3 2044 078 440 435

www.libtool.com.cn

Digitized by Google

www.libtool.com.cn





Digitized by Google

www.libtool.com.cn

Digitized by Google

www.libtool.com.cn

Digitized by Google

Geo. Shartswood
1846
L14

PENNSYLVANIA

www.libtool.com.cn

STATE REPORTS,

CONTAINING

CASES ADJUDGED IN

THE SUPREME COURT,

DURING

DECEMBER TERM, 1845, MARCH TERM, AND PART OF MAY TERM, 1846.

VOL. II.

BY ROBERT M. BARR,
STATE REPORTER.

PHILADELPHIA:
T. & J. W. JOHNSON,
LAW BOOKSELLERS AND PUBLISHERS.
1846.

Digitized by Google

www.libtool.com.cn

ENTERED according to act of Congress, in the year 1846, by
T. & J. W. JOHNSON,
in the Clerk's Office of the District Court of the Eastern District of Pennsylvania.

Rec. Dec. 29, 1883

Digitized by Google

www.libtool.com.cn

JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA.

Hon. JOHN BANNISTER GIBSON, Chief Justice.

Hon. MOLTON C. ROGERS,
Hon. JOHN KENNEDY,
Hon. THOMAS SERGEANT,
Hon. THOMAS BURNSIDE,
} Justices.

JOHN K. KANE, Esq., Attorney-General.

Digitized by Google

www.libtool.com.cn

Digitized by Google

www.libtool.com.cn

LIST OF CASES.

A.

PAGE

Altemus v. Elliott, - - - - - - - - - - - - 62
American Philosophical Society, Drum v. - - - - - - 75
Atherton v. Atherton, - - - - - - - - - - - 112
Arrison v. Harmstead, - - - - - - - - - - - 191
Aycinena v. Peries, - - - - - - - - - - - - 286

B.

Bachert, Weaver v. - - - - - - - - - - - 80
Baker v. Williamson, - - - - - - - - - - - 116
Bank of Penn Township, McMullen v. - - - - - - 343
Bank of the United States, Keener v. - - - - - - 237
Baptist Church v. Robbarts, - - - - - - - - 110
Barr's Appeal, - - - - - - - - - - - - 428
Barr's Estate, In re, - - - - - - - - - - 428
Beam, Hartley v. - - - - - - - - - - - 165
Becker, Flory v. - - - - - - - - - - - 470
Beeson v. McNabb, - - - - - - - - - - - 422
Bell v. Ingram, - - - - - - - - - - - - 490
Bevan, Fleming v. - - - - - - - - - - - 408
Biddle, Dundas v. - - - - - - - - - - - 160
Biffle, Smilie v. - - - - - - - - - - - - 52
Bittinger v. Keys, - - - - - - - - - - - 459
Board of Health v. Kennedy, - - - - - - - - - 366
Bonham, Thornton v. - - - - - - - - - - - 102
Bowman, Stickney v. - - - - - - - - - - - 67
Bowen, Phillipi v. - - - - - - - - - - - 20
Brewster, Carneghan v. - - - - - - - - - - - 41
Brower's Appeal, - - - - - - - - - - - - 432
Brounfield, Jones v. - - - - - - - - - - - 55
Brown's Estate, In re, - - - - - - - - - - 463
Bunn, De Haas v. - - - - - - - - - - - - 335
Burdick, Commonwealth v. - - - - - - - - - 163
Burkholder v. Keller, - - - - - - - - - - - 57
Bush, Rentzheimer v. - - - - - - - - - - - 88

C.

Carneghan v. Brewster, - - - - - - - - - - - 41
Catherwood v. Konn, - - - - - - - - - - - 341
Cavenaugh, Rush v. - - - - - - - - - - - 187
Chambers v. Denie, - - - - - - - - - - - 421
Chase v. Hodges, - - - - - - - - - - - - 49

Digitized by Google

www.libtool.com.cn

PAGE
Christine v. Manderson, - - - - - - - - - - 363
Churchman v. Parke, - - - - - - - - - - 406
Clarion County, Wilson v. - - - - - - - - - 17
Clark v. Partridge, - - - - - - - - - - 13
Clark, Eneu v. - - - - - - - - - - - 234
Clark, Pearl v. - - - - - - - - - - - 350
Clover v. Painter, - - - - - - - - - - 46
Clymer v. Norris, - - - - - - - - - - 277
Coates' Appeal, - - - - - - - - - - - 129
Commissioners of Kensington v. Keith, - - - - - 218
Commonwealth v. Nesbitt, - - - - - - - - - 16
Commonwealth, Snapp v. - - - - - - - - - 49
Commonwealth v. Burdick, - - - - - - - - 163
Commonwealth v. Martin, - - - - - - - - - 244
Commonwealth v. Conrow, - - - - - - - - 402
Commonwealth v. Kendig, - - - - - - - - - 448
Commonwealth v. Montgomery, - - - - - - - 461
Commonwealth v. Nathans, - - - - - - - - - 138
Conrow, Commonwealth v. - - - - - - - - 402
Council v. Moyamensing, - - - - - - - - - 224
County, Donoghue v. - - - - - - - - - 230
County, Laffery v. - - - - - - - - - - 231
County v. Stewart, - - - - - - - - - - 340
Craig, Smythe v. - - - - - - - - - - - 153
Craig v. Henderson, - - - - - - - - - - 261
Crawford, Gould v. - - - - - - - - - - - 89
Crawford v. Gable, - - - - - - - - - - 444

D.

Dailey v. Straus, - - - - - - - - - - 401
D'Invilliers, Frazer v. - - - - - - - - - - 200
De Haas v. Bunn, - - - - - - - - - - 335
Deardoff, Kitchen v. - - - - - - - - - - 481
Denie, Chambers v. - - - - - - - - - - 421
Dilly, McFadden v. - - - - - - - - - - - 61
Dixon, Riddle v. - - - - - - - - - - 372
Donoghue v. The County, - - - - - - - - - 230
Downing v. Lindsay, - - - - - - - - - - 382
Driesbach v. Keller, - - - - - - - - - - 77
Drexel, Man, Jun. v. - - - - - - - - - - 202
Drexel v. Man, Jun. - - - - - - - - - - 267
Drexel v. Man, - - - - - - - - - - - 271
Dubbs v. Finley, - - - - - - - - - - - 397
Duffy, Lauderbrun v. - - - - - - - - - - 398
Dundas v. Biddle, - - - - - - - - - - - 160
Dunn v. The American Philosophical Society, - - - - 75
Dysart v. Leeds, - - - - - - - - - - - 488

Digitized by Google

www.libtool.com.cn

E.

PAGE
Eichelberger, Hinkle v. 483
Elliott, Altemus v. 62
Eneu v. Clark, 234
Eshbach v. Zimmerman, 313
Etting v. The Schuylkill Bank, 355
Ewing, Kirk v. 453
Ewing, Furness v. 479

F.

Farmers' Bank v. McKee, 318
Farnum, Weiner v. 146
Farr v. Swan, 245
Finley, Dubbs v. 397
Fisher, Oelslager v. 467
Fitch, Potts v. 173
Fleming v. Bevan, 408
Flory v. Becker, 470
Flynn, Hemphill v. 144
Forry, Patterson v. 456
Freedly v. Mitchell, 100
Freedley's Appeal, 304
Frazer v. D'Invilliers, 200
Fries, Lamb v. 83
Furness v. Ewing, 479

G.

Gable, Crawford v. 444
Gans v. Renshaw, 34
Geist v. Geist, 441
German Reformed Society, Hohly v. 293
Gillespie v. Hewlings, 492
Gill's Appeal, 221
Gould v. Crawford, 89
Greber v. Kleckner, 289
Greensweig, Hawk v. 295

H.

Haas, Tompkins v. 74
Haines, Withers v. 435
Haines v. Moorhead, 65
Hanchman, Lewis v. 416
Hancock, McCormack v. 310
Harbert, Wetherill v. 348
Harmstead, Arrison v. 191
Hart, Lloyd v. 473
Hartley v. Beam, 165

Digitized by Google

www.libtool.com.cn

PAGE
Hawk *v.* Greensweig, - - - - - - - - - - 295
Hedges, Spalding *v.* - - - - - - - - - - - 240
Hemphill *v.* Flynn, - - - - - - - - - - - 144
Henderson, Craig *v.* - - - - - - - - - - - 261
Hertzogg, Sailor *v.* - - - - - - - - - - - 182
Herod, Knox *v.* - - - - - - - - - - - - 26
Hewlings, Gillespie *v.* - - - - - - - - - - 492
Hinkle *v.* Eichelberger, - - - - - - - - - - 483
Hirst, Riley *v.* - - - - - - - - - - - - 346
Hodges, Chase *v.* - - - - - - - - - - - - 48
Hogan, Lambertson *v.* - - - - - - - - - - 22
Hohly *v.* The German Reformed Society, - - - - - 293
Hopkins *v.* Jones, - - - - - - - - - - - 69
Hughes *v.* Large, - - - - - - - - - - - - 103
Hunt *v.* Moore, - - - - - - - - - - - - 105
Huff, Ex parte, - - - - - - - - - - - - 227
Humphrey's Appeal, - - - - - - - - - - - 325

I, J.

Jackson *v.* Jackson, - - - - - - - - - - - 212
Jacoby, Taylor *v.* - - - - - - - - - - - 495
Ingram, Bell *v.* - - - - - - - - - - - - 490
Jones *v.* Brownfield, - - - - - - - - - - - 55
Jones, Hopkins *v.* - - - - - - - - - - - - 69

K.

Kean *v.* McKinsey, - - - - - - - - - - - 30
Keener *v.* The Bank of the United States, - - - - - 237
Keith, Kensington *v.* - - - - - - - - - - - 218
Keller, Burkholder *v.* - - - - - - - - - - 51
Keller, Driesbach *v.* - - - - - - - - - - 77
Kennedy *v.* The Board of Health, - - - - - - - 366
Kendig, Commonwealth *v.* - - - - - - - - - - 448
Kensington *v.* Keith, - - - - - - - - - - - 218
Kerns, Ter Hoven *v.* - - - - - - - - - - - 96
Keys, Bittinger *v.* - - - - - - - - - - - - 459
Kimmel *v.* McRight, - - - - - - - - - - - 38
Kingsley *v.* School Directors, - - - - - - - - - 28
Kirk *v.* Ewing, - - - - - - - - - - - - 453
Kirkpatrick, Muirhead *v.* - - - - - - - - - - 425
Kitchen *v.* Deardoff, - - - - - - - - - - - 481
Kleckner, Greber *v.* - - - - - - - - - - - 289
Knox *v.* Herod, - - - - - - - - - - - - 26
Konn, Catherwood *v.* - - - - - - - - - - - 341
Kuhn's Appeal, - - - - - - - - - - - - 264
Kuhn, Sergeant *v.* - - - - - - - - - - - 393

Digitized by Google

www.libtool.com.cn

L.

PAGE
Laffery v. The County, - - - - - - - - - - - 231
Lamb v. Fries, - - - - - - - - - - - - 83
Lambertson v. Hogan, - - - - - - - - - - - 22
Lancaster Turnpike v. Rogers, - - - - - - - - - 114
Lauderbrun v. Duffy, - - - - - - - - - - - 398
Large, Hughes v. - - - - - - - - - - - 103
Leeds, Dysart v. - - - - - - - - - - - 488
Lewis v. Hanchman, - - - - - - - - - - - 416
Lindsay, Downing v. - - - - - - - - - - - 382
Little, Meyer v. - - - - - - - - - - - - 177
Lloyd v. Hart, - - - - - - - - - - - - 473

M.

McAteer, McMullin v. - - - - - - - - - - - 32
McCormack v. Hancock, - - - - - - - - - - - 310
McFadden v. Dilly, - - - - - - - - - - - 61
McKee, Farmers' Bank v. - - - - - - - - - - 318
McKinsey, Kean v. - - - - - - - - - - - 30
McMullin, McAteer v. - - - - - - - - - - - 32
McMullin v. The Bank of Penn Township, - - - - - 343
McNabb, Beeson v. - - - - - - - - - - - - 422
McRight, Kimmel v. - - - - - - - - - - - 38
Man, Jun., Drexel v. - - - - - - - - - - - 267
Man, Drexel v. - - - - - - - - - - - - 271
Manderson, Christine v. - - - - - - - - - - - 363
Manuel v. The Mississippi Railroad, - - - - - - - 198
Marshall, In re, - - - - - - - - - - - - 388
Marshall's Appeal, - - - - - - - - - - - 388
Martin, Commonwealth v. - - - - - - - - - - 244
Martin v. Pennock, - - - - - - - - - - - 376
Maul v. Shaffer, - - - - - - - - - - - - 404
Megargee, Taylor v. - - - - - - - - - - - 225
Megonigal, Rhoads v. - - - - - - - - - - - 39
Merrit v. Smith, - - - - - - - - - - - - 161
Meyer v. Little, - - - - - - - - - - - - 177
Miller v. Stem, - - - - - - - - - - - - 286
Mississippi Railroad, Manuel v. - - - - - - - - 198
Mitchell, Freedly v. - - - - - - - - - - - 100
Montgomery, Commonwealth v. - - - - - - - - 461
Moore, Hunt v. - - - - - - - - - - - - 105
Moorhead, Haines v. - - - - - - - - - - - 65
Morris, Mullen v. - - - - - - - - - - - - 85
Morris, Southern Loan v. - - - - - - - - - - 175
Muirhead v. Kirkpatrick, - - - - - - - - - - 425

Digitized by Google

www.libtool.com.cn

PAGE

Mullen v. Morris, - - - - - - - - - - - - 85
Murray, Simpson v. - - - - - - - - - - - - 76
Myer's Appeal, - - - - - - - - - - - - - 463

N.

Nathans, The Commonwealth v. - - - - - - - 138
Nesbitt, Commonwealth v. - - - - - - - - - 16
Norris v. Clymer, - - - - - - - - - - - 277
Northampton Bank, Winder v. - - - - - - - - 446

O.

Oeslager v. Fisher, - - - - - - - - - - - 467
Offerman v. Starr, - - - - - - - - - - - - 394

P.

Painter, Clover v. - - - - - - - - - - - 46
Painter v. Reece, - - - - - - - - - - - - 126
Parget v. Stambaugh - - - - - - - - - - - 485
Parke, Churchman v. - - - - - - - - - - - 406
Partridge, Clark v. - - - - - - - - - - - 13
Passmore, Tyson v. - - - - - - - - - - - 122
Patterson v. Forry, - - - - - - - - - - - 456
Paxton v. Steckel, - - - - - - - - - - - - 93
Pearl v. Clark, - - - - - - - - - - - - 350
Pennell's Appeal, - - - - - - - - - - - - 216
Pennock, Martin v. - - - - - - - - - - - 376
Peries, Aycinena v. - - - - - - - - - - - 286
Philadelphia Fire and Inland Navigation Company's Appeal, - 263
Phillipi v. Bowen, - - - - - - - - - - - - 20
Phillips v. Tapper, - - - - - - - - - - - 323
Potts v. Fitch, - - - - - - - - - - - - 173

R.

Reece, Painter v. - - - - - - - - - - - 126
Reiff's Appeal, - - - - - - - - - - - - 256
Reigart v. Small, - - - - - - - - - - - - 487
Renshaw, Gans v. - - - - - - - - - - - - 34
Rentzheimer v. Bush, - - - - - - - - - - - 88
Rhoads v. Megonigal, - - - - - - - - - - - 39
Rhodes v. Seibert, - - - - - - - - - - - 18
Riddle v. Dixon, - - - - - - - - - - - - 372
Riley v. Hirst, - - - - - - - - - - - - 346
Robbarts, Baptist Church v. - - - - - - - - 110
Robberts, In re, - - - - - - - - - - - - 371
Rogers, Lancaster Turnpike v. - - - - - - - 114
Rossiter's Appeal, - - - - - - - - - - - 371
Rush v. Cavenaugh, - - - - - - - - - - - 187

Digitized by Google

www.libtool.com.cn

S.

PAGE

Sailor *v.* Hertzogg, - - - - - - - - - - - - 182
Sarkie's Appeal, - - - - - - - - - - - - 157
School Directors, Kingsley *v.* - - - - - - - - - - 28
Schuylkill Bank, Etting *v.* - - - - - - - - - - 355
Schuylkill Navigation Company's Appeal, - - - - - - 148
Seibert, Rhoads *v.* - - - - - - - - - - - 18
Seichrist, In re, - - - - - - - - - - - - 432
Sergeant *v.* Kuhn, - - - - - - - - - - - 393
Shaffer, Maul *v.* - - - - - - - - - - - - 404
Shippen, Trotter *v.* - - - - - - - - - - - 358
Shunk's Appeal, - - - - - - - - - - - - 304
Simpson *v.* Murray, - - - - - - - - - - - 76
Small, Reigart *v.* - - - - - - - - - - - - 487
Smilie *v.* Biffle, - - - - - - - - - - - - 52
Smith, Walker *v.* - - - - - - - - - - - - 43
Smith *v.* Weld, - - - - - - - - - - - - 54
Smith, Merrit *v.* - - - - - - - - - - - - 161
Smith's Appeal, - - - - - - - - - - - - 258
Smith's Appeal, - - - - - - - - - - - - 331
Smythe *v.* Craig, - - - - - - - - - - - 153
Southern Loan *v.* Morris, - - - - - - - - - - 175
Spalding *v.* Hedges, - - - - - - - - - - - 240
Stahl's Appeal, - - - - - - - - - - - - 301
Stambaugh, Parget *v.* - - - - - - - - - - - 485
Starr, Offerman *v.* - - - - - - - - - - - - 394
Steckel, Paxton *v.* - - - - - - - - - - - - 93
Stem, Miller *v.* - - - - - - - - - - - - 286
Stewart *v.* The County, - - - - - - - - - - 340
Stickney *v.* Bowman, - - - - - - - - - - - 67
Stoner *v.* Barr's Appeal, - - - - - - - - - - 428
Straus, Dailey *v.* - - - - - - - - - - - - 401
Swan, Farr *v.* - - - - - - - - - - - - 245

T.

Tapper, Phillips *v.* - - - - - - - - - - - - 323
Taylor *v.* Megargee, - - - - - - - - - - - 225
Taylor *v.* Jacoby, - - - - - - - - - - - - 495
Ter Hoven *v.* Kerns, - - - - - - - - - - - - 96
Thorn, In re, - - - - - - - - - - - - - 331
Thornton *v.* Bonham, - - - - - - - - - - - 102
Tompkins *v.* Haas, - - - - - - - - - - - - 74
Trotter *v.* Shippen, - - - - - - - - - - - 358
Tyson *v.* Passmore, - - - - - - - - - - - 122

Digitized by Google

www.libtool.com.cn

V.

PAGE
Vanartsdalen *v.* Vanartsdalen, - - - - - - - - - 312

W.

Walker *v.* Smith, - - - - - - - - - - - 43
Weaver *v.* Bachert, - - - - - - - - - - - 80
Weiner *v.* Farnum, - - - - - - - - - - - 146
Weld, Smith *v.* - - - - - - - - - - - - 54
Wetherill *v.* Harbert, - - - - - - - - - - 348
Williamson, Baker *v.* - - - - - - - - - - 116
Wilson *v.* Clarion County, - - - - - - - - - 17
Wilson's Estate, In re, - - - - - - - - - - 325
Winder *v.* Northampton Bank, - - - - - - - - 446
Withers *v.* Haines, - - - - - - - - - - 435
Woelper's Appeal, - - - - - - - - - - 71

Z.

Zimmerman, Eshbach *v.* - - - - - - - - - 313

Digitized by Google

www.libtool.com.cn

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

WESTERN DISTRICT, SEPTEMBER TERM, 1845.

PITTSBURGH.

2 13
148 507
2 13
20 SC 1316
2 13
205 2 44

CLARK *v.* PARTRIDGE.

1. Where an omission in a contract is not corrected by reason of the parties agreeing to consider it inserted, and advantage be taken thereof, it is fraud, and as such must be distinctly averred in the pleadings; it is not sufficient to aver facts from which the jury may infer fraud, &c.
2. Evidence to prove facts amounting to fraud is inadmissible under the pleadings, averring it was through mistake and on the suggestion by defendant that he could not deny his agreement.
3. The court were right in declining to instruct the jury, that the omission to state these facts when the referees met and decided the case, was a *strong* circumstance to rebut the presumption of fraud.

ERROR to the Common Pleas of Washington county.

Debt on an award, in which the first two counts were on a bond to refer to three, or a majority; and award by two being a majority; the third count set out a bond to refer to three, "that at the time of signing the bond, it was verbally agreed, that the award of a majority should be final; and that the same was intended to be inserted, but omitted by a mistake of the scrivener, and by the suggestion of the defendant, that the same was unnecessary, that he would not deny his agreement, and if he did, the scrivener could prove it," &c.

Plaintiff then, under objection by defendant, proved the facts averred in the special count, and read the bond and award, which was also objected to. Defendant proved the meeting and qualification of the referees, and that, until the award was made, the plaintiff made no

Digitized by Google

mention of the alleged omission. The court declined instructing the jury that this was a strong circumstance of fraud.

These points were the errors assigned here.

Dunlop, for plaintiff in error, relied on the fact that there was no allegation of fraud in the pleading; and cited, 14 Serg. & Rawle, 159; 2 Johns. C. R. 597; 2 Whart. 75; 7 Serg. & Rawle, 60.

McKennon, contrà.—2 Wharton, 79; 14 Serg. & Rawle, 311, 326; 2 Johns. C. R. 585; 4 Id. 148, 149; 1 Story, Eq. 170, 171; 1 Bro. C. C. 45; 14 Ves. 524; Sug. Vend. 128; 10 Serg. & Rawle, 292; 1 Serg. & Rawle, 464; 16 Serg. & Rawle, 424; 6 Serg. & Rawle, 171; 6 Whart. 305; 14 Serg. & Rawle, 450.

Rogers, J., after stating the case.—It is a case of fraud, not mistake; for although the scrivener was at first in error as to the purport of the agreement, the mistake was discovered before it was signed, and would, we have reason to believe, have been altered but for the false and fraudulent representations of the defendant. If the case be as stated, it is a palpable fraud, which consists in the defendant refusing to comply with his contract, and insisting, in violation of good faith, upon the legal construction of the agreement as written. The gravamen of the plaintiff's action is, that he was induced to sign the submission by the fraudulent representation of the defendant, and on this ground only, on the circumstances which attend the case, can this action be maintained. This appears from Miller *v.* Henderson, 10 Serg. & Rawle, 290; and Hare *v.* Kelbourn, administrator of Bell, 14 Serg. & Rawle, 150. The latter case, which recognises and adopts Miller *v.* Henderson, was a suit on a bond, in which it was held, that parol evidence is not admissible to show that at the time it was executed, the obligee declared that he would exact nothing more than the interest to be paid during his lifetime, and that at his death, the bond should become null and void, *unless the obligor was induced by such declarations to execute the bond.* The court say: had the defendants offered to prove that they were induced to execute the bond in consequence of the representations of Bell, the plaintiff's intestate, that only the interest should be exacted during his lifetime, and that the principal should not be called for after his death, the case would have fallen within the principle decided in Miller *v.* Henderson; but in this particular it was entirely deficient. The cases cited conclusively show that it is only on the footing of fraud that the party can be relieved from the legal effect of a written instrument where no mistake has occurred in reducing the instrument to writing. Fraud

Digitized by Google

or no fraud is the only issue between the parties, and the question is, whether fraud ought not to be directly and distinctly alleged in the declaration. In Hare v. Bell's Administrator, the point in relation to notice of special matter is indirectly noticed in the argument, but in Gross v. Gross, 14 Serg. & Rawle, 184, it is ruled, that wherever a party relies on fraud it ought to be distinctly and particularly alleged. The rule is founded on principles of justice, which requires that the party to be affected should have a full opportunity to meet and disprove the charge. It is not enough to give notice of the facts intended to be proved, from which a jury may infer fraud. If this be requisite in a notice of special matter, much more will it be required in a declaration in which more precision is expected. The regular manner, I apprehend, to bring the matter to issue would be, by a declaration on the award, a plea that the award was not in pursuance of the submission, and a replication that it was agreed, before signing the submission, that the award of a majority should be binding, and that the plaintiff was induced to sign the submission by the fraudulent representations of the defendant. The plaintiff, however, has adopted the mode (which he may do) of filing a special declaration, in the first instance setting out facts from which the jury may infer fraud, but omitting to aver fraud, or that he was induced to sign the submission by the fraudulent representations of the defendant. In this respect the declaration is defective. On this declaration the court erred in admitting the evidence contained in the first bill. The evidence proves that the defendant was guilty of fraud, (if it proves any thing,) in inducing the plaintiff to sign the contract contrary to the agreement, under the fraudulent assurance that he would abide by it in the same manner as if the stipulation had been expressed in the submission. The evidence goes beyond the averment in the declaration. The allegata and probata do not agree. I do not consider this as a mere technical objection. It is a matter of some moment to the defendant to have his cause tried on the only and true issue. It seems to me, that the pleadings must not only be amended as to the declaration but the plea also. The only issue joined being award or no award.

The court was right in negativing the defendant's sixth point, "that the testimony of Mr. Potter, showing that the parties authorized the arbitrators to be organized and sworn, is a *strong* circumstance to be considered by the jury in rebutting any evidence of fraud on the part of the defendant and mistake of the scrivener." That it is entitled to some weight may be admitted; but the court would not be warranted

Digitized by Google

in instructing the jury that it ought to have great influence, which I understand is the purport of the defendant's proposition.

The remarks already made dispose of the whole case, and render it unnecessary to consider the other exceptions.

Judgment reversed, and venire de novo awarded.

COMMONWEALTH *v.* NESBITT.

One of two obligees having been discharged as a bankrupt, the plaintiff may enter a nol. pros. as to him, and proceed to trial against the other.

ERROR to the Common Pleas of Armstrong county.

This was an action on a bail bond, to which one of the defendants pleaded his discharge in bankruptcy. On the trial the plaintiff entered a nol. pros. as to him, and went to trial against the other. On verdict, and judgment, and writ of error taken, this was assigned for error.

Foster, for plaintiff in error, referred to 1 Chit. Pl. 45; 1 Wils. 89; 1 Saund. 207; Tidd, 682.

Phelps, contrà, cited 2 Rawle, 334; 1 Peters, 46; 2 Troub. & Haly's Prac. 438; 1 Wils. 90; 4 Johns. R. 48; 9 Wheat. 289.

ROGERS, J.—One of the defendants having procured his certificate of discharge, the plaintiff entered a nolle prosequi as to him, and this is assigned for error. But this is right, for it is well settled, that in an action on a contract against several defendants, one of whom pleads bankruptcy, or other matter in his personal discharge, the plaintiff may enter a nolle prosequi as to him, and proceed against the other defendants. 2 Tidd's Prac. 796; 2 Troub. & Haly, 438; 1 Wilson, 89; 1 Saund. 207, N.; 1 Chitty, 451.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

WILSON v. CLARION COUNTY.

2 17
172 381
2 17
30SC 124

Under the act of April 15, 1834, to give to the report of county auditors of a balance due by the commissioners, &c., the effect of a judgment, the officer charged must be summoned to appear at the audit.

Semble these proceedings must be made a part of the report.

ERROR to the Common Pleas of Clarion county.

The county of Clarion brought assumpsit for money had and received by Wilson and others. The claim was for the difference between the actual cost of scrip purchased for the county, and the price charged. But one point was made here, whether the commissioners were competent witnesses under the following circumstances. They made the contract with the defendants. The county auditors certified a statement of the accounts of the county treasurer, in which, in the list of outstanding debts due the county, was a charge against the commissioners individually for an over-payment to the defendant for procuring this scrip. The defendants relied on this, there having been no appeal, and the time therefore having elapsed, to exclude the witnesses as incompetent, on the ground that this balance was a personal judgment under the act of Assembly, and that success in this action would discharge them. The court admitted them, and this was the error assigned.

Purviance, for plaintiffs in error, referred to the act of April 15, 1834, Purdon's Digest, 192.

Gilmore, contrà, cited the act of March 16, 1809, sect. 2; 2 Rawle, 40.

BURNSIDE, J.—The sixth section of the act of the 16th April, 1840, Pamphlet Laws, 411, provides, "That no person shall be excluded from being a witness or juror in any suit, prosecution, or proceeding, in which any *county*, city, incorporated district, borough, or township, is a party, or is interested, by reason of *such person being or having been an officer*, rated citizen or inhabitant in such county, city, district, or borough, or township, or owning assessed or taxable property, or being liable to the assessment or payment of any tax therein."

[His honour here stated the case.] If the auditors intended to charge the commissioners with this sum overpaid, it is a strange way of doing it. It is not in accordance with the 48th section of the act of the 15th April, 1834, which authorizes them "to audit, settle, and adjust the accounts of the commissioners, treasurer, sheriff, and coroner of the

Digitized by Google

county, and make report to the Court of Common Pleas of such county, together with a statement of the balance due to or from such commissioner, treasurer, sheriff, or coroner. Auditors have ample powers. It is a pity the Clarion auditors did not read the act of Assembly giving them those powers before they proceeded to perform their duties. Where a person is in default to a county, he ought to be summoned before the auditors and have a hearing, (unless he makes default after being duly summoned.) They shall then state the account, debtor and creditor, on the improper act of the commissioners in allowing a claim or in overdrawing, and charging them with the same, which is made a part of their report to the Common Pleas, to be filed among the records of that court, and has the effect of a judgment. The commissioners have sixty days to appeal. If no appeal is entered, an execution may issue. I am unable to discover that the commissioners had any personal interest in the verdict, and the act of Assembly makes persons in, or having been in office, witnesses, and renders them competent.

The judgment is affirmed.

Rhodes *v.* Seibert.

To authorize a copy of a paper beyond the jurisdiction of the court to be read in evidence the existence and authenticity of the original must first be clearly proved.

Error to the District Court of Crawford county.

Seibert was a sub-contractor under Rhodes, and brought this action to recover money received by him on the assigned contract, in which it was agreed that defendant was to receive the money and pay him. Defendant proved a receipt for $250 in full by plaintiff, dated April 22, 1837. Plaintiff then gave in evidence a deposition of the secretary of a canal company, for whom the work had been done, the witness residing out of the Commonwealth, who stated he could not permit the originals to go out of his office, but annexed accurate copies: these were the estimate showing a balance due this contractor, of $761 62, (the amount claimed in this action,) and a paper purporting to be a receipt by defendant of this amount, dated April 21, 1837. The witness then stated he had no particular knowledge of the work having been done for the company but from the estimates and the payment; he had seen Seibert in the office inquiring about the estimates, and judged from that he was interested in it. The signature of Rhodes

Digitized by Google

www.libtool.com.cn

to the receipt was not otherwise proved. The defendant excepted; but the court admitted it. This was the error assigned here.

Galbraith, for plaintiff in error, relying on the want of proof of the receipt, referred to 2 Watts & Serg. 393.

Derrickson, contrà, argued it was a paper in the office of the company paying the money on it, and there was sufficient to go to the jury on the question of authenticity. 3 Watts & Serg. 395.

BURNSIDE, J.—It is the duty of a party to produce the best evidence of which the case in its nature is susceptible. In this case there was a departure from this rule.

The deposition of Charles D. Hosteller, who had been, and then was, the Secretary of the Sandy and Beaver Canal Company, and kept their office in the town of New Lisbon, in the state of Ohio, was most material for the plaintiffs below. [His honour here stated the facts.] Seibert relied on this receipt, but neither this witness nor any other person proved either the payment of the money, or the signature of Rhodes to this receipt. The papers being beyond the jurisdiction of the court, their production could not be compelled. It is a fit case for secondary evidence, but before the copy could be received in evidence, some proof ought to have been given that the original was a genuine paper. The treasurer who paid him the money might have been examined, or evidence of his handwriting. It is more than probable, that if the attention of Hosteller had been called to the paper, he could have proved the handwriting of Rhodes. The treasurer of the company, who, it is alleged, paid him the money, would have been a competent witness. But when an original paper cannot be produced, before a copy is received in evidence, it is incumbent on the party offering the copy to show, in the first place, that there was an original.

I think the contract and estimates were insufficiently proved in Hosteller's deposition.

The judgment is reversed, and a venire de novo awarded.

Digitized by Google

www.libtool.com.cn

PHILLIPI *v.* BOWEN.

1. Notice to take depositions under a common rule on three consecutive days, held good, there being many witnesses; the substance of the notice being that the examination would be commenced on the first day, and continue during the specified period until finished.
2. Appearance and cross-examination waives any objection to the authority of the examiner.
3. The court may appoint any one commissioner under the common rule, and false swearing before him would be perjury. *Contrà*, of depositions taken by consent before unauthorized persons, or out of the state. Per Gibson, C. J.

ERROR to the Common Pleas of Somerset county.

The only errors assigned here, excepting one not founded in fact, were the rejection of depositions. In the first of these there was a common rule to take depositions before a justice of the peace; to this a notice was attached and admitted to have been received, that the depositions would be taken at, &c., on the 14th, 15th, and 16th days of July. One witness was examined on the 14th, five on the 15th, and one on the 16th. The justice certified that the depositions of, &c., were, &c., on the 14th, 15th, and 16th days, &c., between the hours of 9 A. M. and 9 P. M., to be used, &c.

The second was a common rule to take depositions, and notice that they would be taken before D. K., prothonotary of Fayette county. The certificate of the prothonotary showed the counsel for both parties attended, and the witnesses were cross-examined. This was signed by D. K. as commissioner.

Wegand and *McCandless*, for plaintiffs in error.—There is no other mode by which depositions, occupying more than one day, can ever be taken, unless by notifying the party of all the days on which it will be done, and commencing on the first and continuing until they are finished, for the justice cannot adjourn, as has been decided by this court.

As to the second, the party attended and cross-examined, and it becomes, therefore, evidence by consent, (2 Yeates, 212,) irrespective of the rights of the officer, though we contend he may be authorized by the court as their agent or commissioner.

Gebhart and *Cox*, contrà.—The notice in the first case was clearly a nullity. Carmalt *v.* Post, 8 Watts, 406. As to the prothonotary, the deposition was without the sanction of an oath, for which there

Digitized by Google

might be a prosecution for perjury. 2 Yeates, 92; 7 Serg. & Rawle, 172; 14 Serg. & Rawle, 372; 2 Bin. 72.

www.libtool.com.cn

Gibson, C. J.—We did not say, in Carmalt v. Post, that notice to take depositions on consecutive days is necessarily bad in every instance. There was, in that case, but one witness to be examined; and we held that to keep the vigilance of the opposite party on the stretch for two whole days was unnecessary and oppressive. The period of attendance might as well have been protracted to a week or a month; and the notice was therefore held to be bad for want of precision. But what is to be done when a multitude of witnesses are to be examined, and when their depositions cannot all be written out in a day? To say that the party shall give a separate notice for each day, would come to the same thing in the end as if all the days were put in the same notice. It might be thought sufficient to require the opposite party to appear before the examiner at a day certain, and observe the periods of adjournment till all the examinations were concluded, had it not been determined in Hamilton v. Menor, 2 Serg. & Rawle, 73, that a magistrate has no power to adjourn without notice or consent; that is, I take it, to begin a new examination, for necessity requires that he have power to finish an examination left incomplete over night for want of time. But the notice, in this case, was substantially such; for it indicated that the business was to be commenced on a day certain, and continued throughout the period. Cases of the stamp depend essentially on their circumstances; and though Carmalt v. Post was undoubtedly well decided on the facts, its principle is not of universal application.

The rejection of depositions taken before the prothonotary of an adjoining county was also erroneous. It is true, as was said in Keller v. Nutz, 5 Serg. & Rawle, 248, that a rule to take depositions implies that the examiner be a judge or a justice of the peace, though it be not so set down; and it is also true that a prothonotary has no power to administer judicial oaths in matters that belong not to the business of his office. It is as true, however, that such a power may be delegated to him by rule as fully as it may be delegated by commission, or by appointment, or by verbal direction to a by-stander in the presence of the court; and had the rule contained such a delegation, there would have been no colour for an objection. It would have been the court that administered the oath by its agent, and not the agent by virtue of any independent power of his own. If the rule had been so expressed as to make the prothonotary a judicial instrument, the witnesses would have testified under the sanction of a judicial oath, and at the

Digitized by Google

www.libtool.com.cn

peril of a prosecution for the violation of it. But the question is, whether the want of this sanction can be supplied by consent. Certainly it cannot, in order to jeopard the witnesses; but common consent may make their testimony competent under the sanction of an extra-judicial oath, or without any oath at all. Witnesses have been admitted at bar to testify without being sworn; and if the parties may dispense with their oath in the presence of the court, why may they not dispense with it in the presence of the court's substitute? Liability to criminal prosecution is not the test of competency. Witnesses examined beyond the jurisdiction of the state are not liable to prosecution on our laws, whatever may be their liability to prosecution on their own; yet their testimony, when properly taken, is to be received. On what ground, but that of implied agreement, does appearance before the examiner amount to a waiver of notice? and why shall not participation in the examination amount to a waiver of the judicial oath? Had the depositions been taken ex parte, an objection to the prothonotary's authority would have come with irresistible force: but the opposite party thought proper to waive it beforehand; and to renew it, having consented to stand the chance of the examination, would be unfair.

The objection to the testimony taken on commission is unfounded in fact. Enough appears to convince us, that every cross-interrogatory was put, and that the commission was well executed.

Judgment reversed, and venire de novo awarded.

---

2 [illegible]
172 144
J172 146

LAMBERTSON & McCLELLAND *v.* HOGAN et al.

The act of April 12, 1842, and March 11, 1843, relative to tax sales, has no effect on cases already adjudicated, for explanatory acts cannot alter or impair vested rights; they are to be so construed as to affect future cases under doubtful statutes.

Where an act of the legislature has received a construction, a remedial act will always be construed to extend to future cases: And *semble*, The legislature have not the constitutional power, by such acts, to impair or affect rights acquired or existing under such a construction.

A purchaser from a vendee at a tax sale, having notice, actual or constructive, by ancient improvements, which puts him on inquiry, that the land was seated, not entitled to retain for improvements made by himself.

ERROR to the Common Pleas of Venango county.

The defendants in error brought ejectment, and having shown title, Lambertson proved a purchase at a tax sale, a sale of part to McClelland, and improvements made by them; it was then shown the tract was improved at the time of the tax sale. The case is stated on the paper-book to be the same as was decided in 2 Watts &

Digitized by Google

Serg. 107. Probably that was for part of the same tract. The defendants relied on the acts of Assembly commented on in the opinion of Mr. Justice Rogers. The court instructed the jury, the original purchaser must be considered as having knowledge of the facts; and the purchaser was in the same situation under the acts of Assembly if the improvements were ancient, for that put him on inquiry whether they existed at the time of the tax being laid, in which case neither party was entitled to retain for improvements.

Dennison, for the plaintiffs in error, argued that these acts were remedial, and intended to explain the statute which has been construed in 2 Watts & Serg. 107.

Pearson, contrà.—Such a construction would make the act most iniquitous, if not unconstitutional, for the title was vested, and this would have the effect of putting a charge on one who was in no default. 5 Watts, 350; 2 Watts & Serg. 107; 4 Serg. & Rawle, 401; 6 Bin. 118; 2 Gall. 105; 3 Bin. 356; 4 Watts & Serg. 223.

ROGERS, J.—A defendant in ejectment, claiming title under a treasurer's sale for the payment of taxes, is not entitled to recover compensation for the value of his improvements, if his title be defeated, on the ground that the land was not unseated at the time the taxes were assessed upon it, and for payment of which it was sold. Nor is a subsequent purchaser in any better situation than the vendee of the treasurer. The point was ruled on the impregnable ground, that the tract being seated, the treasurer has no authority to sell, and, consequently, the title of the purchaser was null and void for want of jurisdiction. Unseated land alone is liable to be sold for payment of taxes. Taxes on seated tracts, and other species of property, are personal charges against the owner. This principle was ruled in three cases, Chew *v.* Young, McCall *v.* Lanmer, McKee *v.* Lambertin, reported in 2 Watts & Serg. 107, and would be decisive of this case, but for two acts of the legislature, one dated the 12th April, 1842, the other, the 11th March, 1843, which it is supposed alters the situation of the parties. This renders it necessary to investigate the application of these acts to the case in hand. The latter act (which it is most convenient to examine first) is entitled, "An act to repeal the Nicholson Court of Pleas, and to release the lien of the Commonwealth on the estate of John Nicholson, deceased." In the second section, the provisoes in the 20th section of the supplement to the act, (the act first cited,) authorizing the governor to incorporate the Tioga Navigation Company, passed the 12th April, 1842, are repealed, and the provisions of the 20th section of the same act,

Digitized by Google

as to a valuation for improvements, are applied to all cases of improvements made bonâ fide under a tax title. Now, although it is not easy to comprehend how a person can act bonâ fide who improves land, knowing at the time the worthlessness of the title under which he claims, we are spared that question, as it is clear the repealing clause only applies to land formerly belonging to John Nicholson and Peter Baynton. There are reasons for the repeal of those clauses, peculiar to the estates held under those titles, which cannot affect seated lands sold under treasurer's sales, on which improvements have been made, the purchaser being aware that the tax title was not only defective in form, but absolutely null and void. Surely the legislature, whatever may have been the covert design of the draftsmen of the bill, could not intend to deprive minors of the protection afforded their interests by one of the provisions of the act which it is said is repealed. This act was a statute of repose, with the special object of putting at rest certain questions which have vexed the holders of these lands, and the legislature cannot, by a fair construction, be said to have had any thing else in view. It would be dangerous, although general words may be used to extend an act passed beyond the provisions of the statute, as it may have the effect of unsettling a general system, by so construing expressions introduced carelessly, or perhaps for a sinister purpose, into a bill designed to regulate a particular class of cases only. Throwing, therefore, this act out of view, we must next inquire as to the construction of the act of the 12th April, 1842. Has the act any application to this case? It will greatly aid us in arriving at a proper conclusion, to consider the effect of the construction insisted on by the defendant's counsel. Assume whatever disguise it may, the result is, (if we adopt their reading of the statute,) that the legislature has undertaken, without the slightest compensation, to take the property of A. and give it to B. Now, it has been ruled on grounds which cannot be gainsaid, that the government cannot take the property of one citizen for the mere purpose of transferring it to another, even for a full compensation, where the public were not interested in such transfer; and that such an arbitrary exercise of power would be an infringement of the spirit of the constitution, as not being within the power delegated by the people to the legislature. 18 Wend. 14; S. P. in Rawle, 137; and the Mayor, Aldermen and Citizens of Pittsburgh *v.* Scott, decided at this term, 1 Barr, 309. And even for a public use a man's property cannot be taken without just compensation being made. Article ix. 10th sect. Constitution of Pennsylvania. If it cannot be taken for private purposes with compensation, and for public use without compensation, much less can it be taken for private use without an equiva-

Digitized by Google

lent. This is so evidently founded on principles of natural justice and reason as not to need the aid either of argument or authority.

It must be recollected that when this case was in review before, it was decided, after solemn argument, that the defendant on the same state of facts was not entitled to payment for the value of his improvements,—that he had no claim whatever against the plaintiff: it is now urged, that by an omnipotent legislative fiat he has a legal and constitutional right to full compensation. With every respect for that branch of the government, we must take leave to deny that any such authority as is claimed belongs to the legislative power of the state. Thus, suppose a suit is brought by A. against B., and the court should decide that A. was entitled to nothing, would it be competent for the legislature to interfere, and by the flimsy pretext of giving a construction to a previous act on which the question may depend, on the statute of usury, for example, or to a principle of the common law, which amounts to the same thing, enable A. to recover the full amount of his claim. And yet, stripped of the specious pretences with which the argument of the defendant's counsel is clothed, it is precisely what is attempted here. It is proposed, by the substitution of legislative will for right, to compel the plaintiff to pay for improvements, when it is clear, so far as judicial determination can make it so, he was not under an obligation, either legal or moral, to do so, before the passage of the act. In other words, it is seriously contended that the legislature, in the plenitude of their generosity, have transferred the money of the plaintiff into the pocket of the defendant. The furthest the court has gone is in O'Conner *v.* Warren, 4 Watts & Serg. 223, where it is held, that until the judiciary has fixed the meaning of a doubtful law, upon which right has become vested, it may be explained by legislative enactment. But in that case it is strongly intimated, if not directly decided, that where the construction is not doubtful, particularly where it has been under judicial cognisance, no subsequent act of the legislature, whether it assumes the form of an explanatory act, or whatever shape it may take, as using the words "it shall not be construed," which is now the usual formula, it cannot affect or change previous rights already fixed and settled. Explanatory acts must be construed as operating on future cases alone, except where they are designed to explain a doubtful statute, in which cases they deserve and always will receive the most respectful attention from the judicial branch of the government. It would be a libel on a co-ordinate branch of the government to suppose, without express words, they intended to commit so great and manifest injustice. In Bedford *v.* Shilling, 4 Serg. & Rawle, 401, which was a case that involved the question whether the

Digitized by Google

act of the 10th March, 1814, explanatory of the act for the sale of vacant lands, extended to suits commenced before its passage, the Chief Justice remarks, the question will be whether the explanatory act of Assembly extends to suits commenced before its passage. And that it does not, I am clearly of opinion, because nothing less than *positive expressions* would warrant the court in giving a construction which would work manifest injustice. It would be disrespectful to the legislature to impute to them deliberate intention to do wrong, or wantonly to violate the constitution. The words of the 20th section are general, but there are no express words or language which is equivalent to positive expression, which clearly indicates an intention to give a retrospective effect to the act, by including cases already adjudicated. This being so, it is the duty of the court to confine its action to cases which may hereafter arise. But be this as it may, there is nothing wrong in the instruction of the court. The purchaser at the treasury sale, and his vendee, stand on the same platform. Neither are entitled to compensation for improvements on seated tracts, if the defect of title was known to the purchaser at the time of sale. And what will affect the purchaser with knowledge is notice, actual or constructive; that is, such knowledge as will put a prudent man on inquiry. If the purchaser knew, or ought to have known, as from marks on the ground, that it was a seated tract, he acts, according to every principle of law and justice, with bad faith in the attempt to improve the owner out of his title. Whether the improvements are of this description is necessarily a question for the jury; and as they have found that Lambertson knew the defects of title, at the time the improvements were made by him and his vendee, or ought to have known, (if common prudence had been observed,) that it was a seated tract, we see nothing in the case which would justify us in disturbing the judgment. Judgment affirmed.

KNOX *v.* HEROD and WILSON.

In ejectment, under a sheriff's deed, it is error to exclude evidence of a tenancy in common between the debtor and one admitted to defend as landlord to the tenant, who came in under the debtor.

THIS ejectment was founded on a sale of Gooding's estate, to whom a patent was shown and former possession, the original defendant succeeding him. Herod, who was admitted to defend as landlord, offered to show that the patent was obtained for the use of Griffith's

Digitized by Google

www.libtool.com.cn

heirs, of whom Gooding's wife was one, with knowledge to the purchaser, plaintiff, and that he, Herod, had purchased the estate of eleven of the heirs. The court rejected the testimony, on objection, as irrelevant.

Henigken and *Deford*, for plaintiff in error.—The possession of one tenant in common is the possession of all. 2 Cr. Dig. 551. Hence we in effect offered to show we were in by an independent title. Hart *v.* Gregg, 10 Watts, 185.

Veech, contrà.—The patent was an absolute conveyance to Gooding, and we were entitled to hold as he held, with or without title. Culbertson *v.* Martin, 2 Yeates, 443; Young *v.* Algeo, 3 Watts, 227; Clark *v.* Vankirk, 14 Serg. & Rawle, 156.

ROGERS, J.—A purchaser at a judicial sale has a right to recover the interest the debtor has (whatever that may be) at the time of sale. If a naked possession only, he succeeds to that right. But was the court correct in assuming that the debtor had the exclusive possession of the premises, and for that reason alone ruling out the evidence? The defendant offered to prove that he, and those under whom he claims, are tenants in common with the debtor. If so, his possession (as is settled by numerous authorities) is their possession. It is begging the question to say that the debtor was in the exclusive possession of the whole tract. The evidence rejected by the court is pertinent to *that* issue, and unless rebutted by clear proof of an actual ouster, or that the debtor held under a lease, it is conclusive on that point. It would seem that the agent of the purchaser was aware that Gooding held but an undivided third of the tract in right of his wife, and that he held the patent as a trustee for the parties in interest. It is not my intention to intimate an opinion on the title, which can only be decided understandingly when the whole question is before us. The nature and extent of Gooding's possession may hereafter be a matter of inquiry, and can only be determined after hearing the whole case. The defendant does not contest the purchaser's title to an undivided third, nor his right of possession as a tenant in common. A purchaser at sheriff's sale can succeed to no greater right than the debtor. And it cannot be that merely because the debtor is in possession, the purchaser can turn not only him out but his co-tenant also. Can he turn him round to an action of ejectment to re-instate himself in possession? This would be an entire perversion of a salutary and conservative principle of law. The defendant would have much right to complain,

Digitized by Google

www.libtool.com.cn

as this verdict and judgment may hereafter be counted as one on the rubber. It would be doing him an injury to no useful purpose, as the title can be as well tried in this action as in any other. It is proper to remark, that if it should appear, when the whole case is brought out, that the parties are tenants in common, and that there is no ouster, ejectment is not the proper remedy, but partition.

Judgment reversed, and a venire de novo awarded.

---

2 28
184 510

KINGSLEY *v.* The School Directors of PLUM Township.

1. The school directors of a district should sue in their public capacity.
2. A trustee of the owners of a building leased to the directors of schools, held liable in trespass for entry before the expiration of the term; nor is it material that the public school had no funds, or that the teacher had not been examined for that year, if he have a certificate and had been examined on a previous occasion.
3. Unless the inhabitants choose a teacher, the board of directors may appoint one.
4. One of three trustees has not authority to put an end to a lease of the property of the charity.

ERROR to the Common Pleas of Venango county.

There being no bill of exceptions in this case, which was trespass vi et armis, the only error assigned, apparent on the record, was whether the action was rightfully brought by the plaintiff in error. The facts, as they may be collected from an opinion of the court below, &c., will be found in the opinion of this court.

Pearson and *Galbraith*, for plaintiff in error.—Purd. 315, act of 13th June, 1836, sect. 1, as to the form of suit. 1 Watts & Serg. 428. Whether they had a right to hold the property, 1 Watts & Serg. 90.

Howe, contrà.—6 Watts & Serg. 46.

BURNSIDE, J.—The principal question assigned for error in this case is settled in Barnett *v.* The School Directors, 6 Watts & Serg. 46, where it was held that school directors should sue in their public capacity and not in their individual names.

They may maintain assumpsit, trespass, or any other action that is suitable to the injury they have sustained. The evidence is not returned with the record. From the charge of the judge, and the points made in the cause, we take it that the schoolhouse in question had been built by the citizens of the immediate neighbourhood by subscription. They elected three trustees, who agreed to let the

Digitized by Google

school directors have the schoolhouse for five years for a public school, for such period in the year as they would require it, paying one dollar a month while they used it, to be laid out in repairing the building. When the school directors did not require it, the owners of the building had a right to occupy it. There was nothing wrong in this. The school directors had a right by law to have a schoolhouse. The school directors had placed a public school in the building, the lease of which would have expired in about ten days. Such was the impatience of the defendant below to put in a new master, and to obtain possession of the building, that he removed the fastening of the door and entered upon the public school. This was clearly a trespass. He undertook to remove the school and turn out the master. All the schools in the district are under and subject to the supervision of the school directors. A careful examination of the system shows their power and authority; and although the inhabitants of the sub-district may assemble and choose the teacher, if they neglect to do so the school directors may place a teacher in the district. There is no evidence in the case to show that this sub-district ever attempted to act. The plaintiff in error entered as one of the trustees of the owners of the building; one of the trustees was out of the county, and the other trustee forbid him to enter by violence, or removing the fastening from the door. He had no business there, and he had no right to the possession of the building until the public school was ended. There is nothing in the objection that the public school had no funds—that was no business of the defendants below—or that Warner had not been examined in 1840. He had been examined in 1839, and received a certificate, and had also received a certificate for 1840. The trustees of the contributors did not act so as to authorize Kingsley to put an end to the lease. They ought to have met and passed a resolution for that purpose. He was a mere wrong-doer, and possession of the building in the defendants in error was good against him. The law can have no commiseration for such a wanton, meddling, and improper act.

The judgment is affirmed.

Digitized by Google

www.libtool.com.cn

† KEAN *v.* MCKINSEY.

1. A promise to pay a judgment, if the plaintiff would not proceed further, is a promise in consideration of general forbearance, and on a loss ensuing the guarantor is liable.
2. The judgment is conclusive against the guarantor as a party.
3. A guarantee without the request of the debtor is without consideration as to him.

ERROR to a special Court of Common Pleas for Crawford county.

Kean having recovered judgment before a justice against Frazier, proved that defendant promised to pay the debt—"told him to get a judgment against Frazier, but to do no more in it." Plaintiff informed him he had obtained one; he answered, "that is right, do no more in it, but I will see you paid." He also proved he might have levied on property of Frazier.

Defendant proved by Frazier that the debt for which judgment had been obtained was not due, having been paid before that suit was commenced.

Plaintiff objected on the score of interest; but the court said it did not appear the assumption was at Frazier's request.

The court left the question of the existence of the original debt to the jury.

Riddle, for plaintiff in error, cited 6 Watts, 398; 4 Rawle, 273; 1 Pet. C. C. R. 202; 10 Watts, 101; 3 Watts, 217; 5 Rawle, 69.

Dennison and *Pearson*, contrà.

ROGERS, J.—There is no valid objection to the competency of James Frazier as a witness, for if the defendants agreed to answer for his default, it was a contract entered into voluntarily and without request. It cannot, therefore, form the ground-work of a suit; for it is well settled, that a voluntary payment or engagement to pay the debt of another, gives no right of action against the original debtor. But the exception to the subject-matter of his testimony stands on a different footing. The witness was admitted to prove that the judgment rendered against him was obtained by fraud; that there was nothing due when rendered. But so far as respects the defendant, who agreed to pay it, it is conclusive. It is so against Frazier, and why it should not be so against McKinsey, who voluntarily makes himself privy to it, it is difficult to understand. Suppose a man becomes surety for stay of execution in a judgment obtained either by default or by verdict of a jury, can it be that it is permitted to the surety to go behind the

Digitized by Google

judgment and show that the judgment was improperly obtained, and that there was nothing due! If this is allowed, nothing will be settled; for after the most tedious and protracted trial between the original parties, every thing will be opened, and the plaintiff will again be compelled to sustain his claim. There is no principle better settled than that the validity of a judgment cannot be impeached in a collateral action. A verdict and judgment between the same parties, or their privies, is conclusive. 3 Rawle, 273; 6 Watts, 398, Farly *v.* Hays. Third parties, it is true, who have no other mode of rescinding or setting aside a judgment, may aver that it was obtained or kept in fact by *collusion between the parties*, and in such case, although binding between the parties, as to others it is of no effect. But here there is no averment of collusion between Frazier and the plaintiff to defraud the defendant. The defence is, that the plaintiff improperly obtained a judgment against Frazier, when, in fact, there was nothing due. Of this no person has a right to complain except Frazier himself; and it is not competent for any person, whether stranger or privy in a collateral suit, to re-investigate the original cause of action, or to examine into the regularity of the judgment. As long as it remains a valid judgment it cannot be questioned by others, except there is collusion between the original parties, as, for example, where there is a combination to defraud creditors. There is no doubt it is competent for the defendant to prove (if he can) that the debt has been subsequently paid, and that the judgment is kept on foot by fraud or by mistake. The gravamen of the plaintiff's action is a promise to pay the debt of another in consideration of forbearance, that the plaintiff did forbear, whereby he lost the chance of levying his debt on property then owned by Frazier. A promise to forbear generally, without specifying any time, is a sufficient consideration; for, by a forbearance in general, without adding any particular time, is to be understood a general forbearance. Evidence of a promise to pay in consideration that the plaintiff would wait, forbear, or give time indefinitely, or for a reasonable time, at the instance and request of the defendant, will maintain an action against the promisor. And when the plaintiff is requested to forbear, and a promise made to pay the debt, and he does forbear, it is such evidence as will maintain the suit. 3 Watts, 213; Clark *v.* Russell, 5 Rawle, 69.

Judgment reversed, and a venire de novo awarded.

Digitized by Google

www.libtool.com.cn

McAteer *v.* McMullen.

1. Evidence of contradictory statements, to discredit a witness examined at the trial, not admissible, unless he is first examined as to such statements, so as to give an opportunity for explanation.
2. So of an omission by the witness to state facts in a previous trial between other parties, unless it be shown to have been pertinent to that issue, and then subject to the rule above stated, § 1.
3. Purchaser under devisee has notice of a subsequent devise in the same will of a part of the subject of the first devise, though uncertain until election.

Error to the Common Pleas of Cambria county.

The defendant in error claimed title in ejectment as heir of her brother Robert, in whom she showed title under the will of his father, who devised to him "fifty acres on the west end of the place previously given to his son Michael, for ten years, and at the end of that time to hold the same by paying to Michael five dollars per acre in instalments, to be given him on either side of the road, as Michael may think proper," &c. She then proved by Michael, that the premises in question were set off at the west end of the tract devised, though a clearing had first been commenced at the east end, by an agreement between himself and Robert, and had been paid for; but no deed had been made, nor does it appear there was any continued possession by Robert.

The plaintiff below was a purchaser at sheriff's sale under Michael, and claimed to hold as a purchaser without notice, on which the court charged "that the will under which the defendant claimed was notice to him of a devise of fifty acres off the north-west corner of the tract, that being the part which best answered the description in the will, unless it had been selected elsewhere, and never given up; any man reading the will would be bound to inquire whether Robert had got his fifty acres, and when; and whatever would put a man on inquiry was notice."

Two points were made on rejection of evidence. 1. That after a previous ejectment by a stranger against the present defendant for this land, Michael, the witness of the plaintiff, had said he had now gained his own land, and would go back there to live; and, also, that when examined in that case he had said nothing about Robert's having first commenced a clearing at the east end of the tract.

Michael being recalled, said his son had purchased a right under which the recovery was had, and he expected to come in with him, but he had no contract.

Digitized by Google

www.libtool.com.cn

Banks, for plaintiff in error.

Cox, contrà.

ROGERS, J., (after stating the case.)—It is not pretended the witness had any right in the land, and the testimony is intended to impeach his credit by his own declaration, which goes to show he supposed he had an interest. In that view we think, in justice to the witness, who has rights as well as the parties, the defendants were bound to interrogate the witness in the first instance as to what he did say, so that he may have an opportunity to explain. An explanation was afterwards given, which, if true, and it was not attempted afterwards to contradict it, shows his conversation with McGlaughlin, if any he had, was harmless. He says after the former trial he told McAteer that they should leave the place, for he would come back in spite of them, for his son had bought the land and paid for it, and he would have better authority than they. He did not say he had gained the land again, for he was not contending for it. He may have had a conversation with McGlaughlin. He never told him he had gained the land. He may have said he would go back to Mullen's Hill, for his son was able to buy it, and pay for it. The case itself shows the propriety of the rule, for after this explanation no attempt was made to contradict the witness.

The defendants then offered to prove, that Michael Mullen was examined as a witness for the plaintiffs in the case of Brady and wife *v.* McAteer; that the suit was for an undivided interest in the same land claimed to be recovered in this suit. That in that trial Michael Mullen, in his testimony, said nothing about Robert Mullen having commenced a clearing on the east side of the turnpike. Had it been between the same parties, there would have been less difficulty, but there is nothing on the record to show that the testimony offered was mentioned in the first case, or that it would have been pertinent to the issue; in that case only would the omission to state it have thrown the slightest discredit on the testimony of the witness. We think on that ground its rejection was proper. Besides, it is open to the same objection as in the first bill. Michael Mullen should have been called on to state what he did say in the former suit, whether he did tell the same story then as now, and his reasons for omitting to tell, if he did so, that which he now testifies to.

The defendant alleges there was error in instructing the jury that the devise to Robert Mullen, in the will of his father, was sufficient notice to Philip Neen that he was not a bonâ fide purchaser without notice.

The court instructed the jury that Neen was not a bonâ fide purchaser without notice, because the testator, in the will under which he

Digitized by Google

of course must claim, devised to his son Robert fifty acres of the north-west corner of the tract, that being the part which last answered the description in the will, unless it had been selected elsewhere and never given up. That any person on reading the will would be led to inquire whether Robert Mullen had got his fifty acres, and where, and whatever would put him on inquiry would be notice. This is a correct application of an acknowledged elementary principle, and consequently effects the purchaser with constructive notice.

Judgment affirmed.

---

2 34
25 SC 380

Gans *v.* Renshaw.

A vendee, by articles of agreement, is not bound to restore the possession to the vendor and give up the contract, before he can make objections to the title in an action brought for the purchase money.

He cannot keep both the estate and the price of it; but it is the vendor's business, if he finds that he cannot make such a title as the vendee is bound to accept, to refund what has been paid, and bring an ejectment for the property.

The vendee is not bound to accept a title depending on a conveyance to a creditor, where there is evidence to raise a suspicion that the object of the conveyance was to elude other creditors who were pressing for judgments.

Nor, if there be a covenant for title, clear of encumbrances, where there are unextinguished ground-rents; and it is error to instruct the jury that the defect may be compensated by a deduction from the purchase money.

Error to the Common Pleas of Fayette county.

Renshaw brought covenant on articles for the purchase of land by Gans, who agreed to transfer judgments amounting to $1000, in payment, as soon as plaintiff would execute a deed, clear of all encumbrances: possession to be delivered on the 14th of the next month. He then proved an entry by the son of the defendant.

Also a tender of a deed with warranty against all encumbrances except quit-rents, at which time defendant objected that there were judgments and liens.

Defendant then showed a judgment against William Schroyer, security of Schroyer and Stinger, on the 4th of February, 1842, with a fi. fa., and sale of the property now in question, to a stranger; also a conveyance by W. Schroyer, on the same day, to Renshaw, for $600; that $100 was paid in cash, and the residue in debts due by Schroyer; he also showed the land was first held at $1200, but finally agreed to be sold at $1000. There was evidence of his knowledge of the existence of the rent and a payment of it by him, after entry under the articles. The court told the jury the defendant could not keep the land on account of

Digitized by Google

defect of title, without paying the purchase money. That fraud must be clearly proved, and there was no evidence to justify holding the conveyance by Schroyer to be fraudulent as to his creditors. If defendant was unwilling to complete the title, on account of defects, he was bound to give up possession, and rescind the contract. That, as to the quit-rents, a compensation could be made, unless the jury believed defendant was aware of their existence, and agreed to pay them at the time of the entry.

Patterson, for plaintiff, in error, contended there was some evidence of fraud to go to a jury; that defendant was not bound to do any act. The rule would be different, if he were proceeding to enforce the contract; but that in covenant on articles the plaintiff must prove performance, as in any other case; aliter where the proceedings are ejectment to compel performance; and referred to 1 Watts & Serg. 68; 2 Watts, 227; 4 Watts & Serg. 316; 5 Serg. & Rawle, 311; 4 Watts, 153, 146; 2 Taunt. 145; 7 Serg. & Rawle, 62; 11 Serg. & Rawle, 246.

Veech and *Deford*, contrà, cited 4 Watts, 151, 153; 2 Watts, 483; 1 Watts, 236; 1 Rawle, 376; 7 Serg. & Rawle, 43; 7 Watts, 227; 4 Watts & Serg. 316; 11 Serg. & Rawle, 246.

GIBSON, C. J.—A purchaser is not bound to take a doubtful title; and why should the defendant below have been bound to take the property under something more than a suspicion, that the conveyance from Schroyer to the plaintiff was tainted with fraud by the 13 Elizabeth? Because, it is said, it was his duty, if the title was not such as he had bargained for, to give back the possession, and declare his determination to abandon the contract. And, for not having done so, he is to pay a sound price for an unsound title! I am aware that the taking of possession may be a waiver of objection to the title, as was intimated in Colton *v.* Wilson, 3 P. Wms. 193, and directly decided in Calcraft *v.* Roebuck, 1 Ves. jun., 225; but it appears from Hearn *v.* Tomlin, Peake's Cases, 192, that the vendee may safely take possession at the time of the contract, as was done here, because he cannot be held to waive objections of which he was ignorant. But whose business was it to move towards a rescission of the contract? Not the defendant's. He was at liberty to fold his arms and await the movement of the plaintiff, whose cue it was to take the next step towards an abandonment, or a completion, of the purchase. It was not for the defendant to know what title the plaintiff should be able to make, when he should come to tender the conveyance. The plaintiff's power to perform his part was best known to himself; and if he found the defect

Digitized by Google

in his title to be irreparable, what was he to do? Certainly not to bring an action for the purchase money, in order to force a rotten title on the purchaser of a good one, and this on the basis of his own default. It would be his duty to apprise the vendee of his inability, restore whatever had been paid, and demand the possession. In that case, equity would not enjoin him from proceeding on his legal title to get back the property, but not to compel the vendee to pay for what he did not get. Now, what was the evidence of defectiveness in this title? Schroyer sold the property to the plaintiff, his father-in-law, for $600; and in less than two months the plaintiff sold it to the defendant for $1000. This might be a circumstance, with others, to show that Schroyer had sold it greatly at an undervalue, which would be a very suspicious feature. Schroyer himself testified that he was indebted to the plaintiff between four and five hundred dollars, or thereabouts; and that the plaintiff was to satisfy an unascertained claim of Crozier, and pay $100 to Riffles, which, however, he paid to Schroyer himself. The sale was made when judgments were about to be obtained against him; and though an insolvent debtor may give such preferences to particular debtors as he may see proper, yet if the motive be not payment of his debts, but, in the language of the statute, "to *delay*, *hinder*, or defraud" particular creditors, the conveyance, though made on valuable consideration, is not *bonâ fide*, and therefore not saved by the proviso. In Twyne's case, 3 Rep. 80, which is the leading one, the conveyance, as in this case, was in payment of a debt; yet the retention of the goods by the debtor was held to be proof that the sale was not bonâ fide, but intended to delay the pursuing creditor, and the conveyance was consequently adjudged to be fraudulent. Now, even if there had been no other circumstance in the case, the question whether the conveyance, in this instance, were bonâ fide, or to elude the creditors in close pursuit, ought to have been left to the jury instead of being put aside by the direction that the defendant could not detain the purchase money, unless he had offered to surrender the possession and abandon the contract; and by an intimation that there was no evidence of fraud. But Schroyer himself testified that one sixth of the purchase money was paid to himself; and if the purpose of the sale was known to the plaintiff, the conveyance was fraudulent by the statute, not only in part but in the whole. But did not all this, combined with the fact that the property was bought in adversely on one of the judgments, cast such a doubt on the title as would excuse the defendant from receiving it, though the proof of collusion might turn out to be less than would entitle the sheriff's vendee to a verdict? In Sedgwick *v.* Hargrave, 2 Ves. sen. 59, the Master of the Rolls remarked that he had heard it

Digitized by Google

said, the title of a vendor must be like Cæsar's wife, not only pure but unsuspected; and though a vendee is not at liberty to speculate in probabilities, he is not bound to take the property encumbered with a lawsuit. I have seen no exception to this, but the anonymous case mentioned by Mr. Sugden, (Law of Vendors, chap. 7,) in which a vendee had refused to complete the purchase, because certain mines in it were under a common, and he would consequently be exposed to actions by the commoners for sinking the necessary shafts; but Lord Eldon compelled him to execute the contract, because he thought that a farthing would be as much as a jury would give in damages. Proceeding on the maxim de minimis, he evidently went further than any of his predecessors had gone; and much further than he afterwards went himself in Edwards v. McLeay, 2 Swanst. 287, in which even a contract executed was rescinded by him, and the purchase money restored, because the vendee had discovered, that a part of the premises had been taken from a common. Now, it is well-known that it requires a stronger case to induce a Chancellor to rescind a contract, than to withhold his assistance in causing it to be executed. If, then, the defendant, in this case, would be exposed to a lawsuit, with the least chance of losing it, he ought not to be held to the bargain.

It seems that the encumbrances, except the quit-rents, were discharged before tender of the conveyance and suit brought; but if the quit-rents could not be extinguished, the defendant was not bound to receive the title, unless he had agreed to take it with that particular encumbrance upon it. By the abstract of the articles before us, which, in the absence of fraud or mistake, must be taken to contain all the terms and conditions of the bargain, it appears that he was to have "a good and sufficient deed clear of all encumbrances;" and the testimony of Schroyer that he asked, shortly after the bargain, for the name of the person to whom he was to pay the rents, cannot alter the terms of the plaintiff's covenant, which certainly is not to be satisfied by the conveyance of a title irremediably encumbered. It is true that when a defect goes only to a part of the property, and that not the principal one, it may be compensated by a deduction from the purchase money; as in Stoddart v. Smith, 5 Binney, 335; but not where there is a canker in every part of it. The jury ought not, therefore, to have been instructed that they were at liberty to make the defendant take the property, with compensation for the quit-rents as the equivalent of an unencumbered title.

Judgment reversed, and venire de novo awarded.

Digitized by Google

www.libtool.com.cn

KIMMEL *v.* M'RIGHT.

1. A purchase by one indebted, in the name of a natural child, being intended to delay, &c., under 13 Eliz., may be avoided by a purchaser at sheriff's sale of the title of the father.
2. Declarations of intentions, in making such purchase, admissible in evidence.

ERROR to the Common Pleas of Westmoreland county.

The plaintiff, as purchaser of George Kimmel's estate at sheriff's sale, brought ejectment against him. It appeared from the evidence, that Obadiah, a natural son of George, claimed the property under a conveyance from a stranger, and that his father lived in the house with him; but he was not named defendant on the record.

To avoid the effect of this conveyance, plaintiff showed that at the time of this purchase, which was subsequent to his judgment, Obadiah was but fourteen or sixteen years old. That his father made the bargain and handed him the money to pay the price. The defendant objected to evidence of a declaration by George Kimmel, that "he would buy land in Obadiah's name." The court told the jury the purchaser was entitled to recover, if George Kimmel had any beneficial interest in the land; that if he made the purchase at the time, and was indebted, a resulting trust would arise to him; though, as a general rule, such a trust would not arise, where the payment was not with consent of the grantee. Or if the jury found the purchase was with intent to defraud his creditors, they would be entitled to retain it, under 13 Eliz., against Obadiah.

The fourth point of defendant was, "That a man indebted is not prevented or prohibited by law from making a present of money, if he has it, to his children, that it is no fraud to do so." "We answer that the law is the reverse of the statement in this proposition."

Coulter, for plaintiff in error, cited 1 Lord Ray. 68; 1 T. R. 101; 5 Watts, 408; 1 Ashm. 55.

Nicholls and *Forbes*, contrà.

ROGERS, J.—No exception can be taken to the general charge, nor to the answer to the points, except the fourth. The court are made to say, that a man is prohibited from making a present of money to his children. As an abstract principle, nothing can be more erroneous, for undoubtedly, a man may do as he pleases with his own property. But the court must have intended, as appears very clearly from the

Digitized by Google

general tenor of the charge, that a man who is largely indebted in proportion to his means, cannot give his property to his children at the expense of his creditors. And this certainly is the law, a man must be just before he is generous. The title to the land passed from the several grantors to Obadiah; and as against his father, as it appears to have been a gift, he might have held the land. But the father, at the time of the several conveyances, was largely indebted; and these conveyances to his son were devices to cheat and defraud his creditors. As against them, by the statute of fraudulent conveyances, the title is utterly void.

We see no cause for complaint, admitting even the testimony of the declarations of Dr. Kimmel, that "now he would buy land, and that he would buy in Obadiah's name." If he was indebted at the time the declarations were made, it is pertinent testimony; if he was not, it is evidence in the defendant's favour, as it shows his honesty of purpose. In no point of view is he injured, and the court would be badly employed in reversing judgments for errors which work no mischief.

Judgment affirmed.

RHOADS v. MEGONIGAL.

1. A bond or note cannot be levied on and sold by the sheriff; nor will such sale and delivery pass any title.
2. *Semble:* a note deposited in pawn may be attached as a debt under an attachment and execution against the owner; but it is proper to return specifically what goods, &c., were attached. Per Rogers, J.

ERROR to the Common Pleas of Westmoreland county.

Rhoads, to the use of A. Cannon, brought debt on a single bill, the title to which was deduced by the records of a judgment against Rhoads, the plaintiff, an execution and levy on the note in the hands of John Cannon, and a sale to A. Cannon. It was then shown that the note had been deposited as a collateral security in the hands of John Cannon; that after the levy, but before the sale, an attachment in execution on a judgment against Rhoads had been executed by a return of "served as to Rhoads," and "on Megonigal," the drawer, "by reading and copy." The defendant withdrew his plea of payment, and pleaded this attachment specially.

It was shown that Rhoads had never given any express assent to the sale to the present plaintiff, nor did he give any notice, though present at the sale.

Digitized by Google

The court, after instructing the jury on the effect of Rhoad's conduct, told them that independent of that, the rights of the creditors having attached previous to the sale, it could produce no effect on them.

Armstrong, for plaintiff in error.—The note, being pawned, was subject to levy and sale like any other chattel, and being deposited for an indefinite time, it was the duty of the pawnee to give notice to the owner; Delisle *v.* Priestman, 1 Brown. 176; and not having done so, the title passed as in a sale by the agent. 2 Dow. & Ry. 270; Chalmers *v.* Pope, 2 Barn. & Ald. 695. The remedy is against the pawnee for delivering, Owen's Rep. 123; Anon., 2 Salk. 522; Coggs *v.* Bernard, 3 Salk. 268; Thompson *v.* Patrick, 4 Watts, 414. Nor was there any violation of his duty; and this amounted to an equitable assignment. United States *v.* Vaughan, 3 Bin. 294; Caldwell *v.* Vance, Id. 400, cited; Croser *v.* Craig, 1 W. C. C. Rep. 424.

Nothing was in fact attached in the hands of the pawnee; he did not hold a debt but a chattel, an evidence of the debt of a third person. To enable the court to render judgment, the specific goods must be returned. Ninian *v.* Ward, 1 Watts & Serg. 82; Barns *v.* Billington, 1 W. C. C. Rep. 29.

The knowledge of Rhoads without dissent was sufficient to estop him. Epley *v.* Witherow, 7 Watts, 163.

The plea was bad, as to defend himself a party must show he has been compelled to pay the money; Lowry *v.* Lumberman's Bank, 2 Watts & Serg. 214; Irvine *v.* Lumberman's Bank, 2 Watts & Serg. 190; and the plea is only in abatement, Chenango *v.* Jones, W. C. C. Rep. 359.

Nicholls, contrà.—A note is not the subject of levy and sale; it has been frequently decided that such things cannot be seized, any more than bank notes could, before the statute.

ROGERS, J.—That a bond or note cannot be levied on and sold at judicial sale as a chattel, is too plain to admit of argument. But it is said that it was delivered to the constable for that purpose, by John Cannon, with whom it had been deposited as collateral security for a debt owing to him by Adam Rhoads. But what authority had he to deliver it to the officer to satisfy the debt of another? It was not put into his hands for that purpose, but as a collateral security only. He has no express authority, as must be conceded; and what implication can arise from his character of pledgee, we cannot comprehend. That Rhoads gave no express consent, is granted; but it is contended, that

Digitized by Google

as he was present at the constable's sale, and did not give notice of his dissent, his right became vested in Cannon. But he was not bound to give notice, for Cannon was just as competent to judge of the right of the constable to sell a chose in action as Rhoads; and admitting there was a mutual mistake as to the law, unless Rhoads encouraged Cannon to purchase, his right cannot be affected. But this is not pretended. Rhoads, it is true, was present at the sale, but no express assent is shown, nor is there any implication of assent; on the contrary, it appears it was sold contrary to his wish, Rhoads saying it was a bad piece of business, but that he was so encumbered at the time that he could not avoid it. But the plaintiff contends the court were wrong in their instruction as to the attachment; that the court took it for granted the note was attached, whereas the return of the attachment merely sets out that the writ was served on John Megonigal by reading and copy, and on Rhoads in the same way; the officer does not set out that he attached the note, as he should have done. This is clearly a blunder. It appears, however, that in truth the note was attached, although it is not noted in the return. On the trial, it must be remembered, no objection was taken on that ground, for neither the counsel nor the court adverted to the return. Under these circumstances, we do not think ourselves bound to reverse a just judgment for a slip of this kind, and particularly where it is apparent that in another trial it must result in the same way. On the whole record it is plain that Alexander Cannon, who purchased at the constable's sale, and for whose use this suit is brought, acquired no title to the note.

Judgment affirmed.

CARNEGHAN v. BREWSTER.

1. On the sale of the equitable interest of a vendee under articles, the proceeds are to be distributed, according to the priority of the liens.
2. Nor is this rule altered by the fact, that on the first of two judgments for instalments of the purchase money, bail in stay of execution has been given, and the plaintiff has received the money on the second judgment and execution.

ERROR to the Common Pleas of Erie county.

Carneghan, being entitled by articles to a conveyance, sold his right to Johns, in consideration of the payment of the unpaid purchase money, and $2020, in four annual instalments to himself.

On a judgment for the second instalment, Brewster entered security

Digitized by Google

for stay, &c. On this judgment there was a credit for a surplus under a previous sale.

www.libtool.com.cn

A judgment was then obtained for the third instalment, on which Johns' interest was sold, and the proceeds receipted for by the plaintiff's attorney.

These facts appearing on a sci. fa., on the recognisance of Brewster, the plaintiff contended, he had right to apply the money raised under the third judgment to any debt; and having done so, he could not be compelled to apply it to the second judgment, in relief of Brewster; or, at most, he could only have a pro rata share, with all the instalments due. The Court decided the law made the application, on the receipt by plaintiff, to the elder lien.

Babbett, for plaintiff in error, cited 5 Watts & Serg. 352; 17 Serg. & Rawle, 400.

Walker and *Galbraith*, contrà.—5 Watts, 412; 7 Watts, 476; 10 Watts, 434.

Burnside, J.—The lien of judgments, in Pennsylvania, has been extended beyond the limits of the common law. A judgment is held to be a lien on every kind of equitable interest in land, and on every right vested in the debtor, at the time of the judgment. Carkhuff *v.* Anderson, 3 Binn. 5.

Bearing this in mind, let us inquire what were the leading facts of the case under consideration. [His honour here cited the facts of the case.]

The plaintiff's counsel requested the court to charge the jury: That the plaintiff having received, and receipted the recovery, upon the last judgment, on which the sale took place, he could not be compelled to apply it to the prior judgment, where Brewster was bail.

2d.—If the defendant is entitled to relief at all, he is only entitled to a pro rata, upon the whole debt due upon the articles of agreement. The president of the Common Pleas did not sustain these positions, and this is assigned for error. The judge held, that the law made the appropriation, and that the oldest judgment was entitled to be first paid.

In support of the first position, the counsel of the plaintiff relied on Armstrong's appeal in 5 Watts & Serg. 352. In that case there were a number of liens against Armstrong. The proceeds of the sheriff's sale was brought into court for distribution. Amongst the liens was one in favour of Eaken, Spangler & Co., in which Edward McGarvey had become bail for stay of execution. McGarvey was obliged to

Digitized by Google

discharge the lien, and desired to be subrogated, which the Supreme Court refused to permit, to the injury of subsequent judgment creditors. This case does not support the plaintiff's first point; nor does the case of Donnely and another assignee of McKean v. Hays, 17 Serg. & Rawle, 400, support the second point. There a mortgage and eight bonds were given, to secure the price of a tract of land; five of the bonds were transferred to different persons; the premises were sold, for a less sum than the amount of the mortgage, on one of the bonds, and the money brought into court for distribution. This court, considering the equity of the respective holders of the bonds, decided they were to be paid pro rata.

There is nothing in the exceptions to the charge. Bennet had an equitable interest in the land. The first judgment bound that interest; Brewster knew that, and went bail; the sheriff's sale discharged that judgment, and of course cleared the bail.

The judgment is affirmed.

WALKER v. SMITH.

1. The lines marked on the ground constitute the actual survey, and control the return of the surveyor, even where that calls for a natural or other fixed boundary, though the space between the two be but twelve perches in breadth.
2. The 2d section of the syllabus in Martz v. Hartley, 4 Watts, 261, and the dictum on which it is founded, is not warranted by the case then before the court, and is an erroneous statement of the law.

ERROR to the Common Pleas of Armstrong county.

This was an ejectment for thirty acres of land. The plaintiff showed title, by an order of survey on a location, in 1769, and a return of a survey, made in 1770, calling for the Manor line as a boundary. The date of the return was not stated on the record, but it is assumed by the court below to have preceded the warrant of defendant. The defendant claimed, under a warrant in 1797, and a survey in 1801, including the land in controversy. He then proved that the lines of plaintiff's survey did not, as they appeared on the land, extend to the Manor line, but there was an interval of twelve perches between them.

The court instructed the jury, that the lines on the ground constituted the real survey; but there was an exception to that rule, when a natural boundary was called for, in which case it extended to that, though the marked lines stop short of it. If the fact, that this land was included, be established, and the return is made before other

Digitized by Google

rights intervene, it is sufficient, although the lines found on the ground be at variance with it.

www.libool.com.cn

Buffington, for plaintiff in error.—The question is, which is to govern, the lines marked or the return? Clearly the former, as is settled by the cases, though there be a dictum to the contrary. Hall *v.* Powell, 2 Yeates, 311; 4 Serg. & Rawle, 462; 5 Serg. & Rawle, 215; 6 Binn. 39; 2 Binn. 109; 9 Watts, 116; 4 Watts & Serg. 326. 4 Watts, 261, is but a dictum, for the case did not require it; it was decided on principles of a general nature, not our peculiar land-law.

Phelps, contrà, relied on 4 Watts, 261, where the principle, as decided below, is expressly laid down. 9 Watts, 117; 4 Watts & Serg. 323; 7 Watts, 98.

BURNSIDE, J.—On an error assigned in the case of Hall *v.* Powell, 4 Serg. & Rawle, 462, that the late President Walker instructed the jury, where lines and corners were found on the ground, that they could not be departed from, though there may be a variance in the courses and distances, Justice Duncan, who delivered the opinion of the Supreme Court, declares that the law has ever so been held. The real survey is the lines marked on the ground. The return of survey is only evidence thereof. In that case, the warrants were each for two hundred acres. They purported, on the return, to contain about two hundred acres. But on the ground, the lines were near twice as long as they were returned, and contained near double the quantity returned. The surveys called for visible courses that were found. The court declared it had been so long settled, that where lines and courses were found, they could not be departed from, though there was some variance in the courses and distances. This rule of property was so well settled that the court would not permit the question to be submitted to a jury, to inquire whether the surveyor, finding he had more land in the survey than he could legally return, had thrown off all beyond the distance returned into the land-office. The surveyor having returned, by lines and courses found on the ground, that was the true survey; and the court say the question has been frequently agitated, and is now put at rest. In Mageehan *v.* Adams, 2 Bin. 169, a survey and patent of one Conrod, which were given in evidence, called for, as the place of beginning, a black oak on the state line; thence by the same one hundred and twenty perches to a post. The plaintiff below offered to prove that the black oak, and the marked line run from the black oak, were not on the state line, but about thirty perches east of it; and the evidence was admitted, and the plaintiff recovered according to the

Digitized by Google

www.libtool.com.cn

marked line. Here the survey has been returned by courses and distances, and marked courses, which were all found on the ground. The returned survey called for adjoining the Manor line, but the Manor line was from ten to fifteen perches off the line of the survey. If the returned draft had called for the Manor line, and the line next the Manor had not been run and marked on the ground, the defendant in error would have held to the Manor line. The line being well marked, as returned on the ground, unless we unsettle the law, the survey cannot be extended to the Manor line. The return of survey was in accordance with the marked lines and courses. I see nothing in the case, to infer that the surveyor had thrown away the line he had run and marked on the ground, and that he had extended his survey by protraction to the Manor line. A surveyor, when the land is vacant, may, when he calculates his quantity, and finds a deficiency in his boundary to fill his warrant, extend his lines by protraction, and if the line so extended is not an open one, a careful surveyor will obliterate the marks, and the title will be good for the protracted part from the acceptance of the survey, if there is no intervening right. 3 Yeates, 407, 2 Binn. 37, 55. But in this case the returned draft corresponds with the lines, courses, distances, and corners found on the ground.

The judge of the Common Pleas was misled by the report of the case of Martz *v.* Hartley, 4 Watts, 262. When that case is examined, it will be found to be correctly decided. There the parties had made a consentable line through a small vacancy between their surveys for twenty-one years, and held and occupied the ground. It was right not to disturb their possessions, and the court only held, that after a survey has been made for twenty-one years, and possession held in pursuance of it, and one of its lines was agreed on by the owner of the land, and the owner of an adjoining tract, to be at a certain place, such designation of the division is conclusive without regard to the point where the surveyed line actually is. This was the point decided by the court. But the learned judge, who delivered the opinion of the court, went beyond the case before him, and he declared "that there was no such thing as finding a gore of *four*, or *five*, or *ten* acres between two surveys which call for each other. When the latter calls for the former, and the course is the same, the line of the former is seldom retraced in making the latter. When this is the case the judge is right; there is no vacancy. I agree that when the line of either is an open line, and they call for each other, the line run on the ground is the true line between them. But where both lines are run and actually marked on the ground, and both found, the space between them does not belong to either before the actual occupation and improvement.

Digitized by Google

The case did not warrant the second member of the synopsis to the report, that where a survey has been made on a warrant, and returned, calling for an adjoining survey as one of its boundaries, the title of the warrantee will extend to such adjoining survey, although the line actually run and marked on the ground may be a few perches from the line of such adjoining survey.

In the case now under consideration both lines were run and marked; they did not run the same course, neither have any right beyond their lines on the ground, and the law has ever been so ruled. It is a sacred and important rule of property which ought not to be changed. The land between the Manor line and the Findley survey is regularly returned, surveyed, and accepted in the land-office in the survey of Walker; and the defendant below, if the jury believed the evidence of Ross and others, had a right to hold it. It was error to instruct the jury in favour of the plaintiff below, that he had title for the land outside of his survey marked on the ground.

The judgment is reversed, and a venire de novo is awarded.

Clover *v.* Painter.

One who has acquired an interest in a debt by assignment is incompetent as a witness in a suit for its recovery, even though he has re-assigned his interest, and pays all the costs into court.

Error to the Common Pleas of Clarion county.

Painter brought assumpsit. On the trial he called Bachman, who, being objected to as interested, stated on his voir dire that he was a partner of the plaintiff. The debt was originally contracted with Painter, but at the formation of the partnership, it, with other accounts, went into the concern; that he has since re-assigned it, and has no interest remaining. He then paid into court sufficient to pay past and future costs. The court admitted him, and this was the error assigned.

Purviance, for plaintiff in error, relied on 7 Watts & Serg. 144.

Howe and *Loomis*, contrà.

Rogers, J.—In Post *v.* Avery, 5 Watts & Serg. 509, The Reading Railroad Co. *v.* Johnston, Id. 317, and in other cases not yet reported, the authority of Steel *v.* The Phœnix Insurance Co. was greatly shaken, and finally in McClelland *v.* Mahon, decided at this term, is overruled. The latter case establishes the rule, that a creditor or legal

Digitized by Google

www.libtool.com.cn

owner who, before suit brought, transfers his debt to a third person with or without a valuable consideration, whether the assignment be real or fictitious, is not a competent witness for any purpose connected with the action. This case differs from the cases cited, in one particular merely. In the former, the original creditor, or nominal plaintiff, was offered as a witness; in this, it is the assignee of the original creditor. This suit is brought to recover a debt contracted with the present plaintiff, transferred by him to the firm of Painter and Bachman, and re-transferred by Bachman to the plaintiff. Bachman is now offered as a witness in an action to recover this debt, and admitted by the court, on the ground that, as by the re-assignment he has no present interest, his competency is restored. Now, whether the re-assignment is a sham, which there is some reason to believe, or a real bonâ fide transaction in the usual course of business, with or without a consideration, cannot make the slightest difference; for sad experience has shown the expediency, if not the necessity, of excluding testimony coming from such a suspicious source. It is said he was but the equitable owner of the debt by virtue of the assignment, and that this interest is extinguished by the re-transfer; but the question is not whether he has a present interest; but had he, at any time, such an interest as disqualified him from giving testimony? That he had, will not be disputed. What difference can it make, whether the witness was the legal or equitable owner of the debt at the time of the re-assignment, if made with the sole purpose of enabling him to testify by ridding himself of an unanswerable objection to his testimony? The obligee of a bond cannot be admitted to qualify himself in this manner to testify, and why should his assignee, who becomes the owner of the debt, (without recourse to the assignor,) by this device remove a decisive objection to his own competency? The remarks of Mr. Justice Kennedy, in Patterson and Reed, apply with the same force to this as to that case. It enables the owner to bring his own oath into market, and to recover a debt otherwise valueless, by force of his own testimony. This glaring abuse of every principle of right, it is the design of recent decisions to prevent. In justice to the defendant, and the party himself, we must avoid leading parties into a temptation they may not have virtue to resist. It is of no consequence, whether the assignment is made before or after suit brought. Being once incompetent, as the owner of the debt, he cannot remove the exception to his competency by a release or extinction of his interest. The decisions rest for their justification on plain and obvious principles of public policy and private right.

Judgment reversed, and a venire de novo awarded.

Digitized by Google

www.libtool.com.cn

2 49
177 688

Chase *v.* Hodges.

The death of defendant, between verdict and judgment, if not more than two terms intervene, cannot be averred for error, since the statute 17 Ch. 1, c. 8; 1 Ja. 2, c. 17, s. 5.

Error to the Common Pleas of Warren county.

This was a sci. fa. on a recognisance of bail in error, in which the following facts were stated for the decision of the court:

A trial was had between Chase and Morse, and verdict rendered March 11th, 1835. A motion for judgment was held under advisement until June term; and on the 5th of June the judgment was entered. Morse died abroad on the 8th of May of the same year, but it was not known until after a writ of error was issued, in which the present defendant became bail. The judgment was affirmed by the Supreme Court.

The court below gave judgment for defendant.

Pearson and *Galbraith*, for plaintiff in error.—In Hopkins *v.* Wrigglesworth, 2 Lev. 38, it is said such a fact cannot be noticed by the Exchequer Chamber on a plea of in nul. est er.; and it seems to be a general rule that nothing can be assigned for error which contradicts the record. 2 Bac. Ab. *Error*, 489; Roll. Ab. 757. Thus a death, before the test of the dedimus, cannot be averred. Id. Dyer, 89; Cro. Eliz. 469. The very case seems decided in Plummer *v.* Webb, 2 Ld. Raym. 1415, n.; 1 Salk. 262; 3 Wils. 85; Pet. C. C. R. 155.

Browne, contrà, referred to 6 Serg. & Rawle, 126.

