision in Pa. R.C.P. 3118(a), subparagraph (6), gives the court the right after judgment has been entered, in aid of execution, to grant such other relief as may be deemed necessary. Relying on this the bank maintains that if judgment was entered on behalf of the dealer in replevin, the court could order the bank to satisfy the lien and deliver the title, citing *Kaleita v. Kaleita*, 36 D&C 2d 59 (CP Mercer County, 1964). In that case, plaintiff obtained a judgment in replevin to recover a stove from the defendant. But the stove had been moved to Ohio and placed in storage. The court ordered the defendant under subparagraph (6) to return the stove free and clear of all liens and encumbrances or other obligations for the storage of the same.

Rule 3118 was interpreted by its authors in *Greater Valley Terminal Corporation v. Goodman*, 415 Pa. 1, 202 A.2d 89 (1964). They said:

> ....The Rule generally provides for injunctive relief, discovery and similar assistance to the judgment-creditor unavailable in ordinary execution proceedings. The first five paragraphs of the Rule enable the judgment creditor to *preserve the status quo as to the judgment-debtor's property* by authorizing the court to enjoin transfers thereof, to direct disclosure to the sheriff of the whereabouts of such property, and to order delivery by the debtor to the sheriff of property which the debtor has concealed. (emphasis in original)

As to subparagraph (6), the court said it must be read in conjunction with and as effectuating the same purposes as the other five paragraphs, that is to preserve the status quo. We believe that is what the *Kaleita* court intended to do, though it may have interpreted Rule 3118(a)(6) too broadly.

In this case the status quo is a certificate of title with a lien held by the bank. Preserving that is not what the dealer wants. He wants the certificate delivered to him with the lien satisfied so the title to the Fiat can be transferred to him free and clear of the lien. Equity, not law, is the appropriate forum.

The bank's demurrer will be overruled.

ORDER OF COURT

October 23, 1979, the demurrer of the defendant, the

Valley Bank and Trust Company is overruled. The defendant is granted 20 days from this date to file a responsive pleading or suffer non pros.

ROSENBERRY v. SWAN, C.P. Franklin County Branch, Civil Action

Non-Support - Paternity - Proof by Preponderance of Evidence

1. The question of paternity is determined in a civil action where the burden of proof is by a preponderance of the evidence.

2. The fact that a mother admits to one incident of sexual intercourse around the time of conception by someone other than the alleged father is a matter to be weighed in the balance by the trier of fact along with all other evidence.

3. Where it is impossible to determine whether a child is born of the sexual relations with the alleged father or of a single sexual act with another man, the plaintiff has not met her burden of proof.

District Attorney's Office, Counsel for Plaintiff

William C. Cramer, Esq., Attorney for Defendant

OPINION AND VERDICT

EPPINGER, P.J., October 25, 1979:

This is an action to compel Donald E. Swan (Donald) to pay support for a child born to Barbara A. Rosenberry (Barbara).[1] Jason Alan Rosenberry, the child, was born December 27, 1978. Donald and Barbara dated from December 1, 1977; they began having sexual relations at that time and continued doing so once or twice a week. Their respective spouses found out about it and she was "kicked out" of her home. They continued seeing each other and in April, 1978, Donald left his wife and moved in with Barbara. After this they had sexual relations three to four times a week, using no birth control measures. Barbara discovered that she was pregnant in April, 1978. Donald left her and went back with his wife in June, 1978.

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1 After the trial, counsel requested the opportunity to prepare briefs and argue the case. Supplemental briefs were later filed.

While Barbara did not come right out and say to Donald that he was the father, she took it for granted that he knew he was. But this is not the entire story. On March 8, 1978, Barbara had sexual relations with her husband. Both of them had been drinking and she claims that her husband used a contraceptive, a statement which we do not accept as being true in light of her experiences with Donald when no birth control methods were used. A trier of fact is free to believe all, part or none of the testimony of any witness. *Commonwealth v. Harper*, Pa. , 403 A.2d 536 (1979).[2] During the trial, the child that was born to Barbara was brought into the court room. There was nothing about the child's appearance that would suggest that he was Donald's son.

Construing the Act of 1978, P.L. 202, No. 53, 42 P.C.S.A. Sect. 6704 to give effect to subsection (f),[3] it appears that paternity is to be decided by the court without a jury (unless either party demands a jury trial) and that the burden of proof is "by a preponderance of the evidence". The issue is a civil matter.

While defendant concedes this to be the burden of the plaintiff in establishing that he is the father, he argues that because of the presumption of legitimacy of the child, in order to establish that he is illegitimate the proof must be of such overwhelming weight as to be irrefutable. *Commonwealth v. Cicerchia*, 177 Pa. Super 170, 110 A.2d 776 (1955). How much of a factor the presumption of legitimacy, which at the time of *Cicerchia* meant that the child was born in wedlock, might be now is questionable considering the Act of 1971 P. L. 175 No. 17, Sect. 1, as amended, 48 P.S. Sect. 167, which declares that all children shall be legitimate regardless of the marital status of

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2 If indeed it was true that contraceptives were used when Barbara had sexual relations with her husband, that is a matter on which she could have been corroborated by her husband, and he was not called to testify. Where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him. See *Commonwealth v. Gibson*, 245 Pa. Super 103, 369 A.2d 314 (1976) and cases cited therein.

3 Former section 5 of the Act of July 13, 1953 (P.L. 431, No. 95), from which section 6704 was derived, was amended April 28, 1978, No. 46, effective in 60 days, by adding subsections (e) and (f). These subsections are to be given effect in construing section 6704, in accordance with the Official Note to 42 Pa.C.S.A. Sect. 6704.