Burnside, J.—The statute of 17 Charles 2, chap. 8, made perpetual by 1 James 2, chap. 17, sect. 5, enacts, that when either party dies between verdict and judgment, the death shall not be alleged for error, so that the judgment be had within two terms after verdict. Robert's Digest, 309; 6 Serg. & Rawle, 126; Murray *v.* Cooper. [His honour here stated the facts of the case.]

In Hopkins et al. *v.* Wrigglesworth, 2 Levinz, trespass and judgment against the defendant in the Exchequer Chamber, and assigns for error the death of the defendant before the first judgment. The defendant in error pleads in nullo est erratum, which confesses error in fact; but the court affirmed the judgment, for the Court of Exchequer had nothing to do with the error in fact. It is a general rule, that nothing can be assigned for error that contradicts the record. 2 Bac.

Digitized by Google

Ab. 489; Rolle Ab. 787, and note to 2 Ld. Raym. 1415; Murray *v.* Cooper, 6 Serg. & Rawle, 126.

Here the defendant Morse had all the advantage of the writ of error. The plaintiff was delayed, and the recognisance of the defendant in this action became absolute by the affirmance of the judgment that he, Hodges, would pay the debt and damages.

The judgment is reversed, and judgment entered for the plaintiff on the case stated.

SNAPP *v.* THE COMMONWEALTH.

1. The sureties of a constable are only responsible where an execution is delivered to him in his official capacity by the magistrate.
2. To charge the surety, the action should be against the constable as such.

ERROR to the Common Pleas of Union county.

On a sci. fa. on a constable's bond, against Snapp and others, the plaintiff proved a transcript of a judgment on which an execution was issued and placed in the hands of the defendant, Snapp; that he collected the money and had never made a return. The record does not state by whom it was delivered, nor indeed any thing further than appears above.

Defendant offered a transcript of that judgment, on which it appeared that the execution had been delivered to one Crabb, constable; also a transcript of a judgment against Crabb, delivered to the defendant. They also offered to prove these facts by the magistrate. The court, on objection, excluded the testimony.

Patterson and *Deford*, for plaintiff in error.—It was to show that at the time of the judgment before the magistrate the sureties were not liable, that we offered the evidence, and as such it was admissible. 17 Serg. & Rawle, 358; 8 Watts, 398.

Austin and *Howell*, contrà.

BURNSIDE, J., after stating the case.—The plaintiff below relied on the case of Musser et al. *v.* Strickland, where it was held that a judgment against a constable, for official misconduct, is conclusive against his surety, as to his misconduct, and the extent of damage sustained by the plaintiff; 17 Serg. & Rawle, 378; and in Evans *v.* The Commonwealth, 8 Watts, 398, where it was also held that in an action against the sureties of a constable, upon his official bond, to recover

Digitized by Google

www.libtool.com.cn

the amount of a judgment for which the constable became liable, the judgment previously obtained against the constable himself is conclusive evidence of the liability of the sureties. Regarding these cases as the settled law, the parties in this case stand upon very different principles. The cases referred to were upon scire facias issued against the constable, to whom the executions were directed, in pursuance of the 12th section of the Hundred Dollar Act, Purdon, 583, which provides that "on the *delivery of an execution* to any constable, an account shall be stated on the docket of the justice, from which the said constable shall not be discharged but by producing to the justice, on or before the return-day of the execution, the receipt of the plaintiff, or such other return as may be sufficient in law," &c. We must take the offer as true, and if so, the execution of J. W. Austin never was delivered or directed by the magistrate to Snapp, but to Crabb. How he got the possession of the execution does not clearly appear; probably from Crabb; and if so, Snapp was his agent. We presume Snapp got it in some way from Crabb. If so, he was in this case the representative of Crabb, but not his legal representative from any evidence we can discover in the case. If Snapp had levied the execution without a deputation, he would have been a trespasser. The justice could not have issued a scire facias against him, because it was not directed to him to be executed, and so entered on his docket, as the statute requires. So far as we can judge, it was a private matter between Crabb and Snapp. Sureties are only liable according to the strict legal construction of their bond, the true meaning of their obligation: 15 Serg. & Rawle, 107. Then why should the sureties of Snapp be liable for an execution issued to Crabb, and so charged on the magistrate's docket. The certificate of Justice Lindsey, given in evidence, is without date. It does not state how Snapp was got before him, or whether there at all; how he was sued, whether as constable or as a private citizen. It was not a scire facias against him as constable of the borough of Union Town, to answer for misconduct in not returning an execution delivered to him by a magistrate. The whole evidence ought to have been received, and the question submitted to the jury, whether Snapp had been guilty of misconduct as constable of the borough of Union Town, for which his bail was liable. If there is truth in Justice Lindsey's transcript, Snapp got the debt; but whether as the agent of Crabb, or on an execution directed to himself, is not so clear. I think the former probable. Crabb should have moved more rapidly, and not let his friend Snapp clear out with the fruits of the execution.

The judgment is reversed, and a venire de novo awarded.

Digitized by Google

www.libtool.com.cn

BURKHOLDER v. KELLER.

1. A return of "served" by a constable to an execution is insufficient; and on a scire facias and plea of nul tiel record, judgment was entered for plaintiff.
2. The proceedings before a justice are to be tried by inspection; for the plea of *nul tiel record* to a writ, setting them out, raises an issue of law to the court.

ERROR to the Common Pleas of Somerset county.

The plaintiff, having obtained a judgment before a justice, issued an execution and delivered it to defendant, who was a constable. He returned the writ "served;" an alias was then issued, which was returned with a certiorari. On a scire facias, setting forth these facts, being issued, and judgment thereon, an appeal was taken, and the court on the plea of nul tiel record gave judgment for plaintiff; this was the error assigned here.

Hampton, for plaintiff, contended the return was sufficient under the act of 1810, sect. 12.

Cox, contrà.

BURNSIDE, J., after stating the facts.—The only question raised by this issue was, whether there was such a record as the scire facias described. The court could only try it by inspection, and they found a full and perfect record, on which the court gave judgment for the plaintiffs. This entering of judgment is assigned for error. It is impossible to conceive how the court could have done otherwise on the issue in law raised by the plea. The only thing the court had to do was to examine and find the record. The return of the constable was insufficient. The 12th section of the act of 1810 declares, "That on the delivery of an execution to any constable, an account shall be stated in the docket of the justice, and also on the back of the execution, of the debt, interest and costs; from which the said constable shall not be discharged but by producing to the justice, on or before the return-day of the execution, the receipt of the plaintiffs, *or such other return as may be sufficient in law.*" The act provides for a proceeding by scire facias in case of a false return or where it is not sufficient in law. The return "served" is not sufficient. He should have advertised and sold, or attempted to sell, and if he could not sell, so to return to the justice "unsold for want of bidders." If true, it would have been a good return. But his pleas put nothing in issue but the fact whether there was such a record as the scire facias described, and the court very properly, on inspection of the record, gave judgment for the plaintiff.

The judgment is affirmed.

Digitized by Google

2 52
28 SC 465

www.libtool.com.cn

SMILIE *v.* BIFFLE.

1. A purchaser from one of several trustees for A. for life, remainder in trust, to sell and pay to B., entered under his deed. The statute of limitations commenced running against the whole estate, and twenty-one years adverse possession bars as well the trustee as the cestui que trust tenant for life, and those in remainder.
2. As respects strangers, the legal and equitable estate are one, so as to be barred by adverse possession to the legal estate.

ERROR to the Common Pleas of Fayette county.

John Smilie died about 1813, having made a will whereby he devised the premises in question to Lane, Griffin, and Houston, and to their use in fee, in trust to receive, &c., for the separate use of Jane Craig, his daughter, for life, then a feme covert, with a power to sell during her life, at discretion; and in case a sale was made, to divide the proceeds at her death, as the land was devised in case no sale was made, which was after the death of Jane, to sell the same and pay it in certain proportions among his grandchildren.

Plaintiff was a child of Jane, and proved an election before suit brought by all the heirs to take it as land.

The defendant showed a deed in 1813, from Houston, as acting executor of Smilie; an entry and possession to the present time.

The plaintiff asked the court to instruct the jury, 1st, That if Jane Craig died within twenty-one years, the plaintiff could recover; which the court declined, saying, the legal estate being in the trustees, any possession which barred that, would bar the cestuis que trust. 2d, That the statute did not commence running, until the death of Jane, against the present plaintiff. The court said this was not so, and referred to their previous answer.

Deford and *Biddle*, for plaintiff in error, referred to 16 Serg. & Rawle, 384; 1 Watts, 120; 1 Watts & Serg. 118; 1 Johns. Ch. 110; 4 Kent, Com. 172; 8 Serg. & Rawle, 486; 7 Watts, 261; 6 Watts, 500; 4 Johns. 402; 8 Id. 262; 9 Mass. 508; 15 Id. 471; 8 Watts, 507; 5 Cow. 96; 4 Watts & Serg. 196.

Veech, contrà.—1 Wh. 61; 3 Penna. 426; Blanchard on Limitation, 82.

ROGERS, J.—An opinion was formerly pretty generally entertained, that trust estates were not within the statute of limitations. But in Llewellen *v.* Mackworth, Lord Hardwicke observes, The rule in a court of equity, that the statute of limitations does not bar a trust

Digitized by Google

estate, holds only as between cestui que trust and trustee, not between cestui que trust and trustee on the one side, and a stranger on the other; for that would be, to make the statute of no force at all, because there is hardly an estate in the kingdom without such trust; and so the act would never take place. Therefore, where cestui que trust and trustee are both out of possession, for the time limited, the party in possession has a good bar against both. 15 Vin. 125, pl. 1; 1 Saunders, Uses & Trusts, 280; 1 Cox, 28; Blanchard on Limitations, 38. Indeed, the wonder is, that so plain a proposition should ever have been doubted. A party obtains an inceptive title, by an adverse holding, subject to be defeated only by the entry of the owner of the legal estate at any time within twenty-one years. And the trustee may be compelled by the cestui que trust to enter, so as to avoid the adverse possession; and the cestui que trust may himself enter as a defeasor. By the terms of the will, the trustees had the right to enter on the land, to take the rents, issues, and profits, and apply the same to the separate use of Jane Craig, the testator's daughter, during her natural life, with power to sell the fee simple, and appropriate the interest of the purchase money to her use, and after her death, to be paid to certain legatees therein named, of whom the present plaintiff was one. The property was sold in the lifetime of Jane Craig; but the sale was the act of but one of the trustees, and it is contended, that the execution of a joint trust must be by the concurrence of all. In this respect, the title of Nicholson, the purchaser, is manifestly defective. But Nicholson took possession of the premises in pursuance of the contract, and held the same for upwards of twenty-one years. He therefore held adversely to both cestui que trust and trustee, and consequently, obtained by the statute of limitations, an indefeasible title, which cannot now be disturbed or gainsayed. The statute of limitations is emphatically a statute of repose. The plaintiff had no interest in the land at the time of the entry, for land, ordered by will to be converted into money, is money. Now, even admitting that this is a case of election, and that the legatees, beneficially entitled, have elected to take it as land, (and on both propositions there is some doubt,) no act of theirs can prevent the running of the act of limitations. The act commenced running, the instant the purchaser took possession; at that time the legatees had no interest in the land as land, and a subsequent election cannot affect the right of the purchaser. When the act commences running, it continues to run, as is well settled. It would strike me to be an anomaly, that the owner of the legal estate should be barred, and that the owner of the equitable title, whether his interest be an interest in possession, or by way of remainder, should nevertheless be entitled to enter. Equity follows the law, and courts

Digitized by Google

of equity have adopted the act of limitations by analogy. If a trustee is negligent of his duty, (as he may be,) the cestui que trust is not without remedy. That there are exceptions in favour of infants in cases of implied trusts may be conceded. But this is not a case of that description, and there is nothing to exempt it from the operation of the rule.

Judgment affirmed.

SMITH *v.* WELD.

The erasure of the name of one obligee, and substitution of another, avoids the instrument as to parties not consenting.

IN covenant on a bond, sealed by Weld, Pound and Stiffy, defendant showed that the name of McCready, who was one of the original obligors, who were sureties, was erased, and Stiffy and Pound added, with consent of all parties but John Weld, who was also a surety. The bond showing this erasure was objected to on this evidence, but received and recovery had.

An exception to the admission of the evidence, and the charge of the court, directing the jury that the action would lie, were the points argued here.

The pleas are not stated on the record.

Nichols, for plaintiff in error.—This erasure and alteration, after the delivery of the deed, avoided it, unless all the parties consent. Matthewson's case, 5 Rep.; Pigott's case, 11 Rep.; 6 Watts & Serg. 498; 9 Cranch, 28; 14 Serg. & Rawle, 405.

Coulter, contrà.—The deed, certainly, could be read in evidence, as it was the deed of the parties; and any matter avoiding it being shown, it was a fit subject of a prayer for instruction by the court, which was not done.

ROGERS, J.—Any alteration or addition in a material or immaterial part of a bond by the obligee, without the consent of the obligors, avoids the whole deed. And when the alteration is apparent on the face of the instrument, and non est factum is pleaded, before it is proper to admit it in evidence, the consent of all the obligors must be shown; at least some evidence must be given, from which their assent may be implied. The plea of non est factum goes to the state and condition

Digitized by Google

of the bond, when the plea is pleaded, as well as when it was sealed and delivered. It puts in issue the execution of the bond, and its continuance, as the deed of all the parties, to the time of the plea. Barrington et al. v. Bank of Washington, 14 Serg. & Rawle, 423. Where the deed is avoided by matters ex post facto, by addition or alteration, as where the name of one obligee is stricken out and others added, it ceases to be their deed, and becomes another instrument, and therefore is not evidence, where non est factum is pleaded. It is not his deed, at the time of the plea. The court may either exclude it altogether, or they may, if they think proper, pronounce upon its effect after it is submitted to the jury. Here the assent of the obligee and of one of the obligors was proved, but no attempt was made to prove that John Weld, the other obligee and surety, assented to the substitution of Pound and Stiffy, in the place of McCullough. Whether the change is for the better or worse, is immaterial; such an alteration cannot be made without his consent. The name of an obligor may be razed from a bond, and a new obligor, by consent of all parties, added, without making the bond void, and such consent may be proved by parol; Speake v. The United States, 9 Cranch, 26; and such may be the case, on another trial, here. The obligation is joint and several. The suit is brought as on a joint bond against Weld, Pound, and Stiffy. This makes it necessary to prove the assent of Weld, for the discharge of one of the joint and several obligors is the discharge of all. Whether a remedy may not be had in another form of proceeding, if the plaintiff fails to prove the assent of Weld, it would be premature to say.

Judgment reversed, and a venire de novo awarded.

JONES v. BROWNFIELD.

1. Declarations, at the time of doing any act, uncertain as to its effect, admissible to prove intent.
2. Where an improvement was made by a tenant, who was employed by his landlord, as a charcoal-burner on the land; the declarations of the landlord, that he intended to settle and improve the land, are admissible.
3. Judgment creditor of one who may be insolvent is a competent witness for him, in a suit for the recovery of land.
4. Whether an improvement was made for the purpose of a continued residence, &c., is for the jury.

Digitized by Google

5. If the settlement was with a design to use the land for making charcoal, or for cutting timber, it would not give an improvement right.
6. Settler entitled to a tract in a reasonable shape about his improvement, even though he may not have marked the lines or boundaries.

www.libool.com.cn

Error to the Common Pleas of Fayette county.

This was an ejectment, by Brownfield, tried at a special court before Grier, J., for one hundred and one acres, part of a tract claimed under a settlement and improvement by Victor, of which the boundaries had not been designated, and purchased at a sale by his administrator for payment of debts.

The defendant held under a warrant. The validity of the settlement, with some points of evidence, were the questions here.

The plaintiff first showed an ejectment by Jones, in which he was admitted as landlord, and a verdict and judgment for defendant, affirmed in this court. It appeared that after this the tenant left the land and Jones entered.

To support the settlement right, the plaintiff proved that Victor was in possession, claiming title, about fifteen years before his death, in 1835, and erected a house, in which he placed a tenant, who cut wood for his forge, in the neighbourhood; another house was built, since dilapidated; a garden cleared around both the cabins about a quarter of an acre in extent. In this cabin a tenant was placed, who paid rent. Turnips, corn, &c., were raised for the use of the families; he also proved declarations by Victor, of his intention to clear part of the land for a meadow, and build a saw-mill, and move on the land; also that he planted some peach trees. After Victor's death, the tenant moved out, and his administrator, in a few weeks, put another in, the other house being then torn down. Whether the tenants immediately succeeded each other, in Victor's lifetime, was not positively shown. There was evidence of his instructions to his tenants, to preserve the wood fit for timber, and to coal the tops, &c., only.

Plaintiff then proposed to prove that Victor, in his lifetime, intended to take out a warrant for this tract, the value he set upon it, and the improvements he proposed to make. Defendant objected, but the court admitted it, saying, "A man's intentions may, and can be known, only by his declarations or his acts; if his acts are equivocal, or capable of different constructions, his declarations may be given in evidence to explain them. It has been proved that Victor had tenants on the land, and cut the timber off; whether it was his intention to take the land by settlement, or only to squat on it temporarily to plunder it of its timber, is (as is known from a former trial of this case, and repeated declarations of counsel) one of the leading points in the case; most of the testimony hitherto received, without objection, has been to the same

Digitized by Google

point, and of the same character with that now offered." The objection was overruled, and exception taken.

The witness, on his voir dire, stated he was a large creditor of plaintiff, but did not think he would be insolvent. It might depend on how he should treat him. He could make him so. He had a judgment, which would be a lien on the land. It did not matter whether he recovered in this suit, so far as he, the witness, was concerned. He did not know what personal estate plaintiff had. Defendant objected, that the witness was interested, which was overruled, and exception taken.

The intention of Victor to take out a warrant, as well as to erect a saw-mill, was then proved.

The defendant's title was under a warrant in 1836, surveyed in February, on the return to which, it was said, there was a small house on the land, in which Jones (who was shown to have been a tenant of Victor) had lately moved, and a small piece of ground, cleared, perhaps, for a garden, but not fenced, and a request for a caveat by the administrators of Victor, as they claimed the land on behalf of his heirs. Evidence contradictory of Victor's intention to move on the property was given.

The defendants asked the court to instruct the jury,

First, That according to all the evidence given in this case, Philip Victor, in his lifetime, never made a settlement upon the land in dispute.

Fourth, That if the jury believe the erection of the two cabins was done for the convenience of his ironworks, and to facilitate the cutting of timber and coaling it for his works, such erections, and the occupancy thereof by his hands, employed, not in agriculture, but as labourers at his ironworks, does not constitute a settlement within the meaning of the law, and gave Victor no pre-emption right, as against the Commonwealth, or any of its citizens.

Sixth, That the plaintiff, having purchased after the warrant and survey of the defendant, is a purchaser with notice of defendant's title, and has no equity as against defendant, other than that possessed by Philip Victor in his lifetime.

His honour, after stating the principles of law relating to the acquisition of title by improvement in ordinary cases, and when made through a tenant, charged the jury:

"The intention of a person, taking possession of a piece of vacant land, must be judged of by the jury, both from his acts and his declarations. Was this settlement, made by Victor, an actual personal resident settlement, not a mere temporary squatting, without any view to hold the land, or of purchasing it of the Commonwealth; or did he erect these houses merely for the temporary accommodation of his wood-

Digitized by Google

choppers and coalers, while he stripped the land of the timber? Was it his intention, when he erected these houses, to make them permanent places of residence for his tenants or himself, or was it only to keep off others while he plundered the land of its timber? Did he intend to keep the land for agricultural purposes, the support of a family, and to obtain a title from the Commonwealth, or only to hold a temporary possession, and when he had used all the wood for his iron-works, and the timber for his saw-mill, abandon the land as worthless? It is not necessary, that any given quantity of land be cleared and cultivated; the building a house, occupying it by tenant, with a garden spot, if half an acre, used for corn and vegetables for a family, will be sufficient, if the intentions of the settlement were of the bonâ fide character I have stated. Perhaps the value of the land may consist in preserving the timber trees, and not in clearing a great portion of the land. If you find that Philip Victor took this possession to keep off others, and to strip the land of its trees and timber for the use of a forge and saw-mill, without any intention of making it a place of abode for himself or tenant, or the means of supporting a family by cultivation of the soil, then Victor gained no title to the land, and of course the plaintiff cannot recover. But if you believe he had not such intention, but has shown, by his conduct and declarations, that he intended a bonâ fide claim to the land, in the manner I have stated, then his title, and that of the plaintiff, would be older and better than that of defendant, if you believe the testimony of the witnesses. And this brings us to another subject of inquiry—Can the plaintiff recover without showing a survey, or some specific demarcation of the boundary and extent of his claim? I think that (in case of lands lying east of the Alleghany river) he may, under the peculiar circumstances of the case, if, on the other point, you think his claim valid. When the defendant, Jones, took out his warrant, or at least when he had his survey made, the tenant of Brownfield or Victor was in possession. The former ejectment, brought by Jones against Jennings, the tenant, admitted him in possession of the hundred acres surveyed and claimed by Jones, against which a caveat was entered. While the question is litigated, as to whether Jones had a right to have his survey accepted, he seizes the possession, and after Brownfield has obtained a verdict and judgment in his favour, as to the right, he is compelled to resort to this suit. Under these circumstances, if the jury believe, from the other testimony in the case, that giving the plaintiff his quantity of three hundred acres, in a reasonable shape around his original improvement, included the land in dispute, taking into consideration the survey, they may find for the plaintiff, if they think him entitled to recover in

Digitized by Google

view of the other circumstances of the case already noticed. If the jury find for plaintiff, they will have to assess the mesne profits. It is usual, in such cases, to allow the defendant for valuable and permanent improvements, when he has entered, claiming bonâ fide. In case of a sheer trespass, without pretence of title, the jury might be justifiable in making no allowance for improvements, and finding even exemplary damages. In this case the defendant has, at least, a pretence of claim, under his warrant and survey, and ought not to be subjected to a harsh rule of damages; but the jury will judge.

Henniken and *Dawson*, for plaintiff in error, cited 10 Serg. & Rawle, 293; 5 Watts, 16; 10 Watts, 428; 4 Serg. & Rawle, 502; 6 Id. 189; 5 Id. 289.

Howell and *Patterson*, contrà.—3 Watts & Serg. 530; 16 Serg. & Rawle, 193; as to the competency of the witnesses, 2 Rawle, 279; 9 Watts, 268.

BURNSIDE, J.—The first error assigned is the admission of Judge Ewing to prove that P. Victor, in his lifetime, intended to take out a warrant for this tract; the value he set upon it, and the improvements he proposed to make upon it. [His honour here stated the reasons given by the judge for admitting the evidence.] When we look into the paper-book and examine the evidence given, there was no error in admitting the evidence offered. The declarations of a settler, while he is making an improvement, have always been received. They were particularly proper in this case, as a principal point of the plaintiffs in error was to satisfy the jury that Philip Victor never had an actual bonâ fide settlement.

The second error assigned is the admission of Judge Ewing as a witness, on the ground of interest. [His honour then stated the evidence on the voir dire.] It is settled that a *remote*, *contingent*, and uncertain interest does not disqualify a witness. As a creditor of an estate, not in a course of liquidation, or an insolvent estate, is a competent witness for the administrator; where he stands in the same relation to the estate now, as he did to the debtor in his lifetime, and the probability that his testimony may be beneficial to himself, by increasing the fund out of which he is to be paid, is equally remote and contingent in both cases. Greenleaf's Evidence, 308. An annuitant under a will is also a competent witness for the executor in an action against him for the debt of the testator. Newell *v.* Davis, 5 Barn. & Ad. 368. I find no case going the length that the counsel for the plaintiff in error insists

Digitized by Google

on. The witness is never excluded where the interest is so remote, uncertain, and contingent.

The third error assigned is in not instructing the jury, as requested, in the first, fourth, and sixth points of defendant's counsel. [His honour stated them.] The judge very properly answered that these points were matters of fact for the jury, under the principles already stated. In the general charge the judge had laid down the law with correctness and precision. [His honour here stated the charge.] Is this not a full answer to these points? I cannot conceive that a more proper and perfect answer could be given in the case.

The last error assigned is, that the court erred in that part of their charge where they tell the jury, "that if they believe, from the testimony in the case, that giving the plaintiff his quantity of three hundred acres in a reasonable shape, around his original improvement, includes the land in dispute, taking into consideration the survey, they may find for the plaintiff." If an actual settler is wise, he will designate his boundaries. If he makes a mistake and takes in surveyed land, and there is still more vacant, he can change his boundaries, so long as the land is not appropriated, and no one injured. If he omits to circumscribe his boundaries, he is entitled to a reasonable vicinage, to the extent of the quantity he claimed, not exceeding two hundred acres in the old purchase. In this case the evidence is, that Philip Victor claimed from one hundred and fifty to one hundred and sixty acres, and he particularly claimed both sides of the creek, and where Jones built the sawmill. If Jones had laid his warrant outside of the one hundred and sixty acres, I think, under the evidence, Brownfield would have been held to that quantity, as that was the quantity he purchased at the Orphans' Court sale. But Jones laid his one hundred acre warrant on the improvement, and the land claimed by Victor, and in the possession of Brownfield by his tenant. This question was not raised on the trial, that any part of Jones's survey was outside of Victor's one hundred and sixty acres. As the question was not raised by the defendant, and no injustice has been done by the judge in the general expression in the close of his charge, it is not a ground for reversal.

The judgment is affirmed.

Digitized by Google

www.libtool.com.cn

McFADDEN v. DILLY.

A bond to take the benefit of the insolvent law is not discharged by the act of July 12th, 1842.

ERROR to the Common Pleas of Crawford county.

Debt on a bond dated May, 1842, conditioned that A. would take the benefit of the insolvent law. At the next term, August, the petition was presented, and the second Monday in November fixed for hearing. Nothing further being done, this suit was instituted. The court was of opinion that the act of 1842 discharged the obligation of the bond.

Pearson, for plaintiff in error, contended that act extended merely to cases where the bail could surrender in discharge at any time, which was not the case here.

Farrelly, contrà.

BURNSIDE, J., after stating the case.—It is in vain we look into the act of the 12th July, 1842, to abolish imprisonment for debt and to punish fraudulent insolvency, for a single principle or expression that would warrant this instruction. The act is totally silent on the subject of insolvent debtors who had been arrested and given bonds to take the benefit of the insolvent laws. It makes no mention or allusion to such cases. It has no provision about them. The condition of the bond was, "that Dilly should appear at the next term of the Court of Common Pleas of the said county, and then and there present his petition for the benefit of the insolvent laws of this Commonwealth, and comply with all the requisitions of the insolvent law, and abide all the orders of the said court in that behalf, or in default thereof, and if he fail in obtaining his discharge as an insolvent debtor, that he shall surrender himself to the jail of said county." The plaintiff had no interest in the property he returned; the order of the court was that he should appear on the 25th November, 1842. This he omitted to do, and this omission was a forfeiture of his bond. It is held in Hulmer v. Bast, 1 Penna. Rep. 270, that it is the duty of one who has given bond to make application for the benefit of the insolvent laws, to surrender himself to prison in discharge of his surety, where he has omitted to take the benefit of the insolvent act, and this without the order of the court for the purpose. Here Dilly neglected to comply

Digitized by Google

with the orders of the court. He omitted to surrender himself to jail as the insolvent laws required, and the act of the 12th July, 1842, did not exonerate his bail, nor him from complying with the conditions of his bond.

Judgment reversed, and a venire de novo awarded.

ALTIMUS *v.* ELLIOTT.

1. A. and B. contracted to purchase three tracts, C., D. and E., and in consideration of services by B., which were rendered, A. agreed to sell C. and D., and after deducting expenses, to pay one-half of the proceeds to B., and to convey one-half of E., to such person as he should name—costs and expenses to be deducted from the proceeds of the other two tracts. On the sale of these, less was received than had been expended by A. *Held*, that B., having performed his services, was entitled, under the contract, to a conveyance, without regard to the profits or loss on the sale of the other two.
2. Trustee having advanced for the trust entitled to reimbursement, which will be enforced by an ejectment and conditional verdict.

ERROR to the Common Pleas of Indiana county.

Nicholas Elliott, by articles executed in Sept. 1833, agreed with Altimus that he would accompany him to Baltimore, at his own expense, to procure a purchase of three tracts, warranted in the names of Morrell, Hogg, and Baker; in consideration of which Altimus was to advance the purchase money, not exceeding $2000, and procure the titles in his own name; and should he succeed in the purchase, he agreed to sell the Baker and Hogg tract, with all convenient speed, and pay Elliott one-half the net profits, after deducting the original costs and expenses of recovering them; and further, that he would convey one-half the Morrell tract to such person as Elliott should name; in consideration whereof Elliott agreed Altimus should reimburse himself one-half the original costs and expenses of recovering said tract, out of the profits of the sale of the other two tracts.

The parties proceeded to Baltimore, and the conveyances were obtained for the Morrell and Hogg tract, and for a moiety of the Baker tract. Elliott gave notice to Altimus to convey the moiety of the Morrell tract, which being refused, this ejectment was brought. It was proved Altimus had sold part of the land for $2500, and received $1300, and rents amounting to $540. His expenditures were about $3260, in procuring titles and expenses. It seems the Hogg tract was not recovered, and the defendant contended he could retain, to satisfy himself for disbursements. The court considering it a case of specific performance, told the jury there was no such hardship in the case as

Digitized by Google

www.libtool.com.cn

would prevent an enforcement of the contract, and that the plaintiff was entitled to recover.

Drum, for plaintiff in error, contended the contract to convey was dependent. 11 Wend. 67; 1 H. Bl. 270; 3 Law Lib. 36. There was a mutual mistake, of a material fact as to the title to one tract, and as that had failed, he could not be compelled to perform his contract. 3 Rawle, 240; 1 Story Eq. The defendant must tender the amount of his share of the expenditures, before bringing suit. 4 Serg. & Rawle, 302; 8 Serg. & Rawle, 495; 3 Rawle, 335; 9 Serg. & Rawle, 92; 10 Watts, 139; 16 Serg. & Rawle, 280.

Foster, contrà.—The agreement is to govern. By the terms of that, the conveyance was to be made, whether the residue yielded profits or not; to them the defendant must look for reimbursement. Pebbles *v.* Reading, 8 Serg. & Rawle, 484. The court were right in their instructions. In a case of this kind the jury are only to find the facts; on them the court must decide the species and extent of the relief.

Rogers, J.—The court assimilates this case to a bill for the specific performance of a contract, and have applied the principles pertaining to that peculiar class of cases to this action. Of that the plaintiff in error surely has no right to complain, as that view of the question is more favourable to the defendant, than if considered as an action (which it doubtless is) in the nature of a bill for the execution of a trust. By the article of agreement, in consideration of certain services rendered by Elliott, he is entitled to an equitable interest in a moiety of the Morrell tract, the legal title being vested in Altimus. In despite of the agreement, the trustee withholds the possession from the cestui que trust, and to recover the possession, so withheld, is the object of this action. We cannot perceive any legal obstacle in the way of the plaintiff's recovery. It is a singular pretension (asserted, I think, for the first time) that a trustee can turn his cestui que trust out of possession, and keep him out any indefinite time, under the pretext, real or imaginary, that he made advances, and expended money for the benefit of the trust. This is not in accordance with the trust, but an abuse of it, and, if countenanced, would lead to much mischief, if not promptly corrected by compelling the trustee to restore possession. A reception of the profits may possibly be the only means of paying even the just demands of the trustee. No doubt, in a proper case, the court would decree an account, and if the trustee had expended money on the trust, would order the cestui que trust to

Digitized by Google

reimburse him by sequestering the profits, or, perhaps, decreeing a sale of the premises for that purpose. In consequence of our want of a Court of Chancery, which only can afford specific relief, we have to resort to the comparative clumsy expedient of an ejectment, and are compelled to do justice in the form of a conditional verdict. This was the mode adopted here. It appears that the jury, with the aid of the court, (who in such cases have more latitude than in ordinary suits,) took an account of the expenditure and receipts, which resulted in the conviction that Altimus has received upwards of $3500, whereas his expenditures had not exceeded $3200. For this reason, if no other, the defendant is not injured. But independently of this, Elliott has an equitable title for an undivided moiety of the Morrell tract, aside of every consideration arising from the sale of the other two tracts mentioned in the article. Altimus agrees, that the two tracts, warranted in the name of Baker and Hogg, respectively, shall be sold with all convenient speed, and that he will pay to Elliott one-half the net profits, after deducting the original cost and all legal expenses of recovering them. There is also a positive covenant, that Altimus may reimburse himself, and retain one-half the original cost and legal expenses of recovering the original tracts, out of the profits arising from the sale of the other tracts. Altimus agrees to furnish the money necessary, and to be at the cost and trouble of recovering the property, to be reimbursed as above stated. Now it unfortunately happens that there were no profits; that there was nothing to retain; but this is nothing to Elliott, who is entitled absolutely to the one-half of the Morrell tract, in consideration of services performed by him, and money expended, without reference to the costs and expenditures of Altimus. It may, and may not, be a bad bargain; but what if it is? It is the contract of the parties, performed in good faith by Elliott, and which Altimus cannot be suffered to elude. It is not the case of a bill for the specific performance of a contract, in which, in hard cases, or where there has been any trifling or unnecessary delay, a court will refuse to interfere, but it is the case of a bill for the execution of a trust, which the party has the right to ask the court to enforce. The one is ex debito justitiæ, the other depends on the discretion of the court. We are at a loss to see what the costs incurred, and expenditures made by Altimus, have to do with the question, whether Elliott is entitled to the possession of the Morrell tract. It would be very pertinent in an action of assumpsit or account render between Elliott and Altimus, but in no point of view can it have much weight here. From this view of the case, the doctrine of tender has but little, if any thing, to do with the case. The objection has but

Digitized by Google

www.libtool.com.cn

little weight, for the law is not so unreasonable as to require an impossibility, or one so difficult to perform as to amount to a denial of justice. How could Elliott tender to Altimus the amount of expenditure, which he had no means to ascertain?

As to the error assigned, that the court withdrew from the consideration of the jury important facts, upon which the determination of the case mainly depends, (an exception so often made, that it might, for the benefit of the profession, be stereotyped,) there is nothing in it. There was nothing to leave to the jury; for admitting all that was proved, or which had the semblance of proof, the court were right in instructing the jury, that the verdict should be for the plaintiff; and especially are they bound so to instruct them, in a case where the court and jury are exercising the functions of a court of chancery. This is a principle often asserted, and the experience of every day proves the wisdom of the rule.

Judgment affirmed.

HAINES v. MOORHEAD.

A plaintiff, who appealed from an award in his favour, and recovered more than the sum awarded to him, but less than such amount with interest added for the immediate time, allowed to recover full costs.

MOORHEAD having obtained an award in December, 1843, for $448 13, defendant appealed; on the trial in May, 1845, plaintiff recovered a verdict for $469 80. The court gave judgment, with full costs.

Cowen, for plaintiff.—The act of 1810, sect. 13, directs, if the sum recovered be less than the award, it shall not carry costs. Here, the interest on the amount of the award was greater than the excess of the verdict, and this is within the spirit of the act.

Foster, contrà.—The verdict is greater and more favourable than the award, and is within the very words of the act.

Per CURIAM.—The judgment is for more than was awarded, and why shall it not carry costs? Because, says the defendant, it is less than the sum awarded, with interest during the interval. But the award, being appealed from, did not bear interest as a judgment; nor does it appear that the original demand did. The jury may, or may

Digitized by Google

not, have allowed it; and the elements of their verdict are too uncertain to furnish a safe ground of comparison. The only practical criterion is the difference of amount; and we cannot enter into an examination of the cause by which it was produced.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

2 67
143 407
2 67
160 267

EASTERN DISTRICT, DECEMBER TERM, 1845.

PHILADELPHIA.

STICKNEY *v.* BORMAN.

1. Conveyance by husband to wife void at law.
2. Equity will not aid, in favour of purchaser under such deed, against assignee of an heir, where the provision was unfair or unreasonable as to husband's creditors.
3. Valuable or meritorious consideration and fairness essential to obtain the aid of chancery to perfect a conveyance void at law.—Per ROGERS, J.

APPEAL from Nisi Prius.

Dec. 8.—In ejectment, for an undivided sixth of a lot on Seventh street, the plaintiff showed a deed, in 1801, to Jacob Belsterling, the father of John F., reserving a ground-rent; the will of Jacob, in September, 1815, whereby he devised the residue of his estate, among his seven children in fee, of whom John F. Belsterling was one; the discharge of John F., as an insolvent debtor, in Oct. 1836. In the schedule, annexed to his petition, this property was mentioned, and plaintiff was appointed trustee.

The defendant gave in evidence a deed, called an indenture, dated October, 1801, between John Belsterling and his wife, whereby Jacob, in consideration of natural love and affection, conveyed the lot to his wife in fee, subject to the ground-rent, with a covenant against himself and his heirs. He then proved that John F. Belsterling was not a son of the wife named in this deed, but of a second wife. There was evidence of John Belsterling being indebted at the date of this deed. The jury found a verdict for the plaintiff; to be set aside, and verdict

Digitized by Google

and judgment entered for defendant, if, on argument, the court should decide in favour of defendant. The court entered judgment for defendant, and this appeal was taken.

Brightly and *H. M. Phillips*, for appellant, argued that the deed was not a legal conveyance, and there was no equity in the wife, as her husband was then embarrassed, and it was in fraud of creditors; the onus of showing any equity was on defendants; and cited 1 Greenl. 398; 3 Greenl. 64; 1 Day. 385; 3 Monr. 33; 7 Watts & Serg. 238; 7 Serg. & Rawle, 60; 10 Peters, 513, 94; 6 Wend. 13; 2 Iredell Dig. 540.

Keenelé and *Randall*, for defendants. The wife may purchase, without a trustee, from husband; 6 Whart. 576; 5 Watts & Serg. 499. It being good between the parties, the plaintiff, claiming under one of them, could not object to it, as he was not a creditor of either. 7 Watts & Serg. 238; 2 Serg. & Rawle, 539; 2 Halst. 142; 5 Day, 47; 2 Roper, Husband and Wife, 152, 174–176, 289; 17 Serg. & Rawle, 361; Clancy, 20–29; 3 Rawle, 199; 4 Whart. 500.

Dec. 17. ROGERS, J.—As the legal existence of the wife is merged in the husband, a conveyance by the husband to the wife, without the intervention of a trustee, is void at law; and in equity, courts frequently refuse to lend assistance to such a deed, or to any agreement between them. Of this many instances are given in Sheppard *v.* Sheppard, 7 Johns. C. R. 60, where the cases are fully reviewed. But there are cases, where a court of chancery will not refuse its aid, as when the grant to the wife is nothing more than a reasonable provision for her, taking the circumstances of the husband at the time into consideration. Or, as in the case of the Lady Arundel *v.* Phipps, 10 Ves. 146, where it was held, that a husband and wife, after marriage, could contract, for a bonâ fide and valuable consideration, for a transfer of property from the husband to the wife, or to trustees for her. There must be some meritorious or valuable consideration, either before or after marriage, to induce the court to lend its aid to a defective and void conveyance. The conveyance from Jacob Belsterling, to his wife Marie Magdalen, was utterly void at law; and have such circumstances been shown, as will warrant the interposition of a court of equity? An attempt has been made to prove that the wife possessed property at the time of the intermarriage, and that this was the consideration of the conveyance; but the evidence on this point is too loose and indefinite to lay the foundation of equitable relief; besides, the provision made for the wife is unreasonable; for at the

Digitized by Google

www.hnbook.com.cn

time of the conveyance, as appears from the defendant's own evidence, the grantor was largely indebted in proportion to his means. Indeed, we are not without reason for believing, that the conveyance was made in fraud of creditors. When a person asks the aid of a court of equity, he must come into court with clean hands. There is no instance, where a court of equity has lent its aid to a defective or void conveyance, where the applicant claims through the medium of a fraud. If made to defraud creditors, (which there are grounds to believe,) she was a party to it; and the defendant claiming under her, with notice of the defect, which is apparent on the face of the title papers, is not entitled to relief. Every point in the case is at war with the notion that she, or the person who stands in her place, is entitled to favour. At the time of the conveyance the husband was largely indebted; it cannot come, therefore, within the class of cases where the court relieve because it is but a reasonable provision. She can claim no equity for the amount of property brought by her, to her husband, at the time of the marriage, for on that point the evidence is slight; and above all there are the best reasons for thinking, it was a mere contrivance to delay, hinder, and defraud creditors. The maxim that a man must be just before he is generous, is grounded in morals as well as law. It appears that the husband continued to occupy the property as his own, and after his death a subsequent wife came in and occupied the estate as the representative of her deceased husband.

Judgment reversed, and judgment for the plaintiff for the one-sixth part of the premises described in the writ of ejectment.

HOPKINS v. JONES.

2 69
160 258
2 69
e 31 SC 424

Bequest of interest to A., and if she die without lawful issue, the principal to B., is a vested interest in B.

In cases of personalty the words "dying without issue" are construed to mean without *leaving* such, if in accordance with testator's intent.

Dec. 19.—ERROR to the District Court of the city and county of Philadelphia.

R. Jones devised, "to my niece, Susan Foulke, the interest arising from the sum of $2000, which sum I request my executors to place at interest, in such a manner as they may deem suitable, and such interest to be paid to her, as and when received; and in case she shall die without lawful issue, I then bequeath $1000 of the principal sum to my niece R. J. Rutter. I bequeath to Foulke $500 of the above-mentioned

Digitized by Google

sum; the remainder of said sum, I direct my executors to divide equally between such of said E. Foulke's daughters as are unmarried at the time of their aunt Susan Foulke's death.

"Item.—I give to R. B. Jones, the remainder and residue of all my estate of every description."

R. J. Rutter died in 1841, leaving plaintiff her executor. Susan Foulke died in 1842, without issue. The court below gave judgment for defendants, in a case stated for their opinion, whether the bequest to R. J. Rutter vested in her, so as to entitle her executor to recover.

Hopkins and *Newcombe*, for appellant.—Time not being of the substance of the gift, the legacy is vested. *Then* refers to the event of no issue, not to time.

The gift of interest and principal may be distinct, and yet both vest. Monkhouse *v.* Home, 1 B. C. C. 298. [*Sergeant*, J.—The event was certain.] Pinbury *v.* Elkin, 1 P. Wms. 563, was on an uncertain event. Patterson *v.* Hawthorne, 12 Serg. & Rawle, 112. The contingency would have operated to divest the gift.

Gerhard, for defendant.—The case is governed by Ring *v.* Ring, 1 Watts & Serg. 205; Caudler *v.* Dinkle, 4 Watts, 143. It being after indefinite failure of issue, it is void, Beauclerk *v.* Dormer, 2 Atk. 311; or it comes within the distinctions taken in Fearne Cont. Rem. 553n., of separate devises of principal and interest. Clowberry's case, 2 Vent. 342; Billingsley *v.* Wills, 3 Atk. 219, 3 Ves. 362.

Dec. 26. SERGEANT, J.—There is no contingency here that affects the transmissibility. There is a contingency, which affects the right of Rebecca J. Rutter ever to take, but none that affects the vesting of her right or possibility, so as to pass to her representatives on her death, before the contingency happens. The rule on this subject is recognised by this court in Kelso *v.* Dicky, 7 Watts & Serg. 279, which in effect decides the present case, that is to say, in case of contingent executory bequests, the interests of the first and subsequent takers, *quodum modo* vests *eo instanti*; so that if the substituted legatee die before the contingency happens, upon which he is to succeed to the legacy, his representative will, notwithstanding, be entitled to it so soon as the event shall take place. Suppose, then, a bequest be made to A., but if A. died under twenty-one, or without leaving children or issue, to B.; although B. happened to die before A., B.'s personal representative would be entitled to receive the legacy upon the happening of the contingency, on the ground of its being a vested right in B. previously to his

Digitized by Google

www.libtool.com.cn

decease. 1 Roper on Leg. 401. The present seems to be in effect the case put. The words "die without lawful issue," are to be construed, in case of personal estate, to mean "die without leaving lawful issue," when that corresponds with the testator's intent. Pinbury *v.* Elkin, 1 P. Wms. 563. In that case, the corpus was left to the legatee for life. If that be so, such intention is more apparent where, as here, the interest only is given to the legatee for life.

Judgment reversed, and judgment for plaintiff.

WOELPER'S APPEAL.

1. A husband may reduce into possession a wife's legacy, in remainder, during the existence of a life-estate in the property, and thereby acquire an absolute property therein. Vid. 7 Watts & Serg. 168.
2. And this, though he be trustee for the tenant for life.
3. The foundation of the husband's right is his power over his wife's chose, coupled with an exercise of ownership, of which reduction into possession is but an evidence.
4. User as his own, at a time he might have reduced it into possession, will amount to reduction, even if the money was unlawfully converted in the first instance.
5. A stranger or remainder-man cannot object to the acquisition of a title, that it would have been a breach of trust, the cestui que trust not complaining.

CERTIORARI to the Orphans' Court, Philadelphia.

Dec. 10, 11.—Kintzinger, by will, gave one moiety of his estate to Catherine, (then the wife of appellant,) and the other moiety to appellant, in trust to pay the income to Elizabeth for life, and on her decease, he gave said moiety to Catherine, and named appellant executor. The estate was in bank stock. In 1817 the executor sold the stock, and paid out a part of the proceeds in small sums, in his own business. He also purchased a farm at the same time, which he afterwards sold, and offered his declarations, at the time, that the purchase was made with the proceeds of the stock, which were excluded. He paid Elizabeth the interest on the amount of her moiety, until her death in 1837. In 1829 Catherine and appellant separated, at which time he paid her $2000. In 1839 Catherine procured a divorce, and married Stuckert. They then cited appellant to file his accounts as executor.

He objected, for want of interest in the parties, which was overruled by the court below.

The court, 2 Ashm. 455, charged him with the amount of the moiety to which his wife was entitled, in remainder, and disallowed a claim for credit for the $2000, paid on separation. The decree below, and the arguments here, assumed an appropriation of the money, during the continuance of the life-estate.

Digitized by Google

E. Ingersoll and *C. Ingersoll*, for appellant.—Any act of ownership, without reduction, is sufficient; that, without intent to convert, is not, in Pennsylvania. Siter's Case, 4 Rawle, 468. The sale was with that intent, but evidence of that was rejected. Doswell *v.* Earle, 12 Ves. 473.

1. The husband, during the life-estate, had a right to reduce the remainder, which was a separate and distinct estate—for there is no distinction between this and the immediate estate of the wife, about which there is no dispute.

2. Mere possession, after that, was a sufficient reduction and conversion. Ellis *v.* Baldwin, 1 Watts & Serg. 253; Hine's Estate, 5 Whart. 138.

The right to reduce, subject to the wife's chance of survivorship, which is the English doctrine, Honner *v.* Morton, 3 Russ. 65, is overruled in Siter's Case, so that it is immaterial, that it is a remainder. The cestui que trust for life could alone complain of sale and conversion.

Barnes and *D. P. Brown*, for defendant.—It was a chose in action of the wife, and remained so at the death of tenant for life, unless for the fraud of the husband, with no act done since.

The conversion was a fraud. Oliver *v.* Clapp, 3 Howard, U. S. 333. Mere transfer would not amount to reduction. Wall *v.* Tomlinson, 16 Ves. 415. There was no evidence of intent to convert, which is necessary. Wintercast *v.* Smith, 4 Rawle, 177. [*Gibson*, C. J.—The auditor should have received the evidence, for the court to judge of its effect. *Rogers*, J.—Declarations, at the time, are evidence, or none can be given.] Trustee cannot strip the fund of its character, Raphael *v.* Booth, 11 Ves. 108; and mere possession by him is insufficient, Balker *v.* Hall, 12 Ves. 501; Wall *v.* Tomlinson, antè.

Dec. 29. GIBSON, C. J.—The bequest of half the residue to Woelper, as executor in trust, to pay the interest accruing from it to the testator's daughter, Elizabeth, during her life, did not prevent the bequest over to Catherine, the executor's wife, from vesting in interest in Elizabeth's lifetime; and he reduced his wife's part of it, to actual possession, by purchasing land with it, for his own use. So far as his wife was concerned, he had an undoubted right to do so; and why shall not this act of ownership be taken for a divesture of her title? Because, say the counsel, the investment was a breach of trust, as to Elizabeth, and no one shall take advantage of his wrong, to make it the foundation of a right. That is the argument; and the fallacy in it

Digitized by Google

is the supposition, that reduction to possession is the foundation of the husband's right, and not merely the evidence of his will. There has been a general error, here and abroad, in receiving the evidence of a thing as the thing itself, which has complicated this part of the law with arbitrary distinctions. The true foundation of the husband's title, is his power over his wife's choses, coupled with an exercise of his will, of which reduction to possession is a particular indication, but not a conclusive one. He may apply his wife's choses to his own use, by parting with them for value; or, he may leave her title to them intact, even where they are in his possession, if the presumption of ownership, from the ordinary badge of it, be rebutted by circumstances. It is his assumption of the title, and not the form of the act, by which it is indicated, which is the criterion. Now, the executor in this case had full power to make himself owner of his wife's reversionary interest in the legacy, even in the lifetime of Elizabeth who was entitled to the produce of it; and what matters it, that the act by which he exerted his power was a breach of duty to Elizabeth? Had he attempted to found a right on it against her, it would have been a different matter; but I am unable to see what room the wife and her present husband have, to set up the breach of trust in regard to another. The legal presumption in favour of duty might be primâ facie evidence, that he considered his possession to be that of a trustee, were it not repelled by the most absolute evidence, that he used the money for his own purposes; and even were we to treat the presumption as an estoppel between him and Elizabeth, it would conclude him for the benefit of his wife, who was a stranger to the trust, and could not be prejudiced by the breach of it. Between the present parties, then, we have the naked case of an actual use of the wife's chose in action by her husband, for his own purposes: and what is the consequence of it? Certainly a transfer of her ownership. Even had it not thus operated in the lifetime of Elizabeth, yet as the fiduciary character of his possession ceased, in any event, at her death, his continued user of it, as his own was the only means of asserting his title to it that was left to him. There could be no further reduction into possession, and if the money had not then become his own, he would have been without a remedy for an undoubted right. But as the whole matter was subordinate to his will, any act by which he thought proper to evince it would be decisive; and the very circumstance, that he allowed his wife $2000 when they separated, clearly disclosed his will that she should have no more. This adjustment of by-gone matters, coupled with his absolute power over the subject, indicating, as it did, an assertion of his title to the rest, would be a decisive answer to the pre-

Digitized by Google

sent claim. The decree of the Orphans' Court is, therefore, reversed, the report of the auditor is set aside, and the executor is allowed to go without day. So decreed.

TOMPKINS *v.* HAAS.

1. Mere receipt of payment, for one item of an entire contract, is no waiver of a demand for the residue.
2. Purchases at an auction constitute an entire contract.

ERROR to the District Court of the city and county of Philadelphia.

Dec. 12.—Tompkins purchased two parcels of goods at auction. By the conditions of sale, they were to be paid for before delivery, and taken away in ten days. He took one parcel, and paid for it. When called upon for the payment of the other, he refused. The action was for the difference between the bid and the price at a subsequent sale, with notice.

The objections were, first, that the contract was entire; and second, a settlement of the one bid was a waiver.

The court refused to charge, as desired, on the second point.

Badger, for plaintiff, referred to Barclay *v.* Tracy, 5 Watts & Serg. 45; Coffman *v.* Hampton, 2 Watts & Serg. 377; 1 Salk. 65; and said, waiver was a question of fact.

The court declined to hear *V. Bradford* for defendant.

Dec. 20. BURNSIDE, J., after stating the case.—I see no error in this opinion. It was settled by this court in Coffman *v.* Hampton, 2 Watts & Serg. 377, that where a purchase is made at auction, of numerous articles of personal property, at one and the same time, and from the same vendor, the whole constitute but one entire contract, though the articles purchased are struck off separately, at separate and distinct prices. (See 1 Salk. 65.) There is no doubt but that the sale of two parcels of sugar, of different quantities, quality, price, and time, is an entire contract; but it does not follow that calling within the ten days, weighing off one lot, paying for it, and taking it away, and then refusing to take or pay for the other lot, was a performance of an entire contract, on the part of the plaintiff in error. An entire contract is reciprocally binding on both parties. Each is equally bound, in good faith, to fulfil and perform his engagement. A contract has

Digitized by Google

two sides. The law is not so absurd as to hold it entire on one side, and discretionary on the other; hence the taking and paying for one lot of the sugar was not a performance of the whole contract. I am unable to discover a spark of evidence, in the paper-book, of any act or agreement of the defendant in error, which went to change or rescind the contract with Tompkins. The law will hold both parties to good faith and performance of their engagements.

Askew *v.* Smith, 2 Penna. Rep. 211, settles that where the vendee refuses to carry the sale into execution, the vendor may make a resale at a less price, and the vendee is liable to the vendor for the loss sustained. The law is there held, that when the vendor has acted bonâ fide, the measure of damages is the difference of price in the resale.

The judgment is affirmed.

DUNN'S Executors *v.* The AMERICAN PHILOSOPHICAL SOCIETY.

The court will not interfere, to stay execution by executors against legatee, but where it is clear the estate is sufficient to pay the legacy.

Dec. 13. N. Dunn, being a creditor of the society, bequeathed them a legacy, payable in the event of his estate proving sufficient to pay prior legacies.

His executors having issued execution on their judgment, a motion, for a rule to show cause why the judgment should not be opened and execution set aside, was made. The execution having been stayed on affidavit during vacation, according to the practice in this court, the defendants were heard as if the motion was now made.

Wharton and *Kane* argued the bequest was a release, or at least a set-off, and that they should be permitted to show the legacy would be paid.

Meredith, for plaintiff.

ROGERS, J.—It is at least doubtful whether the legacy will be reached, and the court should not interfere except in a perfectly clear case.

Rule refused.

Digitized by Google

www.libtool.com.cn

SIMPSON *v.* MURRAY.

A sale under a claim against a house in A. street will not pass a house in B. street, against the original owner.

Nor is parol evidence admissible, to prove the description was intended to apply to the house sold, with knowledge of the owner.

A general judgment, on a scire facias to revive judgment sur claim, reciting a former general judgment, does not constitute a judgment in personam or extend the lien.

Dec. 12. SIMPSON brought ejectment, for a house on the south side of Pine, between Ninth and Tenth streets. He showed a claim, filed against a house on the south side of Tenth street, below Pine, and judgment thereon in 1830, against the defendant.

In 1835, revival by consent. In 1841, a scire facias, reciting a general judgment "for non-performance of a certain promise and assumpsit," and judgment for want of appearance, a fi. fa. and sheriff's deed for the property named in the writ, and for which this suit was brought. There was variance in the other matters of description between the lien and writ.

Plaintiff offered to prove they were the same. That the work was done on the Pine street house. That defendant built and occupied the house, and knew it was the one intended to be described in the claim, which was rejected. The court ordered a nonsuit.

Perkins, for plaintiff.—The confession and judgment of revival in 1835 and 1841 cured the defect; and the defendant's remedy is against the price; Purd. Dig. 427; Heister *v.* Fortner, 2 Binn. 40; and the court could amend. Arnold *v.* Gaw, 1 Rawle, 223; Cowen *v.* Simpson, 3 Watts, 87. The judgment on scire facias is a new one. Hays *v.* Shannon, 5 Watts, 548; Bowen *v.* Bowen, 6 Watts & Serg. 584; Feger *v.* Krole, 6 Watts, 294; Ewing *v.* Barras, 4 Watts & Serg. 467. Misdescription can only be taken advantage of at an early stage of the cause.

W. Hirst, for defendant.—The lien is not amendable. Tilford *v.* Wallace, 3 Watts, 143. Privilege by statute is strictly construed. The lien does not show the time the work was done. Kehrer *v.* Beigler, 3 Watts & Serg. 259. Scire facias does not extend the lien, being a proceeding in rem. Hays *v.* Shannon, antè.

Dec. 26. SERGEANT, J.—Although, as is said in Ewing *v.* Barras, 4 Watts & Serg. 468, every mistake in filing a claim, however trivial, will not invalidate the lien, yet the building must be described substantially, so as to identify it. The creditor cannot claim against a building in one

Digitized by Google

public street, and then sell by his execution a building in another public street. Nothing but uncertainty and confusion could result if this were allowed. The object of the law, which is to give notice to the owner and others of an encumbrance on the realty, would be wholly defeated. The old acts of 17th March, 1806, and 21st March, 1808, under which this claim was filed, are not so particular, it is true, in their requisites of the ingredients of the claim, as the act of 16th of June, 1836; but still, they contemplate that the claim is to describe a building, and that the building against which the claim is filed is to be the object of the plaintiff's pursuit. It would be taking too great a latitude, we think, to sanction the sale of a house in Pine street, below Eleventh street, under a claim against a house in Tenth street, below Pine; nor could they be considered, in any legal contemplation, as the same building. Nor can the subsequent proceeding of revival and judgment on the scire facias be treated as constituting a new judgment in personam, under which the plaintiff might levy on and sell any real estate of the defendant. They are all merely continuances of the original suit, and profess to be so, and have that operation.

Judgment affirmed.

DRIESBACH v. KELLER.

2 77
f 35 SC 591
2 77
f224 197

1. Certainty to common intent sufficient in mechanic's claim.
2. "That the contract was made on 16th April, 1841, and the work done between said 16th and 29th August, 1842," is sufficient, it being a question for the jury, whether filed within six months after completion.
3. Repairs and additions may constitute a new erection within the act.
4. The addition of one story, and a new building beside the old house, of equal dimensions, the whole being new roofed and weatherboarded, with interior communications, constitutes a new erection.
5. An account for liquor, sold on credit by a tavern-keeper, is null within the act; hence the allowance in a settlement of accounts will be no bar to an action.

ERROR to the Common Pleas of Monroe county.

Dec. 15.—Keller filed a claim as a mechanic, stating the contract was made 16th April, and the work done between said 16th April, 1841, and 29th August, 1842. Defendants pleaded inter alia, claim not filed within six months. The parties had a settlement on the 28th and 29th August. A bill for liquor and some other articles being deducted, the balance was paid in cash; a note and a receipt was given. Originally there was a one-story house, beside which a two-story house was

Digitized by Google

erected. When the family, who had occupied the old house, moved into the new one, the weatherboards were then stripped off, and a new story added, the whole being under one roof, with communications in the interior. A shed or porch around the house was added.

The court, in answer to defendant's points, charged, 1. The claim was well stated as to time. 2. Whether filed within six months was for the jury. 3. Whether it was merely an enlargement, and formed additions only to the main building, in which case it was not within the act, was for the jury. 4. That the credit for the liquor in the settlement could not be allowed for, under the act. The credit was $162, of which $100 was admitted to be due on the note given.

Reeder, for plaintiff in error.—1st, Lehman *v.* Thomas, 5 Watts & Serg. 268. Same rule of construction as against grantor, Tilford *v.* Wallace, 3 Rawle, 153. Parol evidence cannot aid. 2d, Onus is on plaintiff. 3d, Miller *v.* Oliver, 8 Watts, 514; Penigo *v.* Vanhorn, 2 Miles, 359. 4th, Dealing in liquor is allowed; the credit only is objectionable; after a settlement, the remedy by forfeiture is gone.

J. M. Porter, for defendant.—1st, The time was essentially stated, as much so as could be expected from an illiterate man. 3d, Olympic Theatre, 2 P. A. Browne, 284; In re Burling, 1 Ashm. 377. 3d, Act 1834, sects. 22, 23, Purd. Dig. 550; Duchman *v.* Sagerty, 6 Watts, 65. Malum prohibitum cannot be recovered on, consequently cannot be set off. Youngst *v.* Roberts, 5 Serg. & Rawle, 139. The receipt can be opened, it being mere evidence of payment.

Dec. 26. SERGEANT, J.—The act of the 16th June, 1836, sect. 12, requires a mechanic's claim to set forth, among other things, the "time when the materials were furnished, or the work was done, as the case may be." The present claim is for work done to a dwelling-house and shed, and states, "that the contract for the workmanship of said dwelling-house and shed was made between said George Keller and John Driesbach, on or about the 16th April, 1841, at Tobihanna township, Monroe county, aforesaid, and said work and labour was done between the said 16th April, 1841, and the 29th day of August, 1841." This is said to be insufficient and uncertain, because it does not specifically state the days on which the work was done, nor the time when the work was begun or completed. We think, however, certainty, to a common intent, is all that can reasonably be effected; and according to a fair and reasonable interpretation of these words, they may mean the work was begun on the 16th April, 1841, and completed on the 29th day of August, 1842; especially as the defendant is not bound

Digitized by Google

by the description in the claim, but may show, on the evidence, it was not filed within six months from the time when the work was done. There was no error, therefore, in this point.

2. We agree also with the court below, that it was right to leave it to the jury to say, whether, on the evidence, the claim was filed in due time or not. There was evidence given on the subject by witnesses, whose dates were not precise, nor did they agree; but the fact might be reasonably inferred, from all the evidence in the case, whether it was filed within six months after the work was done, or not; and that was for the jury, and not for the court.

3. The lien given by law to the mechanic is for work done in the erection of a building, and the question is, whether it is legally to be considered as the erection of a building, or as merely the repair of an old one, to which no lien is given. Repairs may be slight, or, in some cases, they may be very considerable, and carried to such an extent as, in fact, to amount to the erection of a new building, different in its capacities and character from the old one. In extreme cases, there can be no difficulty in determining in which class to rank it, either as merely repairing or restoring an old building to its original state, or, as, in effect, constituting another building. Even a slight addition, manifestly subservient to the original edifice, might, perhaps, be merely a repair. But a substantial addition of material parts, a rebuilding upon another and larger scale, constitutes a new building, even though some portions of the old are preserved and incorporated in the new.

Here was originally a one-story house. The defendant had a new story put upon it, and lengthened it so as to make it all into one building, two stories high, covered by one new roof, and twice the front of the former house. This, we think, constitutes such a change of the house as to render it substantially and essentially a new erection, and, therefore, subject to the lien of the mechanic's claim. There is, therefore, no error in the charge of the court on this head; at least, none that the plaintiff in error can complain of, since it was quite as favourable to him as he had a right to.

4. The last question that arises is upon the tavern bill. It is clear, that as a set-off or defalcation, this would be inadmissible, being expressly prohibited by the act of Assembly. But the defendant contends, that what is called the settlement between the parties on the 29th August, 1842, prevents all inquiry into the nature of the claim, and is tantamount to payment for the liquor. In this view of the case, however, we cannot concur. The words of the act of Assembly are very strong: "No innkeeper or tavern-keeper shall trust or give credit to any person whatsoever for liquors, under penalty of losing and for-

Digitized by Google

feiting such debt." In the present instance there was a trust or credit given; not a payment at the time the liquor was drank: nor is there evidence of any previous agreement that the liquor should be in payment for the work. Being, therefore, a trust or credit, the debt thereby incurred was null and void; and if the defendant released his own claim for labour, in consideration of such debt, the release would be without consideration, and void. At most, the receipt in full was but a release by the plaintiff of part of his claim, in consideration of the defendant releasing to him in return a debt for liquors, which had no legal existence, and the recovery of which was prohibited by statute. A release obtained without payment or consideration is tantamount to fraud, and will be set aside by a court of equity: more particularly if it appears to have been obtained under circumstances which carry the appearance of advantage being taken by one party of the other.

Judgment affirmed.

www.libtool.com.cn

Weaver *v.* Bachert.

1. In an action for breach of promise of marriage, seduction cannot be given in evidence in aggravation. See 8 Watts & Serg. 27.
2. Mutual promises must be proved; at least, circumstantially. Consent to intercourse, and purchase of furniture, &c., are not evidence of a promise by the woman. Nor will his admissions of a promise, which it is uncertain as to what act it referred, be evidence against the man.
3. The court are not to strain evidence against a seducer; and evidence of a promise by the woman, in her action, must be such as would support an action against her by the man.—Gibson, C. J.
4. Dic. in Paul *v.* Frazier, 3 Mass. 73; Con *v.* Wilson, 2 Overton, 233, overruled.

Error to the Common Pleas of Lehigh county.

Dec. 16.—This was an action by Bachert, for a breach of promise of marriage. The plaintiff, under exception, proved, 1st, her own acts, as purchasing furniture, dresses, &c., and declarations of her intention to marry defendant, made at the time, to prove her promise. 2d, Also that she had a child by defendant. 3d, That in conversation with a third person, he had declared he never intended to marry her. The evidence of the promise was, constant visits, during which they were left alone; conversations respecting the disgrace, during which she said, "You know what you promised;" to which he replied, "It was not his fault." Also a declaration, "If he knew she had a child he would have married her."

The exceptions were, to the evidence in the first and second points

Digitized by Google

above; to the charge in submitting the questions of promise by defendant and plaintiff; the readiness of plaintiff, and the refusal by defendant. His honour also stated the action was not for seduction, but on the contract.

W. A. Porter and *J. M. Porter*, for plaintiff.—1. The only case supporting such evidence is Peppinger *v.* Law, 1 Halst. 384, and that is founded on Hutton *v.* Mansell, 6 Mod. 172, which was after express promise, and is bad law. [*Burnside*, J.—The case is good to prove assent by the woman, though the book be bad.] 2. Seduction is a separate action, and cannot be brought by the woman; and it is not admitted in aggravation in an action by her. Paul *v.* Frazier, 3 Mass. 71, is an obiter dic.; Burks *v.* Shain, 2 Bibb. 341. The offer must be express, 2 Saund. Pl. and Ev. 666; Burks *v.* Shain, antè; Martier *v.* Patton, 1 Littel, 235; and the refusal as much so, 7 Cow. 22; 2 Saund. Pl. and Ev. 665.

A. E. Brown, contrà.—1 Ros. Civ. Ev. 193, 194; 2 Stark. Ev. 942; Peppinger *v.* Law and Hutton *v.* Mansell, antè; Boynton *v.* Keller, 3 Mass. 191; Con *v.* Wilson, 2 Overton, 233; 2 Saund. Pl. and Ev. 665, 666.

Jan. 14. GIBSON, C. J.—The decision of the point before us by the Supreme Court of Kentucky, in Burks *v.* Shain, 2 Bibb, 343, seems to be founded in the true principles of the action. The mind is indeed at first inclined to doubt it, by the inequality of the consequences of seduction, which are borne by the feebler party, and produced by her confidence in the promise whose breach is the ground of the action. Still illicit intercourse is an act of mutual imprudence; and the law makes no distinction between the sexes as to the comparative infirmity of their common nature. A woman is not seduced against her consent, however basely it be obtained; and the maxim volenti non fit injuria is as applicable to her as to a husband, whose consent to his own dishonour bars his action for criminal conversation. This maxim runs through a variety of actions, such as those for injury from mutual negligence; or for the recovery back of money voluntarily paid, where there was no debt; and some others. It extends even to contracts, in the forming of which the parties are equally culpable, the consideration being immoral or illegal. If, then, a woman cannot make her seduction a ground of recovery directly, how can she make it so indirectly? Parties may show their circumstances and condition in life as matter of aggravation or mitigation, but these have no connection with their participation in the act complained of; and no court has gone further. Even

Digitized by Google

the rejection of another suitor must be laid as special damage, Archb. N. P. Suppl. 281; and that there is no precedent for a declaration in which seduction has been so laid, is strong evidence that it enters not into the action in any shape. It was, indeed, said by Chief Justice Parsons, in Paul *v.* Frazier, 3 Mass. 73, that where seduction has been practised under colour of a promise of marriage, the jury may consider it to aggravate the damages in an action on the contract. That, however, was not the point decided; and there was neither reason nor authority given for the doctrine in that case, or in Con *v.* Wilson, 2 Overton, 233; while the converse of the point decided in Burks *v.* Shain was held in Tulledge *v.* Wade, 3 Wils. 18, and Foster *v.* Scofield, 1 Johns. 297, where it was ruled that in an action for seduction a promise of marriage cannot be given in evidence to swell the damages. If a father could give such evidence in his action for the seduction; and if the daughter could give evidence of seduction in her action on the promise, the defendant would be doubly exposed to vindicatory damages. The bastardy ought, therefore, to have been excluded from the evidence and the charge.

But a more grave objection lies to the want of evidence, that there were mutual promises, or any promise at all. Witnesses were examined to prove the separate and contradictory declarations of the parties, which, as they contain no admission on the part of the defendant, amounted to nothing. It appeared that the parties were on apparent terms of courtship, and that the plaintiff purchased those things which are usually provided in prospect of marriage; but neither were these acts evidence of a promise to marry. Every girl, who is silly enough to surrender the citadel of her virtue to her lover, on the credit of general professions of attachment, is silly enough to believe that she is going to be married to him out of hand; and it must not be forgotten that professions are not promises. The only part of the testimony that could possibly be supposed to contain a spark of evidence sufficient to be left to the jury, was the dialogue proved by the plaintiff's brother, in which the defendant complained of the disgrace brought upon him, and was answered by her, that "If he had done what he promised, it would not be so." What did he promise? to marry her, or to behave discreetly when admitted to undue familiarity with her person? It is impossible to say; but it was probably not the first. To have married her, having first deflowered her, might have lessened, but could not have prevented the disgrace; yet that was what she intimated if she meant that a promise of marriage was the price of her consent to yield her person to his desires. Her expression was not less ambiguous than the declaration of the defendant in Hay *v.* Graham, 8 Watts

Digitized by Google

& Serg. 29, that when the plaintiff should get better, he would go to her "and make all things straight;" which was held not to be evidence of a promise. Yet the jury were allowed, in the present case, to infer a promise from a train of circumstances, none of which pointed, either separately or collectively, to the conclusion desired; or differed materially in circumstances, number, or force, from those found in the story of every seduction. But, considering the deceptiveness of appearances, and how artfully they may be produced, courts ought not to strain the evidence, even against a seducer, beyond its legitimate effect; else they may readily violate the maxim I have quoted, by giving to simple seduction the effect of a promise to marry. In no case that I have seen, was the plaintiff allowed to recover on evidence so loose as the evidence in this. Perhaps the nearest approach to it is found in King *v.* Robinson, Cro. Eliz. 79, in which it was said that an action on the case for deceit lies against a woman who gives a man blanda verba matrimonio æquipollentia, whereby she obtains presents from him. But without stopping to inquire whether that would now be ground of action, it may be safely said that such words would not support an action directly on the contract. It is true that the promise need not be in writing; but it is necessary to prove, under the general issue, the consideration for it, and, where that is promise for promise, the promise of the plaintiff also, (Archb. N. P. Suppl. 280,) at least circumstantially. Now, if the defendant had sued the plaintiff—and he seems to have thought himself the only party disgraced or aggrieved—could he have recovered on this evidence? The evidence was deficient also in proof of an offer to marry by the plaintiff, and a refusal by the defendant; and the court ought not to have left these facts necessary to sustain the action to the jury.

Judgment reversed, and venire de novo.

LAMB *v.* FRIES.

The assignment executed by an insolvent on his discharge by a foreign court, having apt words, will pass land in Pennsylvania.

ERROR to the Common Pleas of Northampton county.

Dec. 16.—C. L., in 1802, devised to his wife, Sarah, all his real and personal estate for life, first paying debts, and at her decease he gave the same to his son Jacob. He then directed her to maintain his son. If Jacob died during her life, her estate was to be absolute, "him leaving no

Digitized by Google

lawful issue, but if he dies and leaves issue, then the same to fall to his lawful issue at the time aforesaid, being the time of my widow's decease." If the widow married, the executors were to take the estate and give it to the son at twenty-one. Land passing under this will was the subject of the controversy.

www.libtool.com.cn

In 1821, Jacob was discharged as an insolvent, in Northampton, the assignee not giving bond or acting. In 1837, he was also discharged by the inferior Court of Common Pleas, of Warren county, New Jersey, and assigned to P. J., his executors and administrators, in trust for his creditors. This assignee never acted, nor was the assignment recorded in Pennsylvania. In 1838, Fries obtained a judgment, which has been duly revived. In 1842, Lamb was discharged as a bankrupt. In 1843, the widow died, not having married again.

The question stated for the court was, whether Lamb, at the time of the rendition of the original judgment or bankruptcy, had such an interest as could be taken in execution under the judgment; if so, judgment to be for Fries, the plaintiff.

The court was of opinion he had.

After this decision, it is believed, the fact of the discharge in 1837 was discovered, and added to the case stated, but there was no re-argument in the court below.

J. M. Porter, for plaintiff.—As to the discharges, twenty-one years had not elapsed before judgment. The assignment in New Jersey passed the estate, or was evidence to rebut presumption of payment. Teetor *v.* Robinson, 7 Serg. & Rawle, 182.

H. D. Maxwell, for defendant.—There was a presumption of payment under the discharge, and a resulting trust, Roper *v.* McJunkin, 14 Serg. & Rawle, 364; Powers *v.* Hallman, 2 Watts, 218; Reely *v.* Glenn, 5 Watts, 77, 4 Whart. 269; Ebright *v.* The Bank, 1 Watts, 397. The New Jersey discharge was without effect. Story Confl. Laws, sec. 411, 428; Miln *v.* Morton, 6 Bin. 361; Williams *v.* Maus, 6 Watts, 278.

Dec. 29. GIBSON, C. J.—As Jacob Lamb is still alive, it is unnecessary to determine the quantum of the estate which he took by his father's will, for, whatever it may be, it is unexpired. If it was divested by any proceeding under an insolvent law, prior to the judgment in 1838, on which the premises were sold to the plaintiff, he had no interest that could be bound by it, except the interest which would result to him by implication of law after payment of the debts. He was discharged as an insolvent debtor by the Common Pleas of Northampton county, in 1821, on assigning his property for the benefit of his creditors; and as

Digitized by Google

nothing was done under the assignment for more than twenty years, the presumption is that the debts were paid by him, and that the beneficial ownership of the property had all along remained in him. But there is no room for such presumption after his discharge by the inferior Court of Common Pleas of New Jersey, in 1837; and if the land in contest passed by his assignment on that occasion, there was no beneficial interest in him, on which the judgment could operate. It is clear that land can pass only by a conveyance, according to the laws of the country where it is situate; and hence a foreign assignment in bankruptcy, not being a voluntary conveyance of it by the bankrupt, will not pass it. But there is no reason why it should not pass by an insolvent's voluntary deed, without aid from the law of the country where he was discharged, provided the conveyance be executed according to the law of the situs. In Mullikin *v.* Aughenbaugh, 1 Penna. Rep. 117, it was said that an insolvent debtor's assignment, on his own petition, is a voluntary conveyance in consideration of his discharge; and it will consequently pass his land here, if it contain apt words, and be executed in all respects according to the law of the state. It is a part of the case, that there was a general assignment in this instance; and as the presumption is, that it was by deed according to the common law, it is decisive of the question. On the facts stated, we must take it, that the legal title to the premises is in the insolvent's assignees, under the law of New Jersey; and as there is neither proof nor presumption of payment, it appears that there was no beneficial interest in the insolvent debtor which would be bound and sold.

Judgment reversed, and rendered for the defendant below.

---

2 85
135 175

MULLEN *v.* MORRIS.

1. The recital of notice to endorsers, in a foreign protest, is no objection to its going to the jury.
2. Printed books, professing to be the statutes of a sister state, admissible as primâ facie evidence of the law of that state.
3. Offer to return claims received, to be collected and applied to payment of debts, is sufficient, unless some be lost through negligence in proceeding thereon.
4. Endorser is liable for interest on a bill according to the law of the place on which it is drawn.

ERROR to the Common Pleas of Northampton county.

Dec. 17.—Morris brought an action against the endorser, on a bill of exchange drawn in and on New York, and dated Easton, Pennsylvania.

Digitized by Google

He proved notice of protest, and also, under exception, gave in evidence the protest reciting the fact.

Defendant proved the receipt by a witness of the plaintiff, who was an agent of Morris, of certain securities, which, when collected, were to be credited on the note, with the privilege of returning them at any time, and then objected to him as interested.

Plaintiff proved an offer to return the securities two years after. He also read the printed statutes to prove the rate of New York interest.

The court left the questions of notice, offer to return, and whether by delay in suit any were lost, to the jury, who found for plaintiff with seven per cent. interest.

Maxwell and *J. M. Porter*, for plaintiff.—On the protest, Fitler *v.* Morris, 6 Wharton, 415. The offer to return was insufficient; it was his duty to collect. Chit. on Cont. 475, 534. Interest should have been according to the law of Pennsylvania. Story, Confl. Law, sect. 315.

Reeder, for defendant.—The protest was not shown to prove notice, which was shown aliunde. It is evidence. Morris *v.* Freeman, 1 Dall. 193; 20 Johns. 168, as to interest. The guarantee is of the drawee. Ludlow *v.* Bingham, 4 Dall. 61; Golden *v.* Price, 3 Watts C. C. Rep. 313; Story, Confl. Law, sects. 286, 291.

Jan. 5. BURNSIDE, J.—1. The only ground urged in this court, to maintain the first bill of exceptions, is, that the witness Peter Morris, who was the brother of John Morris, the plaintiff, was interested. We are unable to discover that he had any interest in the verdict.

2. The second exception was to the admission in evidence of the bill of exchange, and the certificate of protest accompanying it. The handwriting of Mullen, the drawer of the bill, had been proved. The deposition of Campbell, the New York notary, had been duly taken and was in evidence; proving that on the evening of the day he protested the bill, he put into the post-office of the city of New York notice of protest of the bill, directed to Patrick Mullen, Easton, Pennsylvania. The universal law is, that the seal of a notary public is judicially taken notice of by the courts; he being an officer recognised by the whole commercial world. 1 Greenleaf, Evid. 535. But the learned counsel complains, that the bill and protest were sent out with the jury. There was no special exception to the protest going out; nor would it have availed, for the universal practice of Pennsylvania is to send out with the jury all papers given in evidence; depositions are never sent, except by consent. The fact of notice to the drawer was proved by the oath of the notary as well as stated in his protest.

Digitized by Google

3. The plaintiff offered and gave in evidence a printed book, styled "The revised Laws of New York," and offered to read from page 771.

This forms the third bill of exceptions. In the Supreme Court of the United States, and I believe in every state of the Union, in accordance with the connection and constitutional ties binding them together, the rule has been relaxed, which requires foreign laws to be verified with the sanction of an oath: hence printed volumes, purporting to be on the face of them the laws of a sister state, are admissible as primâ facie evidence, to prove the statute laws of that state. 1 Greenleaf's Evid. sects. 488, 489; 4 Cranch, 384; 6 Binn. 321; 12 Serg. & Rawle, 203.

To the charge of the court, two errors have been assigned.

1. That the court erred "in what they said in the charge respecting the liability of the plaintiff in not returning the claims left with him." The best answer is, to inquire what the court did say, and we find the charge to be clear and correct on this subject, viz., "It is said that the plaintiff was bound to return some claims that were put in his hands to meet this claim, and that he has not done so. If this is so, he must stand charged with them. There is proof that an offer to return was made. If this is so, that is enough. It is all he could do, and removes all ground of complaint on this head. It is said the plaintiff did not duly prosecute these claims, and that they have been lost. If this is true and the debts are lost, or their recovery endangered, it would be a defence to this amount."

The last error complained of was, that the judge directed the jury to allow New York interest. In this he was clearly right, for the law seems to be settled that interest is to be paid according to the law of the place where contracts are to be performed. Story's Conflict of Laws, 2d ed. 242, 243. Here this bill was drawn in Easton, on T. B. Wright, of the city of New York. It was accepted, and of course payable there. Protested for non-payment in that city, the holder was entitled to New York interest.

The judgment is affirmed.

Digitized by Google

www.libtool.com.cn

RENTZHEIMER *v.* BUSH.

Proof of items of set-off, before arbitrators, no waiver of the necessity of special notice under the rules of court.

ERROR to the Common Pleas of Northampton county.

Dec. 17.—This was an action of assumpsit. The question was as to the defence; the plea was payment with leave. Plaintiff objected to evidence of set-off, for want of notice under the rule of court requiring it, "where there has been mutual dealings and defendant intends to defalk." Defendant proved the items of the account were read and taken down by plaintiff before the arbitrators.

W. Porter and *J. M. Porter*, for plaintiff.—Want of notice. Sullivan *v.* Johns, 5 Whart. 366; 5 Watts, 275; Beyer *v.* Fenstermacher, 2 Whart. 97; 5 Watts & Serg. 103; 4 Watts & Serg. 570.

Reeder, for defendant.—The judges must construe their own rules, and it is not error.

A point was made that the judgment should have been without costs, less having been recovered than arbitrators awarded. [*Rogers*, J.—We would enter the right judgment; not reverse for that.]

Dec. 26. ROGERS, J.—Evidence of set-off cannot be received, unless notice is given of the matter intended to be defalked. This is a rule not peculiar to the county of Northampton, but has been adopted, with some variation, in every judicial district in the state. It is admitted that no notice was given, but it is contended that it is unnecessary, because the same evidence, offered at the trial, was given before the arbitrators, which is, as is said, equivalent to notice. But in Beyer *v.* Fenstermacher and another, 2 Wharton, 96, it is declared by the court, that notice of set-off and other special matter must be given, although the evidence offered to establish such matter has been given on a former trial before arbitrators. The rule is recognised in Sullivan *v.* Johns, 5 Wharton, 369, and is made the basis on which the decision is rested. It was there contended, that an affidavit of defence was equivalent to notice, but the court say, this will not justify a court in dispensing with the positive requirements of a rule of court, intended to guard against surprise. That the defendant, having omitted to give notice, the plaintiff had a right to suppose, that all intention of insisting on a set-off had been abandoned. It is better to have no rule, than to depart from it on slight or frivolous

Digitized by Google

pretexts, or to suit the emergence of a particular case. When the interest of the party is in danger of being sacrificed, the court can prevent injustice by withdrawing a juror. And this is a power wisely vested in the court, and, in my opinion, should be liberally, but judiciously, exercised. It is said, that the decision of the Common Pleas is in accordance with the practice in that county, but on the other hand this is denied. It therefore can furnish no rule for us. And even, if the practice be as stated, the sooner it is abolished the better. It is very desirable that there should be, (as far as practicable,) a uniformity of practice, in the several judicial districts.

As this view reverses the case, and the cause must go down for another trial, it would be useless to express an opinion on other points, which may not, and in all probability will not, occur again. Indeed, the case is so defectively stated, that there would be danger of doing injustice to the parties, by noticing the several points in detail.

Judgment reversed, and a venire de novo awarded.

GOULD v. CRAWFORD.

1. If plaintiff files two declarations, defendant may demur, or the court may refuse to try, or nonsuit, should plaintiff refuse to indicate which he relied on.
2. The evidence of a deceased witness may be stated in substance; the precise words are unnecessary.
3. Whether a witness is competent, by reason of intoxication, is in the discretion of the court.
4. One not made a party defendant, cannot be objected to as a witness, on the allegation that he is liable to plaintiff.
5. Where a witness has no home or family, his deposition taken out of the jurisdiction, at a place where he was at work, when last heard of, may be read.
6. A compulsory nonsuit of a justice is conclusive of the suit, unless appealed from; for, having no power to enter such a judgment, it is equivalent to a judgment that plaintiff has no cause of action.

ERROR to the Common Pleas of Carbon county.

Dec. 17, 18.—The case was argued by Maxwell for plaintiff, and Porter for defendant.

The opinion contains a full statement of all the facts of the cause.

Jan. 3. ROGERS, J.—This was an action of debt for work and labour done. Plea, nil debet.

The plaintiff filed three different declarations, and one statement. The court granted a rule to show cause, why all, but one, should not be stricken off. The plaintiff then withdrew all but two, which purported to be filed the 14th of August, 1844. Whereupon, the defend-

Digitized by Google

ant's counsel made the following application to the court. There appearing to be, in this case, two declarations, marked filed, in the handwriting of the plaintiff's attorney, on the same day, viz., the 14th of August, 1844, the counsel ask the court to designate which is the original narr. This the court decline, because the declarations bear the same date, and because the plaintiff alleges, that as both declarations were filed at the same time, they constitute but one declaration. The defendants, certainly, can be called on to answer, but one narr. and if the plaintiff files two, it is bad, and the defendant may demur. But he does not pursue this course, but asks the *court* to designate which is the original narr.; but this they are not bound to do. They may order the party to choose which he will go to trial on, and if he refuses, they may either continue the cause, or, on special demurrer, may turn the plaintiff out of court. But it is alleged, the two constitute but one declaration; it is form, and not substance, which the court are not bound to notice on motion. The proper remedy is by special demurrer.

On the trial, the plaintiff was allowed to prove what Daniel Castellon, a deceased witness, said, on his examination before arbitrators. The principle, applicable to this part of the case, has been settled in Chop *v.* Chop, and in numerous other cases, which it would be a waste of time even to cite. The witness testifies, in substance, to all he said. He cannot recollect his precise words, nor is it necessary, nor, in ninety-nine cases out of a hundred, is it possible he should. But it is alleged, that the witness was intoxicated at the time he was under examination. This is the principal objection, and doubtless affects his credit greatly; but is he thereby rendered incompetent? Now, although the court will not suffer a person to be examined as a witness, who is in such a state that he cannot understand the obligation of an oath, nor, ordinarily, when in such a situation that he may be tempted to disregard it, yet, the counsel have failed to convince us that this is cause of error. Such cases must depend on the sound discretion of the court that hears the cause. They will not, if they can avoid it, deprive a party of the benefit of testimony, which may be essential to his case, merely from the indiscretion, call it by no harsher name, of the witness. His intoxication may be caused by the artifices and management of the other party, for there are persons so base and wicked as to resort to such means to rid themselves of the force of testimony they are not prepared to rebut, and the temptation to such stratagem would be greatly increased, were we to decide that it amounts to an absolute disqualification. There are degrees of intoxication, of which the court alone can judge. They may postpone the cause, to give the witness a chance to recover from his

Digitized by Google

degraded situation, or they may suffer him to be examined, leaving his credit to be weighed by the jury. We know but one safe rule, and that is to leave it to the sound discretion of the tribunal before which the cause is tried.

Mahlon H. Taylor was admitted a witness, in opposition to an exception on the score of interest. One part of the defence was, that the proper parties were not before the court; that Taylor was a party to the contract, and that he ought to have been included in the suit. This the plaintiff denied; and to exclude the witness on that ground would be virtually to decide the cause. The court, therefore, was right in admitting the witness, and referring this question to the jury. But here the plea was nil debet, and the defence could only be made by plea in abatement. We see no interest which the witness had in the event of the suit. Result as it may, the judgment could not be given in evidence in any suit in which the witness was a party. There is nothing in the objection, that the witness was permitted to speak of a paper handed to him at his examination; nor to the paper itself, which is pregnant proof, connected with the admission of Mr. Gould, of the number of days the plaintiff was employed in the service of the defendant. It was proper and pertinent evidence on the count for work and labour done.

The deposition of Patrick Daily was properly admitted. The witness had no settled home; was a labouring man, without family. And the last time he is traced is at Taylorsville, in the state of New Jersey, where his deposition was taken. The probability is, that at the time of the trial he was not within the jurisdiction of the court. Under these circumstances, depositions are always received in evidence.

Next, as to the charge. The present plaintiffs brought suit against the present defendants, on precisely the same cause of action. This is conceded. The parties appeared, and on the hearing, the justice ordered the plaintiff to be nonsuited, because, as he says, the suit is brought against Isaac and Stephen Gould, instead of being brought against Isaac and Stephen Gould and others. It must be noticed that it is the judgment of the justice, and not a nonsuit, or discontinuance, of the plaintiff; nor does it appear that he consented, at the time, to this disposition of the case. The question, therefore, is, has a justice, after hearing the parties, their proofs and allegations, power to order a nonsuit; and if he undertakes to do so, what is the legal effect of his decision? Is it a bar to a future suit between the same parties, or may the plaintiff maintain another suit before the same, or another justice; or, as here, before a superior tribunal, and so, toties quoties, as often as the justice may make such a disposition of the case? We are of opinion,

Digitized by Google

www.libtool.com.cn

that the act confers no power on the justice to order a nonsuit, with the ordinary incidents of a nonsuit; that such an entry amounts, in effect, to a peremptory nonsuit, and is equivalent to a judgment that the plaintiff has no cause of action; that the only remedy, when the decision is erroneous, (as this unquestionably was,) is by appeal to the Court of Common Pleas; and that this defence is good, as a plea in bar, or under the general but comprehensive plea of nil debet. The only judgment the justice can give is a final judgment; that is, as I understand the act, a judgment which ends the controversy between the parties to the record, subject, of course, to the right of appeal. The second section of the act of 1810 provides, that if the parties appear before the justice, he shall proceed to hear their proofs and allegations, and, if the demand shall not exceed five dollars and thirty-three cents, shall give judgment as to right and justice may belong, which judgment shall be final. And in the fourth section: If either party, their agents or attorneys, shall refuse to refer, the justice may proceed to hear and examine their proofs and allegations; and thereupon give judgment publicly, as to him of right may appear to belong, either party having the right to appeal, within twenty days after judgment, either by the justice alone, or on award of referees, when said award shall exceed the sum of twenty dollars. For an erroneous judgment, therefore, whether by the justice, or referees, the only remedy given by the act, is an appeal; and in the case in hand, it would have been an effectual remedy. Justices of the peace derive their whole authority (at least so far as regards the collection of money) from the acts of Assembly; and I have looked in vain for the authority claimed for them. It will be conceded, that it is an implied, and not an express, power; and it seems to me it would be inexpedient, by implication, to enlarge a jurisdiction already ample enough for all useful purposes. The effect would be to enable justices (if so disposed) to favour plaintiffs, at the expense of defendants; certainly contrary to recent legislation and judicial decision, the aim of which has been, so far as practicable, to put them on an equal footing. This useful branch of our judicial system has been already charged (although I think unjustly, at least it has been greatly exaggerated) with favouring plaintiffs at the expense of justice. Let us not, therefore, by adding to their authority, give occasion for an increased slander against them. Why concede to them a power, with which even our courts of general jurisdiction are not clothed? The latter cannot order a nonsuit without the assent of the plaintiff; and to enable them to do so, has required express legislative enactments, with which the profession are perfectly familiar. Thus, in Gerard *v.* Getting, 2 Bin. 234, it is ruled, that it is not in the power of the court to order a nonsuit

Digitized by Google

against the consent of the plaintiff; so in Miller v. Miller, 5 Bin. 62, it is decided, that arbitrators have no authority to award a nonsuit. If the plaintiff fails to attend, the proper award is, that he has no cause of action. This case is very pertinent to the point in issue. The reason given for the decision is, because the act of Assembly does not give express authority to direct a nonsuit in the manner accustomed in courts of law. The duty of arbitrators is, so says the act, to investigate, examine, and decide the cause. In the act relating to justices, no such authority is conferred, except in the single case, where it is provided, that, before hearing, the plaintiff may suffer a nonsuit, or discontinue the cause. But when the justice has proceeded to the hearing, it is his duty to find for or against the plaintiff, either that there is, or is not, a cause of action. If the decision is erroneous, the remedy is by appeal; or where error is apparent on the record, by continuance. It will be remembered that this decision only applies where the suits are between the same parties, and for the same subject-matter. In that case only may the first point be pleaded in bar of the second.

Judgment reversed.

---

2 198 405
2 93
24 SC 1451
2 93
40SC 178

PAXTON v. STECKEL.

1. The return "attached," where the goods are the property of a stranger, subjects the sheriff to an action of trespass. Manual occupation, touching, or removal, is not essential.
2. The sheriff's return is conclusive on himself.
3. The sheriff is entitled to the same privilege, in his communications with his attorney, as other persons.

ERROR to the Common Pleas of Northampton county.

Dec. 18, 19.—Plaintiff was assignee for creditors of certain railroad iron, sills, &c. On the trial of an action of trespass against the sheriff and another plaintiff in a foreign attachment, for seizing the property under the writ, he offered the return of the defendant, as sheriff, to the writ: "Attached twenty-four pieces iron rails, &c., in the possession of J. Stettler, and summoned said J. Stettler as garnishee;" and proved admissions that this was the same property.

The return was made on the representations of one Hartz, who took an account and forbade the hauling away by teamsters.

The deputation of Hartz was special in the suit of a stranger, at request of the plaintiff there.

Digitized by Google

It was not shown under what title Stettler had possession; defendant gave no evidence.

www.libool.com.cn

The court charged: There must be an actual intermeddling or touching, unless the return was conclusive, which it was not, but might be rebutted.

The exceptions were to the charge, and to the ruling in the case of a witness, who was an attorney and had ceased to practise for fifteen years, and kept the books of the sheriff, that all communications between himself, as counsel, and the sheriff, were protected.

M. H. Jones and *A. Brown*, for plaintiff in error.—It is a mere fiction that possession is required. Wood *v.* Vanarsdale, 3 Rawle, 401; Hunt *v* Reading, 12 Serg. & Rawle, 41; 2 T. R. 225. Sheriff's return conclusive, Hick *v.* Troxell, 7 Watts & Serg. 68; Mentz *v.* Hanna, 5 Whart. 153; 6 Watts, 593; 10 Serg. & Rawle, 266; Phillips *v.* Hyde, 1 Dall. 429; 4 Burr. 2429; Wilson *v.* Hurst, Pet. C. C. Rep. 341; he could not contradict it, Townsend *v.* Horn, 2 Watts, 182; and the action was joint and several, 1 Str. 635. Intermeddling without touching sufficient, 7 Cow. 735; 1 Civ. Pl. 155; 10 Mass. 125; 3 Cow. 323; 7 Johns. 254; 6 Bac. Ab. 580. Constructive force sufficient. Com. Dig. *Tresp.* A. I.; Watson on Sheriff, 73; 5 Whart. 153, antè; 4 Whart. 321; Dubois *v.* Lord, 3 Watts, 49; 5 Watts, 183; 2 Lord Ray. 184. The witness was not protected. Gresley Ev. sect. 244; 2 Stark. Ev. 230; 6 Mod. 292.

Maxwell and *J. M. Porter*, for defendant.—Possession and actual force, or implied taking submitted to, is necessary to constitute trespass. 1 Smith L. Cases, 219; Downing *v.* Baldwin, 1 Serg. & Rawle, 198; Smith *v.* Rutherford, 2 Serg. & Rawle, 358; Gilchrist *v.* Ball, 8 Watts, 355; Cotteral *v.* Cummins, 6 Serg. & Rawle, 343; 10 Mod. 180. There was no evidence of actual touching the property, or submission to the attachment. The only evidence of possession at time of attachment was the return that showed it was in a third person.

The witness answered all the questions asked him. The sheriff's return was not conclusive between third parties; plaintiff invalidated it by his own evidence. If conclusive, it would also be so of right of property.

Jan. 3. SERGEANT, J.—The first question in this case arises upon the bill of exceptions taken by the plaintiff to the decision of the court below, that Wm. L. Sebring might testify to every fact of which he had a knowledge, and which knowledge he did not learn from sheriff Steckel as his counsel. There does not appear to be any error in this.

Digitized by Google

www.libtool.com.cn

We think there is no reason for saying, that the sheriff cannot have counsel in matters connected with his proceedings, or enjoy the same privilege that exists in other cases. The business of a sheriff is multifarious, intricate, and emphatically of a legal complexion; and it is not to be supposed he can always conduct it properly, without the aid of an adviser, to inform him of the law to which it is his duty to conform. He ought, therefore, to be able to consult his counsel with the same freedom and privacy as other persons, and to be subject to the same rules.

We think it clear, however, that the court erred in their charge to the jury in stating, (for such seems to be the tendency of the charge,) that to constitute trespass by the sheriff, it is necessary he should touch the property, or take it into possession, or do some act operating upon the body of the property, or cause it to be done; and that the sheriff's return was only evidence against the defendant, that he took possession of the property attached, but not conclusive. In the first place, it is well established by the authorities cited, that the sheriff's return in a cause is, as between the parties, conclusive against him, so that he cannot contradict it by parol evidence. In this suit, the return of Steckel was, therefore, conclusive evidence against him. In the next place, it is not necessary to constitute trespass by an officer who executes a writ of attachment on chattels, to prove any manual handling of the property, or taking them into possession. The levying of the attachment may be done without these acts, and the property be fully bound by it, and be in the officer's power and possession, and the owner divested of the possession. Trespass de bonis asportatis against a sheriff is maintained by proof that he unlawfully exercised an authority over the chattels against the will, and to the exclusion of the owner, though there was no manual taking or removal when he took them under process of law, and by virtue of his office. Miller *v.* Baker, 1 Metcalf, 27; Gibbs *v.* Chase, 10 Mass. 128.

Judgment reversed, and venire facias de novo awarded.

Digitized by Google

www.libtool.com.cn

TER-HOVEN *v.* KERNS.

1. Ground-rent is payable out of proceeds of sheriff's sale, under a lien acquired before the rent became due, but without interest.
2. Judgment to cover future advances is valid, but if the creditor gives a statement of the amount then due, to enable the defendant to borrow from another, he is estopped claiming beyond that amount.
3. It seems, future advances will not be preferred to liens attaching before such advance is made. Per KENNEDY, J. If there be an obligation to make the advance, Query.

Dec. 13.—EXCEPTIONS to auditor's report on sheriff's sale of defendant's property.

In 1839, Kerns confessed a judgment to the bank of N. L. for $10,000, conditioned to pay all notes now, or to be, drawn or endorsed by Kerns, and discounted by the bank. This judgment was revived on 4th May, 1844.

Ter-Hoven claimed the fund under a judgment confessed October, 1842, and showed a statement by the cashier of the bank, in April, 1842, that Kerns "was indebted to the bank $845, amount of lien on a judgment held by it," and proved it was obtained at the time of the treaty with him for a loan on bond and mortgage, on which bond the judgment was entered, which statement was given Kerns to enable him to raise money.

The conditions of the judgment were not otherwise altered, and the bank continued discounting until May, 1844, without actual notice of Ter-Hoven's claim; when Buhler, at request of, and as a favour to Kerns, paid the debt due the bank, amounting to $2086 71, and took an assignment of the judgment. The bank, in October, 1842, gave a release of the property mortgaged to Ter-Hoven, reserving their lien as to all others, the debt being then $457 65, $400 having been paid the bank. Williams claimed four years' ground-rent with interest; the auditor awarded the fund to Buhler.

The questions were, 1, Was the judgment good for future advances against the intervening judgment? 2. Whether the certificate did not estop the bank and its assignee claiming beyond that amount. 3. As to the ground-rent.

Brightly and *Price*, for Ter-Hoven.—1st point, Garbro *v.* Henry, 6 Watts, 59; Brinkerhoff *v.* Marvin, 5 Johns. C. Rep. 327; James *v.* Johnson, Id. 429; Erwin *v.* Taff, 17 Serg. & Rawle, 422; Patterson *v.* Griswold, 4 Conn. Rep. 161: 5 Rawle, 51, 131. The assignee is

Digitized by Google

in no better plight than the assignor. Crantz v. Brown, 1 Penna. 260. Second point, 4 Pet. 1; 1 Johns. Cas. 174; 4 Bin. 231, 314; 8 Pick. 386; 5 Day, 88. There was no stipulation for future advances, and that distinguishes it from Lyle v. Ducomb, 5 Bin. 585.

Kennedy, for Buhler.—There being no money lent between the certificate and release, there is no intervening equity. The certificate is but a statement. At the time of the loan there was notice of the nature of the bank's judgment. 5 Bin. 585; 4 Kent, Com. 175.

N. R. Potts, for Williams.—As to the ground-rent, Bantleon v. Smith, 2 Bin. 146; Sands v. Smith, 3 Watts & Serg. 1.

Jan. 20. KENNEDY, J.—The first exception is, that the auditor refused to allow a claim of $152 60, for and on account of ground-rents, falling due from the estate sold, in the years 1841, 1842, 1843, and 1844. In this, we think that the auditor erred, so far as the $152 60 were composed of principal, but right so far as it consisted of interest calculated upon the principal, from the times, respectively, at which it became payable. That the owner of the rent is entitled to have the principal of the rent, out of the moneys arising from the sheriff's sale, was settled in the case of Bantleon v. Smith, 2 Bin. 146; but not to interest thereon. This rule has been uniformly observed and adhered to ever since. We, therefore, consider the owner of the rent entitled to receive the principal of it, coming to him, in this case, without interest, the amount of which is referred to the prothonotary of the court to be ascertained by him. [His honour then stated the material facts of the case.]

With respect to the validity of the judgment taken by the bank, of Kerns, there can be no question. A judgment or mortgage taken to secure the payment of an existing debt, and debts or liabilities to be created in future, has been held to be good and valid by numerous decisions. Gordon v. Graham, 7 Vin. Abr. 52, E. pl. 3; Lyle v. Ducomb, 5 Bin. 585, 4 Kent Com. 175, and the cases there referred to. It may also be regarded as settled, when the prior encumbrancer, in such case, especially if his encumbrance be a judgment, makes future advancements upon the faith of his encumbrance, with actual notice of a new intervening encumbrance, that he will not be preferred for such subsequent advancements, to the intervening encumbrance; the latter will be entitled to a preference. But suppose he makes such advancement without any actual knowledge whatever, on his part, of the existence of the intervening encumbrance; shall he be postponed or not, the same as if he had had actual notice? This question, I think,

Digitized by Google

has not been definitively settled. And I am inclined to believe that there may be a diversity of opinion in regard to it. In Gordon *v.* Graham, 7 Vin. Abr. 52–3, E. pl. 3, where the prior encumbrancer took a mortgage to secure the payment of money already lent, as also such other sums as should thereafter be lent or advanced, and the second mortgagee took his mortgage with notice of the first; and the first mortgagee after this, with notice of the second mortgage, lent a further sum of money to the mortgagor, Cowper, C., was of the opinion that the second mortgagee could not redeem without paying all that was due to the first mortgagee. In Shirris *v.* Craig, 9 Cranch, 34, Marshall, Chief Justice, gives it as the opinion of the court, that a mortgage executed to secure the payment of an existing debt, and for debts subsequently contracted, upon its faith, either by advancements made or liabilities incurred prior to the receipt of actual notice of the subsequent title of the defendants, was good, and entitled to a preference; see pages 50, 51. So Chancellor Kent, 4 Commentaries, 175, after stating that a mortgage or judgment may be taken and held as a security for subsequent advances and responsibilities to the extent of it, when this is a constituent part of the agreement, says, the future advances will be covered by the lien, in preference to the claim under a junior intervening encumbrance with notice of the agreement. Indeed, Chancellor Kent seems to think the prior encumbrancer entitled to a preference, if the instrument under which he claims provides for his making future advancements, whether he has notice or not, at the time of the junior intervening encumbrance, and that the junior encumbrancer will only be preferred where he has no notice or means of knowing the agreement under which such future advancements have been made. Yet in Brinkerhoff *v.* Marvin, 5 Johns. Ch. Rep. 326, after referring to several cases, where it had been held, or laid down, that a mortgage or judgment, taken as a security for future advances, beyond the amount actually due, was good and valid, he observes, the limitation to this doctrine "I should think would be, that when a subsequent judgment or mortgage intervened, further advances, *after that period*, would not be covered." Thus leaving the question to be decided, without regard to notice, according to the fact whether the future advances were made prior or subsequently to the junior encumbrance coming into existence. To this, I apprehend, there can be no just or equitable objection made, where every encumbrance upon real estate, before it can become such, must be placed on record, or registered, or filed in some public office, where its being and extent may be fully ascertained by any one whose interest it may be to know it. Such is the case as to encumbrances created upon real estate in Pennsylvania; no such encumbrance can exist without being

www.libtool.com.cn

Digitized by Google

placed on record, or registered, or filed in some public office appointed by law for the purpose, where any one may be fully apprized of its existence or non-existence by calling and making the necessary inquiry. But it is said, a prior encumbrancer is not bound to look to the obtainment or entry of subsequent encumbrances; and generally this is true, and perhaps universally, where the encumbrance is given to secure the payment of a debt in being, the amount of which is fixed and mentioned, or as an indemnity against future liabilities, which may and shall arise from having become bail or surety for the encumbrancer, in some particular respect mentioned, and referred to in the agreement. But where the encumbrance is given for a debt, of a certain amount already owing, and for future advances or responsibilities which cannot be made or incurred without the future will and consent of the party taking such encumbrance; there is no good reason why he, before he advances or accepts of any new responsibility in future, should not examine the various offices for junior and intervening encumbrances, in the same manner as if he were about to accept of a new and independent liability from the party, having no reference whatever to any prior encumbrance. Every future advancement or responsibility created, is, in reality, a new debt, and such responsibility is created by a new contract, having a reference merely to the prior encumbrance, for the purpose of making it a lien upon the debtor's real estate; so that with respect to those who have acquired liens upon the real estate of the debtor, in the mean time, there is no ground or just reason whatever, why such future advances or responsibilities should not be looked on and considered as having no connection with the prior encumbrance under which they may have been made. In the abstract, there is quite as much reason why the prior encumbrancer should look to the then existing state of the encumbrances upon the party's real estate, or otherwise act at his peril, and take the risk upon himself, as if he were about to make an advancement to, or create a liability with, the party for the first time. And if we look at the thing in practice, I think it will appear not only more practicable, but much more reasonable and just, that the prior encumbrancer should be regarded as bound to know the state of the encumbrances at the time, against the real estate of the person to whom he makes future advances, than that every junior or intervening encumbrancer shall be bound to run after, and give him personal notice, or notice in fact of such subsequent encumbrance having been obtained, together with the amount of it. In some instances it may be almost, if not wholly impracticable, for the junior encumbrancer to do so, as where the prior encumbrancer may be a non-resident of the state, and residing abroad in parts unknown. To

Digitized by Google

require such notice to be given to the prior encumbrancer, in such cases, by the junior encumbrancer, would most likely put it out of the power of the party, whose estate is so encumbered, to borrow or obtain money upon it, and his ruin be produced in consequence of it. But it is in all cases practicable for the prior encumbrancer, without much trouble or inconvenience, to ascertain, by inquiry and search, at the several offices where encumbrances are to be found, if any junior exist; and to ascertain the extent of them. He is under no obligation to make future advances, and most likely, therefore, will never do so, unless he can make profit by it, and throw the expense attending the same upon the party to whom such advances are made. Taking every thing, then, into consideration, there appears to be no good or just reason why he should be regarded otherwise, in making future advances, than if he were making advances to the party for the first time.

This court, therefore, order and decree that the principal of the ground-rent be first paid to the owner thereof, out of the $1016 33 remaining, after paying taxes and the charges of auditing, (the amount of the principal of the ground-rent to be ascertained by the prothonotary of this court;) next that $457 71 be paid to the Bank of the Northern Liberties, for the use of Tobias Beehler, with interest thereon, from the 25th of October, 1842, to the date of the sheriff's sale. And, lastly, that the residue of the said $1016 33 cents be paid to Anthoon Ter-Hoven.

SERGEANT, J., dissented.

FREEDLY *v.* MITCHELL.

1. Plaintiff in ejectment may waive proceeding against defendants added by the sheriff, under sec. 2, act 1807.
2. It is not error to enter a nol. pros. as to some of the defendants after verdict, there being no contribution.
3. Plaintiff in ejectment aliens after suit brought; he is entitled to judgment for nominal costs and damages.

ERROR to the Common Pleas of Montgomery county.

Dec. 22.—Mitchell brought ejectment against three. The sheriff returned non est inventus as to McCredy, and served, as to the other two, and thirteen terre-tenants. Appearance was entered for McCredy, and a general plea on a two day's rule, with notice at bar. The jury were sworn generally. A sheriff's sale subsequent to the writ having destroyed the plaintiff's title, the court directed a verdict for nominal costs and damages.

Digitized by Google

After verdict, plaintiff entered a nol. pros. as to all but the two defendants served, and judgment was entered.

The exceptions were, 1. To the judgment, plaintiff having no title at the time of the trial. 2. No evidence of the possession of McCredy. 3. No issue as to several defendants. 4. Entering nol. pros. after trial.

Mallery, for plaintiff.—The rule to plead only extended to those appearing, and who did plead is but matter of inference.

The jury could only have been sworn as to those pleading, and this uncertainty is error.

The judgment should have been taken against those not appearing, under act 1807. This leaves two liable for all costs and mesne profits. Bratton *v.* Mitchell, 5 Watts, 69; Michew *v.* McCoy, 3 Watts & Serg. 501; Moss *v.* Moss, 5 Watts, 315; 1 Lord Ray. 729; 2 Salk. 476. A non pros. cannot then be entered. 1 Tidd, 632.

Fox and *C. Fallon* for defendant.—There was a general plea, behind which we could not go, and the jury must follow the record. The plea prevented us following the act of 1807. The nol. pros. was right; it amounted to an acquittal. Our action for mesne profits is several, and there is no contribution, it being trespass. Brideman *v.* Vanderslice, 2 Rawle, 338; Bingh. Judg. 50; 6 Serg. & Rawle, 418.

1st point. 4 Y. 382. [*Gibson*, C. J., there is no doubt of it.]

2d. Appearance cured the defect.

Jan. 2. PER CURIAM.—The act of 1807 was made for the relief of plaintiffs in ejectment, who formerly experienced great difficulty in proving defendants to be in possession, and thus compelling them to take defence on title; and to obviate uncertainty in the execution of writs of possession, the sheriff was directed, also, to return the names of any other persons found by him on the premises, and the prothonotary was directed to add them as parties. But as a party, for whom particular provision is made, may waive the benefit of it, we see no reason why the plaintiff, in this instance, might not elect to go on only against the persons named in the writ. Nor would we, in any event, reverse, for a mere clerical omission which did not prejudice them; and they certainly had no interest in having additional parties who could not be made liable to contribution.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

2 102
e221 370

THORNTON *v.* BONHAM.

1. Judgment having been recovered, in foreign attachment, on a bond for appearance, damages must be assessed under writ of inquiry, before scire facias can issue against the garnishee; and in default of such assessment the writ abates.
2. The garnishee may take advantage of the irregularity on the trial, under the scire facias.

ERROR to the Common Pleas of Bucks county.

Dec. 24.—The plaintiff took judgment by default, in foreign attachment, for the penalty of a bond to the sheriff for appearance, and issued scire facias against the garnishee. The court charged he could not recover, not having ascertained the true amount due on the judgment.

Dubois and *Fox*, for plaintiff.—Under the statute Will. & M., and our act, the proper course is to take judgment and execution for the penalty, and mark the real amount. 1 Dall. 377; Arrison *v.* Commonwealth, 1 Watts, 374; Bennet *v.* Reed, 10 Watts, 396; Sergt. on Att. 95; 1 Dall. 378.

The writ of inquiry is merely to inform the court, and the garnishee cannot dispute the debt. This is merely to compel an appearance, and after that the amount may be ascertained.

Ross, for defendant.—This is within the act of Assembly, O'Neal *v.* O'Neal, 4 Watts & Serg. 430, and that is positive; 1 Saund. Rep. 58, n. For want of a chancery court, the same rule prevailed before the act, 4 W. C. C. R. 414; Robison *v.* Whiteside, 16 Serg. & Rawle, 320; Bowes *v.* Nagel, 3 Serg. & Rawle, 254.

Even at common law, damages must be ascertained by a jury before execution. Low *v.* Pearce, 4 Burr. 2225; 3 Bos. & Pull. 630.

Jan. 3. SERGEANT, J.—It would seem that this action is on a bond for the performance of a written agreement, within the provisions of the act of 14th June, 1836; and there being no power given, by statute, to grant summary or equitable relief, it follows, that judgment having been rendered by default for the penalty, the plaintiff ought to have the damages he had sustained by reason of the breach of the condition to appear, assessed by writ of inquiry, before issuing his scire facias against the garnishee. O'Neal *v.* O'Neal, 4 Watts & Serg. 130. It seems, also, that he may take advantage of this objection, on the trial of the issue on the scire facias; for in Pancake *v.* Harris, 10 Serg. & Rawle, 109, it was decided that the declaration, being in substance a declaration in assumpsit for goods sold and delivered, and the judg-

Digitized by Google

ment not for a liquidated sum, the plaintiff could recover nothing from the garnishee, without executing a writ of inquiry; and he was allowed to take advantage of the objection on the plea of nulla bona; and the judgment for the garnishee in the court below was affirmed in error. We consider, however, the objection rather in the nature of a plea in abatement, on account of the irregularity in issuing the scire facias, and not as a plea in bar that concludes the plaintiff when his proceedings are made regular.

Judgment affirmed, and record remitted.

HUGHES v. LARGE.

1. Endorsee of an over-due note takes it, subject to the equities arising out of the note it self, and not to set-off generally.
2. *Semble:* The commercial law governs negotiable notes in Pennsylvania; they are not dependent on the acts of Assembly.

ERROR to the Common Pleas of Bucks county.

Dec. 26.—Hughes brought assumpsit on a note, dated August 28, 1837, at thirty days. On the 12th December, 1837, it was endorsed specially, and by successive special endorsements came to plaintiff. Under plea of set-off, defendant showed plaintiff's note of September 21, 1837, at one day from date, endorsed in blank, and proved that some time in 1838 he was the holder. The evidence was admitted, and raises the question in the cause.

Roberts, for plaintiff in error, made two points. 1. Defendant was bound to show he was the holder of the note, meant to be set off, before transfer of the note to plaintiff. Hinkley *v.* Walton, 8 Watts, 260; Morris *v.* Morelan, 15 Serg. & Rawle, 63; 2 Johns. 274. 2. The equities, subject to which plaintiff took, were such as then existed on the note. Chit. Bil. 8 ed. 822; Burrough *v.* Moss, 10 B. & Cress. 558; Chit. Bil. 15; Byles, 95; 10 Mees. & Wels. 696; Story, Prom. Note, § 178, 195; Ib. on Bills, § 220, 107; 5 Pick. 1; 10 Connect. 55, 10; 6 Cow. 693; 3 Har. N. J. R. 222.

Dubois, contrà.—1. The inference of law was, our note was endorsed at date, being in blank. 8 Wend. 600. 2. Our act of defalcation is much more extensive than the British statute.

Jan. 2. GIBSON, C. J.—It is certain the profession formerly thought that the endorsee of a promissory note took it, subject not only to equities

Digitized by Google

arising out of the original transaction, but to demands collateral to it. For proof of this, we need go no further back than to Cromwell *v.* Arrott, 1 Serg. & Rawle, 180, in which it was said by Chief Justice Tilghman, and Mr. Justice Yeates, that before the act of 1797, it was considered that the endorsee held it subject, as well to set-off as to every other legal or equitable defence that could be made against the payee. Indeed, the framers of the statute took it for granted that such was the law; for they enacted, that notes, drawn in a particular form, and dated in the city or county of Philadelphia, "shall be held by the endorsee discharged from any claim of defalcation *or set-off*." It was further said by the Chief Justice, that this notion sprung from the act of 1715, which put the assignment of bonds, and the endorsement of notes, on the same level, by enacting, that a person to whom "bonds, specialties, or notes, are assigned, endorsed, or made over," may prosecute actions at law in their own names, "for recovery of the money mentioned in such bonds, specialties, or notes, or so much thereof as shall appear to be due at the time of such assignment, *in like manner as the person to whom the same was made payable could have done.*" From this it was inferred that there was no design to put an assignee or endorsee on better ground than the assignor or endorser; and, acting on this interpretation, in Metzgar *v.* Metzgar, 1 Rawle, 227, we allowed an obligor to set off the debt, even of an intermediate assignee, in which we certainly went beyond what had been done before. But the Chief Justice added, that the legislature, finding the law of the state to be behind the law of our neighbours, yielded so far to the necessities of trade, as to put notes, dated in the city and county of Philadelphia, on a footing with notes in the neighbouring states. Such was the inadequate provision of the act of 1797! Since that time, we have established by decision—for the act of 1824 had regard to promissory notes discounted by banks—the indispensable principle, that the endorsee of a note, wherever dated, takes it, if, in the usual course of trade, discharged of equities growing out of transactions between the original parties. Shall we not go one step further, and put commercial paper, though taken when overdue, on the same footing in Pennsylvania as that on which it will certainly stand in every other part of the commercial world? As the law merchant is part of the jus gentium, we receive foreign precedents as controlling authorities, when they would not overturn our own decisions; and it was distinctly ruled in Burrough *v.* Moss, 10 B. & C. 558, and Whitehead *v.* Walker, 10 Mees. & Wels. 696, that the endorsee of an overdue note takes it liable to equities arising out of the transaction itself, but not to set-off. It is somewhat remarkable, that this distinction between equities and

www.libtool.com.cn

Digitized by Google

cross-demands, did not occur in England before 1830, though it had been taken three years before in Massachusetts and New York. It has been recognised by Mr. Justice Story, Law of Prom. Notes, sect. 178, as a settled principle of commercial law; and though I would have decided the point at Nisi Prius, as it was decided by the court below, I concur with my brethren that it is proper we conform to what is to be the universal rule.

Judgment reversed, and venire de novo awarded.

---

2 105
178 559

HUNT v. MOORE.

1. An executor, defendant, cannot be a witness to charge himself, thereby discharging the land of a devisee, co-defendant, of the decedent's debts.
2. An executor, being a man of business, and a neighbour of a creditor of the decedent, who was an aged, weak, and illiterate woman, induced her to take his own bond in lieu of one creating a lien on the estate of a devisee, falsely representing the amount of the liens against his own estate. A court of equity would set aside the transaction, and hence she may sue on the original bond.
3. *Semble*, Such a false representation would have avoided the contract between persons in equal situations.—Per ROGERS, J.
   Semble, The mere payment to executor, by devisee, of the amount of decedent's debts, will not discharge the land; nor will a refusal to accept the amount, because it was paper money, impair the right of the creditor. Ibid.
4. Nor is ignorance as to the truth or falsehood of the assertion, in the person making it, of any consequence. Ibid.
5. Ignorance or mistake in law may afford some inference of imposition, though in itself it cannot be relieved against. Ibid.
6. *Semble*, One cannot take advantage of a release or discharge obtained through the fraud of a third person, even though he was not a party thereto.

ERROR to the Common Pleas of Bucks county.

Dec. 26.—This was an action against Moore, executor of Michener, and J. Michener, his devisee, made a defendant under the 34th section of the act of 1834, on a bond of testator. Defendant proved an acceptance of the bond of Moore, in consideration of that of Michener; receipts of money by Moore from Michener, the devisee, and refusal, by plaintiff, to receive it, being paper money; and then, under objection, proved admissions of Moore, that he had received from Michener money to pay this bond and discharge the land, and to corroborate other evidence of a loan by plaintiff to Moore. The plaintiff was eighty years old, unable to read or write, and was said not to be competent to transact business at the time of the alleged exchange. Devisee said he procured the interview between plaintiff and Moore, who had told her there were no liens on his property but $100, and that he had searched and could find none, which was false, the pro-

Digitized by Google

perty being in fact encumbered beyond its value. The court submitted whether the bond was taken in satisfaction of that of decedent. If so, whether she was of sound mind at the time, which would be a good defence, unless fraud was practised. The weakness of mind, to relieve her, must be such as unfits her for the superintendence of her ordinary transactions. If she was thus competent, the misrepresentation as to amount of liens would not be relieved against, nor could it be, on the ground of mistake.

The errors assigned were, 1st, as to the evidence of J. Moore; 2d and 3d, to the charge that the misrepresentations and fraud could not be relieved against.

Dubois, for plaintiff.—1st point, cited 3 Stark. Ev. 1063; Guin *v.* Albert, 5 Watts & Serg. 338; Wolf *v.* Fink, MSS. at Pittsburg. 2d, Weakness of mind and ignorance, taken advantage of by superior knowledge, will avoid. Platt on Cov. 108–9; Wilson *v.* Bigger, 7 Watts & Serg. 111; 2 How. R. 43–45; Esp. N. P. Tit. Deceit; Leigh N. P. 1079, 1067, 1081; 8 Watts, 497.

Ross, contrà.—1st. It was competent. Gilb. Ev. 120; Doug. 140; 1 Wm. Bl. 166. Exception was too late. 2d. 8 Price Ex. R. 620; 1 Swanst. 329; Chit. Cont. 31; 1 Mad. Ch. 279; 1 Story Eq. 201, 206; 2 Kent, Com. 484; 12 E. 637. Misrepresentation immaterial, for there was notice in law. 8 Cow. 195; Chit. Cont. 627; 1 Wend. 35; 10 Pet. 137; 10 Pick. 533; Wht. Selw. N. P. 73.

Jan. 9. ROGERS, J., after stating the case.—The evidence (of receipt by Moore) was received on the supposition that it creates an equity in favour of the devisee; but how the fact of her refusal to accept paper instead of specie, can give an equity to one and prejudice the rights of the other, is not very apparent to my mind. It is enough that bank notes had no value in her eyes, that she was not bound to receive any thing but gold and silver, and that it was the executor, and not to the devisee, to whom she had to look for her money. She had nothing to do with any arrangement between the executor and the devisee, made for their own convenience; it does not appear that she took any part, or that she knew any thing about them. But granting the evidence to be pertinent to the issue, can it be proved by the declarations of the executor, a party to the suit? He is excluded as well on the ground of policy as interest. This is an inflexible rule, which we have lately had occasion to assert, in Wolf *v.* Fink, 1 Barr, 435. There is no principle better settled, than that a party cannot be a witness in his own case, much less can

Digitized by Google

his declarations be received in evidence. Can it be tolerated that the executor and devisee should be permitted to manufacture evidence to suit their own case, without even the sanction of an oath? If this be allowed, on any pretence whatever, there is an end to the administration of justice. The case itself shows the danger of such testimony; for the declarations of the executor, which were permitted to have so great an influence in the decision, were made to exculpate himself from a charge, as respects this very transaction, made by the respectable society of Christians, of which (if this account be true) he was an unworthy member. [His honour here stated the charge.]

To the first part of the proposition we see no objection; but from the last I totally dissent. It is not a case of suppressio veri, but of suggestio falsi, and by confounding the two classes of cases, which are entirely distinct, the court has fallen into error. It is a case of gross imposition and fraud. The plaintiff was a woman certainly of weak intellect, little conversant with business, could neither read nor write, and, moreover, had reached the advanced age of eighty years; the executor a man of business, in whom she naturally placed confidence. He, taking advantage of the influence necessarily resulting from their relations, induces her to agree to the exchange, falsely, basely representing, that his real estate was encumbered to the amount of $100, whereas, the lien against him being equal in value to his whole estate, the debt is lost, or greatly endangered. If the facts be as stated, can a court of equity hold this to be a valid exchange? And why should it be so? Because, says the court, it was her folly. The liens were of record, and she ought to have searched for encumbrances. Can it be the law that we are to repose no confidence in each other, without being branded with the charge of folly, and losing the earnings of a lifetime? True, says the defendant, I told you a deliberate falsehood, but you ought not to have believed one word I said. Had you searched the records, you would have discovered it was all untrue. It was your folly to put confidence in the truth of a neighbour or friend. I can, therefore, with calm conscience pocket my ill-gotten gains. I never can, I never will, consent that any person shall be permitted, in this sort, to take advantage of his own wrong. Had he been silent merely, perhaps this plea would have availed him, although even in that case a court of equity would lay hold of slight circumstances to relieve a victim to such duplicity. No honest or honourable man would have concealed the extent of the encumbrances, under the circumstances in which these parties were placed. It falls within that large class of cases denominated, in the books, the suggestio falsi. Courts of equity always grant relief where there has been misrepresentation, and

Digitized by Google

www.lntoopl.com.cn

confidence abused. Where the party intentionally, or by design, misrepresents a material point, or produces a false impression, in order to mislead another, or to entrap or cheat him, in every such case there is a positive fraud, in the truest sense of the term. There is an evil act with an evil intent; dolum malum ad circumveniendum; and the representation may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions. Whether the party thus misrepresenting a fact, knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party. These are elementary principles, settled by numerous authorities, Story, Eq. 201. It is very true, that every wilful misrepresentation, even of a fact, will not avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it; for courts of equity, like courts of law, do not aid parties who will not use their own sense and discretion upon matters of this sort. Story, Eq. 209. But all the cases put are exceptions to this rule in equity, grounded on natural justice and sound morals, which requires the most scrupulous good faith, candour and truth, in all dealings whatever. This case does not fall within any of the exceptions. I am not disposed to enlarge the number. It is ruled, that if an executor of a will should obtain a release from a legatee, upon a representation that she had no legacy left her by the will, which was false, James *v.* Dale, 1 Ver. 19; or if a devisee should obtain a release from the heir-at-law upon a representation that the will was duly executed, when it was not; in each of these cases the release might be set aside for fraud; and yet, had the party resorted to the records, they would have discovered that the representation was false, and, according to the opinion of the learned judge who tried this cause, would not be entitled to relief. And see Jones's Appeal, 8 Watts & Serg. 151. It is said by the Chief Justice, that it is not incumbent on one person dealing with another, to treat him as a rogue, for that would require of him the highest and most exacted vigilance. It is in vain to deny, that this was a misrepresentation of a thing material, in regard to which one party placed trust and confidence in the other. It was not a mere matter of opinion, but the false assertion of a fact which, if it had been truly represented, would have prevented the contract from being entered into. Equity will not interfere for th-

Digitized by Google

relief of a party who claim on the ground of a mistake of law, Good v. Herr, 7 Watts & Serg. 253; but even in that case it has never been doubted, that mistakes, or ignorance of the law, may give rise to a presumption that there has been undue influence, imposition, mental imbecility, surprise, or confidence abused; and where this expressly appears, equity will always relieve. A court is never better employed than in enforcing the principles of honesty and good faith. The court seems to rely on the position that the devisee is placed in a better situation than the executor. The only evidence we have of this arises from the parties themselves, which may well give rise to some suspicion. But granting the facts to be as claimed, yet I cannot bring myself to believe that this is clear of doubt. There are grounds for believing that Moore was but the instrument of Michener; that, in truth, it was a plan concocted between them; that the executor was but the agent of the devisee. Moore, so far as appears, had no interest in effecting the exchange; it was altogether for the benefit of the devisee. It may be true that the devisee was not actually present when the last bond was given, although even in that there is some discrepancy in the evidence. It was, however, in proof, that the devisee called to see the plaintiff immediately before the exchange; for what purpose it is not difficult to conjecture. The object was to get her to do something, but that is not stated. He said if she would come to his house, he would take her to Moore; and it is proved she did go to his house. One witness says, Michener told him he took her to Moore's, as he was dissatisfied with the situation of things; that James Moore told her there was nothing on his property except a lien of $100; that he had searched the office and could find nothing more. And yet this imbecile old woman is to lose her debt because she was ignorant of what the devisee was ignorant after diligent search. From the evidence, the jury may believe that there was a conspiracy to defraud the plaintiff, and this certainly would be good ground for equitable relief. But be this as it may, if the jury believe that the false and fraudulent representations were such as charged, there is nothing in the way of the plaintiff's recovery. On every principle of equity and fair dealing, the defendants cannot avail themselves of an exchange that has been induced by misrepresentation, imposition, undue influence, and misplaced confidence.

Judgment reversed, and a venire de novo awarded.

Digitized by Google

www.libtool.com.cn

Baptist Church *v.* Robbarts.

A paper, purporting to be testamentary, being found with the signature obliterated, the presumption is, it was obliterated by the testator.

The onus to show accident, mistake, &c., lies on the party offering it for probate.

Declarations of intent, and condition, and circumstances of families, are not sufficient to rebut the presumption.

Error to the Common Pleas of Bucks county.

Dec. 26.—The case arose on an issue whether a certain paper was the will of John Robbarts. The paper purported to be so was in his handwriting, dated in 1838, and signed thus—~~Jno. Robbarts.~~ Its execution was proved. John Robbarts died December, 1844. Plaintiff then offered to prove "declarations of John Robbarts in September, 1843, and November, 1844, when in declining health; that he had, and always kept a will; that he wished to prevent his property going as he did not wish;" and the circumstances of his family. It was rejected, and is the first error assigned.

On the envelope was endorsed, that it was deposited with the executor, not to be opened till death. When found by the executor, in a locked secretary of John Robbarts, it was in the present condition, with the seals of the envelope broken, the executor having possession of the key.

The present defendant was not there till after the paper was found.

The court rejected the paper, and this was the second error.

J. Fox, for plaintiff.—It was a question of fact, whether it was intended to revoke, even if the obliteration was by Robbarts himself; Rob. on Wills, 364; Onions *v.* Tyler, 1 P. Wms. 345; Lovel. on Wills 15, L. L. 185, 350; or whether with design to make a new one, in which case it was conditional. 18 Ves. 348; 2 Phil. 173; 8 Cow. 56; 4 Kent, 530; 1 Victoria, C. 26, 25 L. L. 187.

Chester, for defendant.—Offer was immaterial; animus revocandi is a legal inference from the paper itself, and the onus is on them to show the contrary. 6 Cru. Dig. 94, § 28; 2 Bla. R. 1093; 5 Connect. 165; 2 Stark. Ev. 1286.

Dec. 30. Burnside, J.—The 13th section of the act of the 3d April, 1833, relating to wills, is substantially the same as the 29th Charles 2, chap. 3, sect. 6. It provides, that "no will in writing, concerning any real estate, shall be repealed; nor shall any devise, or

Digitized by Google

direction, be altered, otherwise than by some other will, or codicil in writing, or other writing declaring the same, executed and proved in the same manner as hereinbefore provided; or by burning, *cancelling*, or *obliterating* or destroying the same, by the testator himself, or by some one in his presence, and by his express direction."

The plaintiff proved the will by the subscribing witnesses, and that it was executed about the first of June, 1838. It had been in the hands of McDowell; for when he unlocked the testator's desk, a day or two after Captain Robbart's death, in the deceased's chamber, three miles from Doylestown, he knew the paper to contain the will. This was about the first of December, 1844. The seals of the envelope were broken, and the name obliterated. We have inspected it. A strong black line was drawn over and along the whole name. It is in vain to infer, from the evidence in the case, when or how this was done. The will was found in the private chamber of the deceased, in his dwelling, and locked in his private desk. The name was obliterated, and the will cancelled. The legal presumption, arising on the evidence, was, that it was the act of the testator. There was no evidence that it was done by accident or mistake, or to disconnect the act from an intention to revoke. It was a cancelled will. Dunlap on Wills, 346. It is true, the name being obliterated, at first blush it is an equivocal act. But the paper being found in the manner in evidence, and being mutilated, it lay on the plaintiffs, who wished to establish the will, to give evidence how it was done. Without that evidence, the legal inference is, that the testator did it himself. The onus was cast on the plaintiff before this obliterated paper could be read to the jury.

The evidence offered did not tend to show how Captain Robbarts' name came to be obliterated. This was necessary to be first shown before the paper, purporting to be his will, or the evidence offered, could be received. The offer which it made was not pertinent to the issue which the jury were sworn to try. The issue trying, and the only issue, was, whether this mutilated paper was the last will and testament of John Robbarts, deceased; and the evidence offered only tended to mislead the jury from this issue, and was properly rejected.

The judgment is affirmed.

Digitized by Google

www.libtool.com.cn

2 112
157 450
Pa. State.
2 112
201 187

ATHERTON *v.* ATHERTON.

1. Judgment having been obtained, at the suit of one heir against the administrator, who was the only other heir, execution issued on the ancestor's land, in the hands of an alienee of the heir; it was set aside for want of a judgment against the heir as such, under the 34th section of the act of 1834.
2. The creditor is not bound, under this act, to elect in the first instance to proceed against the heirs; his proper course is to proceed to judgment against the representative, and then obtain judgment de terris by scire facias against the heirs.
3. In such a proceeding the heirs may contest the judgment on original grounds, or that the lien of the debt is lost. Per GIBSON, C. J.

ERROR to the Common Pleas of Bucks county.

Dec. 27.—Henry Atherton died in December, 1839, leaving Thomas and Charles sole heirs. Thomas administered. Charles held a bond of his father, which, in January 1840, he assigned to Jones, who brought this action in Charles's name, to his use against Thomas, as administrator; and recovered judgment 2d May, 1843.

In May, 1840, Charles conveyed his estate in his father's land to Thomas, in consideration of his paying intestate's debts.

In 1841, Thomas assigned in trust for creditors, and Eyre purchased the land of intestate at the sale by assignees.

In February, 1844, execution was levied on this land under Jones's judgment.

In April, 1844, Thomas filed an account as administrator, claiming a balance, and Charles, as heir of Henry, assented to the above judgment, and released all errors, &c.

On the application of Eyre, the court set aside the levy, which is the error assigned.

Fox, for plaintiff.—Charles waived notice, and has released. Thomas had notice. Murphy's Appeal, 8 Watts & Serg. 168.

It lies not in the mouth of an alienee to object that there was no return showing want of personal estate.

The purchaser took under the covenant for payment of debts.

Ross, contrà.—The 34th section of the act of 1834 applies, and execution cannot be levied, which is the only point here.

Return of nulla bona is essential to ground the proceeding against land of heir. 2 Arch. Prac. 434; 2 Penna. Prac. 463; Act of June 16, 1836, sect. 43. There is no notice of intent to hold him as heir, to affect a purchaser from him.

Jan. 26. GIBSON, C. J.—The proper practice, in cases like the present, was indicated in Murphy's Appeal, 8 Watts & Serg. 165, on

Digitized by Google

which it was shown that it is unnecessary to make the widow or heirs parties, in the first instance, to an action brought to charge the real estate. "In all actions," says the statute, "against the executors or administrators of a decedent, who shall have left real estate, where the plaintiff intends to charge such real estate with payment of his debt, the widow and heirs, or devisees, and the guardians of such as are minors, shall be made parties thereto." But when? Primâ facie, it might seem, at the beginning. But why bind the creditor before he has moved at all to make up his mind as to the course he intends to pursue, in regard to the land, when there may be a fair prospect of obtaining satisfaction from the personal assets, which are the primary fund? Where there is such a prospect—and every creditor may fancy there is such—it would be unwise to involve him in trouble and perplexity, either to make unnecessary parties, or to give up his hold on the real estate. The statute meant not, however, to put him to such election; but it meant to secure to the owners of the land, before it should be sold, an opportunity to contest the lien or disprove the debts, in an ordinary common law proceeding, free from incongruity and absurdity. But to join others to the personal representatives in the primary action, would require anomalous pleadings to adapt it to the purpose, which could not be accomplished without distorting the whole frame of the proceeding. It is hard to imagine how such an action could be carried through at all. Would the plaintiff count against the widow and heirs, or devisees, as co-debtors with the personal representatives; and if the latter should obtain a verdict on the plea of plene administraverunt, against whom should execution go to reach the land? To avoid such difficulties, the course is plain. Let the plaintiff proceed on a judgment against the executor or administrator, as he is directed by the preceding section of the statute to proceed on a judgment against the decedent himself. Having obtained such a judgment, the next step is a scire facias against the owners of the land, who, notwithstanding the judgment against the personal representative, will be let in to contest the demand on original grounds, or the continuance of the lien; which is all that the statute intended to give them. If they fail, the plaintiff will proceed to execution of the land upon judgment de terris. That course is not only free from embarrassment, but it is the natural one. It was pointed out in Murphy's Appeal, but as the decision in that case was in a proceeding in the Orphans' Court, it is proper to establish the practice in the Common Pleas. As the execution was not founded, in this instance, on such a judgment, the levy and proceedings on it were properly set aside.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

2 114
25 SC 409
2 114
28 SC 647
2 114
30 SC 549
44 Am. Dec. 179

LANCASTER Turnpike Company *v.* ROGERS.

1. A private nuisance may be abated by any one whose property is injured, and entry for such purpose is justifiable.
2. A public nuisance may be abated by any one.
3. A turnpike company, having erected a toll-house partly on the land of another, under license in consideration of user of the road by such owner, abandoned the house as a toll-house, and removed the gate. *Held:* It becomes a nuisance both on the road and on the land, and may be removed by any one injured.

ERROR to the Common Pleas of Chester county.

Dec. 30.—The plaintiff erected a toll-house about 1809, extending five feet on land, (now owned by defendant under several mesne conveyances from the then owner,) under parol agreement for use of the road toll free in consideration thereof. The defendant continued to use the road, toll free, until she removed the house, (March, 1843,) which was the trespass complained of. In 1839, the gate was removed to another place; the house locked up, and taken charge of by plaintiff. Defendant entered it and used it for other purposes during the removal. In the latter part of 1842 she had notice of the intention of the company to retake possession, and replace the gate, the experiment of removal not being successful; to which she objected, declaring, that it was hers, and they should not use it.

The court charged: The license was binding on defendant with notice so long as the company used the house for the purpose for which it was erected; as soon as it was abandoned for that purpose, it became a nuisance, and might be abated. Whether the parol agreement was for perpetual occupation, or to continue so long as used for a toll-house, was a question of fact. In the latter case, if she objected, gave notice, and ceased to use the road toll free, before asserting her title, she was not liable; if the former, she was.

Dillingham and *H. J. Williams*, for plaintiff in error.—They might abandon for a short time at least, with assent, of which going toll free was evidence. The agreement was for valuable consideration, and her entry in that part of the house standing in the plaintiff's property was a trespass. (Per cur.: That point was not made below.)

From the time of intention to replace, it was too late to exercise her right; certainly, from the first act towards replacing, after which she passed toll free.

Hemphill and *Darlington*, for defendant.—It reverted on abandonment. Stoever *v.* R. Road, 2 Watts & Serg. 548; Turnpike *v.* Stoever,

Digitized by Google

6 Watts & Serg. 380. The evidence showed a total abandonment. Nor will use of the road be sufficient to establish a new agreement. The remedy was by motion for a new trial.

www.hbtool.com.cn

March 11. BURNSIDE, J.—The act of the 9th of April, 1792, 3 Smith's Laws, 83, authorized the incorporation of a company for making an artificial road from the city of Philadelphia to the borough of Lancaster. The company had power to erect gates, and appoint collectors on the road. All our subsequent turnpike acts are substantially copied from the act of the 9th April, 1792, relating to the Lancaster turnpike. The case of the Ridge Turnpike *v.* Stoever settles the right of turnpike companies generally to erect toll-houses at their gates, for the accommodation of their toll gatherers. 2 Watts & Serg. 548. This right is indispensable to the enjoyment of the grant, but companies have no right to erect toll-houses outside of the limits of the road, without the consent of the owners of the land. [His honour here stated the material facts of the case.] The company had no right under their charter to have a building, part on the road and part on the land of the defendant, except for a toll-house. When the company ceased to occupy the building as a toll-house, the defendant had a right to revoke her license. When the building on the road ceased to be there for a lawful purpose, it was a public nuisance. Whatever worketh *hurt*, *inconvenience*, or *damage*, is a nuisance. 3 Black. Com. 215; 2 Greenleaf's Evid. 465. A common nuisance is an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires. 2 Roll. Ab. 83; Hawk. P. C. ch. 75; 5 Wils. Bacon, 146. It is agreed to be a nuisance to dig a ditch, or make a hedge over-thwart a highway, or to erect a new gate, or to lay logs or timber in it; or generally to do any other act which renders it less commodious. 5 Wils. Bacon, 150, tit. *Highway*, E.

Hawkins says, book 1, ch. 75, sect. 12, it is laid down that any one may pull down, or otherwise destroy, a common nuisance, as a gate, or even a new house erected in the highway. So, if one whose estate is or may be prejudiced by a private nuisance actually erected, as a house hanging over his ground, or stopping his lights, may justify the entering into another's ground, and pulling down and destroying such a nuisance, whether it were erected before or since he came to the estate; surely, it cannot but follow, à fortiori, that any one may lawfully destroy a common nuisance. 5 Bac. Abr. tit. *Nuisance*, C. 152; Hawk. P. C. ch. 75, sect. 12, &c.

It was held in Lowry *v.* Arnold, Comberbach, 417, that an action

Digitized by Google

of trespass does not lie for pulling down a house which is a nuisance in a highway. The gist of the action of trespass is the injury to the plaintiff's possession, and that possession must be either actual or constructive. Here the company, when they ceased to occupy the building as a toll-house, the license of Mrs. Rogers being revoked, had neither.

The judgment is affirmed.

2 116
147 398

2 116
f 34 SC 1 98

Baker *v.* Williamson.

1. Where the court of Common Pleas, deciding on a case under the chancery powers vested in it by act of Assembly, direct an issue, writ of error will not lie to the proceedings thereon in a court of law.
2. The remedy is on appeal from the final decree by the court in chancery.

Error to the Common Pleas of Delaware county.

Dec. 30, 31.—Baker filed a petition, on the equity side of the court, setting forth a conveyance to the defendant and others, with verbal directions as to the distribution of the property, that by an agreement between defendants as trustees, and the relations of the grantor, a certain sum was to be paid to petitioner, William and Walter Green and others, "the excess to be distributed among the parties;" that petitioner was entitled to the shares of the Greens and others, under an assignment thereof, in 1842; that there was an excess, and prayed an account. The auditor, as master, charged the trustees with certain sums, and on the hearing, a feigned issue was directed to test whether these were due. On the trial, exceptions to the admission of certain testimony were taken, and this writ of error sued out.

Tilghman, for defendants, moved to quash, for that no writ of error lies to a feigned issue directed to inform the conscience of the chancellor. The motion and case were heard together.

Edwards and *Lewis*, for plaintiffs.—The judge was sitting on the common law side, and unless properly tried, equity is not satisfied.

In analogous cases, error lies as on issue from Register's Court, Vansant *v.* Boileau, 1 Bin. 444; or from Common Pleas, Kellog *v.* Krauser, 14 Serg. & Rawle, 137; Neff *v.* Barr, Id. 171. The 33d sect. of the act of 1836, Purd. Dig. 85, gives a general rule for the Orphans' Court and Courts of Chancery.

Digitized by Google

B. C. Tilghman and *Tilghman*, for defendants.—The judgment was a nullity, a certificate only should have been given. 11 Price, 162; 6 Yerger, 402; 2 Rose, 178. This being a new jurisdiction, error does not lie. Keehlanan *v.* The Com'rs, 5 Binn. 24; Commonwealth *v.* Beaumont, 4 Rawle, 366; 9 Serg. & Rawle, 317; 3 Binn. 30; 3 Serg. & Rawle, 410. It is merely to inform the courts, and within their power, 1 Serg. & Rawle, 45, 46; Id. 255; 2 Ves. 553; 1 Dow. N. S. 139; and they may order the parties to be examined, 2 Moll. 24; 1 Jacob. 516; Amb. 210; and will not grant new trial for rejection of evidence in all cases, 2 Russ. 63; 19 Ves. 500; 9 Ves. 155. This is not a final judgment on which alone error lies. Erie *v.* Brawley, 8 Watts, 530. Appeal is the remedy; act 1836, sect. 36.

Jan. 16. ROGERS, J., after stating the material facts of the case.—The defendant in error moved the court to quash the writ of error, alleging that it is a proceeding in equity; that the cause is now pending and undetermined in the Court of Common Pleas; that the remedy, after final decree, is by appeal to this court, and consequently no writ of error lies.

This is a question of the first impression in this state, and as the legislature has, of late years, thought proper to clothe the courts with extensive equitable powers, it becomes of great importance as a matter of practice.

Is this a case in equity? is the first question; and on this point we have no doubt. Fraud, accident, and trusts, are peculiarly cognisable in a court of equity. This is a proceeding under the several acts of Assembly to prevent the failure of trusts, and to provide for the settlement of the accounts of trustees. In all the acts, whether for the appointment of trustees to prevent a failure of trusts, or to enforce the faithful performance of the trusts, the legislature, regarding it as an equitable power, have given the courts authority to grant relief in equity; from this, the inference is plainly deducible, that the equitable remedies are to be administered by the same means, and in the same manner as is usual in a court of chancery, except so far as they are restrained by the acts themselves, or by inveterate practice. Of the latter, the 33d and 34th sect. of the act of the 14th June, 1836, are examples. The several courts of Common Pleas, as is there provided, shall have the same powers and authorities, and the manner of proceeding, to obtain the appearance of persons amenable to their jurisdiction in cases of trusts, and to compel obedience to their orders and decrees, and enforcing execution thereof, shall be the same as are now by law vested in and provided for the several Orphans' Courts of the

Digitized by Google

Commonwealth. And the 31st sect. directs, that it shall be lawful for any judge, issuing a citation to any assignee or trustee, as hereinbefore provided, if the circumstances of the case shall appear to him to require it, to order such citation to be returned to a special court, to be convened for the purpose, in the manner allowed by the laws relating to the Orphans' Court. These acts direct the mode of proceeding in certain specified cases, but in no wise do they interfere with the essential principle that the practice of the courts of Common Pleas, in relation to trusts generally, shall be according to the formulæ which regulate courts of chancery. What then is the rule of practice in a court of chancery? On this point the authorities are full, and without difficulty. In all cases where an issue is directed out of chancery, inasmuch as the issue is merely to inform the conscience of the chancellor, no writ of error lies. At least, this is the conclusion that inevitably flows from the case; and no case to the contrary has been cited. That the Court of Common Pleas, in relation to this matter, was sitting as a court of equity, we think too clear to admit of doubt. Judge Bell directed this issue; the issue is to be tried by himself with the aid of a jury; it is intended to inform his conscience as a judge sitting in a court of equity. It must be remarked, that he has the power to direct the issue, and that is the point to which the attention of the court, strange as it may appear, in Kellog, Assignee, *v.* Krauser, 14 Serg. & Rawle, 177, was principally directed. The court there decided, that the Court of Common Pleas have power to entertain a motion for a set-off, or open a judgment, or to order a feigned issue, for the purpose of ascertaining necessary facts. So in Neff *v.* Barr, 14 Serg. & Rawle, 166. And in directing an issue, devisavit vel non, Vansant *v.* Boileau, 1 Binn. 444, that a writ of error will lie in these cases, it is not my purpose to deny. They are proceedings of a court of law rather than of equity, and it is equally convenient on the issue to determine the whole case as in other modes. But I do not perceive that the cases rule any thing as to the proper mode of conducting an issue, when the object is merely to inform the conscience of the chancellor. Nay, the distinction is glanced at in Neff and another *v.* Barr, already cited. It is there said, that a feigned issue is to inform the conscience of the court as to disputed facts, and is to be moulded as their discretion dictates; and the mode in which it is done by the court below is not the subject of a writ of error, and cannot be judicially decided by the Supreme Court. True, in this case it is ruled, that errors on the trial of the issue may be corrected by writ of error. When the proceedings are according to the course of the common law, or in the nature of proceedings at common law, they may be

Digitized by Google

reviewed by the Supreme Court, either on writ of error, or by certiorari, as in the case of the Commonwealth v. Beaumont, 4 Rawle, 366, and other cases. This is not denied. But the question is, where the proceeding is purely a proceeding in chancery, and the chancellor directs an issue to inform his conscience, can errors of law be corrected on the trial of that issue; in other words, has the court, which directs and tries the issue, power, without review or error, to determine all matters of law which occur in the course of the investigation? On the hearing of a cause, the chancellor often deems it expedient to direct an issue, a case, or an action. In the Court of Exchequer, which is both a court of law and equity, if a question of mere law arises in the course of its equity jurisdiction, the court will decide upon it without referring it to another jurisdiction. In our practice, where our courts have common law and equity jurisdiction blended, they may decide the law, or the law and facts themselves, except when controlled by statute; or they may direct a trial, or an issue, or may state a case, or direct an action, which is unusual. But as in chancery, so here, when sitting as a court of equity, references proceed, not of right, but of discretion, to satisfy the conscience of the court concerning doubts as to the facts or as to the law. In Dale v. Roosevelt, 6 Johns. 257, the chancellor observes, it is the practice and the undeniable jurisdiction of the court to decide on the fact as well as the law, and the awarding of an issue rests in sound discretion. It would be an abuse of that discretion, and the creation of a great and unnecessary expense, to award an issue when the truth of the fact could be sufficiently and satisfactorily ascertained by the court itself.

It has been said already, that the court may direct an issue, a case, or an action; and between an issue and a case there is this distinction: In the first, an application for a new trial must be made to the court by which it was directed; in the second, to that in which the action is brought. Contairs v. Stein, 2 Rose, 178. The action is tried according to the principles of the common law. In that form, I suppose, a writ of error would lie. Sed quære?

An issue is under the peculiar control of the chancellor, as appears from all the cases. Thus in Perkin v. Mincher, 2 Molloy, R. 24, an issue being directed, an order was made that the defendant be at liberty, if he thinks fit, to examine plaintiff before the jury; and in Gardner v. Rice et al., 4 Mad. 236, where an issue was directed, an order was made that the plaintiff and defendant be examined upon the trial of the issue.

And in refusing and granting new trials, the same latitude is ob-

Digitized by Google

served. This is the necessary consequence of the principle, that an issue is granted merely to satisfy the conscience of the chancellor.

Then a new trial of an issue will not be granted, merely because, on the former trial, evidence was rejected which ought to have been received. Barker *v.* Ray, 2 Russel, 63.

The chancellor says, in considering whether, in such case as this, the verdict ought to be disturbed by a new trial, allow me to say that this court, in granting or refusing a new trial, proceeds upon different principles from those of a court of law. Issues are directed to satisfy the judge, which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed here; and looking at the depositions, or the course and the proceedings both here and at law, he is to see whether, on the whole, they do or do not satisfy him. It has been ruled, over and over again, that if, on the trial of an issue, a judge reject evidence that ought to have been received, or receive evidence that ought to have been refused, that though in that case a court of law would grant a new trial, yet, if in this court he is satisfied that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely on such ground. In the East India Company *v.* Bayall et al., Taunt. 43, 516, it is said, there is this difference between a motion for a new trial, in a court of law, and in a court of equity. In a court of law, if the jury find the fact, although the judge may think differently, yet it is permitted to stand, for the finding of the fact is the province of the jury. But in chancery, the verdict is something more than the verdict of the jury; it must be such as to satisfy the court that it can make that its own declaration of the fact which the jury had made theirs.

And in Beaulau and others *v.* Hirst, 11 Price, 163, a new trial in ejectment was granted, under peculiar circumstances in evidence in the cause, notwithstanding the verdict of the jury (for the defendant) was in conformity with the direction of the judge who tried the cause. So in Hamilton *v.* Hamilton, 3 Ves. & Beam. 40, it is ruled that the improper rejection of written evidence is no ground for granting a new trial of an issue, the court being satisfied with the verdict upon all the evidence, including that rejected.

In Faulconberg *v.* Peirce, 1 Ambl. 210, if a verdict is not against the evidence, a court of law cannot grant a new trial, but a court of equity will, for the verdict cannot satisfy the conscience of the court.

A review of those authorities shows conclusively, to my mind, that the idea of a writ of error, for the rejection or admission of improper

Digitized by Google

www.libtool.com.cn

evidence is wholly inconsistent with the whole course of proceeding in a court of chancery. We cannot, therefore, touch the error assigned.

Indeed, if a contrary practice shall be unfortunately adopted at the commencement of the new and beneficial system, it cannot but be seen, it would lead to endless litigation and enormous expense. I agree with Chancellor Kent, in Dale *v.* Roosevelt, that it would be an abuse of the discretion of the chancellor, and create a great and unnecessary expense, to award an issue, when the truth of the facts can be sufficiently and satisfactorily ascertained by the court itself. We will not add to it by adopting writs of error as a mode of review.

Indeed, when the correct course of practice is preserved, there is nothing to which a writ of error can be taken, because no judgment can be properly rendered. Nor should they direct a case or action, unless on points presenting some interest on nice principles of law. It is their duty, in most cases, to determine the facts and law themselves.

Thus, in 6 Yerger, 402, it is decided that where an issue is sent out of chancery to be tried before a jury, the judge can give no judgment on the verdict of the jury. He can only certify the record of the finding to the Chancery Court. This certificate is entitled to great weight, for Faulconberg *v.* Peirce, 2 Ambl. 10, the court granted a new trial, because the judge certified the verdict was against the weight of evidence. It is said, mistake may be committed on the trial. True; but the only way in which they can be corrected is by appeal from the final decree. We have the whole case before the Court of Review, who will, of course, see that justice be done, according to the received and well-established principles of law.

In conclusion, I will remark, there are many cases in which no writ of error lies. Thus no writ of error lies to an inquest, finding a person to be a lunatic. Case of John Gest, a lunatic, 9 Serg. & Rawle, 317. So a writ of error does not lie upon proceedings in a domestic attachment, Lewis *v.* Wallace, 3 Serg. & Rawle, 410.

On the whole case we are of opinion that judgment was improvidently entered.

The writ of error is quashed, and the cause is remanded to the Court of Common Pleas for further proceedings.

Digitized by Google

2 122
132 68
2 122
137 376
2 122
157 357
2 122
23 SC 456

www.libtool.com.cn

TYSON *v.* PASSMORE.

1. A. agreed to sell the whole of a tract of vacant land, alleging a warrant he held would entitle him to obtain a title from the state. Articles were then drawn for the land to be acquired under said warrant. The law only permitted him to acquire a part under this warrant, which he did, and offered to convey. He then procured a warrant, &c., for the residue; and the vendee was held entitled to recover in ejectment, in the nature of a bill for performance, the part thus subsequently acquired.
2. On an agreement to convey, equity will turn the party into a trustee when he subsequently acquires the property.
3. Misrepresentation of the effect of a written agreement, at the time of execution, must be made good.—Per GIBSON, C. J.
4. Interest on purchase money, not recoverable from vendee never having been in possession.
5. Hunt *v.* Rousmanière, 8 Wheaton, 174, commented on.

ERROR to the Common Pleas of Chester county.

Dec. 31, *Jan.* 2.—This was an ejectment by Tyson, the vendee, against the vendor, under articles.

The articles were proved by plaintiff, dated April, 1833, in the handwriting of plaintiff, by which, after reciting a warrant for seventy-five acres, defendant agreed to procure a survey and return, pay charges, &c., and on 7th July next, to convey to plaintiff in fee all the estate in the land "acquired by defendant by the warrant and survey aforesaid;" and plaintiff covenanted to pay on execution of the deed. Also receipts in August and October, 1833, for part of the money.

He then offered to prove, that at the time the articles were signed, defendant stated the warrant would cover the whole vacant tract, supposed to contain two hundred and sixty acres; that his reason for not taking a warrant for the whole tract, was to save expenses at the land-office, as any quantity might be surveyed under the one obtained; that defendant was induced to contract on the faith of the representation, and the money was paid and accepted for the whole tract, and the value of the seventy-five acres did not exceed one-fifth of the price agreed upon. It was rejected, and is the second exception.

He then renewed the offer, with the addition that it was made upon the land, and a draft for two hundred and sixty acres was produced as the land defendant was selling; that a survey was made on the warrant for two hundred and twenty-two acres, and rejected, for excess at the land-office, when a resurvey of seventy-five acres of the least valuable parts was made, and another warrant for the residue taken out by defendant. This was rejected and is the third exception.

He then offered a deed, prepared at request of defendant, for the whole tract, with a small reservation as evidence of the contract. It was rejected, and is the fourth exception.

Digitized by Google

www.libtool.com.cn

He then showed the warrant and the two surveys; the one rejected was ruled out. This is the fifth exception.

Also the survey of the residue; which is the sixth exception. He then proved a tender of the balance of the purchase money, and deed in 1844.

The court ruled he could only recover so much as was surveyed under the seventy-five acre warrant, and as he had had no possession he was not liable for interest.

The first part of the charge constitutes the ninth error assigned. The defendant also excepted to the charge as to liability for interest; and both parties brought writs of error.

Darlington and *Lewis*, for plaintiffs.—The ejectment is a substitute for a bill, and equity would reform the contract; 1 Story, Com. 164—175; 4 Kent, 450; 2 R. & My. 614; 2 Johns. Ch. Rep. 593; 2 Vern. 555—609; 4 Johns. Ch. Rep. 144; 1 Day, 139; 6 Har. & Johns. 27. Even though the party drew the instrument, 1 Sim. & Stu. 211; Gower *v.* Steiner, 2 Whart. 29; 2 Watts, 148; 14 Serg. & Rawle, 207. The assertions were part of the res gestæ, 6 Serg. & Rawle, 171, and the party must make them good, Shultz *v.* Diehl, 2 Penna.; McPherson *v.* Cunliff, 2 Serg. & Rawle, 427; Rohr *v.* Kindt, 3 Watts & Serg. 563. He is either our trustee ex maleficio, or our agent for the purchase, 1 Dall. 424; 3 Bin. 505; 1 Story, 312; Brown *v.* Geisinger, 1 Rawle, 408; Kisler *v.* Geisinger, 2 Watts, 325; 5 Watts, 27; 5 Watts, 303; 7 Serg. & Rawle, 230; 7 Watts, 472; 2 Serg. & Rawle, 461.

P. F. Smith and *Meredith*, contrà.—To enable a party to reform a contract, he must sue on it, and set out the mistake or fraud; thus giving notice of intention, and showing on the record what was recovered on, Jordan *v.* Cooper; Vicary and Moore, &c. Ejectment is only maintainable on such equitable estates as the statute of frauds recognises; Hager *v.* Plice, 3 Rawle, 345, was on another point. But the allegation is not of an omission of any thing intended to be inserted, but that both were mistaken in legal effect of the warrant; this is never reformed, Wood *v.* Hearl, 7 Watts & Serg. 253. If inserted, the contract would be altered, it being clear it was a purchase of the chance, and if inserted, the reference to the warrant would control, as in Rohr *v.* Kintz. But is it competent. The distinction is between adding land to that included, and excluding part mentioned in the agreement, Gillespey *v.* Moon, 2 Johns. C. R. 593; Ridgway *v.* Zeitzinger, 4 Watts & Serg. 472; Kanister *v.* Wise, 8 Watts, 215. That he is trustee or estopped, assumes it was included. He is entitled to interest, having done all on his part, 10 Watts, 90.

Digitized by Google

Jan. 10. GIBSON, C. J.—The plaintiff in this ejectment, to enforce what he insists were the actual terms of the purchase, contends that the parol evidence of those terms was competent either to reform the articles, or to entitle him, in some shape, to relief for misrepresentation and mistake. As it is not pretended that any thing was omitted which was intended to be inserted, the defendant denies that there is any thing to be reformed; and that a mistake as to the legal effect of the words, being a mistake of the law, is not a ground of relief. That the agreement was penned by the defendant, and that the plaintiff, being an inhabitant of another state, was probably ignorant of the lex loci, enters not into the effect of the written agreement, or of the extrinsic evidence by which it is attempted to be controlled. The articles, by whomsoever penned, are presumed to contain the terms and conditions of the bargain till the contrary be established; and a stranger is as much bound to know the laws of the country, on the basis of which he deals, as a citizen or subject would be. Was any stipulation omitted in the articles? or was any misconception of the effect induced by misrepresentation? [His honour here stated the evidence and the offer.]

It is true that this would prove, not an omission of any stipulation intended to be inserted, but a misconstruction of stipulations already inserted; and if there was nothing unconscionable in taking advantage of ignorance and credulity abused by misrepresentation, there would be no ground for relief. But he who would avail himself of his own misrepresentation, even where it was unintentional, is as much open to an imputation of fraud as if its falsity had been known to him. Such was the quality of the fraud which in Hurst *v.* Kirkbride, 1 Bin. 616, gave to the words, "as to the manor, I will treat with you about it again," the force and effect of a reservation out of a general conveyance. In that case, less was shown to have been intended than was expressed: in this case more; but the principle of each is the same. And Flagler *v.* Pleis, 3 Rawle, 345, is not only the same in principle, but nearly so in circumstances. There, a vendee was allowed to prove that the ground in contest had been shown by the vendor as a part of the premises; yet it had not been alleged that any substantive stipulation had been omitted. Now, it is a fair deduction from these cases, that whether misrepresentation of a material fact were intentional or not, it draws after it the same consequences. It is not the suppression of a truth, but the suggestion of a falsehood to the injury of an innocent man. The consequence of an innocent misrepresentation, if there can be such a thing, must fall on him who was the author of it, on the principle that the acts of even an innocent man shall pre-

Digitized by Google

www.libtool.com.cn

judice himself rather than a stranger equally innocent. In Fisher *v.* Worrall, 5 Watts & Serg. 483, it was said that he who has positively asserted what he does not know to be true, is as answerable to one who would suffer by having reposed on his assertion, as if he had known it to be false; and the same thing was said in Jones' Appeal, 8 Watts & Serg. 151, as well as in Hunt *v.* Moore, decided at the present term. If, then, the defendant sold the two hundred and sixty acres comprised by the lines of the old draft, and the plaintiff was induced to buy it by his representation that the whole might be surveyed and returned on his warrant for seventy-five acres, it was not competent to the defendant to acquire for his own use the surplus above the excess of ten per cent. usually allowed, and hold it adversely to the plaintiff. It struck me at the argument, that Hunt *v.* Rousmanier, 8 Wheat. 174, ruled the case; but it is certainly not the same in every particular. The court enforced a contract secured by a power of attorney, which had been irrevocable during the life of the party who gave it, but which was unexpectedly revoked by his death. Though the instrument was taken to be a consummation of the agreement, it was held that a court of equity will enforce the whole bargain where the agreement has failed to express it. The decree was put on the insecure ground of mistake on matter of law not induced by misrepresentation; but I conceive with deference to the judgment of the illustrious man who delivered the opinion of the court, that the true ground of the decree was accident—a distinct head of relief—happening by the unexpected death of the party. "In this case," said Chief Justice Marshall, "mistake is the ground on which the plaintiff comes into court; and that mistake is in the law. The fact is in all respects what it was supposed to be: the instrument taken is the instrument intended to be taken. But it is contrary to the expectation of the parties, *extinguished by an event not foreseen or adverted to;* and it is therefore incapable of effecting the object for which it was given." But it seems to have been inaccurate to say that the fact was then as it had been originally; or to assume that the parties did not know that the powers delegated by the instrument might be extinguished by the death of one of them; and that, had such an event entered into their contemplation, they would not have chosen a different security. They may indeed have been ignorant of the law in that particular; but that they were so, was no part of the case. The plaintiff was undoubtedly entitled to relief; but only on the ground taken in Newton *v.* Rouse, 1 Vern. 460, in which one hundred guineas which had been given as an apprentice-fee were decreed to be returned to the father because the master had died a few days after the sealing of the articles. The

Digitized by Google

www.libtool.com.cn

propriety of the decree was, perhaps justly, doubted by Lord Kenyon, when Master of the Rolls, in Hale *v.* Webb, 2 Bro. Ch. Rep. 80, not, however, as regards the soundness of the principle, but as regards the application of it to the circumstances, the contingency of death having been, not only contemplated, but provided for in a special stipulation that only 60*l.* should be returned. The decision in Hunt *v.* Rousmanier, however, has been erroneously taken for an authority that an instrument may be reformed for a mistake purely of its legal effect; but though it is not an authority for that position, it is a powerful one to prove that the original terms of a bargain are not necessarily merged in the instrument employed to give them effect. Though it was admitted to be a general rule that an instrument carrying an agreement into execution is not to be varied by evidence of conversations anterior to it, yet it was maintained that in cases of fraud or mistake, courts of equity may carry the intention of the parties into execution where the written agreement has failed to express it. Predicated of a mistake of law induced by misrepresentation, the principle is true in its utmost latitude. The proper relief, however, is not to reform the instrument, but to convert the fraudulent vendor into a trustee ex maleficio. But whatever the form on a bill in equity, it is not the less certain that, in this ejectment, the evidence ought to have been received; but the exceptions to the charge by the defendant are unfounded.

Judgment reversed, and venire facias de novo awarded, and judgment affirmed in Passmore *v.* Tyson.

Painter *v.* Reece.

A partition fence having been destroyed by a flood, either party may recede from the former line, and erect a fence on his own land, leaving the intervening space open to the public; in which case he is not bound to maintain the former fence.

***Semble*: He is entitled to do so only in the event of a destruction of the former fence by an accident.**

Error to the Common Pleas of Delaware county.

Jan. 3.—Reece and Painter were the owners of improved and enclosed tracts of land, adjoining each other, separated by a partition fence, which had been maintained for forty years, by the respective owners, at their joint expense. A private lane ran along this fence, on Painter's land, with a three bar fence enclosing it.

A public road was laid out through both farms, crossing this lane at right angles.

Digitized by Google

The partition fence having been destroyed by a flood, Painter declined contributing to the repair, but threw open the private lane to the public, putting up a fence on the side adjoining his tract, and alleged that, having abandoned the ground over which the lane ran, he was not bound to assist in maintaining a fence between it and Reece's land.

It will be observed, unless there be such a fence, Reece's land lies open to the new public road, through the lane, thus made public.

This action was on the award of the fence-viewers.

The court below decided he was liable.

Darlington, for plaintiff.—The award is not conclusive, being a court of inferior jurisdiction; the court can inquire whether the case is within their jurisdiction. 3 Serg. & Rawle, 197; 1 Rawle, 146; 1 T. R. 161; 11 Id. 226; Id. 491; 13 Id. 444; 2 Day, 423; Willes, 31, 128; 3 Cranch, 338. The appeal and the action given shows it is not conclusive.

Is the right or obligation any thing more than the equitable right of contribution so long as he enjoys a joint benefit? If so, by abandoning the benefit he abandons the charge. 4 Paige C. R. 554.

Edwards, for defendant.—The jurisdiction is by act of Assembly, and all things are presumed rightly done. Can a person throw the whole burden on his neighbour by wrongfully electing to place his own fence a few feet from his line? He cannot. Overseers of Byberry *v.* Anon., MSS. per *Rush*, J. He is bound by prescription. 1 Dane Abr. 676; 3 Dane Abr. 246.

April 11. BURNSIDE, J.—The act of 1700 provides, that "When any neighbours shall improve lands adjacent to each other; or where any person shall enclose land adjoining to another's land already fenced in, so that any part of the first person's fence becomes the partition fence between them, in both these cases the charge of such division-fence, so far as enclosed on both sides, shall be equally borne and maintained by both parties."

When this act was passed, Pennsylvania had but few improved farms, and these were confined to the counties of Philadelphia, Bucks, and Chester—the three lower counties, as they were familiarly called (now the state of Delaware) then belonged to the province. The object of the act was to compel owners of adjoining fields, where the common fence was the partition fence, and equally beneficial to both, each one to pay a moiety of the expense of erecting the fence, and maintaining it.

Digitized by Google

www.tiptool.com.cn

The act of the 11th of March, 1842, Pamphlet Law, 62, is in substance a repetition of the act of 1700, and declaratory of the universal construction that act ever received. The third section declares, "That where any two persons shall improve lands adjacent to each other, or where any person shall clear any land adjoining to another's land already fenced in, *so that any part of the first person's fence becomes the partition fence between them*, in both these cases, the charge of such division fence, so far as enclosed *on both sides*, shall be equally borne and maintained by both parties. This act provides for cases where persons clear lands up to their lines and use a common fence; or where one improves, adjoining another's fence, so far as he uses the old fence as a boundary, the charge of the division-fence is to be equally borne. The act of 1842 sanctions the practice of Pennsylvania under the act of 1700. That practice was, that wherever persons used a common fence, each was bound to pay a moiety of the cost of its erection, and each bound to maintain it. Each had a common advantage, and the fence was equally beneficial to both. But any person, if he thought proper, might build a fence within his boundary, and refuse to permit the owner of the adjoining land to join him, and thus compel his neighbour to make a fence to protect himself. The act of 1842 sanctions this practice, for it expressly provides for cases where the first person's fence *becomes the partition fence*. Pennsylvania at all times granted her lands in fee-simple. She fixes the boundaries of every grant. The grantee and his successors hold upwards as well as downwards. The grant includes every thing terrestrial, above or beneath, except the one-fifth of the gold and silver, which were specially reserved in the grants. 2 Black. Com. 18; 1 Kent Com. 401. [His honour here stated the case.] Painter chooses to abandon the old partition fence and build a new one within his boundary on his own land. This he had a right to do; any other construction would be inconsistent with the free enjoyment of property. I agree a man would have no right to remove a partition fence in upon his own land, to the injury of his neighbour, but where from flood or fire, or otherwise destroyed, he may abandon the site, and build his new fence within his boundary. So he may abandon an old fence and build a new one on his own land when he pleases, but when he does so, he gives up all right in the old fence to his neighbour. The case was not within the jurisdiction of the fence-viewers. The whole proceeding was erroneous.

The judgment is reversed, and judgment for defendant below, on the case stated.

Digitized by Google

www.libtool.com.cn

COATES' APPEAL.

1. On bequest to wife of personalty absolutely, having full confidence that she will leave the surplus to be divided, at her decease, justly among testator's children, the widow is entitled to the income for life merely, and is a trustee for the children of the principal.
2. There being a previous devise for payment of debts, the word "surplus" construed to mean all that shall remain thereafter, and not to give any right of disposition to the widow during her life.
3. Words of desire, expectation, or confidence, create a trust, whether the subject be real or personal estate.

APPEAL from the Orphans' Court of Chester county.

Jan. 5, 6.—Pennock, by his will, gave his real and personal estate to be possessed and enjoyed by his wife for life, or during widowhood, "to be used and applied to maintenance and support of his children, and at her decease or marriage, should either take place before they come of age, then among them equally."

By a subsequent will and codicil, revoking all others, he gave, after payment of debts, "the use, benefit, and profits of his real estate to his wife for life, and also all his personal estate of every description, including ground-rents, bank stock, &c. &c., absolutely, *having full confidence that she will leave the surplus to be divided, at her decease, justly among his children.*" He then made specific bequests of his real estate to his children; and annuities to each of his daughters out of his personal estate, during the life of his wife, to cease on their marriage. He then recommended the children to remain in the family with their mother, expressing a confidence they would have a comfortable home. By the codicil he directed an appraisement of the real estate, as soon as convenient, after one of his daughters came of age, and directed that if the marriage of any child, or education of his son, should make an addition to his wife's income necessary, certain real estate should be sold, and the proceeds placed at the disposal of his wife for the benefit of his children, as she should judge prudent. He then expressed confidence in his wife's discharging the duties of a mother, and a desire that they would manifest filial subjection and attachment, with many expressions of affection to both wife and children. On the death of the wife, the husband of one of the children petitioned for a citation for the settlement of the widow's accounts, as surviving executor of the testator. The petition stated she had made a will. That testator's real estate was large, and the personalty exceeded $110,000. The executor of the widow demurred, and the court dismissed the petition.

Lewis and *Sergeant*, for appellant.—It is well settled that precatory or recommendatory words, or those of confidence, create a trust.

Digitized by Google

2 Story Eq. sect. 1068; Lewis on Trusts, 77, 78; 2 Rop. Leg. 296; 17 Ves. 255; 2 Ves. jun. 335. Whether she executed it by will was refused to be shown. Morris *v.* Bishop of Durham, 9 Ves. 399, does not apply, and was overruled in Witman *v.* Lex, 17 Serg. & Rawle. Perhaps she might discriminate, but not refuse to execute, in which case it goes under the statute of distributions. 1 Atk. 468; 4 Ves. 708; 8 Ves. 570; 3 Ves. & Bea. 198; 9 Ves. 319; 2 Bro. Chan. Rep. 38; 3 Mer. 437; 2 Ves. 335. The word "surplus" is certain enough. 3 Yeat. 187; Jacob, 517; Ll. & Gould, 454; 2 Ves. jun. 336. 1 Serg. & Rawle, 387; 1 Bro. Chan. Rep. 179; 3 Ves. 7. It was from kindness and respect to the widow that she was not restricted during life, and their connection shows a mutual understanding expressed by the word "confidence." The absoluteness of the gift was essential to create the trust and not leave it a naked power.

P. Smith and *Meredith*, for appellee.—The doctrine is not countenanced in England at present, and has never been decided in Pennsylvania. 1 Sim. 534, 540, 566; 1 Ves. & Bea. 316; 2 Rop. 308; 2 Story, 1069; Prec. Ch. 500; 1 B. R. 142; 10 Sim. 1. The three requisites, according to these cases are, 1. Words sufficient to create a trust. He gives it absolutely, though but a life-estate in the realty.

2. Objects certain. 3. Subjects—it is what remains after what she chooses to spend, and is too uncertain. 2 Cox, 349, 354; 1 Sim. & Stu. 301; 8 Ves. 375; Fitzgib. 414.

Jan. 21. ROGERS, J., after stating the facts, delivered the opinion of the court.—The testator died, seised of a large real and personal estate, the income of which was little, if any, short of $8000; the personal estate, besides ground-rents, being, as appears by the inventory and appraisement, $110,622 05.

To the petition, the respondent demurs, and the only question is, as to the interest which the widow took in the personal estate. The petitioner contends, the bequest of the personal estate was for the benefit of the wife during her life, and in trust for the children after her death. The respondent, that she had an absolute estate in the personal property, with the right of disposing of it in her lifetime, and after her death as she might think proper. One asserts it to be a trust, the other an absolute gift.

It is worthy of remark, in the first place, that no person can read this will without coming to the conclusion that the principal objects of the testator's bounty were his children. Every clause and expression in the will evinces this. He speaks of them in the tenderest manner, and uses the most endearing terms. The means by which he seeks to

Digitized by Google

www.ibook.com.cn

secure their welfare is by a devise to his wife of almost the whole of his estate, real and personal, the income of which he confidently supposed would be devoted to that object. It is a cardinal rule in the construction of wills, that the general intention of the testator is to be carried into effect. Particular words and expressions being always subservient to the general purposes of the testator. The principles which appertain to the case are settled by abundant authority. The only doubt which can arise is the application. Is this an indirect or constructive trust for the benefit of the children after the death of the wife? It is a general principle, that whenever a person having a power of disposition over property manifests any intention, with respect to it, in favour of another, the court, where there is no want of consideration, will execute that intention, through the medium of a trust, however informal the language in which it happens to be expressed. A court of chancery will execute the general intention of the testator, without regard to the manner it is announced. And on this point it is decided that a testator manifests an intention of creating a trust, if he employ words precatory or recommendatory, or expressing a belief; as if he desire, will, request, will and desire, wish and request, entreat, most heartily beseech, order and direct, authorize and empower, recommend, hope, do not doubt, be well assured, *have the fullest confidence*, or use such expressions as "of course the legatee will give, in consideration the legatee has promised to give," &c. These principles are supported by a host of authorities. Lewis on Trusts, 77; 2 Story's Eq. 328, and in Ward on Legacies, 297, where all the cases are cited.

The testator leaves all his personal estate to his wife, Martha Pennock, absolutely, having full confidence that she will leave the surplus to be divided, at her decease, justly among his children. Setting aside the word "absolutely," and "surplus," of which I shall speak hereafter, it cannot be doubted that this case falls within the principle of the cases cited, and particularly Wright *v.* Atkyns, 17 Ves., which was a devise to A. and her heirs for ever, in the fullest confidence that after her decease she will devise the profits to his family. It was there held that A. has an estate for life only, with remainder in trust for the devisor's heir as persona designata.

That this then is a trust in the wife for life, with a remainder in trust for the testator's children, seems clear, unless there is something in the will which manifests a different intent. It is very true that the current of decisions, of late years, has been against converting the legatee into a trustee. Sale *v.* Moor, 1 Sim. R. 534; Meredith *v.* Heneage, 1 Sim. R. 452. Mr. Justice Story, in his treatise on Equity, p. 329, in commenting on these decisions, remarks: "The doctrine of

Digitized by Google

www.hpbook.com.cn

thus construing expressions of recommendation, confidence, hope, wish, and desire, into positive and peremptory commands, is not a little difficult to be maintained, upon a sound principle of interpretation of the actual intentions of a testator. It can scarcely be presumed, that every testator should not clearly understand the difference between such expressions, and words of positive direction and command, and that in using the one, and omitting the other, he should not have a determined end in view. It will be agreed on all hands, that when the intention of the testator is to leave the whole subject as a pure matter of discretion, to the free will and pleasure of the party enjoying his confidence and favour, and when his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control or govern it, then the language cannot and ought not to be held to create a trust. Now, words of recommendation, and others precatory in their nature, imply that very discretion, as contradistinguished from peremptory orders, and, therefore, ought to be so construed, unless a different sense is irresistibly forced upon them by the context. Accordingly, in more modern times, a strong disposition has been indicated not to extend this doctrine of recommendatory trusts; but as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peculiar sense." I have made this extract of the remarks of Mr. Justice Story, with a view of expressing my dissent. With the utmost deference to the wisdom of the profound jurists, who seem to censure the judgments of their predecessors, I hope it will not be considered as presumptuous if I venture to adhere to and vindicate the propriety of the ancient doctrine. A different interpretation of wills, with all respect I submit, would, in a very great majority of cases, defeat the manifest intention of the testator; for although a husband may think it but kind and respectful, proper, decorous, and affectionate, to use mild and persuasive terms, in addressing a beloved wife, a valued friend, or a dear child, yet they are as indicative of intention as when he used words absolute and imperative. No person can doubt that by such expressions he intended to indicate his design, that they (his children, for example) shall, in proper time, reap the fruits of his bounty. I admit, that where, from the will, it is apparent that expressions of desire, recommendation, &c., are intended as mere moral suggestions, to excite and aid the discretion reposed in the first taker, but not absolutely to control or govern, that the language cannot, and ought not, to be held to create a trust. But I cannot agree, that unless it is clear that they are designed to be used in a peremptory sense, they must be regarded in what they are pleased to call their natural and

Digitized by Google

ordinary sense. In my opinion, and I announce it with all deference, the reverse is the proper rule, unless it appears, from the context, that such was not the intention of the testator; words of desire, recommendation, and confidence, should be construed in an imperative and peremptory sense. The word *confidence*, be it remarked, is a word peculiarly appropriate to create a trust. It is as applicable to the subject of a trust, as nearly a synonyme as the English language is capable of. *Trust* is a confidence which one man reposes in another, and confidence is a trust. Nay, I agree with the learned counsel who argued the case, that the words used in the will would, if used in a deed, create a trust, which a court of equity would compel the trustee to execute. On an attentive consideration of the will, we are clearly of opinion that there is nothing which shows that the testator intended to create his widow the absolute and uncontrolled owner of the personal estate. If then there is nothing else in the case, she must be deemed as entitled to nothing more than a life-estate; as to the remainder, she is but a trustee for her children. In Roper on Legacies, 297, supported by the authority of Lord Eldon, in Wright *v.* Atkins, 1 Turn. 157, also Morris *v.* Bishop of Durham, 10 Ves. 538, the rule is laid down, thus: When a person bequeaths property to another, absolutely or for life, accompanied with words expressive of recommendation, request, hope, or expectation, that the legatee will dispose of the gift as his own, to or among one or more objects, the court of chancery will construe such recommendation or request as a trust; provided the words be imperative, and the objects and the property certain. It must be remarked how completely the bequest in this will tallies with the rule laid down. Thus, where a person bequeaths to another, *absolutely* is part of the rule, the same term used by the testator here. In fact, this word, or one of equal signification, was necessary to create an interest in the corpus, and to distinguish it from a power which, in the nature of things, widely differs from a trust. In the former, the party may or may not act, at his discretion. In the latter, the trust will be executed, notwithstanding his omission to act. The cases must be carefully distinguished from each other, as their effects are so entirely different; and hence I am not without suspicion it was designedly used for that purpose. But be this as it may, it is difficult to imagine why the word *absolutely*, used in this will, should have more potency in vesting the uncontrolled power over the interest bequeathed, than the words in Wright *v.* Atkins, 17 Ves., which was a devise to A. and his heirs for ever, and yet held, notwithstanding, to be a devise to A. of an estate for life, with a remainder in trust for the devisor's heirs, as

www.libtool.com.cn

Digitized by Google

personæ designatæ. In this particular, it is conceded, there is no difference between real and personal estate.

www.libtool.com.cn

But the courts will not construe precatory or recommendatory words as trusts, where the objects intended to be benefited are imperfectly described, or the amount of the property to which the trust should attach is not sufficiently defined. The reason given of the limitation by Lord Eldon, in Morris *v.* Bishop of Durham, 10 Ves. 536, is because, from the difficulty which would attend the execution of such trusts, a conclusive argument arises that no trust was really intended.

Were, then, the objects of the trust certain and definite? is the next inquiry. In respect to certainty (says Story, J., in his treatise on Equity, p. 331, in which he is supported by the authorities cited) in the description of objects or persons, in recommendatory trusts, it may be proper to state that it is not indispensable that the persons should be described by their names; but mere general description will often amount to a sufficient designation of the persons to take; such, for example, as sons, children, family, and relations, if the context fixes the particular persons who are to take, clearly and definitely. Thus a devise to the family of A. will often be a sufficient designation, and may be construed to mean the heir-at-law of A., or the children of A., or one of the relatives of A., according to the context. On the other hand, the language may be so loosely and indeterminately used, as not to amount to a clear designation of persons, and thus the recommendation may fail to create a trust. The latter branch of the rule is illustrated by divers cases cited, which it is unnecessary to notice particularly. Here the persons designated to take are the testator's children, which has been held, as above stated, to be sufficiently certain and definite.

Next as to certainty in the description of the property, or as to what property is given. It is argued that where there is any uncertainty of the property to which the bequest should attach, it defeats it as a recommendatory trust. Thus in Pushman *v.* Filliter, 3 Ves. 7, testator gave the residue of his personal estate to his wife, desiring her to provide for her daughter A., out of the same, as long as his wife should live, and at her decease to dispose of what shall be left among his children in such manner as she shall judge most proper. Held, that it is not an absolute trust for the children after the death of the wife. So when the testator bequeaths to his wife the residue of his personal estate, not doubting but that she will dispose of what *shall be left at her death*, to his two grandchildren, it was held not to be a recommendatory trust. As there was an uncertainty as to what *might be left*, the widow having the power to dispose of as much as she pleased, it

Digitized by Google

defeats it as a trust, and is an absolute gift to the wife. So if, in this case, the fair construction, "having full confidence that she will leave the surplus to be divided at her decease, justly among my children," should be that the wife had an absolute control over the whole personal estate, to do with it as she pleased—to sell it or give it away—and that the testator intended the remainder, or residue only, left at her death, should be divided among her children, the uncertainty attached to the bequest will defeat it as a recommendatory trust. This is conceded; on the other hand, if, on a sound construction of the whole will, the testator's intention was to bequeath to his wife the income of his estate during life, under a trust that at her decease it would be divided among his children, that the word "surplus" refers to *his death*, and not to the death of his wife, it must be viewed as a recommendatory trust, which a court will take care shall neither be defeated nor perverted.

What then was the general intention of the testator, to be collected from the whole will, the amount of the property bequeathed, and the situation of his family? The will, as before observed, must be construed in subservience to the general intention. The testator died leaving a large real and personal estate, the income of which was little, if any, short of $8000 a year. This income was amply sufficient, unless on the happening of a contingency, to supply all the wants, nay luxury, of his wife and children, for whose welfare he seems to have been so anxious. There was, therefore, no necessity for giving her more than the income of his estate, which he, it is evident, deemed enough for these purposes, unless on the happening of a contingency, for which he provided in the codicil. "It is my will, and I hereby direct, that the appraisement of my real estate be made as soon after my daughter Mary Ann Pennock arrives at the age of twenty-one years, as may be convenient; and moreover, in case either of my children should enter into the marriage state, or that the educating of my son, George Pennock, should make it necessary that a further addition to my *wife's income* should be made, then, and in that case, I direct, that the slitting mill, or the water-power thereof, together with the land adjoining thereto, containing about seventy-five acres, more or less, &c., to be sold, and the proceeds thereof placed at the disposal of my dear wife, for the benefit of my children, as she may judge prudent." The words, "my wife's income," are significant of the intention, and certainly refer not only to the profits of the real estate, but the interest and profits derived from ground-rents, bank stocks, bonds, &c., which he had bequeathed to her. It is at least susceptible of that construction, and to prevent the general intention from being defeated, I consider that we are bound to give it that con-

Digitized by Google

struction. If the income only is given to the wife, all uncertainty ceases. It is evident, from this clause in the codicil, that the testator was unwilling that she should have power to dispose of the corpus of the bequest, for in the contingency pointed out, which might make a further addition to her income necessary, he designates what is to be sold. He sets aside part of his real estate for those purposes, leaving his personal property intact, for a reason, probably, which belongs to the history of the times when the will was written. Then his personal property, which consisted of bank stock, ground-rents, notes, and bonds, was supposed to yield a more fixed, certain, and determinate income than real estate. He places the proceeds at the disposal of his wife, for the benefit of his children, as she may judge prudent. He gives her absolute power over the purchase money, to be disposed of, not according to her caprices, but for the especial benefit of his children, who were principally the objects of his affectionate regard and most anxious care. Although she has power over the corpus, could she have sold the property under the pretence of executing the will, and given it to a stranger to the testator's blood? An attempt to do so would shock the moral sense of every man in the community, and would be promptly restrained by a court of equity. And if this mother had been so unnatural as to endeavour to disappoint the just expectations of her offspring, to violate the solemn trust and confidence reposed in her, enforced as it is in almost every clause and paragraph of the will, by a bequest to a person not of his blood, who would not feel it as an outrage on the testator's intentions? And yet it is for this absolute power and control the counsel for the respondent contends, and to prevent which, the decisions, which make recommendations equivalent to commands, have been ruled; decisions grounded upon the well-founded presumption that by this train of judicial interposition, the courts carry into effect that cardinal rule of construction, that the intention of the testator must govern. If the income only be given to the wife, and this is the result of a close investigation of the different provisions of the will, it follows that there is no want of certainty in the bequest. But it is said an uncertainty arises so as to defeat the trust, from the use of the word "surplus." If we take the two items of the will in juxta-position, and consider them together, it seems to me to furnish the key to the testator's intention.

In the first place, says the testator, "it is my will and desire that all my just debts and funeral expenses be fully paid and discharged. Then I will and bequeath unto my dear wife Martha Pennock, the use, benefit, and profits of all my real estate during her natural life, and also all my

Digitized by Google

personal estate of every description, including ground-rents, bank stock, bonds, notes, book debts, goods and chattels, absolutely, having full confidence that she will leave the surplus to be divided, at her decease, justly, amongst my children." In other items, he bequeaths unto his four unmarried daughters the sum of $50, to be paid to each of them yearly, during the lifetime of his wife. In case, however, of the marriage of his said daughters, the allowance of such to cease. These payments to be made out of his personal estate. To what does the word *surplus* refer? It seems, to the amount of money or personal estate which remains, after the debts, funeral expenses, and legacies are paid. That is the natural signification, and best comports with the general intention. He orders his debts and funeral expenses to be paid, and, of course, out of his personal estate, and then immediately after adds, that the surplus shall be divided, at her decease, justly among his children. The division is to be made at her decease, but the sum which is to be divided is ascertained at his death, the amount of which consists of the aggregate of his personal estate, after deducting the sums required to pay debts, funeral expenses, and legacies. If, then, the testator refers to this time, or immediately after his own death, the bequest is certain, and definite; it is susceptible of easy ascertainment and mathematical demonstration. It depends on the will and caprice of no person, and consequently cannot be used as a means of defeating the trust. The maxim applies, and it could not be applied to a better purpose, id est certum, quod certum reddi potest. Without quarrelling with the cases which have been cited on this head, although I am not altogether satisfied with their soundness, it is sufficient to observe they do not apply. No intention adverse to a trust can be inferred from it, as in the case where the residue of the estate is that only which the wife chooses to leave. Here, if our deductions be true, she had no claim. She could spend the income, as he directed, for the good of her children, but the surplus, or that which remains after paying debts and funeral expenses,—the capital stock,—was beyond her control. For that, she is a trustee for the benefit of her children, the recommendations, if they may with propriety be so termed, being equipollent with an express and positive command.

In order to prevent misapprehension, I wish it to be distinctly understood that all we decide on the demurrer is, that Martha B. Pennock, the first taker, had but a life-estate in the personal property bequeathed to her by the testator, with remainder in trust for the testator's children. Whether he gave her power to make a will, and to discriminate among her children, according to her idea of justice, we do not undertake now to decide. We reserve the consideration of these points until the whole

Digitized by Google

case, on further hearing, is brought before the court. As the case now stands, we are of opinion that the Orphans' Court erred in not overruling the demurrer, and compelling the respondent to a further answer.

The decree of this court, therefore, is, that the decree of the Orphans' Court, sustaining the respondent's demurrer, be reversed; record remitted to the Orphans' Court; and procedendo awarded.

COMMONWEALTH *v.* NATHANS.

1. The guardians of the poor must make the complaint for desertion of wife and children under 6th section of the act of 1812.*
2. It should be before two magistrates.
3. And the guardians, not the Commonwealth, should be plaintiffs. Per KENNEDY, J.
4. The right to hold to bail given to one magistrate is auxiliary to the proceeding before two justices.
5. One judge holding a court of quarter sessions has no jurisdiction of cases arising under the poor laws.
6. In my opinion, two judges of the Common Pleas are required to hold a court of quarter sessions. Per KENNEDY, J. Sed vide Commonwealth *v.* Martin, post, contrà.

CERTIORARI to the Quarter Sessions of Philadelphia.

Jan. 6, 7.—On the complaint of Elizabeth Pratt, charging the defendant with desertion of his daughter, and refusal to give her reasonable support, whereby she is likely to become chargeable to the county, one alderman issued his warrant, and the defendant was held to bail to appear at the quarter sessions. The guardians of the poor presented their petition at the next term of the January Quarter Sessions, (1845,) stating the separation and desertion of his wife and two children, leaving them a charge, and praying maintenance.

It was agreed the complaint should be considered as originally entered for the desertion of the alleged wife and children.

Defendant denied the marriage.

The court ordered the maintenance, one judge only signing the order. This, with the opinion annexed, was treated as showing that one judge only heard the cause; a fact not denied; the record, otherwise, did not show how many sat.

H. M. Phillips and *O. F. Johnson*, for defendants, made five points.

---

* This section appears not to be repealed by the general act of 13th June, 1836, Purd. Dig. 875, the 45th section of which excepts special provisions. The material distinction is in allowing bail in the first instance, as auxiliary to the proceeding to be taken by one magistrate. It will be found in Purd. Dig. 679, 680, ed. 1824.

Digitized by Google

1. The proceedings should have been before two justices. Act of 1812, sect. 6, 5 Sm. Laws, 391 ; 1814, sect. 5, 6 Sm. 136 ; 29th sect. Act 1836, Purd. Dig. 875 ; and if there be defect here, or in the next point, the court had no jurisdiction.

2. It should have been by the guardians. Same acts.

3. There was no previous warrant to ascertain whether he had property. Same acts ; 1 Serg. & Rawle, 239 ; 2 Serg. & Rawle, 365 ; 4 Serg. & Rawle, 505 ; 5 Serg. & Rawle, 112, 388.

4. A proceeding for alimony and divorce was the proper remedy under the act of 1817, Purd. Dig. 294.

5. There was no court having jurisdiction, one judge alone sitting. The constitution creates the tribunal by name, (art. 5, sect. 1 ;) and though the legislature may take away any part of the jurisdiction, and vest it in another court, or create new courts, they cannot alter the organization of the court. There are, then, two questions: 1st. How is the court organized? The 7th sect., art. 5, declares it to be composed of the judges of the Common Pleas, any two of whom shall be a quorum. The 3d sect. has reference to the Common Pleas alone ; and the fact that the same judges sit in both courts is immaterial. The 2d is, In what court has the jurisdiction of the present case been vested? Is it a new court created by the legislature, or is the jurisdiction of the constitutional court merely extended to embrace it? The latter. The act of 1840, sect. 7, Pamph. Laws, 61, vested this power in the court created thereby.

By the act of 1843, Pamph. Laws, 8, that court was abolished, and by the 1st sect. this jurisdiction transferred, not to a new court, but to the court then established under the constitution. Zeppon's Case, Law Journ., June 1845, 362. Hence it follows that the order was not made by a court duly constituted. The counsel proceeded to argue the case upon the evidence below. But when the other side came to reply, the court declined hearing them, stating the evidence had properly no place on the record.

J. Murray Rush and *J. Hanna*, contrà.—1st. The exception should have been taken below ; after trial on the merits, it is too late. 2 Watts, 43. 2d. This was a mere clerical error ; the complaint was, in fact, made by the guardians, and we could have, and would now prove it ; besides, the agreement was a waiver. 3d. The warrants may issue independently ; the object being to compel a party having no property, to pay out of his earnings. Act 1771, sect. 30, 1 Sm. 345 ; 1803, sect. 30, 4 Sm. 50. 5th. The act of 1840 allowed one judge

Digitized by Google

to sit, and the same right is given by that of 1843. This point was decided in Zeppon's Case.

www.libtool.com.cn

Jan. 12. KENNEDY, J.—It is claimed by the counsel on the part of the Commonwealth, that the proceeding, in this case, was commenced and carried on under and in pursuance of the provisions contained in the act of the 31st of March, 1812, 5 Sm. Laws, 393; and particularly in the sixth section of that act. After reciting that "it sometimes happens that men separate themselves, without reasonable cause, from their wives, and desert their children; and women also desert their children, leaving them a charge on the said city, district, and township, although such persons may have estates, rights, and credits, which should contribute to the maintenance of such wives or children: It is therefore enacted, that it shall and may be *lawful for the guardians of the poor*, in the said city, district, and township, having first obtained a warrant or order from two aldermen of the said city, or from two justices of the peace of the county, residing in the said district or township where such wife or children shall be left or neglected, *to take and seize so much of the goods and chattels, rights and credits, and receive so much of the annual rents and profits of the lands and tenements of such husband, father, or mother, as such two aldermen or justices shall order and direct*, for providing for such wife, and for maintaining and bringing up such child or children, which *warrant or order being confirmed at the next Mayor's Court for the city, or Quarter Sessions for the county, it shall and may be lawful for the* said court there to make an order for the guardians of the poor to dispose of such goods and chattels, rights and credits, by sale or otherwise, or so much of them, for the purpose aforesaid, as the court shall think fit, to receive the rents and profits, or so much of them as shall be ordered by the said court, of his or her lands and tenements, for the purposes aforesaid, *and if no real or personal estate, rights and credits of such husband, father, or mother, can be found, wherewith provision may be made as aforesaid, it shall and may be lawful to and for the said court to order the payment of such sums as they shall think reasonable, for the maintenance of any wife or children so neglected*, and commit such husband, father, or mother, to the common jail, there to remain until he or she comply with the said order, *give security for the performance thereof, or be otherwise discharged by the said court;* and on complaint made to any alderman of the city of Philadelphia, or to any justice of the peace residing in the district of Southwark, or township of the Northern Liberties, of any wife or children therein being so neglected, such alderman

Digitized by Google

www.libtool.com.cn

or justice shall take security from the husband, father, or mother neglecting as aforesaid, for his or her appearance at the next Mayor's Court or Court of Quarter Sessions, *there to abide the determination of the said court*, and, for want of security, to commit such person."

The first error assigned is, that the complaint was not made by the guardians of the poor, in the city of Philadelphia, but by a certain Elizabeth Pratt, who by law had no duty or trust to perform whatever in regard to the matter. It is unquestionably made the duty of the guardians of the poor, of the city, to attend to the poor therein, and to provide relief for such as become chargeable and are unable to provide for themselves, as also to attend to those who are deserted, and left without the means of support and maintenance, by those whose duty it is, by law, to provide in this respect for them, and to compel, if practicable, a reasonable maintenance to be furnished by those whose duty it is to supply it. And for the purpose of enabling them to perform this duty, where wives are deserted, without reasonable cause, and left destitute by their husbands, or children by their fathers or mothers, who have the capacity and means of supporting and maintaining such wives and children, it is perfectly obvious that the section of the act of 1812, recited above, was passed. The guardians of the poor, having first obtained a warrant or order from two aldermen, are thereby expressly directed to act in the matter, and no others are so authorized. They are first to obtain the warrant. How are they to obtain it? Certainly by an application to the two aldermen for the purpose. It would be improper and wrong for the aldermen to grant the warrant, upon the application of any other person or persons, seeing the act does not in terms authorize it. If any other person or persons know the fact of wives or children being so left and neglected, and are desirous that relief should be administered, as it is very natural they should be, they may, and I would say, ought to inform the guardians of the poor, that they may proceed to inquire and act in the case, if requisite. But it is said, that it is only where the application is directed to be made to two aldermen for a warrant or order, that the section requires that the complaint shall be made by the guardians of the poor of the city; and not where a single alderman is applied to, under the last part of the section, to take security from the husband, father, or mother, neglecting his wife, or his, or her children, as aforesaid, for his or her appearance at the next mayor's court, or court of quarter sessions, there to abide the determination of the said court, and, for want of security, to commit such persons. It is true, that this part of the section does not *expressly* say on whose complaint the alderman shall

Digitized by Google

act in such case, but it is abundantly clear, that it is auxiliary to the proceeding authorized by the first part of the section, and that the complaint must therefore be made by the same persons, the guardians of the poor of the city. And I am further of opinion, that security, under the last part of the section, ought only to be demanded by the guardians of the poor, or taken by a single alderman of the city, of the husband, &c., for his appearance at the next court, &c., where a warrant or order has been issued under the prior part of the section, by two aldermen, for seizing his personal, and the rents and profits of his real estate, and no, or sufficient, real or personal estate cannot be found; for it would seem, that it is only when such real or personal estate cannot be found, that it is made lawful for the court to order the payment of such sums as they shall think reasonable for the maintenance of any wife or children so neglected, and to commit such husband, &c., to the common jail, there to remain until he, &c., comply with the said order, give security for the performance thereof, or be otherwise discharged by the said court. Indeed, it is repugnant to the genius and spirit of our laws, that a man's body should be taken and held in confinement, for the non-payment of money, without its appearing that sufficient property belonging to him cannot be found, out of which to make it. Besides, I would say, that the guardians of the poor, &c., ought to be named as the plaintiffs or complainants in every such case as the present, and not the Commonwealth, as here. In the Overseers of the Poor *v.* Smith, 2 Serg. & Rawle, 363, it was held unnecessary that there should be a binding over of the husband to answer to the complaint of the overseers of the poor; and it may fairly be inferred, from what Chief Justice Tilghman says, that it ought not to be done without cause being first shown for it. So a recognisance, entered into by the husband on the application of the wife *alone*, and complaint that he had deserted her, was held bad. Com. *v.* Hill, (mayor's court,) 2 Bro. 212.

After what has been said, it is unnecessary to notice the second error further, which is, that "the complaint ought to have been made before two magistrates."

The third error is, that the proceedings were before one judge only, who, according to the provisions of the constitution of the state, could not hold a court of quarter sessions; and that the matter was only cognisable in the court of quarter sessions of the city and county of Philadelphia. The seventh section of the fifth article of the constitution is here alluded to; which declares that, "The judges of the court of Common Pleas of each county, any two of whom shall be a quorum,

Digitized by Google

shall compose the court of quarter sessions, of the peace, and Orphans' Court thereof." But it is said, this was only to be so "until otherwise directed by law," according to the first clause of the third section of the same article: and that the same has been altered by the seventh section of an act passed the 25th of February, 1840, Pamph. L. 62, 63. A new court for the trial of crimes and misdemeanors committed in the city and county of Philadelphia was established by this act, called by the name of "The Court of General Sessions for the City and County of Philadelphia." The seventh section enacts that "any one of the judges of the court thereby created, shall have power and authority to hold the said court for the trial of all indictments, (excepting as aforesaid in cases of homicide, when as aforesaid there shall be two of the said judges;) and also for the passing of sentences, and for the adjudication of cases of breaches of the peace, master and apprentice, and *such as may arise under the poor laws;*" and although this court, thus created, was abolished by an act of the 3d of February, 1843, yet the first section of this latter act vested all the powers, jurisdiction, and authority, given to it, in the court of oyer and terminer, general jail delivery, and court of quarter sessions of the peace, in and for the city and county of Philadelphia. And further, by the fourth section thereof it is enacted, that "any one of the judges of said court (the last-mentioned court) shall have full power and authority to hold said court for the trial of all indictments, except in cases of homicide, when there shall be two of the said judges, and also for the passing of sentences, and for the adjudication of cases of breaches of the peace, master and apprentice, for the punishment of all contempts, and to make such orders or decrees, and render all such judgments as he shall consider legal and equitable in such cases as he has jurisdiction." It is contended, that these last words, "in such cases as he has jurisdiction," gave to the judge, by whom this case was decided below, full power and authority to determine it. This would certainly be straining their meaning beyond what must be considered the intention of the legislature. For if the legislature had intended to include cases *arising under the poor laws*, why should they have omitted to transcribe the words they used for that purpose in the act of 1840, after transcribing the several provisions immediately preceding? The only rational answer that can be given is, that they did not intend that cases arising *under the poor laws* should be adjudicated by a single judge, holding a court of quarter sessions of the peace; especially as I must say for myself, that in my humble opinion, the constitution requires that two of the judges, at least, of the Common Pleas, shall be necessary to

Digitized by Google

constitute and hold such court. But we are all satisfied that the learned judge before whom the case was tried had no power or authority, under any act of Assembly in force, to do so; and that the judgment and proceeding must be quashed on this ground, even if there were no other: though I must say that other errors seem to be presented by the record, but seeing they are not assigned for error, it is unnecessary to notice them.

www.libtool.com.cn

The remaining errors assigned, are either such as go to the merits of the case, or such as are dehors the record, and, therefore, cannot be inquired into on a writ of certiorari.

The judgment and proceedings of the court below are quashed.

---

2 144
171 376
2 144
28 SC 236

HEMPHILL *v.* FLYNN.

A landlord may, at his election, treat a tenant holding over, after a term, as tenant from year to year, or as a trespasser.

ERROR to the District Court of the city and county of Philadelphia.

Jan. 8th.—Use and occupation. A store was originally let by the year to L. & Co. On the 4th May, 1842, plaintiff agreed to permit defendant to occupy for the unexpired term of L. & Co.'s lease, with their assent, say up to the 1st Dec. 1842, for $500, payable 1st Sept. and Dec. On the 1st March, 1843, defendant, having quit possession, paid one quarter's rent, and then tendered the key, which, after refusal, was accepted, subject to plaintiff's right to bring the action: or without prejudice to the rights of either party, according to one witness. This action was to recover for the residue of the year 1843.

Stroud, J., charged, that the holding over being after a lease for a definite period, the landlord could recover only for the actual occupation.

The case was argued, Dec. 9th, 10th, and again on this day, by

C. Ingersoll, for plaintiff.—The receipt of the key was immaterial, under the circumstances. Marseilles *v.* Kerr, 6 Whart. 500. This action lies as well where there has been an actual occupancy, as where the tenant might have occupied. 2 Whart. Dig. *Land. & Tenant*, 211, 212. If the cases do not establish a tenancy from year to year, from the mere holding over and an election of the landlord, yet at least the

Digitized by Google

jury may infer such a contract from these acts. Boggs *v.* Black, 1 Bin. 336; Bedford *v.* McElherron, 2 Serg. & Rawle, 49; Fauhenstock *v.* Fauhenstock, 5 Serg. & Rawle, 58; Grant *v.* Gill, 2 Whart. 45; Logan *v.* Herron, 8 Serg. & Rawle, 461, 468—470, 473—475. The only act of election by the landlord could be acceptance of the rent, which was done, and as for one quarter.

T. S. Smith, contrà.—The naked question is, what is the tenure? for the original was, at all events, definite. It is at sufferance: and this very case is put, as an instance of such title, by Blackstone and Coke. Being liable as a trespasser, (Boggs *v.* Black,) he is entitled to the rights, and may cease trespassing by going off at pleasure.

Jan. 21. SERGEANT, J.—The charge of the court below was, that as the lease to the defendant was originally for a definite period, until the expiration of the term of J. S. Lewis & Co., say 1st December, 1842, the plaintiff could only recover for one quarter. The fact that the lease to the defendant was only for a definite period, does not determine whether he might not become tenant for the ensuing year, under the circumstances that occurred. The decisions are, that where the lease is for a definite period, and the tenant holds over, the landlord may treat him as a tenant by sufferance, and turn him out without three months' notice, previous to the end of the period. But it is a different question, whether, in case the tenant holds over, in such case, the landlord has not the option to treat him as tenant for another year, under the same terms as the former lease, so far as applicable. There seems to be both reason and authority to show that he may. The tenant knows the time when his lease will determine; it is his duty to move out by that time, and surrender the premises to the landlord: and if he does not, it seems reasonable to consider his conduct as evidence of his assent to continue tenant for another year, which is the time the law ordinarily implies. If he do not remove, the landlord may be materially injured. He is prevented from providing another tenant, and is left at the mercy of one who stays or goes as it suits him. It is but just, therefore, if the landlord should be at liberty to take him at his offer, and consider his remaining as an assent on his part to continue, and that such an agreement is implied by the law in that case. The nature of so important a relation ought not to be left to the caprice of one party, to retain the possession of another man's estate, or leave it, without his consent. In Dillon *v.* Roberts, 13 Serg. & Rawle, 63, Tilghman, C. J., says, it was contended for the

Digitized by Google

www.libtool.com.cn

defendant, that on the plaintiffs holding over, after the first year, the law implied an agreement, that he should pay the same rent, and at the same time, which he had agreed to pay in the first year. Such, undoubtedly, is the general rule: but the covenants did not extend to the second year, being to be performed in the first year only. So in Phillips *v.* Monges, 4 Whart. 229, it is said, by Rogers, J., that when a landlord suffers the tenant to remain in possession after the expiration of the tenancy, and receives rent from him, a new tenancy from year to year is established: and if no new agreement is entered into, the law will presume a new agreement is entered into, in the silence of the parties; that the tenant holds the premises subject to all such covenants contained in the original lease as apply to his present situation. In the case before us, the tenant held over for a quarter, paid a quarter's rent, and then insisted he was bound no longer. The landlord contends that the defendant thereby became tenant for the ensuing year, if he choose so to consider him, and to assent. In this we think the landlord is right.

Judgment reversed, and venire facias de novo awarded.

WEINER *v.* FARNUM.

1. The Bankrupt Act has no operation on an assignment for the benefit of creditors, valid by the previous law of this state, until the 1st February, 1842. The words, "future conveyances," contained therein, mean those made after the act went into operation.
2. Cornwell's Appeal, 7 Watts & Serg. 305; Anon., 1 Law Journ. 326; Hutchins *v.* Taylor, 5 Law Rep. 289, contrà, overruled.

Jan. 9, 12, 13.—ELLIOTT, a trader, on the 23d Sept., 1841, made an assignment to defendant, reciting his inability to pay his debts, for his creditors generally, "without any preference or priority," with a proviso, that no creditor should be entitled thereunder, who did not release, at a day certain; seven-eighths in value released. In February following, he was discharged as an insolvent, and plaintiff appointed his trustee. This action was to recover moneys of the estate, passing under the assignment; in March, he filed his petition; in May, he was decreed a bankrupt, and in September he was discharged.

Stroud, J., charged, 1st, This was not such preference as avoided

Digitized by Google

www.libtool.com.cn

the assignment under the bankrupt law. 2d. Even if it was, the act of Congress had no operation upon it until 1st February, 1842, at which time the 17th section declared it should go into operation.

P. P. Morris and *Tyson*, for plaintiff, made three points.—1. The act of Congress (Bankruptcy) avoids conveyances, which are a fraud thereon from the date of its passage, and not from the date it is to go into operation. Acts speak from their date, and are laws from that time, Dwarris, 683; Constitution U. S., art. 1, sect. 7, p. 2. By the 2d sect. *future conveyances for the purpose of giving a priority* are avoided. The provisions of the 4th sect., as to those guilty of wilful fraud, and not keeping books, must include such acts between the date and operation of the act in other particulars. The word *future* is special, and excludes the 17th sect. as to this point. This view is sustained in Anon., 1 Law Jour. 326; Hutchins *v.* Taylor, 5 Law Rep. 289—293. Cornwell's Appeal, 7 Watts & Serg. 310.

2. This assignment is a fraud upon the law, or, being prohibited, is avoided by it. In *contemplation of bankruptcy*, in the 2d sect., means of a *state* of bankruptcy. This state appears in the deed—he knew it would render him liable to such proceedings under the 1st sect. at election of creditors, and it is a question for the court; Breneman's Case, 1 Law Jour. 187; Arnold *v.* Bernard, 5 Law Rep. 299. Being forbidden, it is void, McKay *v.* Cairns, 5 Cow. 548; McClurg *v.* Leckey, 5 Penna. 83; Hyssolp *v.* Clark, 14 Johns. 462. It gives a preference. That some creditors are to be paid, and others not, is plain. Is no advantage given? Thomas *v.* Jenks, 5 Rawle, 224, Lippincott *v.* Barker, 2 Binn. 174, assume such a provision to be a preference, and it is so decided in Cantillon *v.* Moffit, 1 Edwards, C. R. 451; Aspinwall's Case, 3 Penna. Law Jour. 212; Pearson *v.* Croswell, 6 Law Rep. 411. It is not within the provisoes, for none can be bonâ fide which are apparently a fraud on the act, and it gives notice.

3. It was conceded the plaintiff could take advantage of the defect if the deed was a fraud, under the act.

Meredith and *Randal*, for defendants.—The deed is conceded to be valid by the law of Pennsylvania, unless for the bankrupt act; was it made when that was in force? [*Kennedy*, J.—The point was not argued in Cornwell's Appeal.] Can the act avoid a deed unless it be contrary thereto; and can this be, unless the act be in force?

The deed puts the creditors on the same footing as the bankrupt law, and this has been held good, Schuylkill Navigation Company's Appeal,

Digitized by Google

Supreme Court, April 23, 1844.(a) But if inconsistent, the condition, being subsequent, is void, and the property passes. 2 Bla. Com. 381; Hard. 94; 1 Bac. Abr. tit. *Cond.* K. L. M; 1 T. R. 645; 5 Bos. & Pull. 233–40; Co. Lit. 206 b. [Per *Gibson*, C. J. It depends on the intent of the act avoiding such conveyances.]

The word "future," in the second section of the Bankrupt Act, means future, to the 1st February, 1842, and not to the 19th August, 1841: because,

1. The seventeenth section provides expressly, that "the act shall take effect from and after the 1st February, 1842," i. e. the *whole* act. An act speaks from the time at which it takes effect.

2. If this act speaks from the time of its passing, then the second section was in force on the 20th August, 1841, but the 1st section and all the other sections were equally in force; for they are all in the future time:—"all future payments" means no more than "all payments which shall be made." The result, therefore, of the principle advanced on the other side, is to strike out the seventeenth section altogether.

3. The act (see sect. 1) purports to establish a uniform *system* of bankruptcy, "as follows:" This intention would be wholly violated, by giving effect to one section, before the rest of the act took effect.

4. Congress has no right to make enactments, such as those in the 2d section, *except* as part of a uniform system of *bankruptcy;* if therefore the second section were intended to take effect before the rest of the act, it would be unconstitutional and void. United States *v.* Fisher, 2 Cranch, 358; United States *v.* Koons, 12 Peters, 75; Blougher *v.* Brewer, 14 Peters, 178; Judd *v.* Jones, 4 Metc. 401.

5. Every part of the act in which time is specially referred to, takes effect after 1st February, 1842.

(a) Schuylkill Navigation Company's Appeal, 1844.

The reporter has been enabled to obtain the case from a copy of the record; there was no opinion delivered.

Freedly & Wood, traders, in June, 1842, were insolvent, but able to pay their individual creditors out of their private estates. On that day a petition for decree of bankruptcy, *in invitum*, was presented, but discontinued on the 15th.

On the 28th, by deed, reciting the proceedings, and intent to deliver their property, to be distributed according to the Bankrupt Law, they conveyed to Ludwig all their property in trust, to sell and pay the proceeds of the private property to the individual debts, and the balance, and the proceeds of the joint property to the joint debts, agreeably to the 14th section of the Bankrupt Law. *Provided no creditor was to be entitled who did not claim within three months, and covenant to release, on receiving his share of the estate,* to the end it might have the same effect as if they were certified bankrupts.

A claim was made against the private estate of one partner, which was solvent, and it was argued a release was immaterial, as, at all events, his private debts were to be paid, and the release required was in contravention of the Bankrupt Law. The Court—Burnside, President—held they were entitled to a release, as stipulated for, and it was not in contravention of the act, and so decreed, which was affirmed.

Tilghman and *Sergeant*, for appellants. *Mallory*, for appellee.

Digitized by Google

www.libtool.com.cn

The proviso in the second section, in regard to transfers, "made after the 1st day of January last, or at any other time," establishes a *condition* of *discharge* merely: so do the provisions in the fourth section, relating to the keeping of regular books, and the applying of trust moneys, "after the passing of this act."

6. The second section prohibits payments, &c., by any *bankrupt*, not by any *person:* and in contemplation of *bankruptcy*. There could be no *bankrupt* or *bankruptcy*, till the whole act was in operation: both of these words are *defined* in the seventeenth section. "Bankrupt" and "bankruptcy," in an act to establish a uniform system of *bankruptcy*, must necessarily be taken in their legal statutory sense: and not in any other. Morgan *v.* Brundrett, 5 Barn. & Ald. 289, Pidgeon *v.* Sharpe, 5 Taunt. 539.

7. By the first proviso of the second section, all dealings and transactions made bonâ fide by and with a bankrupt, without notice, &c., are good, unless a petition be filed within two months afterwards. So that if that section took effect on the 19th August, 1841, the creditors would be bound by this statute of limitations, long before the law allowing them to file a petition with effect.

8. Our construction agrees with that which was put upon the bankrupt act of 1800. That *began* with, "from and after the 1st day of June next;" *this ends* with, "shall take effect, from and after the 1st February, 1842."

9. The *object* and *intention* of fixing a certain subsequent day, on which an act shall take effect, is to avoid the *injustice* of subjecting parties to a rule of action, of which they must necessarily be in ignorance.

It is more necessary to give men notice of new provisions, avoiding certain deeds and conveyances as fraudulent, than it is to give them notice that after a certain day they may be discharged from payment of their debts.

It would be *unjust* to enact that deeds, good by every *known* law, should be void by a new statute, of which the party could have no notice. No doubt it was to avoid *this* injustice, that Congress named a *future* day at which the law should take effect. *This* provision is in the second section.

10. The effect and consequence of our construction is simply this, viz: that the laws of the states remain in force, *until* the Bankrupt Law takes effect. This is reasonable: any thing else would be not only *unreasonable*, but *unconstitutional*.

Jan. 29. KENNEDY, J., after stating the case.—In regard to the point raised by the first error assigned, we are not fully prepared, at

Digitized by Google

this moment, to express an opinion on it; nor is it necessary, to the final determination of this case, that we should, as we have come to the conclusion that the court was right in its instruction given to the jury on the point involved in the second error assigned. This, of itself, negatives all right, on the part of the plaintiff, to claim or have the money in dispute, and necessarily goes to determine the case in favour of the defendant.

It is true, that this court, in Cornwell's Appeal, 7 Watts & Serg. 305, did decide, that the word *future*, in the commencement of the second section of the Bankrupt Act, applied to the date of the passage of the act, and embraced all conveyances therein mentioned, made subsequently to that date. That case, however, was not argued on behalf of the voluntary assignee, or, if it was, it was but imperfectly done; and it may be, that we were advised, before pronouncing our decree in the case, of the decisions made previously by Mr. Justice Baldwin and Mr. Justice Story, who each held that the word *future* referred to the date of the passage of the act, and embraced all conveyances of the description there mentioned, made subsequently to that date. See 1 Penna. Law Journal, 326—328, and 5 Law Reporter, 289, 293. And if it be, that we were so apprized of these decisions, as I am rather inclined to believe that we were, it will not be thought, I presume, that, coming from judges so highly distinguished for their law learning and talents as they were, we should have decided as we did, without the benefit of an argument to awaken and call our attention to the particular consideration of the question. It is certainly true, that every act of Congress speaks from the date of its passage, and will operate as a law from that time, where there is no provision or declaration to the contrary contained in it. But it is equally true, if it be expressly provided or declared that it shall not take effect until after a future day, that it can have no effect or operation whatever until after that day has arrived and gone by. It would seem as if the minds of Mr. Justice Baldwin and Mr. Justice Story, in regard to this act, had been carried away with the idea that the general provisions of the act, as also the primary object of it, were to prevent debtors, as early as possible, from giving a preference or priority to some of their creditors over others, and that in this respect the main design of the legislature would, or at least might, be defeated in a great degree, unless the word *future* were to be held to apply to the date of the passage of the act. But upon full and deliberate consideration, confining ourselves to the terms and language of the act throughout, it does appear that it would be carrying the operation of it beyond what could have been intended, otherwise dif-

Digitized by Google

ferent language would have been used. It is argued that the act, in some of its provisions, is made expressly to take effect from its passage, and in regard to some matters even prior to that date, so that the seventeenth section could not have been intended to limit and control the operation of the whole of the act. The parts which have been referred to in support of this argument are contained in the second and fourth sections. In the second section, where it is declared, that the bankrupt, his application being voluntary, has, subsequently to the first day of January then last, or at any other time in contemplation of the passage of a bankrupt law, by assignment or otherwise, given any preference to one creditor over another, he shall not receive a discharge, unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred.

But it is a mistake to say that this clause of the act, though retrospective, was to have any effect or operation whatever, before the first of February following the passage of the act, when it was to be regarded by the court as excluding those voluntary bankrupts, there described, from a discharge, unless assented to by a majority in interest of the non-preferred creditors. It is, at most, only a condition or qualification annexed to the right on the part of such voluntary bankrupt, to obtain his discharge under the act. Had Congress intended to confine the word *future* to the date of passing the act, why should they not have declared "that all payments, securities, &c., made or given *after the passing of this act*, by any bankrupt in contemplation of bankrupty," &c., as they have done in the fourth section, where it is declared, that no person, being a merchant, banker, &c., shall be entitled to any such discharge or certificate, who shall become a bankrupt, and who shall not have kept proper books of account, *after the passing of this act:* nor any person who, *after the passing of this act*, shall apply trust funds to his own use. These two latter clauses show very clearly, that Congress, when they intended to confine any particular provision to the date of passing the act, did so in express terms, and were not content with using the word *future*, or with speaking simply in the *future* tense, which, perhaps, is little different from, if any thing more or less than the word *future* in meaning. These latter clauses in the fourth section, like the clause noticed in the second section, do not go to annul or render any act of the party illegal, that should be done before the first of February then next following the passing of the act, but merely go to exclude him from obtaining a certificate of discharge, a privilege that otherwise he would or might have been entitled to. That Congress had the power to discriminate and exclude in this respect, as they did, cannot be questioned; and I

Digitized by Google

www.lsjtool.com.cn

am rather disposed to think that no one had just cause to complain on account of their having done so, for it was the duty of those persons mentioned in the first of these two clauses, to keep proper books of account, independent of the act; and that such a person as is mentioned in the second of these two latter clauses, who has the charge of trust funds, ought not to apply them to his own use, all, I think, will admit; so that they may be said to have excluded themselves from the benefit of a discharge under the act, because they had acted improperly, and failed to perform duties resting upon them independent of the bankrupt law. Congress, doubtless, intended to introduce into the Union a general system of bankruptcy, and was also desirous that it should be known generally throughout the same, before that it should come into operation; and therefore allowed upwards of five months for that purpose, after the passing of the law; intending to leave the citizens of the several states and territories of the United States, to regulate their dealings and intercourse with each other agreeably to the laws of the states and territories respectively, of which they were resident, in the same manner as they had done previously. But to give *immediate* operation to certain parts of the act, and some of the more material and important too, by mere construction, without being necessarily required by the terms thereof, would seem to be in direct contravention of this view, which, we think, was the one taken by Congress, as also a violation of the seventeenth section, which enacts, in the most explicit terms, such as cannot possibly be mistaken, "that the act shall take effect from and after the first day of February, then next." This view of the question accords with that taken of it by other judges of the United States courts, who have decided the same question in direct opposition to the decisions made thereof by Mr. Justice Baldwin and Mr. Justice Story. In the matter of Chadwick and Lesvitt, 5 Law Rep., Judge Irwin, of the District Court of the United States for the western district of Pennsylvania, held, that the word "future," in the second section of the bankrupt act, must be taken to mean future, in reference to the first day of February, 1842, the day from and after which the act was to take effect, by the express terms of the seventeenth section; and that an assignment made by debtors subsequent to the passage of the act, but before the first of February, 1842, of all their property, in trust for certain preferred creditors, was valid, and did not prevent their being entitled to a discharge and certificate, under the act, upon their voluntary petition. Also in the matter of Eli Horton, 5 Law Rep. 462, in the Circuit Court of the United States of Connecticut, composed of Mr. Justice Thompson, late one of the judges of the Supreme Court of the United

Digitized by Google

States, and certainly not among the least of them, and Mr. Justice Judson, judge of the District Court of the United States for Connecticut, it was adjudged that the bankrupt law did not go into operation until after the first day of February, 1842, that it could have *no influence upon, or control over, any party or transaction before that time*, and, consequently, that an assignment made in Connecticut, after the passage of the law, but before the first day of February, 1842, under the state insolvent law in being at the time, created a lien upon the property in the hands of the trustee under the assignment, which could not be affected by the bankrupt law. It would seem, too, that the decision of the late Mr. Justice Story, in the case of Hutchins *v.* Taylor et al.; 5 Law Rep. 289, in the Circuit Court of the United States in Rhode Island, determining that the word "future," in the first clause of the second section of the law, was future *with reference to the passage of the law*, did not pass without criticism: First, because inconsistent, as it was conceived, with the express provision of the act, as contained in the seventeenth section. Secondly, because the circumstances under which the act was passed and postponed in its operation, required that the word "future" should be construed as having reference to the first day of February, 1842. Thirdly, because the act makes no exceptions as to the parts of it which shall and which shall not take effect immediately. And fourthly, because the spirit of a constitutional provision was violated by the construction of Mr. Justice Story. See 5 Law Rep. 424.

The judgment of the court below is, therefore, affirmed.

SMITH *v.* CRAIG.

Where an objection to a witness is taken at nisi prius, and a reason assigned, none other can be noticed on a writ of error, the facts of the case being known to the parties.

ERROR to the District Court of the city and county of Philadelphia.

Jan. 13, 14, 15.—Andrew Craig brought replevin for three hundred and fifty hogsheads of molasses and twenty-five hogsheads of rum, of the value of $9000. The pleas were non cepit, and property in defendant.

On the trial before Pettit, president, plaintiff produced H. Craig, who on his voir dire stated, that his firm had sold the property to plaintiff, which they had previously purchased from Smith, in payment for which certain notes were to be returned to Smith, which notes were endorsed by the firm

Digitized by Google

www.libtool.com.cn

to plaintiff. A deed was then read, dated January 9, 1840, assigning a debt due by Smith to witnesses' firm of $9099 63, and the notes for the same and all other securities, together with the rum and molasses. Also a release by plaintiff, dated May 11, 1840, to said firm, of all causes of action by reason of any affirmation or warranty, &c., arising out of said sale, and all defences to any action for the price. Also a general release, January 11, 1844, to the same parties. Defendant objected to the witness as incompetent, from liability on the endorsement of his firm, which was overruled and exception taken. The sale by Smith was in payment of a debt on condition of the delivery of Smith's notes. To enable witness to do this, he sold to his brother, the plaintiff, who took up Smith's notes, and made a tender and demand next day after the alleged sale, which being refused, this suit was commenced. The two partners of this witness were subsequently examined without objection. As the rest of the case is not noticed by this court, it is omitted here.

The only point argued here, which this court decided, was, whether the witness was competent, in which was considered the exception; and whether other reasons than those assigned below could be assigned here.

This case was argued at a former term, and now re-argued by *F. W. Hubbell*, for plaintiff.—On the incompetency of the witness premising the other evidence showed a transaction entirely different in its nature, and this witness, alone relied on to make out the essential facts in the cause, was the real party in interest—the machinery to convert him into a witness being the sale and releases. It is a question of judicial policy whether such an arrangement will be permitted. The late cases have removed the line separating us from the rest of the world, established in Steel *v.* Phenix; and the reasoning and language in these cases, Post *v.* Avery, 5 Watts & Serg., &c., is almost the same as in Bell *v.* Smith, 1 Dow. & Ry. 846—854, where a partner was not allowed to be witness in a suit on a policy in the name of the broker, the firm being the parties in interest, though he had released his interest. The succession of assignments, relied on there, appears here, and that case settles the policy of law, and extends far beyond parties to the record.

The doctrine of Steel *v.* Phenix, 3 Bin. 306, had been recognised in many cases, the courts saying the reasoning could not be refuted, though it failed to convince. But in all these there were corroborative circumstances; when a case occurred, so glaring that the court in Post *v.* Avery vindicated the rule of common sense, followed by Lieper *v.* Pierce, 6 Watts & Serg., and Patterson *v.* Reed, 6 Watts & Serg. 144,

Digitized by Google

www.libtool.com.cn

and established that an assignment, to make a witness out of a party in interest, could not avail. Such was the case here, for would the plaintiff have purchased a lawsuit without discount for any other purpose? Is he subject to the imputation of champerty, is the true ground of the rule, and that exists at common law. Thurston *v.* Percival, 1 Pick. 416; Key *v.* Vatere, 1 Hammond, 132. Smith having denied the bargain, it became a mere chose, and incapable of sale. He then proceeded to argue the witness was unsustained by other testimony. Though the ground of exception be incorrectly stated, it is immaterial, as the point taken was interest, though it appears in a different way from that taken.

Cadwalader, contrà.—The question as to a witness is two-fold; is he a party to the record, if not, is he interested. If released, one not on the record may always sustain his own title. The cases of vendor with warranty released, or with special warranty, are uniformly recognised.

It does not depend on the time suit is brought, for the reality of the transfer is essential to the action, and for the jury; the very point in issue. The distinction is between assignments of corporeal and incorporeal substances; in the latter being a mere chose in action, suit must be brought in assignor's name. The cases show, though the line must be very narrow, this is the line; and no one who at the time suit was brought was a part-owner of the substance, or on the record, can be a witness. Bell *v.* Smith, cited for plaintiff, to be found in 5 B. & C. 188; Gallagher *v.* Mulligan, 3 Penna. 178, support the first. But a party to the record stands alone on policy, without regard to interest, with few exceptions. Loffi's Gilbert, 243; Freer *v.* Evertson, 20 Johns. 143; Levy *v.* Burley, 2 Sum. 361, and in Hoke *v.* Head, 5 Watts, 81, 82, the common law is referred to as the rule. Scott *v.* Lloyd, 12 Pet. 145—149; Stein *v.* Bowman, 13 Pet. 219. Equitable owners are considered in the light of parties, 16 E. 143; De Bolie *v.* Insurance Company, 4 Whart. 74, which explains Bell *v.* Smith, for such a policy cannot be sued on without averment of interest in the party offered. McKinley *v.* Macgregor, 3 Whart. 199, which is restrained in Orphans' Court *v.* Woodburn, 7 Watts & Serg. 162, not to include one who had intermediately acquired and lost his interest. But one parting with his interest and not being liable for costs is always admitted. Lily *v.* Kitzmeller, 1 Yeates, 30; Brown *v.* Insurance Company, 4 Yeates, 192; Caskey *v.* Gibson, at N. P. before Burnside, J., which was a case of a bankrupt. Stacy *v.* Franklin, at N. P., Sergeant, J., case of a corporator; also Smith *v.* Bank, 5 Serg. & Rawle, 319; Bank *v.* Green, 3 Watts, 374. So an alienor for the purpose of giving jurisdiction, where the court had to pass on the fact of conveyance, it being in equity.

Digitized by Google

1 Pet. 623—625; Smith *v.* Rutherford, 2 Serg. & Rawle, 358; Cleavinger *v.* Reiner, 3 Watts & Serg. 486—490; Drexel *v.* Man, 6 Watts & Serg. 343; Miller *v.* Fitch, 7 Watts & Serg. 366, which are contemporaneous with Post *v.* Avery. Copeland *v.* Bosquet, 4 Watts C. C. Rep. 485. Can a legatee never be a witness? The true test in such cases is a willingness to give a release.

Is the exception before the court? That the party must be tied to the grounds of exception at nisi prius, was settled as early as Shower, P. C. It was ruled in Wolverton *v.* Commonwealth, 7 Serg. & Rawle, 276, 277; Drexel *v.* Man, 6 Watts & Serg. 343. Does not the record show a waiver? two witnesses in the same situation having been examined without objection. Had further objection been taken, we would have brought evidence to corroborate.

There is no exception to the charge; a party must, if required, specify or waive. 4 Pet. 80, 81; 15 Pet. 406. The court will not modify the points. Elliot *v.* Pearsol, 1 Pet. 338; Wolverton *v.* Commonwealth, antè. For form of bill, see 2 H. B. 288; 1 Scott N. R. 500. Also the reasoning in Drexel *v.* Man, 6 Watts & Serg. 336, of Stroud, J., in his return to mandamus. The cases last cited for plaintiffs were either error apparent on the record, or where the judge chose to allow the exception generally. On the 21st, the following references to bills of exceptions were given: Murray *v.* Leech, Bull. N. P. 312, 313, 318, 319. Allegations of counsel to show a party not within certain statutes. 4 Bin. 729—734. Reason for objecting to a witness. Plaintain *v.* Williams, 2 Adol. & Ell. 187, 188. When the objection is specific, the court will not look to any other. Hinds *v.* Hollingsworth, 11 Wheat. 200, 201; Taylor *v.* United States, S. C. United States, Dec. 1844, S. P.

March, 5. Per Curiam.—As the cause has been compromised since it was spoken to, we express no opinion on any thing but the competency of the defendant below, to assign error in the reception of evidence on a ground different from that specified in the bill of exceptions; and we express our opinion on that, only to reassert the principle of Wolverton *v.* The Commonwealth, which, did it need any other authority than a solemn decision of this court, would be fully sustained by the precedents, both English and American, produced since the argument. We would not, therefore, have reversed the judgment, merely because Craig and Bellas were clearly incompetent, from having assigned their interest to the parties on the record, the specific ground of exception taken below being their supposed interest as endorsers. On no other ground could they have been supposed, at

Digitized by Google

the time of the trial, to be incompetent; for the principle of Steele *v.* The Phenix Insurance Company had not then, as it has since, been exploded. Nor could the counsel predict what was to come, else the exception would doubtless have been shaped to meet the event. The exceptions to the charge are possibly not free from difficulty; but as the cause is at an end, we do not give judgment for either party.

SARKIE'S APPEAL.

2 157
189 636

1. Where A., who was a foreigner and a male representative of the decedent, and had mortgaged his share, after residing here some years, absented himself for nine months, the court granted letters testamentary to an inhabitant, at the instance of the attorney of a sister of decedent, appointed to collect her share, and of the mortgagee, and this refused to interfere on behalf of A. on his return.
2. Residence and title to a share in the estate are material qualities for an administrator, and want of these will authorize the register, in his discretion, to appoint the nominee of one otherwise having less title to the office, under the act of Assembly.

APPEAL from the Register's Court of Philadelphia county.

Jan. 15, 16.—On the 24th February, 1844, appellant filed a petition, stating that in 1833, his younger brother Catchick died in Calcutta, and letters of administration there and in London were then granted to appellant, who also administered in Copenhagen. In 1837, he came to Philadelphia to administer on the estate here, and to attend to his own family's interest, under the will of his grandfather, under which his brother derived his estate. As that estate was not ready for his distribution, there being no other assets, he proposed delaying to take out letters of administration until he could receive the funds. That petitioner was entitled to the administration: his brother dying without issue or widow, and leaving a mother and two brothers, one residing in Calcutta. In 1842, he was unexpectedly called to London, and his intended stay of a few weeks prolonged to thirteen months, until October, 1843. That in March preceding, letters of administration on Catchick's estate were granted to Joseph Cabot, without any necessity, there not yet being any funds to be reached, said Cabot being neither relative, creditor, nor recommended by any such; petitioner not having refused nor being incompetent, and no notice having been given to himself or counsel known as such, and residing here. There were no debts. He prayed a revocation and new letters to himself.

The respondent stated he knew nothing of petitioner's intention in coming here, or delay in administering, but when he took out letters, understood he had gone to England, intending to return home to Cal-

Digitized by Google

cutta, and that no relative of Catchick lived in the United States. He was informed his share was waiting for distribution by the administrator of his grandfather; the accounts were before auditors; that petitioner abandoned his attendance and refused to inform them who the relatives were; that he knew not where to notify him, or of his being represented by any counsel; that he acted at the instance of the attorney of a sister of Catchick, by whom he has since been recognised and directed as to appropriation of the money, and also by one holding the share of petitioner in pledge, until which is redeemed he is informed petitioner has no interest. That those represented here have no confidence in petitioner, but apprehend waste if delivered to him, he having forfeited their confidence.

Petitioner proved his absence was unexpectedly continued as stated; his administration in Calcutta; powers of attorney to himself and the administrator of his grandfather by various members of his family interested in the said estate; also, of Catchick to the same, to claim his share. That no account had been filed by Cabot. No debts appeared, and no notice was given; and also the power of attorney by the sister, under which Cabot claimed to act, to Richard and Samuel Oakford, to collect her estate, and that said Oakfords requested said Cabot to act. The appellee proved the deed of mortgage by appellant, part of which appeared to be paid; it recited that no part of appellant's share had been received by him, whereas, in fact, $15,000 had been. (It is proper here to state this pledge was stated by counsel to have since been redeemed; the deed was produced, and a motion was made to let it in as further proof, and that it had been executed without perusal by appellant.) The attorney of the mortgagee and of the brother objected to the revocation. It seemed there were three sisters, a mother and two brothers, in the family. The court dismissed the petition.

C. Ingersoll, for appellant.—The next of kin is deprived, and one not entitled is let in; and the allegations in the answer, to take him out of the act of Assembly, have not been proved. As to the mortgage, it is immaterial; the mortgagee was not connected with the estate. His absence at the time is unimportant; it was temporary, and he had long lived here for that purpose, particularly as the letters were then unnecessary. But he was entitled to notice, Goddard *v.* Cressdale, 3 Phil. 637; for his not being a subject does not affect our rule. Toller, 104, Ellmaker's estate, 4 Watts, 34; Caroon's case, Cro. Chas. 9; Act 1832, sect. 27, Purd. Dig. 716; even an alien enemy may administer, Brookes *v.* Philips, Cro. Eliz. 684; Tol. 34. It should have been durante ab-

Digitized by Google

sentia, if at all; Willing *v.* Perot, 5 Rawle, 264; Richie *v.*——, Hayw. 220; Toll. 104. The counsel here tendered the deed, to show the pledge was redeemed, but it being objected to, he stated the fact merely. Atkinson *v.* ——, 2 Phil. 416. The register has no discretion in such a case. Toll. 90; 1 Com. Dig. Admr. B., 6; 2 Bl. Com. 496, 504; 9 Rep. 39; Johns *v.* Rone, Cro. Chas. 106; Blackburn *v.* Davis, 1 Salk. 38. Nor has he obtained nomination of a majority; two sisters and mother are not shown to object, or to be of a different opinion from that entertained when he left. The answer not being responsive must be proved. As to the false recital, the deed was immensely long, and he never read it.

Price, for defendant.—Our policy is opposed to giving administration to non-residents; thus, even executors removing may be dismissed, Act 1832, sect. 27, Purd. Dig. 813. But the auditors' report in the record show they were in session, and there was no one to check the accountant till we appeared. There is no case of administration durante absentia the next of kin; and here it would be wrong, for one was represented here, and on that claim letters were granted; and this nomination the register was bound by; Ellmaker's case, 4 Watts, 37. There is a discretion, our acts having but little altered the English statutes. Offley *v.* Best, 1 Leo. 186; 1 Williams, Ex. 364; 11 Vin. Executors, 116, pl. 23. But take it as an appeal to this court's discretion, this record is sufficient. The rule is, that a majority in interest is to be preferred; Earl Warwick *v.* Greville, 1 Phil. 123; and the least taint of fraud would exclude any one; Ellmaker's case. The deed contains a false recital, and that shows enough fraud.

Jan. 21. SERGEANT, J.—The act of the 15th March, 1832, prescribes certain general rules, according to which the register is to be governed in granting letters of administration, but still there is a legal discretion to be exercised by him in many cases. He may grant them to the widow or relations, or he may join one or more of them with the widow, preferring those of the nearest degree of consanguinity, and males to females; and even these are not entitled, if incompetent, of which the register must judge. Among the causes of incompetency appears to be non-residence in the state, as may be inferred from the provisions of the 27th sect. of the act of 29th March, 1832, that when an administrator has *removed* from the state, or *ceased* to have any known place of residence therein, during the period of one year or more, the Orphans' Court may vacate the letters of administration; and the 27th sect. of the act of the 15th March, 1832, which prohibits letters testamentary being granted to any person not being an inhabitant

Digitized by Google

of this Commonwealth. Again, it is necessary by the words of the act of the 15th March, 1832, sect. 27, not only that the applicant should be a relation, or of kin, but he must be entitled to the residue of the personal estate, or a share therein. Notwithstanding, therefore, the preference claimed by the present petitioner, as male over a female, yet had this dispute occurred at the time the letters of administration were taken out, between the two persons claiming to be appointed administrator, the petitioner would have been liable to the objection, first, that he was not then a resident of this state; and secondly, that he had assigned or pledged his claim to others, and so was not entitled to the residue, or a share therein.

But the case is still stronger against him now, when an administrator, liable to no personal objection, has been appointed so far back as March, 1843, and has acted in the administration at the instance of the sister and a transferee, and was appointed at a time when the petitioner had been absent nine months from the United States, and it seems to have been important to the estate that an administrator should be appointed to prosecute the claim before auditors, and the claim has been so prosecuted, and is now on the point of being distributed. There is nothing in the case, under these circumstances, which, we think, would authorize us to disturb what has been done, and create unnecessarily new embarrassment, delay, or litigation.

Decree confirmed.

Dundas *v.* Biddle.

The court will compel a feme covert trustee by descent, to acknowledge that she executes the deed voluntarily, &c.

Jan. 17.—The case is reported in 6 Whart. 392, as Vaughn *v.* Barclay. After that decision it was found that trusts descended, in Virginia, as beneficial interests to children equally; whereupon an amended bill was filed against all the heirs of John Barclay, for a conveyance. A decree for a conveyance was made. One of the defendants, a feme covert, signed and acknowledged the deed, but refused to acknowledge that it was done voluntarily, &c.; the law of Virginia being imperative, and the deed a nullity, as to her, without it.

The case was heard on a rule to show cause why the deed should not be executed agreeably to the law of Virginia.

Digitized by Google

Wm. Tilghman and *Tilghman*, for the motion, referred to the act, and stated, without this there was, in fact, no conveyance.

Geo. W. Biddle and *Meredith*, contrà.—Will the court compel a party to say she performs an act voluntarily? The decree has been complied with; she has done all the others were required to do. She requires a decree to protect her.

PER CURIAM.—It is no right acquired by marriage, but she is the real party. The deed is no deed without the forms are complied with.

Let the decree be entered.

MERRITT v. SMITH.

Costs accrued are to be paid on appeal: the 2d art. of sect. 27, of the act of 1836, not being altered by the act of March 20, 1845.

Jan. 17.—RULE to show cause why defendant should not appeal from award without payment of costs in this action, which was assumpsit.

Wm. Hirst, for the rule.—The bail was taken away by the act of 1842, p. 342, as was decided in 7 Watts & Serg. 365. Then the act of 1845, p. 188, was passed, requiring security to be given for past and future costs; this in effect repeals the act of 1836.

Stroud, contrà.—The act of 1845 was intended for appeals from justices, and to give absolute security for future costs to a defendant; it does not interfere with the provision of the act of 1836, as to costs already accrued.

Feb. 4. BURNSIDE, J.—Among the conditions imposed on an appellant from the award of arbitrators, in the act of the 16th March, 1836, are, that he, his agent or attorney, shall pay *all the costs that may have accrued in such suit or action; and that he* shall, within twenty days after the award is filed, enter into a recognisance by himself, his agent, or attorney, *in the nature of special bail*, with one or more sufficient sureties, conditioned agreeably to the provisions which the act prescribes. So the law stood until the legislature, on the 12th July, 1842, passed the act abolishing imprisonment for debt. Imprisonment for debt being abolished, recognisances generally, in *the nature of special bail*, fell with it. It having ceased to be lawful to

Digitized by Google

www.libtool.com.cn

confine the body of any person in custody who was sued for the payment of debt, hence the Supreme Court, in Beers *v.* The West Branch Bank, 7 Watts & Serg. 365, held, that appeals from the award of arbitrators were to be entered without bail. It has been recently decided by the Supreme Court, that the act abolishing imprisonment for debt vacated all recognisances of *special bail or appeals;* that it was unlawful for special bail, since the passing of that act, to take their bailee in custody; nor was it necessary; they might, to a scire facias, plead that act in bar to the action. (This case is Kelly *v.* Henderson, 1 Penna. St. Rep. 495.) The legal operation of the act abolishing imprisonment for debt, having received a judicial construction in the case in 7 Watts & Serg. before referred to, the legislature, on the 20th March, 1845, passed the act entitled "an act concerning bail and attachments." The section relating to bail, of this act, provides, "that in lieu of the bail heretofore required by law, in the cases herein mentioned, the bail in cases of appeal from the judgments of aldermen and justices of the peace, and from the award of arbitrators, shall be bail absolute in double the probable amount of the costs accrued, and likely to accrue in such cases, with one or more sufficient sureties conditioned for the payment of all costs accrued, or that may be legally recovered, in such cases, against the appellant." There is not a single expression in this act repealing the provision in the act of 1836, making it obligatory on the appellant that, before his appeal is valid, he shall pay all the costs *which have accrued in such suit or action;* besides, appeals from the judgment of aldermen and justices were always allowed by law, without the payment of costs.

The whole argument, in support of the rule, is based on the words *accrued, and likely to accrue in such cases.* The obvious intention of this act is, that the recognisance which the law requires is to cover the costs which may accrue on the appeal, or may be legally recovered in such cases against the appellant. This construction will preserve the words of both acts, and will not repeal the salutary provision, for the payment of costs, in the act of 1836. The construction contended for would repeal that act by implication, which, we cannot suppose, the legislature ever intended.

The rule is discharged.

Digitized by Google

www.libtool.com.cn

COMMONWEALTH v. BURDICK.

The false assertion of possession of money on the credit whereof goods were obtained, is a false pretence within the act of July 12th, 1842.

Jan. 19.—This was an indictment under the act July 12th, 1842, sect. 21, Pamphlet Laws 345, which provides, that "every person who, with intent to cheat or defraud another, shall designedly, by colour or any false token or writing, *or by any false pretence whatever*, obtain from any person any money, personal property, or other valuable things, shall, &c.;" and it alleged that the defendant falsely, &c., "pretended to, &c., that he possessed a capital of $8000; that said $8000 had come to him through his wife, it being her estate, and that a part of it had already come to his possession, a part would come into his possession in the month then next ensuing, and that the remaining part thereof he would be obliged to wait for a short time," which was false, and by which he obtained goods. The second count stated the same allegation as to possession, and the means of acquisition. The third, possession of the capital simply. Defendant demurred.

F. Wharton and *Attorney-general*, for the Commonwealth.—A similar question arose, under 30 Geo. 2, c. 29, to be found in 2 Russ. on Crimes, 284, 298, and seq., with an abstract of decisions thereon. There are also cases in our own country; People *v.* Kendal, 25 Wend. 399; assertion of ownership of a herd of cattle; People *v.* Conyer, 1 Wheel. Crim. Ca. 448; pretence of being a person of wealth, S. C. 14 Wend. 396. Their statute differs from ours merely in extending to the obtaining a signature. People *v.* Haines, 11 Wend. 557, supports this. Commonwealth *v.* Hutchinson, 1 Penna. Law Jour., pretence of wealth; nor have the judges been disinclined to enforce this rule of morality when sanctioned by the statute, Rex *v.* Young, 3 T. R. 98; Rex *v.* Barnard, 7 Carr. & Pay. 784, was a false token at common law; Rex *v.* Wickham, 1 Adol. & Ellis, 34. But the English cases under the statute above cited, which is identical, are full to the point; Rex *v.* Henderson, 1 Carr. & Marsh. 328, defendant to be worth a specific sum; Rex *v.* Young, 1 T. R. 104, promise to share a bet never made; Rex *v.* Wisemore, 1 T. R. 104; Rex *v.* Parker, 2 Moody, 1. The precedent is from 3 Chit. Crim. Law, 337; Arch. Crim. Pl. 275.

Defendant's counsel did not appear.

Digitized by Google

Jan. 31. GIBSON, C. J.—The rule of the common law, that cheating in private transactions without affecting the public, must, to be indictable, have been effected by artful devices or false tokens, was found to be too narrow for the business of the world; and the English statute, 20 Geo. 2, c. 29, which has given place to the 7 Geo. 4, c. 92, sect. 53, was enacted to extend the limits of the offence. From these our act of 1842, sect. 21, seems to have been taken, and decisions on the clause in the first, which declares it an indictable offence to get money, chattels, or securities, from another "by false pretence or pretences," or in the second, "by *any* false pretence," may advantageously be applied to cases here. The distinctions taken, under these statutes, between cases sometimes differing in almost imperceptible degrees, are nice and well founded; and though not authoritative here, may help us in attaining a sound construction of our own statute, which differs from either of its models very little in substance or in form. It would be a waste of time to pass those decisions in review, as they are collected and arranged in all the text books on criminal law; but it may be collected from them, that a professed intent to do an act which the party did not mean to do, as in Rex *v.* Goodall, Russel & Ryan, 461, and Rex *v.* Douglass, 1 Moody Cr. Ca. 462, is the only species of false pretence to gain property which is not indictable. These two cases, having been decided by the twelve judges, are eminently entitled to respect; but I think it, at least, doubtful whether a naked lie, by which credit has been gained, would not, in every case, be deemed within our statute, which declares it a cheat to obtain money or goods "by any false pretences *whatsoever*." Its terms are certainly more emphatic than those of either of the English statutes; but whether a false pretence of mere intent be within them or not, it is certain that a fraudulent misrepresentation of the party's means and resources is within the English statutes, and a fortiori within our own. In Rex *v.* Jackson, 3 Camp. 370, it was held to be an offence to obtain goods by giving a check on a banker with whom the drawer kept no cash. Of the same stamp is the King *v.* Parker, 2 Car. & P. 825; but Regina *v.* Henderson and another, 1 Car. & Marsh. 183, is still more to the purpose. The prisoners falsely pretended that one of them was possessed of £12, which he agreed to give for his confederate's horse, for which it was proposed that the prosecutor should exchange his mare; and this was held to be clearly a false pretence within the statute. Now the defendant is charged in the indictment before us, with having wilfully misrepresented that he had a capital of $8000, in right of his wife; that a part of it was already received; that another part would be received in the course of a month; and that the residue

Digitized by Google

would be received shortly afterwards: and if, as was said in Witchell's case, 2 East P. C. 80, a false pretence is within the English statute wherever it has been the efficient cause of obtaining credit, the false pretence before us is within our own.

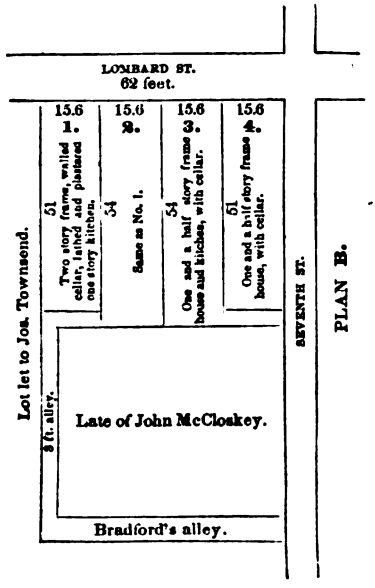
Demurrer overruled, and judgment of respondeat ouster.

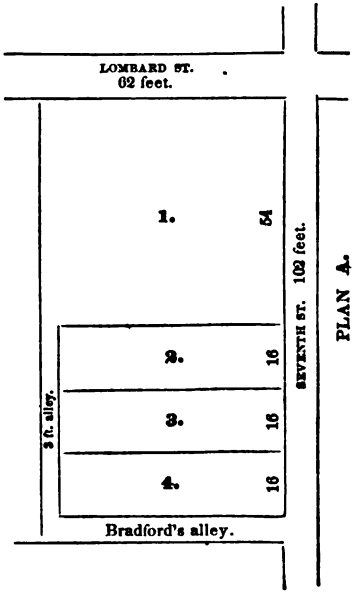
HEARTLEY *v.* BEAUM.

1. A. being the owner of part of a large lot of land, and also of rents reserved out of another part, the marshal, under a levy upon a judgment against him, describing by metes and bounds the larger lots, with the *rents, issues, and profits thereof*, made a sale of the same, at public vendue:—*Held*, that under the word *rents*, the ground-rents reserved passed to the purchaser.
2. And this though the advertisement described the land only, for defective description therein can have no effect after the deed is acknowledged.

ERROR to the District Court of the city and county of Philadelphia, on case stated.

Jan. 21, 22, 23.—In 1794, Boudinot et al. being seised in fee of a lot at the S. W. corner of Lombard and Seventh streets. Sixty-two feet on Lombard street, by one hundred and two feet deep, conveyed the same to Cadwallader Griffith, reserving a ground-rent of $84 53.





Digitized by Google

www.libtool.com.cn

In 1796, Griffith conveyed to Conner lots numbered 3 & 4 in the plan A, reserving a ground-rent of $53 33, with clause of distress and re-entry, and covenanted against the paramount rent.

In 1797, Conner conveyed to Faimin lot 3, subject to $26 67 per annum, payable to Griffith.

In 1800, Elisha Gordon having purchased lot 4, subject to a similar rent, conveyed to Thomas Francis.

The same year, Griffith conveyed lot 2 to John McCloskey, reserving $26 67 ground-rent, with covenant as to paramount rent.

There was no allegation of assent to the apportionment of the rent on lots 3 & 4, by Griffith.

In 1806, the United States recovered judgment against Griffith for $1953 61. A fieri facias issued, and was returned levied, &c., with the same description in full as is contained in the vend. exponas. In 1808, the venditioni issued; after reciting the fi. fa. it proceeded, "And you on that day returned that by virtue of the said writ to you directed, you had seized and taken in execution, as the property of Cadwallader Griffith, all that certain lot or piece of ground, situate on the south side of Lombard street, and west side of Delaware Seventh street, in the city of Philadelphia, containing in front or breadth on Lombard street aforesaid, sixty-two feet, and extending in length or depth on Seventh street, one hundred and two feet, (to a twelve feet wide alley, running east and west from a certain sixteen feet wide alley into Seventh street,) bounded on the north with Lombard street, on the east with Seventh street, on the south with the said twelve feet alley, on the west side with the other ground of Elias Boudinot and William Bradford, intended to be granted to Joseph Townsend on ground-rent. The northermost seventy-eight feet of the above described lot is part of the same ground which the Supreme Executive Council, &c., granted unto the said Elias Boudinot and William Bradford, in fee as tenants in common, and the southermost twenty-four feet is part of the same ground which Joseph Cowperthwaite, Esquire, High Sheriff, &c., granted unto the said William Bradford and Elias Boudinot in fee, as tenants in common, as in and by the said deeds fully and at large appears, together with the free use, liberty and privilege of the said twelve feet alley, in common with the said Elias Boudinot and William Bradford, their heirs and assigns, tenants and occupiers of their other ground bounding on the same alley, at all times hereafter for ever, and together also with all and singular the improvements, ways, waters, water-courses, rights, members, liberties, privileges, hereditaments, appurtenances whatsoever thereunto belonging, or in any wise appertaining, and the reversions, remainders, rents,

Digitized by Google

issues and profits thereof, subject to a yearly ground-rent of eighty-four Spanish milled silver dollars, clear of taxes or assessments, which remained in your hands unsold for want of buyers, and therefore you could not, &c." The inquest was then recited. "Wherefore we command you, that all that certain lot or piece of ground, situate on the south side of Lombard street, and west side of Delaware Seventh street, in the city of Philadelphia, before described by you in form aforesaid, seized and taken in execution without delay, you expose to sale, and that you have that money before the said judge," &c.

The debt and costs exceeded $2000.

Three advertisements of the sale, by the marshal, one for 16th Feb., the other for 3d and 10th of March, were made a part of the case, subject to the opinion of the court as to their competency, bearing, and effect as evidence. The description of the property in two of them was,

"All that lot or piece of ground situate on the south side of Lombard street and west side of Delaware Seventh street, in the city of Philadelphia, containing in front or breadth on Lombard street sixty-two feet, and extending in depth on Seventh street fifty-four feet, bounded on the north with Lombard street, on the east with Seventh street, together with the buildings and improvements thereon erected," seized, &c.

That for the 3d March divided the property into four lots, as in plan B, numbers 1, 2, 3, 4, and gave the breadth and depth, "with the privilege of a three feet wide alley, communicating with Bradford's alley."

The marshal returned that he had sold, on the 10th March, to Thomas Francis, all the right, title, and interest of Cadwallader Griffith, in, &c., following the above description in the levy, and venditioni.

The sale was for - - - - - - -		$2100 00
Left in the hands of T. Francis		
Ground-rent - - - - - -	$876	
Which, with costs, amounted to - - -		1000 32
Leaving - - - - - - - -		$1096 68

The marshal further returned, "That by virtue and authority of Cadwallader Griffith, the defendant, the sale of the property within described, was sold in the manner and form as set forth in the deed executed (and acknowledged in open court) to Thomas Francis, and that the said Cadwallader Griffith furnished the plan hereunto annexed."

Plan B is the plan referred to in these writs and returns.

The marshal, by his deed, conveyed to Thomas Francis, in fee, all the estate of Cadwallader Griffith, in that certain lot, sixty-two feet on Lombard street, and one hundred and two feet on Seventh street, "and the reversions and remainders, *rents*, issues, and profits thereof."

On the 26th April, 1808, Griffith and the marshal gave Francis a

Digitized by Google

receipt for arrearages of ground-rent on the lot occupied by him, the said arrearages being up to the time of sale, and being on account of the ground-rent generally. This the marshal admitted was to be applied on account of the execution.

These papers were admitted, subject to question of competency and effect.

Since the sale, Thomas Francis has collected the rents reserved on lots 2 and 4, and has paid the paramount rent; the right to claim the former is denied by defendant.

The present plaintiff claims the lot and the two ground-rents as the property of Thomas Francis, under this sale, through two intermediate conveyances for value, &c.

Griffith died in 1820. In 1834 his heirs distrained for the rent and arrears out of number 4; the plaintiffs replevied.

The questions submitted were, 1. Whether the rents passed by the marshal's sale? 2. If not, whether the lot he did purchase was subject to the whole paramount rent, or a proportionate part? The court below gave judgment for the avowant, and the plaintiff brought this writ of error.

D. Gordon, for plaintiff, argued at length that the advertisements were not admissible; and that the assent of the debtor, as shown by the return, cured the defect, if there was one, and cited many cases to these points, but the court stated that the only question they wished spoken to at present was, whether there had been a levy on this rent. On this he argued that the words of the levy were the sole guide, nor were they to be passed over as of course, but were to be given their full effect, Grubb *v.* Guilford, 4 Watts, 323; nor will his declared interest at the sale to the contrary be of any effect, Reigle *v.* Seiger, 2 Penna. 340. Here hereditaments out of the land are levied on. [*Rogers*, J.—What estate do you contend he had in the land?] What was called an escheat or reverter, or quasi reversion anterior to the statute quia emptores. Co. Litt. sect. 215, 144 a, n. 5; Fearne Ex. Dev. 381, n. 1. It is this which enables him to distrain. Phillips *v.* Bonsall, 2 Bin. 138. This construction is essential, for, by the act of 1700, lands and houses, and by that of 1705, lands and tenements, were alone subjected to execution. Yet in Hurst *v.* Lithgow, 2 Yeates, 27, rents were held to pass. So in Streaper *v.* Fisher, 1 Rawle, 155, the levy was on the rent, but the sale was of the land, and the rent passed—[*Kennedy*, J., there was no objection before acknowledgment,] so here, twenty-six years have passed. The point has been ruled in New York, where the statute is the same. 7 Wend. 463. In fact, land includes all interests, and a levy on that will pass all minor estates. Shaupe *v.* Shaupe, 13 Serg. & Rawle, 9. The purchaser is, in the words of the

Digitized by Google

Act of Assembly, in the same estate, and as fully and amply as the debtor. Arnold v. Gorr, 1 Rawle, 223, 226; Freedley v. Sheets, 9 Serg. & Rawle, 162. The interest, whatever that may be, is sold, Wilder v. Farmers, 11 Serg. & Rawle, 138. The construction is favourable to the creditor, McCormick v. Harvey, 9 Watts, 482.

E. Spencer Miller and *V. L. Bradford*, for defendants.—The sale need be of a part merely, and the return makes the diagram a part of it, and shows McCloskey's lot was a boundary. Was there a power in the venditioni to sell? That depends on the levy. Was the levy on the rent as such? No. Was it drawn in by any reversion in the land remaining in Griffith, or included in the general word *land*? In devises of land, rent will pass, Sty. 261; but not if there be land for the will to act on, 3 Taunt. 147; Cru. Dig. 200. Statutes are more narrowly construed, as will be seen by the cases cited on writs. Deeds are still more strictly construed, 4 Ves. 708. Sty. 201, expressly said, "rents" would not pass by the word, "lands." 3 Mason, 281. In Franciscus v. Reigart, 4 Watts, 109, it was decided below—rents would not pass under name of lands. 2 Leon. 43; 1 Salk. 328; 7 Petersdorf, Abr. 465, n. But sheriffs' deeds and adversary writs are still more strictly construed, Fonb. Eq. 426; Jackson v. Delaney, 13 Johns. 581; the general words were held not to pass more than the tracts specifically levied on, 10 Watts, 90. And in pleading, land will not include rents. Siley v. Siley, 1 Vent. 260; Jac. L. Dic. "land." The sheriff need not recite, but misrecital is void, Palmer's Case, 4 Rep. 74. The levy cannot be strained, 9 Watts, 484. The general words here merely refer and belong to the deeds under which the party claimed.

But is it attracted by the reversion as an incident? That, if there be such, cannot be sold, Shep. Touch. 120; 5 T. R. 108, n.; Prest. on Est. 441. It is not devisable, 6 Cru. Dig. 27. The owner of the rent has no estate in the land, 2 Black. Com. 106, 41; 1 Domat. C. L. 210, s. 15; and the mode of pleading shows this: it is seised in fee, not in his demesne as of fee. In Pennsylvania, the estates have been held distinct, and an alienation in fee, the entire disposition of the estate, notwithstanding a reservation of rent. Kenege v. Elliott, 9 Watts, 262; Franciscus v. Reigart, 4 Watts, 120; Skerret v. Burd, 1 Whart. 250; Philadelphia v. Ingham, 1 Whart. 85; Phillips v. Bonsall, 2 Bin. 142; Hurst v. Lithgow, 2 Serg. 25; Bantleon v. Smith, 2 Bin. 154; St. Mary's v. Miles, 1 Whart. 234, 235; Bailey v. Jackson, 16 T. R. 214; Pennington v. Coates, 6 Whart. 283.

Digitized by Google

The marshal was not bound to sell all. [*Kennedy*, J.—His return falls short of the execution.]

www.libtool.com.cn

The question as to the nature and origin of the feudal tenures was then discussed at length, and also whether they ever prevailed in Pennsylvania, and whether the Revolution and acts of 1779 and 1781 had not destroyed them; and the dicta in 3 Watts, 71; 1 Whart. 85; 4 Serg. & Rawle, 435; 3 Serg. & Rawle, 457; 9 Serg. & Rawle, 338; 5 Rawle, 113; 2 Cow. 657; 3 Kent, Com. 408—412; 9 Watts, 262; 1 Whart. 337, were referred to.

Cadwalader, in reply.—There are two propositions which are to be considered here; the 1st is general. A levy and sale of land by any name, within certain metes and bounds, passes every incorporeal hereditament—every thing that is real estate. But should this be doubtful, the facts here are abundant to show this rent passed. The first point is a matter of settled rule, in regard to titles on which the profession uniformly act. Rent is the incorporeal hereditament nearest to land; thus, Lit. sect. 10, puts it on the same footing in pleading, viz., in his demesne, &c.; all others are simply as of fee; and this sustains Scott *v.* Lunt, 7 Peters, 606, allowing covenant by the assignee in his own name. In 13 Ed. 4, 4 b, it is called "land" expressly. This rule is important, for it is often impossible to know exactly which of the estates a man has; he cannot have both, because of merger; hence the course is to levy on the land and take whatever he may have; nor is any hardship done, for the court on his showing his estate will compel a proper advertisement. It is clear it would pass by his voluntary grant. Bro. *Grant*, pl. 102, rent-charge by the word *tenement*, 2 Roll. Ab. 57, *Grant*, T. sect. 6; S. P., 1 Id. 614, *Dev.* n. 4, case of tithes; Newman *v.* Rutter, 8 Watts, 51, by devise of a town, ground-rents thereout reserved will pass.

That the same will be effected by involuntary grant, is the settled rule of Pennsylvania, 1 Sm. Laws, 7; "as fully and amply as ever they were to the debtor," are the words of the statute of executions, Foot *v.* Calvin, 3 Johns. 222; Cooper *v.* Galbraith, 3 W. C. C. R. 550, followed by Young *v.* Algeo, 4 Watts, 223, sustain this construction of the act. The reasoning in Palmer's case, 4 Rep. 74, puts him in a better position. This is cited, 10 Watts, 100, 101, referred to by my colleague. The construction is at least, according to this rule, most strongly against a grantor. The case of People *v.* Haskins, 7 Wend. 463, decides the point, for the whole case assumes the rents were reserved before the judgment, and their statute only extends to lands. The S. P. prevails in England on the construction of the stat. West-

Digitized by Google

minster 2d, which includes only lands; and yet rents reserved, before judgment, may be extended. Bro. Abr. *Ext.* 143; Fitzh. Gr. Ab. *Avow.* 237; Moore, 32, pl. 104; 7 Rep. 37, 38, a, Dillington's case. But the facts here exclude doubt. Boundaries are the controlling matters to be considered in conveyances. The sheriff refers to the conveyance to Bradford, which is entirely within the part now said not to be conveyed by his deed; and also to Bradford's alley as a boundary, with which we had nothing to do but on our construction. Then there is the measurement. As to these being words of course, they are put in to prevent those very disputes now raised here. But levies do not usually contain them—it being settled they are included by implication; for what purpose were they specially inserted, but to pass this rent.

Jan. 31. SERGEANT, J.—In this case, the levy, the sheriff's return, and the sheriff's deed, all correspond and embrace a lot of ground on the south side of Lombard street, and west side of Delaware Seventh street, containing sixty-two feet on Lombard street, and one hundred and two feet on Seventh street; bounded on the north by Lombard street, on the east by Seventh street, on the south by a twelve feet alley, and on the west by other ground of Boudinot and Bradford, together with the rents, issues, and profits thereof, subject to a yearly ground-rent of $84. At the time of the levy, the defendant in the execution retained but fifty-four feet on Seventh street by sixty-two feet on Lombard street; having, previously to the levy, granted away the other portion on sub ground-rents by two separate deeds. And the only question really existing in the case is, whether these ground-rents passed to the purchaser at sheriff's sale, as well as the fifty-four feet remaining in the grantor. It is impossible to entertain a doubt about it, since the rents are levied on and sold as well as the lot or piece of ground; they actually issued out of portions of the lot described. And we cannot satisfy the call of the levy and deed, if either lot or rents be excluded. A great deal has been said, in the argument, about the operation of the word *land* to carry a rent, which is irrelevant, because the rents here are expressly levied on and sold, *eo nomine*, as much as the rest of the lot is. That a ground-rent is real estate subject to levy and execution, as such, has long been settled, and indeed is not contested. Neither is there any weight in the objection to the description in the levy. The lot is particularly described by metes and bounds, and the rents described as issuing out of it, which is good enough. A sheriff's levy and sale, to be sure, is a mere nullity, when it affects to pass all the defendant's

Digitized by Google

property in general terms, such as all his lands in Pennsylvania, &c. But on the other hand, as it is not in the power of the sheriff or plaintiff always to ascertain precisely the details of a defendant's property, a reasonable degree of latitude is allowed in the description, Palmer's case, 4 Co. 74; Inman *v.* Kutz, 10 Watts, 90; and if the description is not, in the defendant's opinion, perfectly precise, he may have relief by application to the sheriff or court to correct it before deed acknowledged. He has the knowledge in his own breast, and if he lies by and allows a purchaser to pay his money and receive a deed, he has no cause of complaint; but the purchaser takes what is reasonably comprehended in his deed, though it might have been made more particular. The same remark applies to the sheriff's advertisements, which are but extrinsic preliminary matters, and have no bearing or effect on the title after deed acknowledged, which must be judged of by the record of the judgment, levy, return, and deed. Nor is there any weight in the allegation, that the sale is according to the diagram annexed, and that the diagram shows but fifty-four feet sold. For on the face of this diagram, it embraces a lot bounded according to the description in the levy and return—the interior measurement placed on part of it gave no lot at all of fifty-four feet, but of fifty-one. No lot of fifty-four or fifty-one feet is subject to the $84 ground-rent. Nor does any thing on the face of the diagram contradict or vary the prior description.

The present case is stronger than in Streaper *v.* Fisher, 1 Rawle, 155. Yet there the levy and venditioni were of a rent-charge issuing out of a lot, describing it; the sheriff sold the lot, and made a deed of the lot, together with all the rights, &c., and the reversions, remainders, rents, issues, and profits thereof, and it was held the rent passed by the deed.

We are therefore of opinion that the court below erred, and that, on the case stated, judgment must be rendered for the plaintiff below.

Judgment reversed, and judgment for plaintiff below.

www.libtool.com.cn

Digitized by Google

www.libtool.com.cn

POTTS v. FITCH.

1. Proceedings cannot be sustained on an insolvent's bond, after an order to answer for fraudulent insolvency, during the pendency of the indictment, there being an appearance by defendant.
2. Where the bail has been reduced by a subsequent order, the latter is the only one which can be recognised as obligatory.

ERROR to the District Court.

Jan. 26.—The question in this case was, whether the defendant was liable as surety on an insolvent bond. The jury found a special verdict, and the court below gave judgment for defendant. In 1841, Kinsman being in custody, under a ca. sa., at the suit of the plaintiffs, gave this bond to appear at the next term, present his petition, and comply with the requisitions of the law, and abide all orders of the court: or in default, and if he fail in obtaining his discharge, then to surrender himself, &c. At the next term, October, Kinsman did present his petition, and it was held under advisement till January 5th, following, when the court refused to discharge him, and ordered him to give bail in $5000, to answer at the General Sessions. The bail was not given until the 8th January: the court on that day having reduced the amount to $2000. That Kinsman did not surrender himself at any time since the date of the bond. That Kinsman did appear, and pleaded to an indictment, according to the order, which proceeding is still undetermined; and whether the surety is liable, &c.

John Fallon, for plaintiff.—These bonds are strictly construed. Kelley *v.* Stepney, 4 Watts, 69; and having failed in procuring his discharge, his bond is forfeited, according to its terms. In Potter *v.* Newman, 4 Yeates, 388, a surrender at a second term, to which it was continued, is insufficient. Ingraham on Insolvency, 28, 29. But at all events, after the refusal of the discharge, he must then surrender, 1 Penna. 270. And he delayed three days, and this is fatal, for the order must be exactly complied with, as was said in Frick *v.* Kitchen, 4 Watts & Serg. 32. Nor could the court alter this, it having become a vested right, 1 Penna. 271.

Ingraham, contrà.—The error in the argument is, in not distinguishing between a rejection *ad interim*, and finally. All the cases cited are instances under final orders. This order was to give the defendant the privilege of an appeal from the court to a jury, to have whose opinion on the facts is the right given by the law.

Digitized by Google

This trial is in lieu of the decision of the Common Pleas, and if acquitted, the court must discharge the party. As to the delay, it is clear that the court was then holding the application for reduction of bail under consideration, and until the amount of bail was finally settled, the order was incomplete. So soon as it was fixed, and the order became final, it was complied with; and upon this indictment, the petitioner, Kinsman, may be acquitted, and the court must then discharge him on his original petition. To hold that the bond is forfeited, would be to render his compliance with the order of court the groundwork of a forfeiture.

Feb. 7. KENNEDY, J.—We are satisfied that the defendant was entitled to a judgment in his favour, on the special verdict found by the jury, and that the court were right in rendering one accordingly. By the finding of the jury, it does not appear that the insolvent, Kinsman, the principal, had, anterior to the bringing of this suit, committed a breach of the condition of the bond, upon which it is founded, in any respect whatever, but on the contrary, had performed and complied with all things therein mentioned and required of him. The only particular, in which it is alleged that he failed to comply with the condition of the bond, and for which there is even the slightest colour of plausibility, is, that the court, to which he presented his petition for the benefit of the insolvent laws, in conformity to the condition of the bond, after having proceeded thereon, and having heard him and his creditors, and thereupon, not being satisfied, that he was entitled to a discharge under the insolvent laws, made an order on the fifth day of January, 1842, in the following words:—"The court refuse to discharge the said Israel Kinsman as an insolvent debtor, and direct him to give security in the sum of five thousand dollars, conditioned for his appearance at the next court of General Sessions, to answer the charge of fraudulent insolvency." This order, though made by the court, was not permitted to remain in force, but was, in effect, vacated by the court, three days afterwards, on the eighth of the month, by the court's direction that the said Kinsman should give security, for the like purpose as that of the first order, in the sum only of $2000, which he immediately did. The latter order of the court, reducing the amount of the security to be given to $2000, is the only order, in this respect, that can be looked at, or regarded by this court, or any other court, as binding upon the insolvent. The order for giving security in $5000 must not only be left out of view, but considered as out of being.

Israel Kinsman, the principal in the bond, having then complied

Digitized by Google

with all things mentioned in, and required of him by the condition thereof, at the time of commencing this action, as the jury have shown fully by their verdict, there is no ground for making the defendant liable, as his surety in it.

The judgment is therefore affirmed.

SOUTHERN LOAN CO. v. MORRIS.

1. An endorser is not liable on a promissory note of a corporation which it could not lawfully issue.
2. Even though the instrument purported to be a certificate of deposit, which it was lawful to issue: for the properties of promissory notes, which are forbidden, cannot be given to lawful instruments.

ERROR to the Nisi Prius.

Jan. 26.—This action was on the endorsement of certain instruments in the following words:—

"The Philadelphia Loan Company promises to pay R. Morris or order, $1000, three months after date: being a deposit made by him with the Company, bearing interest at the rate of — per cent. per annum, payable at the office of the Company.

"T. MOORE, Cashier, GEO. S. SCHOTE, President."

Endorsed by defendant.

At Nisi Prius, Sergeant, J., ruled, that the notes were not negotiable instruments. That the company had no right to issue such notes, and defendant was not liable as endorser.

The charter of the company will be found in Pamph. Law, 1835–6, pp. 275, 479. The clause which was relied on by counsel, as giving the privilege of loaning on securities, was the seventh section, by which it was "provided, nothing contained in this act shall be construed to authorize said company to discount notes; and provided this corporation shall issue no notes, or bills of credit, or promissory notes, in the nature of bank notes, or exercise any banking privileges whatever." The sixteenth section authorized "a certificate of deposit to be given to the depositor, stating the rate of interest, and the period for which such a deposit is made."

Brewster, for plaintiff.—This is a negotiable instrument; McCormick v. Trotter, 10 Serg. & Rawle, 94. It was lawfully issued: for the six-

Digitized by Google

www.fbtqol.com.cn

teenth section authorizes such an instrument, and if it becomes in effect a note, it is the fault of the charter. The seventh section cannot annul the subsequent section. But that section must be confined to what are strictly banking privileges, which are issues on the credit of the institution. The distinction between this case and Patterson *v.* Poindexter is, that there was but an implied promise, and that, on contingency; there was uncertainty in the amount, from the agreement for interest, and hence it was not commercial; but none of these are in this case.

But even if it is void, the endorser is liable as a new drawer.

Clarkson, for defendant.—It is a settled rule, that courts will not entertain a suit, founded on a transaction prohibited by statute. Seidenberger *v.* Charles, 4 Serg. & Rawle, 151; Mitchell *v.* Smith, 1 Binn. 110; Smith *v.* Smith, 6 Watts, 294; Ebertson *v.* Waler, 1 Watts & Serg. 184. This is clearly forbidden by the charter, it being a promissory note, and such as is called a post-note by the banks, well known in the commercial community. Certainly the sixteenth section does not affect this prohibition. What is a certificate?—an authoritative declaration merely; surely it cannot be, that an authority to give the evidence of receipt of money is to repeal such an important prohibition as that of issuing a currency.

Feb. 6. SERGEANT, J.—The object of the act of the 31st March, 1836, obviously was, to establish a company to lend money on pledges, at the legal rate of interest, and thereby save the community from the extortions and frauds of pawnbrokers. With this view, the seventh section of this act makes it lawful for the company to loan money in any sum or sums, from one dollar upwards, on pledges of goods or chattels and other securities, to be deposited with the company as security therefor, and to charge all reasonable expenses incident to the same, at an interest not exceeding six per cent. per annum. Other sections provide for the redemption of the pledges, and for the sale of such as are not redeemed; and the second section declares, they shall not, directly or indirectly, deal or trade in buying or selling any goods, wares, or merchandise whatever, except by receiving and disposing of the same, in the manner referred to.

The legislature, also, aware of the tendency of companies erected for other purposes, to pervert the privileges granted to them, by embarking in banking speculations, and issuing their paper for circulation, and witnessing the enormous frauds, abuses, and public mischief that attended these practices, determined to guard against them by express restrictions and prohibitions. Accordingly, in the seventh section,

Digitized by Google

there are two provisoes. The first declares, that nothing in the act contained shall be construed to authorize the said company to discount notes. The second enacts that this corporation shall issue *no notes or bills of credit*, or promissory notes in the nature of bank notes, or exercise any banking privileges whatever. These prohibitions appear on the face of the charter, and constitute fundamental articles. But vain are legislative enactments, if disregarded by those who are intrusted to execute them. These plain directions have been unceremoniously set aside, by the issue of instruments, which, in their ostensible character and effect, are as plain promissory notes as it is possible to make them: being promises, in consideration of money received, for the payment of money, payable to order, at a certain time, and then negotiated and put in circulation as negotiable notes. There is nothing in either of them that purports to be a certificate of deposit of goods, &c., but they are promises to pay money, in consideration of money received. And even if they were legitimate certificates of deposit, such as the company are authorized by their charter to issue, they would not be negotiable instruments, so as to make the endorser liable on his endorsement. These notes, in their original concoction and transfer, being in open violation of powers and prohibitions contained in the act of Assembly, of which all concerned in these instruments were bound to take notice, we are of opinion that this action cannot be maintained, and that the charge to the jury was correct.

Judgment affirmed.

MEYER v. LITTELL.

1. The proper course, on failure to file a warrant of attorney, is to stay proceedings, not quash the writ.
2. Where a general authority was given by the owner and chief of a trading "institution," to a factor residing abroad, as chief of a branch house, on all matters connected with the house, he is authorized to institute a suit in the individual name of one of his principals, without evidence that the property belonged to the "institution."

ERROR to the District Court of the city and county of Philadelphia.

Jan. 26.—An action of replevin was instituted in the name of Joseph Meyer, and the goods, consisting of books, &c., were delivered. A rule was taken April 7, 1840, on plaintiff's attorney to file his warrant. A warrant was filed, signed by "Joseph Meyer, by his attorney in fact, C. H. Hauseman." After a rule to quash the writ was taken, an instrument on which the question in the cause arises was filed, but the

Digitized by Google

court, conceiving it did authorize Hauseman to give the warrant, made the rule absolute.

www.libool.com.cn

The instrument was executed by Minna Meyer, late Grobe, as owner of the Bibliographic Institution, J. Meyer, (the plaintiff,) chief of the said institution, and said C. H. Hauseman. From this it appeared that Mrs. Meyer, the owner of said institution, with consent of Mr. J. Meyer, had determined to establish a branch house for the sale of books, &c. in America. Mr. Hauseman was appointed the agent there, and gave security for his faithful conduct. His powers and responsibilities as agent of the house were great; nor was there any question made in the cause as to his right to represent the institution in every thing. He was to sign, "Pp. N. A. Bibliographic Institution, C. H. Hauseman.—Particular instances of powers, &c., are referred to in the opinion of the court, showing the extent of his rights and duties.

Keemlé, with whom was *Ingraham*, argued that, admitting the power was insufficient, the only remedy was to stay proceedings, under the act of 1834, Purdon's Dig. 92. He then argued, the only point the court ought to inquire into was, whether the suit was vexatious. Here it was evident Mr. Meyer was *interested* in the property of the institution, his wife being the owner; and the court could not inquire, in this summary manner, whether the suit was in the name of the owner. Indeed, absolute ownership was not essential, but the right of possession was the very point to be established in the suit. It abundantly appeared Mr. Hauseman was qualified and bound to take all measures to protect the rights of his principals.

Markland and *Meredith*, contrà.—If the property belonged to the institution, the suit must be in that name, for its title imports a corporation. Norris *v.* Stappes, 1 Hob. 211; 2 Lord Ray. 1535; 2 Stra. 807. If it did not, he had no authority to institute a suit in the name of Meyer. That he does not proceed for the institution, appears from his not signing as authorized. The long delay, and no better authority produced, shows Mr. Meyer has not sanctioned this proceeding. The court has this supervisory jurisdiction over its officers and process, King *v.* Oliver, 2 W. C. C. R. 429; and this is the remedy, 1 Tidd's Prac. 160, 161, 167, 488, 494. Besides it appears the wife is owner, and there is no authority from her. This court recognises the separate rights of married women, according to the lex loci. Dougherty *v.* Snider, 15 Serg. & Rawle, 84. The act is but directory, and in this suit the stay of proceedings is exactly what he desires, having got possession of the goods.

Digitized by Google

Feb. 6. ROGERS, J.—Whether the action be properly brought in the name of Joseph Meyer, the president of the Bibliographic Institution at Hildburghausen, or should have been instituted in the name of Mrs. Minna Meyers, wife of Joseph Meyer, late Grobe, or both, or as the Bibliographical Institution at Hildburghausen, its corporate name, it would be premature now to decide. The question does not arise on a motion to quash the writ, for a defect of this kind can only be taken advantage of by plea. There is one thing about which we cannot be mistaken, that it was the intention of the pleader, in the action brought, to remedy a wrong alleged to be done by the defendant, in withholding property belonging to the institution, of which the plaintiff was the president and husband of her who is acknowledged to be the sole owner. As appears from the contract, exhibited as part of the case, the mother institution in Germany established a branch, under the name or firm of the North American Bibliographic Institution at Philadelphia, for the sale of works and articles on commission, consisting of fancy, scientific, and standard works in literature in general. Of the branch here, C. H. Hauseman, who gave Mr. Ingraham the warrant to commence and prosecute the action, was the agent, chargé d'affaires, or factor, and as such took charge of the establishment.

In his character of factor, Hauseman was at liberty to commence suit for the recovery of any debts, dues, or profits, belonging to the institution, either in his own name or the name of the principal. If he adopted the former mode, it will hardly be denied he could appoint an attorney-at-law to conduct the suit. If the latter, to my mind it is equally clear he could give a warrant to an attorney for the same purpose, without resorting to his principal for special authority. The power necessarily results from the relation of the parties to the contract; for the delay, when the latter resides in a foreign country, which must ensue, would, in many cases, be destructive of the interest of both principal and factor. Prompt action alone will often save a debt or property from destruction. No authority has been cited contravening these positions, and it is believed none can be produced, and there is nothing in a contrary direction which commends itself in such a way as to induce us to establish it as a precedent to govern future cases. It is said a factor has no right to involve his principal in costs without his consent. To this the answer is obvious, that in the mean time the debt, when the principal is at a distance, may be lost. Besides, the cost of the suit is matter properly resting between the factor and principal, and if the confidence of the latter is abused in this or any other way, the former is liable in damages, so that ultimately the costs will fall on the factor or delinquent party. In article 10, Hauseman guaranties the

Digitized by Google

mother institution, or its owner, for all the losses occasioned by his faults in general, as, for instance, by neglect, mismanagement, want of vigilence, faithlessness, &c. From this arises an implication of every authority requisite to guard his own and the rights of his principals. An authority to appoint an attorney is indispensable, and were he to lose property by neglecting to exercise that right, it would be a flimsy pretext against an action, charging him with want of diligence at the suit of the principal. In article 11, he guaranties the mother house for one half of all the debts which may be outstanding during his administration of the branch, (Philadelphia house;) he is also bound for the other half, in case he has effected sales to insolvents or such as are unable to pay, contrary to contract, or agreement, &c. Every outstanding debt which he is unable to collect within two years from the time of its being due, is considered as lost. In article 25, it is agreed that he shall stand responsible for those persons *whom he has to select, to observe, to direct, to discharge*, for any losses which may be occasioned by their neglect. But it is useless to multiply extracts, for every clause and paragraph of the contract teems with proofs of the interest and authority of the factor, and the absolute control of the agent over the business of the institution in this country. He has the right, it is his duty to select, to observe, to direct, and to discharge the agents which he may employ. It is difficult to conceive more ample authority than is conferred by the 25th article above quoted. An attorney-at-law is but an agent employed for a special, necessary, and indispensable purpose.

But conceding, for the sake of the argument, that Hauseman had no power to authorize Mr. Ingraham to commence the suit, was the court right in quashing the writ? The act of the 14th April, 1834, after providing for the admission of attorneys, compelling them to file their warrants, if required, enacts, that if any attorney shall neglect or refuse to file his warrant of attorney, in the manner required by law, he shall not be allowed a fee in the bill of costs, nor be suffered to speak in the cause until he shall have filed his warrant.

By a free construction of this act, the only power which the court has, is to stay the proceedings. In addition to being deprived of his costs, the attorney can do no act in the cause until he files his warrant, in pursuance of a rule taken on him for that purpose. This, in effect, stays the proceedings. The warrant of attorney is intended, at least, as much for the protection of the principal as the adverse party; and when required by the latter, the object generally is any thing but the advancement of the principles of justice in the particular case. In this country, as well as in England, the practice of not filing, but even of taking, these warrants of attorney, is, for the most part, at this day,

Digitized by Google

disused; a mere parol retainer is deemed sufficient. Hence the court should be indulgent when such objections are taken. It is a summary method of trying, or rather not trying, causes, which ought not to be encouraged. It is, however, not intended to deny that the defendant has the right to know the authority by which he is sued; but it may be well doubted, whether it is required, to the ends of justice, that the court should have power to rule the plaintiff out of court, and thereby destroy the right of action for ever, as would be the case when the act of limitation intervenes. But, however this may be, the act gives no such right, nor do we think the courts ought to assume it. It seems to be conceded, that, in ordinary cases, as, for example, suits for the recovery of money, justice may be obtained by staying the proceedings; but it is said that the action of replevin, when the goods are delivered to the plaintiff, is an exception. But, be it remarked, no such exception is noted in the act, and we see no reason for extending the penalty beyond the express requirements of the statute. In replevin both parties are actors, and of course there is no difficulty in trying the title, which if found in the defendant, the goods will be returned by a writ of retorno habendo, or damages given to the amount of the value. It must be observed, that, in this case, the plaintiff is not the only person interested; but the sureties in the replevin bond also, answerable as they are to the defendant, if the order of the court, quashing the writ, is allowed to stand. Many cases have been cited where courts have quashed writs. The general power is not doubted, but we have yet to see the case where the power has been exercised because the attorney has neglected or refused to file his warrant. It is ruled in the case of the King of Spain *v.* Oliver, 2 Wash. C. C. R. 429, that it is a power which belongs essentially to all courts, to superintend the conduct of its officers, to see by what authority they act, and that its process shall not be vexatiously employed; and if the defendant insist upon it, the plaintiff's attorney must file his warrant. These positions are not denied, but the inquiry is, what is the penalty attached to a non-compliance with the act? Beyond this we are prohibited by the act of 21st March, 1806, from going. In the case in hand, there is not the shadow of a pretext for supposing that the process of the court has been abused. The suit was instituted, as there is no room for doubt, to try a bonâ fide assertion of right, but whether brought in the right name we cannot now decide. The rule of law is, that whenever the court is satisfied that the attorney has authority to institute the suit, whether by the production of the warrant of attorney, or by any other manner—even parol evidence that he has authority—they cannot, in a summary way, as by quashing the writ, arrest the

Digitized by Google

proceedings. As the writ of error has been taken within proper time, there is nothing in the argument derived from the time which has been suffered to elapse since the writ was quashed.

The order of the court, quashing the writ, is reversed, record remitted to the District Court, and procedendo awarded.

SAILOR *v.* HERTZOGG.

2 182
226 *228

1. It is not sufficient to admit an insolvent petition from one under whom the other party claims, that the names are identical, and twenty-five years having elapsed since the filing thereof.
2. When the title is incomplete, under the statute of limitations, in one either a trespasser or with colour, admissions of facts by him are evidence to show possession is not held adversely.
3. Admissions of independent facts, even though in an offer of compromise, are evidence, though concessions for the purpose of a compromise in a treaty would not be so. GIBSON, C. J.

CERTIFICATE from the Nisi Prius.

Jan. 27.—This case is reported at length in 4 Whart. 259; but two points were considered here. On the trial, before Huston, J., plaintiff having shown title through Jacob Sailor, defendant offered the insolvent petition, &c., of Jacob Sailor, in 1817, which was objected to, without evidence of identity, but admitted. It being a disputed question, on the evidence, whether possession had been taken by those under whom defendant claimed twenty-one years anterior to 1815, plaintiff offered to prove that in the year 1815, Daniel Ley, under whom the defendant claims, clearly, absolutely, unquestionably, and unconditionally, acknowledged the title of Jacob Sailor, under whom plaintiff claims, and agreed either to purchase or to rent the premises from Jacob Sailor, admitted that he had no title to the premises himself, and that Sailor had the true title, and declared in *effect that he intended no longer to hold adversely to him, and that his declarations and admissions were such as to induce Sailor to believe that he would in future hold under him;* but the witness was rejected on the ground that a party having been in possession more than twenty-one years, especially when under colour of title, could not be affected by any thing short of what would avail to divest the title.

H. Hubbell and *Rawle,* for plaintiff.—The main question for the jury was assumed here; and also that a witness could state exactly what he did on a former trial. Now it is clear, that whether possession be

Digitized by Google

adverse or not, is for the jury; McMasters *v.* Bell, 2 Penna. 180. Here the offer, if proved, would have clearly shown the possession was by permission, under an offer to purchase—the very point decided in Miller *v.* Keen, 5 Watts, 548. Circumstances may be used for this purpose, Wallace *v.* Duffy, 2 Serg. & Rawle, 527. In fact, we used the very language of the judge, in Farmer *v.* Wilson, 10 Watts, 261; and entirely within that laid down in Cresswell *v.* Altemus, 7 Watts, 366; so that, in fact, the question for this court is the important one of keeping the duties of the judge and jury separate.

C. Ingersoll and *Keemlé*, contrà.—The witness had been examined five times, and this court, in 4 Whart. 285, 286, decided his evidence would not sustain the case. Why, then, waste the time of the court? In Farmers *v.* Wilson, 10 Watts, 261, nothing short of an express agreement to become a tenant, or quit, is said to be sufficient. Nor was there any offer to show the possession was retained by a fraud or trick, which is the exception, Paul *v.* Mackey, 3 Watts, 125; and it is the duty of the court to reject irrelevant testimony, Pettrich *v.* Searle, 5 Serg. & Rawle, 237. What was to be proved, *in effect*, amounted to nothing more than the facts stated in his offer, after being required to specify; Commonwealth *v.* Breneman, 1 Rawle, 316, 317.

Feb. 27. GIBSON, C. J.—The petition of Jacob Sailor, for the benefit of the insolvent laws, in 1817, ought not to have gone to the jury unattended with evidence that he was the person under whom the plaintiff claims. Identity of name is ordinarily, but not always, primâ facie evidence of personal identity. The authorities, on the subject, may be consulted in Sewall *v.* Evans, 4 Ad. & Ellis, 632; (S. C. 45 E. C. L. R. 631,) from which Lord Denman, and the other judges of the Queen's Bench, concluded that identity of name is something from which an inference may be drawn, unless the name were a very common one, or the transaction remote; and the reason given for casting the onus on the party who denies, is that disproof can be readily had by calling the person, whose identity is contested, into court. The name, in this instance, is not a very common one; but after more than a quarter of a century there ought certainly to be some preliminary evidence, however small.

Without intimating an opinion on the facts that might have been proved, we hesitate not to say that the testimony of Isaac Young ought to have been admitted, that the jury might determine whether it proved an independent acknowledgment, by Ley, of Sailor's title, and a declaration that he would not hold adversely to it, which, though accompanied with an offer to purchase, was allowed

Digitized by Google

to rebut an allegation of adverse possession in Miller *v.* Keane, 5 Watts, 348, or only an offer of compromise, under a belief, whether true or false, that Sailor had the better title, which would be no acknowledgment at all. The offer was, that Ley admitted the title to be in Sailor; that he declared, in effect, he would hold adversely to it no longer; and that his declarations were such as to have induced Sailor to believe he was going to hold under him. Certainly, if the evidence had come up to the offer, it would have disproved the allegation of adverse possession very effectually, because it would have proved an unconditional submission to Sailor's right, even though it were coupled with an offer to purchase, which would have been entirely consistent with it; and though it did not constitute a contract that could be enforced by a court of law, or even the abstract relation of landlord and tenant, which was thought to be indispensable by Mr. Justice Huston, in the Farmers and Mechanics' Bank *v.* Wilson, 10 Watts, 264. He affirmed without qualification in that case, as well as in the trial of the present, that the occupant must have entered into an *agreement* or a *contract* to leave the land or take a lease of it. Would the possession of one who had done so be more or less an occupancy by *permission*, than that of one who had been suffered to occupy under a treaty of purchase which had failed by reason of inability to come to terms? Nor is it material, though it was supposed to be, that Ley had entered under a recorded deed from a supposed owner to whom he had paid the greater part of the purchase money. If indeed the statute had already closed upon the title, nothing less than a legal or an equitable conveyance would have revested it. But that was not the question. It was admitted by the judge, in his charge, to be doubtful whether the evidence made out an adverse possession from 1790, and consequently, whether the statute had run its course in 1815, when Ley submitted and proposed to purchase. Now, a parol disclaimer of hostile possession has the same effect, whether it be made by a colourable owner or an avowed intruder. Each is equally a trespasser, and each equally stops the running of the statute when he surrenders at discretion. Mr. Justice Kennedy stated an indisputable principle in Creswell *v.* Altemus, 7 Watts, 581, when he said that "it is sufficient to prevent the possession from being adverse, that the party taking possession *intends* to occupy the land subject to the *will* of the owner; and that if this be made to appear clearly by the evidence, the statute of limitations will form no bar to the owner's recovery of the possession whenever he may demand it." But how can his intention be made to appear by any thing else than his declarations, which have always been received as evidence of the nature of

www.jibtool.com.cn

Digitized by Google

an occupant's possession? By the rule just stated, it is enough that he does not himself consider it to be adverse. In consonance with it, I allowed a plaintiff at Nisi Prius to recover a few inches of ground covered by the side of a frame warehouse which had been accidentally pushed over the line by pressure of the contents within, but which had been concealed from view by an adjoining building. And on the same principle is Comegys *v.* Carley, 3 Watts, 280, in which possession had been taken in mutual misapprehension of a boundary. In Hawkes *v.* Senseman, 6 Serg. & Rawle, 23, adverse possession was defined to be such as is "actual, continued, visible, notorious, distinct, and *hostile*." And why must it be so? Because the statute protects the occupant, not for his merit, for he has none, but for the demerit of his antagonist in delaying the contest beyond the period assigned for it, when papers may be lost, facts forgotten, or witnesses dead. Why then should an occupant be protected who has himself induced the delay by insincere professions of submission, and illusory proposals of purchase? (The statute was not made to serve the purposes of artifice and trick.) For this reason it was, that letters which contained a recognition of the title and a proposal to purchase, were held to stop the running of the statute in Miller *v.* Keane. And they were rightly so held; for there is a marked difference between the positive admission of particular facts, and an offer to buy peace without regard to the title. An offer of compromise is not allowed to operate as an implied recognition of the opposite title, because it is not necessarily so; for a man may choose to buy in even a worthless title to avoid a lawsuit; and he must be allowed to bid for it without being supposed to admit any thing. But the direct confession of a fact stands on different ground. In Cumming *v.* French, 2 Camp. 106, n., the clerk of the plaintiff's attorney, being called to prove notice of dishonour, testified that the defendant, being asked, when arrested, what he proposed by way of settlement, replied, "I am willing to give my bill at one or two months;" upon which Lord Ellenborough nonsuited the plaintiff, saying, "this is neither an acknowledgment of notice, nor a waiver of it." It is easy to divine what he would have said, had the acknowledgment of notice been direct instead of inferential. The result collected from the cases by Professor Greenleaf, in his Treatise on the Law of Evidence, part 2, chap. ii. sect. 92, is that the direct admission of a fact will always be received, unless it were made expressly without prejudice, or, at the least, on the faith of a pending treaty, into which the party might have been led by a confident expectation that a compromise would take place; and that even an offer to compromise a claim thus tacitly admitted, is competent evidence, unless it were ac-

Digitized by Google

companied with a caution that the offer was confidential. And the authorities sustain it. "Evidence of concessions," said Lord Ellenborough, in Gregory *v.* Howard, 3 Esp. 113, "I shall never admit: but facts admitted before arbitrators I always shall." An independent fact is never acknowledged by way of *concession.* In Waldridge *v.* Kennison, 1 Esp. 144, an admission of handwriting, made pending a treaty of compromise, was received. True it is that Lord Kenyon said, the handwriting was no way connected with the merits, and that it was capable of being proved by other means. But it was, therefore, the more distinctly an independent fact: and an admission is not the less competent because it would not have availed the party to withhold it. In Slack *v.* Buchannan, Peake's Ca. 5, Lord Kenyon said he would, in future, receive evidence of all admissions which the party would be bound to make in answer to a bill in equity. In Cory *v.* Britton, 4 Car. & Payne, 462, a letter containing an acknowledgment of the debt was ruled out only because it contained a reservation of a right to object to its being used to the writer's prejudice, "now, or in any future arrangement that may be made or instituted." It had evidently been written in the course of a negotiation to compromise. So far the English cases; and the American courts go certainly as far. They hold that the admission of *any* independent fact is receivable, though made during a treaty of compromise; for which are given, Mount *v.* Bogart, Anthon's Rep. 190; Murray *v.* Coster, 4 Cow. 635; Fuller *v.* Hampton, 3 Conn. 416; Sanborn *v.* Neilson, 4 New Hamp. 501; Gerrish *v.* Sweetser, 4 Pick. Rep. 374, and Delogny *v.* Rentoul, 1 Martin, 106. "The law on this subject," said Chief Justice Hosmer, in Hartford B. Company *v.* Granger, 4 Conn. 148, "has been often misconceived, and it is time that it be firmly established. It is never the intendment of the law to shut out the truth, but to repel any *inference* which may arise from a proposition made, not with the design to admit the existence of a fact, but merely to buy one's peace. If, however, an admission is made *because* it is a fact, the evidence to prove it is competent, whatever motive may have prompted the declaration. If A. offers to B. ten pounds in satisfaction of his claim of a hundred pounds, merely to prevent a suit, or purchase tranquillity, this *implies* no admission that any sum is due, and therefore the testimony to prove the fact must be rejected, because it evinces nothing concerning the merits of the controversy. But if A. admits a particular item in the account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy." I have extracted the passage entire, because it contains a more lucid statement of the

Digitized by Google

distinction than I have seen elsewhere. Now, the case offered to be proved in this action is the very case actually proved in Miller v. Keane, except that the admission in the one was written, and in the other verbal—a difference that was held to be immaterial in Cory v. Britton, just cited; and it is certain that the proposal to purchase, in the latter, was not allowed to reduce the whole to the consistence of an offer of compromise, or make the direct admission of the fact of ownership and amicable holding the less potent to rebut the allegation of adverse possession. Whether the evidence will sustain the offer, when it shall be heard, it is not for us at present to determine, from any thing that has heretofore transpired: it is enough to say that the plaintiff is entitled to go with it before a jury.

Judgment reversed, and venire de novo awarded.

www.libool.com.cn

RUSH v. CAVENAUGH.

1. To call an attorney a cheat is actionable, even though an indictable offence be not imputed.
2. Counsel, employed by a prosecutor, acts for the attorney-general; and, in assenting to the discharge of an accused, must be guided by his own judgment on the evidence, of the innocence of the party, even though it be contrary to the oath of the client.
3. And in such case he is entitled to compensation.
4. Refusal to permit defendant to withdraw a plea of justification to an action of slander, is not a subject of writ of error.

CERTIFICATE from the Nisi Prius.

Jan. 29.—This was an action of slander by an attorney. On the trial he proved that defendant charged him with having collected a note, and pocketed the proceeds, calling him a thief, robber, and cheat, and that he had cheated him in his professional capacity, as was averred in the declaration. The witnesses agreed they did not understand the charges to be of indictable crimes, but professional misconduct. The money was retained for fees, and there was evidence of the defendant's assent thereto. Witnesses were examined as to their regularity; but the only point of interest was the fee for attending to a charge of forgery made by defendant, in which the plaintiff consented to a discharge of the prisoner, after hearing evidence which convinced him of the mistake, though defendant still persisted in the charge. Defendant offered to prove his own character for veracity, to show the reasons were insufficient to justify plaintiff in thus agreeing to the discharge.

Digitized by Google

The court was requested to charge that the *legal offences* must have been intended, to make the words actionable. 2. Discontinuing criminal proceedings, on evidence disputed by the client, was a breach of professional duty. 3. That under such circumstances he was entitled to no fee.

His honour, Serjeant, J., after stating the general rules governing the action, told the jury that words are actionable if they are such as are calculated to impair a person's standing, and deprive him of reputation in his calling or profession. To say of a lawyer, he is a knave, &c., is actionable. But if, in the use of the words robbery or theft, the party accompanies them with words which show that he did not mean them, in that case then they are to be taken in the sense intended. If the defendant imputed robbery or theft, or used words meaning that the plaintiff had cheated him in his profession, then the defendant is liable under this declaration. If the words robbery and theft were not used in the sense of implying a felonious offence, which may be gathered from the accompanying language or circumstances, or from the manner in which they were understood by those who heard them, then the other charge only would remain, viz., the cheating of the defendant professionally.

This is not a suit to decide whether the fees charged by plaintiff were right or wrong; for, if his charges were too high, that would not justify the defendant in charging him with having committed any of these offences. This is not a case in which the plaintiff's charges of fees are in issue; yet the amount of damages will depend upon the circumstances. In some cases they should be merely nominal. The damages should be proportioned to the injury. That he thought the attorney should retire from the case, if he believed the accused to be innocent; and if the witness who proved the innocence of the accused was right, plaintiff was entitled to his fee, otherwise not. The rejection of the evidence, the charge and refusal to permit the withdrawal of the plea of justification, were the errors assigned.

Earle, for appellant.—A private prosecutor is recognised by the law, and has an interest in the proceedings, being liable to pay costs; his counsel therefore has no other discretion than in a civil suit, and there he cannot act contrary to instructions, but if asked to plead falsely, must plead non veraciter informatus, 1 Bac. Ab. 491. Certainly he cannot, relying upon the oath of one witness, contradicted by his client, act contrary to instructions, and then demand compensation.

Hazlehurst, contrà.—The counsel relied on the evidence of an un-

www.libtool.com.cn

Digitized by Google

www.libtool.com.cn

biassed witness, which was conclusive in its character. As to the refusal to permit withdrawal of plea, it was entirely within the discretion of the court; and after leaving it until found to be impossible to be sustained, the party must take the consequences. Jackson *v.* Winchester, 2 Yeates, 529.

Feb. 26. GIBSON, C. J.—It is settled by Alston *v.* Moore, 1 Rolle's Abr. 53, that it is actionable to call a lawyer a cheat; for though he were not indictable for cheating his client, or punishable for it by striking from the roll, it is enough to support an action for words which impute it, that they touch the business by which he gets his bread.

But the material question is, did the plaintiff violate his professional duty to his client, in consenting to withdraw his charge of forgery against Crean when before the alderman, instead of lending himself to the prosecution of one whom he then, and has since, believed to be an innocent man? It is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any one except his client; and that the latter is the keeper of his professional conscience. He is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man. But the prosecution was depending before an alderman, to whom, it may be said, the plaintiff was bound to no such fidelity. Still he was bound by those obligations which, without oaths, rest upon all men. The high and honourable office of a counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience. The origin of the name proves the client to be subordinate to his counsel as his patron. Besides, had the plaintiff succeeded in having Crean held to answer, it would have been his duty to abandon the prosecution at the return of the recognisance. As the office of attorney-general is a public trust which involves, on the discharge of it, the exercise of an almost boundless discretion by an officer who stands as impartial as a judge, it might be doubted whether counsel retained by a private prosecutor, can be allowed to perform any part of his duty. Certainly not, unless in subservience to his will and instructions. With that restriction, usage has sanctioned the practice of employing professional assistants to whom the attorney-general, or his regular substitute, may, if he please, confide the direction of the particular prosecution; and it has been beneficial to do so where the prosecuting officer has been overmatched or overborne by numbers. In that predicament, the ends of justice may

Digitized by Google

require him to accept of assistance. But the professional assistant, like the regular deputy, exercises not his own discretion, but that of the attorney-general whose locum tenens at sufferance he is; and he consequently does so under the obligation of the official oath. In the case before us, Mr. Rush not only acted in accordance with it, but was guided by an extremely delicate sense of propriety. Convinced by the testimony of Mr. Bacon, that the accusation was false, he did not only what every honest man would do, but what happened to be the very best thing he could do for his client—he abandoned the prosecution for the avowed reason that it could not be supported. He did not discontinue it, as has been said; for its fate was in the hands of the magistrate, who alone was responsible for it. But the defendant offered to prove the goodness of his own character, to show that Mr. Rush ought not to have acted on Mr. Bacon's information in preference to his client's instructions. His client's character, however, was not in issue; nor was Mr. Rush bound to give credence to the instructions of a heated client, rather than to the sober testimony of a dispassionate witness. It is enough that he acted to the best of his judgment on reasonable premises; for, judging in sincerity, he would not be responsible for the accuracy of his conclusion. Besides, it was not pretended at the trial that he had judged erroneously. His relinquishment of the prosecution, then, being defensible, he was entitled to compensation for his services so far as he had gone. Had he continued to prosecute against the dictates of his conscience, he would have been entitled to nothing; and the argument here, that he was not entitled, because he did not continue, would place him on the horns of a dilemma. But his task was done when the prosecution was ended; and he was then entitled to demand a quantum meruit.

As an act of discretion, the refusal of leave to withdraw the plea of justification was entirely proper. By posting the plaintiff on the very record as a professional cheat, the defendant had given durability to what was originally momentary; and he attempted to withdraw this aggravation of the injury only, when he had effected his purpose by it. The judge, therefore, very properly prevented him from eluding the consequences of his misconduct. Besides the propriety of a discretionary act is not a subject of review in a court of error; and a defendant has not a legal right to withdraw a plea by the act of 1806, which, though it allows him to alter, allows him not to escape from responsibility incurred. And he can amend only for *informality*, when, in the opinion of the court, it will affect the merits. There was no informality here; and the judge very correctly thought that the amendment would injuriously affect the merits. There was, therefore, no ground to except. Judgment affirmed.

Digitized by Google

www.libtool.com.cn

ARRISON *v.* HARMSTEAD.

2 191
211 *120

A deed was executed and left with the magistrate before whom it was acknowledged, and taken away by a brother of the grantee for him: *Held*, to be proper evidence of delivery to leave to a jury.

A conveyance, reserving a rent in fee, was altered by the insertion of material words, after delivery, by the agent of the grantor; the land passes discharged of the covenants.

Nor can a recovery be had on the original contract, independent of the deed.

Nor by an action for use and occupation; for the grantee is the owner of the land.

Nor will equity relieve and compel a redelivery of the premises, or payment of the rent.

The estate of the person making the alteration is destroyed, as a penalty of his fraud. Per ROGERS, J.

The deed being avoided by such alteration, a purchaser bonâ fide, without notice, is in no better situation than the original parties.*a*

ERROR to the District Court of the city and county of Philadelphia.

Jan. 30, 31.—This was an action for ground-rent. The first count was on the covenant; the second on a verbal contract, averring possession taken thereunder by the defendant; the third for use and occupation, and the fourth for interest. Pleas, non est factum and nil debet. The main question was the effect of an alteration of the deed. After the originals and counterparts were executed, they were left at the office of an alderman, before whom they were acknowledged, and taken away by defendant's brother, for the owner. At the request of plaintiff's agent, the deeds were returned to the scrivener employed by defendant to draft them, to be recorded. This person purchased the rents, but did not take a conveyance to himself; when he sold they were conveyed to his vendee. After they had been thus returned, the words "within ten years" were inserted in a blank left in the printed deed, in the redemption clause, by a clerk in the scrivener's office, but by whose direction, or whether before the purchase by the scrivener, was the point submitted to the jury. The contract for the conveyance in consideration of these rents was proved. The real plaintiff was a bonâ fide purchaser, to whose use this action was brought in the name of the original covenantee. His honour, Jones, J., told the jury, a delivery might be made without formal words, and left it to them to say whether leaving the deeds with the alderman, and possession taken by defendant, with consent of plaintiff, was a sufficient evidence of delivery. Second, If the plaintiff, or any one by his authority, or the scrivener

a An eminent counsel informs me, he has always required, on the purchase of a ground-rent, a written statement from the owner of the land that he has no defence, &c., to the payment of the rent; the propriety of which is shown by this case; the deed itself affording no suspicion of the fact of an alteration, as it was inserted in a blank space, and the words were those almost uniformly used in similar conveyances.

Digitized by Google

after purchasing, made the alteration without defendant's consent, it avoided the deed, and recovery could not be had thereon. Alteration by a stranger would not affect it; a bonâ fide purchaser could not recover on this deed if thus avoided; that use and occupation would not lie. The jury found for defendant.

E. S. Miller, for plaintiff.—The onus, under the plea of non est factum, is on the defendant; 6 Mod. 208. Delivery must be actual, or by words, or both, Touch. 58; but the evidence here shows no delivery of the counterpart to plaintiff until after recording, and it is certain the alteration was before that. Even the record is not conclusive of delivery, 1 Penna. 32; 12 Mass. 461; and we are entitled to the strictest rule; nor is mere intention to deliver sufficient, 8 Connect. 42; 5 Mason, 60; 12 Johns. 421; and the presumption is in favour of alteration before, 2 Greenl. 147; 1 Halst. 215; but the alteration by the owner, not having a conveyance, will not avoid the deeds; 15 Johns. 298; 1 Paine, 343. The cases in Pennsylvania are numerous, of an innocent purchaser, through a void deed, being protected and relieved.

But, at all events, the party must elect whether he will consider the deed void or valid; and here, after having notice of the act, he entered and still occupies; 1 Swan. 390; 1 Ves. 172; 2 Sch. and Lef. 450; 13 Vin. *Fait*, W. pl. 6; Bacon Abr. *Election*, E.; 13 Serg. & Rawle, 22, 24; 10 Serg. & Rawle, 171. That the two distinct estates in the rent and land, Roff *v.* Weaver, 8 Watts & Serg. 126, were not divested by the alteration, is certain, Gib. Eq. Ca. 236; and our remedy would be in equity, which must here be administered through this action. This *estate* makes the difference between our case and a bond, Vin. Abr. *Fait*, X. 2, pl. 5, and the only consequence is to destroy our evidence; but as in Lewis *v.* Paine, 8 Cow. 71, we made it out aliunde; Hatch *v.* Hatch, 9 Mass. 311. But use and occupation would lie if the deed is gone; Comyn. Land. and Tenant, 431. [*Curiam.*—The difficulty is, the defendant owns the land.] But there is a holding of us; Franciscus *v.* Riegart, 4 Watts, 98. The seignory remains though the reversion is gone, 8 Watts & Serg. 126.

J. A. Phillips, contrà.—There was sufficient to warrant finding delivery, Shelton's Case, Cro. Eliz. 7. [*Curiam.*—The judge was right there.] The doctrine of innocent purchasers does not apply, for there was no deed in existence at the time of the purchase. It was not like a deed good till avoided, but it was in fact avoided. Use and occupation never lies if a deed was made, 10 Watts, 380; 3 Serg. & Rawle, 502, Henwood *v.* Cheesman.

Digitized by Google

Price, in reply.—Words, or an act, are essential to delivery, Van Amrige *v.* Morton, 4 Whart., and here the parties knew the blanks were to be filled up, 11 Serg. & Rawle, 171. But the grantee may elect to treat a deed after alteration as valid. Vin. *Fait*, U. pl. 6; Cauffman *v.* Cauffman, 17 Serg. & Rawle, 24, 365, 423; Masters *v.* Miller, Sm. Lead. Ca. n.; 2 H. Bl. 63. Equity would reform this instrument in favour of a purchaser. [*Gibson*, C. J.—Show a case. The deed is dead, and equity cannot put life into it.] Price *v.* Jenkins, 4 Watts, 85; Fletcher *v.* Peck, 6 Cranch, 133.

March 24.—Rogers, J., after stating the pleadings.—The jury found that the plaintiff, Matthew Arrison, sold the defendant, Oliver P. Harmstead, a vacant lot, for which he executed a deed duly delivered, conveying to the defendant the said premises, reserving the rent, for which suit is brought. That, subsequently to the execution and delivery of the deed, it was altered in a material part by the plaintiff, or by some person having an interest in the premises, or by their authority. One of the disputed points at the trial was as to the time of the alteration; that is, whether it was made before or after the delivery of the deed. That an alteration was made, varying the effect and operation of the deed in a material part, and that the deed was delivered by the grantor to the grantee, seems not to have been denied, nor could it be, with any chance of success. This point was sent to the jury with a direction that a deed may be delivered by a formal act without formal words of delivery. If a man execute a deed, with a view to its being delivered, that is; if he does all that is necessary to perfect it, with the intention of having the deed delivered to the grantee, and the deed afterwards comes into the hands of the grantee, a jury may infer the assent of the grantor and the fact of delivery. The delivery may be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing, or it may be by both. Shep. T. 57, 58; 12 Johns. 421; 1 Penna. Rep. 43. And in Shelton's Case, Cro. Eliz. 7, lessor for years grants his term by deed, and sealeth it in the presence of divers, and of the grantee himself; and the deed at the same time was read but not delivered, nor did the grantee take it, but it was left behind them in the same place.

The opinion of all the justices was, that it was a good grant; for the parties came for that purpose, and performed all that was requisite for perfecting it, excepting actual delivery; but it being left behind them, and not countermanded, it shall be said to be a delivery in law. By this it appears that it is the intention of the parties to be collected from all the acts and declarations which is to determine the fact of de-

Digitized by Google

livery. Although it is customary to use certain prescribed words, yet no particular formula is required to pass the title. The deed was actually signed and acknowledged, and the delivery attested by the alderman who took the acknowledgment. It was signed, sealed, and acknowledged with a view to delivery. Of this we are not permitted to doubt. It is equally certain that the deed went into the hands of the grantee with the assent of the grantor. That this was the understanding of all parties is manifest. We hear no complaint on the part of Arrison; on the contrary, Smethhurst, who was his agent, sent to the defendant, in whose possession they were, for the deeds, for the express purpose of having them recorded. But this could not be, except on the footing that the deed had been delivered by his principal. The consummation of the title depends on the intention of the parties, of which the jury are the judges. On this they have passed, nor could they have decided differently from what they did. There is no error in this part of the case.

A deed, good in its creation, may become void by matter ex post facto, as by interlineation, erasure, or by alteration in a material part. But a deed may be good in part, and void in part. It may be good against one person and void against another. Of this many examples are given in Shep. T. 70. By the conveyance, the fee passes to Harmstead, with a reservation of a rent issuing out of the land to Arrison. Now, what is the effect of the fraudulent alteration of the deed by the grantor? The answer is, that the law, in consonance with justice and policy, avoids the covenants reserving rents in favour of the fraudulent grantor, but preserves the fee-simple to the innocent grantee discharged from the covenants in the deed. The law proceeds on a principle of policy, which cannot be safely relaxed, which altogether forbids parties from tampering with written instruments or deeds. On them be the consequences of the fraudulent alteration; it is at their peril. It would be most dangerous, if it could be suffered that a party delinquent may gain, but can lose nothing by his improper and fraudulent conduct. It cannot be, that the estate of the grantee is impaired, for that would be to affect a vested interest, without any fault on his part, a proposition too glaringly unjust to receive countenance in a court of justice. It is said to be contrary to equity, that the grantee shall retain the land without paying the stipulated rent. That by retaining the possession of the premises he elects to pay the price. The principle of election does not apply. When the deed was delivered, and possession taken, the grantee became the owner of the estate in fee-simple, subject to the conditions in the deed, but those conditions have been avoided by the wilful and fraudulent act of the grantor. He can-

Digitized by Google

not invoke the principles of equity. He has forfeited all aid from that quarter by his own fraud. The retention of the property by the grantee is merely the possession and enjoyment of what is his own by the contract. It is impossible, in this case, to say what injury the grantee has sustained. This cannot well be estimated. It does not follow that justice will be done by giving to the grantee a title according to the original and real contract. At any rate the grantor has precluded himself from occupying the ground by his own fraudulent act. The only way in which even a semblance of justice can be done would be by returning the purchase money with interest, paying for all the improvements to, and a re-conveyance of the premises. This, however, has not been offered, nor would the grantee be bound to accept of it if tendered; as it is plain that in many cases it would be impossible to place the parties in their original condition; and besides, it might operate, in some cases, as a premium to fraud.

The counsel for the plaintiff requested the court to instruct the jury, that if they found the deed in question was altered by the plaintiff or his agent, yet, if they found a contract between the parties, similar to that contained in the deed, leaving out the clause limiting the period of redemption, whether verbal or otherwise, executed by delivery of possession and building on, and enjoyment of profits by the defendant, they might find for the plaintiff on the second and third counts of the declaration. This instruction the court very properly refused to give. In the first place, there is no evidence of any contract whatever, independent of the deed, and if there was, it was merged in the deed, and a subsequent fraudulent alteration cannot restore it, so as to form the groundwork of an action in favour of the delinquent party. A party can never claim, either in a court of equity or law, through the medium of a fraud. If a bond, note, or other instrument for the payment of money be altered, and thereby avoided by the obligor, it has never yet been suffered or even attempted to recover on the original contract, as, for example, for money lent. It is a mistake to suppose that the evidence of title only is avoided; the whole contract becomes void, and it is held as a principle of policy that the fraudulent party may lose but can gain nothing by his fraud. To reverse this principle, would be attended with the worst consequences, as it would be in effect deciding that he might gain but could not lose by his own improper conduct. This is admitted as regards chattels, but it is said to be different in real estate; but why there should be a distinction is not by any means clear. And in accordance with these principles are the cases cited in 13 Vin. 40, let. N. pl. 6. If A. lease land to B. by indenture, dated 10th Feb., 27 H. 8, and after dies, and C. the heir of A. by indenture recites

Digitized by Google

the lease, but *misrecites it*, that is to say, reciting it to be dated 10th Feb., 28 H. 8, and then leases it by indenture to B. for years, to commence after the expiration of the said recited lease, and after the sealing and delivery of this last lease, this *misrecital is rased* and reformed, and made 10th Feb., 27 H. 8, according to the true lease, *but it is not proven by whom it is done, nor when;* this shall not avoid *the interest of the estate for years*, though it shall avoid the deed, because the deed is not of the essence to pass the estate. But the estate being well passed, and it not being necessary to show the deed for maintenance of the estate, the estate shall not be destroyed by it. This was so held by Jones and Harvey, J., but Crab, J., held contrà, that as it is lease by the deed it is a contract by the deed, and the party interested rasing the deed, he determines the deed, and his interest, by his voluntary act, as if he had surrendered; and the contract being by deed, he may not determine the deed and the covenants, but quoad himself he doth destroy it; but perhaps quoad the lessor, it may have essence, if the lessor will, but this is at his election, and not at the election of the lessee; 13 Vin. 40, is the authority there cited. It seems to me impossible to doubt the soundness of the latter opinion, based as it is on the injustice of allowing the innocent person to be injured by the act of the delinquent party. He may affect his own title, but cannot injure or impair the title of the other party. Indeed it seems to me difficult to account for the determination of the majority of the court, except that it was not known by whom or when the alteration was made, and therefore it would be unjust to divest his estate, when, for aught that appeared, he was in no default. In the case cited, Justice Jones cites Allen Swanwick's case, in the Court of Wards, to be resolved that the rasure of deed of feoffment doth not destroy the estate. What that case really was, we do not know; but if it was meant to say that when the rasure is made by the feoffor, it does not destroy the estate of the feoffee, it is precisely what we rule to be the law in the case in hand. This is the case of an indenture, by which an estate is conveyed in fee, reserving rent; the grantor alters the deed; we are of opinion that by the alteration his own interest is defeated, but that the estate of the grantee, viz. an estate in fee, is left in full force and virtue. These remarks dispose of the first, second, and fourth counts. The third count remains. The action for use and occupation is founded on an implied contract, for the jury may imply a promise to pay for the use and enjoyment of the property. It is a suit by the owner against a tenant, or occupier, for compensation for the use of his premises. But the evidence in this case was a sale and conveyance of a fee-simple, reserving a ground-rent to the grantor, his

www.hbtpol.com.cn

Digitized by Google

heirs and assigns. This is a contract of an entirely different nature from a contract for use and occupation, and leaves no room for an implication of a promise to pay. Such evidence will not support a count for use and occupation. The defendant is himself the owner of the property, and how he can be compelled to pay for the use of premises which he owns in fee, it is difficult to understand. The action for use and occupation is a suit in which the owner may recover a fair equivalent from the holder, or occupier. But the plaintiff seeks to reverse this principle, by compelling the owner to pay for the use of his own property.

It is said that Mrs. Lewis is a bonâ fide purchaser, without notice, and that the action may be sustained on that ground. But conceding that she is, her situation is no better than the fraudulent grantor's. Although the title of the grantor was, in its inception, good, it became absolutely void by matter ex post facto. At the time of the assignment, the title being avoided, the assignor had nothing to convey; of course nothing passed to the assignee. It may be, and perhaps is, a hard case. Fraud may be committed on an innocent purchaser, who may find it difficult to guard against imposition. This is conceded; but it is far better to encounter this risk, than to give the least countenance to any alteration whatever of a solemn instrument of writing, which would certainly be the result, if the guilty party could escape the consequences of his fraud by a transfer, real or pretended, to a person who might assume the garb of an innocent purchaser for a valuable consideration. We cannot lay too many restraints upon trick, artifice, and fraud. The cases cited apply only to voidable deeds, where it is admitted the bonâ fide purchaser stands in a better position than the participant in the fraud. But these principles do not apply where the assignor has no title whatever, or, which is the same thing, where he once had a title avoided by his own fraudulent act. The assignees must protect themselves from imposition by proper covenants, or where these are improvidently omitted, by suit for an indemnity against the fraudulent assignor. On the distinction between a void and voidable instrument, it was ruled in Master v. Miller, 4 T. R. 320, that the unauthorized alteration of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoided the instrument, and no action can afterwards be brought upon it, even by an innocent holder, for a valuable consideration. In Van Amrage v. Miller, 4 Whart. 382, the point is expressly ruled, on the distinction between a void and voidable deed. It is there held, that if a deed, executed and acknowledged by the grantor, with a blank for the grantee's name, be surreptitiously and fraudulently taken from the grantor's house, and

Digitized by Google

the blank filled up, no title passes thereby; and a bonâ fide purchaser, for a valuable consideration, from the person holding the deed, stands in no better situation than such fraudulent holder.

Judgment affirmed.

MANUEL *v.* The MISSISSIPPI Railroad Co.

The holder of a certificate of deposit having commenced a suit by foreign attachment, surrendered it and took new certificates, the action cannot be maintained thereon.

Feb. 2, 3.—ON the 29th June, 1838, the plaintiff issued a foreign attachment on the property of the defendants, who appeared and took defence, and the question was, whether the plaintiff's subsequent act precluded him continuing this proceeding. No other step was taken in the suit until 1840. Before issuing this attachment, the plaintiff was the holder of a certificate of deposit with defendant, (the Brandon Bank,) for $12,490, dated June 4, 1838, bearing interest at six per cent. until resumption of specie payments. This certificate was protested for non-payment, notes of the institution received, and the same day re-deposited, and a similar certificate, dated 13th June, given, which the same day was protested. On this instrument was endorsed a calculation of interest, and a statement of payment, and both were produced by the defendant.

The plaintiff proved by his own oath the loss of twenty certificates of $500 each of defendant, dated and received on the 24th Dec. 1838, and proved these were in lieu of the second of the large certificates above mentioned, and the balance with the interest thereon was paid in the notes of the institution, after the attachment had issued. These latter certificates bore interest at the rate of eight per cent., which is the legal rate in that state, and were payable in six months. The bank had suspended specie payments before any of these transactions, and never resumed.

The court (Pettit, President) granted a nonsuit on the motion of the defendant.

Perkins and *Randal*, for plaintiff.—The question is, whether the mere taking a new promise destroys the former liability, or merely suspends the cause of action until the maturity of the new note. Owenson *v.* Moss, 7 T. R. 60; Hughes *v.* Wheeler, 8 Cow. 77; War-

Digitized by Google

del v. Server, 5 Hill, 448, but we only contend it is a question for the jury, whether received in satisfaction or as security, and this is a question for the jury, Weakley v. Bell, 9 Watts, 273; Jones v. Johnson, 3 Watts & Serg. 373. But the court took this away, and under our act it is like a demurrer to evidence, Purd. Dig. 252; Bevan v. Insurance Co. at the last term. We were entitled to the benefit of the agreement that the whole arrangement was illusory, defendants never intending to resume.

Cadwalader, contrà.—As to the demurrer to evidence, I deny that all the technical niceties of that are to be the rule of construction of this act; the jury can only make natural and reasonable deductions, Crawford v. Jackson, 1 Rawle, 532. But here his own testimony shows that after commencing suit he delivered up his former securities, and took new ones, payable with eight per cent. interest. Here was then two considerations: 1st, a new note; 2d, an investment for six months, during which tender could not have been made. But though he may elect to sue on the former contract, when the new contract is not complied with, yet, as he could not sue during that time, neither can a suit continue then. A personal action once suspended is gone for ever, Tyson v. Dorr, 6 Whart. 263, 264. At common law, subsequent circumstances cannot aid, Small v. Jones, 8 Watts, 255, 256. So here, for six months, during which defendant was entitled to a trial, plaintiff was incompetent to maintain this suit. Here there was an entirely new contract, and the old one had been cancelled by surrender.

Feb. 24. SERJEANT, J.—Had the plaintiff in December, 1838, received from the defendants (the Brandon bank) $12,490 in bank notes, and surrendered to them the certificate for that amount, and then deposited these notes, and received new certificates of deposit; it could not be pretended that they continued liable on account of the prior certificate, in any respect whatsoever. The bank would have performed its engagement, and its liability upon it would have ceased. Instead of doing so, the plaintiff surrenders the large certificate to the bank, and receives, in its stead, besides bank notes, twenty new certificates of $500 each, which express upon their face that he has deposited money to that amount. Except that the one is more circuitous in mode than the other, I perceive no difference between them. The plaintiff obtains new certificates of deposit of money, both parties treating the transaction as such. He surrenders the first certificate to the bank to cancel or do what they please with. The bank has fulfilled its engagement, by placing him, at his own request, in exactly the same position as if he had received bank notes and again deposited

Digitized by Google

them, and he has agreed, by the terms of the new certificates, that it has so done. The case does not resemble those that have been cited, where a note or security were taken for a subsisting debt, and the question was, whether they were taken as payment or as collateral security. The true mode of viewing it, in my opinion, is that of an instrument of a special character, binding the bank to the payment of certain money; which money, by the plaintiff's own act and admission, has been paid him, and again deposited under a new engagement by him in relation to it, entered into between the parties. We are therefore of opinion that there was no error in directing a nonsuit, there being no fact or inference from fact in the case, on which the plaintiff could be entitled to recover.

Judgment affirmed.

---

2 200
35 SC 1433

FRAZER *v.* D'INVILLIERS.

1. An endorser "without recourse," of a treasury note which had been paid, and afterwards stolen, and put in circulation, the marks of payment having been fraudulently obliterated, is liable to his endorsee; for these words merely limit his responsibility by the law-merchant in the event of the instrument being dishonoured.
2. United States Treasury notes are negotiable instruments.

APPEAL from the Nisi Prius.

Feb. 3.—A treasury note in the following form:

"11 March, 1841.

"The United States promise to pay, one year after date, to CORCORAN & RIGGS, or order, Five Hundred Dollars, with interest, at the rate of six per centum."

Was stolen after being cancelled by the United States, and the words of cancellation having been obliterated, was put in circulation, and a bonâ fide holder endorsed it to defendant's order for safety; on demand, the interest was paid by the United States, and endorsed thereon. Defendant then sold the note and endorsed it without recourse, and interest was again paid.

When the fraud was discovered by the government, and payment refused, the plaintiff sued on the endorsement.

The court gave judgment for the plaintiff.

C. Gilpin, for plaintiff.—The principle of Charnley *v.* Dulles, 8 Watts & Serg. 353, was, that endorsement being of an instrument not nego-

Digitized by Google

tiable, the words "without recourse" had no meaning, and that the party was liable on his implied warranty as on the sale of other chattels. There the paper was valueless by reason of a forgery; but here it is not so, for the United States, having subsequently paid interest, is liable as any person giving currency to a stolen note. Gilkeson *v.* Snyder, 8 Watts & Serg. 200. This point was collaterally decided in Knight *v.* Lanfear, New Orleans, April, 1844.

Gerhard, contrà.—The value of the note depends upon the United States being estopped by the acts of its agents done in ignorance; but neither of the payments of interest were inducements for the purchase by defendant, which is the principle of Gilkeson *v.* Snyder. This alone disposes of the objection; but such a possible value is not what plaintiff bargained for; especially as it cannot be enforced by suit. The rule is settled, that the instrument must be such as it was understood to be by the parties buying and selling. In Young *v.* Cox, 3 Bing. N. C. 724, the want of a stamp, which a foreign government after issue of bonds required holders to obtain on pain of having them rejected; the only effect of which, in fact, was to destroy the marketable quality on the stock exchange, was allowed as a reason for rescinding a contract. Charnley *v.* Dulles settles the effect of the endorsement, and, besides, the instrument here is a negotiable one. United States *v.* Bank United States, 2 Howard, 711; United States *v.* Bank of Metropolis, 15 Peters, 377. Hence the words of endorsement are confined to non-liability for the drawer; and the failure of consideration need not be by a fraud of the party. Jones *v.* ———, 1 Marsh. 157.

Feb. 24. SERJEANT, J.—Treasury notes possess the highest character of negotiability, by the express provisions of the acts of Congress authorizing their issue. For this reason, as was held by this court in Charnley *v.* Dulles, 8 Watts & Serg. 353, the words "without recourse," annexed to the defendant's endorsement, only exempt him from that liability on the note, in the case of its dishonour at maturity, to which he would otherwise be subject by the law-merchant. But they do not exempt him from the obligation he is under, in case the instrument turns out not to be genuine, to return the money paid for it by one to whom he passed it in the ordinary course of business, any more than if he had innocently passed a forged check, note, bill of exchange, or other instrument, for money paid him. In such case it is the duty of the person who passed the instrument, when its falsity is discovered, to return the money paid and take back the instrument; and if he do not, action lies. This note was put in circulation after it

Digitized by Google

had been paid and cancelled by the maker, by means of forgery, and it was a mere nullity. It was incapable of being revived and restored to validity by the mere payment of interest subsequently by the maker.

Judgment affirmed.

www.libtool.com.cn

---

† MAN, Jr. *v.* DREXEL.

1. Judgment in ejectment is conclusive as to mesne profits between the parties, from the day of the issuing of the writ, even though defendant entered by a habere facias possessionem, under a former judgment in ejectment between the same parties.
2. The rule is the same under the act of Assembly, in this respect, as formerly.

ERROR to the District Court of the city and county of Philadelphia.

Feb. 3, 4.—Trespass for mesne profits. On the trial before Jones, J., plaintiff gave in evidence the proceedings in an ejectment, in which the writ issued February 3, 1843, and judgment was obtained March 22, 1844, and claimed for the profits between these dates, having proved the value. Defendant showed an ejectment against the vendor of plaintiff for the same property in which the writ issued 24th July, 1841, and a judgment followed by a hab. facias possessionem, executed. The court being of opinion that the first ejectment was conclusive as to the mesne profits, until actual eviction under a subsequent judgment, on the authority of Postens *v.* Postens, 3 Watts & Serg. 182, directed a verdict for defendant.

Randal and *Wheeler*, for plaintiff.—The case relied on by the court only decided that the recovery was conclusive as to the time between the writ and judgment, in analogy to the old rule in case of a demise. The court seemed to consider, the entry being under a judgment, the party could not be held liable as a trespasser. But this would prevent our recovery, which is against defendant as trespasser. The cases and elementary books show this. 2 Steph. N. P. 1494; Adams on Eject. by Tillinghast, 376, 380, &c.; 3 Marsh. (Ky.) 518; 2 Johns. 369; 11 Johns. 405.

St. Geo. Campbell and *J. R. Scott*, contrà.—The entry under the writ is an exception. This will in effect rule, that by entering under a writ of this court, the party was a trespasser.

April 20. KENNEDY, J., after stating the case and the direction of the court.—It appears to us that the instruction given by the court

Digitized by Google

www.libtool.com.cn

to the jury cannot be sustained. If the court had instructed the jury that the recovery of the premises in the ejectment brought by the plaintiff, that is Daniel Man, jun., against the defendant, Francis M. Drexel, was conclusive evidence, not only of his right to the possession thereof, but likewise of his right to receive the mesne profits, from the date of suing out his writ, on the 3d day of February, 1843, commencing the ejectment, until he recovered the possession by virtue thereof, the court would have been correct. It has ever been held in an action of trespass, brought by a plaintiff for the mesne profits of premises recovered by him of the defendant previously in ejectment, that the judgment in the ejectment, at least, if pleaded, is conclusive evidence of his title to the possession and right to receive the mesne profits from the date of the demise in the declaration, according to the English mode of instituting actions of ejectment, and from the day of suing out the writ of ejectment, as directed by the act of Assembly in this state, until, by virtue of the proceedings had therein, possession is obtained by the plaintiff from the defendant. And this is the effect of every judgment in ejectment, whether it be the first, or second, or third, even between the same parties or privies, and where the same titles are or have been relied on. The judgment in the second ejectment, if contrary to that in the first, may be considered as a reversal in effect of it, from the date of the demise laid in the second, or the date of suing out the writ in it, so that the first is no longer of any force. And so the judgment in the third ejectment, if contrary to that in the second, may be viewed as are versal in effect of the second. But besides, a judgment at most, in ejectment, is regarded in substance as only a recovery of the *possession* (not of the *seisin* or *freehold*) without prejudice to the *right*, as it may afterwards appear, even between the parties. He who enters under it can only be *possessed according to right, prout lex postulat.* If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is *in* as a termor; and in respect to the freehold, his possession enures *according to right.* If he has no title, he is in as a trespasser, and, without any re-entry by the true owner, is liable to account for the profits. Atkyns *v.* Horde et al., 1 Burr. 114, per Lord Mansfield. Mr. Justice Van Ness, in delivering the opinion of the court, in Wright *v.* Dieffendorf, 3 Johns. Rep. 270, considers the amount of a recovery in ejectment as accurately and forcibly stated here by Lord Mansfield. And although a verdict and judgment in a prior ejectment between the same parties may be evidence in a second, yet it is not generally conclusive, and perhaps of no weight, excepting where the scale of evidence appears to be equally balanced, when it may serve to turn the beam in favour of the party for whom it was given. But notwithstand-

Digitized by Google

www.libtool.com.cn

ing this is the case generally, that a verdict and judgment in ejectment is not conclusive, even between the same parties, except under our act of the 13th of April, 1807, wherein it is enacted that two verdicts in ejectment on the same side, and judgments rendered thereon, shall be conclusive; yet in an action of trespass for the mesne profits, brought by a plaintiff, who has previously recovered the premises in an action of ejectment, the judgment in ejectment is not only evidence, but conclusive evidence of the right of the plaintiff to the possession of the premises, and to his right to recover the mesne profits as against the defendant in the ejectment, from the date of the demise as laid in the declaration, or from the date of suing out the writ of ejectment. Aislin *v.* Parkin, 2 Burr. 668; Bull. N. P. 87; Barnes' Notes, 472, (3d edition;) Van Alen *v.* Rogers, 1 Johns. Ca. 281; Benson *v.* Matsdorf, 2 Johns. Rep. 369. The defendant cannot set up a title even if he have a better title. Benson *v.* Matsdorf, 2 Johns. Rep. 369; Jackson *v.* Randall, 11 Johns. Rep. 405. So where the lessor had taken possession under the judgment in ejectment, and brought his action for the mesne profits, and the defendant had, in the mean time, brought an ejectment for the same premises, and obtained a verdict and judgment, it was held that he could not set the same up as a bar to the action for the mesne profits. Jackson *v.* Randall, 11 Johns. Rep. 405. Nor can any defence be set up to the action for mesne profits, which would have been a bar to the action of ejectment. Baron *v.* Abeel, 3 Johns. Rep. 481; Jackson *v.* Randall, 11 Johns. Rep. 405; Languedyck *v.* Beerhans, Id. 361. A distinction, however, has been lately taken in England, between the effect of the judgment in the ejectment, when pleaded in the action for mesne profits, and when given in evidence only on the general issue, holding in the former that it is conclusive upon both court and jury, but not so in the latter. Vide Doe *v.* Huddart, 2 Cr., Mee. & Ros. 316. And this would seem to be the rule recently established in all cases, that a judgment between the same parties or privies on the same point is not conclusive upon the jury, unless pleaded. Vaught *v.* Winch, 2 B. & Ald. 662. In actions stricti juris, such as trespass vi et armis, it is no doubt always requisite to plead a former recovery, where the defendant intended to rely on and give it in evidence, because it would not be given in evidence on the general issue; but in an action upon the case, which is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and in effect is so, a formal recovery may be given in evidence by the defendant on the general issue, and need not be pleaded. Bird *v.* Randall, 3 Burr. 1353. But then I cannot assent to the principle, that it is not binding upon the jury in the same

Digitized by Google

manner as if it had been pleaded. This, as it appears to me, may be shown from authority, reason, and sound public policy. In the Duchess of Kingston's case, 20 State Trials, 538, Lord Chief Justice De Gray says, "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar; or, as *evidence*, *conclusive* between the same parties, upon the same matter directly in question in another court. Secondly, That the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter between the same parties, coming immediately in question in another court for a different purpose." Thus declaring that the proper deduction to be drawn from all the civil cases on the subject was, that the judgment of a court of concurrent jurisdiction between the same parties, upon the same point, deciding the same matter, was conclusive, as well when given in evidence without being pleaded as when pleaded. And so thought Lord Mansfield, who possessed talents of the first order, with great legal experience and learning on the subject, as distinctly appears from what he has said in Aislin *v.* Parkin, 2 Burr. 668, already referred to, with Bull. N. P. 87, and Barnes' Notes, 472, (3d edition;) and again in Bird *v.* Randall, 3 Burr. 1353. See also, to the same point, Hancock *v.* Welch, 1 Stark. Rep. 277; Whately *v.* Manheim, 2 Esp. Rep. 608; Strutt *v.* Bovingdon, 5 Esp. Rep. 56, 59; Rex *v.* St. Pancras, Peake's Ca. 220, and the Duchess of Kingston's case, 20 State Trials, 538. And I would infer that such was the opinion of Lord Coke, from what he says in his preface to the 8th part of his Reports, 26, 27; where he says, "In personal actions, concerning goods and chattels, a recovery or bar in one action is a bar in another, and there is an *end of the controversy*. In real actions for freehold and inheritance, being of a higher and worthier nature, and standing upon greater variety of titles and difficulties in law, there could not be above two trials, or, at most (and that very rarely) three, and in the mean time, after one recovery, the possession resteth quiet." He speaks of the former recovery being a bar, and putting an end to the controversy, whenever it shall be made to appear, without mentioning how, whether by being pleaded or given in evidence on the general issue, that such recovery existed. And he gives the reason, therefor, by superadding, "And therefore, to this end the ancient and excellent institution of the common law might be recontinued for the *good of the commonwealth*, (for it is convenient for the commonwealth that there be an end of controversies.)" From which it appears that he very justly conceived that the public have an interest in having an

Digitized by Google

www.libtool.com.cn

end put to all further litigation between the same individuals, after the matter in dispute has been determined and passed upon by a court of competent jurisdiction, as long as such determination remains unreversed by some prescribed course of law. See this matter shortly discussed in Marsh *v.* Pier, 4 Rawle, 288, 289; and 1 Greenleaf's Evidence, sect. 531, and note to the same, where Professor Greenleaf, after a careful examination of the question, and the authorities bearing upon it, comes to the conclusion, that the weight of authority, in this country at least, is believed to be in favour of the position, that where a former recovery is given in evidence, it is equally conclusive in its effect as if it were specially pleaded by way of estoppel. And, indeed, it may be questionable, whether it is as yet settled definitively otherwise in England. In Outram *v.* Morewood, 3 East, 364, 365, Lord Ellenborough, who was certainly among the first of the English judges, speaks of a former recovery as conclusive, when pleaded by way of estoppel; but if given in evidence only, would not be conclusive, as an estoppel would be. But the question did not arise in that case. In Vooght *v.* Winch, 2 Barn. & Ald. 662, the question was made and discussed by each of the judges, three only being present, and each gave his opinion that a verdict and judgment, in favour of the defendant in a former action, for the same cause, was not conclusive, because it was not pleaded in bar, but given in evidence under the plea of not guilty. This case was cited afterwards in Stafford *v.* Clarke, 1 C. & P. 405, and was again discussed, in the same case, 2 Bing. 377, without being approved of; for each of the learned judges expressly declined giving any opinion on the point. But subsequently in Doe *v.* Huddart, 2 Cr., Mee. & Roscoe, 316, it was adopted, and applied in the case of an action brought for the recovery of the mesne profits, after a recovery had in an ejectment by the plaintiff, and held that the recovery in the ejectment was not conclusive of the right of the plaintiff to the possession, because it was not pleaded, but merely given in evidence. As a reason for this distinction, it has been alleged that the party, by not pleading the former judgment in bar, *consents* that the whole matter shall go to the jury to be determined by them according to the view which they shall take of the whole of the evidence relating to the point. Vooght *v.* Winch, 2 Barn. & Ald. 668. Goddard's case, 2 Co. Rep. 4, has also been referred to in support of the principle of the distinction, first, by Mr. Justice Holroyd in Vooght *v.* Winch, and again by Baron Bolland in Doe *v.* Huddart, where the plaintiff, as administrator of Newton, had brought debt upon a bond made to the intestate, bearing date the 4th of April, 27 Eliz. The defendant pleaded

Digitized by Google

that the intestate died before the date of the bond, and therefore concluded that the writing was not his deed, whereupon they were at issue. The jury found that the defendant delivered it as his deed, the 30th July, 23 Eliz., and found the tenor of the deed verbatim; that it was dated the 4th of April, 24 Eliz.; that the intestate was living 30th July, 23 Eliz.; but that he died before the date of the bond, and prayed the advice of the court, whether this was the defendant's deed; and it was adjudged his deed; for which the court gave this reason, "that although, in pleading, the obligee cannot allege the delivery before the date, because he is estopped to take an averment against any thing expressed in the deed; yet the jurors, who are sworn to say the truth, shall not be estopped; for an estoppel is to conclude one to say the truth." But if the decision in Goddard's case is to depend upon the validity of the reason given for it, it amounts to nothing: for it has been held, and it is no doubt the law too, that though a deed appears on the face of it to have been made on one day, yet if in truth it were delivered on a different day, that may be *shown by averment;* for the date of a deed is not an estoppel against stating and proving the time of the delivery. See Bro. *Obligation*, pl. 40; *Departure*, pl. 14; Stone *v.* Bull. 3 Lev. 348; Shep. Touch. 74, Prest. ed.; Lord Say and Sele's case, 10 Mod. 40; Hall *v.* Cazenove, 4 East, 480—482; S. C. 1 Smith, 272; 1 Chitty, pl. 639. And certainly, it would be somewhat anomalous, if the law were otherwise, as it would be allowing a party to *prove*, what it would not permit him to *act*. Now let us see what foundation there is for saying, that the party, by not pleading the former judgment in bar, *consents* that the whole matter shall go again to the jury, in the same manner as on the trial in the former suit; or, as Mr. Smith, in his 2 Leading Cases, and note to Trevivan *v.* Lawrence, page 444, has it, "that a party may waive the benefit of an estoppel, and that he *elects to waive* it, by not pleading it when he has an opportunity of doing so." Before such *consent* or *election to waive* a benefit can be said to have been given or made by a party, there ought to be some evidence of it; some ground, at least, upon which it may be fairly presumed, that he has done so; but here there is not the least shadow of ground whereon to raise any presumption of the sort: on the contrary, all the springs of human action, and the motives which prompt mankind, almost universally, to act in such like cases are opposed to it. Why should a party, who has had a controversy judicially settled and determined in his favour, without any consideration, or any possible chance of gain, agree to submit all the matters involved in the controversy to a new investigation and decision, as if it had never been settled or decided before, and thus

Digitized by Google

subject himself to an inevitable loss of time and money, for which he can never be remunerated? Such a thing cannot be presumed, because utterly repugnant to all the springs and motives of human action; and it is wonderful to me how it could have entered into the mind of any one to suppose that it could be so in such case, without the clear and unequivocal consent expressly given by the party, that he was willing to do so. If, as Mr. Smith, in page 439 of his note, observes, the law of estoppel be founded on justice and good sense; and if it be true, as no doubt it is, that, nemo debet bis vexari pro eadem causa, it would be strange to say, that the *accidental* form of an issue should deprive a party of the benefit of it, and force him to litigate the same question twice over; and that the form of the issue generally in such case is altogether accidental, and formed without the slightest intention to relinquish or surrender any right or benefit that may or can arise from estoppel, cannot possibly be doubted, as it appears to me. Then, if there be no real foundation for the allegation, that the distinction taken between the effect of a former recovery, if pleaded, and when not pleaded but given in evidence on the general issue, as I think I have shown from the nature of the thing there is not, it is perfectly clear that it has not the least shadow or colour of ground to rest on; for it is admitted that the jury, as also the court and the parties, are bound by it, and estopped from acting in opposition to it, in all cases where, according to the rules of pleading, it cannot be pleaded, but if brought forward at all, must be given in evidence on the general issue: so that it is not because the jury are not estopped from speaking the truth, that the distinction has been taken, and attempted to be established. The distinction is not only artificial, but worse, because it is invariably, I think I may say, repugnant to the intention and design of the party claiming the benefit of the former recovery: and certainly repugnant to the rule as laid down by Chief Justice De Gray in the Duchess of Kingston's case. The guarded and particular language of the rule, as laid down by him, shows most clearly that his great care was, if possible, to prevent all misapprehension of it, and render *constructive interpolations* wholly unnecessary; yet it is said that he meant where the former recovery could be pleaded, it must be pleaded, in order to make it *conclusive;* but where it could not be pleaded, that then it would be *conclusive* if given in evidence merely. It is too much to suppose, that such a man as Lord Chief Justice De Gray would not have expressed himself to that effect, in terms that could not have been misapprehended or misinterpreted, if such had been his intention; and more especially so, when the occasion is considered, which called for his declaring what

www.liptool.com.cn

Digitized by Google

the rule was on the subject. Vooght *v.* Winch would seem to be the first English case in which the question arose directly, and where the court took the distinction and acted upon it, by deciding that the verdict for the plaintiff was good, notwithstanding it was given by the jury, in direct opposition to a former verdict and judgment thereon between the same parties on the same matter, which were given in evidence on the trial of the cause by the defendant under the general issue, and held by the court, that the verdict was good, because the former verdict and judgment were not pleaded. A previous case, decided in Mic. 3 Ann. B. R., Trevivan *v.* Lawrence, 1 Salk. 276, is sometimes referred to as tending to support the same distinction; but this is a mistake, for it, so far as it has a bearing on the point, may perhaps be regarded as being rather the other way. But the truth is, the question did not arise in the case. The action was ejectment, and the plea was not guilty, as appears from the report of the case in 2 Ld. Raym. 1036. The plaintiff claimed the land upon an extension and delivery of it to him under a writ of *elegit* which he had sued out upon a judgment obtained in his favour, which bound the land. The judgment had been revived by scire facias against the terre-tenant, which misrecited the term in which the judgment had been obtained. The plea of nul tiel record was put in, and issue joined thereon; upon which a judgment awarding execution in favour of the plaintiff was rendered. Upon the trial of the ejectment, the variance between the real date of the judgment, and the date stated in the scire facias, was interposed by the defendants, to show that there was no such judgment as warranted the taking of the land in execution; but the court held that they were *estopped* from doing so by the judgment of the court rendered upon the plea of *nul tiel record*. This was in substance the case of Trevivan *v.* Lawrence.

I will turn now to some of the cases decided in this state, and to what has been said by some of our judges in relation to the question. In Bailey *v.* Fairplay, 6 Binn. 450, it was held that the recovery in ejectment was *conclusive* evidence against the defendant in trespass, for the mesne profits of the premises recovered in the ejectment, though given in evidence on the plea of not guilty alone. The counsel for the defendant also admitted that it was so. In Cist *v.* Zeigler, 16 Serg. & Rawle, 285, which was an action on the case for the use and occupation of certain premises held by the defendant of the plaintiff, it was ruled that a former verdict and judgment for the plaintiff in replevin, on the issue of no rent in arrear, was a bar to an action for use and occupation, for the same rent for which the distress was made; if it appear by the pleadings, that a certain rent was reserved,

Digitized by Google

www.hbtool.com.cn

and that the distress was for the same rent claimed in the action for use and occupation, whether the former judgment be pleaded as an estoppel, or given in evidence on the general issue. The late Mr. Justice Duncan, in delivering the opinion of the court, says, "I know there are recent English decisions, that if the former judgment is not pleaded, but given in evidence on the general issue, it is not conclusive; yet the law appears to have been settled to the contrary by many authoritative decisions, which I am not inclined to disturb." Mr. Justice Duncan died shortly after this; and in less than nine months afterwards, it was held in Kilheffer *v.* Herr, 17 Serg. & Rawle, 319, which was an action on the case for the continuance of a nuisance in erecting a dam, that a verdict and judgment for the plaintiff in a former action, in which the same matter was in controversy between the parties, were not conclusive when given in evidence, without being pleaded. It is said, however, there, that in actions of debt, assumpsit, &c., where special pleading is not required, the record of a former recovery is conclusive evidence, binding on the party, the court, and the jury; which furnishes to my mind additional evidence of the indefensibility of the distinction which has been attempted of late to be established. I may also remark, that from the report given of the case of Kilheffer *v.* Herr, it is difficult, if not impossible, to tell how the question could have been properly brought before the Supreme Court. The writ of error was not for a judgment given in the court below upon a demurrer, special verdict, or case stated; and it does not appear that any direction was given by the court below to the jury on the point, to which exception was, or could be taken. For all, then, that appears in the case, the Supreme Court, it would seem, could do nothing with it, but affirm the judgment of the court below, whether it was decided according to law or not. The legal effect of the former verdict and judgment between the parties, as they were given in evidence, without being pleaded, does not appear to have been passed on and decided by the court below. But, some five years afterwards, in Marsh *v.* Pier, 4 Rawle, 273, in an action of replevin, brought for certain goods by Pier *v.* Marsh, in which Marsh pleaded property, and issue being taken thereon, Marsh, upon the trial of the cause, among other things, offered in evidence the verdict and judgment of another court of concurrent jurisdiction rendered against Pier, the plaintiff, in an action brought by him to recover the price or value of the same goods against a W. Natt & Co., from whom Marsh, the defendant, in the replevin derived his claim and right of property to the goods, by purchase. The court below rejected the evidence, but this court held, that it was not only admissible under the plea of property, but, when

Digitized by Google

admitted, would have been *conclusive*, and have been a *bar* to Pier's right to recover in the replevin. I am still, therefore, of opinion, notwithstanding what was said in Kilheffer *v.* Herr, that the conclusive effect of a former judgment on the same point, or matter of controversy, between the same parties or their privies, is precisely the same, whether pleaded, or given in evidence without being pleaded. In conclusion, I beg leave to repeat what Professor Greenleaf has said in the 531st section of his treatise on Evidence, vol. 1. "It is agreed, that where there has been no opportunity to plead a matter of estoppel in bar, and it is offered in evidence, it is equally conclusive as if it had been pleaded. And it is further laid down, that when the matter to which the estoppel applies, is alleged by one party, and the other, instead of pleading the estoppel, choses to take issue on the fact, he waives the benefit of the estoppel, and leaves the jury at liberty to find according to the fact. This proposition is admitted, in its application to estoppels, arising from an act of the party himself, in making a deed or the like; but it has been denied in its application to *judgments* recovered, for it is said the estoppel in the former case is allowed for the benefit of the other party, which he may waive; but the whole community have an interest in holding the parties conclusively bound by the result of their own litigation. And it has been well remarked, that it appears inconsistent that the authority of a *res judicata* should govern the *court*, when the matter is referred to them by pleading, but that a *jury* should be at liberty altogether to disregard it, when the matter is referred to them in evidence; and that the operation of so important a principle should be left to depend upon the technical forms of pleading in particular actions." He then concludes, "And notwithstanding there are many respectable opposing decisions, the weight of authority, at least in this country, is believed to be in favour of the position, that where a former recovery is given in evidence, it is equally conclusive in its effect as if it were specially pleaded by way of estoppel."

The judgment of the court below is reversed, and a venire facias de novo awarded.

Digitized by Google

www.libtool.com.cn

2 212
22 SC 266

JACKSON *v.* JACKSON.

1. A direction that a legatee shall have the guardianship and tuition of after-born children is a provision for them within the act of 1833, 8th April, it being a trust created for the purpose of maintenance and education.
2. And it seems this would be so, even had the children no pecuniary benefit from the will.

Feb. 4.—IN September, 1833, Jackson being then married, but having no children, made his will, giving all his estate to his wife, and in case he should leave any children, he gave the tuition and guardianship of them to his wife, who survived him, during their minority. Testator left children, and real estate in another state, and personalty here, and the question was, whether the 15th section of the act, 8th April, 1833, produced an intestacy as to these children.

J. R. Ingersoll, for the children, plaintiffs, submitted a written argument, of which the following is believed to be a correct outline; its great length prevented its insertion entire :—

The question is, whether testator died intestate as to these children, under 15th section of the act. Under that there are several requisites: 1. A will. 2. Subsequent marriage or birth of children. 3. Death; children surviving. 4. Such children unprovided for. The three first are embraced in the case stated. The fourth depends on the construction of the words "not provided for in such will." Do these require a provision in money or property, or such foresight as proves they were not forgotten? If the former is unnecessary, the will is good, and such is contended for here. The words are broad enough, for children are provided for by appointment of a guardian, which the law recognises, and this is perhaps as wise a provision as any, and there is no necessity to restrict the words of the act. The intention was to put after-born children on an equality with the others, on the presumption they were not in the mind of testator. If so, then bequests are in effect contingent to either classes of children, and he may omit either, or give directions without property. The only distinction is, that a mere omission will not disinherit after-born children. To require pecuniary gifts would be contrary to the whole tenor of the act, for negative words are not required in cases of living children. The opposite construction would be inconvenient—for what amount will be a sufficient provision under the act, and must the condition and circumstances be considered? If a nominal provision would do, it would be nothing more than is here contended for, to wit, as tending to show the child was considered by

Digitized by Google

testator. So the state of his affairs might render the gift an uncertain one. Must his testacy remain unsettled during all that period? The tendency of modern legislation has been to extend the right. The construction in this case, contrary to what is here contended, would be opposed to it. It would be opposed to all the reasoning and analogy in English precedents; for, though it is true they have not a positive statute, they are governed by the intention of the testator, to effectuate which was the object of this act. In fact it is nothing but the doctrine of implied revocation—by a mere republication, he may defeat the operation of the principle; and this shows the intention, express or implied, is to govern. It is expressed, when he provides according to the true meaning of that term. It is implied, when he omits to provide for them, and to make any testamentary arrangements after they are born.

Not omitting is as conclusive one way as omission is the other. The elaborate opinion of Sir John Nicholl, in Johnston v. Johnston, 1 Phil. 447, contains the cases: the conclusion is, that the birth of children, with other circumstances, revokes the will of a married man. It is declared to rest on a believed intention, inferred from a change of circumstances.

There is no distinction between our own act and the rule, as laid down by him, page 150, 1 Eccl. R. Where no intention is declared, there is room for presumption; but if declared, with a view to circumstances, there is no such room. Circumstances cannot alter the statute, but the reasons for enacting it are valuable guides in the construction of it. Hence, as the intention of the testator was the reason, a construction defeating it is not lightly to be adopted. It is necessary to inquire whether the words of the act have any technical meaning which requires a pecuniary provision. This depends on the use, by courts and legislatures, of the terms. Some decisions rely less on the intention for implied revocation. Lancashire v. Lancashire, 5 T. R. 58, Lord Kenyon puts it as a tacit condition originally annexed to the will. If this be so, an expressed declaration to the contrary would prevail. Brown v. Thompson, 1 Eq. Ca. Abr. 413, was the case of a man marrying his devisee, and leaving her enceinte; the Lord Keeper considered the wife and child provided for. Earl of Ilchester's case, 7 Ves. 348. Provision by settlement was considered sufficient.

The rule is derived from the civil law. In lib. vi. tit. xxix. De Posthumio, it is held, intestacy occurs where no mention is made of the posthumous children. Similar language is used in our act of 1748. If the children are not named, &c. The act of 1794 substituted the present words. The latter is more comprehensive, for they may be provided for without being named, and there might have been doubt on

Digitized by Google

the former, as they could not strictly be named. "Provided for" sometimes refers to a change of circumstances, as in Talbot *v.* Talbot, 1 Haz. 705, "if the change has been provided for, it will not work a revocation." A guardian appointed is a providing for. And the act will be construed according to the settled construction of the courts, and not more narrowly.

www.libtool.com.cn

In Emerson *v.* Boville, 1 Philm. 342, it is said some recognition, or something to show the intention, is necessary to prevent an implied revocation. Tomlinson *v.* Tomlinson, 1 Ashmead, 227: Judge King, referring to the Roman law, says, a birth of a child unnoticed in a previous will annuls it. These cases show the tenor of authority will authorize this construction. Other reasons already suggested tend to the same result. The circumstances were foreseen; the will, therefore, is not revoked by implication, but remains in full force.

March 4. ROGERS, J.—We are of opinion the defendant is entitled to judgment on the case stated. The provisions of the will, for the benefit of the children, satisfy the words and spirit of the act of the 8th April, 1833, which, among other things, provides, that when any person shall make his last will and testament, and afterwards have a child, or children, *not provided for in such will*, he shall, &c., be deemed and construed to die intestate. We view the clause relating to the children, as a bequest for their benefit and support; for, in addition to the reasons urged with so much force by the defendant's counsel, which we adopt, we consider the devise in their favour a trust for their benefit, which a court of equity will, if necessary, enforce. If so, it is a provision for after-born children, and, as such, falls within the words as well as the spirit of the act. Although a bequest often assumes the form of a recommendation, it is not less obligatory on that account—a principle explained at some length in Pennock's case. (Coates' Appeal, reported antè, 129.)

The will clearly evinces the great confidence reposed by the testator in his wife and principal legatee—a confidence or trust which there is no danger will be abused, except in the improbable contingency of an ill-advised and unfortunate second marriage. He not only directs that his wife, executor, and principal devisee, shall have the guardianship of his after-born children, but that she shall have charge of their tuition also. This is a trust which she cannot assume, or throw off, if she were so unnaturally disposed, at pleasure. If she accepts the benefit, she must also bear the burden imposed by the will. Coupled with the other parts of the will, this intention, and the intention of the testator is a cardinal rule of construction, is mani-

Digitized by Google

fest. Viewed in an enlarged and comprehensive sense, it contains an injunction obligatory on the legatee, to provide an education suitable to their situation in life, and an adequate support during minority. The just expectations of the testator she has no right to disappoint, for, by the acceptance of the bequest, she incurs not only a moral but a legal obligation, which the court, if necessary, will find means to enforce. In the interpretation of the language of wills, courts of equity have created implied or constructive trusts, from mere recommendatory and precatory words of the testator. Thus recommendation, confidence, hope, wish, and desire, have been construed into positive and peremptory commands. But in this devise there is something more, I take it, than a mere recommendation.

After leaving his wife his whole estate, the testator emphatically says: "And in case I shall leave any child or children living at the time of my decease, *my will is*, and I do hereby appoint, that my said dearly beloved wife Louisa shall have the *tuition* and guardianship of such child or children, during his, her, or their minority." Although expressed in mild language, such as an affectionate husband thought it decent and proper to use towards a beloved wife; yet it is equally positive and imperative as if it assumed the ungracious form of a peremptory command. The moral obligation of a parent to provide for the sustenance and education of his children, and his parental affection, add force to this view of the question: for we cannot readily admit that a parent intends to leave his children at the mercy and caprice of any person whatever. The inclination of my mind, in all similar cases, is to construe words of a recommendatory or precatory character into express and positive commands. The bequest also possesses all the other requisites to constitute a trust. In respect to the certainty of the description of objects, or persons, in a recommendatory trust even, it is not indispensable that the persons should be described by their names. After-born sons, daughters, or children, is a sufficient description; for otherwise, a trust, by implication, could not be raised in their favour—a distinction between them and children in esse, the reason of which it would be difficult to perceive. There is also a certainty in the description of the property, a benefit to which the children are entitled. The maxim, Id est certum, quod certum reddi potest, properly applies. The court, if necessary, will fix the amount which may be required for maintenance and education of the children. The intention of the testator is the controlling rule in the construction of all wills; and, in my judgment, the reasons of which have been fully expressed in a recent case—Pennock's case—the rules adopted by the courts of equity are eminently calculated to carry into effect that

Digitized by Google

intention, and ought to be upheld and enforced by the courts. As to the measure of relief, that must depend on a variety of circumstances; the amount of the property bequeathed; the station in life of the family; and other matters, of which the court will be fully competent to judge.

Judgment for the defendant.

Pennell's Appeal.

1. Where curbing, paving, and laying pipes is done by the district authorities opposite land owned by one person, but divided into several lots; each lot is subject to a lien for the amount of the work done opposite to it. The lien is not joint on the whole property.
2. Settlement of trustees' accounts, charges and commissions allowed.

Appeal from the Common Pleas of Philadelphia.

Feb. 4.—The trustees of Isaac Jones filed their accounts, admitting a debit of $13,463 43, and claiming credits, leaving a balance for distribution of $1079 50. Three items were contested and admitted by the auditor and the court, and this appeal taken; they were,

1. Commissions at 5 per cent. on gross amount of sales, which composed the debit of the account from which these commissions were deducted. The evidence was, that the services were considerably more than ordinary ones; and that the charge was fair; the charge was not much contested.

2. For drawing a deed - - - $150
   For drawing a deed-poll - - 50

The first was a deed by sixteen parties, containing numerous recitals; twenty-one parcels of property, and covering five and a half largest size skins of parchment. Evidence of conveyancers proved it to be usual and fair.

The second was a deed by the sheriff, and services attending thereon; the mere drawing was considered worth $25 or $30.

3. A lien of the district of Spring Garden for paving, iron pipes, &c., made in 1829, 1831. The property was divided into several lots according to a plan. Some of these lots had been previously sold by the sheriff; and it was contended that the lien, being a general one, must be considered to have been paid to the amount of the sale. The question was, whether the remaining lots were liable. The auditor apportioned the claim upon the lots according to their size.

Digitized by Google

www.libtool.com.cn

Budd, with whom was *C. J. Ingersoll*, appeared for appellants; but the reporter did not hear the argument.

March 9. KENNEDY, J.—This case was referred by the court below to an auditor, who made a lucid and detailed report. Various exceptions were taken and filed against it, all of which were overruled by the court, and the report confirmed. Many of the exceptions were to the credits claimed by the accountants, as being either exorbitant or not well founded. We, however, think that the evidence given before the auditor goes to show pretty clearly, that the credits claimed and excepted to did not exceed what is usually charged and allowed in such cases for similar services; and that he was therefore right in allowing, and the court in confirming, his allowance of them.

A claim, however, set up by the district of Spring Garden against the moneys in the hands of the accountants, arising from the sale of the lots made by them, seems to have been, perhaps, the principal subject of controversy. This claim was for pitching, curbing, and paving, which the district had done, as far back as from September, 1829, to September, 1832, opposite to the most of the lots sold by the accountants. The objection to this claim was, that it had been presented to the sheriff of the county, in 1836, and claimed of him out of moneys in his hands, made by a sale under judicial process, directed to him, of some part of the real estate opposite to which the curbing and paving had been done. It appeared that the claim had never been paid, either in part or in whole, by the sheriff, and that the property sold by him formed but a small part of that opposite to which the curbing and paving had been done. The auditor, conceiving, however, as I understand his report, that each lot, or separate parcel of the property, was liable only for the curbing and paving done opposite to it, allowed the claim of the district, with the exception of that portion thereof chargeable on the property sold by the sheriff. This, we think, was right, and in conformity to the first section of the act of the 3d of March, 1818, which makes such claim a lien on the *real estate in front* of which the curbing and paving is done. Where, therefore, curbing and paving is done by the district, in front of two or more lots adjoining to each other, and belonging to the same owner, the cost of doing the whole does not become a lien or charge upon the lots either jointly or severally, but each lot, as I take it, becomes separately liable for the payment of the cost of the curbing and paving alone done in front of it. It is, therefore, unlike the lien or charge alluded to by the auditor, which was presented for consideration, in the Presbyterian Corporation *v.* Wallace and others, 3 Rawle, 109; and besides, I may

Digitized by Google

www.libtool.com.cn

observe, that the principle of that case has been lately overruled in the matter of the appropriation of the moneys arising from the sale of J. H. Cowden's real estate. Vide the case, 1 Barr. 267.

But there is an item of $42 06, with interest thereon, from the 31st of October, 1831, in the claim of the district of Spring Garden, for iron pipes, which has been specifically objected to, as not coming within the provisions of the act of 1818; or within those of any other act before the act of the 16th of April, 1840, which is too late, as is alleged. This may be so, but then the act of the 9th of March, 1826, seems to be sufficient to embrace it, if considered as a tax assessed for furnishing and laying down the pipes in front of the property, which, we think, is the proper light in which it ought to be viewed. Taking this view of it, it became a lien under the act of 1826, upon the property sold by the accountants, and therefore ought to be paid out of the moneys in their hands, arising from the sales thereof.

---

2 218
160 432
2 218
32 SC 564
2 218
e 36 SC 572

The Commissioners of the District of KENSINGTON *v.* KEITH.

1. Commissioners of Kensington have no claim for curbing, paving, &c., on the property adjacent, when the improvement exceeds the limit allowed by the legislature.
2. Nor does the act of 1843 disable the party to plead such excess of authority in defence.
3. A limitation of authority, by a proviso, is a negation thereof.

ERROR to the District Court of the city and county of Philadelphia.

Feb. 4.—This was a sci. fa. on a claim for curbing and paving by the district. The affidavit of defence, after denying consent to the work, set out that more than three squares were curbed and paved at one time, and the act of 1828–9, p. 190, 191, giving the authority to the district, provided, the curbing, &c. "be not less in length than one, nor exceeding three squares at one time;" and also that the lien had ceased before the writ issued. The lien was filed in 1834, and the writ issued in 1843. The court below gave judgment for the plaintiff.

Randal, for plaintiff.—The rule in construing charters is a strict one, and if the district paved more than three squares, they have no authority, and have no claim under the act. 2. The statute of limitations applies, and had barred the debt before the writ issued.

Digitized by Google

E. D. Tarr, contrà.—The act is merely directory; in fact the provision is void for repugnancy. But the act of 1843, p. 342, prohibits either of these defences being set up.

ROGERS, J.—The question arising in this case is one of some interest to the inhabitants of the district, but happily of easy solution. It in truth is, whether municipal corporations are without check or control, so far as the pecuniary interests of the inhabitants of the district adjacent are concerned. The act under which the question arises runs thus: "That the board of commissioners" (the commissioners of the Kensington district) "shall have full power and authority, upon the application of a majority of the owners of lots fronting on any street, road, lane, or alley, to pitch and pave such street, road, lane, or alley, within the said district; provided, the same be not less in length than one, nor exceeding three squares at one time; and the property in front of which such street, road, lane, or alley, is pitched and paved, shall be taxed, for the expense of such pitching and paving, in proportion to the extent of the same in front." By virtue, and by the authority of the act, the commissioners have undertaken to pitch and pave more than three squares at one time, and now seek, through the medium of this suit, to throw the expense of making the same on the owners of the property in front of which the improvements are made. The extent of the excess is not stated, nor is it material, for the principle is the same, whether the surplus exceeds the limits prescribed by three inches or three miles. The power to do the one necessarily involves the right to do the other. That the commissioners may, by virtue of their general powers, if they deem it conducive to the general welfare, pitch and pave the whole district at one and the same time, is not denied. The grant of this authority, as the legislature wisely foresaw, would not be so obnoxious to abuse, because, the burden falling on all, the check to any injury which might arise out of it would be in the majority having an interest, and full power to control the action of the board. But this is a case of special legislation, and we cannot fail to perceive the difference, when the expense is thrown (as in this clause) upon individuals who may be comparatively (as where they are non-residents) but little interested in the contemplated improvement. And hence it is, that in granting the extraordinary authority, the legislature has constantly limited and restricted the jurisdiction of the commissioners, by providing, that no improvement shall be lawful which exceeds three squares at one time. That the restriction assumes the form of a proviso, cannot alter the case, as the intention of the legislature, which furnishes the only safe

Digitized by Google

rule, is too plain to admit of question or dispute. The proviso is a limitation of power, and amounts to a negation of all authority, beyond its prescribed and clearly defined limits. It cannot be that the proviso is directory merely, as that would be to set at naught all the guards provided by the legislature against the abuse of authority conferred by the act. It in truth is a question of power; and how a corporation, municipal or pecuniary, can acquire a right of action against a citizen, however humble, by a palpable usurpation, passes my comprehension. It is an attempt to exercise an authority destructive of private rights, not granted, and which the legislature refused to grant; a pretence which cannot be too firmly or promptly resisted. It matters not what may be the motives which prompted the legislature to qualify and restrain the general power of the commissioners; it is sufficient that the restriction appears in the act. But a man must be but little conversant with the history of the times, and the motives of human action, who cannot discern the reasons of the restriction. The limitation was requisite to guard individuals against the abuse of power, which might, unless controlled, in some instances amount to a confiscation of property. Such instances have occurred, and may occur again. To a certain extent, minorities are constantly exposed to the rapacity of majorities, without the means of redress. Hence the necessity, when they, or, which is the same thing, those who represent them, exceed the authority granted, the burden must be borne by all: the only fair rule is, that the expenses should be taken from the public purse; for it would be palpable injustice that the cost of pitching and paving the streets should be subtracted, without colour of right, from the pockets of those who happen to own property fronting the improvements. If the commissioners, who transcend their power, can, notwithstanding, recover from each individual owner of the adjacent lots the expense attending the work, they may act as they think right without check or control: there is a wrong without a remedy, contrary to the common law and the constitution of the state. Although it may be some check (a most inefficient one indeed) to subject the commissioners to an indictment, it would be no redress to the person aggrieved. His money, notwithstanding, would be taken for purposes, and in a manner not warranted by the law. He would still be without remedy. But the bill of rights provides that no person shall be deprived of his life, liberty or property, unless by the judgment of his peers, or the law of the land. So every man, for any injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. To prevent the temptation to injustice and

Digitized by Google

www.libtool.com.cn

oppression, it is indispensable that no man's property shall be burdened with a debt, without his express consent, except in the manner pointed out by law. From the act alone is the jurisdiction derived. On that alone they must rely, as the groundwork of the action. If the proviso had excepted any one of the streets, lanes, or alleys in the district, it would scarcely be contended, that notwithstanding the exemption, the commissioners could pitch and pave the excepted streets, and charge the cost of making the improvement to the owner of the adjacent lots. And yet it is difficult to perceive the distinction: they depend on the same principles; the arguments which support the one apply with equal force to the other. The acts, in like cases, are void, and for the same reason, for both are palpable usurpations of an authority not conferred. The experience of every day, admonishes us of the absolute necessity of scrutinizing with care the acts of corporations, whether municipal or pecuniary. It is well that the eyes of the people are open to the dangers arising from this source, particularly when it operates on individual rights, in a manner most ruinous and mischievous. On this subject, we hear frequent and just complaints. It may be, they have taken too deep root of late to be altogether prevented, but may they not be in some measure diminished by a firm rule, and impartial administration of justice? While the just rights of corporations are entitled to protection, they must, at the same time, act within the line of duty, and on no account, or under no pretence, be suffered to overleap the limits marked out in the act of incorporation.

Judgment reversed.

GILL'S APPEAL.

1. Widow's legacy does not bear interest until the expiration of the year—there being no estate of which she was dowable.
2. Nor would it, if there was real estate of the husband.—Per GIBSON, C. J.

FROM the Orphans' Court of the city and county of Philadelphia.

Feb. 4.—Testator residing here, bequeathed his wife $20,000, to be paid her as soon as practicable after his decease; and to the creditors of G. F. & Co., $5000, of which firm he had been a member—but the debts had been released. He left no real estate in Pennsylvania. The estate was insufficient to pay the legacies. The widow claimed interest

Digitized by Google

from the death of testator. The auditor allowed it, but the court set aside the report, and the widow appealed.

Williams, for appellant.—The proposition contended for is, that a legacy in satisfaction of a debt, being for a valuable consideration, carries interest from the death of testator, and when in bar of a dower, the cases are still stronger. In Martin *v.* Martin, 6 Watts, 67, there was a dictum the other way, but from the authorities cited, it is plain this exception was not before the court, as it was not material to the decision. In 2 Wms. on Ex. 877, that interest is allowed in such cases, is expressly laid down; so in Clark *v.* Shewell, 3 Atk. 99; Shirk *v.* Westley, 16 Ves. 393; and by Baldwin, J., in S. Zane's will. So they do not abate, 2 Wms. Ex. 838, 839; Heath *v.* Dandy, 1 Russ. 543. In 1 P. Wms. 127; 2 Ves. sen. 420; Ambl. 244; 3 Dr. & Warren, 506, Pepper *v.* Bromfield; 6 Paige, 305, Williamson *v.* Williamson; and Duncan *v.* Alt, 3 Penna. Rep. 384, this doctrine of the preference of a widow is established. Now our act makes this a bar to dower, hence it is a valuable consideration, and the case in 1 Russ. is to the point, for there was a post-nuptial settlement, in consideration of dower.

Gerhard, contrà.—The words, "as soon as possible," have no effect, 8 Ves. 410. As to the widow's right, Martin *v.* Martin was a solemn decision, for the land on which it was charged was sold before testator's death; hence, the legacy became a general charge. As to the consideration from election, there was no land, and of course there could be no election.

Feb. 24. Gibson, C. J.—Notwithstanding a dictum by the Master of the Rolls, in Crickett *v.* Dolby, 3 Ves. 10, that he thought a wife would come under the same exception to the general rule for payment of interest on legacies as a child, it is settled otherwise on indisputable ground, by Lowndes *v.* Lowndes, 15 Ves. 310; Raven *v.* Waite, 1 Swanst. 553; and Stent *v.* Robinson, 12 Ves. 461, in which Sir William Grant expressly said, there was no authority to support the dictum, notwithstanding the numerous instances of legacies to wives. The case of a destitute child, which alone is excepted out of the rule that, in the absence of specific intention to the contrary, a legacy does not bear interest, before it is payable, rests on the natural obligation of a father to maintain the helpless being he has contributed to bring into the world, till it can maintain itself; and interest is allowed on a legacy to it, not as interest, but as maintenance, which may be even at a less rate than that of chancery interest, at the discretion of the chancellor.

Digitized by Google

But a husband is bound by no tie, legal or natural, to provide for the future maintenance of his widow, niece, grandchild, or natural child, who is, in contemplation of law, not his offspring: these are strangers to him, for whom others must provide, or who must provide for themselves. The dissolution of the marriage bond is a dissolution of all the obligations to th wife that sprung from it; and a widow is, consequently, entitled, in regard to future maintenance, to no consideration in a court of chancery, to which she is not entitled in a court of law. Such is indisputably the law in England—and why is it not the law here? It was held in Clark *v.* Sewell, 3 Atk. 96, that a legacy, given in satisfaction of a debt, bears interest from the death; and as our statute directs that every legacy shall be taken to be in satisfaction of dower, unless the contrary be expressed, it is insisted that a widow, being a purchaser, stands as a creditor for her legacy, as the price of her dower. The reason given in Clark *v.* Sewell, for excepting the case of a creditor, is, that because the debt is extinguishable presently, the legacy, to extinguish it, must also be payable presently; for which cause it is, and not for any inherent virtue or desert in his claim, that a creditor's case is an exception to the general rule, that a legacy is not demandable within the year. It is made so in the case of a creditor, to effectuate the manifest intention of the testator. In addition, it is obvious that if the debt were not extinguished till the expiration of the year, it would bear interest in the mean time; and that it is consequently immaterial whether the interest be paid on the debt or the legacy. A widow's dower, however, is extinguished, not by present payment of her legacy, but by her election to take it in satisfaction; and as it does not bear interest in the mean time, there is no occasion to allow interest on its substitute. Should the widow not think the legacy, without interest, a fair equivalent for her dower, she is not bound to take it. Besides the dictum in Martin *v.* Martin, 6 Watts, 68, we have the case of Weiser's Appeal, decided by this court, at the last term for the middle district, and now in the hands of the reporter; which, according to my recollection of it, goes the length of the present case. There, as here, there was no time appointed for payment of the widow's legacy; and she demanded interest from the death, insisting that she stood in the place, not only of a child, but of a creditor. She was, in fact, otherwise provided for; but the court took the broad ground that the testator was not bound to provide for her at all; and that, though her being a purchaser would serve her in a question of abatement, it would not serve her in a question of interest. She was, therefore, allowed interest only from the end of the year on such parts of the *corpus* of the legacy as were not

Digitized by Google

making interest at the time of the death. In the case before us, it does not appear that the widow even had any dower to relinquish; but she would not be entitled to interest on either ground.

Decree affirmed.

2 147

COUNCIL *v.* MOYAMENSING.

1. The lien for curbing, &c. given to the districts is not limited by the act for limitations of personal actions, there being no personal liability therefor.
2. Nor did the act of 1820 require an apportionment, but the whole lot was bound, though there be several buildings thereon.
3. The act of 1840 only provides a remedy.

ERROR to the District Court of the city and county of Philadelphia.

Feb. 5.—This was a sci. fa. by the township for curbing and paving on Council's property. The claim was filed February 15th, 1843, against a lot and two houses. The items were dated 1831, 1832, 1833, 1837. The court below gave judgment for the plaintiff on the verdict. The points relied on were, 1. The want of apportionment. 2. That this lien does not come within the act of 1840, 16th April, which is prospective merely; and that the lien is filed too late.

H. Hubbell, for the plaintiff.—There was no lien until the act of 1840, Pamph. Laws, 412, sect. 9 and 10, but it would be grossly unjust to give a construction affecting a purchaser with a lien of which he could have had no notice. This act directs the mode of proceeding to be according to the practice in cases of mechanic's liens. From this I infer an analogy exists as to the mode and time of filing. Here there is manifest error, for it is not filed within six months, nor apportioned. Besides, the debt was barred by the statute before filing, except the last item.

S. F. Reed, contrà.—The acts of 1819, 1820, Pamph. Laws, 98, and 1834, 1835, page 242, sect. 6, create these debts liens. The act of 1840 only indicated the mode of enforcing them. There is no rule which requires apportionment; and besides, this is between original parties.

March 11. PER CURIAM.—The solution of the difficulty attempted to be raised in this case is, that the lien was created by the acts of the 22d of March, 1820, and 3d of February, 1824, not by the filing of the claim under the act of 1840. Those acts did not require the lien

Digitized by Google

www.libtool.com.cn

to be apportioned when two or more buildings were bound. The improvement benefited every part of the lot, and the whole was bound for it, as premises are bound by a mortgage. The claim being filed against Council as the reputed owner of the lot, fulfilled the intent of the act of 1840, which was evidently intended to provide a remedy to enforce as well existing liens as those to be created thereafter. And it was entirely competent to the legislature to enact such a law, without which antecedent liens would have been ineffectual. These liens were not limited by any statute, and as there was no personal liability on the part of the owner, there is no pretence to say they may be barred by the act for the limitation of personal actions.

Judgment affirmed.

TAYLOR v. MEGARGEE.

2 338
184 423
2 225
205 1296

1. Poverty alone will not rebut the presumption of payment of a judgment after a lapse of twenty years.
2. Proof of positive inability during the whole period would do so.

ERROR to the District Court of the city and county of Philadelphia.

Feb. 5.—The question here was whether the presumption of payment from lapse of time was rebutted. A judgment was recovered in 1814. The present sci. fa. issued in 1842. The plea was payment. The plaintiff, to rebut the presumption, proved insolvent discharges anterior to the recovery of the judgment; his great poverty since; payment of his funeral expenses by others, &c. The only part of the charge of Stroud, J., which appeared on the record, was the answers to defendant's points, which, so far as were decided, were:—

1. That the continued poverty of the defendant alone is insufficient to rebut this presumption of payment, without proof of demand of payment, or some effort made by the plaintiff to collect the debt.

Ans.—"This is not correct."

2. That even if the jury believe that the original defendant was insolvent, yet in the present case there is a presumption that his debts have been paid, arising from the lapse of time, (26 years.)

Ans.—"I cannot give this instruction."

3. That the length of time which elapsed from the death of the defendant in the original judgment, before the issuing of the present scire

Digitized by Google

www.libtool.com.cn

facias, being more than fourteen years, bars the plaintiff's right of recovery, under the provisions of the act of 4th April, 1797.

Ans.—"I decline giving this instruction."

These constitute the three last exceptions. It was said the charge explained these points, but was accidentally lost.

J. P. Montgomery and *J. Todd*, for plaintiffs.—The question is an open one in Pennsylvania. The presumption is twofold, first of payment, second of a release. But mere poverty, however great, never has been held sufficient to rebut the first of these. In Whilaume *v.* Gorges, 1 Camp. 217, there was a trust for creditors of an absconding debtor living under a feigned name, and the belief of his friends of his inability, and this was not considered sufficient. So it is said in Burn *v.* Freer, 2 Moll. C. R. 171, 176, 178, to prevail in case of rich and poor. Many other cases are to the same effect. 5 Verm. 236; 14 Serg. & Rawle, 22; Lewis *v.* Van Buskirk, 7 Watts & Serg. 75; 2 Watts, 213, 215, 217; 1 Yeates, 344; Sailor *v.* Hertzogg, 4 Whart. 298, case of a discharged insolvent.

Oakford and *Kennedy*, for defendant.—The charge is not fairly on the record, but even the point stated must be taken with the evidence, which showed positive inability. This, like any other *circumstance*, may rebut a presumption of fact. Fladon *v.* Winter, 19 Ves. 196, n.; Wilkinson on Limit, 9, Winn *v.* Wearing, there cited, and in 19 Ves. there was a lapse of fifty years. This rule is well settled, Mayor *v.* Horner, Cowp. 109; Tilghman *v.* Father, 9 Watts, 442; 2 Cranch, 180; 6 Cowp. 401.

Feb. 25. Per Curiam.—It is difficult to see what the act of 1797, to limit the duration of decedents' debts, had to do with a question of presumptive payment raised by lapse of time, or what the jury had to do with the interpretation of the rule of presumption. It was the business of the court to interpret it, and for the jury to apply it thus interpreted to the evidence. The material question raised by the assignment of error is, whether the mere poverty or insolvency of the defendant was sufficient to rebut the presumption, from the lapse of twenty years. The cases quoted on the part of the plaintiff in error show that neither the one nor the other can do so, unless it be such as to have created an abiding inability to pay during all the time. A man may be poor or insolvent, and yet contrive to pay a debt in twenty years. Whilaume *v.* Gorges is much stronger in circumstances of extreme destitution than the case before us, yet Lord Ellenborough held that the presumption of payment

Digitized by Google

www.libtool.com.cn

was not rebutted by them. And Fladon *v.* Winter is consistent with it. A debtor doubtless cannot pay when he has neither the means nor an opportunity to pay; but that was not the case here. The defendant had ample opportunity; and, though poor, the proof is that he was not all along entirely destitute, though he died so. For error, therefore, in directing that insolvency or poverty alone might rebut the presumption, the cause must be sent to another jury.

Judgment reversed, and a venire de novo awarded.

Ex Parte Huff.

1. A power to sell in fee, on ground-rent or otherwise, is well executed by a sale on ground-rent with a clause in the deed allowing a redemption of the rent by the purchaser, on payment of a sum of money.
2. Where a sale on ground-rent has been made under such a power, and the right to extinguish the rent is given on payment of a sum certain to the grantors, they are entitled to receive the money and release the rent, even though the estate in the rent has become executed in others by virtue of the reservation in the deed and the statute of uses.
3. *Semble*, That the donees of the power would not have the right to release the rent but for the express reservation.—Per Kennedy, J.

Jan. 24.—The question here was as to the right of executors to receive the redemption money on a ground-rent. Samuel English directed his executors to pay his debts, and on the marriage of any of his single daughters, to furnish equal amounts of furniture and money as had been given by him to his other daughters, with annuities, until marriage or death of his widow, to whom he gave the whole of his personalty, and the income of his real estate, during life; and after her decease, he gave all his estate among his children, with cross remainders in the event of either dying without issue. He then appointed executors "with full power to sell and dispose of, or to let on ground-rent, all or any part of his real estate, and make and execute sufficient deeds of conveyance, in fee-simple or otherwise, to the purchasers."

George B. English, and others who were named executors in the will, as such conveyed to petitioner, in fee, a lot, "yielding and paying therefor, unto the said George B. English et al., their heirs and assigns, for the uses of the will of, &c., the yearly rent of, &c., provided that if said Huff should, on, &c., pay to the said George B. English et al., their heirs or assigns, &c.," the rent should be extinguished. The petition set out that he was willing to pay, but was advised the executors had no authority to release the rent, and prayed that the executors,

Digitized by Google

or such other persons as for the time were authorized to receive the rents, should be authorized and required to execute a release.

The executors demurred, and the court ordered notice to the devisees.

Potts, for petitioner.—The rent being executed in the devisees, it is thought the right to receive the redemption money passes with it, as was held in Ex parte Elliott, 5 Whart. 524. If so, the owners are the proper parties to receive the money.

Hopper, contrà.—The power was given to sell in fee absolutely, with or without reserving a ground-rent, and the executors had the power to give this right of redemption, it being but an executory sale in fee, as they might have reserved it to a stranger, being responsible for the purchase money. Being then responsible, they only are entitled to receive it.

Feb. 7. KENNEDY, J., after stating the case.—This court are satisfied that the executors had full power to sell and convey the lot or piece of ground in question, by the terms of the will, in the manner they did. It is clear, by the express terms of the will, that they might have sold it absolutely in fee without reserving any rent, or that they might have sold and conveyed it in fee, reserving a ground-rent in fee, without allowing the vendee the privilege of redeeming it from the rent at any time; and had they sold and conveyed the lot in this manner, it may be that they would have had no right or power afterwards, under their authority, on the will, to have released the ground-rent upon receiving a sum of money, which, put out on interest at six per cent. per annum, would have produced an annual interest equal in amount to the ground-rent reserved to be paid annually. But it is very clear that the executors might have made an executory contract for the sale of the lot, by agreeing with the purchaser to receive the purchase money in instalments, payable annually, or at other periods as agreed on, and to make a deed conveying the same in fee upon the whole of the purchase money being paid. If it was competent for them then to make the entire contract for the sale executory, what reasonable objection can there be to their making it so in part? I can see none. The stipulation contained in the deed, allowing the purchaser to redeem the lot from the payment of the ground-rent, at any time within the ten years, may be regarded as executory, and as forming a part of the contract for an absolute sale, out and out, if the purchaser should elect to have it so, and therefore as coming fairly within the powers given them by the will. And seeing by the terms

Digitized by Google

of the deed of conveyance, or indenture executed by and between the parties, it is provided that the executors shall receive the redemption money, if paid within the time specified, and thereupon execute the release, they are, therefore, the proper, and indeed the only persons capable of doing it. From the nature of the duties to be performed by them under the will, they must be considered trustees as well as executors: they are to hold the money arising from sales of the real estate in trust for the benefit of the wife, the executrix herself, to whom the use of it is given by the will during her life; and for those again ultimately entitled to it thereby in remainder. It was a sale of the estate to the vendee in fee, to be held by him and his heirs, upon their paying the ground-rent mentioned in the deed, with an election, upon their part, to hold the estate absolutely and entirely released from the payment of the ground-rent, upon their paying at any time within the space of ten years, the gross sum of $533 33. This was a sale of the estate in fee, leaving it to the election of the vendee, to be made within a limited time, whether he would continue to hold the estate, by paying the ground-rent, according to the terms of the deed, or would take and hold it released therefrom by paying the gross sum. It appears to me that it was not only competent for the vendors to sell the estate in this way, under the will, but that they have full power, under the same, to receive the redemption money and to release the vendee, or those claiming under him, from all further payment of the ground-rent. The mode of exercising the power given to dispose of the estate in this way, was doubtless the most favourable for those who were intended to be benefited by the exercise of it, that could have been adopted, and is therefore entitled to great favour. We therefore think the case presented by the petitioner is not such as requires the interposition of this court.

The petition is dismissed, and the petitioner ordered to pay the costs of it.

Digitized by Google

www.libtool.com.cn

DONOGHUE *v.* The COUNTY.

1. In an action against the county for damages by a mob, evidence of unlawful conduct by men assembled within a church, of which the plaintiff was pastor, properly excluded as irrelevant, it being shown he was absent from the city at the time.
2. Notice under the act need only be given, when the owner has knowledge of the intended attack.
3. Verbal notice "that it was expected the church would be attacked, and if so, the school-house would go too," is sufficient in case of the destruction of the school-house.—Per SERJEANT, J.
4. Whether an agent for sale merely, can give such notice, *Quære?*
5. That the verdict was against the weight of evidence, cannot be assigned for error on certificate from the Nisi Prius.
6. Transactions during the riot properly excluded as irrelevant, unless the plaintiff can be implicated.
7. Even as cross-examination of a witness, stating so much as related to the destruction of the property.
8. Omission to set out in the narr. the ward in which the property is situated, is cured by verdict.
9. An accidental destruction by fire communicated from a building fired by a mob, is within the act giving a remedy against the county.

CERTIFICATE from the Nisi Prius.

Feb. 24.—This was an action on the case for the destruction, by a mob, of a school-house, the property of the plaintiff, formerly used by the Sisters of Charity, and occupied at the time. The plaintiff was the pastor of St. Michael's Church, and resided in the parsonage, but had been absent for some time. He officiated in the church on the 5th, and the next day went into the country, some miles from town—no disturbance having then taken place. The house was destroyed on the 7th. The defence endeavoured to be established was, such conduct as excluded him from remedy under the 8th sect. of the act of 1841, p. 418, providing that no one shall be entitled to the benefit of the act, if it shall appear the destruction was caused "by his illegal or improper conduct." His honour, the Chief Justice, overruled a question as to when the men first collected in the church on the evening of the 7th. They then showed that on the evening of the 7th, a number of armed men came out of the church, and offered to show that this body fired upon an unarmed assemblage in front of the school-house, but it was rejected for the same reason, to wit, no connection with plaintiff being shown.

The notice proved was, that Frenaye, who had a power of attorney to sell the house, but no other authority, called with others on the sheriff, and told him of the general apprehension of the destruction of the church, and said, "If the church went, the school-house would go too."

Digitized by Google

Shots were fired from the school-house on Monday, and many of the men engaged in the riot on the 7th, which led to the attack and destruction of the house on the 8th, came out of the parsonage.

The judge was requested to charge the jury—

1st. That the notice in this case to the sheriff was insufficient.

2d. It was insufficient, inasmuch as what is alleged to be notice was not given by the party owner, or any one authorized by him; and inasmuch as Mr. Frenaye did not give notice of any intended attack, but merely expressed his apprehension that if the church was burnt the school-house would be destroyed.

3d. That the notice must be distinct and explicit in stating an intended attack, or intention to collect a mob for that purpose.

4th. That the firing from the school-house was improper and illegal.

5th. That if there was improper or illegal conduct from the parties in possession, the plaintiff cannot recover.

6th. That if the persons in charge of the house invited others to enter with arms, to be used against the crowd, and those persons did so, they became parties to the riot, and their improper or illegal conduct is a bar to the plaintiff's recovery.

The learned judge charged, that if the facts sworn to are true, the sheriff had sufficient notice of the apprehended danger. Also, that if the shots were not fired from the building before the mob attacked it, the firing was justifiable. That the building was a dwelling-house, and castle for family defence; and that a homicide in resistance of a felony is justifiable, especially if committed in the night. That it was justifiable to introduce men and arms into the house, as the exercise of a freeman's privilege, whether there was an apprehension of danger or not; and that if the mob was not fired on till after it had begun the attack, this part of the defence had failed.

The errors assigned were, the overruling the testimony offered; the charge as to the notice being sufficient either in form or by the proper person; the defect in the declaration, in not setting forth the ward.

LAVERY *v.* THE COUNTY.

CERTIFICATE from the Nisi Prius.

Feb. 24.—The action and defence was the same as in Donoghue *v.* The County. The house was not directly fired by the mob, but a neighbouring building having been set fire to by them, the conflagration spread and consumed the property, for which the action was brought.

Digitized by Google

A general rumour of an intention to sack and destroy property having been shown to exist on the 7th, the plaintiff proved, he, with others, called on the sheriff on the 8th; and one, on behalf of himself and the citizens of Kensington, requested him to take measures to preserve their lives. The court refused to permit the witness, on cross-examination, to state the circumstances occurring on the day antecedent to the riot; he also rejected a witness for the same purpose.

The errors assigned were these decisions on evidence; and that the declaration did not set out the ward; nor that the proceeding was on the act of Assembly.

A new trial having been refused, this appeal was taken, and the cases were argued together.

H. M. Phillips, for the county.—The witness having stated part of the riot, we were entitled to have the whole, for we meant to implicate the plaintiff; and we were not bound to make the witness our own. The question of notice is material. Under the act, the sheriff, failing to perform his duty, is liable over to the county, and plaintiff must prove such notice as would compel him to show, in an action, that he performed all the law required. [*Curiam.*—There was no intention to destroy his property, as it was accidental, another building having been the object; he gave notice of all he could have had knowledge of, which was general rumour.] The act is the sole right of action, and he must bring himself within it; it provides no one shall be entitled, "unless upon knowledge of the intention, and sufficient time intervening, he shall give notice to the sheriff, constable, &c."

Doran and *Meredith*, contrà.—There was no offer to connect the party with these transactions; hence it was irrelevant testimony. In Lavery's case no notice was required, as in fact no design to injure him existed; he did give all that he knew of.

This statute is founded on that of Geo. 1, and is to be construed liberally, as that always has been. Hyde *v.* ——, 2 Doug. —; Bull. N. P. 180.

Phillips, in reply.—In Donoghue's case, his residence in the parsonage, which was connected with the church, was sufficient to connect him; he was responsible for what was permitted in his own house.

March 4. SERGEANT, J.—The first error assigned, that the verdict is against the weight of evidence in the point of notice, is not a subject of error here, when the case comes up by certificate from the judge at Nisi Prius, under the act of Assembly of the 26th July, 1842. That

Digitized by Google

act confines the supervision of this court to cases where the judge refuses to grant a new trial on points of law, or whenever either party tenders a bill of exceptions to any opinion or charge of the court, or in any case where a writ of error is allowed in a like case to any Court of Common Pleas or District Court. The remedy of the party on the ground of a verdict being against the weight of evidence, is before the judge at Nisi Prius by motion for a new trial.

The next error assigned is, in overruling the testimony of William Craig. We think this was properly done, as the evidence offered was irrelevant to the issue trying, unless the defendant had gone further, and offered to show that the plaintiff was in some way connected with those circumstances. Nor was it material to prove that there was firing from an adjoining house, which communicated the flame to the plaintiff's house; and that setting fire to the first house was a necessary act of self-defence. In order to debar a person from the remedy provided by the act of Assembly of the 31st May, 1842, it must be made to appear, in the words of that act, that the destruction of his property was caused by his illegal or improper conduct. He is not involved in the misconduct of others, even supposing there were such, or that they occupied an adjoining house, when he has had nothing to do with it, so far as appears.

The next error is in overruling the testimony proposed by the defendant in the cross-examination of C. B. F. O'Neill. This was properly rejected, for the reasons already given. It was introducing proof of circumstances of no importance in the cause, tending to encumber the trial with superfluous and irrelevant matter, and not in the nature of cross-examination of what had previously been stated.

The last error is a defect in the declaration, in not mentioning the ward. This, we think, is cured by the verdict.

Judgment affirmed.

DONOGHUE *v.* The COUNTY. *March* 4.—It is only necessary to notice such points as have not been decided in the preceding case.

1. Error is assigned in overruling the testimony of Alexander Erwin and John Lynch. This testimony was designed to show that men collected in St. Michael's Church on Monday evening: that armed men came from that church and fired upon an unarmed assemblage in front of the school-house, which was the property destroyed for which this suit is brought. To make this testimony relevant, the defendants were bound to show either that the plaintiff was one of these men, or that he participated in their conduct, or was in some way connected with them, otherwise he is not barred by the provisions of the act of

Digitized by Google

Assembly. But the defendant did not offer to show this, and the testimony previously given led to a different inference. The testimony of Lynch, the sexton, was, that the plaintiff was not in the church that night; that none of them had been in the parsonage house, (the residence of the plaintiff;) that the plaintiff had officiated in the church the day before, (of which he was pastor,) but he understood he was gone into the country. The evidence offered, therefore, was immaterial and leading to no result, and was, for this reason, we think, properly rejected.

2. The next question is as to the notice. The act of Assembly requires that notice be given to the sheriff, alderman, justice, or constable, when there is sufficient time intervening. But in what cases is the party required by the act to give this notice? When he has knowledge of the intention or attempt to destroy his property or to collect a mob for such purpose. It would be strange to require him to give notice where he has not such knowledge; and therefore in such case he is not debarred from his remedy, though he has not given any notice. In the present case there is no evidence showing such knowledge in the plaintiff, but rather the contrary; and therefore he was in no default. If Frenaye, who merely had a power of attorney to sell, could be considered as the plaintiff's agent for the purpose of giving notice, (which is far from being clear,) we think the notice he gave was sufficient within the act.

Judgment affirmed.

ENEU *v.* CLARK.

1. If a feme give a warrant of attorney to confess judgment on her bond, and afterward marries, judgment may be entered against husband and wife.
2. The practice is to move the court for leave on filing an affidavit of the facts and a declaration, and unless loss would accrue, to give notice also to the husband; but that was not required in this case.

Feb. 25.—MOTION to enter a judgment against a husband and wife, on warrant of attorney given by a feme before marriage.

C. Fallon, for the motion, referred to Hartford *v.* Mattingley, 2 Chitty, 117; Anon., 1 Show. 91; Madder *v.* Lee, 3 Burr. 1469; Sheble *v.* Cummins, 1 Browne, 253. From these cases it appears the practice is to enter the judgment on motion and affidavit of the marriage: and in Berring *v.* Burnett, in the District Court, January 6th,

Digitized by Google

1845, a declaration was required. These have all been complied with. [*Curiam.*—Has notice been given to the husband?] It has not, and we may loose our execution or lien if it be required; the husband may move to set it aside. [*Curiam.*—Take your motion; if the husband has a defence, your proceeding is a nullity.]

Feb. 27.—A motion was made to open the judgment.

Feb. 28. *St. George Campbell* and *Naylor* for the rule.—Defendant has offered and is willing to pay the amount of the judgment, if the other securities will be assigned. We appear on behalf of subsequent execution creditors having the money ready. The debt in this case is secured by a mortgage, and the party should either resort to the land, or, taking our security, give us his. Second, But the judgment is wrongfully entered; the better rule is that the warrant is avoided by the marriage, and the party is put to his suit; it is so decided, Anon., 1 Salk. 399, and there is a dictum on p. 117 to the same effect. Clancy, 152, says, this is more in accordance with principle, and that the cases in 1 Show. and Salk., contrà, are against the present practice. 2 Roper, Husband and Wife, 68, and 2 Chitty, 117, are to the same effect. [*Rogers*, J.—Why should the voluntary act avoid a power coupled with an interest?] The debts are contracted by the marriage, but the power is not given; at all events, we are willing to pay, if such justice is done as the court would have compelled in the first instance.

Fallon, with whom was *F. W. Hubbell*, contrà.—There are no merits here; the husband received the money raised on this mortgage; these are not in question here, but the regularity of our proceeding, which is sustained, besides the cases cited on the motion, by Lofft, 530. [*Curiam.*—Not the best authority.] Staples *v.* Mercer, 3 M. & Scott, 800; S. C., 2 Dowl.; Troub. Tidd, 600; 2 Chitty, Archb. 689; 1 Paine and Duer, 609; Beering *v.* Burnet, D. C. 4 L. J. 185, fully argued and considered. These all agree on the modern practice.

March 19. Rogers, J.—It is not to be disguised that there is a conflict of authorities as to the point raised, namely: whether a subsequent marriage revokes a power of attorney to confess a judgment against a feme? In an anonymous case, 1 Salk. 399, decided on a dictum in 1 Salk. 111, it is ruled, that if a woman, dum sola, execute a warrant of attorney to confess a judgment, and afterwards marry before the judgment is entered, the warrant is countermanded, and shall not be entered against husband and wife. In 1 Salk. 111, also anonymous, already cited, it is ruled, that if a warrant be given to a

Digitized by Google

woman, dum sola, who afterwards marries, it will not be revoked by her subsequent marriage. Alter, says the judge, if a feme sole gives a warrant of attorney and marries. This is the foundation of the dictum, and the only authority for the case cited. The reason given for the distinction is, that in the former case it would charge the husband, in the latter it is for his advantage. With every respect, I am not satisfied with the distinction, or the reasons given for it, for the court have evidently proceeded on the ground that the only thing worthy of regard is the interest and convenience of the husband. But it seems to me some respect must be paid to the rights of the obligee, who unquestionably has an interest in the early entry of the judgment, an interest which can neither be defeated nor impaired by the voluntary act of the obligor and another, who chooses to enter into a contract of marriage. I know of no case, certainly none has been cited, where one party to a contract has been permitted to infringe it at his own will and pleasure. It would be obviously contrary to every received principle of right. If it be a power uncoupled with an interest, as for example to collect debts, a subsequent marriage, with notice, will amount to a revocation: confounding this plain distinction, lies at the root of the mistake into which the court, in 1 Salk., has fallen. Mr. Richardson, in his treatise on the practice of the King's Bench, 325, appears to have been struck with the injustice of this consequence of a subsequent marriage, and subjoins a quære, whether the judgment can be entered up so as to be a judgment at the time she was sole, though really signed after marriage? But the suggestion, for obvious reasons, has not been acted on, but the courts, in modern cases, have acted more wisely by overruling the case in 1 Salk. In 1 Shower, 91, it is stated to be the practice to enter up judgment against husband and wife, where a warrant has been given by her before marriage. The point is ruled in the same manner in Lofft, R. 530; Hartford *v.* Matingly, 2 Chitty, 114; 3 Moore and Scott, 800; 2 Dowling, 764; and in James Beering *v.* L. W. Burnet and Charlotte his wife, late Charlotte White, 4 Law Journ. When a bond and warrant of attorney is given by a woman, dum sola, and she afterwards marries, the proper practice is to obtain leave to enter up judgment against husband and wife, on motion accompanied with an affidavit of the facts, and afterwards to file a declaration. It is said that judgment ought not to be entered against the husband, because it charges him, and that he has given no warrant for that purpose. It is true he has given no express authority, but the authority is implied from the fact of marriage, a voluntary act of his own. The husband is entitled to the personalty of the feme, and takes her, cum onere, subject to all her debts, contracts, engage-

www.libtool.com.cn

Digitized by Google

ments, and liabilities. He has a full equivalent for any duties the law imposes on him. The argument proves too much, for the husband gives no express warrant for suits against her, yet no person will deny he subjects himself to suit for debt, and that he must, during coverture, make good her contracts. The truth is, it is a question of practice, and to my mind the recent decisions are most consonant to principle and convenience. The practice is, not to enter up judgment without leave of the court, and if done without leave, the judgment will be set aside. I would also suggest, that when it can be done without risk, it would be better to give notice to the husband before judgment is entered, although, in the cases ruled, this would seem not to have been required.

KEENER v. Bank of the UNITED STATES.

1. Plaintiff purchased bills on London, at one hundred and eighty days' sight, not to be negotiated, unless eastward of the Cape of Good Hope, by giving his note at twelve months, on the maturity of which the amount was to be adjusted on stipulated principles. This was done, new notes given and paid after knowledge of all the facts:—*Held*, The interest paid during the time the bills were outstanding could not be recovered, because, 1. He was bound to pay the notes at maturity, at all events. 2. Because voluntary payments, with knowledge of facts, could not be recovered.
2. Evidence of mercantile usage that the interest, during such period, was for the benefit of the purchaser of the bills, was inadmissible, as tending to alter the express agreement of the parties.

CERTIFICATE from the Nisi Prius.

Feb. 25.—In May, 1835, plaintiff purchased of defendants bills on London for £7000. By an agreement, then executed, these were to be drawn at one hundred and eighty days' sight, and not to be negotiated but to the eastward of the Cape of Good Hope. The defendant was to give his note at twelve months, at the rate of $5 for £1.

The agreement then continued, "On payment of this note at maturity, the bank will adjust the account, by converting the pounds sterling on the face of the bills, plus two and a half per cent., into dollars, at whatever rate of exchange the bank may then be drawing, at sixty days' sight, on London, and should this amount in dollars exceed or fall short of the said payment, the bank shall, in the first case, receive from the said Keener, and in the last case, refund to him the difference." If the bills were returned unnegotiated, the note was to be surrendered on payment of one per cent. So also, if lost, and proof thereof and indemnity. But no interest was to be allowed by the bank, however long it might be before return or proof of loss.

Digitized by Google

In June, other bills were drawn on a similar agreement.

www.libtool.com.cn

These bills were sent to Canton, and sold about the 27th September, 1836—four months after the maturity of the note, and sixteen from the date of the bills.

At the maturity of the first note the account was adjusted according to the rate of exchange on London, the two and a half per cent. commissions added, and a new note, including interest for the new term of credit, given. This, after several renewals, was paid, and the present suit was to recover back the interest paid the bank, after the maturity of the first note, until the maturity of the bills in England. In May 12, 1837, plaintiff, writing to the bank, requesting a renewal, said, "As the delay was of no ordinary character, and contrary to instructions, I cannot suppose it is the intention of the bank to charge interest during all this period, as there was none accruing on the bills." The note was renewed, but the letter does not appear to have been replied to.

In April, 1840, after final settlement of his note, plaintiff again wrote the bank, detailing the transaction, and making his demand. After referring to his letter of the 12th May, he added, "To this part of my letter no particular answer was returned at the time; and as the bank was indulgent in regard to the payment of the notes, I let the matter rest, and did not urge the claim. It is true, I might have refused to pay the last note without the allowance being made; but I thought it more consistent with a strict sense of justice and honour to pay up the full amount of my notes *first*, before I renewed my claim." In reply, beside insisting on the agreement having been strictly complied with, the bank stated this delay was no unusual occurrence, and was one of the advantages counted on.

On the trial, before his honour the Chief Justice, the plaintiff proved a final settlement of his account with the bank, in March, 1839, and offered to show, that by the usage of merchants the interest that accrued on sterling bills, (drawn at six months' sight,) from the time of settlement in this country, to the time they fell due in England, was for the benefit of the purchaser of the bills. That in the settlement of credits arising out of such transactions, it was the invariable custom to allow the *principal any advantage in interest* which might accrue from the non-appearance of bills drawn in virtue of such credits.

The court rejected it, and directed a verdict for defendants.

Hazlehurst and *Rawle*, for plaintiff.—This is the case of a credit given to be used abroad, and the question is, to whose benefit does the non-user accrue? The contract must determine it, and where that is

Digitized by Google

silent, usage must be the guide. The fact that no interest was payable in the event of a return, shows none was to be paid until they were used. The *difference* to be refunded can only refer to interest. But these are merely assistants in the construction, there being no positive agreement in this state of facts. Usage, then, alone can be resorted to, Stulz *v.* Dickey, 5 Bin. 287; United States *v.* Arredondo, 6 Peters, 715; and it is always used to explain a doubtful clause; Winthrope *v.* Insurance Company, 2 W. C. C. R. 7; United States *v.* McDaniel, 7 Peters, 1; Eyre *v.* Marine, 5 Watts & Serg. 116, 2 Peters, 148. Here it is not said who is to pay interest until the bill appears. It was forgotten, or left to custom. Interest is the price of money paid, and none was paid here, nor was the bank bound to keep funds to meet the bills, having six months after presentation allowed for that purpose. The letter of the 12th May, not being replied to, was assented to.

The case of Orr *v.* Chandler, 1 H. Bl. 227, is very similar, and it was there held, the interest was only payable from payment of the bills.

The opposite construction makes the agreement, in effect, usurious.

Cadwalcder, contrà.—Two points rule this case. Under the agreement the plaintiff was bound to pay the note at maturity, whether the bills were or were not paid. It was a sale of foreign money—an article of merchandise, and so treated by courts. The agreement was by both parties; one had a certain credit of twelve months, without interest, the other the chance of delay in the presentation. The *difference* in the agreement was between the value of foreign money and the note at the settlement; not the amount of interest. The testimony offered was irrelevant to a special contract, according to the settled rule of this court, and his reference to "principal" shows the custom referred to was as to bills on an agent.

The bank did assume responsibilities; for those on whom the bills were drawn must have funds to authorize an acceptance, for refusal of which it would be liable to re-exchange; and interest was only paid on the debt after it became due.

But the second point is conclusive. Plaintiff paid the interest with full knowledge of all the facts, and he cannot reclaim it.

The case in H. Bl. was a penalty, and the party was restricted to his original agreement.

March 9. KENNEDY, J., after stating the case.—As to the evidence offered, it is perfectly obvious, if it had been received, that it would not only have contradicted and changed the agreement made between the parties, materially from what they were, as made by and between them, but have varied and changed the tenor and legal effect of the

Digitized by Google

notes given, in exact accordance with the same. No one can doubt for a moment, from the tenor and legal effect of the notes, if the plaintiff had failed to pay, and had not arranged the principal of the notes at the end of the twelve months mentioned therein, he might have been sued on them, and compelled to pay, not only the principal, but likewise the accruing interest thereon, from the time the principal became payable, according to the tenor of the notes. And if he had thus been compelled to pay the interest by suit, it will scarcely be pretended that, after having so paid it, he could have recovered it back. Then, is it not equally clear, that having paid it voluntarily, when he might have been compelled by law to pay it, that he cannot recover it back again? It would be most strange and anomalous if he could. The parties, by their agreement, seeing that it was not unlawful in any respect, made a law for themselves, which bound them, and by it, and it alone, their rights were to be, and must be determined; so that no custom could be admitted to be proved, which would go to defeat and change the nature and plain legal effect of the agreement made between them.

It is also equally clear, that as the plaintiff showed that he had paid the interest, which he claimed to recover back, in conformity to his agreement, which was certainly legal, that he could not claim to recover it back; and that the court was right, therefore, in directing the jury that their verdict ought to be for the defendant.

Judgment affirmed.

SPALDING *v.* HEDGES.

1. It is immaterial that the party have correct sources of information, when the plaintiff has made false representations of facts relating to land situated in a distant country.
2. Gazetteer not admissible to prove relative distances of places.
3. Purchaser rescinding an agreement for conveyance, need not surrender the agreement until he has been repaid, and he may do it on the trial.

ERROR to the District Court of the city and county of Philadelphia.

Feb. 25, 26.—This action was on a note, given for the purchase money of stock in the town of Bellefontaine. On the trial, before Stroud, J., the defendant, having shown false representations respecting the situation of the land, and the distance of the town from St. Louis, gave in evidence a certificate, dated April 17th, by which de-

Digitized by Google

fendant, having paid a certain sum, and given his notes for the balance, was declared entitled to one share in the stock, composed of six hundred and seventy-two lots, divided into seventy-five shares, at $500 each, under a conveyance made by plaintiff to Burgin and another, on the 13th April, as trustees for the stockholders. The stock was to be retained as security for payment of the purchase money. Plaintiff called Burgin to prove what the representations were, and their truth, who, on his voir dire, stated he was a stockholder, but this money would not go to the association, defendant having purchased directly from plaintiff. The articles of the association were then proved to the court, signed by defendant, which recited an agreement for contribution in the purchase, and a contract to purchase from plaintiff the land, and that the land should be conveyed to trustees, &c. The court rejected the witness, and this is the first exception.

He then offered to prove, by the same witness, that by an alteration of the articles, specific lots had been assigned to each stockholder; he was rejected, and this constitutes the second exception. He was again offered, after releasing to plaintiff, but was rejected: third exception. Printed circulars and advertisements by trustees, with evidence of authenticity to prove the representations actually made, were also rejected, and are the fourth, fifth, and sixth exceptions. On a former trial, defendant having read a deposition taken on his commission, plaintiff offered to read it now, but it was rejected, and is the seventh exception. The eighth was the rejection of Burgin to prove delivery to him by defendant of a letter from one Pearce, and containing a statement of the situation, &c.

The ninth was the rejection of the Gazetteer of the United States, published in 1818, to show the true distance from St. Louis.

His honour charged, a reconveyance was not necessary to entitle the defendant to rescind the contract.

There was no other conveyance than has been stated above.

Rockhill, and *T. J. Wharton*, for plaintiff.—Burgin was not interested, for defendant was one of the original purchasers from plaintiff, not from the association: in fact, the note is part of the purchase money to be paid by the associators. We were entitled to read the deposition, for defendant having used it on a former trial made it evidence, McClay *v.* Work, 10 Serg. & Rawle, 194; Church *v.* College, 3 Watts & Serg. 223; Styles *v.* Bradford, 4 Rawle, 401; Stockton *v.* Bemoth, 7 Watts, 39; Wheaton *v.* Peters, C. C. U. S.; on the authority of Stainbaugh *v.* Insurance Co., 2 Caines, 131. The delivering the letter was evidence that the facts there were the same as were

Digitized by Google

stated to him on the purchase. The Gazetteer should have been received, on the same ground that historical books are, Commonwealth *v.* Alburger, 1 Whart. 175; 6 Carr. & Payne, 586; or a directory, 9 Cow. 141; 1 Phil. Ev. 223, 224. But if he elected to rescind for fraud, he had no right to retain the property, 2 Watts, 474; 4 Mass. 502; 15 Mass. 219; 3 Wend. 236. [*Curiam.*—He has nothing; the legal title is in the trustees, and this agreement would be of no use, the bargain being at an end.]

Stokes and *E. Ingersoll*, contrà.—The notes formed part of the partnership property: nor will a release aid, for it is but an assignment, Gallagher *v.* Milligan, 3 Penna. 178; Culvert *v.* ——, 5 Watts, 496; Crozer *v.* Leland, 4 Whart. 12; he being liable for contribution to costs. The advertisements were not brought home to defendant, Watkinson *v.* Bank, 4 Whart. 484; 9 Petersd. Abr. 218; 17 Wend. 596. The interest of the deponent was subsequently discovered, and it is never too late to object to that, 6 Johns. 538; Stiles *v.* Bradford, 4 Rawle, 401. As to Pearce's letter—[*Curiam.*—It is no question; so of the Gazetteer.] As to the reconveyance, we never had any but a mere agreement only, to be enforced in chancery. [*Curiam.*—You ought perhaps on the trial to have offered to give it up.]

March 2. GIBSON, C. J.—It is necessary only to state the facts on which the point depended, to show that Doctor Burgin was not interested in the event of the suit. The plaintiff was the owner of land divided into town lots according to a general plan, which he sold in shares to the members of a joint stock company formed by him, and conveyed the legal title to two trustees nominated by the company to receive it, and convey the lots according to its direction. The capital stock consisted of six hundred and eighty lots, divided into seventy shares, which were separately sold by the plaintiff to the shareholders, each of whom gave separate promissory notes for the price of his share; on two of which the action before us is founded. Doctor Burgin, the proposed witness, was a shareholder and a trustee, but either in the character of the one or the other, it is difficult to perceive what he had to do with the separate bargain between the plaintiff and the defendant. Had the shareholders purchased jointly, all would have been liable for every part of the purchase money, and all would consequently have been interested in every measure to make the defaulters pay up; but it is not pretended that they were liable for each other. They were partners, it is true, but they were partners to sell, not to buy. They bought their shares separately, and put them together when bought, as common stock, to be sold at a profit by retail. To

www.libtool.com.cn

Digitized by Google

constitute partnership, it is by no means necessary that the capital stock be put in as money. Each partner may contribute his share in the form of the specific article to be dealt in; and where that is the case, the other contributors have no imaginable interest in the event of an action brought for the price of it by him from whom the contributing partner purchased it. Exactly such was the case in the court below; and the remarks already applied to it, dispose, in the same way, of the ruling out of Pearce's deposition on the ground of interest, without recurring to the principle by which the defendant is supposed to have made it competent, though the fact of interest were confessed.

The other exceptions are unfounded. The printed circular, the advertisement published in the American Sentinel, and Pearce's subsequent letter, produced by the defendant to Doctor Burgin, had no connection with the alleged misrepresentation at the time of the bargain; the evidence of which it was proposed to rebut. It would have availed nothing to show that sources of accurate information were open to the defendant at the time, or that the plaintiff had, on other occasions, represented the property to be what it truly was; and, as independent evidence, it is not contended that the documents were competent.

Neither was the "Gazetteer abstracted from the Universal Gazetteer," and published in 1818, competent evidence of the distance between St. Louis and Bellefontaine, where the property is situate. Even a book of general history, though competent to prove by-gone matters which concerned the country at large, is not so to prove matters of private right; and it is incompetent for any purpose, on an obvious principle, where better evidence can be had. In a case cited in Stainer v. The Burgesses of Droitwitch, 2 Salk. 282; Dugdale's Monasticon was not allowed to prove an abbey to be of an inferior order, because recourse might have been had to the records. Now the distance between places in our own county is susceptible of proof by witnesses who know the fact, and whose testimony is certainly better than the crude information collected by the editor of a book of topography, from what sources we know not, and published when the place of which he professes to treat was scarcely known to exist. Even actual surveys of a country are evidence of its topography only when they are backed by great antiquity or public authority.

Of the remaining exception it is scarce necessary to speak. The defence can be maintained only on a rescission of the contract; and when that is established, the defendant's share will revert to the plaintiff when he refunds what he has already received. He will then be entitled to the plaintiff's certificate, which may be surrendered at the trial, or whenever else the money shall be repaid.

Judgment reversed, and venire de novo awarded.

Digitized by Google

www.libtool.com.cn

COMMONWEALTH *v.* MARTIN.

Under the constitution, a single judge is competent to hold a Court of Quarter Sessions, when so directed by the legislature. (*a*)

Feb. 22.—*B. F. Brewster* moved for an allocatur on writ of error to the Quarter Sessions. In support of the rule he stated two grounds: 1. The indictment, which was for assault and battery, &c., was defective in not containing any words to distinguish it from an ordinary trespass. [*Chief Justice.*—We never grant a writ of error in criminal cases for mere technical matters not going to the merits.] 2. It was tried before one judge, who has no power, under the constitution, to hold the court, and Zephon's case only decided that the legislature might make any one judge president for the time.

F. Wharton, contrà.—37 Hen. 8, c. 8; Rob. Dig. 324, expressly avoids the necessity of these words. As to the 2d, in Zephon's case, 8 Watts & Serg., it is expressly decided, and, after that, argument would be improper. The record in that case, which I have here, shows he was arraigned and pleaded before one judge, though two were present at the trial.

March 10. PER CURIAM.—The constitution (art. v. sect. 3) reserves to the legislature full power to alter the structure of the Common Pleas, and consequently of the Quarter Sessions, being held by the same judges. "Until otherwise directed by law," it is there said, "the courts of Common Pleas shall continue as at present established." But they were to continue so no longer. As then established, any two of the judges were competent to constitute a quorum: when directed otherwise by law, any one of them might be equally so. The framers of the constitution could not have intended to prevent the legislature from adapting these courts to the exigencies of new times and new circumstances, or to make it necessary to resort to fundamental legislation for the most trivial alterations. The power exercised in this case is more clearly within the pale of the constitution than that which was held to be so in Zephon *v.* The Commonwealth. That was within the spirit of the constitution; but this is within the spirit and the letter too. But nothing less than an imperative case would justify us in disregarding an act of the legislature at the expense of

(*a*) The same point was fully argued in Commonwealth *v.* Nathans, antè.

Digitized by Google

throwing open the jails and turning loose on the community the malefactors convicted in a course of years. The other grounds of exception are still more obviously unfounded; and besides, we never grant an allocatur for an exception that does not touch the question of guilt or innocence. Motion dismissed.

FARR v. SWAN.

1. An allotment on Schuylkill Front street, on Holmes's map, to a first purchaser, with proof of an allotment of a square, according to the present plan, to twenty-five persons, of whom this first purchaser was one, with title from him and possession had for forty years, is evidence of a possession sufficiently ancient to support the title without proof of actual location by warrant and survey.
2. But such ancient possession merely is not sufficient to raise a presumption of a grant in favour of the same party in his own right, for more than his own quantity, as a first purchaser, against the Commonwealth or its grantee, for, per SERGEANT, J., this would require another presumption, namely, of a conveyance from some other first purchaser, which cannot be made from a mere possession encroaching on the proprietary or Commonwealth.
3. The act of 1781 was directed against intruders without colour of right, not against persons in possession, or entering within seven years thereafter, and holding under first purchasers.
4. Warrant and survey not necessary to title of a first purchaser to an appurtenant city lot.
5. An extract from a paper in the land-office, if it appear to contain all that relates to the subject in controversy, (as an entire square,) is evidence.
6. Nor is it necessary it should show by whom or when made, for the presumption is in favour of regularity.
7. An objection that a paper "is not original" is a waiver of any defect in the acknowledgment, when the paper is a certified copy of a deed from the recorder's office.
8. A surveyor permitted to state where he would locate a warrant similar to that under which defendant held.

ERROR to the District Court of the city and county of Philadelphia.

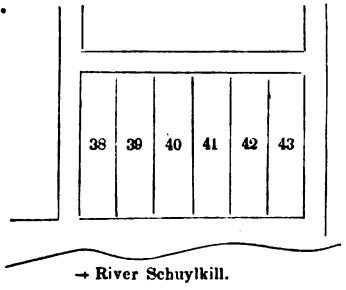
Feb. 27, *March* 2, 3, 4.—This was an ejectment for two lots in the square at the corner of Vine and Schuylkill Front street, included in plan C, between double lines. On the trial, before Pettit, president judge, the plaintiff claimed under a deed from the Penitentiary Commissioners, in 1830, under the act of 1821, March 20th. Then, as proof the lots were vacant, he showed a warrant and survey to Emlen, in right of Kellenbeck, in 1768, 1770, for the lot between the lots in question, extending from Second to Front streets, describing it as bounded by vacant lots.

The defendant showed the list of first purchasers, of which the part that referred to this square contained twenty-five names, five being opposite each number, which list was annexed to Holmes's map, and an

Digitized by Google

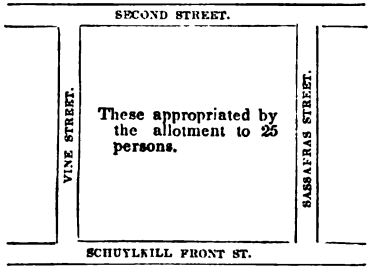
extract from which is given below. He then showed Holmes's map, the square on which appears thus: (Plan A.)

A.



He then proved a plan of a square at Front and Vine: (Plan B.)

B.

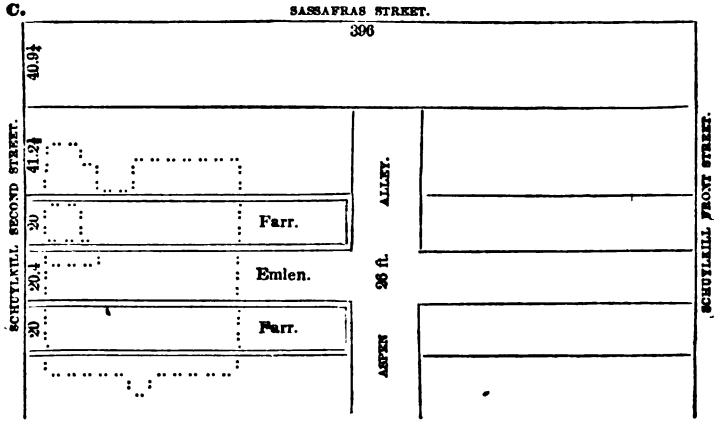


Certified to be "a true extract taken from the draft or plat of the city lots, remaining on file" in the land office.

To which plaintiff objected, because it was but part of a paper, not shown of what paper, or when made, and by what authority; but the court admitted it.

Plan C was made by the city surveyor, and shows the present localities. Defendant's enclosure is within the dotted lines:

C.



Digitized by Google

www.libtool.com.cn

He then showed a copy certified by the recorder of deeds, in 1804, of a conveyance, dated in March, 1716, by Reuben and George Pownall, sons of George Pownall, (reciting a lease and release to George, the father, by William Penn, for one thousand acres,) to David Powell, of the city lots belonging to the one thousand acre purchase not yet taken up or located. This was proved in 1716, before a justice of the peace, by the oath of one subscribing witness, (the recorder being present.) It was objected to, "there being no evidence of pedigree, and that the paper was not original," but admitted. Defendant then showed lease and release to Pownall, as first purchaser, for one thousand acres. A conveyance by David Powell, of all his estate, in 1730, in trust, remainder to his daughters, whose sole descendant was Mrs. Dobson, from whom defendants showed descent.

He then offered to show possession in 1804, to prove the boundaries and possession were always the same, for a period as far back as the memory of living witnesses extended, and as tending to show actual possession beyond that period. Plaintiff objected, because no title was shown out of the Commonwealth; that warrant and survey, or some office right, was necessary; that possession could not give title against Commonwealth or her grantee, and the proprietary right, if any, was barred by the act of 10th April, 1781; adverse possession only commencing (to give title) at the date of plaintiff's purchase. But the court admitted the evidence. Defendant then showed he was in possession and erecting a house in 1804; continued to the present time; and the existence of fences back to a swamp, for the filling up of which, in 1830, by the board of health, defendants paid.

Plaintiff then called the city surveyor, who testified that "Holmes's map" did not represent the streets as they now are; that No. 38, on that map, is west of the present Schuylkill Front street. The streets on Holmes's map are about six hundred feet west of those laid down on the present plan. That if he wanted to locate No. 38, on that map, he would go west of the present Schuylkill Front street.

On cross-examination, being shown the Emlen warrant, he said, he had no doubt it was located with one end on the present Schuylkill Front, and the other on Second street. Counsel then asked where he would locate Wm. Brown's warrant? This was objected to, but admitted. He stated he would survey between present Front and Second streets, being governed by the ordinance of 1814, and could only recognise the present plan. He never knew a Front street lot surveyed by him, which had not one end on the present Front street.

Re-examined.—If asked to locate by numbers on Holmes's plan, he would do it by that. But if asked to locate in the range of Kellenbeck,

Digitized by Google

he would, of course, go alongside Emlen's lot. The house stands entirely on the northern lot. The enclosure had been different at different times. Defendant then showed a warrant to Wm. Brown, in 1683, and survey in 1683 and 1688.

This warrant directed a survey of a front lot, where his lot fell. The survey was on Front street.

Also the minutes of the Board of Property, on the petition of a first purchaser, in 1714, and a patent for lots on Schuylkill Front street granted thereby. Reciting a survey on Front street, bounded by lots of Brown and Vickeris.

Also a warrant in 1683, to Bennett, a first purchaser, directing a survey of the lot appointed in the street on front of the purchasers of the like quantity, where his lot is fallen at Schuylkill. And a copy of the list of first purchasers.

The court was requested by plaintiff to express their views on the following points, in such manner and order as they thought proper.

1. That under the division as made on Holmes's plan, and the list of first purchasers, each individual was entitled to but one-fifth of each lot, or one-thirtieth of the whole square.

2. That if it appeared the first purchasers' claims were ascertained by the consecutive numbers, and there had been no severance, the same rule would apply in ascertaining the respective titles of the five who were entitled to one lot on Holmes's plan.

3. That the claim to a city lot, as marked by the annexation of a name opposite a number, if not more precisely located by warrant and survey, must be held to apply to the spot of ground indicated by Holmes's map.

4. The location could not be changed after deed of lease and release delivered, but by consent of the proprietary, of which the best evidence was a warrant and survey.

5. The change in the location of the streets would not change the location of a first purchaser's lot, without his assent, which could not be presumed, nothing having been done for a century after the purchase.

6. The claim, not having been prosecuted till 1804, was abandoned, and passed to the Commonwealth, under the divesting act.

If the court were against him on these, then,

7. That a warrant, survey, or some proprietory or office designation of the bounds of a claim were necessary to put the title out of the Commonwealth.

8. That the building in 1804, and possession since, cannot, in absence of any authority shown, raise presumption of grant against subsequent grantee.

Digitized by Google

9. The presumption, if any, is not conclusive.

10. No title can be derived in this county by settlement and improvement.

11. Nor by adverse possession against Commonwealth.

12. As against grantee, it commences at the time of his purchase.

13. As to the jury's right to give a verdict for whole or part.

The court charged in substance, 1. If Pownall was a first purchaser, twenty-one years' possession would authorize presumption of a conveyance of the rights of other first purchasers, to an extent necessary to support the title claimed under him.

2. If there was no difficulty as to the rights of other first purchasers named with him, then if the lots in question were part of a city lot, assigned to George Pownall, according to the list of first purchasers, Holmes's map, &c., then possession taken within seven years after the act of 1781, 7th April, sections 8, 9, was sufficient to perfect his inceptive title against the Commonwealth.

3. Whether this lot was assigned to Pownall, was for the jury.

4, 5, and 6. Under the facts proved, the jury might infer a more ancient possession than in 1804, and they must find it as early as 1788, to avoid the statute 1781, and also be satisfied of the pedigree.

7. The act under which the plaintiff claims was confined to vacant lots, the property of the Commonwealth. Possession and improvement of these, without title, legal or inceptive, would not deprive the lot of its character as vacant.

8. The jury might give a verdict for a part. The court was not aware, until reading this point, of any ground for discrimination; but if, upon the law as stated, the evidence would warrant it, the jury should make the proper discrimination.

The counsel said they did not desire more specific answers, and excepted.

The jury found for the defendant.

Errors asssigned:

1. Admission of map C.

2. Admission of deed by Pownall to Powell.

3. Admission of evidence of possession in 1804.

4. Admission of Haines's answer, as to where he would locate Brown's warrant.

In the charge:

1. Answers to the 1st, 8th, 10th, 11th, and 12th points.

2 and 3. In charging as in his 1st, 2d, 3d, and 4th points, there being no proof or evidence to presume possession.

Digitized by Google

4. In not instructing them in the principles which guide them in his 3d point.

5. In answering in the 7th point, without adding that under the acts of Assembly, of which that of 1821 was one, mere inceptive title, not asserted and prosecuted, should be considered abandoned, so as to make the lot a vacant one.

6. In not stating positively there was ground for discrimination in the 8th point, and leading the jury to believe defendant's whole title rested on same foundation.

Lewis A. Scott and *J. M. Scott*, for plaintiff.—1. The map was a muniment of title, and there should have been evidence of what it was. Certainly every loose paper in the land-office is not per se evidence of title. It was but a mere extract; and there is the same presumption against that as against a copy. Dennis *v.* Barber, 6 Serg. & Rawle, 104. The act of 1823 does not help the case, and Griffith *v.* Tunkhouser, 1 Pet. C. C. R. 418, is on the very point. It is moreover essential it should appear to be by the proper officer. Pain *v.* Hartman, 2 Dall. 230.

2. The act of 1715 is the one under which this acknowledgment is made, and in Vickroy *v.* McKnight, 4 Binn. 204, it was held, proof by one witness was insufficient. And if improperly recorded, it is no evidence, or the books are better, 2 Watts, 75; Murphy *v.* Lloyd, 3 Whart. 538; Watson *v.* Craig, 10 Watts, 289; and no possession was shown here to come within Arnold *v.* Gorr, 1 Rawle, 223; 6 Binn. 435; as copies must always come from the proper custody, 8 Adol. & Ellis, 151. It will be observed from 1712 there is not a document mentioning this lot specifically.

3. Possession in 1804 could not affect our right. By a series of acts it will be seen the state has chosen to consider these titles, unless prosecuted before 1788, as derelict, and has assumed the lots, and by very strict enactments forbidden the acquisition of any title but in one way, and under that we are entitled. The acts are 1779, 1 Sm. 479, the divesting act; 1780, Mar. 25, 2 McK. 374; 1781, 1 Sm. 533, which limits claims to seven years, and directs they shall be sold. Nor had defendant a right to enter under this act, but he was bound to proceed against the attorney-general, act 1786, 2 Sm. 380; Mayor *v.* Clifford, 4 Yeates, 272, is an ejectment under this act, and it was for lots 42, 41, in this square; acts of 1791, 3 Dall. 55; 1797, 3 Sm. 300, which is the last extending the time of claim. The cause is not difficult to discover. If parties had not claimed for a century, was it probable

Digitized by Google

they ever would? And it was essential for the public credit to dispose of all vacant lands.

Then come the acts for erecting the Penitentiary, under which we claim. 1803, 4 Sm. 87; 1807, Id. 402; 1821, 20th March. Under these, any one in possession, unless as there provided, must take the disadvantage of a plaintiff.

4. There was no such possession here as warranted presumption of a conveyance. The right was of the lowest kind, 2 Sm. 106, 107, 108, 138; 5 Sm. 411; and most liable to be abandoned, 3 Whart. 538. They passed as chattels, and were so considered, 4 Watts & Serg. 437; Serg. L. Laws, 286; 4 Yeates, 142. The question then is, whether there was not presumption of abandonment before 1804. The cases authorize this, for better titles on slighter grounds. Starr v. Bradford, 2 Penna., warrant and survey; Plumstead v. Raddebaugh, 1 Yeates, 502, there had been possession for thirty years. Hurst v. Durnell, 1 W. C. C. R. 263, warrant for liberty land unexecuted for many years. 6 Peters, 498; 4 Peters, 480; 7 Peters, 763; 11 Peters, 41; 1 How. 189. But length of time of possession cannot be presumed, 1 W. C. C. R. 80; and it is made here for the purpose of avoiding the act of 81, a statute of repose.

But at all events Pownall, and those claiming under him, could be entitled to no more than he originally had, and that was twenty feet; and there was clear error in leaving it as a question of fact to the jury, whether the whole of the lot now claimed had been assigned to him in his right as first purchaser.

Oakford, contrà.—1. An extract from an office paper may be read, De France v. Stricker, 4 Watts, 327. So part of an act of Assembly, Addle v. Sherwood, 3 Whart. 481. So extracts from land-office accounts, 1 Watts, 57.

2. We were prepared at the trial to show the original was lost, and this was an ancient copy accompanying possession, when it was clearly evidence. 1 Atk. 49; Bull. N. P. 254; Garurin v. Dennis, 4 Binn. 3; Duffy v. Brindley, 1 Rawle, 94, 95; James v. Ethry, 8 Watts & Serg. 192. We had shown possession as far as living witnesses could remember, and that authorizes presumption of an earlier possession, Chad v. Filset, 2 Brod. & Bing. 403; a usage was presumed under such circumstances. It is said in 10 Pick. forty years is the limit of legal memory. In Rogers v. Allen, 1 Camp. 309, 310, ancient licenses were read without proof of payment thereunder, on proof of similar modern licenses and payments under them for forty years. The rule is a reasonable one, as it would otherwise be impossible to establish

Digitized by Google

www.libtool.com.cn

the facts, 3 Watts, 165; Serg. L. Laws, 165; Hepburn *v.* Dundas, 5 Cranch, 263.

6. The counsel did not desire a more specific answer. Indeed, the great question was whether the evidence would justify presumption of our older possession, and the possession by us with an older title related to that. Mather *v.* Trinity, 3 Serg. & Rawle, 510, 517; Kingston *v.* Leslie, 10 Serg. & Rawle, 389.

Cadwalader, on the same side.—The act of 1781 does not apply. It allowed any person's property to be sold, compensation being directed for the payment of the public debt. The summary proceedings were confined to lots claimed by the proprietors in their individual rights. The plaintiffs themselves showed a clear title, under Kellenbeck, without any paper title or office right. It is sufficient if we show such an appropriation as would be good against the proprietaries, and this we have done by Holmes's ancient map, and the more modern one, agreeing that this square had been appropriated. A number on Holmes's map has been held sufficient in Mayor *v.* Clifford, 4 Yeates, 272; Commonwealth *v.* Alberger, 1 Whart. 469. Our case is exactly similar, except that a corporation claimed as trustee for the public. It has been supposed that Holmes's map was altered, after it was laid out on the ground. But, in fact, the present plan existed in 1683, and the Centre Squares were in the same position as at present. The map known as Holmes's was made in London, by one who evidently had not seen the ground. But the plan now used was made prior to Penn's arrival here. Letter to Turner, 12th April, 1681, Historical Soc. Coll. 1 vol. 202, 204.

The charter was in the previous month, eighteen months prior to the grant of the three lower counties. The surrender was received in New York, in June, 1 Hazz. Reg. 305; and in August the records at Upland show he was acting as governor. In July, the conditions and concessions were made which presuppose a settlement, and the instructions to the commissioners, 30th September, 1681, forbade grants until location, 2 Hist. Soc. Coll. 216, 217; this was thirteen months before Penn's arrival. In March, 1682, eight months before his arrival, Markham issued grants, which were forbidden unless the plot was then made. *Mr. Cadwalader* read from a book of warrants in the Recorder's office, warrants and surveys under Markham, p. 54, a lot on Walnut street, 1682. The allotment on Holmes's plan was not about the time of his letter to the Society of Free Traders, but in 1682, for that map and list of purchasers contain only the Front and High street lots, but this book contains a drawing of the inner lots on p. 1,

Digitized by Google

made after Holmes's plan, dated 19th September, 1682, and the exemplification of the list from Harrisburg agrees with the numbering. This explains the remark in Proud, 262, 263, as to the advance of the city, 1 Hist. Soc. Coll. 413; 1 Watson's Annals, 49. The only change was between the paper plan and that located. *Mr. Cadwalader* read a survey for a lot on Eighth from Schuylkill and Broad street, laid down on the map, adjoining the Centre Square, dated 1684.

The evidence here shows that any one entitled to a front lot, according to Holmes's plan, took one on the Front street as laid down. The grouping was according to the *concessions*. Thus the two maps, one of the proposed, the other the actual plan, agree as to this square. This is sufficient to exclude subsequent office rights without possession. We have shown four out of the twenty-five actually were located in the present square. A survey was only necessary to ascertain the spot, but it gave no right. There is no dereliction where possession is taken before another title commences. 10 Serg. & Rawle, 389, 390; 7 Watts & Serg. 215, 217.

In the act of 1759, under which the Book of Warrants was compiled, the preamble recites many warrants and surveys were lost; act 1786, March 28. In 4 Yeates, 144, Shippen, C. J., said, the survey of the Liberty lands was lost. Many lots are held under the allotments merely. Twenty-one years' possession does not bar the remedy, but gives a right, 2 Salk. 421; Burr. 119; 2 J. & Walk. 156; 5 Serg. & Rawle, 240; 4 Whart. 275, 290.

Under the second error, two objections have been made; the one stated below is the only one noticeable here. In 8 Watts & Serg. 192, recitals in a deed accompanying possession were held evidence of pedigree. So in 5 T. R. 413, Clarkson *v.* Woodhouse, where the deeds were so ancient that no one could speak to possession under them, provided the modern possession had been consistent. The objection to the acknowledgment was not made below, but even then it is admissible as an ancient copy. Styles, 445; 4 Dow. 297, 334. It was ruled in Smyth *v.* Craig, at this term, that the party is strictly confined to the form of his exception.

A survey and warrant was not necessary for any appropriated lands; even in the case of the proprietaries it was a mere formality required to save the divesting act. The act giving compensation shows this, but the plaintiffs must go further, and show no presumption exists of a warrant and survey. The fact of this book of warrants being accidentally saved from destruction, would compel such presumption, but the authorities are sufficient; 12 Rep. 4 b, Beadle *v.* Beard is a case of presumption of endowment from length of possession; Powell *v.*

Digitized by Google

Milbank, Coop. 103, of a grant by the crown from two presentations; 11 East, 490, of crown lands from possession of fifty-five years; Jackson *v.* McCall, 11 Johns. 377, of patent. Serg. Land Laws, 206; Wilson *v.* Stoner, 9 Serg. & Rawle, 38. This is said not to apply, probably, to parts of the state recently settled, Mather *v.* Trinity, 3 Serg. & Rawle, 570; Murphy *v.* Lloyd, 3 Whart. 538, 545, 546.

4th. The witness was an expert, and, as such, competent to testify, 9 Bing. 335, 336; 4 Pick. 158, 159, Davis *v.* Mason; but here the witness had been examined in chief to the same point. The divesting act contains many classes of provisions; 11th, 12th, 13th, 14th sects. refer to the private claims of the proprietaries. The 8th, 9th, 10th, with 4th, had reference to intruders merely. I construe the words "or otherwise," to refer to a proceeding by a claimant out of possession against a purchaser from the Commonwealth. In Shoemaker *v.* Huffnagle the right was held derelict, because there had been no possession for a century and a half.

March 10. SERGEANT, J.—In the general principles of law contained in the charge of the court, we perceive no error, but in their application to the present case, we think a distinction must be made as to the quantity of ground claimed, to which the defendant sets up a title interfering with the plaintiff's purchases, which would seem to be two lots of about twenty feet each. So far as the defendant was entitled as holding under one of the first purchasers of a city lot appurtenant to his one thousand acres, we do not perceive that it was indispensably necessary that he should have procured a warrant and survey from William Penn, or his successors, although this course seems to have been taken in many instances, and was, perhaps, the most prudent, so as to set out and appropriate the same in severalty. But we do not, at this time of day, feel at liberty to decide, that if a first purchaser of a city lot, designated on the map or plot, took possession where his lot fell, it would not give title. Such purchaser had a strong equity by payment of his money, and a deed from the proprietaries in general terms; and we see no reason why he might not appropriate it in severalty by taking possession and holding it undisturbed. This appears to have been the only title by which the defendant obtained a verdict in the case of the Mayor *v.* Clifford, 4 Yeates, 272, 379, for one city lot, and no question was made on this head by court or counsel. There the plaintiff claimed a large lot on Schuylkill Front street near Vine, by patent from the Supreme Executive Council in 1790. The defendant showed possession of three lots, parts of the lots claimed, from the year 1787, under a mere survey of the city regulator, with a

Digitized by Google

www.libtool.com.cn

title under Francis Smith, a first purchaser, to one of the three lots of which he had possession. A verdict was given for the defendant as to the lot to which he showed title under Francis Smith, and for the plaintiff as to the residue, and was confirmed, after argument, on a point reserved. This case seems entitled to weight with us, considering its much nearer approximation to the origin of these titles than we possess at present.

The subject is now, after a lapse of a century and a half, necessarily obscure, especially when we find Judge Smith, more than thirty years ago, complaining of its intricacy. 2 Smith's Laws, 138. As, however, a purchaser of one thousand acres was entitled only to one lot on Schuylkill Front street, of twenty or twenty-one feet, 2 Smith's Laws, 107, he would be authorized to take possession and hold under his original title only so much. If he took possession of more, it was wrongful. Here the possession is shown as far back as the year 1804, forty years ago; and we think that if George Pownall was the person under whom the ancestor of the defendant's landlord held, and was one of the five first purchasers to whom a city lot was appropriated, this possession continuing to the present day, being consistent with the title, would authorize the jury to presume an ancient possession long enough to support the title to the extent of the right, but not for any further portion of ground. Beyond that, the case would require another presumption, namely, of a conveyance from some other first purchaser, which cannot be made from a mere possession encroaching on the proprietary or Commonwealth, or those holding from them as grantees under the acts of Assembly. The act of 1781, and subsequent acts on the subject, are directly levelled against intruders, who without right had taken or should take possession of city lots, and make such possession illegal, so that no right could be acquired under it: but, on the other hand, was not designed to disturb those who had that possession under the title of the first purchasers; for all these acts for divesting and disposing of the proprietary rights, saved the titles of previous bonâ fide purchasers from them, in whatever mode manifested, and if their lots happened to be sold under the act of 1781, it provided compensation. So the act 20th March, 1821, under which the plaintiff's title accrued, authorized the sale only of the title and interest of the Commonwealth in vacant lots undisposed of. The general limitation clauses of the act of 1781 seem not to apply to first purchasers or their grantees, then in possession, or who took possession within seven years, where there was no proceeding to sell their right or disturb their possession.

The other points arising in the bills of exceptions are not sustainable. The first is to the extract from the draft or plot of the city lots

Digitized by Google

remaining on file in the office of the secretary of the land-office, which is objected to as being a mere extract, and also because its authenticity was not previously shown. An extract is evidence, if it appears on its face to contain all that relates to the subject in controversy. It cannot be deemed necessary for a party to go to the expense of copying large plots and maps containing irrelevant matter. In De France *v.* Stricker, 4 Watts, 327, a certified extract from the general draft of donation land, for which a patent had issued, was held to be receivable in evidence. The same principle was applied to an act of Assembly in Addle *v.* Sherwood, 3 Whart. 481. As to the other ground, the act of 21st of March, 1823, makes copies of records, documents, and papers in the offices of the land-office, evidence where the original would be. If they are there on file, the presumption is they are regularly so, unless objectionable on their face. To require previous proof that they were authentic, would be attended with great inconvenience, and defeat the object of the act. In Oliphant *v.* Ferren, 1 Watts, 57, extracts from blotters in the office were held evidence under this act, though deemed not properly office books.

The second bill of exceptions was taken on the ground that there was no evidence of pedigree, and that the paper offered was not the original. The ground now taken is, that the deed was not proved by the two subscribing witnesses. This is an entirely different one, and would subject the other party to be taken by surprise. We think the plaintiff in error is confined to the grounds taken below, and cannot now travel out of them.

Judgment reversed, and venire facias de novo awarded.

Reiff's Appeal.

An administrator permitting goods to remain with the widow, is chargeable at the appraisement; nor is evidence admissible to show they were of less value.

March 4.—The administrator, settling his accounts, proved that certain debts in the appraisement were either paid in the decedent's lifetime, or were valueless. The item was allowed as a credit. The furniture was appraised at $211 75; it had been left with the widow. This valuation was reduced $22 71. The auditor refused to hear testimony to reduce the valuation of such articles as the widow was entitled to under the act of Assembly, the estate being insolvent; and after deducting the appraised value of such articles, charged accountant with the balance of appraisement.

Digitized by Google

Wm. Hirst, for appellant.—The inventory is primâ facie evidence, but not conclusive, and it was in fact so considered by the auditor, for he permitted us to discharge ourselves of the debts. [*Curiam.*—The debts are not properly a part of the inventory.] The practice has always been to put them in. [*Rogers*, J.—The proper practice is for appraisers to add a list of debts, marking them speedy or desperate; the former is a primâ facie charge, the latter not.] We offered to show we were entitled to retain all the articles of furniture. In Gordon's Dec. 156, 159, it is said the inventory is not conclusive.

Brightly, contrà.—The offer was not thus made; but the auditor in fact did make an allowance. Our act requires an appraisement by sworn officers, which is not necessary in England; hence it has always been considered a fair value when the goods are retained. Here the widow herself was the witness offered.

March 10. ROGERS, J.—Whenever there is reason to believe that the estate of a deceased person is insufficient to pay his debts, exclusive of such articles as may be by law exempted from levy and sale, upon an execution against a debtor, it is the duty of the administrator or executor to keep a distinct and separate account of all such articles so exempted, and to suffer the same to remain for the use of the widow and children, if residing with the deceased at the time of his death; sect. 4, act of Feb. 24, 1834. Although such articles do not properly constitute part of the inventory, yet the list of the exempt property should be noted by the administrator in his return to the register, for the information and guidance of that officer and the creditors. It may, however, happen, that the insolvency may be unknown, and in such cases he cannot be subjected to any injury, for a subsequent appropriation to the use of the widow and children, proxed it does not exceed the limits prescribed by the act. In this case no separate account was kept, but the widow was allowed to keep in her possession all the household furniture, &c., belonging to the estate, at its appraised value; but, notwithstanding, the court, in the settlement of the account, has made an ample allowance for the exempt articles, and this is all the administrator can reasonably require. He has lost nothing, and he cannot complain that he obtains no advantage by neglecting to comply with the directions of the act.

But the appeal is taken on another ground. The appellant, the administrator, complains that he is charged with the appraised price of the goods taken by the widow and children, although he offered to prove that they were of much less value. It has been questioned by some whether an administrator is, in strictness, justifiable in permitting

Digitized by Google

the widow to take property at the appraisement, as it is notorious that in a great majority of cases the assets are put at an undervalue. It has been thought that even in that case it should be submitted to the test of a public sale; but from motives of humanity a different practice has been suffered to prevail, that cannot now be disturbed, even if we were so disposed. It is held to be valid unless tainted by such collusion and fraud as affects the bonâ fides of the transaction. But be this as it may, this is the first time it has been doubted that where a widow takes property at the appraisement, (whether the deceased be solvent or insolvent,) the administrator can discharge himself by proof that the property was overvalued. It is obvious that it may lead to much mischief and injustice, if the family, who have enjoyed the property, are permitted to discharge the administrator, and, consequently, themselves, from the payment of the appraised value, on any such pretext. There is danger of collusion and fraud, particularly when the administrator and family, as is usually the case, are closely connected by ties of consanguinity or affinity. The claims of creditors will be little regarded when they conflict with persons so situated. It is the duty of the administrator to charge himself with the appraised value of the goods taken by the widow, because it is a sale by him to her at that price for which he, of course, is answerable to the creditors and personal representatives. There is nothing harsh or unjust in this, as it is the voluntary act of the parties charged. If the administrator pursues the course pointed out by the law, he cannot be injured. If he chooses to deviate from the prescribed rule, for reasons best known to himself, he can excite but little sympathy when the loss, if any, is thrown upon himself.

Decree affirmed.

Smith's Appeal.

Testator bequeathed to his debtor legacies larger in amount than the debt; the payment of which, he directed was to be made when entirely convenient, free from the charge of interest, and named him executor; he also relcased another debtor from interest for twelve months after his decease.—*Held*, the amount of the executor's debt could not be deducted from the commissions charged on filing his third account.

Appeal from the Orphans' Court of Philadelphia county.

March 4, 5.—Grant, an executor, having filed an account, Seaton, his co-executor, prayed it might be taken as a joint account, to which Grant assented. The only question argued here was, whether Grant was chargeable with a debt due by Seaton to the estate. The testator,

Digitized by Google

by his will, gave $10,000 to said Seaton; and by a codicil, $5000 additional, which, by a subsequent codicil, he revoked and gave him a house in Chestnut street; he then added, "The said Henry Seaton will be indebted to my estate, at my demise, as will be seen by my ledger; the payment of said debt is to be made, when entirely convenient to him, free from any charge of interest."

Testator, in his will, released one Smith from all interest due on a debt to him, and directed him to pay the principal equally between his (Smith's) brothers, allowing twelve months for payment, without interest.

The debt due by Seaton was upwards of $2000.

The claim by the residuary legatees, was to charge the executors with this debt, on the ground that the will enabled Seaton to pay the debt; and that the account was a joint one.

The auditor was of this opinion, and considered the commissions due Seaton should be thus applied.

He charged "commissions disallowed on former account"	$11,771
Seaton's half of commissions on second account - -	2,075
Seaton's half of commission on present account - -	82
	$13,928

The court below (King, President) struck out these charges, considering the debt was not to be enforced during Seaton's life, and the legatees appealed.

Meredith, for legatees.—The case of Shore *v.* Davidson, 3 Madd. 396, relied on by the judge, is not in point; for a discretion was there given to executors in compelling payment. But here Seaton occupied two positions, as executor and as debtor; in the former character no discretion is given; in the latter there are but two constructions of the words "entirely convenient," if, in a popular sense, it has no meaning, being but the ordinary phrase of polite demand; if, in a legal sense, the only light in which the court can look at it here, it means ability. A class of cases shows this, in which the promises are to pay when convenient, &c., debts discharged by law; as the stat. of limitations, bankruptcy, &c., in which ability must be shown as a condition precedent. These cases are in Moore, Espinasse, and Tyrwhitt, cited on the other side. But here is an existing debt due, and this voluntary condition should not be so strictly construed. Even then we have shown ability. In Hagin *v.* Williamson, 5 Monr. 8, the words "not to be hastened," were held not to alter the liability. The word "convenient" has been defined to be what is legal, fitting, proper, in

Digitized by Google

Co. Litt. ss. 138, 139, 231, 269, 440, 665, 670; and the law always considers payment of debts of this character.

It is true, Grant could not have been chargeable but by consenting to file a joint account, especially when he paid the money to his co-executor, as here, though it has been disallowed.

Williams, for Seaton.—Seaton being now dead, and according to the decision below, his estate chargeable, the only question is as to time of calculating interest. The words must give a discretion to the debtor; to construe them "when able," would contradict the intention, as that is very different from "entirely convenient." The testator, in the case of Smith, has shown he knew how to explain his meaning. [*Curiam.*—May it not be a discretion in the executor?] They have never demanded it. 3 Esp. 159; 4 Esp. 36; Davis *v.* Smith, 12 Moore, 305; S. C. 4 Bing. 105, and Edmunds *v.* Downes, 4 Tyrw. 173, show, proof lies on the party claiming in such case.

C. Ingersoll, for Grant.—The disallowed commissions were paid to Seaton, and cannot be refunded, as he is dead, insolvent; and the question is, are the executors jointly liable? It was said in M'Coy's Appeal, 17 Serg. & Rawle, 57, after six years a joint account could not be altered; but here there was no joint charge; but a simple disallowance in a joint account; are the executors, under such circumstances, jointly chargeable? M'Nair's estate, 4 Rawle, and 6 Watts, 250, shows the executor is not liable to a legatee for a payment to a co-executor. It makes a double charge, first of the commissions received and retained by Seaton, and next of a debt on the supposition of those commissions being in the power of the executors.

March 10. Per Curiam.—Precedents cannot help us to arrive at the testator's meaning in a case like this. It must be drawn from his words, and the context of the whole will. Payment of the debt was to be made by Seaton, "when entirely convenient to him, free from any charge of interest." Had the testator meant that the debt was to come out of the legacy, he would have said so; for it appears from his language in other bequests, that he knew how to speak with precision. It seems he spoke in general terms, because Seaton's necessities might have made the defalcation of the debt from his legacy much more than inconvenient to him. It is evident that the testator considered him to be a needy man, and meant to relieve him. Had he meant to give him a legacy less the amount of the debt owing to him, what was the use of saying the debt should not bear interest? A legacy given in payment of a debt bears interest from the death, in order to counter-

Digitized by Google

balance the interest on the debt, and work an immediate extinguishment of it. It clearly seems to have been intended that Seaton should be under no obligation to pay at all. The object was to relieve him from embarrassment, making him the judge of its accomplishment, and leaving the rest to his conscience. Coinciding with the judge on the ground taken by him, it is unnecessary to consider whether it is too late to extricate Mr. Grant from the difficulty into which he brought himself by the perilous step of settling a joint account.

Decree affirmed.

www.libtool.com.cn

CRAIG v. HENDERSON.

2 261
e196 193

A., the partner of B., assigned all his interest in the partnership effects to B. with power to settle and compromise. B. may set off a debt due to the firm against a debt due by himself alone.

ERROR to the District Court of the city and county of Philadelphia.

This was an action on a promissory note given by Henderson for merchandise. Defendant pleaded, by way of set-off, that one Darlington, before cause of action arose, was indebted to plaintiff $3000; after which said Darlington entered into partnership with defendant and another, but afterwards withdrew all his capital; that plaintiff fraudulently procured Darlington to deliver the notes of the firm in payment of his private debt, and afterwards, funds of the firm in payment of said notes; that plaintiff was bound to refund, and this he asked to set-off.

Plaintiffs replied, that they did not procure the notes, nor the money in payment thereof, in manner and form, &c., and that defendant is not authorized to make set-off in manner, &c.

The evidence relied on to prove this right of set-off, was an assignment by Moore, the third partner, to defendant, of all his interest in the partnership property, for a valuable consideration, and his subsequent death, and an agreement whereby Darlington, in settlement of all controversies, assigned to Henderson all his interest in the partnership effects, with power to collect debts, pay liabilities, and wind up the business by sale or otherwise, to the best advantage of the parties concerned; and after payment of certain amounts, surplus of profits, on winding up of concern, were to be paid to him.

His honour, Pettit, President, charged, that under the facts and circumstances in evidence, the defendant might set-off the claim.

But one point was argued here.

Digitized by Google

J. A. Phillips, for plaintiff.—There is no act shown by which the defendant was entitled to use a claim due to his partnership, as a set-off to his private debt. The assent of all the partners is requisite for this, as was settled in Wrenshall *v.* Cook, 7 Watts & Serg. 464; Tustin *v.* Cameron, 5 Whart. 339.

www.libool.com.cn

The court declined hearing *St. George Campbell.*

March 12. ROGERS, J.—In a suit against one member of a firm, it is not permitted to set off a debt due the firm from the plaintiff, because of the want of that mutuality which is essential to a set-off. But a surviving partner may set off a debt of the partnership, against a demand on him, in his own right; Slipper *v.* Lane, 5 Term Rep. 493; recognised in 6 Term Rep. 582; Wrenshall *v.* Cook and Shoyer, 7 Watts, 465. The reason is, that as he has the settlement of the business, he may release or compound the debts due the firm, and there is nothing to prevent him from using them as a set off against a demand against him in his own right. And the same principle, for the same reason, holds, where, by contract, one of the members of the firm becomes the owner or has the exclusive right to settle and control the partnership effects. Indeed, the power to set off may be necessary to prevent the loss of the debt, as when the plaintiff is, or is like to be, insolvent. It is for the advantage to the other members of the firm that he should so use his authority to collect the debts, and their assent is an implication necessary to carry into effect his power. The acting partner is, of course, answerable for the abuse of his authority, and will be bound to account for the use of the partnership funds. The case in hand is an illustration of the benefit to be derived from the application of this principle; but for the set-off the debt may have been lost. Was, then, Henderson the owner, or had he acquired a right to collect and use the partnership funds as he might think proper, responsible, of course, to the other partners, provided they have an interest in the partnership effects? (His honour here stated the material facts of the case.)

By the latter transfer, and the previous assignment to Moore, Henderson became the absolute owner of all the effects or debts (among which the subject of the set-off is doubtless included) belonging to the late firm of J. P. Darlington & Co., and Silas Moore & Co. As, then, the defendant is absolute owner of the debt, there is nothing in the way to prevent him from using it as a set-off. Moreover, full power is given to Henderson "to collect all the debts due the firms, or either of them, to pay all the liabilities of said firms, and generally to wind up the business, as speedily as possible, by sale or otherwise, to

Digitized by Google

www.libtool.com.cn

the best advantage of the parties concerned." There is, therefore, no use in getting the assent of the other partners, (even granting they are still interested in the proceeds,) as plenary authority is given by the agreement to Henderson to manage the business in the manner best calculated, in his judgment, to collect and secure the assets belonging to the respective firms.

The first and third errors were properly abandoned, because the points are not raised on the record.

Judgment affirmed.

Philadelphia Fire and Inland Navigation Company's Appeal.

A judgment on a scire facias post annum et diem revives the lien, as well as if entered on a writ directed by the act of 1798.

Appeal from the District Court.

March 6.—The Mechanics' and Tradesmen's Loan Company entered judgment on warrant of attorney, in November, 1837, on which a scire facias was issued, reciting the original judgment and that execution remained to be done, and commanding the sheriff to warn defendant to show cause why plaintiff ought not to have execution. On this, judgment was entered in March, 1842. . Appellants subsequently obtained a judgment, on which the property was sold, and the question was as to the lien of the Loan Company, which the court decided bound the property.

A. Phillips, for appellants.—In Gash *v.* Petterman, 3 Watts & Serg. 351, it was held, the judgment was not revived. [*Chief Justice.*—No; only that he could not have judgment, as nothing was due at the suing out of the writ.] In Arrison *v.* The Commonwealth, a misrecital of the original judgment was held fatal. [*Chief Justice.*—The judgment revived was not the same as that on which the writ issued.] In Pennock *v.* Hart, 8 Serg. & Rawle, 379, the right to a new judgment under this writ was denied. [*Chief Justice.*—That was the first time it was doubted, but the practice had been such as not to be changed. For twenty years after the act of 1798, no other writ was used in the western part of the state, and numerous titles would have been disturbed by such a decision.]

This court has held that where a new act of Assembly has reaffirmed

Digitized by Google

www.libtool.com.cn

a former one, the former practice must be amended to suit the direction of the legislature; Foreman *v.* Schricon, 8 Watts & Serg. 43. The same thing occurs here.

The court declined hearing *St. G. Campbell*, for appellee.

March 10. PER CURIAM.—The very point before us was ruled at the last term at Pittsburgh, in Tiernan *v.* Dougherty, in which it was held, that the lien of a judgment may be revived as well by a scire facias post annum et diem as by the writ directed in the act of 1798; and this, on the ground that it would produce a scene of general ruin to decide otherwise. Though the practice of the profession was for many years irregular in this respect, we dare not disturb it, and the point must be considered as at rest.

Decree affirmed.

2 264
137 15

KUHN'S APPEAL.

Land was sold on a judgment obtained after the registry of a mortgage, which was the first encumbrance, and before the entry of the judgment on the bond, accompanying the mortgage. The lien of the mortgage is not discharged, and the proceeds are to be applied to the judgments, according to priority.

Notice of the mortgage given by a judgment creditor, at the sale, and that the judgment had been entered, and was in process of collection, is immaterial, for the purchaser had constructive notice by the registry and record.

APPEAL from the District Court of the city and county of Philadelphia.

March 6.—In 1829, a mortgage on the property now in question, with others, was executed and registered, and was the first encumbrance. Prior to November, 1843, various judgments were entered against the mortgagor, on one of which the mortgage property was sold. In that month, judgment on the bond accompanying the mortgage was entered by warrant of attorney, and before the sale a fi. fa. issued, and was returned nulla bonâ. The mortgagor had become the owner of one of the intervening judgments by assignment; and at the sheriff's sale gave notice of the mortgage, and "that judgment had been entered on the bond accompanying the same, which was in process of collection." The assignee of the mortgagee and the purchaser at sheriff's sale claimed to apply the proceeds to the payment of the mortgage. The court decreed the money to the judgments according to their priority.

Kennedy, for the owner of the mortgage and the purchaser, appellants.—But one question is raised here; whether a sheriff's sale dis-

Digitized by Google

charges a mortgage, when a judgment has been entered on the bond secured thereby? The case was decided in Whitehead *v.* Purnell, 2 Miles, 434, and it was there held that the mortgage was discharged. It so results from the connection between a bond and mortgage for the same debt, and is nothing more than the principle of Bantleon *v.* Smith, 2 Binn., that one lien for a debt being discharged by the sale, any other lien for the same debt on the land is also discharged. There is no doubt as to the right to both liens, for their amount may be different. But a discharge of one is necessarily a discharge of both, Brown *v.* Johnson, 4 Rawle, 146; Pearce *v.* Potter, 7 Watts, 475; Wilson *v.* Stoxe, 10 Watts, 437. The act of 1845, p. 489, remedies the evil, if it be one.

H. McCall, contrà.—Whitehead *v.* Purnell does not go to the extent contended for. The error is, in relying on the mere reasoning of the judge who delivered the opinion. There is no question that a judgment on a bond, accompanying a mortgage, is to be paid in its order of date, for it is a separate and independent lien, and as such is treated like any other judgment. But the mortgage is also separate and independent, and is regulated by express words of the act of Assembly. Aside from these principles, the case is governed by Shultz *v.* Diehl, 2 Penna. 277, 278; and the party buying, subject to a notice of the lien of the mortgage, cannot now set up that it is discharged.

May 4. BURNSIDE, J.—In Willard *v.* Norris, 2 Rawle, 56, the law was held, that when land, subject to a mortgage, is sold under a judgment, obtained subsequent to the execution and recording of the mortgage, the purchaser at sheriff's sale takes the land discharged of the lien of the mortgage. This decision, as well as others embracing the same principle, induced the legislature to change the law and pass the act of the 6th April, 1830. Pamphlet Laws, 293. They provide from henceforth, "when the lien of a mortgage, upon real estate, is or shall be prior to all other liens upon the same property, except other mortgages, ground-rents, and the purchase money due to the Commonwealth, the lien of such mortgage shall not be destroyed, or in any way affected by any sale made by virtue or authority of any writ of venditioni exponas." The mortgage to the Pennsylvania Hospital, of Parish and Kuhns, for $8000, was the first lien on the premises sold by the sheriff. It was recorded on the 2d day of March, 1829. On the 18th of November, 1843, judgment was entered in pursuance of the warrant of attorney, accompanying the bond in the office of the District Court of the city and county of Philadelphia. On the 16th of October preceding, the bond and mortgage were assigned by the Pennsylvania

Digitized by Google

Hospital to William Overington, and the assignment of the mortgage recorded. Parish was the owner of the property sold, and purchased by Kuhns. The sale was made at the suit of L. J. Levy & Co., and a judgment obtained on the 24th June, 1843. After deducting costs, there remained in court the sum of $889 04, for distribution. Kuhns, the purchaser, and Overington, the owner of the mortgage, desired the court to appropriate the money in court, in part payment of the mortgage. This was contested by judgment creditors of Parish subsequent to the mortgage. An auditor reported in favour of making the appropriation to the mortgage, but the District Court reversed the report of the auditor, and decreed the money in court to the oldest judgments, subsequent to the mortgage, according to their priority. From this decree Kuhns and one of the judgment creditors appealed, and contend that as the judgment bond accompanying the mortgage was entered up and of record before the sale and notice of this judgment, and the mortgage given at the sale, Overington is entitled to the money in court.

I am unable to discover that the notice makes any difference in this case. The mortgage and judgment being on record before the sale, the law deemed them constructive notice. Constructive notice of mortgage duly recorded, and judgments legally entered, bind equally with actual notice. Duncan's Lessee *v.* Curry, 3 Bin. 66. The entering up of a judgment bond accompanying a mortgage cannot affect the lien of the mortgage. A fi. fa. had issued on the judgment, and returned nulla bonâ. That merely was no satisfaction either of the judgment or mortgage.

If money had been made on the fi. fa. and appropriated to the execution, it would have been a satisfaction of the judgment and mortgage to the amount. But it is admitted by the case stated, that no part either of the judgment or mortgage has been paid. For what purpose is the judgment bond given with the mortgage? The mortgage is a pledge of the real estate to secure the amount of the bond, and vests the freehold in the mortgage, subject to the equity of redemption. Garro *v.* Thompson, 7 Watts, 416. The warrant of attorney accompanying the bond authorizes the entry of the bond of record, and does not affect the lien of the mortgage. This case, in the judgment of the court, is within the letter and spirit of the act of the 6th of April, 1830. The purchaser at sheriff's sale is bound to pay the amount of his purchase, and takes the property sold, subject to the mortgage. Any other decision would defeat the plain enactment of the legislature.

The judgment is affirmed.

Digitized by Google

www.libtool.com.cn

DREXEL v. MAN, Jun.

Two verdicts and judgments in ejectment on the same title, between the same parties or their assigns, are conclusive of the title, under the act of Assembly.

March 9.—ON the trial of this ejectment before Gibson, C. J., after the plaintiff had shown title, the defendant, for the purpose of proving that two verdicts and judgments out of three had been in his favour, showed title in Man the elder, with the record of an ejectment against him by the present plaintiff, in which the judgment was for defendant. The plaintiff objected, because the suit was not between the same parties. Defendant then showed a conveyance, in consideration of natural love and one dollar, by Man the elder to Man the younger; he also showed the record of an ejectment by Man the younger, immediately after the execution of this deed against Drexel, in which the judgment was for plaintiff. Plaintiff objected to this, and offered to show, in support of his objection, that Man the elder was examined as a witness on the trial. Defendant then proved that on the trial of the ejectment between Man the younger and Drexel, the record of the recovery by Drexel against Man the elder, which was the second of the three ejectments, was used and relied on by the present plaintiff. This was objected to, but admitted to show an affirmance of the principle by Drexel, which was here set up by Man the younger. Plaintiff then offered to show, that on the trial of the third ejectment, Man the elder was examined as a witness by Man the younger, and also offered to prove that his title was the better one, but the court rejected the testimony, being of opinion the two judgments were conclusive. The plaintiff then suffered a nonsuit, with leave to move, &c. The motion was refused, and a bill of exceptions signed.

J. M. Scott, with whom was *St. Geo. Campbell*, for the plaintiff.—The whole question turns on the act of 1807, sect. 4. We contend this does not apply. This is not the case of two verdicts and then a transfer, but of a sale after one verdict. [*Rogers*, J.—The only question is, whether Man the younger is a privy with his grantor.] We shall show by authority he is not so as grantee, though he would be as heir. In the case of a writ of right, he is bound as a stranger. But this is not the only question. The titles are different: a title is the means whereby a man has the just possession of his property, 2 Black. Com. 195; 1 Inst. 345, 346. It is clear that Man the elder claimed under

Digitized by Google

the sheriff's deed; Man the younger, under the deed from his father. [*Kennedy*, J.—Can a man out of possession convey a better title than he himself has?] No; but the titles were rendered different by matters in pais relied on. It was by these our title was destroyed, and this sustained. But this is not the case of two verdicts, &c., under the act. When the conveyance was made, there being but one, the title was unaffected. Does the act give any weight to one verdict counterbalanced by another? It is to be construed according to the ordinary meaning of the words, 1 Watts, 339. The whole course of decision has been to restrain the operations of the act, against the arguments of counsel who sought to extend it: thus, in Jones *v.* Leip, 14 Serg. & Rawle, 301, an award unappealed from was held not to be equivalent to a verdict, for the statute was in restraint of common right. So in Mercer *v.* Watson, 1 Watts, 330, a reversal of the second judgment was not considered equivalent to the recovery of a verdict and judgment. Blackmore *v.* Gregg, 10 Watts, 222, a writ of error pending, was held to destroy the effect of the judgment. The only case in which this court extended the act was Seitsinger *v.* Ridgway, 9 Watts, 496, and the legislature again extended it, act 1841, p. 446.

The court is here asked to extend the operation of the act to privies who are not named in the act. Nor is Man the younger a privy with his grantor. Co. Litt. 171 lays down who are privies. Donor and donee, which is confined to grants in tail; Ibid. 42 b; not feoffor and feoffee. So Booth on Real Actions, 81, treats a purchaser as a stranger, 17 Vin. Abr. 534, tit. *Privies;* 2 Preston Convey. 327–360. It may be gathered there is no privity but between persons holding parts of the same fee, as joint-tenants, or trusts. It implies a trust or confidence, 2 Saund. Uses and Trusts, 29; 15 Petersd. Abr. 163.

This defendant is therefore no privy, and consequently is not entitled to the benefit of the previous verdict, nor is he named or included within the act.

The court declined hearing *Wheeler* and *Randal*, contrà.

April 2. KENNEDY, J.—A number of points were made on the trial of this cause,-but all seem capable of being comprised within the question, whether there had not been previously, between these parties, two verdicts and judgments rendered thereon, out of three, in favour of the defendant, Daniel Man, jun., giving him the property in dispute. [His honour here stated the facts of the case.] Upon these facts the defendant claims that the plaintiff is barred from bringing this or any subsequent action upon the same title, for the property in

Digitized by Google

question. For this, he relies upon the fourth section of the act of Assembly of the 13th April, 1807, which enacts, "Where two verdicts shall, in any writ of ejectment between *the same parties*, be given in succession, for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought; but where there may be verdict against verdict between *the same parties*, and judgment thereon, a third ejectment in such case, and verdict and judgment thereon, shall be *final* and *conclusive*, and *bar the right*." But it is objected on behalf of the plaintiff that the parties between whom the three verdicts and judgments have been had are not the same. Individually, it is true that they are not so; but, in contemplation of law, and especially in reference to the object which the legislature must have had in view, they may be well considered the same. Indeed, it is impossible to avoid coming to the conclusion, that the intention of the legislature was to make two verdicts and judgments thereon, in favour of the same title, between the same parties or their assignees, claiming the same property adversely to each other, final and conclusive, so that there should be an end to all further litigation under the same titles. Daniel Man, junior, the defendant here, by taking a deed of conveyance from Daniel Man, senior, of all his right, interest, and title to the property, acquired precisely the same, and no other right, title or interest thereon or thereto, than what Daniel Man, senior, had when he succeeded in the writ of ejectment brought against him by the plaintiff, Francis M. Drexel. And, although he lost in the second writ of ejectment, brought against him afterwards by Drexel, yet the present defendant, after having become invested with it by a deed of conveyance from his father, recovered by virtue thereof in a subsequent and third writ of ejectment; thus showing a verdict and judgment thereon, in a third ejectment, in favour of the defendant's title, which, added to the verdict and judgment thereon, in favour of the same title, when vested in his assignor, Daniel Man, senior, may, as I conceive, be very fairly considered as two verdicts and judgments thereon, legally speaking at least, in favour of the *same title*, between the *same parties*. This, I have no doubt, the legislature intended should be a bar to any subsequent action of ejectment brought by the same person, after having two verdicts and judgments thereon rendered against him, or any others claiming from him as his heirs or assigns, for the purpose of recovering the same property by force of the same right or title. This seems to be the only construction that the act is susceptible of, in order to render it of any force, making the law different from what it was before. For it is easy to perceive that if a party, losing in a writ of ejectment, could have his title tested

Digitized by Google

www.tibtool.com.cn

a trial in a second writ of ejectment, by assigning it to a second person, in whose name the second suit is brought, in which a verdict and judgment is rendered against the assignee, and the act of Assembly in this behalf is not to be held a bar to a third suit on the same title, there may be writs of ejectment brought in succession, without limitation as to number, to try the validity of the same title, by making a transfer or assignment of it to some new person as often as a verdict and judgment thereon shall be given against it. But surely no one will seriously contend that the legislature could have intended to sanction such a course as this, for it was the evil that they designed to remedy, as is perfectly manifest from the whole tenor of the section, and, therefore, they must have intended, where the same property was claimed by the plaintiff and defendant respectively, in the writ of ejectment under the same titles, to make two verdicts and judgments thereon in favour of the same title, final and conclusive as to its validity, whether each ejectment was between the same parties individually, or their heirs or assignees. The section of the act in question says nothing about the *titles* of the respective parties being the *same*, but merely speaks of the *parties* being the *same*, yet no one could well imagine that the legislature could have intended to make two verdicts and judgments thereon, in favour of the same one, of the same two parties, final and conclusive, where the successful party set up and relied on a distinct and different title at each trial. But with the same propriety might this interpretation of the section of the act be urged, as that which has been contended for on behalf of the plaintiff. No doubt both are alike repugnant to the scope and true meaning thereof, and are therefore alike inadmissible. According to the principle contended for on behalf of the plaintiff, even two verdicts and judgments thereon, in two successive writs of ejectment, between the same individual parties, in favour of the same one of them, would form no bar to the bringing of a third ejectment by the assignee of the unsuccessful party, because such third ejectment could not be said, according to the plaintiff's argument, to be between the same identical parties. But would it not be singularly strange, if not absurd, to say that the assignee of the unsuccessful party or assignor ought to be regarded as standing in a different situation, under the act of Assembly, from that in which the assignor would have stood, in case he had brought the third ejectment in his own name? It will be difficult, I think, for any one to discover a reason why he should.

Then as to the competency of Daniel Man, senior, to be a witness for his assignee, Daniel Man, junior, we think it is very clear that he

Digitized by Google

was competent. For any thing that appears, he had no interest in the event of the suit, and was no party to it. Neither could his being a witness make the title different from what it was when he resisted successfully, by force of it, the recovery of Francis M. Drexel. Daniel Man, junior, had no other title to the property than that which he derived from Daniel Man, senior, so that whether the one or the other succeeded in holding or recovering the property by means of it, it was the same identical title.

We therefore consider that the judgment ought to be affirmed, and accordingly affirm it.

DREXEL v. MAN.

A verdict and judgment in ejectment is conclusive of the right to mesne profits from the time of the service of the writ, though the defendant's title is established by two verdicts and judgments, between the same parties and on the same title, one of which was prior, and the other subsequent to the term for which the recovery was sought.

CERTIFICATE from the Nisi Prius.

March 9.—Drexell brought trespass for mesne profits from the 24th July, 1841, to the 19th Jan. 1843; and on the trial, before *Kennedy*, J., showed a record of a recovery in ejectment for the land, in which the writ was served on the 24th July, and the hab. fa. poss. executed January 19th; and having proved the value, closed his case. Defendant offered to show: 1. That he was a bonâ fide purchaser, and entitled to defaulk for improvements. 2. That he held under a legal adjudication. 3. That he was not such a trespasser as to be liable in this case; and to do this by the record of a recovery by him from plaintiff in a previous ejectment. The court received it for the first two points only, and defendant excepted. For the same purposes only the court admitted evidence of a purchase at sheriff's sale, by defendant, on a judgment against Dyott. He then offered to show that on the trial of the first ejectment, plaintiff gave in evidence the same record, sale, and evidence, on which he recovered in the second ejectment, and that the title established in the first ejectment was the same tried in the second, on which plaintiff recovered. His honour rejected the evidence.

In addition, he offered to show that the right of defendant to the mesne profits, if he ever had any, had been since extinguished; and that it had been finally determined at law, that the title to the premises was in the defendant, by evidence of a conveyance by defendant, an

Digitized by Google

www.libtool.com.cn

ejectment by such grantee against plaintiff, in which the same title was in controversy, and a recovery, &c., had by his grantee against plaintiff. His honour rejected the evidence. He then proved the payment of taxes and repairs.

His honour instructed the jury, that the plaintiff was entitled to recover in this action the mesne profits of the premises in question, during the time which he claimed in this suit; that the record of a recovery given in evidence by the plaintiff was conclusive, and could not be controverted; that the jury might give the plaintiff interest from the commencement of the present suit, if they thought proper; that interest was a matter for them to decide according to their discretion.

Wheeler, with whom was *Randal*, argued that a party placed in possession by the law could not be considered a trespasser, and that this is what was offered to be proved. There is no authority that can be produced of a recovery such as this. The second judgment concluded the title, and the effect is to produce the absurdity of a party being liable for mesne profits while he was the owner of the land. 1 Leo. 314; 3 Leo. 194; 3 Wils. 120; 2 Johns. Rep. 369; 4 Marsh. (Ky.) Rep. 288.

The court declined hearing *St. Geo. Campbell* and *J. M. Scott*, contrà.

April 2. KENNEDY, J., after stating the case.—That the action of trespass is the proper mode for recovering the mesne profits, after a recovery had in ejectment, notwithstanding the changes made by the acts of Assembly of the 21st of March, 1806, and the 13th of April, 1807, prescribing that an ejectment should be commenced by suing out a writ of a certain form, in the name of the party claiming to recover the land, instead of serving the party in possession with a declaration and a notice to appear, &c., as practised prior thereto, was decided by this court in Osborn *v.* Osborn, 11 Serg. & Rawle, 55. That although the writ is substituted for the declaration, and the real for the fictitious parties, yet the mode of trial, the issue, the verdict, the recovery, the judgment, and the writ of possession, are the same. And the act of 1807 declares, in express terms, that the writ of ejectment prescribed by the act of 1806, shall *give remedy as fully* and *effectually* as in *ejectments* in the form *theretofore used*. So the late Mr. Justice Duncan, in delivering the opinion of the court, lays it down, that the effect of a judgment in ejectment, under these acts, is precisely the same as at common law, with the exception of the bar of

Digitized by Google

two successive verdicts and judgments. In speaking of the action for mesne profits, he says: "Where the plaintiff does not go for damages before the time of the demise, the recovering in ejectment *estops the defendant* from denying his title, provided he proceeds only from the time of the ouster, for profits subsequently accrued. If he goes beyond that, he must prove a title beyond it, and a possession of the defendant beyond it. The recovery for mesne profits, where the *ejectment is under the act*, is in *direct conformity to this*. If he asks not for damages *anterior* to the *service* of the writ of ejectment, the *recovery is conclusive*, and *estops* the *tenant:* if he does, he must show his title and the possession of the defendant." Such appears to have been the opinion of this court, and the doctrine laid down in the case of Osborn *v.* Osborn, and we entertain no doubt of its correctness. Originally, the plaintiff in the action of ejectment, when he recovered his term, recovered also damages equal to the profits of the land which accrued during the tortious holding of the defendant; Adams on Ejectment, by Tillinghast, 379, ch. 14. And in Pennsylvania this was done in the form of ejectment which existed immediately previously to the passage of the acts of Assembly already mentioned, where due previous notice was given, before the trial, of the ejectment, to the defendant, that a recovery of the mesne profits would be claimed thereon. See Butler *v.* Biglow, Peters' C. C. Rep. 452. And in some instances a recovery of the mesne profits has been had in the writ of ejectment under our acts of Assembly, where notice was previously given that they would be shown and claimed on the trial of the ejectment. But would it not be singularly strange, if the plaintiff, by giving such notice, is to be considered entitled to recover the mesne profits in his action of ejectment, and yet not be able to do so in an action of trespass afterwards, if he omits to make his claim therefor on the trial of the ejectment? This would be very anomalous, and without reason, certainly. It would also be contrary to the doctrine laid down in Osborn *v.* Osborn, and established fully by all the preceding cases and authorities on the subject. Where the plaintiff, as has been already mentioned, does not claim damages anterior to the service of the writ of ejectment, the recovery in the ejectment is *conclusive*, and *estops* the tenant from *denying* that he had possession, or that his possession was *tortious*. This is in exact conformity to the cases wherein it has been held, if the plaintiff proceeds only for the recovery of the mesne profits accruing subsequently to the day of the demise in the declaration, he need not prove his title in the premises; for the judgment in the ejectment is *conclusive* evidence of his right from that period, and it is immaterial whether the judgment is founded on a

Digitized by Google

verdict, or has been obtained by default against the casual ejector, Aislin *v.* Parkin, 2 Burr. 668; Bull. N. P. 87; Jackson *v.* Stone, 13 Johns. 447; and admitted in Chirac *v.* Reinecker, 11 Wheat. 280. See also Jackson *v.* Combs, 7 Cowen, Rep. 36; Baron *v.* Abeel, 3 Johns. Rep. 481; Langindyck et al. *v.* Buxhaus, 11 Johns. Rep. 463. Yet notwithstanding a verdict and judgment in ejectment is conclusive between the immediate parties, in an action for the mesne profits, the plaintiff, by virtue thereof, obtains merely the possession of the lands recovered by the verdict, and not a title thereto, excepting such as he previously had. If, therefore, he has a freehold interest in them, he is in as a freeholder; if he has a chattel interest, he is in as a termor; and if he has no title at all, he is in as *a trespasser*, and *liable to account for the mesne profits to the legal owner* without any re-entry on his part; Atkyns *v.* Horde, 1 Burr. 114; Jackson *v.* Dieffendorf, 3 Johns. Rep. 370; Adams on Ejectment, by Tillinghast, 327. And the right to the possession, recovered by the plaintiff in the ejectment, will, at most, I apprehend, only *continue* till the judgment is *reversed*, by writ of error, or *falsified* in another action of ejectment. See Atkyns *v.* Horde, 1 Burr. 89, per Mr. Knowler, *arguendo*. Adams on Ejectment, 327, also lays it down, that the verdict in the ejectment is no evidence in a subsequent action of ejectment, even between the same parties, for which he cites Clerke *v.* Rowell, 1 Mod. 10, where the proposition is not very clearly expressed in the report of the case, which is very short, but sufficiently so in the marginal note of it. It appears, however, to be settled, that where the plaintiff, recovering in the ejectment, has no title at all, he will be considered, in a subsequent action of ejectment, by a plaintiff having a right to the possession and a title to the lands, as a trespasser, and liable to account afterwards for the mesne profits in an action brought therefor against him. So a defendant, against whom a recovery is had in ejectment, may bring a second ejectment against the recoveror, and the previous recovery against him will form no bar to his recovery in the second ejectment, if he can show that he is otherwise entitled to recover. Accordingly, where, after a recovery in ejectment, the defendant's title was sold on a judgment and execution against him, and the purchaser brought an ejectment against the former recoveror, who was in possession under his recovery, and set up a mortgage against the former defendant, which proved to be usurious, and therefore void; it was held that the purchaser was entitled to recover; Hills *v.* Tuttle, 9 Cowen Rep. 233. But it seems to be established, beyond all question, that the verdict and judgment thereon, in favour of the plaintiff in the ejectment, whether it be a first or second ejectment between the

Digitized by Google

same parties, is conclusive evidence of the plaintiff's right to recover the mesne profits from the defendant, in a subsequent action of trespass brought for that purpose, from the date of the demise, or date of suing out the writ of ejectment, until the date of the recovery had therein. From the foregoing doctrine, which appears to be established by a weight of authority that cannot be controverted or overturned, the court was right in the qualified admission of the defendant's evidence, and in not admitting it for the purpose of showing that the possession which he had of the property was lawful, and that he was entitled to receive and retain the mesne profits.

Then in regard to the rejection of the record of the recovery of the property, in the third ejectment, by Daniel Man, jun., of Drexel the plaintiff, offered for the purpose of showing, under the operation of the fourth section of the act of the 13th of April, 1807, that the title to the property had been definitively settled in favour of Man, the defendant; and being thus ultimately decided in his favour, he therefore had a right to retain the rents and profits received by him from the property, and could not be made accountable to Drexel for them. To have received the evidence, offered for such purpose, would have been giving to the section of the act an operation and effect that could not have been intended. It would have been giving to it a retrospective operation, when, in its terms, it is clearly prospective, and made to operate on actions of ejectment which may or shall be brought, after two verdicts and judgments shall have been passed in favour of the same title held by one of the two parties. Besides, the section, in its terms, does not embrace or extend to an action brought for the recovery of the mesne profits. Such action stands upon the same footing, and must be governed by the same principles as before the passage of the act, giving to the plaintiff, recovering in the last ejectment, a right to recover from the defendant the mesne profits received by him during the pendency of the ejectment at least. This seems to be the only construction that can well be given to the section, so as to render it practicable in all cases. Upon a different interpretation, and such as is set up on the part of the defendant here, the right to the receipt of the mesne profits could not be finally adjusted and settled, until the title to the property was first definitively decided by two verdicts and judgments thereon, given in actions of ejectment in favour of the same party. But the defendant in the first action of ejectment, who is turned out of possession upon a recovery had against him, may defer bringing a second ejectment for twenty years and more; when he sues out his writ of ejectment before twenty-one years has run to bar it, and upon trial he is cast by a verdict and judgment thereon being ren-

Digitized by Google

dered against him, which bars all future claim to the property by him under the same title, and gives to the plaintiff, in the first ejectment, an indisputable title as against the defendant thereon, but in the mean time, the six years, which form a bar, under the limitation act, to a recovery of the mesne profits, have gone around, and the party entitled to the land has lost his right to recover the mesne profits. This would be palpably unjust, and consequently an insuperable objection to the construction which the defendant's counsel contends for, even if there were no others. The evidence offered in the second instance was, therefore, properly overruled.

As to the errors which, it is alleged, the court committed in the charge to the jury, we think none of them have been sustained. The court was perfectly correct in telling the jury that the plaintiff was entitled to recover the amount of the mesne profits claimed by him in the action, and interest thereon, if the jury should think proper to allow it. It has already been shown, in the discussion of the bills of exception to the evidence offered by the defendant, that he offered nothing which in law could form any defence to the right shown on the part of the plaintiff to recover the mesne profits received by the defendant. And as to the measure of the damages, the court gave, in this respect, as favourable an instruction as the case could possibly admit of. It would not have been error in the court to have left it to the discretion of the jury to have allowed the plaintiff more than interest upon the amount of the mesne profits. The jury are not confined in their verdict to the mere rent of the premises, although the action is said to be brought to recover the rents and profits of the estate, but may give such extra damages as they may think the particular circumstances of the case demands. See Goodtitle *v.* Tombs, 3 Wils. 118, 121; Adams on Ejectment, 391.

The judgment is affirmed.

Digitized by Google

www.libtool.com.cn

NORRIS *v.* CLYMER.

2 277
210 554

Devise of land in trust for A., B. and C. for life, remainder to their respective children according to appointment; and in default thereof, equally among them, with cross-remainders. A private act authorized a sale on ground-rents, redeemable or irredeemable; the trustees giving security on receipt of the money paid in redemption, to be applied according to the trusts of the will. The act is constitutional, and the court will enforce a contract of purchase from the trustees.

APPEAL from the Nisi Prius in equity.

March 11, 12, 13.—This was a bill by the trustees of Norris for specific performance of a contract to purchase on ground-rent, redeemable in seven years; the only question raised in the cause was the power to make title.

Joseph Parker Norris, by his will, dated in 1838, and proved in 1841, devised to trustees five-sixths of his Fair Hill estate, of which the lot in question is a part, to hold to them and the survivor in fee in trust, "to permit and suffer my five sons C., S., J., G. and H. to reside on and occupy, or at their discretion to receive and enjoy the rents, issues, and profits thereof during their respective lives, in equal shares, without impeachment for waste, in such way and manner that the same or any part thereof shall not become subject or liable to the payment of debts, present or future, of my said sons," and so that no creditor shall be able to take or enjoy any part, &c.; they paying five-sixths of the taxes and wife's annuity; with power to C. to settle one-sixth on his issue in such manner, for such estates, and under such restrictions as he may deem proper, and in default of appointment in trust for such children in common, or the issue of deceased children per stirpes. If C. dies without children or grand-children surviving, then over, on trusts hereafter declared for the other sons. Similar trusts and cross-remainders were limited as to the other sons. The other sixth he gave to trustees to receive rents, and after paying proportion of taxes and annuity, to apply surplus to maintenance, &c. of his son J. P. N., so as that no creditor could take or enjoy the same; remainder to his issue, according to J. P. N.'s appointment by will, and in default over, as in the limitations of the other five-sixths. Testator gave an annuity to his widow, and directed that no division of this estate should be made during her life or within five years from his decease. He then devised his Sep-viva estate in trust for his daughters; and reciting he was possessed of certain lands in Clearfield county, he authorized his executors to sell them as well as all his residuary estate.

Digitized by Google

The trustees refusing to act, two of his sons were appointed. By an act of March 2d, 1842, the trustees were authorized to sell such parts of the Fair Hill estate as they thought proper, reserving perpetual or redeemable ground-rents, and to convey, discharged of the trusts. The purchasers were discharged from seeing to the application, &c.; and any moneys paid in redemption were to be held by the trustees in trust for the uses of the will, and provided that a majority of those having vested estates should consent to the sale, and the trustees give security, &c.; a decree for defendants was entered pro formâ, and this appeal taken.

Price, for appellants.—The case is important from the value of the property in question; it comprises five hundred acres; the streets laid down are forty miles in length, and the income at the present rate of sale would be $200,000 per annum; but if these trustees cannot convey, it will be burdensome instead of beneficial, from the expenses of curbing, taxes, &c. It is also important from the extent of other titles involved, more than nine hundred of these acts having been passed, and many of them the foundation of hundreds of titles. Is the title such a doubtful one as the court will refuse its aid to perfect? The argument will be divided into, whether a power exists independent of the act, and therefore that is merely a shorter method; and, second, the power under the act alone. That the estates after the life-estates are remainders, and not executory devises, need not be argued, Dunwoodie *v.* Reed, 3 Serg. & Rawle, 441. Have the courts of chancery the power to authorize such a sale? if so, clearly the legislature has, for it has from time immemorial exercised that species of power. The rule is, that at law, tenants of the legal estate alone are recognised, and equity has absolute power over the trust, Lewin, 686; and the tenant for life always can part with his interest, Lewin, 138, it not being a special trust, as in Vaux *v.* Parke, 7 Watts & Serg.; 2 Cruise, 439; 2 Ashmead, 22—27; 10 Coke, 466; Fearne, 541; Coxe *v.* Blanden, 1 Watts, 535; Attorney-General *v.* Warner, 2 Swanst. 291, 302. [*Kennedy*, J.—Is the same power exercised in private trusts as in case of a charity?] The principle is the same, and Fisher *v.* Morris, 2 Ashmead, 411; Newport *v.* Cook, Id. 332, 340, 342, show the extent to which the courts here have been accustomed to go. If these were vested interests, we could have complete relief in the Orphans' Court, under act of 1836, ss. 13, 41.

The court decrees liberally, 1 Madd. C. Prac. 343, and a contingent remainder is less valuable in the eye of the law than a vested estate. They are dependent on the will of the tenant for life, and may

Digitized by Google

www.libtool.com.cn

be barred by his recovery, 5 Cruise, 490; Dunwoodie *v.* Reed, antè; Lyle *v.* Richards, 9 Serg. & Rawle, 322, 329, 362, 363—367; Stump *v.* Findlay, 2 Rawle, 176; Waddel *v.* Ratton, 5 Rawle, 231—236. The remainders here are of the same quality as the life-estates, either equitable or legal. In either case there are the same powers and incidents; both are subject to the rule in Shelley's case, 5 Cruise, tit. 36, c. 8, sect. 9; Bridges *v.* Bridges, 3 Ves. 120; they are considered as if executed. Wickham *v.* Wickham, 18 Ves. 395; 5 Cruise, 8, tit. 36, sect. 11. Nor are perpetuities tolerated under cover of a trust, Lewin, 138; and this is a very near approach, and contrary to the policy of our law, 9 Serg. & Rawle, 331. But by joining the trustees, a common recovery certainly could be suffered. 6 Cruise, tit. 36, c. 7, sect. 45; c. 8, sect. 1. Sometimes chancery will direct the trustees to join, or not punish them if they do, 2 Cruise, tit. 16, c. 7, sect. 8, Winington *v.* Foley, 1 P. Wms. 536, and certainly the legislature may exercise the same discretion that a court could in directing or permitting a conveyance.

2. But has not the legislature the power, irrespective of these considerations? The cardinal rule is, that the state legislature has all the powers not prohibited by either of the two constitutions; Congress none but those given, Bosant *v.* ——, 9 Rob. La. R. 411, and if tenants for life could not bar remainders, the legislature might, by a general law, enable them to do so; a private act is equally powerful, 5 Cruise, 9. This court, in Harvey *v.* Thomas, 10 Watts, 66, says, the clause restricting the taking of property for public use, is a disabling one. [*Chief Justice.*—I think differently since that.] Menges *v.* Waterman, at the July term, goes as far. But the present case does not need so extensive a doctrine; but whether a conversion may be made for the benefit of the remainder-men. The only clog on the court is, that the infants' rights over the property are retained; Ex parte Philips, 19 Ves. 122, 123. The same thing was done in the Tilghman estate, and recognised here, 5 Whart. 65. So in Bonsall's Appeal, 1 Rawle, 266, without authority, when in good faith. It is unnecessary to dissect the powers of the legislature; if this be under its judicial or legislative powers, it is equally valid, Livingston *v.* Moore, 7 Peters, 546, 548. In Watkins *v.* Holman, 16 Peters, 367, and Rice *v.* Packenham, 16 Mass. 326, similar acts were considered and held constitutional.

So in Clark *v.* Vanserely, 15 Wend. 436, 439, the case of a tenant by the curtesy; and it was held not to depend for validity on the doctrine of the omnipotence of parliament. Our own law relative to mechanics' lien is equally objectionable; for it destroys all estates;

Digitized by Google

O'Conner *v.* Warner, 4 Watts & Serg. 226; and in Savoy *v.* Jones, 2 Rawle, 350, an act of a tenant for life caused a sale of the fee, according to the decision of this court. [*Curiam.*—If that was wrong, so are all sales for taxes.]—The legislature also destroyed survivorship in joint-tenancy, which might in a certain case have been very unjust, 11 Serg. & Rawle, 193; 4 Mass. 566, is also on the constitutionality of the law. The whole course of our legislation is opposed to upholding such estates; thus the constitution of 1776 directs laws to be passed for this purpose. The uniform practice has been to uphold titles under these acts, as is shown from their number, and great respect is due to that, Blythe *v.* Richards, 10 Serg. & Rawle, 265; and this usage settles the construction as it existed before, and since the framing of all our constitutions, Colwin *v.* Bull, 3 Dall. 386, 398. Such a power must exist somewhere, 2 Story, Eq. sect. 333, 351. In Estep *v.* Hutchinson, 14 Serg. & Rawle, 435, 438, a sale by guardian, with notice, under a private act, was sustained here. So this court has always recognised the power to cure defects in conveyances, as in Mercer *v.* Watson, 1 Watts, 356; Salterlee *v.* Mathewson, 16 Serg. & Rawle, 169; affirmed in 2 Peters, 380, 413, which in fact divested rights, but was sustained because no clause in the Constitution prohibited it.

Is this then a doubtful case. I submit it on the cases, and the uniform practice; but if there be a doubt, it is to be thrown into the scale in favour of the right of the legislature; this is the uniform language of the judges. Cooper *v.* Telfair, 4 Dall. 219. [*Kennedy*, J.—You need not argue that.] That was the ground taken in Bomberger *v.* Clippenger. [*Curiam.*—Cases are unnecessary as to the rules in equity; for this title is either undoubtedly good or bad.]

F. W. Hubbell, contrà.—The will is recent; all the facts now urged were before the testator; so that the question is, can the legislature make a new will? It is conceded, that to sustain the objection to the law as unconstitutional, the prohibition must be found in that instrument; this distinction, as to the powers of Congress and the state legislature, is a familiar principle. Butler *v.* Hill, 1 Hill, N. Y. 324; Braddee *v.* Brownfield, 2 Watts & Serg. 285. I shall not argue from implication, as from the division of power into legislative and judicial; for that was put an end to in the Convention, 1 Deb. Penna. Con. 479. So in Braddee *v.* Brownfield, it is held, this sort of superior equitable jurisdiction has always been exercised by the legislature. So in Livingston *v.* Moore, 7 Peters, 548, it is said this power, if not delegated, remains with the legislature.

Digitized by Google

www.libtool.com.cn

But we find express prohibition in the constitution, in the Bill of Rights, sects. 1, 6, 9, 10, every article of which is excepted out of the powers of the legislature; but there are restrictions even more elementary than these, as the right to acquire means of subsistence, rights of conscience, &c. The 9th section declares a man shall not be deprived of his property but by the judgment of his peers, or the law of the land. This law interferes with that most sacred right of disposition: one of the strongest inducements to acquisition. It moreover takes away the rights of the unborn remainder-men, nor is an equivalent given, for that must be equal in value to the thing taken, at the time of enjoyment, which is not pretended here. It is moreover impossible to retain the incidents of real estate and attach them to the money paid in redemption of the rents; and these are material, especially in case the heirs should be women. The voluntary restraints on passing private acts in England are shown in 5 Cruise, tit. 33, sect. 21, which are modes of barring rights. If they are against common justice they are void, 1 Bay. 93. So in Norman *v.* Heiss, 5 Watts & Serg. 171, it is said, the legislature cannot give the property of A. to B. with or without compensation. The principle of this case is sufficient. And the same is said in Bomberger *v.* Clippinger, 5 Watts & Serg. 311. In private acts none but parties are bound; here many are not parties nor represented. That the courts possess the power to declare an act void is settled, Eakin *v.* Raub, 12 Serg. & Rawle, 330, though it is said it must be a very clear case. [*Chief Justice.*—I have changed that opinion for two reasons. The late Convention, by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the legislature; and from experience of the necessity of the case.] Vanhorn *v.* Dorrance, 2 Dall. 304; Austin *v.* The Trustees, 1 Yeates, 260. In Catlin *v.* Jackson, 8 Johns. 520, a private act authorizing a sale was held not to affect one having title, but not a party, S. C. 2 Johns. 262; in Jackson *v.* Lyons, 9 Cow. 664, the line of descent was changed; Lewis *v.* Webb, 3 Greenl. 326; Holding *v.* James, 11 Mass. 396, particular individuals were excepted from a general law; Durham *v.* Lewiston, 4 Mass. 140, requiring a review of a suit at law; Jones *v.* Perry, 10 Yerg. 59, an authority to guardians to sell to pay ancestors' debts; Stanford *v.* Barry, 1 Aik. Vt. Rep. 314, special enlargement of time for appeal; 1 Blackf. 206, an infringement of the right of trial by jury; Elwood *v.* Page, 2 Scam. 467, usurpation of ordinary judicial functions—are all cases in which the courts have pronounced the law of the legislature unconstitutional and void. It is conceded the legislature cannot transfer the property of one man to another, yet this is the case here. Menges *v.* Waterman affords a key to

Digitized by Google

the cases cited for the doctrine contended against. They are of three classes. 1. Validating informal acknowledgments, as in Barnet *v.* Barnet, 15 Serg. & Rawle; Tate *v.* Stoolfoos, 16 Serg. & Rawle; Mercer *v.* Watson, 1 Watts. 2. Imposing the ordinary obligation of a tenant on one coming in under a Connecticut title. 3. Cases of infants, lunatics, and sales for payment of debts. All these are cases in which there was a moral obligation to permit the acts to be done.

I was surprised at hearing the legislature had done nothing but what the courts would do. With them the equitable estate is the real interest, and these may not be forfeited. No conveyance beyond the real interest is sustained. Lyle *v.* Richards, and Dunwoodie *v.* Reed, per Gibson, C. J. Fearne, 321, sect. 5. Tenant in tail may, because he could call in the legal estate. But here the estates are carefully kept separate, and under Vaux *v.* Parke, 7 Watts & Serg. 19, the tenant for life could not convey. The cases of charities are on a peculiar footing; the beneficiaries are uncertain—belonging to a class constantly changing. Infants and lunatics are on the prerogative, and that power was disclaimed in Whitman *v.* Lex. But this is not a case in which chancery would compel the trustees to join in a conveyance. Those are few and peculiar. Fearne, 326, sect. 10, where the mere naked outstanding legal estate prevents the real owner from having a perfect fee. Fearne, 336, 331.

Meredith, in reply.—Without doubting the broader principle, there is sufficient here on narrower ground. There is no use limited to the trustees, hence the estate is vested; for though the statute has been held not to apply, yet the courts execute them under the same rules. The trust to permit A. to receive the rents in a devise is executed, 2 Saund. U. & T. 195; Vaux *v.* Parke decided the son was not a cestui que use of the land. This act, then, does nothing more than the parties could do by fine and recovery; or if the estates are equitable the remainders are so also, and cannot vest, Saund. 187, Brydges *v.* Brydges, 3 Ves. 120 on Chudleigh's case; and Bagshaw *v.* Spencer, 1 Ves. 140.

It being conceded the power to compel a conveyance of the legal estate can be exercised, the act has only dispensed with a recovery of that or of the equitable estate, or has exercised the power of a court of chancery. The despotic power of the legislature is not contended for. [*Chief Justice.*—I doubt whether a court would do it here.] The only right contended for is of conversion; the remainders are not sought to be disturbed. Menges *v.* Waterman settles it. As to the power to pass private acts, there will be found two, under which Chief Justice

Digitized by Google

Shippen and Chief Justice Tilghman, and several under which members of the present judiciary have acted. The same power exists in the Orphans' Court. [Mr. *Hubbell* here cited Hopkins *v.* Hopkins, 1 Atk. 591, 594, showing that equity will not permit a fee to be gained by forfeiture of an equitable life-estate. Smith on Ex. Int. 448; Fearne, 304, showing that the present trust will support the contingent remainders.] This rule is not denied, but it rests on a mere assumption of a rule, contrary to the principle that an equitable estate has all the incidents of the legal. And it may be doubted whether our common law has not given the same powers and incidents to the equitable owner that the legal estate possessed, as in Willing *v.* Brown, 7 Serg. & Rawle, 467, where it was decided they might sue in partition.

There is no clause in the Constitution of the United States violated, as no contract is impaired, nor the similar one in our own. But it is said the Bill of Rights prohibits this act. The first section is abstract, incapable of being enforced by the courts. As to the sixth section, no right to a trial ever existed. The ninth section evidently refers to accused persons, and has no bearing on this case. Of the tenth section, the first part relates to criminal proceedings, and the latter to a matter different from the present. None of these interfere with this prerogative of parliament, to which the legislature has succeeded, in passing an act for the preservation of property, which this is. [*Chief Justice.*—The expression in 10 Watts, 63, Harvey *v.* Thomas, was inadvertently used.] The constitution must be construed with reference to that lex non scripta, the law of custom, which has always prevailed. Thus, in case of divorce, which is a contract, a special prohibition was required. So of insolvent and limitation laws, of which the real ground is not that the remedy only is impaired, for if all remedy is taken away, clearly the contract is impaired; but that these laws had always been enacted, and no one thought of prohibiting them. There is nothing which prohibits the entire destruction of contingent remainders. Numerous cases show the power to sell, even without security, has been given to strangers, or persons having but particular estates. I would not contend for the extreme case of taking one man's property and giving it to another. The evils prohibited were practical ones, under which the people had suffered, such as attainders. We have then uniform practice sanctioned by the highest names in the judiciary, and uniform legislation. If it cannot be done, the city must stand still. This estate on the north, Powelton on the west, Blackwell and Wharton's estate on the south, hem us completely in, and for half a century the growth of the city must be stopped to protect contingent remainders.

www.libtool.com.cn

Digitized by Google

March 21. GIBSON, C. J.—The argument that the legislature has done no more, by this statute, than a chancellor would do by decreeing the trustees to join in a conveyance to destroy contingent remainders, is plausible but unsound. Such a direction would doubtless be given where the consequence would be a plain benefit to the family, (and the direction which the legislature has given to this property is certainly more beneficial to the family than that which had been given to it by the testator,) but I am unable to perceive how the contingent limitations could be defeated by a fine, recovery, feoffment, or any conveyance which, on feudal principles, would work a forfeiture of an estate for life. Trustees, to support contingent remainders, take the estate in remainder for the life of the particular tenant, after the determination of his freehold by forfeiture; and they may still defeat the dependent remainders as he would have done, by destroying their own freehold, when nothing else is left to support them. Here the trustees have had the legal estate in fee from the beginning; and no conveyance of theirs could extinguish it by forfeiture for an attempt to create one of no more than equal magnitude. With or without the decree of a chancellor, therefore, they could not have destroyed their own estate; and they consequently could not have destroyed the contingent limitations dependent on it. They might have conveyed it; but not being extinct, it would have performed the same office in the hands of their grantee.

But the constitutionality of the act stands on much safer ground than a chancery power unseparated from the other powers of the government, and reserved to the legislature. It stands on the notions of parliamentary power, brought by our forefathers from the land of their birth, and handed down to their descendants unimpaired, in the apprehension of any one, by constitutional restriction of ordinary legislation. A list of nine hundred statutes, in principle like the present, has been laid before us; some of them enacted at the instance of judges of this court; some at the instance of law judges of the Common Pleas; and some at the instance of learned and eminent lawyers, most of whom executed trusts under them without suspecting that their authority was prohibited by the constitution. It is not above the mark to say that ten thousand titles depend on legislation of the stamp. For many of those statutes contain distinct provisions for more than twenty estates. And could not the ruin that would be produced by disturbing them be avoided by any thing less than a convention to effect a constitutional sanction of them, the consummation would not be dearly bought. Fortunately there is no need of a measure so grave. Many of the pre-eminent men who framed the constitution of 1790, in which it was first

Digitized by Google

attempted to impose specific restrictions on the power of the legislature over property, were returned as members in the succeeding years; and we find no opposition to such enactments on constitutional grounds. This remedial legislation has prevailed from the foundation of the province to this day, not, indeed, exactly as it has prevailed in England, where, though the power of parliament is absolute, statutes which infringe upon private property are enacted with extreme caution, yet certainly with caution enough to prevent any sacrifice of private right. In the ten thousand cases to which I have referred, there is not, perhaps, one by which an individual was prejudiced, while it is almost entirely certain that all were benefited. In those instances the legislature was not adverse but subservient to the protection of vested estates; and due care was taken to provide for the security of contingent ones. On what part of the constitution, then, could it be supposed to trench? The only restrictive clauses which could be supposed to reach it, even by the most forced construction, are found in the ninth and tenth sections of the declaration of rights, in which it is said that no one "can be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land." "Nor shall any man's property be taken or applied to public use without just compensation being made." Now, it cannot be said that this statute has deprived any man of his property, or applied it to any other use than his own. The estate is to remain in the trustees; altered, indeed, as to kind, but still applicable to the trusts in the will. It is to be let on perpetual or redeemable ground-rents at the option of the trustees, who are to give such security as the judges of the Common Pleas may require for the due investment of such parts of it as may eventually be turned into money by redemption. Now, as the constitution allows to the legislature every power which it does not positively prohibit, I am at a loss to perceive, in these or any other of its clauses, an ascription of such sanctity to testamentary directions, as to exclude the interference of the legislature with regulations merely modal, for the advancement of interests both private and public. By a due execution of the powers conferred by this statute, not only will the welfare of the family, but the extention of the city be promoted. It would be fraught with incalculable mischief to let a doubt rest on the power of the legislature; and we are entirely clear that the relief sought by the bill be granted.

Digitized by Google

www.libtool.com.cn

AYCINENA *v.* PERIES.

The court will enter judgment specially, so as to make it appear that it does not bind defendant's property, but only such as is held in trust; to reach which was the object of the suit being in the nature of a bill in equity. The case is fully reported in 6 Watts & Serg. 244.

Wm. B. Reed moved for an entry on the record, in conformity to the instructions given to the jury on the trial, that the judgment is not against defendant generally, but only for the purpose of levying on and attaching certain stocks and securities in a schedule appended to the verdict in this case, and that said judgment is no lien on defendant's property.

He stated that defendant's credit was injured by the judgment appearing to be against him generally.

The motion was allowed and the entry ordered.

2b 286
153 94

MILLER *v.* STEM.

A party to a sealed note is competent to prove an extension of time to himself, thereby discharging another party who was a surety, under the pleas of payment, and of this fact specially.

To discharge a surety by extension of the time of payment, there must be not only a sufficient consideration, but the time must be definitely fixed; hence an agreement to delay for an uncertain period—as until some time in the summer—will not discharge him.

ERROR to the Common Pleas of Lehigh county.

March 6.—This action was against Stem, on a joint and several sealed note, executed by Boas, Saeger, and ten others. The plea was payment with leave, under which notice of defence was given that defendant was but surety, and signed the note on condition that another would sign it, and that suit should be brought immediately on maturity; that the new name was refused, and the time extended at the request of the real debtors, and without defendant's consent.

On the trial, defendant pleaded the fact of extension, averring the contract was for valuable consideration, and capable of being enforced in law or equity.

Plaintiff proved his note with a receipt for interest.

The defendant called Boas, whom he released for costs, whose competency was objected to. The witness proved he and Saeger were the principals, the latter having been substituted for defendant on a former

Digitized by Google

note, who then signed the note in contest as a surety that plaintiff agreed to wait, at Boas' request, but he did not know what length of time; it was until some time in the summer, on his payment of three or five dollars. On re-examination, subject to objection as improper and irrelevant, he stated plaintiff knew the fact as to suretyship, on taking the present note, and that he (the witness) had money which he would have paid had it been demanded. This money was paper in bad credit, and had been refused by the plaintiff.

The charge of his honour, Banks J., so far as material here, was that the plaintiff could recover, unless, knowing that defendant was a surety, he agreed with Boas to extend the time of payment, and took three or five dollars in consideration of such extension only, defendant not assenting to it.

Davis and *Porter*, for plaintiff in error.—The defence depends entirely on the testimony of Boas; he was incompetent, for the judgment in favour of one party is evidence for the others; Milliken *v.* Brown, 11 Serg. & Rawle, 146; Kepler *v.* McCormack, 1 Rawle, 445; 3 Rawle, 179. He would moreover be bound to indemnify defendant from any amount recovered by us—not merely costs, from which alone he is released—and he would also be liable to us for costs expended in the recovery against the surety; Conrad *v.* Keyser, 5 Serg. & Rawle, 371. But this evidence was not embraced in the notice of special matter, and the plea does not relieve him; 3 Watts & Serg. 361; Sharpe *v.* Sharpe, 14 Serg. & Rawle, 444, 176. [*Rogers*, J.—If you make a specific objection you abandon others.] It is included in the objection of irrelevant and improper. The amount received was not sufficient to make a contract for valuable consideration; it was not a twentieth part of the interest due; and as it was indefinite as to time, the creditors' hands were not tied; Chitty on Bills, 413, 414; Gillson *v.* Stewart, 7 Watts, 103; 8 Term Rep. 168; 11 Serg. & Rawle, 179; 4 Watts, 446.

King, contrà.—The interest was equally balanced, as he was liable to both parties, and a party to an instrument is clearly competent to prove payment; Phil. Ev. 14, n. a; 10 Johns. 231; Chit. Bill. 669, 670. The principal would not be discharged by a verdict for the surety, Clippinger *v.* Creps, 2 Watts, 45. That the charge was correct as to enlargement of time, Kramer *v.* Higginson, 1 Mason, 305, needs no argument.

March 30. SERGEANT, J.—The first question raised on this record is, whether Boas was a competent witness for the defendant. It is

Digitized by Google

contended that he was not, because he was co-obligor on the sealed note to the plaintiff. Had the issue been non est factum, and so going to the bond itself, the question might be different, but the defence here is personal to Stem. It does not deny the validity of the sealed note, but alleges that Stem was surety, and was discharged by the conduct of the plaintiff. The verdict, therefore, might be in favour of Stem, without affecting Boas' responsibility. Nor is it a ground of objection that if Stem is a party, he could recover from Boas the amount recovered against him in this suit. Boas is equally liable to the plaintiff, and in this respect stands indifferent, and the costs have been released by the defendant. It is said the plaintiff could recover against Boas the costs of this suit, but no authority has been cited to that effect, and we are not prepared to say he could.

The objection on the second bill of exceptions is, that the evidence was not within the notice of special matter. The ground taken in the court below was, that it was improper and irrelevant to the issue trying. It may not have fallen within the notice, but is, perhaps, within the plea.

But the main point of the case is, whether sufficient was proved to authorize the court to leave it to the jury to say that the plaintiff made an agreement to give time, and which had the effect to discharge the defendant. The principle of law, as settled by the recent authorities, is, that if the creditor make an express agreement with the principal, upon sufficient consideration, or on taking a new security, to give a further time for payment, the surety is thereby discharged. But mere consent to forbear, for a loose and uncertain period, does not tie up the creditor's hands, and an agreement, without a sufficient consideration, is nudum pactum; Chitty on Bills, 412—414; 3 Penna. Rep. 440. The evidence in the case before us is defective in these essential particulars. Boas, the chief witness, who speaks to the point, says, he does not remember what length of time it was for; he expected the Northampton Bank would be good in July; he told the plaintiff, if so, he could pay him almost any time then; the plaintiff was to wait till some time in the summer. This is not only vague as to proving an express agreement by the plaintiff to wait, but the time was indefinite and uncertain. To take away from the plaintiff a just debt, in order to relieve a surety, justice requires there should be a clear, distinct agreement by the creditor, placed beyond reasonable doubt for a time certain, or total forbearance, or forbearance for a reasonable time.

Judgment reversed, and venire facias de novo awarded.

Digitized by Google

www.libtool.com.cn

2 289
221 360

GREBER *v.* KLECKNER.

1. Trespass for an injury to timber during the possession of lessee for years cannot be maintained by the landlord.
2. A landlord cannot maintain trespass for cutting timber as to which his lessee was restricted.—*Aliter*, had it been expressly *reserved* in the lease.
3. An answer to a point stating facts, assumed without evidence, if calculated to mislead the jury, is error.

ERROR to the Common Pleas of Northampton county.

March 17, 18.—The declaration in this action was for a trespass, quare clausum fregit, to a close of plaintiff in Lehigh township; the parties were owners of adjoining tracts, and gave evidence of title to the locus in quo, which question depended on the correctness of the lines of surveys. The pleas were short, "non. cul." and "lib. ten.," on which issues were joined. The plaintiff proved he had never been in possession, but the land was occupied by his tenant. There was no evidence on the record of an agreement, such as is referred to in the plaintiff's points stated before. The plaintiff requested the court to charge, "That where a man gives out a farm to a person to work on the shares, giving him a right to cut his firewood, of the old decayed timber in the woodland on the tract, of which the farm-land is part, but restricts him from cutting green or growing timber; the owner of the freehold can maintain trespass against any one entering into such woodland and cutting growing timber."

The court answered, "This point is correct, and if plaintiff's tenant lived on the tract of land, on which the alleged trespass was committed, and for which the plaintiff has shown title on the terms and conditions stated therein; then the plaintiff can maintain this action."

In answer to defendant's points, the court charged, that if the landlord had parted with the entire possession, he could not maintain the action; but that here the tenant was in possession under plaintiff.

"How he was in possession further, than that he was in under the plaintiff, does not appear. It is shown there was a lease. It was the defendant's duty to show that the plaintiff's possession was entirely gone; and as that is not done by them, the plaintiff's possession would follow the title, so as to enable him to maintain this action."

The court also decided that title to an adjoining lot in the same township was not sufficient to bar the action. The defendant sued out a writ of error.

Ihrie, for plaintiff in error.—The plea of liberum tenementum,

Digitized by Google

www.libtool.com.cn

and evidence of title to land within the same township, is a sufficient defence, unless there be a new assignment, which has not been made here. 1 Roscoe, Ev. 380; 13 Serg. & Rawle, 21, 22; 1 Johns. 511; 2 Yeates, 210; Creswell *v.* Altemus, 7 Watts, 580; 2 Saund. Pl. and Ev. 636; 2 Stark. 1465; Collum *v.* Andrews, 6 Watts, 516. But the judge assumed the possession of the tenant to be restricted, as was stated in the plaintiff's point, and either misled the jury, or left a question of fact to them without evidence, either of which was wrong. Urqhart *v.* Coryell, 5 Watts & Serg. 84; Ott *v.* Long, 6 Watts & Serg. 178; Clintop *v.* Trexell, 4 Watts, 301; Hoshower *v.* Horker, 9 Watts, 455; 3 Penna. 415. So he in effect decided they had shown sufficient possession by saying the burden was on us. Newbold *v.* Wright, 4 Rawle, 195; Work *v.* McClay, 2 Serg. & Rawle, 415.

J. M. Porter, contrà.—It is conceded none but one in possession can recover, unless the possession of the tenant be restricted, and then the owner may sue for an infringement of any right thus reserved. Herr *v.* Hough, 2 P. A. Browne, 111; Shunk *v.* Memdorf, Id. 106, in which case, on a second trial, recovery was so had. Adelum *v.* Way, 4 Yeates, 218, is to the same effect. [*Kennedy*, J.—A restriction as to cutting timber is no reservation; it is but what the law implies.] Constructive possession is sufficient for our purpose. Stultz *v.* Dickey, 5 Bin. 285. The cases on the other side are all of money, rents; but a landlord on shares may maintain trespass. Hare *v.* Celey, Cro. Eliz. 143; 1 Leon. 315; Trials per Pais, 445. As to plea, &c., under our system, the court will consider a short plea to stand for what it ought to be, to sustain a verdict where the trial has been on the merits. Now, a new assignment is a replication, and the cause was tried on both sides, as if such had been filed; in fact, the court said it was unnecessary when I offered to file one. Stambauch *v.* Hellenback, 10 Serg. & Rawle, 361; Fisher *v.* Morris, 5 Whart. 358; Collum *v.* Andrews, 6 Watts, 516. [*Rogers*, J.—There would be no difficulty, if the exception had not been taken below.] It is a mere relic of ancient technicality, and should be got rid of in the same manner as multitudes of other such rules have. 6 Bin. 13; 17 Serg. & Rawle, 116; 3 Serg. & Rawle, 564, 577.

April, 11. KENNEDY, J.—(After stating the facts of the case, the proposition of plaintiff's counsel, and the answer of the court.) It is not very easy to comprehend the meaning of the proposition, if it can be said to have any meaning at all. From its terms, I think it very clear, that no fixed or definite meaning can be attached to it, and it ought not, therefore, to have been answered as it was by the court, as

Digitized by Google

www.libtool.com.cn

it was calculated to mislead the jury. The testimony did not warrant any proposition of the kind, or one more favourable to the plaintiff below, than that, if he had leased the farm, whereon the trespass was committed, for a term of years, in consideration of receiving a certain portion of the products, produced thereon annually by the labour and cultivation of the tenant, even *restricting* the tenant from cutting growing timber thereon, which restriction the testimony did not seem to warrant; could he maintain trespass against a stranger for cutting growing timber thereon during the continuance of the lease? Had this question been propounded to the court, for their answer to the jury, it ought most clearly to have been answered in the negative. For the action of trespass quare clausum fregit is founded upon the possession of the land, and not upon the right of property in it; and hence, the owner can in no case maintain an action of trespass for a trespass committed upon it, whilst it is in the possession of another. As where he has been disseised, he cannot maintain trespass against any stranger for a trespass committed after the disseisin, without a reentry; for he had not the possession at the time, it being in the disseisor, 2 Roll. Abr. 554, pl. 5. But one in the actual possession of land, however defeasible his title may be, may maintain an action of trespass for a trespass committed by any other than the party, who has the right of entry. As a lessee for years, 2 Roll. Abr. 551, pl. 6. So may a tenant at will, if the trespass be committed by a stranger, Id. pl. 3, 4; Geary *v.* Bancroft, 1 Sid. 347; or even a tenant at sufferance, Fitz. Abr. Trespass, pl. 10; 2 Roll. Abr. 551, pl. 1. In the case of a tenancy at will, the possession may be considered as in either the lessor or the lessee; and, therefore, either or both may have actions of trespass vi et armis, against a stranger for cutting timber, or prostrating houses, and recover damages according to their several losses. Co. Litt. 57 a, note (2). But the landlord of a tenant for years cannot maintain trespass against a stranger, though the act done be injurious to the reversion; his only remedy in such case is an action on the case. Bedingfield *v.* Onslow, 3 Lev. 209; Torrence *v.* Irwin, 2 Yeates, 210; 1 Arch. Nisi Prius, 302. But, if in a lease for years, there be a reservation of the trees, the lessor may maintain trespass against any person who cuts them or injures them; for, by the reservation of the trees, the land in which they grew was reserved also; and the lessor in possession of it in fact at the time of the trespass, Bro. *Trespass*, pl. 55; and see Goodwright *v.* Vivian, 8 East, 190; 1 Archb. N. P. 302. See also Glenham *v.* Hanley, 1 Lord Raym. 739. But a mere *restriction* imposed upon the tenant, not to cut timber, will give the landlord no right to maintain trespass if it be

Digitized by Google

cut by a stranger, because the tenant is considered in possession of the land where it grows, as it is embraced in his lease. Torrence *v.* Irwin, 2 Yeates, 210. A *restriction* is very different from a *reservation* or *exception*. The first is introduced to qualify the occupation of the tenant, and the use that he shall make of the woodland, which is excluded in his lease; but the latter is introduced for the purpose of showing that the parties did not intend that the woodland should be included in the lease, or that the tenant should have any possession of it whatever. It was at one time a practice, not unfrequent in this state, for the owners of lands or farms, in the possession thereof and living upon the farm, to make an agreement with a person to cultivate and sow their land, or some portion thereof, with corn or grain of some sort, on condition of the latter having a certain portion of the grain grown thereon; the latter cannot maintain trespass, nor can he even join with the owner and occupier of the land in an action of trespass quare clausum fregit, for an injury done to the crop, as it would seem, for he was not in the possession of the land. See Hare *v.* Celey, Cro. Eliz. 143; S. C. Gouldsb. 77. But in the case before us, the tenant, notwithstanding his rent was a certain portion of the grain raised and grown by him annually upon the land, yet he was in the entire and exclusive actual possession of the whole, without any reservation or exception that we hear of; that he had been so for five or six years, embracing both the time before and after the commission of the trespass complained of. That the tenant held the land under a rent, consisting of a certain portion of the grain, &c., to be grown by him thereon, and to be delivered to the plaintiff annually, cannot render his situation in any respect different, or give the plaintiff a right that he would not have had, if the rent had consisted of money to be paid. Sir Edward Coke, 1 Inst. 142 a, says, "Rent may be in the delivery of hens, capons, roses, spurries, bowes, shafts, horses, hawks, pepper, comine, *wheat* or other *profit that lieth in render*, &c., as well as in the *payment of money*." It is sufficient that it be certain or capable of being reduced to a certainty. Id. And indeed some have said that *rent* is derived from *reddere*, because it is reserved out of the profits of the land, and therefore is not properly due till the lessee or tenant take the profits; for *reddendo inde*, or *solvendo*, or *reservando inde*, or the like, is as much as to say, that the tenant or lessee shall pay so much out of the profits of the lands; for *reddere nihil aliud est quam acceptum aut aliquam partem ejusdem restituere. Seu reddere est quasi retro dare*, and hereof commeth *redditus* for a rent." We are satisfied that the court erred, in submitting the cause to the jury on a proposition or point which was not raised or supported by the evidence;

Digitized by Google

and that this judgment must, therefore, be reversed. As the cause must go back for another trial, if a new assignment should be deemed requisite, on the part of the plaintiff, it can be supplied by an amendment made to that effect.

Judgment is reversed, and a venire de novo awarded.

---

2 29
26 SC 64

HOHLY v. GERMAN REFORMED SOCIETY.

A demise at will, in consideration of services rendered annually to a religious society as foresinger and organist, is not within the act of 1772, for uncertainty in the rent.

Under this act, the determination of the term must be distinctly found; it is not sufficient for the inquest to find a tenancy at will, and a notice to quit prior to the commencement of the proceedings.

ERROR to the Common Pleas of Lehigh county.

March 18.—The German Reformed and German Lutheran Societies gave notice to Hohly to quit the premises, which he held as tenant from year to year. Three months afterwards they made their complaint by a committee, before two justices, setting forth their title in trustees, and "That several years since a certain George Hohly was permitted by the congregations aforesaid, to possess and occupy the said premises as tenant at will, as part consideration for his services to be rendered in the said congregations, as foresinger and organist, and that he has since so possessed them, rendering the aforesaid services, in payment of rent for the same;" their desire to repossess, notice, refusal, &c. Upon which a warrant issued. The inquest found the title in trust for the German Reformed Society, the terms of the demise as stated above, and the entry and possession, "for such rent rendered annually," &c., as in the complaint. A writ of possession for the two societies was executed accordingly. On certiorari, (Banks, President, dissenting,) the proceedings were affirmed with costs by the court. The errors assigned were the exceptions below, of which so many as were for matters apparent on the record are,

1. The proceedings did not set forth that the term had expired.
2. Nor that any certain rent was reserved.
3. That only one society was found entitled.
4. The notice was to him as tenant from year to year, and the proceedings against him as tenant at will.
5. The title being in trustees, the proceedings should have been by them.
6. Inquest was defective for the reasons above stated.

Digitized by Google

William Porter and *King*, for plaintiff.—The act of 1772, Purd. Dig. 927, expressly and throughout makes the determination of the lease a necessary fact. And it also confines the proceedings to cases of certain rents. 2 Serg. & Rawle, 486; 3 Penna. 34, 55, are express to this effect. These facts must also be stated in the inquest, Fahnestock *v.* Faustenauer, 5 Serg. & Rawle, 174.

Bridges, contrà.—The term was ended at the election of the parties, and this fact appears on the inquest. Whatever can be rendered certain is sufficient, 3 Penna. 55, 56, and that is so here. 5 Binn. 228. We will pay the costs if the court should think proper to reverse the proceeding without a writ of restitution.

March 30. GIBSON, C. J.—This court certainly went far in Shaffer *v.* Sutton, by ruling that payment of taxes, and the chinking and daubing of a house, was a certain rent within the purview of the act of 1772. It was held in Scott *v.* Fuller, 3 Penna. 55, that the quantity, quality, and duration of the rent need not be specified; but it was said in Steele *v.* Thompson, 3 Penna. 34, that the landlord and tenant act was intended for plain and simple cases, in which the rent and the nature of the tenure are certain; in accordance with which, it was ruled in Scott *v.* Fuller, that the service of taking care of the lessor's grain on the farm, and keeping the cattle out of the fields, was not a certain rent within the statute, because it could not be enforced by distress or action; and there is nothing more certain in the services of a person employed as foresinger, sexton, and organist of a congregation. Rent is certain enough when it can be reduced to certainty by reference to a subject in existence at the time of the contract; but not by reference to contingent services, whose quantity is to be ascertained only after actual performance.

The exception that the inquest have not expressly found that the lease was ended, is equally founded. The fact might perhaps be inferred from the date of the notice and the entry of the plaint; but it is the business of an inquest, or a jury, to find facts, and not the evidence of them. In accordance with this principle, it was ruled in Fahnestock *v.* Faustenauer, 5 Serg. & Rawle, 174, that all the component parts of the case committed to the justices and inquest, should be distinctly found; not left to inference or conjecture. The very words of the statute seem to require it; for the whole case must appear in the inquisition without reference to any other part of the proceedings. As the preceding exceptions are fatal, it is unnecessary to go further.

Judgment reversed, and proceedings quashed, but no writ of restitution awarded.

Digitized by Google

www.libtool.com.cn

HAWK v. GREENSWEIG.

1. Where the vendor sues on his legal title, the vendee defends under the articles as on a bill to restrain the action at law, and less proof is required in such case than if the vendee were seeking specific performance; and the verdict is to be so moulded as to give the same relief which a court of equity would give under similar circumstances.
2. A vendor having agreed to convey, by a day certain, in consideration of certain acts to be done to himself, and payments to a third person, without tendering a deed, brought ejectment, alleging non-performance by vendee, who had entered and made improvements; the court should direct a conditional verdict in such amount as on performance would compensate the plaintiff for neglect of the vendee; to be levied on delivery of a deed to be so drafted as to secure all the covenants thereafter to be performed.
3. Where the action is in the nature of a bill, to compel performance of articles, or the vendee defends thereon in the nature of a bill to restrain the proceedings at law, delivery of a deed, though a condition precedent, need not be made or tendered before bringing suit. The court will direct a verdict, conditional on delivery of a proper conveyance.

ERROR to the Common Pleas of Monroe county.

March 19, 20, 21.—This was an ejectment on the legal title, which defendants resisted under articles, by which plaintiff covenanted to convey to W. and H. and N. H., guardian of A. and P. H., by deed, on or before the 1st September, 1839, and also to give the stock, with certain exceptions; in consideration of which defendants agreed to pay $900; $300 on the 1st April, 1842, 1845, and 1849, without interest, which was to be done by notes payable on those days, in favour of the sisters of defendants. Also to give plaintiff one third of the produce of the land, except the hay, and let him have the privilege of the house and cellar. Defendants were also to harvest and thrash all the grain sowed on the premises, and receive one-third as a compensation. Plaintiff offered to prove that defendants refused to give the third of the produce. That the land was not farmed in a proper manner, and that the privileges were interrupted. Defendants objected. Evidence was then given as to bad management, neglect of the farm, ill treatment of the plaintiff, and neglect to comply with the stipulations as to the produce. Defendants produced evidence in contradiction. The second exception was to evidence of the declarations of one defendant as to the profits of the land. Defendants proved that before the 1st of September plaintiff called on the person with whom the articles had been deposited, and directed him not to draw a deed, as he was not willing to give one, and endeavoured to have a return of the articles; that he did not then complain of the conduct of the defendants, but that his wife, who was their mother, had behaved badly. Defendants also showed they had made improvements, by clearing, fencing, and erecting a barn, &c. Much evidence was given on both sides as to the facts in controversy. The

Digitized by Google

www.libtool.com.cn

court charged, in substance, that a previous tender by plaintiff of the deed was unnecessary, that his legal title would entitle him to recover, unless the defendants could make out such a case as would be sufficient in chancery to entitle them to a decree for performance, or an injunction to restrain the action at law. To do this, they must have substantially performed their contract. It was for the jury to decide this fact. An immaterial non-compliance was unimportant, but whether the defendants had shown an honest desire by their acts and declarations to live up to it. If the defendants have neglected to comply with the provisions of the articles by not rendering to plaintiff his portion of the produce, and by their acts have shown a determination to withhold from him that support which seems to have been the principal inducement to the bargain, plaintiff can treat it as abandoned. To the fourth point presented by defendants, he said, though he did not see how the point could arise, that a deed containing reservations according to the articles would not be such as they were bound to accept, as the covenants were of a personal nature. The jury found for plaintiff.

Reeder, for plaintiff in error.—The delivery of the deed was a condition precedent to any acts on our part, and no advantage could be taken for non-compliance by us, while he was in default, especially after he had refused to comply. But the court erred in leaving the question to the jury, whether we had complied or shown a disposition to trifle; for it was a matter of law for the court, as chancellor, whether, under the evidence, he would decree a performance. The danger of this is shown in 1 Story's Eq. sect. 19; 8 Watts, 378, 379; it is to make an ever-varying rule of equity. In equity non-performance of a condition precedent cannot be relieved against, but is held as strictly as at law. Jones *v.* Berkley, Doug. 665; Thorp *v.* Thorp, 1 Lord Raym. 662; 2 Story's Eq. sect. 773; Ca. temp. Finch, 445; Newlin Cont. 249; Sanders *v.* Pope, 12 Ves. 289; Hill *v.* Barclay, 16 Ves. 403. So there are cases in our own books which may be said to decide it, Williamson *v.* Develing, 9 Watts, 311; Brown *v.* Metz, 5 Watts, 164; Bossler *v.* McKnight, 2 Serg. & Rawle, 352.

Ihrie and *J. M. Porter*, contrà.—The question is, whether the court will not leave the defendants to their remedy at law; for to entitle him to a conveyance he must have done every thing on his part to be done, Griffith *v.* Corkran, 5 Binn. 105, where in our courts he is considered as possessing the legal title. The acts of the parties were the proper evidence to show an abandonment of the contract, so far as a determination not to perform it, Ong *v.* Campbell, 6 Watts, 396; and the previous tender was not essential on our part, Smith *v.* Webster,

Digitized by Google

www.jrgbooks.com.ch

2 Watts, 478, having been overruled in Brown *v.* Metz, 5 Watts, 164. [*Chief Justice.*—That case has been misunderstood. The syllabus is incorrect; without that the cases coincide. The question was not of tender but of right.] The court look to the condition of the parties at the time of the decree, in a case like this, Markley *v.* Schwartzlander, 8 Watts & Serg. 176; that is, of grace; 1 Watts, 401, Pennock *v.* Freeman. But there would be peculiar hardship in this case had defendants recovered. We should have been left to the personal covenant of one party; the other, having executed as guardian, was not bound, neither were his wards. [*Chief Justice* and *Kennedy*, J.—He would be personally bound.] There is a learned opinion of Luther Martin, in the Law Journal, contrà. [*Kennedy*, J.—It has been well settled since, that he is.] The party did not refuse to execute the deed to the party, nor request his declaration to be communicated; so it comes to this—would the court compel him to perform his contract, 2 Binn. 129; 17 Serg. & Rawle, 247; 2 P. Wms. 204; 7 Watts, 375, 144; 9 Watts, 16; 4 Whart. 230, where it is a gift in substance, and the small return has been refused, the party driven from his home by the conduct of the claimants?

March 30. ROGERS, J., after stating the case.—The action is brought to rescind the contract and recover the possession, and the plaintiff rests his case on two grounds: First, That the contract was obtained by fraud and misrepresentation. Second, That the defendants have failed to comply with the terms of the agreement.

The first ground is easily disposed of. There is not a particle of evidence of fraud or misrepresentation, and so the court instructed the jury. That he may have been induced to enter into the arrangement by affection for his wife and step-children, and for this reason to have given them the property on more favourable terms than strangers, is very probable. But this is the extent of the plaintiff's proof on that head. The scrivener, who drew the agreement, and who seems to have been the confidential friend of all parties, states: That the plaintiff called on him alone to write the agreement; said he had made an arrangement to sell his land to the Hawks; that the boys lived with him, and were smart boys, and that he intended to give them a chance. Here we have his motives disclosed, which do honour to his good feelings. It was not done in a hurry, nor unadvisedly. The witness says, he had often spoken of the sale of the property afterwards and before; told him he intended to sell it to the children. This was a natural disposition, especially as he had no children of his own; but that there was any undue influence or imposition practised on him, by

Digitized by Google

any person, does not appear. We have assertions, surmises, and conjectures, to that effect, but there is no proof of these allegations. It is not even clear, under the circumstances, that it was an improvident contract; but that of itself would be no ground of relief, although in the case of an executory contract it may be urged as a reason for refusing the extraordinary interposition of a court of equity. That it does not answer the expectations of all the parties, may, perhaps, be as much attributable to the infirmity of the plaintiff's temper excited by domestic squabbles, as to any fault properly imputable to the defendants. But, be this as it may, we do not see the justice of visiting on the children the faults or misconduct of the mother. It will be remarked, she has an interest in the agreement, not only as a wife, but because the article contains a stipulation in her favour. It would be an easy and convenient mode to avoid an improvident or silly contract, if the quarrels of husband or wife generally could be used as a pretext for that purpose.

But is the plaintiff entitled to recover on the ground that the defendant has not complied with the contract?

The case, as it is presented by the evidence, is in the nature of a bill to rescind and cancel the agreement. The plaintiff brings ejectment, and the defendants ask the interposition of the court, by way of injunction, to restrain the plaintiff from making an improper use of his legal title in a court of law. It requires, I apprehend, less proof to induce a court of chancery to refuse its interposition on an application to enforce the specific performance of a contract, than it does to cancel and annul an agreement. When a contract is executory, and one party seeks a specific performance, the interference of the court is discretionary. The court will refuse its aid when the party seeking to enforce the agreement has neglected or refused to perform his part, or has been guilty of any trifling or delay. He is left to his remedy for damages at law. But where the contract has been in part executed, as by delivery of the possession, and the retention of it for several years, making improvements, they require more stringent proof of the abandonment of the contract, so as to permit the plaintiff to recover the possession as on a cancelled agreement. The rescission, or specific performance of contracts, is not a matter of right in either party, but is a matter of discretion in the court; not of arbitrary or capricious discretion, dependent on the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself, as far as may be, by general rules and principles, but at the same time which grants or withholds relief, according to the circumstances of each particular case, where these rules and principles will furnish any exact measure of jus-

Digitized by Google

www.libtool.com.cn

tice between the parties; 2 Story's Equity, sect. 742, and the authorities there cited. In short, a court of chancery will look to the whole case, when within their jurisdiction, and will make such a decree as to do justice between the parties.

Now what is this case? Although the vendee is forced to go into chancery to defend himself against the legal title; nevertheless, the case is not to be considered as in the nature of a bill for the specific performance of an executory contract, but as a bill in equity by the vendor to cancel the agreement. In this point of view, it is the duty of the vendor to satisfy the court that *he* has performed his agreement; that he has placed himself in such a condition to enable him, at law, to compel the defendant to perform his covenants. It would be unjust to annul the agreement when the default was on the side of the vendor, and where he could not for that reason sustain suit on the article of agreement; and this leads to the consideration of the agreement. From the contract, it is clear that the delivery of the deed is a condition precedent to the right to recover the money payable to the daughters, or to claim the one-third of the produce of the farm. If the vendor, instead of commencing an ejectment, had brought covenant, or if the guardian of Liffy and Catharine Hawk had brought an action of covenant, it would be necessary to aver and prove the execution and delivery of a deed, or a tender of a deed, for until this was done, the defendants are in no default. This action being in the nature of a bill in chancery, it was not necessary to tender a deed before the commencement of the suit, as has been repeatedly decided. But that is not the point here. The question is, can the vendor ask the court to annul or cancel a contract, when he has neither performed, nor offered to perform his part of it? Would it not be a sufficient answer to reply, True, I have not paid all the purchase money, nor have I performed other stipulations in the agreement, but my excuse is, that I am not bound to do so in consequence of your neglect, or refusal to give me a deed for the premises? Would a court of chancery cancel the contract, or would they content themselves with making a decree for the payment of the purchase money in arrear, to be paid on the execution and delivery of the deed? The truth is, it is not a case for rescission, but for compensation. The plaintiff agreed, in consideration of certain stipulations already enumerated, to give a deed for the premises to the defendants in fee, on or before the 1st September, 1839. This the plaintiff has not only neglected, but has refused to do; and what right has he to complain? The scrivener says that the plaintiff, before the time mentioned in the agreement, to wit: the 1st September, 1839, came to him and told him not to draw the deed; that he was not will-

Digitized by Google

ing to give the deed. He wished him to give up the article. The scrivener offered him a copy, with which he was not content. The reason of his refusal to give the deed, was not on account of any misconduct on the part of the children, nor any alleged failure to pay rent, nor on account of bad husbandry, but because he was displeased with his wife, who, to use his own language, had behaved nasty to him. If there was any failure whatever, it was after the time when, by the article, the vendor was bound to assure the title. Suppose there was a failure to pay rent, is hat a r ason for rescinding the contract at the instance of a person who was himself delinquent? Had the defendants altogether refused to pay, it would be no reason for cancelling the agreement; much less, when it appears that the default, if any, was partial only. It would seem to me to present a flimsy case for setting aside the agreement, even admitting the vendor had performed, or offered to perform, his part of it: but in the absence of all proof of the kind, and indeed, in the face of evidence, showing his unwillingness and refusal to perform his engagements, the plaintiff is not entitled to rescind the contract, and so the court ought to instruct the jury. But what would a court of chancery do? for this we can, and ought to do, through the instrumentality of a jury. A court of equity would estimate the rent so in arrear. This amount they would order the defendants to pay on the execution and delivery of the deed, according to the stipulations in the article. The form of the deed it is not necessary for us to prescribe, but the justice of the case would require that it should be such as to secure to the vendor the performance of all the covenants in his favour. Moreover, the court would order the defendants to pay or secure the $900, payable to the guardians of Liffy Hawk and Catharine Hawk. It must be a very peculiar case, where a court of chancery would rescind a contract when they cannot replace the parties in their original condition. This would be difficult, if not impossible, in the case before us. Besides, it would be unjust, if it can be avoided, to annul the contract, and would deprive the minors of the interest, without any default of theirs. As the avowed object was to cancel the contract, we think the court erred in admitting evidence to prove a refusal by the defendants, on the 1st September, 1839, to pay or perform the consideration contained in the article. It is, however, objectionable only in that aspect, because if the evidence is used as it may be, to enforce the contract, it would be material to the issue.

It may be proper to remark, that we agree with the court that the defendants were not bound to retain the saw-mill, and set it in a condition for the plaintiff to saw. The article imposes no such obligation

www.libool.com.cn

Digitized by Google

on the defendants. In conclusion, we see no reason to doubt the validity of the agreement, nor is there any evidence from which a jury would be permitted to infer a new contract.

Judgment reversed, and venire facias de novo awarded.

STAHL'S APPEAL.

1. A bequest durante viduitate ceases on marriage.
2. Bequest of household furniture to widow, residue to executors, to pay her the interest so long as she remained his widow, and bore his name. "Should she marry again, then she shall have so much of my property as the laws of the land will give her, and yet $200.". On a second marriage of the widow, the payment of interest ceases, and she is left to her rights at law, and can claim the absolute gift of the furniture, and $200 only.

APPEAL from the Orphans' Court of Lehigh county.

March 21.—Stahl, by his will, gave all his furniture and loose property, except bonds, mortgages, &c., to his wife, absolutely, with the use of his land so long as she remained his widow. The rest of his personal estate was to be placed at interest, and his executors were to pay her the interest so long as she remained his widow and bore his name. He then continued, "should my wife marry again, then it is my will that she shall have so much of my property as the laws of the land will give (or allow) her, and yet $200 in money." He gave a legacy to A. M. E., on the death of his wife, to be paid immediately if she married again. The residue "which may be in the hands of my executors, after the marriage of my wife, shall be paid to my three brothers," &c. Testator left real estate valued at $3000. The widow married again, and the question here was on the settlement of his executor's accounts.

The court allowed her the income of his personal estate till the marriage; then the one-half of the gross amount of that property, deducting from the remaining half the legacy to A., and the $200 legacy, which they also allowed the widow. These, with commissions charged on the income paid the wife until marriage, which also came out of the residue, were the subjects of exception here.

King, for residuary legatees, appellants.—The interest paid the widow during widowhood should not have come into this account, for as to that they were trustees, and should have so accounted. To that fund should the commissions have been charged, for it was payable by the cestui que trust. Equity cannot extend a gift, though it may dispense

Digitized by Google

with a forfeiture; Bennet *v.* Robinson, 10 Watts, 348. What then has the testator given his widow in the event of her marriage? I contend, simply that which the law gives her, in case there is a will, and $200 besides, which is her dower. This is the very case put in Rogers *v.* Rogers, 7 Watts, 15, which it is said would deprive her of every thing but the specific legacy. He evidently contemplates that a second marriage would release his estate. If he is to be considered intestate in this event, she must account for the property given absolutely.

Davis, contrà.—It is clear he intended to provide liberally, and McIlvaine *v.* Gethen, 3 Whart. 575, shows this forfeiture on marriage is void. [*Kennedy*, J.—That was a defeasance; there is no objection to a limitation over on such event.] We contend the residue was given after she got all the intestate laws would give her, and $200 besides.

April 11. KENNEDY, J.—It will scarcely be denied, or even doubted, after reading the will, that the testator intended to give his wife a larger portion of, or interest in, his estate, as long as she should remain his widow, than she should have or enjoy after her marriage, if she married again. This appears plainly from the whole face of the will itself. [His honour here stated it.] The auditor, to whom the account was referred by the court below, in his report, allowed to the widow, upon her getting married again, the one-half of all the testator's personal estate absolutely, in the same manner as if he had died intestate, beside the $200 legacy in addition thereto. "The household furniture and other loose property," given to her in the first part of the will, amounting in value to $293.68, which she received immediately after the death of the testator, were deducted from the whole mass of the personal property before dividing and giving or allowing one-half thereof to the widow, so that she has thus allowed to her the household furniture, and the $200 legacy, in addition to the one-half of the residue of the whole of the personal estate. Now, I think, it must be apparent to every one, that this, instead of allowing to her a less portion of the testator's estate, on account of her having married again, as the testator unquestionably intended, would be giving to her a much larger portion thereof than she could have claimed, or would have been entitled to receive, under the will, had she abstained from marrying. By the will, if she had not married again, she could only have claimed and received the interest, annually, upon $3391 58, that sum being the whole amount of the personal estate, after deducting the household furniture, and the expenses attending the administration of it; but according to the report of the auditor, which was approved

Digitized by Google

and confirmed by the court below, she has had allowed and decreed to her $1695 79, one-half the amount of the whole of the principal, besides the $200 legacy, thus giving to her $1895 79 of the principal, instead of an interest, annually, of $203 49, which is all that she could have had if she had abstained from marrying, as the testator wished her to do. We cannot think that the testator intended to give her any thing like so large a proportion of his estate if she married, which he appeared to have been very solicitous she should abstain from. Such an allowance, instead of restraining her from marrying again, and changing her name—a thing, I repeat, that the testator seems to have been extremely anxious she should not do—would rather have had a tendency to have inclined her to do it, as it would have improved her condition in a pecuniary point of view. It is impossible to doubt for a moment, that the testator intended she should have less of his estate if she married again than if she remained unmarried. This must be regarded as a clew to a proper construction of the will, so that the intention of the testator may be carried into effect. The sentence giving rise to the difficulty is very badly and obscurely expressed, and it is only by ascertaining what it was that the testator wished to effect, if possible, by introducing it, that his meaning can be discovered. Seeing then his great object was to prevent her marrying again, and parting with *his* name, the natural, if not the inevitable conclusion, is, that he intended, if she married, she should have only $200 of his personal property, beside the household furniture, which he had given to her in the first part of his will, unless she should be entitled to it by the law of the land, against his will and consent.

The decree of the court below is, therefore, reversed, and $200 only, with interest thereon from the marriage of the wife, are decreed to be paid out of the testator's personal estate, to her and her present husband, beside the household furniture, which she received, and is, as we conceive, entitled to retain. Next, $800, with interest thereon, from the wife's marriage, out of the same, to Anna Maria Eckroth; and the residue thereof is ordered and decreed to be paid to the brothers and sisters of the testator, or their legal representatives, as directed by him in his will. The costs, however, are ordered to be first paid out of the residue.

Digitized by Google

www.libtool.com.cn

2 304
161 254

SHUNK'S APPEAL.
FREEDLEY'S APPEAL.

Two and a half per cent. commissions allowed on sale by assignees of real estate, the purchase money being about $44,000, of which $13,000 came into their hands, the residue continuing a lien, by agreement between a mortgagee and the purchaser.

In the distribution of an assigned estate, lien creditors let in pro rata with general creditors on the personal property: retaining their liens on the realty for the residue.

FROM the Common Pleas of Montgomery.

March 23.—The question here was on the distribution of an estate assigned for creditors generally. At the time of the assignment, there were several judgments and other liens on the real estate. The assignees declined to sell, being uncertain whether the purchase money would pay these liens and enable them to make title. The lien creditors agreed they should sell, reserving their right to the proceeds, which amounted to about $44,000. This was done; and by an arrangement some of the liens were allowed to remain, and credited as payments to the purchasers, so that but about $13000 was received by the assignees. The assignees claimed two and a half per cent. commission on the gross amount of the sales. The court awarded $800.

Krause, President J.—"The question whether this fund is to be treated simply as money, without regard to the nature of the estates from which it has been converted, or respect must be had, as in the distribution of decedents' estates, to the paramount rank which landed property holds above personal property—whether, in short, the chattels of the debtor must not first be exhausted in an effort to pay all his debts before a resort is had to his realty—remains to be answered. And the inquiry necessarily follows, whether the doctrines in equity, relative to marshalling assets and securities, furnish any analogy from which a rule applicable to the case may be deduced.

"Estates are held to be equitable assets in chancery, which are made subject to the payment of debts by the act of the debtor, and which, without his act, are not answerable for such purpose. The instrumentality of that court is necessary to their distribution; and this it always withholds from creditors who refuse to bring into hotchpot what they may have received out of legal assets, on the principle that equality is equity. But equity follows the law, and adopts the rules of the courts of law, wherever estates are made legal assets by statute; and then it enforces claims, charges, and antecedent liens *in rem* according to their priorities, whether or not those claims, charges, &c., or the assets, be legal or equitable, 1 Story Eq. 520, 524. Now, all the debtor's pro-

Digitized by Google

perty in Pennsylvania is a legal fund for the payment of demands upon him—his chattels are so at common law, and his lands are expressly made so by statute; in which case it is seen that equity follows the law. It is not perceived, therefore, that this principle in equity of enforcing equality in distributions is applicable here; nor that the other principle is applicable which seems to result from the doctrine of marshalling securities. It is true that wherever it can justly be done in this state, creditors are so placed by the courts as to restrain those who have a claim on two funds from taking away all the chance another may have on one of them, of obtaining satisfaction; but there is no principle which takes from a creditor any part of his security until he is completely satisfied. 19 Johns. Rep. 493. And consequently, if the lien creditors here have a right at all to come on the personal property, they have it without going into hotchpot, or surrendering part of their real estate securities. As between them and the other creditors, the principle of either marshalling assets or securities is inoperative, and can only be applied in the case of a contest for a surplus beyond the amount of encumbrances, between the assignor and creditors who are not secure by liens. Here, however, there is not a surplus but a deficiency.

"That the lien creditors have a right, *pari passu*, with the other creditors to come on the personal fund for a pro rata share, can scarcely be disputed. A mortgage is but a collateral security for the debt of the mortgagor on the original contract. The mortgagee is entitled to be paid out of the personal fund; Ram. on Assets and Debts, 356. And so of judgments; which, although they merge all minor securities, work no dissolution of the debt as a personal obligation. 'The debt is the same though the old evidence of it melts into the new one; the creditor, in obtaining a judgment, merely gets a higher security, without having an indivisible debt of different degrees.' 3 Watts & Serg. 278. And besides, in executing his judgment, he is forced by law upon the personal property of his debtor for satisfaction, before he can call on his real estate. The assignor is therefore still a debtor on the original contract, as well to his lien creditors as to other claimants; and it is in reference to the original contract that creditors, who are secured by liens, are, notwithstanding, entitled to be paid out of the personal fund, as far as it reaches in an apportionment. The assignee, moreover, having placed in his hands a personal fund sufficient, as it might turn out in some instances, to satisfy all the debts, would have to pay them all out of that fund without touching the land; and the 30th section of the act of 14th June, 1836, giving power to courts to compel conveyances by trustees, where the trust has been executed or

Digitized by Google

has expired, is a provision that shows such instances to have been contemplated by the legislature as sufficiently probable to call for its enactment. Is not, then, the question under consideration to be determined by the character which is impressed on real and personal estate by the common law, as modified in this state by statute, in connection with the order of appropriation to which they are relatively subjected when it becomes necessary to devote them to the payment of debts according to law? If this be so, the solution is an easy one; for the common law, not regarding real estate as a fund for the payment of debts, except the present profits, makes satisfaction of the creditor's demand out of the personal property alone. This was changed, it is true, by the early legislation, as by the articles agreed upon among the adventurers in England, and by the statute of 1682; but the act of 1700 restored the common law, so far, at least, as to postpone all attack on the realty, until it was shown by the return of a judicial writ, that the debtor's personal property was not enough to pay his debts on record. And, as if this feudal protection of land from sale had not yet been sufficiently reclaimed, the act of 1705 was passed, requiring first an appropriation of the personalty; next, the profits of the realty if in seven years they would pay the debts; and last of all the land itself. The land was not to be brought under the hammer until both the other resources had been shown to be inadequate. Except where land is specifically pledged, as by mortgage or mechanics' lien, such is now the law, and, it may be added, our settled policy. The conclusion is, that personal property is at law the primary fund for the payment of debts, and must in the first instance be appropriated to their payment, whether satisfaction of them be sought through the instrumentality of an execution, or 'the debtor's instrument for satisfaction,' as the Chief Justice calls the assignee, in 7 Watts & Serg. 375. It is the primary fund for this purpose both at law and in equity, 2 Sm. Chan. Prac. 252, 253; and Kent in his 4 Com. 420, says this is the general rule of the English and American law, even in payment of mortgages, which are merely collateral security for the personal obligation. The reason of the rule is given by Lord Eldon in 7 Ves. 334, viz.: 'the principle upon which the personal estate is first liable in general cases is, that the contract, primarily, is a personal contract, the personal estate receiving the benefit; and being primarily a personal contract, the land is bound only in aid of the personal obligation to fulfil the personal contract.' The exception is a class of cases in which the owner of land has not contracted the debt which the encumbrance on it was given to secure, nor made the debt his own by some decisive act; 9 Serg. & Rawle, 73; in such predicament the land is made to bear its own burden. In a case like

Digitized by Google

this, therefore, in which the assignor imposes no terms, prefers no creditors, expresses no special intent, but hands over an insufficient real and personal estate for distribution according to law, the court, it would seem, must base its orders and decrees on the principles stated, and consequently distribute the fund arising from personal effects pro rata among all the creditors, and thus ease the land pro tanto of its burden, whether the claims be secured by liens on the realty or not, no execution having been issued against the personal property. And this conclusion is fortified by the case of Adams *v.* Humes, 9 Watts, 305, which rules on authority, as well as reason, that sales by assignees are not of the interest of the assignor in the land, but his title as it is, encumbered or not as the case may be; that even to sales in bankruptcy, where the vendor seems to be the implement of the law much more than assignees in this state, the maxim of caveat emptor does not apply. It is said in that case, 'if the title is encumbered or defective, it is easy to offer it for what it will fetch as it stands,' and that 'every thing should be avoided in such sales which might lead to misconception.' The case finally decides that if the land be sold out and out as free from encumbrance, any charge upon it must be deducted from the price. How is the assignee to conduct a sale upon such principles, if the personal fund be not first distributed; for in no other way can the clear amount of liens on the lands be ascertained. On the other hand, each lien, having received its pro rata share out of the personal property, will be reduced to a certain amount by the mode of distribution indicated, and both assignees and bidders can act in reference to the sale, unembarrassed by any thing that may lead to misconception.

"To these considerations may be added another, arising from the right of the assignees, by the 29th section of the act of 1836, to commissions out of the effects in their hands. Two and a half per cent. for receipts and disbursements, and a just allowance for trouble besides, are said to be a proper allowance as a uniform measure; 4 Whart. Rep. 104. A sale of real estate brings the proceeds into their account as effects in hand, and it is easy to see a strong temptation to make such sale, although not necessary, it may be, as to much or some of the assignor's land. The case in 7 Watts, 71, is an example of a surplus remaining in the hands of assignees, large enough to have saved a comfortable home for the family. A panic in their affairs, or other cause, has hurried men to the determination of making an assignment; they made it, and a surplus was left for them, or they were dissuaded by a professional friend and surmounted their difficulties. In cases like these, the rule is a wholesome one which prevents a premature or unnecessary sale of the real estate, besides being one of benignity. And

Digitized by Google

the rule is not less so, which restrains the assignee from swelling his commission, and thus reducing the surplus, by selling more of the land than is needed to pay the debts and reasonable expenses, where a surplus may result, or reducing the fund for the creditors where a deficiency is apprehended. In this case, the sale was made with the concurrence of the encumbrancers; the assignees showed a commendable zeal for the interest of the creditors, and enlarged the fund by judicious management; and for that reason commission is allowed them on the whole amount charged in their account. But the case itself is an example of what facility there is of abusing the trust in this particular, if the rule insisted on for distribution be not applied, under the chancery jurisdiction to control trustees, which is given to the courts.

"The court therefore decrees that the auditor's report be re-committed to the auditor, with instructions,

"1. To deduct from personal fund five per. cent. commissions for assignees.

"2. Costs and expenses on personal property and one half expenses of court costs.

"3. One half auditor's fees.

"4. Taxes on real and personal property.

"Then distribute personal fund remaining, among all the creditors, both such as are secured by liens, and other securities, pro rata.

As to Real Estate,

"1. Deduct from proceeds of sale $800 commissions.

"2. One half auditor's fees, expenses and costs.

"3. Then distribute according to priority of the several liens.

By the court."

The general creditors and the assignees appealed.

Mulvany, for the general creditors, appellants.—The lien creditors were precluded, by their agreement, from having any benefit out of the personal estate. But the court considered the whole constituted but one fund, and that all were equally entitled; the lien creditors retaining their preference on the proceeds of the real estate.

We contend we were injured by that agreement to the extent of the increased expenses incurred by it. The commissions claimed were $1100; and if the sheriff had sold, it would not have exceeded $300. Then there was the auditor's and counsel's fees, and the consequence is, these should be deducted from the amount they would be entitled to receive, not from our fund, for they were bound to go on and sell the land before they came on the personal estate, which was our sole fund. Hastings' case, 10 Watts, 304.

Digitized by Google

www.libtool.com.cn

Guillou, contra.—The auditor believed the sale by the assignees realized far more than would have been done by the sheriff—more than enough to pay all the expenses incurred, and left the personal estate free.

Boyd, for the trustees, appellants.—The assignees were entitled to two and a half per cent. commissions, 4 Whart. 104; even though they made such arrangements as did not disturb the liens; the trouble was very great, and by this means a much higher bid was obtained. This allowance is the lowest rate, as was decided in the case referred to. (The court intimated it was unnecessary to argue the point.)

Per Curiam.—Nothing is plainer than that lien creditors may have recourse to the personal estate as the primary fund for their whole demand in the first instance, and subsequently to the land for the residue. Why should they not do so here? Because it is said that the lien creditor last in the order of payment released his judgment in order to enable the trustees to make a title at private sale instead of pressing a sale by the sheriff, by which they affirm they may have been prejudiced. But as the fact is stated by the auditor, and it stands uncontradicted by evidence, this creditor did not release the judgment, but only his lien on the land, which he might well do without releasing his debt. That the sale by the trustees, instead of a sale by the sheriff, was prejudicial to the trustees, there is no proof, and the fact is not to be assumed. The opinion of the court is entirely satisfactory as to the principles involved, and it is unnecessary to add to it.

There has evidently been a clerical mistake both by the court and the auditor. The principle assumed, and it was the true one, would give the appellants $1100, yet they have a decree for no more than $800; and it is reversed so far as to correct the error.

It is ordered, therefore, that their commission be $1100 80, and that the residue of the decree be affirmed.

Digitized by Google

www.libtool.com.cn

McCormac *v.* Hancock.

An attachment in execution and scire facias having been served on the original defendant, and the garnishee; the jury should be sworn as to the garnishee alone, on the trial of the issue on the plea of nulla bona; for though both parties are required to be served, the proceedings are distinct

On such an issue, the original defendant is a competent witness for the garnishee; for they have contrary interests.

March 23.—McCormac having recovered judgment against Matheys et al., issued an attachment execution against Matheys, defendant, and Hancock as garnishee; there was a general appearance, and plea of nulla bona by the garnishee; against whom alone, on the trial, the jury were sworn. Plaintiff proved an assignment to the garnishee, containing a preference for Matheys, and a balance due to him in the hands of the garnishee under the assignment, according to the report of the auditors. Defendant proved by Matheys, under objection, that the assignor had paid Matheys $400 for this claim, and received his order for it before the attachment was levied. Plaintiff also showed the bankruptcy of the assignor subsequent to the purchase of the claim, in which no notice was taken of his right under the former assignment. The swearing the jury, the admission of the witness and the order of Matheys for the fund, constituted the exceptions.

Mulvany and *Raybold*, for plaintiff.—The original defendant is a party; he is made so by the act of 1836, sect. 36, directing service to be on him, and that is essential, Corbin *v.* Bollman, 4 Watts & Serg. 342; Ogilby *v.* Gill, 7 Watts & Serg. 444; the act directs it to be proceeded in as in foreign attachment. [*Curiam.*—This is not a suit; it is a judicial process. If he appears, the proceedings must be kept separate; the defendant can plead payment only, and the garnishee nulla bona; their interests are contrary.] Could the garnishee be a witness for defendant? [*Curiam.*—Certainly.] But they are the parties named on the record, and then the general rule of exclusion applies. It was said a garnishee could not be a witness in Wood *v.* Severn, 5 Serg. & Rawle, 446. [*Curiam.*—That was in a proceeding against him.] But here was a release, and after that it was a new acquisition. [*Curiam.*—He is not supporting the existence of his claim, but simply that another is entitled to it.]

The court declined hearing the other side.

March 31. Rogers, J.—We are of opinion that the court was right in directing the jury to be sworn, between the plaintiffs in the execution and the assignees of Isaac H. Miller, who were summoned

Digitized by Google

as garnishees. The only issue was, on the plea of nulla bona, to determine whether, at the time of the attachment, or any time since, they, or either of them, had in their hands or possession any money, stocks, or effects belonging to the defendants, or either of them, and what was the amount or value thereof. Although the 36th section of the act of the 16th June, 1836, directs, that it shall be the duty of the officer charged with the execution of the writ of attachment, to serve a copy of the writ upon the defendant, in the judgment, it does not follow, as is contended, that the jury shall be sworn as to him in the suit against the garnishees. This would serve no good purpose; for here the debt has been already ascertained, and the judgment rendered, on which the execution is issued. Besides, his interest is adverse to the plaintiff, and also to the garnishees; it is for his benefit to diminish the one and increase the other. To refer the cause to the same jury, would answer no other purpose than to embarrass the proceedings. If the defendant has any defence, he may appear, plead payment, and have the cause tried. But this is not a prerequisite to the trial between the plaintiff and garnishees, as has been ruled in a case not yet reported. (His honour here stated the facts of the case.) The defendants object to the competency of Mathews, because he was one of the defendants in the original judgment, served as a party, and was interested. I cannot see the force of the objection. It is true, he was one of the defendants in the original judgment, and was served with a copy of the writ according to the requirement of the act of the 16th June, 1836; but his interest is adverse to the garnishees. He is swearing against his own interest, because the greater the amount of the fund in the hands of the garnishees belonging to him, the more of his debt will be paid, and to that extent will his liability be lessened. The objection is founded in a fallacy, for, as has been already shown, he is not a party to the proceeding against the garnishee; at least, it would not be proper to include him in the trial against them, his interest being in hostility to theirs. The report of the auditor assigns the dividend to her; but that was a mistake which certainly cannot conclude the parties in interest, who are at liberty to show that it belonged to another. It may affect his credit, and as such may be used before the jury, but cannot destroy his competency. The order was properly admitted, because it strengthens the testimony of Matheys. It is proper to remark, in conclusion, that it is of no sort of consequence whether the order to Miller enure to his benefit or to the benefit of his creditors. All that we can inquire into, in this suit, is, whether Matheys was entitled to the dividend under the assignment; if he was not, which the jury have found, there is an end of this case. Judgment affirmed.

Digitized by Google

www.libtool.com.cn

VANARTSDALEN *v.* VANARTSDALEN.

Devise that executors should have the management, control, and leasing of a farm, and that testator's daughter should be permitted to remain thereon during her life at a moderate rent, in the discretion of executors; after the death of the daughter, the land was given to her children; at the death of the daughter, the estate vests in the children, who may maintain ejectment in their own name.

ERROR to the Common Pleas of Bucks county.

March 23.—This was an ejectment by infants by their guardian, for land devised to the children (plaintiffs) of testator's daughter after her decease, subject to $2000, with interest from his death. Testator directed that his daughter should be permitted to remain thereon during her life at a moderate rent, but if she became infirm, his executors were to deduct thereout as much as they deemed necessary for her support; any rent received was to go to the payment of the charge. Residue to his other children. The executors were appointed guardians, and were directed to have the care, superintendence, and renting of the farm. The daughter died, and this suit was brought against her husband. The court were of opinion the plaintiff could not sue as guardian.

Fox, for plaintiffs.—The executors clearly were only to have the care during the daughter's life; after that it immediately vested in the children. (The court declined hearing further argument.)

No one appeared for defendant.

April 11. KENNEDY, J.—The only question in this case is, whether the plaintiffs, the children of Jane Eliza Vanartsdalen, became entitled, immediately upon the death of their mother, to the possession of the land in question, under the will of their grandfather, Adrian Cornell. [His honour stated the case.] The testator, though he speaks of his executors in the plural number, appointed David Cornell alone the executor of his will, by whom this action is brought as the guardian of the children. The husband of the daughter, who is the father of the children, the plaintiffs, was living at the time of making the will, and is still living, and is the defendant in this action. The defence set up is, that the executor, by the terms of the will, is entitled to the possession of the land, so long, at least, as the children remain in their minority, and, therefore, this ejectment cannot be maintained by them; but if by any person, it must be by and in the name of the executor. It would seem from the will, as if the testator intended that his executor or executors should have the charge of the

Digitized by Google

land, and the leasing of it to his daughter, the mother of the plaintiffs, at such moderate rent as might be agreed on, or to strangers, as it may well be implied, with her consent; but it does not appear that this power was to be exercised quasi executor, longer than during the life of the mother of the plaintiffs, when, by the explicit terms of the will, it passed to the plaintiffs as their freehold, at least accompanied with, or right to the possession of course, as it does not seem to be disposed of otherwise. Besides, for all that was to be done after the death of the mother, there was nothing which required the interposition of the executor as such; as the guardian of the estate given to the plaintiffs, he could take care of and manage it for their benefit and advantage. It is fair also to presume, that the executor was appointed by the testator, guardian for the plaintiffs for this purpose; because the testator could not supersede the authority of their father over their persons as guardian, and consequently, the testator could only have intended that the executor should be guardian of the plaintiffs in regard to the estate given them by the will. This being, as we conceive, the design and intention of the testator, we think that the action is rightly brought in the names of the children by the executor as their guardian, and that the court ought to have instructed the jury to this effect, and not as they did, that David Cornell could not recover possession of the land, as *guardian;* because, from the terms of the will, it would seem that the testator intended the executor should have the care of it.

The judgment is therefore reversed, and a venire de novo awarded.

ESHBACH v. ZIMMERMAN.

A. conveyed to B., by a deed absolute on its face; B. entered; subsequently a creditor of A. purchased his estate at sheriff's sale, at which B. gave notice that A.'s title was vested in him by the deed.

On ejectment, the purchaser proved the conveyance was for the purpose of enabling B. to raise money on his bond and mortgage, which was done: *Held*, the proceeding was in the nature of a bill to redeem, hence a tender previous to suit was unnecessary. 2. The notice of claim to the absolute title precluded B. setting up any other title against the purchaser.

March 24.—The assignees of A. conveyed to Brower, in fee, April 1, 1843. Zimmerman purchased at sheriff's sale, under a judgment, in January, 1844, against Brower, and on this title brought ejectment. The defendant showed a deed, in fee, from Brower, dated April 1,

Digitized by Google

1843. To avoid this, plaintiff showed evidence, which the jury found to be the fact, that this conveyance was merely to enable him to raise money, which was done on a mortgage by Eshbach, the defendant, to Stetler. Brower and Eshbach were in possession as partners for about a month, from Sept. 1843, when Brower left, and Eshbach continued in exclusive possession. There was some evidence of a parol agreement of sale by Brower to Eshbach, at that time. At the sheriff's sale Eshbach gave notice that he claimed under the deed of 1843, and that Brower's title was entirely vested in him, and he would contest it in a court of law. The amount of the mortgage to Stetler was paid into court conditionally on recovery. The court said that the purchaser stood in the shoes of Brower, and if he was but mortgagor, must make a tender before suit brought, and bring the money into court, but that the notice was a waiver of the right of a previous tender, if sufficient was now paid in. The parol contract was avoided by the statute of frauds, there being no possession taken under it, and the notice waived that also.

Mulvany, for plaintiff.—It is proper to state Eshbach always claimed, and considered himself absolutely entitled, but that is decided against us by the jury. The only question here is whether he is entitled to a previous tender, which is always required on an ejectment by one having an equitable title against the legal title; Gore *v.* Kinney, 10 Watts, 140; Thomas *v.* Reigart, 9 Serg. & Rawle, 92; Hart *v.* Porter, 5 Serg. & Rawle, 201; 6 Watts, 539. Is he then estopped by the notice from asserting his other titles? It was without consideration; and in Miller *v.* Baker, 1 Metc. 27; Swan *v.* Duery, 22 Pick. 485, it was said not to estop him on that account. Moreover, the waiver must be by express words; 1 Selw. N. P. 153, n. 83; 4 Esp. N. P. 68; Frick *v.* Brook, Bing. N. S. 253. [*Gibson*, C. J.—It is like a denial of landlord's title, which is a waiver of notice.] But here he honestly acted, according to what he believed his rights, and silence merely will not estop him, unless it amount to fraud; Robinson *v.* Justice, 2 Penna. Rep. 22. [*Chief Justice.*—There he did no act.] But no injury was done to the purchaser, and that is essential to work an estoppel by declarations; Well *v.* Hathaway, 8 Wend. 40; 5 Wend. 572.

Boyd and *Freedley*, contrà.—The party is bound by his representations, where the other party relies on them; Foulk *v.* Beidleman, 6 Watts, 339; McDonald *v.* Lindle, 3 Rawle, 446; and here it might, on the authority of the dictum in 7 Watts & Serg. 339, 340, be said, the claim, as absolute owner where the instrument is but a mortgage,

www.hbtool.com.cn

Digitized by Google

amounts to fraud. But here Eshbach had no interest; he was but trustee for the purpose of mortgaging; subject to that mortgage the whole estate remained in Brower, and the furthest the court should have gone would have been to direct a conditional verdict, which would secure him from any personal liability on the authority of Peebles *v.* Reading, 8 Serg. & Rawle, 434, but we do not quarrel with this part of the charge.

April 4. ROGERS, J.—If the evidence is believed, and the jury have found it to be true, this is a case between cestui que trust and trustee, and not between mortgagor and mortgagee. But whether it be the one or the other, (I mean after the day the money is payable, the mortgagee being in possession,) the ejectment is in the nature of a bill in chancery, and of course governed by principles of equity. It is not, therefore, a case which requires a tender before the commencement of the suit, as is ruled in Derling *v.* Williamson, 9 Watts, 318, and in other cases, for a court of chancery always considers the condition of the parties at the time of the decree, and not at the commencement of the suit. The plaintiff, it appears, made no tender before suit brought, but, what answers the purpose equally as well, brought the money due on the mortgage into court for the use of the mortgagor. This view of the case renders it unnecessary to consider whether the defendant, by the notice at the sheriff's sale, dispensed with a tender. That the general principles asserted by the court, on this point, are sound, cannot be controverted, whatever doubts may exist as to their application to the facts of this case.

The counsel for the plaintiff in error contends, that there was error in ruling that the defendant was precluded, by the notice referred to, from setting up a title by parol contract with Brower; and in charging the jury that no such change of possession was proved in the case as would entitle the defendant to a verdict, even if a parol contract was proved; and in withdrawing the facts in relation thereto from the jury.

I will remark, in the first place, that whenever a person endeavours to enforce a parol contract for the sale of land, and fails in any particular to give evidence of such facts as are required to take the case out of the statute of frauds, it is the duty of the court so to instruct the jury, in the most plain, specific, and positive terms. This is all the learned judge has done, and it would have been error to have done otherwise. The court instructed the jury that there must be a contract for the sale of the property distinctly proved, such as may be executed on comprehensible terms, and it must be accompanied by possession given in pursuance of the contract, and so clearly referable

Digitized by Google

www.lbtool.com.cn

to it, as that the transmutation cannot be accounted for on other grounds. Like livery of seisin, the change of possession must be a visible, notorious act, consequent on the contract. Such a change of possession the court says is not proved, and to this we fully agree; and moreover, they might have added, without insisting on proof of all the requisites so accurately enumerated, that there was no evidence of the terms and conditions of the alleged sale. If purchased by Eshbach, what was the price, when and how was the purchase money to be paid, the possession to be delivered, the title to be made? Of these indispensable particulars there is not a particle of proof. On that ground alone, if no other, the court was bound to instruct the jury the defence had totally failed. But the court assumes another position. In the notice which the defendant gave at the sheriff's sale, he claims title to the property solely under the deed of the 1st April, 1842, from Brower and wife. He makes no mention of any other claim of title on his part, but on that, and no other, he invites the purchaser into a contest for the property. He is now estopped from setting up another title against the plaintiff, even if he could prove another valid in law under different circumstances. We see no objection to this part of the charge, under the facts in evidence, for it is clear, that if a parol contract was entered into between these parties after the date of the deed, it was known to Eshbach as well as to Brower, and that it is totally inconsistent and distinct from the title referred to in the notice. It would lead to a fraud on the purchaser at sheriff's sale, which might be designedly perpetrated, if the owner is at liberty, with perfect impunity, to refer in his notice to a defective title, known to be such, and at the same time conceal a title valid in law. A purchaser at sheriff's sale, it is true, in ordinary cases, takes the risk of the title, but this is where no default is imputable to the real owner; but when the owner of the estate induces another to purchase a defective title, knowing it to be defective, justice requires that he should be postponed. In that respect there is no difference between a judicial and a private sale. The rule is adopted, and is intended to prevent fraud. Had Eshbach informed bidders that he not only claimed under the deed, but by virtue of a subsequent parol sale, it would have put purchasers on inquiry, and possibly may have deterred the plaintiff from purchasing the property. There is no evidence which even tends to show that the vendee of the sheriff had any knowledge of any other title, except the one referred to in the notice, a title which he was advised was worthless. Only at the trial was he informed that the defendant also claimed title under an alleged parol contract. It is a surprise on the sheriff's vendee, who certainly had a right to suppose that he would not give

Digitized by Google

notice of a worthless title, withholding all reference to a good or valid title. He has a right to take him at his word, and try conclusions with him on the title, on which he alone relied. Had the defendant given no notice whatever, or had he been ignorant of his title at the time, it would present a different question, but here it cannot admit of doubt, that he knew of the parol sale, if any was made, and consequently was bound upon every principle of honesty and faith to refer to it in the notice. His assertion as to one, and silence as to the other, was so treacherously expressed, as to estop him from insisting on it, to the prejudice of the title of the sheriff's vendee. In analogy to this, and on the principle adverted to, the case of Woods *v.* Farmer, 7 Penna. 384, is ruled. In that case it was decided that the possession of land is notice of the possessor's title, but the registry by him of a particular title would restrict the generality of notice from possession. By exhibiting a conveyance, to which, by his own showing, his possession may be referred, he does what he can to turn a purchaser from the direct path of inquiry. The party for whose protection registration is intended, would be more misled by the use of it than if the occupant had pointed to his possession alone, as that would have led him to a particular examination of the foundation; and when the occupant, therefore, points the attention of the public to a particular conveyance by the register, he abandons every other index. So in the case in hand, by directing the attention of purchasers to the title under the deed from Brower and wife, he abandons every other title which he may have to the land. It behoves the court, in all cases, anxiously to uphold the principles of good faith, and to set their faces against the introduction of a rule which may lead to trick, artifice, and fraud.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Farmers' Bank of Bucks Co. *v.* McKee.

2 318
168 132

In trover, the plaintiff must show that he is entitled to the property by a complete performance of his contract of purchase.

A. agreed to employ B. to carry coal in boats, which were delivered to him; certain portions of the freight were to be retained until they equalled the value of the boats, when they were to be transferred to B. In trover against the purchaser of A.'s interest, B. is not entitled to recover to the extent of the payments made, if they are less than the price. *Aliter*—Had the price been paid according to the agreement, or in any other way.

A creditor of the vendor of a chattel, of which it was uncertain that the price was fully paid, levied and sold; profits which might have been made by the use of the chattel, or loss from incapacity to employ men and horses, by reason of its detention, are speculative, and cannot be estimated, there being no other circumstances showing oppression, or calling for vindictive damages.

A book of entries, which would be evidence against the owner of a chattel, will also be evidence against a purchaser of his right at sheriff's sale.

To make the agreement by the president of a private corporation evidence, it should be shown to be within the scope of his authority.

Error to the Common Pleas of Bucks county.

McKee brought trover for seven canal boats. He proved they were sold by the sheriff on the 1st October, 1842, as the property of the Sugar-Loaf Coal Company, and purchased, and taken possession of by Taylor, as the agent of the bank; notice of title having been given at the sale. He then proved he had purchased from the company, and that their agent had agreed to credit the debt due him on his account for the boats.

Defendants having shown their title under the execution, proved the articles between the company and McKee, dated August 5th, 1841, by which the former agreed to employ him to boat coal during the season at certain rates; by the second clause it was agreed, "That $10 of the freight money of each trip should be retained by the company; and when that amount should equal the cost of the boats, viz., $375 each, with interest, then they should be transferred to him." One-tenth of the freight money was also to be left with the company until January 1st, to be forfeited to the use of the company, in case he failed in his agreement. In case he was detained at the shipping port, waiting for loading, or at Bristol or Philadelphia, more than three days, except Sundays; the Company was to pay $2 50 per diem demurrage, to be estimated from the time of reporting at the respective agencies. This was signed by Newbold as president, and was under the seal of the company.

They then proved by Taylor, that after the sale plaintiff called on him; that witness said he did not acknowledge any claim to the boats

Digitized by Google

by McKee; various offers were made; finally McKee acceded to an offer, which was to deliver him the boats on the terms he had agreed with the company, giving him the credits he had on their books, and $25 additional; he made no demand for other debts due him by the company; nor did he use the word demurrage; after this no other demand was made before suit. Plaintiff then proved articles signed by himself and the company's agent, dated August 11th, 1841; these were identical with that of August 5th, excepting that one-fifth of the freight money was to be left subject to forfeiture; and in addition, there were the names of the seven boats annexed, with his own opposite, marked as owner. He then proved very great delays had taken place in consequence of the company not furnishing the necessary money; that some boats made but one trip, &c.; and that they often lay ten or fifteen days for want of money to pay the tolls. A witness, agent of the company, then produced a book, showing the trips, time of arrival, &c., of the boats; he made the entries from letters from the agent at the place of loading, and the manifests brought down by the boatmen, delivered to him by the agent, and the toll receipts on the canal. It was objected to as not the best evidence, and that the documents from which they were made should have been produced. The court said it was in accordance with the trade and business, and therefore primary evidence. This was the 2d exception, the 1st relied on here. He then stated from the book the number of trips, and the credits for freight. It was a little over $1000; he said there was no demurrage in 1841.

Plaintiff then proved there was a verbal agreement between himself and Newbold the president, in the spring of 1842, in consequence of the company being unable to pay the freight; that that and the demurrage at that time or hereafter becoming due, should go off the price of the boats. This offer was objected to, because Newbold had not authority to make it, and because it varied the written contract, and constitutes the 3d exception. The demurrage never was settled by the company.

His honour, Burnside, P. J., charged the jury that this was not a lease, but a conditional sale, to be transferred when the payments were made, and not fraudulent, as possession was delivered. Unless the price was fully paid, the creditors of the company had a right to levy and sell their interest to which the purchaser succeeded; that the purchase and refusal to recognise any title was evidence of a conversion.

As to the demurrage, after cautioning them as to the evidence of an agreement to credit it on the boat, he told them plaintiff was entitled to recover to the extent he had paid on the boat. This was not a case

Digitized by Google

for vindictive damages; but their amount was for the jury; an injury beyond the mere value of the property being frequently a fair subject of compensation. The verdict was for $3050.

The exceptions to the charge were as to the evidence of conversion. 2d. In not charging that no title passed till payment and transfer, according to the agreements. 3d. In charging, recovery could be had to the extent of the payments. 4th. As to their right to give damages beyond the value of the property.

Ross and *Fox*, for plaintiff in error.—By the contract, the property remained in the company until the payments were completed by the $10 per trip retained, and a transfer made; the object was to secure the service of the boats and men for two years. The case was in effect decided by Lehigh *v.* Field, 8 Watts & Serg. 232, where, under a similar agreement, it is said no title passed. But this action is founded on property, the full and perfect right to which is necessary to its maintenance, 2 Sel. N. P. 520; 13 East, 614, 522; 2 Maul. & Sel. 397, (Busk *v.* Davis); M'Donald *v.* Hewit, 15 Johns. 349. If any act remains to be done, trover will not lie, was said in this case, and Rapeljie *v.* Smith, 6 Cowen, 250; 2 Bl. Com. 448; Ross on Vend. 28; Shipley *v.* Davis, 5 Taunt. 621. Here the company had the right to declare all the payments forfeited, and the condition of a transfer shows the title was intended to remain. Nor could he sue thus for a partial right; if he was entitled to any part, it was to the whole, 1 T. R. 658; 1 East, 363. The question of demurrage had not been settled by the company; nor had the president a right to allow credit for another debt; it was beyond his authority, Ridgway *v.* Farmers' Bank, 12 Serg. & Rawle, 263; 1 Rawle, 230. The evidence showed, after all the evidence of conversion which was relied on, that plaintiff assented to the retention of the boat, and brought suit without further demand. The rule as to damages is found in Taylor *v.* Morgan, 3 Watts, 333; and the court misled the jury. The book was but a copy; and corporation books are not evidence against strangers, 12 Serg. & Rawle, 49; Cooper *v.* Maule, 4 Yeates, 34. [*Rogers*, J.—Are you not in the situation of the corporation?]

Gibbons, contrà.—There is a marked difference between the articles in this case and in that in 8 Watts & Serg. 232; there is no right reserved to forfeit the $10 paid on account of the purchase money, but merely the per centage on the freight. Had we entirely paid for the boats, it clearly would not be considered executory in favour of the party in default for not transferring; the only question then is, whether we had paid; and the jury found we had; was the evidence proper? It was

Digitized by Google

not to alter a written contract, but to prove another, or merely as notice of our intent to do what the company could not have prevented—give notice of our design to credit our purchase account with other debts due us by the same parties, under the same agreement, Heines v. Barnitz, 8 Watts, 39; and for this the evidence was competent, Bremer v. Howson, 11 Serg. & Rawle, 352. That we had clear right, having done all on our part, and having possession also, and nothing but a formal transfer being required, is shown in Scott v. Wells, 6 Watts & Serg. 366.

March 31. SERGEANT, J.—In the case of The Lehigh Company v. Field, 8 Watts & Serg. 232, the question arose upon a contract made by that company for the boating of coal, similar in substance to the present: and it w s there held that the agreement was only executory, that the master had possession of the boat but as servant of the company, the property remaining in them until the price was paid. This being the law, it is clear that in the present instance the boat remained the property of the Sugar-Loaf Company, and the party purchasing from them, unless by the retention of freight, demurrage, or otherwise, the price agreed upon by the contract had been paid. The plaintiff alleges that this was the case: the defendants deny it, and the court in one part of their charge leave this to the jury. But in a subsequent part of the charge the court say the plaintiff had rights to the extent he had paid, and could recover in this action to the extent of his payments, in pursuance of his contract. In this, we think there was error. The action was trover and conversion, and in that action it is essential for the plaintiff to show that the right of property was in him at the commencement of the action: and if he had not then paid up the whole purchase money, he had no right of property in the boat, nor was the company bound to transfer it to him. His remedy would be against the Sugar-Loaf Company, for failure on their contract, if that had been the fact.

The case does not resemble those to which the court below compared it, of a part owner suing in trover, or a tenant in common, for it could not be pretended that under the contract the plaintiff was to be part owner or tenant in common with the company, either in proportion to the amount of his payments, or otherwise. Under the agreement the whole property was to remain in the company till he paid up the price, and when that was done, the whole property in the boats was to be transferred to the plaintiff; and whether the price was paid was a fact to be decided by the evidence of the amount of freight retained, and of the alleged agreement that the demurrage and other

Digitized by Google

freight should be credited to the plaintiff, as part payment, and what their amount was. If these equalled the price of the boat, the credit should be for the value of the boat and interest. This would cover, in a case like the present, all the damages the plaintiff is entitled to. There appears to be nothing in the conduct of the defendant vindictive or oppressive, and the jury would have no right to give damages of a speculative character, for interruption of business, loss of profits, or the like, under the circumstances of this case and in this kind of action.

The bills of exception relied on are the second and third. The second bill was to entries in a book kept by Russel West, of the loading of boats at Mauch-Chunk, from letters by the agent of the Sugar-Loaf Company, who attended to the loading, manifests brought down by the boatmen, and toll receipts from the two canals. This was objected to by the defendant, because not the best evidence, but the documents themselves should be produced. The court admitted it as in accordance with trade and business. If, as it seems, the witness was agent of the Sugar-Loaf Company, the books would be evidence against them, and as the defendants claimed under them, it would also on that ground be evidence against the defendants.

The third bill was to the evidence of Robert McKee, of the agreement of Newbold, the president of the Sugar-Loaf Company, with the plaintiff, as to the demurrage and freight, made in the spring of 1842. Whether the evidence offered was admisssible or not, would depend upon whether Mr. Newbold was acting within the scope of his authority. The charter and regulations of the company are not shown, nor is there any evidence as to the duty or power of the president of a coal company, or what authority he usually exercised. We think some evidence on this subject ought to be given to lay a ground for admitting his acts or declarations as obligatory on the company: and as this cause must go back for another trial, there may be something shown on the subject.

Judgment reversed, and a venire facias de novo awarded.

Digitized by Google

www.libtool.com.cn

PHILLIPS, administrator of RAMBO, v. TAPPER, administrator of SMITH.

1. Where there was a contract for the purchase of a boat, to be paid for in freights, entries made by the purchaser of the delivery of goods to strangers, coupled with proof that during the time when the entries were made the purchaser carried for no one but the vendor, are not evidence; no charge being made against the vendor, and entries of the party not being generally admissible to prove performance of a special contract.
2. A copy of an account taken from a book, from which a settlement had been made, was delivered to the party, and retained five months without objection; a copy of that copy, and the book from which it was taken, showing the same balance, are evidence.
3. The owner of a canal boat is liable for provisions and necessaries furnished and charged to the captain of the boat.

March 25.—THIS was an action of trover for one-half of the canal boat Sea Gull, agreed to be tried on its merits, without regard to form. It appeared Smith, the plaintiff's intestate, bought the boat, the price to be paid by a note of a third person, and by freights. Plaintiff then proved a book was kept in the boat, in which were certain entries; during the time these were made, Smith carried for no one but defendant; that the entries were made by Smith, but when, or what they were, witness could not state. He offered to read the entries, which were in this form:

"Sept. 27, To William McDowell, 2100, and received in cash, $5 00.
April 12, Landed 1782 bushels of lime," &c. &c.

But there was no charge against defendant. The defendant objected, but the court admitted it.

Defendant proved a settlement of accounts, by the agent of defendant, with Smith, and the delivery of a copy about five months before his death. He then offered to read the book from which the account was taken, and also a copy of the account furnished to plaintiffs. The court rejected them both. He then proved the payment of an account charged thus:

"John Smith, captain of the boat Sea Gull, Dr. to Wm. McF., to sundries and provisions."

The court instructed the jury, the payment was voluntary, and could not be taken into the account between the parties.

Mulvany, for plaintiff.—The book kept by himself was to prove performance of his contract, and is not evidence; 1 Nev. & Man. 131; besides, it does not purport to charge the defendant; Alexander v. Hoffman, 5 Watts & Serg. 384. It is clear we were liable for the provisions furnished our agent, and the payment therefore was not

Digitized by Google

voluntary. The account was also evidence, as an account stated, by reason that there was no objection.

www.libtool.com.cn

Boyd, contrà.—The books were merely used to show the amount; we proved we carried the goods for defendant alone; for this they are evidence; Linn *v.* Naglee, 4 Whart. 97; 1 Watts & Serg. 356; so in 5 Serg. & Rawle, 410, though there be no charge against the party. Their regularity was left to the jury. We are not liable for the captain's private debts.

March 31. SERGEANT, J.—The first bill of exceptions in this case is to the admission in evidence, on the part of the plaintiff, of a book containing entries proved to be in the handwriting of John Messer Smith, and in his possession at his decease. It seems that although there was originally an action of trover and conversion brought by Messer Smith, for a moiety of the boat Sea Gull, yet it was afterwards agreed that the cause should be tried on its merits, without regard to form: that is to say, I presume, that the plaintiff should recover whatever balance should appear to be due to him from the defendant. The plaintiff alleged the defendant had sold him half the boat, to be paid for partly in a note of other persons, handed over to the defendant, and partly by carrying lime on defendant's account during the years 1842 and 1843, for the freight of which the plaintiff was to have credit. It was to this part of the case these entries are supposed to relate, and the book would seem to have been offered to show the carrying of the lime, and the amounts and times. But on examining these entries, they do not appear to relate to the matter in contest. There is no charge in them against the defendant Rambo, or, indeed, against any one. They are mostly memoranda of lime carried for divers persons, and of the receipt of cash for so doing. Thus the first entries, as, "Sept. 27, To Wm. McDowell, 2100, and received in cash $5. Oct. 8, Landed for Polk, 1366 bushels, and received in cash 3½ per 4681," and so on; so that it would seem the lime was carried on account of various persons, on freight, and the cash received, and there is no charge of an outstanding claim against any one. Besides which, book entries are not ordinarily admissible to prove a special contract, or the performance of it. We therefore think the court below erred in receiving this evidence.

The second and third bills of exceptions are to the rejection of the book kept by Eder, and of the statement of the account between Rambo and Messer Smith, copied from it. The book itself would not be evidence of cash or credit transactions, if kept by one party only, or his agent. It is asserted that Eder was the agent of both parties,

Digitized by Google

but the evidence does not show this. We think, however, the account contained in the book, according to which Eder says he made a settlement with Messer Smith, showing the same balance, and of which he gave Messer Smith a copy, was evidence to go to the jury. Even an account current furnished by one party to the other, if not objected to in a reasonable time, becomes a settled account; Bainbridge *v.* Wilcocks, Bald. 536; Jones *v.* Dunn, 4 Watts & Serg. 109. Without saying, in the case before us, that it was a settled account, either by the want of objection, or by the evidence of settlement, it was certainly, we think, primâ facie evidence to go to the jury to show the items of dealings between these parties, and the balance.

5th error.—In the matter assigned as error in the charge of the court as to the two items of provisions, and work furnished the boat, we are of opinion the court below erred in instructing the jury that the defendant paid these bills as a volunteer, and could not charge the plaintiff with them; for if they were necessaries furnished to the boat by order of the master, the owner of the boat was liable for them as well as the master; Story's Abbott on Shipping, 101; Holt on Shipping, 822; 1 Term Rep. 108; 2 Vern. 643; 2 Stra. 816; 3 Kent's Com. 133. If, therefore, Rambo was owner of the boat at the time these bills were contracted, and they were contracted by Messer Smith as the master, the defendant would be liable, and might legally pay them and charge the plaintiff in account.

The other errors are not substantiated.

Judgment reversed, and venire facias de novo awarded.

In re JOHN WILSON'S Estate.

Incidental expenses of an administration may be allowed on the settlement of a distribution account. *Aliter*, of claims for debts due from the estate.

On a distribution account, an executor allowed to retain the amount of a balance due a co-executor, to whose account, and the auditor's report thereon, exceptions were pending. So of partial payments to distributees.

Where a trust is already created by the lunatic, the committee of his person and estate has no right to the control of the property.

An expectation as devisee of one yet living may be *settled* on marriage.

Executors were declared trustees by a will; the offices being inseparable, security can only be demanded as executor, and not as trustee.

ON an appeal by Humphreys, as administrator of John Wilson, from the decree of the Orphans' Court of Montgomery, this court appointed an auditor to settle and adjust the distribution account between the executors and the parties entitled to the residue, and make distri-

Digitized by Google

bution. From the auditor's report two of the claimants appealed. The case was this: John Wilson, by his will, in 1825, gave his estate among his nephews and nieces. The share of William Wilson, one of his nephews, he gave to his executors thereinafter named, and to a majority of them, who might take on themselves the execution of his will, and to the survivor in trust, to invest and apply the income to his maintenance, with authority, at discretion, to pay him part or the whole of the principal. In 1845, William Wilson was found a lunatic, and Corson appointed committee of his person and estate. Sarah Saulneer, one of the nieces, by settlement, in contemplation of marriage, with consent of her intended husband, before 1825, conveyed all her estate, and all that she might become entitled to by devise, bequest, or descent, in trust, for her separate use, remainder to her children. She died, leaving one son. Potts was the trustee under the settlement. Anderson took out letters on her estate. George Wilson, who was a legatee and executor of his uncle John, died, and Humphreys, in right of his wife, who was a niece and executrix of John Wilson, took out letters testamentary. He also, as executor of George Wilson, filed an account of the executorship of John Wilson's estate, in 1837, showing a balance due George Wilson of $2197, from the estate of John Wilson; to this exceptions were filed, which are yet undisposed of. As executor of John Wilson he filed an account, August 18th, 1842, which was confirmed absolutely, by agreement, August 17th, 1844, showing a balance in favour of the estate of $21,030. It was with reference to the distribution of this fund that appeal was taken to this court, and sent to the auditor.

The auditor, assuming this balance as the fund, allowed Humphreys a credit for various items of expenditure, on account of the estate, in 1837, 1840, 1841, and so on, up to 1845. Deducting these from the balance of the former account, he charged interest thereon up to the time of the report. From this balance he deducted the amount appearing to be due the estate of George Wilson, on the account before stated. The residue he distributed among those entitled, giving William Wilson's share to Thomas Humphreys, as testamentary trustee, allowing a credit for $2133, for which a receipt by William Wilson, in 1836, was produced, reciting this amount was paid or accounted for to him. In support of an objection to this, it was proved that on a previous citation to Humphreys, for the purpose of showing he was not chargeable with the whole of this apparent balance, he produced certificates of bank stock and receipts. The auditor considered this immaterial, as the fund was to remain with Humphreys. The auditor gave Mrs. Saulneer's share to the trustee of her son. Humphreys, before the

www.tiptool.com.cn

Digitized by Google

auditor, stated that since the former settlement, he had received $3000, and it might be distributed here. This was objected to, on the ground that the auditors had no jurisdiction in the matter. Anderson, as administrator of Mrs. Saulneer and in his own right, and Corson, the committee of William the lunatic, excepted to the report.

Fornance and *Tilghman*, for appellants, stated there were five points raised by the exceptions. 1. The power of the auditor to allow credits under the order of the court. 2. Anderson's right as administrator of Mrs. Saulneer to receive her share. 3. The auditor's duty to ascertain the amount due to the lunatic. 4. His committee's right to such share. 5. Allowing a credit on the faith of the receipt. There had been several settlements by G. Wilson and by Humphreys, all of which were excepted to and remain undetermined. As a compromise, the account was confirmed in 1844, and we supposed nothing beyond this would be examined. Nor had the auditor a right to admit this claim by G. Wilson's estate; as to that he is a creditor, and the authority of the auditor does not extend to it, being merely to distribute an ascertained balance. And if he was right in this, the fact that exceptions were filed, and remain undecided, took away all effect from such report of auditors, whereas it was admitted as primâ facie evidence. [*Gibson*, C. J.—After such delay I think more is put on you than merely showing you filed exceptions. I do not know but it ought to be taken as conclusive, for it was your duty to press the exceptions and have them decided.] It is not pretended that he has paid G. Wilson's estate; he has not said so. Could he claim a credit, had he been a co-executor? But it is plain if he has the right now, he had it in 1842, and it must have been made before the auditor then, whose report was confirmed by consent in 1844. We desired to conform to the decisions of this court, that the accounts as to creditors and distributees should be kept separate. [*Kennedy*, J.—We have never said that payments to legatees should not be brought into a subsequent account.] But that balance was composed of payments to legatees, and the parties who received the money should be charged according to their respective receipts.

The credits allowed were also of payments made before the filing of the last account; certainly it must be supposed they were considered at that time, and allowed or rejected. They are for counsel fees, and should have been taken out of the commissions.

Humphreys was not entitled to retain as trustee for the lunatic; the trust was a personal confidence, and he is an entire stranger. Shaw *v.* McCameron, 11 Serg. & Rawle, 255.

Digitized by Google

R. Hare and *Mulvany*, for appellees.—The will directs the share of Wilson is to remain with the trustee, and the executor is created such, which virtute officii, and under the rule of this court the offices cannot be separated, Innes' est., 4 Whart. 179; Commonwealth *v.* Barnitz, 9 Watts, 253. As to Mrs. Saulneer's share, we have settled with her son, and he does not appear here. The only question is on the right of her administrator. It being a separate use for her life, her creditors have no interest in it, for she could not contract debts to charge it. Lancaster *v.* Dolan, 1 Rawle. The remainder belongs to the son at all events under the settlement.

It will be seen, the settlement recites an agreement expressly including this fund, and conveys all that was intended to be conveyed under the agreement.

April 4. GIBSON, C. J.—The objection to the allowance of credits in the distribution account, which might have been allowed in the administration account, would be well founded if they were claimed for debts contracted by the testator. Such could be settled according to the statute and practice only by being properly vouched, advertised, and passed by the register before confirmation by the Orphans' Court. True it is, that the practice has been to credit the expenses of administration in the administration account, and they may properly be so credited still; but where they have been omitted, it certainly is not necessary to incur the delay and expense of a new account for so small a matter. The object of publishing notice that an account, with the vouchers, is deposited in the register's office for examination, is to give notice to creditors as well as distributees; but when the creditors have been satisfied, and the residue of the estate is before the court for distribution according to the intestate laws or the will, it is enough that the parties immediately interested have an opportunity to be heard. The Orphans' Court is master of the whole subject, and the register has nothing to do with it. Formerly the incidental expenses could be allowed only in the administration account, for there was but one settlement, and the distributive shares were recoverable by action; but now, when they are recoverable by a proceeding in the Orphans' Court, it cannot produce either inconvenience or confusion to deduct them from the balance of the administration account in the first instance.

For the same reason, the auditor properly deducted from it the balance found due to the appellant's co-executor at the settlement of his separate administration account. This balance was a charge on the assets in the appellant's hands, for which he was liable, and he had

Digitized by Google

a right to retain for it. Why then should it not be brought into the distribution account? Because, say the appellees, exceptions taken by them to the co-executor's account are still pending. But why have they pressed for distribution here before they have had their exceptions disposed of there? An estate is not ripe for distribution before all charges on it have come out of it. These exceptions have been depending for nearly ten years; and as no step has been taken in prosecution of them, the auditor might well consider them to be virtually abandoned, and treat the balance found due to the co-executor by the register as primâ facie evidence of a debt still due by the estate; the more so, because, if it were not paid out of the assets in the appellant's hands, sufficient to discharge it might not be received from the Pemberton estate. But by instituting the present proceedings, founded as it is on an assumption that there are no out-standing claims, the appellees have precluded themselves from bringing into it their exceptions to a different account as an element of litigation. The proper time and place to press them is at the final settlement of that account in the Orphans' Court; and they have a right, perhaps, to do so yet, but not to prevent the appellant from retaining enough to meet the event.

The auditor likewise properly took into view payments by the appellant's co-executor to the distributees, without which distribution according to the will could not be effected. This is too plain for further remarks.

Again, Mr. Corson's demand of William Wilson's share, as his committee, was properly disregarded. The testator devised his estate to his executors in trust, among other things, to invest the share in stock, or put it at interest, and apply the income to the lunatic's use, or pay him the whole or part of the principal at their discretion. By what law, then, could the appointment of a committee take this trust out of the hands in which the testator had placed it, and vest it in one who can exercise no greater or other right than could, were he sane, be exercised by the lunatic himself? The estate was devised to the trustees qua executors; and if the distinction were material, it would consequently be clear that the appellant succeeded to the trust vested in his wife by succeeding to her executorship, with which it was indivisibly joined. But whether the appellant or his wife be the trustee, it is certain that Mr. Corson is not; and it is enough to prevent him from getting the direction of the lunatic's estate, that there is a trustee either in esse or in posse. The testator had a right to appoint his own trustee; and if the office were vacant, the proper course would be to fill it by appointment, for which the lunatic's committee, whose busi-

Digitized by Google

ness it is to call the trustee to account, would be the most improper person that could be selected.

Finally, the auditor properly disregarded the claim of Doctor Anderson, as the administrator de bonis non of Mrs. Saulneer. By her marriage settlement, she granted to her trustee all the real and personal estate to which she was then entitled, or which she, or her husband in her right, should thereafter acquire, for her use till the solemnization of the intended marriage, and afterwards to her separate use during the coverture, with power to alien or appoint; and for want of alienation or appointment, for the use of her children the fruit of the marriage. She died without having executed the power, and left a son to whom her share has since been paid. The settlement was executed in the lifetime of the testator, and consequently before any title had vested in her; whence an argument that the settlement was inoperative. It is certain that though a contingent limitation by will, after the death of the testator, or by deed, is a legitimate subject of grant, even at law, yet the hope or expectation of succeeding to the property of another by descent or devise is not so. But it is equally certain that such an interest may be bound by a settlement in equity. The point is settled by Beckley *v.* Newman, and Hobson *v.* Trevor, 2 P. Wms. 181, as well as by other cases in which the doctrine was assumed. Indeed, it is no more than the familiar principle, that he who executes a conveyance, on valuable consideration, purporting to pass a title before it is in him, will be bound to make it good whenever he acquires it. Such a conveyance is liberally interpreted as an agreement. Mrs. Saulneer's estate, which accrued to her subsequently, was therefore bound by her settlement; and how could any part of it go to her administrator? Though she had power to part with it, she had no power to charge it; and no part of it could be claimed for her creditors if she had any. The administrator, therefore, could claim nothing but the unpaid balance of the income from the estate, and not even in a proceeding like the present. But it does not appear that there was any, and if there were, it is not the thing that the administrator is claiming. He claims the share limited to the son of Mrs. Saulneer at her death.

We therefore direct that the report of the last auditor be confirmed, and that distribution be made in accordance with it.

There is also an appeal from another order of the court, which may be disposed of here. Upon a suggestion that Mr. Humphreys was wasting the trust-estate, he was ordered to give security as executor in $5000, and other security in $5000 as trustee; and there is consequently an evident error in separating the office of executor from that of trustee.

Digitized by Google

We direct, therefore, that so much of the order as directs the appellant to give security as trustee be reversed, that the recognisance be so far discharged, and that the order be affirmed for the residue.

So decreed.

In re THORN, SMITH'S Appeal.

1. Judgment, of which the consideration is a previous unsatisfied judgment, good against creditors.
2. Unless a party claim a benefit under a composition deed, he is not bound to notify the creditors that he holds securities of the debtor.
3. Two papers being produced on a call by the other party, both or neither must be read.
4. After a fi. fa. issued, A., who held collaterals in trust for an execution creditor, and was also assignee of the debtor, received money on account of the collaterals; a subsequent execution creditor cannot compel the application of that money to the debt thereby secured, but the assignee may retain it for the general creditors, subject to the obligation to satisfy any deficiency under the execution.
5. Whether the execution creditor really mean to obtain his money, is the question, in deciding whether it is fraudulent as to other creditors.

FROM the District Court of the city and county of Philadelphia.

The question in this case arose in the District Court of Philadelphia, on the distribution of the proceeds of a sheriff's sale of personal property, in which an issue was directed between Smith and S. Thorn, to try, 1st, Whether S. Thorn's judgment was void against Smith. 2d, Whether given for value. 3d, Whether any, and how much, was due. 4th, What had been received before 21st October, 1843, from debts, or property pledged. 5th, Whether the fi. fa. was a lien as against Smith.

On the trial of these issues, the plaintiff having shown the judgment, &c., of S. Thorn against Thorn, her son, the defendant in the execution called for the collaterals given on the debt.

Two lists or receipts for notes of third persons were produced: the latter showing an exchange of securities. The court refused to permit one to be read without the other; exception was taken, and both papers read. Defendant proved an advance of money by her to her son, to set him up in business in 1829. A bond was given, and judgment entered, which is still unsatisfied. In 1832, a new bond was given, including the amount of the former one, and additional advances. In 1842, Thorn being then embarrassed, procured a composition deed to be signed by his creditors; his mother refused, having then a fi. fa. against him, until he promised to deposit the collaterals, which he

Digitized by Google

subsequently did, by delivering them to William Thorn, at which time she agreed in the composition deed not to issue an execution, so long as he complied with his compromise, in which she was not included. Plaintiffs then proved that at the time the composition deed was signed, Thorn did not state he had deposited any collaterals with his mother, and that some of his credits were the notes shown to have been deposited after the deed was signed. Thorn made a general assignment to his brother William, and it was proved he received moneys on account of these collaterals, after the sale under S. Thorn's judgment, by which the present fund was raised, with the assent of William.

The court, in reply to the plaintiff's points, instructed the jury, that the first judgment, though unsatisfied, was a good consideration for the second: that the moneys received by William from the collaterals, after the exit of the fi. fa., were not to be considered applicable to S. Thorn's judgment, as he was assignee, and she had the right to issue the writ without waiting for them. That Mrs. Thorn, not being a party to the composition deed, as a creditor, was not bound to mention that she held the collaterals. As to the rule that there must be an intention to levy, and not merely to keep another creditor at bay, his honour said, it is denied by the defendant that there is any evidence to show that Sarah Thorn's *only* object in issuing execution was to prevent the plaintiff's recovery. A creditor has a right to issue an execution for the purpose of being before other creditors, and thus securing or obtaining his debt.

The broad and true question is, was she seeking her own debt or not? All that the law requires is, that a man without meaning to get payment himself, shall not hinder others from getting their money.

If you believe she meant really to secure her money, her fi. fa. was good; though it was issued in anticipation of other executions, and in effect would obtain a preference over them.

That it was immaterial whether the bond was due when the execution was issued.

Fallon, jun., for appellant.(*a*)

E. K. Price, contrà.

April 13. KENNEDY, J., after stating the case.—That Sarah Thorn is entitled to receive the money towards payment of her judgment and execution, cannot be questioned, if she be a bonâ fide creditor of her son, and has acted fairly towards his other creditors. It

(*a*) The reporter was absent.

Digitized by Google

has been attempted to impeach her judgment, for want of a sufficient consideration to make it good, as against the creditors of her son: but in this we think there has been an entire failure; that his original indebtedness was for moneys lent by her to him, to enable him to enter into the mercantile business, even to a considerably larger amount than what is claimed by her now, is made abundantly clear by the evidence. But it is further objected, that the judgment upon which she issued her fi. fa. was taken for a previous judgment, which she had against him, without satisfying or releasing the first, and therefore the second is without consideration and not good. There is nothing in this objection. A creditor may take as many succeeding judgments for his first, which is good, as the debtor is willing to give, and each of them will be good and available until the debt, interest, and costs are paid, or released by the creditor. If it were otherwise, an action of debt could not be maintained by the creditor upon his first, or any subsequent judgment, which would be contrary to the daily practice; and especially in England, where a considerable amount of interest has accrued upon the first judgment, which cannot be collected there by suing out a sci. fa. and afterwards a fi. fa., as it may be in this state. The only mode for the collection of such interest there, is by bringing an action of debt upon the judgment, whereon the interest has accrued, in which the plaintiff recovers the amount of the judgment and the interest which has accrued thereon. There, in a scire facias upon a judgment, there is nothing more than a bare award by the court, of execution for the amount of the judgment and the costs which have accrued; but here, under our act of Assembly on the subject, a new judgment of quod recuperat is given by the court, for the amount of the judgment with interest thereon from the time of its rendition, besides all costs accrued. It was also objected that Sarah Thorn had taken of her son collateral security for the payment of her judgment against him, and suffered his creditors to enter into an agreement of compromise with him without informing them thereof, which was a fraud upon them; and had afterwards issued an execution upon her judgment, while she held the collateral security, which was also a fraud upon them. We think there is nothing in these objections; she was no party to the agreement of compromise, and did not agree to give up any thing on account of it. On the contrary, it was agreed between the other creditors and her son, that she should not be required to come into the compromise, but should be entitled to recover and receive the whole amount of the debt coming to her from him. And as she did not, upon receiving the collateral security, come under any obligation to forbear payment, or not to proceed, at pleasure, to enforce the payment of her debt by

Digitized by Google

proceeding on her judgment, it is not only perfectly clear, but perfectly just, that she should have the right to proceed at any time she pleased upon it, and likewise to hold the collateral security until she should be fully paid. The other creditors had no lien whatever upon what had been given to her as a collateral security, and having agreed that she should receive the full amount of the debt due to her, in any way she could obtain it, it is also equally clear that they had not the slightest colour of just ground to object to her proceeding as she did.

Bills of exceptions were also taken by the appellant's counsel, on the trial of the feigned issues, in regard to the admission or rejection of evidence offered: but it is sufficient to say, even if we could take cognisance of such matters in this appeal, that we are unable to perceive any ground upon which they could be sustained. It is further objected, that the court erred in not deciding that any money received by the agent of Sarah Thorn, upon the collateral security taken by her, after the seizure and levy under her execution, ought to be applied to the payment of her debt, so as to leave an equal amount of the money arising from the sale of the goods to be applied to the appellant's execution, instead whereof, the court decided, that the trustees to whom Samuel C. Thorn had previously assigned all his property and effects, for the benefit of his creditors, were entitled to receive the money paid on the collateral security, so far as it was not requisite to pay any balance remaining unpaid of Sarah Thorn's debt, after applying the money to that end raised under her execution. In the last place, it was objected that the court erred in not deciding that Sarah Thorn issued her execution, not for the purpose of enforcing the payment of her debt, but with a view to hinder and delay other creditors of her son from suing out execution against him, so that the property taken by it might still remain in his hands, and he have the use of it. We are of opinion that the court decided correctly on this point, because we can perceive no evidence in the case, which would have justified them in deciding otherwise. Her execution was issued, and put into the hands of the sheriff, without any special instruction being given to him in regard to the execution or non-execution of it, leaving him to proceed and do his duty, according to the command contained in the writ, which was to make the money mentioned therein, out of the goods and chattels, &c., of the defendant.

The decree of the court is affirmed, and the appellant is ordered to pay all the costs which have been incurred, as well before as since the appeal taken.

Digitized by Google

www.libtool.com.cn

2 335
199 501

DE HAAS *v.* BUNN.

1. The estate of one claiming by executory devise during the continuance of the previous estate, is the subject of levy and sale.
2. A. being devisee in fee of a moiety of a house, and executory devisee of the other moiety, a fieri facias was levied on both estates and returned unsold for want of buyers; a venditioni reciting this levy, commanded a sale of the vested moiety; the return was of a sale in obedience thereto, and the sheriff conveyed both estates.—*Held*, that both moieties passed. For the court will amend the writ according to the levy, it appearing clearly from the deed, that all the land levied on was actually sold, and forty years having elapsed.
3. Devise to my daughter A. for life, remainder to her children in fee, A. then having a child, "provided if she die without issue to my son B.," an executory devise, and not too remote, the word issue being confined to children previously referred to. Per GIBSON, C. J., and KENNEDY, J.

CERTIFICATE to the Nisi Prius.

March 31.—J. Philip De Haas in 1786 devised, inter alia, one moiety of a house and lot to his son John Philip De Haas in fee, the other moiety to his daughter H. Craig, wife of W. C., for life, and from and after her death, to such child or children as she now hath, or hereafter may have, their heirs and assigns, as tenants in common; provided "if my said daughter shall happen to die without issue, that then, and in such case, the same shall go to my said son John Philip De Haas, his heirs and assigns for ever."

On a judgment against J. P. De Haas the younger, in 1806, a fieri facias issued, under which a levy was made on his undivided moiety, and his right and title to the chance of the reversion of the other half of said house, which the sheriff returned, remained in his hands for want of buyers; a venditioni, reciting this return at length, issued, whereby the sheriff was commanded to sell the undivided moiety, or half part of the house and lot with the appurtenances. The return recited a sale, in obedience to the within writ, for an amount greater than the judgment. The sheriff's deed, reciting the fieri facias, the return, the venditioni exponas, and sale under the said recited writ, conveyed the undivided moiety, and the chance to the reversion of the other moiety under the authority of the said writs, &c., to those under whom defendant holds. In 1823, J. P. De H. Craig, who was living in 1786, the son of H. Craig, the daughter of testator, conveyed his estate in the undivided moiety to those under whom defendant claims, and died in 1829 without issue. H. Craig died in 1834 without issue surviving her; John P. De Haas the younger died in 1827, of whom the plaintiffs are the heirs. This suit was for the reversionary moiety. At the trial before Kennedy, J., at Nisi Prius, his honour directed a verdict for the plaintiff.

Digitized by Google

Kennedy and *Sergeant*, for plaintiff in error.—There is no estate by implication in H. Craig under this will; nor will the children take an estate-tail, but a fee determinable by the proviso—an executory devise. 7 East, 521; 6 T. R. 30; 3 Id. 484. These words, *failure of issue*, refer to such persons as may claim under H. Craig, in which case the limitation to the plaintiff is too remote. But if it be a remainder after a determination of the estate of H. Craig, Waddell *v.* Raton, 5 Rawle, 231; Wills *v.* Rutter, 3 Whart. 208, 226, the devise over was a vested remainder in J. Craig in fee, and as such has passed to us under our deed; for an inquest being unnecessary in such case, 2 Miles, 156, act of 1705, a venditioni was not required, nor was it proper to effect a sale of such an interest. It passed under the fieri facias, as appears from the recital in the deed. It is plain the sale was deferred until the vested moiety could be sold under the venditioni exponas, for the benefit of the owner, and he certainly could not object here, having stood by and permitted the sale and application of the purchase money to his debts; and if he could not, neither can the plaintiff. This interest, and the right of the sheriff to sell it, is to be governed entirely by the rules in the case of personalty, lands being chattels for payment of debts in Pennsylvania, and there being no distinction in the form of proceeding against them until the act of 1705, directing an inquest and venditioni. Where this act has no operation, as here, it is the rule in case of chattels we are to look to. What is that? The levy governs; by it a right is vested in the creditor, 2 Lord Raym. 1073, and the sale may be after the return-day; this being so, this case is established by it; for, after the levy, the sale might be made at any time before or after a venditioni, Stroble *v.* Smith, 8 Watts, 280; no objection to the time of sale could be made after the acknowledgment of the deed. In fact, it must be made under this writ, for a new fieri facias cannot issue.

St. Geo. Campbell and *Meredith*, contrà.—There are two questions here: is the limitation over too remote, or has the sheriff's sale passed the title? It is immaterial whether the children of H. Craig took an estate-tail, remainder to the plaintiff, or by executory devise; one or the other it must be; if the devise be after an indefinite failure of issue, it is an estate-tail; and as that was never barred, we are entitled. But if, as we contend, the devise after failure of issue means after such issue as has been previously named, to wit, children, which is settled to be the construction in case of a devise after failure of issue following a devise to children, Goodright *v.* Dunham, 1 Doug. 264; Ginger *v.* White, Willes, 348; Mallone *v.* Taylor, 2 Russ. & Myl. 416; Jar-

Digitized by Google

www.libtool.com.cn

man on Wills, 371; 2 Barn. & Cress. 926, the estate is good as an executory devise, and is not too remote. Was this then sold? There were two distinct estates in the same land; a contingent interest in one moiety, a vested one in the other. The levy was on both; but was there a sale? If there had been such as was supposed by the defendant, it would be void, being after the return-day, Cash *v.* Towzer, 1 Watts & Serg. 528; but can there be a presumption *against* the record? The sheriff on that, in his return to the fieri facias, says, he has *not* sold under it. After that return, can he sell? Can there be a sale under a returned writ? If not, was there a subsequent authority? The venditioni exponas does not command a sale, but of the vested interest; and unless the sale be commanded, it cannot be made, Sechrist *v.* Baskin, 7 Watts & Serg. 404. So without a venditioni, it is void, 4 Yeates, 212; or if the levy be set aside, and no new one, 2 Binn. 30. The delay has nothing to do with the case; our right did not accrue until after 1834; and assent of parties even will not cure such a defect, 4 Watts & Serg. 20. Whether the estate could be sold might have been doubted, Humphreys *v.*——, 1 Yeates, 427; Rickert *v.* Madeira, 1 Rawle, 325; Fisher *v.* Taylor, 2 Rawle, 33; Vaux *v.* Parke, 7 Watts & Serg. 19; but it can scarcely be considered an open question now.

There is a great distinction between the rules in case of realty and personalty; the levy and the venditioni are notices of an intention to sell the particular estate there mentioned. It was in the election of the party to sell both or either, and he has made it. The proceeds of the sale were greater than the judgment, and it cannot be supposed, contrary to the averments of the record itself, that more was sold than was ordered to be sold.

April 14. GIBSON, C. J.—It is unnecessary to determine the precise nature of the limitation over to John Philip De Haas, and I pretend not to express any opinion on the part of my brethren in regard to it. For myself, however, I may say, that I would feel no hesitation in pronouncing, that as the first limitation in the devise of a moiety of the property to his sister, Henrietta Craig, was for life, and the second was to such child or children as she then had or should have in fee, the further limitation over on the contingency of her dying without issue, the remainder in fee to the son having vested at the death of the testator, was an executory devise; and that it was not too remote; the generality of the word issue being restrained by the words child or children, has been satisfactorily shown by the authorities. The limitations to the daughter's children, and to her brother in the event of

Digitized by Google

her death without issue, were not concurrent contingent remainders depending on a contingency with a double aspect, on the happening of which the one or the other would exclusively vest, because the daughter's son was born in the lifetime of the testator; and as the fee was limited to him neither as an uncertain person, or on the happening of an uncertain event, it vested in him at the testator's death, so that there could be no further limitation of it except by executory devise. It would seem to me, therefore, that the son had a vested remainder in fee, to take effect in possession at his mother's death; and that his uncle had a good limitation in fee mounted on it by executory devise. This however is to be taken only as the opinion of my brother Kennedy and my own. If, however, this last limitation were defeated by the vesting of the fee in the son, the plaintiffs would have no pretence of title, because the defendants have the son's conveyance of all the estate that was in him.

But taking it, for the sake of the argument, that there was a good executory limitation to the uncle, was his contingent interest in it transferred to the purchaser at sheriff's sale, under whom also the defendants claim? It had not vested in interest at the time of the sale, as the son, who was the first devisee in fee, was still living. But it is entirely certain that such an interest may be transferred by assignment even at law, and consequently that it may be sold by execution. The only mere possibility that may not be so transferred, is a bare hope of succession to the property of another, such as may be entertained by an heir apparent. The point is discussed in Atherly on Marriage Settlements, p. 53, where the cases are collected; but it may not be amiss to refer particularly to Gurrall *v.* Wood, Willes, 211, in which an executory devise was held to be an existing interest, and not a bare possibility.

But was this existing interest sold pursuant to any authority or command in the writ of venditioni exponas? The return to the fieri facias contained an express affirmation that it had been seized in execution along with the moiety of the property devised immediately to the debtor himself. The command of the venditioni exponas, however, after truly reciting the levy, was to sell the debtor's vested interest in this moiety, without noticing his contingent interest under the executory devise. The sheriff returned that he had sold "the within described property," (described one way in the recital of the levy, and differently in the mandatory part of the writ;) but that he actually sold the contingent interest, as well as the vested one, is conclusively shown by his deed, in which each is expressly included. Why then should we not treat the omission of a special command to sell the contingent

Digitized by Google

www.libtool.com.cn

interest, as a clerical omission amendable in the proper court, and consequently as actually amended here?

It is argued, that as the judgment creditor was not bound to sell the whole property seized, it is impossible to say, the præcipe for the venditioni exponas being lost, that he did not direct the writ to be issued for the sale of a moiety of the premises, supposing that it would produce enough to satisfy the debt. Had not the sheriff expressly conveyed the contingent interest in the other moiety also, a presumption would certainly arise that an authority to sell it had been purposely omitted; but it is inconceivable that the sheriff would have sold it had the fact been so, or that if he had been restrained by the judgment creditor, the fact would have escaped his recollection when he executed the deed. In point of truth, there cannot be a doubt that the gap in the proceedings is a clerical misprision, and why shall we not fill it by giving to the purchaser, or his substitute, the benefit of the contingent interest which he actually bought and paid for? If the præcipe were before us, showing no special direction to issue for the sale of a moiety, there would be no difficulty in the way of giving the venditioni the effect it would have were it formally amended; for in Peddle v. Hollingshead, 9 Serg. & Rawle, 277, an omission of the entire command to levy the debt in the body of a levari facias, which was jargon and unintelligible nonsense, was treated as a clerical mistake, and amendable by the præcipe after error brought, a case that is full to the point. But Owens v. Simpson, 3 Watts, 87, is still stronger. In that case, the body of the execution, on which the return was endorsed and filed, belonged to another suit, and the sheriff had not the semblance or colour of authority in his hands for his act, yet the whole was amended, or rather reconstructed from the præcipe, levy, inquisition, condemnation, and return of sale, all of which are at hand, as materials for amendment, except the præcipe. But at the end of almost forty years, it is not too much to presume, in support of a title, that it contained a direction for a writ which would have formally authorized the sale which was actually made. It is only by patching up errors in matters of mere form, arising from inexperience consequent on the popular principle of rotation in office, that we can hope to preserve the substance of justice. Whether the principle produces more harm than good, in this respect, it is not for us to say; it is sufficient that it is in active operation, and that it is our duty so to deal with its consequences as to benefit by those that are beneficial, and avert those that are prejudicial. We are of opinion, therefore, that all the interest of John Philip De Haas in the premises, whether vested or contingent, passed by the sheriff's deed and subsequent conveyances to Joseph Rubicam, the defendant's lessor. Judgment reversed.

Digitized by Google

2 340
d 31 SC 51

www.libtool.com.cn

STEWART *v.* The COUNTY.

Interest not payable by county commissioners on damages awarded for opening a street, until the land is entered on.

CERTIFICATE to the Nisi Prius, on a special verdict.

April 3.—In 1836–7, under proceedings in the Court of Quarter Sessions, Jefferson street was opened and declared a public highway. On the 9th of January, the report of viewers was confirmed. The plaintiff was entitled to $2500, awarded by said report. The commissioners declined paying, except in five per cent. loan, then eight per cent. below par. Plaintiff refused to accept this stock until Nov. 1842, when he accepted without prejudice to his claim for interest, which the commissioners refused to pay. The stock was then twenty-three per cent. below par.

The court gave judgment for defendant.

Davis, for plaintiff in error.—The question is whether the county is liable for interest on a debt presently due. By the act of 1834, sect. 3, Purd. Dig. 189, they are liable to be sued as ordinary persons. If so, interest is but an incident.

H. M. Phillips, contrà.—The land could not be taken by the act of Assembly until payment. In this county, the proceedings are void unless the payments are made within a year. During this time, the land not being used, the county is not bound to pay interest. The court declined hearing further argument.

April 8. PER CURIAM.—This is a plain case. The report had relation to the time when the street should be opened, for, till then, the plaintiff, having the use of his ground, could receive no injury. The proceedings would be vacated by lapse of time, at the end of a year, if the public did not exercise its right; and it is true, that in the mean time, he might be prevented, by the uncertainty of the event, from making improvements, but that is an inconvenience which the legislature did not mean to compensate. The plaintiff therefore is not entitled.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

CATHERWOOD v. KONN.

1. The court will allow a certificate to a judgment at Nisi Prius to be taken after the first day of the next term, under special circumstances supported by affidavit.
2. The Nisi Prius is a distinct court from the Supreme Court, and may arrest a judgment after verdict.

April 4.—THIS case was tried by a jury at Nisi Prius, and a verdict rendered on the 19th December, for the plaintiff. The defendant moved in arrest of judgment, which was argued and held under advisement until the 7th of March, when the judgment was arrested. The first day of March term fell on the 16th. The certificate was taken and the affidavit and recognisance filed on the 27th.

J. A. Phillips moved to quash the certificate as too late, not having been perfected on the first day of the next term. The case is decided in Dawson *v.* Ryan, 4 Watts & Serg. 403; Styles *v.* West Chester, Id., immediately after the Nisi Prius act was passed, and the construction in those cases was that the certificate must be ready for a hearing on the first day of the term succeeding the judgment.

Randal, contrà, said, the reason of the delay was his ignorance of the fact of any order having been made in the cause, and absence from the city. (These are stated in the affidavit, which was filed at the request of the court.) There is nothing in the act which requires the appeal to be perfected on the first day of the next term; the words are at the next term, in which there are two return-days, and this certificate was long before the last. This construction is plainly the proper one, for the act allows twenty-one days to make the certificate a supersedeas, and the same period on appeals in equity; and it would be contradictory to say a certificate should have no effect unless perfected on the day after judgment, if the verdict and judgment happened to be on the last day of the term. Dawson *v.* Ryan only decides that an appeal is good if perfected *on* the first day of the term. It is doubtful whether a judgment can be arrested at Nisi Prius. [*Rogers*, J.—That is settled.]

An affidavit of the special circumstances having been required, Mr. Randal filed one, setting forth the facts as to the trial and motion, and that he inquired from time to time whether any opinion had been delivered by the judge, and was told he had not given any. That he had no notice, written or verbal, that the judge was about to deliver any opinion, or make any order in the case. After the judgment was

Digitized by Google

www.libtool.com.cn

arrested, some one mentioned to him that some order had been made, and on examination of the record he learned the facts. He believed this was about the second Monday in March.

May 6. ROGERS, J., after stating the facts.—The plaintiff, therefore, it is clear, was not in time. For in Dawson *v.* Ryan, 4 Watts & Serg. 403, and Styles *v.* The West Chester Railroad Company, it is ruled, that to entitle a party to review the proceedings of the court of Nisi Prius, he must prepare his cause for a hearing at the next term of the Supreme Court after judgment. The appeal must be taken and perfected on the first day of the term, but if before 10 o'clock of that day it is in time. The court was well aware of the inconvenience in all cases of adhering to the strict and stringent rule which they felt themselves under the necessity of laying down, and certainly did not intend to preclude themselves, under particular and peculiar circumstances, from allowing an appeal even after the first day of the next succeeding term. To permit an appeal, nunc pro tunc, is a power inherent in every court, and under proper regulations is indispensable to prevent injustice. Is this such a case as requires the interposition of the court? What are the facts which appear on or dehors the record? A trial was had the 17th December, 1846; a motion in arrest of judgment the 19th December; but the rule was not disposed of until the 7th March, 1846, but before the next succeeding term. Two gentlemen, Messrs. Keemlé and Randal, were the counsel of the plaintiff, but the connection with the cause of one of them, Mr. Keemlé, ceased after the trial. When the judgment of arrest was entered, Mr. Keemlé alone was in court, who stated the absence of Mr. Randal, and that he was the only counsel. Mr. Randal was sent for, but was not to be found. Mr. Randal stated that he was ignorant of the entry of an arrest of judgment until after the first day of the next term had expired. Whereupon, without delay, he prepared the cause for a hearing, by filing the certificate in error, with the other necessary documents, in the court in banc.

It would certainly be more regular to move the court for leave to file the order certifying the record nunc pro tunc. It would, however, be useless to turn the party round on a mere matter of form, as the result must be the same. The question may be as well considered on a motion to quash. It presents the case of a judgment entered at the heel of the term, in the absence of the party and his counsel, of which neither were informed, until the time fixed for entering an appeal had gone by. No fault or negligence is justly imputable to any person, and it strikes me it would be a hard measure of justice that the inno-

Digitized by Google

cent party should lose his chance of review under such circumstances. It is impossible counsel can always be in court, and the same mishap might occur with the most watchful and careful practitioner. He is not justly censurable, and the hardship, if any, will be visited on the party who is certainly in no default. We must be careful to avoid injustice by not adhering too strictly to an act with which, in some cases, it would require great vigilance to comply. We put the case on its special circumstances, for had the counsel known the decision of the court in time, the party would not be entitled to relief. The remedy would be against the attorney for neglect of duty.

It is contended that the Court of Nisi Prius has no right to arrest a judgment. There is nothing in the objection. In Dawson *v.* Ryan, already cited, it is ruled, that the Court of Nisi Prius is a distinct and independent court, and that, unlike the court as organized before the act of 1842, they may, and indeed must, enter a judgment when the party is entitled to judgment. Is the court bound to enter a judgment when they are convinced, as in the case in hand, the plaintiff has no cause of action. It is true, the act does not expressly authorize the court to arrest the judgment, nor, indeed, to enter judgment, yet no person can doubt the power or authority given to do both. It would be a strange anomaly in legal proceedings, to issue a writ of error, or order in the nature of a writ of error, when a judgment had not been or could not be entered.

Motion to quash overruled.

McMULLIN *v.* Bank of PENN TOWNSHIP.

1. The liability of a principal to his guarantee not having paid the money, is not discharged by the bankrupt law.
2. Several sureties for parts of one debt entitled to equal shares of a payment by the debtor.
3. Debt payable in books and labour, discharged under the bankrupt law.

ERROR to the District Court of the city and county of Philadelphia

April 6. The plaintiff was the holder of a note drawn by Desilver for $650, guarantied by six persons, in payments of 108\frac{33}{100}$ respectively, no one being liable for the other. After proving these instruments, he showed a discharge of the drawer as a bankrupt. The defendant, one of the guarantors, proved an arrangement with the bank, by which this, with other debts of Desilver, were merged in one

Digitized by Google

note, which it was agreed should be renewed from time to time, and payment made in book-binding, &c. As an inducement, Desilver agreed to deduct thirty per cent. off his account, and apply it to the payment of his father's debt, for which he was in no way accountable. The sureties assented to this arrangement. The payments on his father's debt were made as was agreed, and this amount the defendant claimed should have been applied to his private debt; the court charged he was not entitled to it, as he had assented to the arrangement. $160 having been paid on the original note, defendant contended he was exonerated, but the court said, as there was no contribution, or joint liability of the sureties, he was only entitled to his proportionate part.

Desilver was offered by defendant as a witness, but the court rejected him. There was an exception to the admission of evidence to prove a demand by the bank, and refusal by Desilver, after his bankruptcy, to perform his contract in furnishing books.

Guillou, for plaintiff in error.—The bankrupt act discharged Desilver from his liability to the defendant and the plaintiff; the surety has, under our law, a right to prove and claim his contingent debt, sect. 4. Under Harker *v.* Conrad, 12 Serg. & Rawle, 305, the payment on the father's debt being voluntary, should have been first applied to the claim for which we were sureties. Pattison *v.* Hull, 9 Cow. 775.

J. Norris, contrà.—There was no contribution between the sureties, and they were equally entitled to the credit. There was no debt due defendant at the time of the bankruptcy, consequently it could not be discharged. Bond *v.* Gardner, 4 Binn. 269; 7 Watts, 380; 3 Watts & Serg. 295.

April 15. KENNEDY, J.—The most of the errors assigned consist of exceptions to the charge delivered by the court to the jury; upon which we deem it unnecessary to say more, than that we think they have not been sustained; that we consider all the points excepted to in the charge correctly decided; and for the reasons given by the learned judge, which are not only forcible but conclusive, in support of his opinion, as expressed on every point.

The remaining errors are exceptions to the opinion of the court, in regard to the competency of R. Wilson Desilver, offered as a witness by the plaintiff in error, and rejected by the court; and the admissibility and competency of the evidence contained in the deposition of Morgan Hinchman.

The objection to the competency of R. Wilson Desilver was, that he was interested in the event of the suit, inasmuch as he would be

Digitized by Google

liable to the plaintiff in error, for whatever he should be compelled to pay under a recovery had therein. This, however, was denied by the counsel for the plaintiff in error, on the ground that R. Wilson Desilver was exonerated from all liability to the plaintiff in error, for any thing that could result from the event of this suit, by his having obtained a discharge and certificate under the late bankrupt law. To support this, a provision in the fifth section of the law has been referred to and relied on, in which it is declared, that "sureties, endorsers, bail, or other persons having uncertain or *contingent* demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have right when their debts and claims become absolute, to have the same allowed them." It is contended that any demand which the plaintiff in error could have hereafter, against R. Wilson Desilver, by reason of his being cast in this suit, and having to pay money upon his guaranty to the defendants in error for the said R. Wilson Desilver, is of the contingent character mentioned in the clause recited, and, therefore, such as would entitle the plaintiff in error to receive a dividend of the said R. Wilson Desilver's estate, which went into the hands of his assignee in bankruptcy; and if so entitled, he of course could have no claim against R. Wilson Desilver personally, or his property acquired subsequently to his discharge under the bankrupt law. But the truth is, that the plaintiff in error had no demand of any kind, either certain, uncertain, or contingent, against R. Wilson Desilver, at the time the latter obtained his discharge and certificate under the bankrupt law, and, consequently, could have no claim to a dividend of, or demand against, his estate and effects in the hands of his assignee; nor can he have such a claim at any time, on account of, or by reason of his guaranty to the bank, for which he has been sued in this case. He, however, will have a right of action against R. Wilson Desilver, for whatever he shall have, or be compelled to pay the bank, by reason of his guaranty; and hence it is perfectly manifest, that R. Wilson Desilver has an interest in defeating the recovery of the bank in this action, and, therefore, not a competent witness against the bank in favour of the plaintiff in error.

The remaining error is to the opinion of the court, in admitting the deposition of Morgan Hinchman. It is objected to, because not relevant to the issue. It certainly relates to the subject-matter of the defence, set up in part, by the plaintiff in error in the court below, and tended to show that R. Wilson Desilver had declined or refused to satisfy the debt owing by him to the bank, according to his subsequent undertaking and agreement with the bank for that purpose, in

Digitized by Google

binding books and stationery; which, as it was alleged by the counsel for the plaintiff in error, he was still liable to perform, notwithstanding his discharge under the bankrupt law, and that the bank might therefore look to him for satisfaction under this promise. No doubt his discharge under the bankrupt law released him from this latter promise, if it was ever binding, as well as his original promise to the bank; but there was nothing wrong or improper in the bank giving evidence to repel all possibility of its recovering satisfaction from R. Wilson Desilver on his subsequent promise, after it was set up by the plaintiff in error as part of his defence, by an allegation that the bank might still obtain satisfaction of R. Wilson Desilver thereon, by getting of him binding and stationery.

The judgment of the court below is therefore affirmed.

RILEY *v.* HIRST.

Money in the hands of an attorney at law may be levied on by attachment in execution under a judgment against his client.

ERROR to the District Court of the city and county of Philadelphia.

April 6. *Hirst*, being summoned as garnishee in an attachment in execution, pleaded that he had no other moneys of defendants, except the sum of $300 then in his hands, received by him as attorney at law, under a distribution of the proceeds of a sheriff's sale of the real estate of a third person. The other pleas are immaterial here. Plaintiff demurred, and the court below gave judgment for defendant.

Markland, for plaintiff in error.—Any one may be garnishee, Serg. on Attach. 97; an attorney, Id. 98. In Silverwood *v.* Bellas, 8 Watts & Serg. 421, money sent by an attorney to his client was held liable to attachment in the hands of the messenger. In 8 Watts & Serg. case 1, it was conceded, but for the assignment it would be subject to attachment, 4 Greenl. 532, and cases cited.

On the 16th, *Hirst*, having obtained leave, argued that error will not lie to such a proceeding; for after a dissolution of a foreign attachment for any possible cause, the proceeding is at an end, Serg. on Attach. 154, 171; and this is precisely similar. What defence could a defendant have to the recovery by the owner of the money? The action cannot be pleaded in abatement; and that is the only form an attachment can be taken advantage of, Miller *v.* Price, 2 Yeates, 162;

Digitized by Google

1 Binn. 226; Lewis *v.* Wallick, 3 Serg. & Rawle, 410. But if it would in ordinary cases, certainly not here, where fourteen months have elapsed before suing out the writ, it would be an intolerable hardship to a party who, as in this case, had paid over the money.

But attachment does not lie to such a debt, 1 Dall. 355; Clapp *v.* Bell, 4 Mass. 99; 2 Aik. Vt. R. 299; 9 Pick. 364; 3 Peters, 292; 1 Root, 551; Spalding *v.* Turley, 11 Conn. 126; 1 Dall. 355; 2 Yeates, 192; 2 Whart. 309. There was no service on the original party, the real defendant, and that is a fatal defect in the proceeding.

Markland, in reply.—The defendant was not in the bailiwick as appears from the return, and it could not be the intention of the law to allow a party to avoid an execution in this way. He had notice by a service on his attorney, and that is sufficient.

April 20. SERGEANT, J.—No reason has been suggested why an attorney at law should not be made garnishee in a foreign attachment. Considerations of public policy and convenience require, that money in the hands of public officers appointed by law, such as sheriffs, prothonotaries, and other depositaries, should not be stopped whilst in custodia legis. But an attorney at law derives his power entirely from his client, and there seems no more reason for his exemption than that of an attorney in fact or other private agent. Accordingly the authorities are all concurrent on the point; and even in England, where the attorney has a privilege not known here, of being sued in his own court; that privilege gives way where the fund in his hand is to be reached by foreign attachment under the custom of London and other places.

We think the court erred in giving judgment for the defendant on the demurrer to the plea, which is the only point that appears to have been raised below. But there are issues in fact to be yet disposed of, and therefore,

Judgment reversed, and record remitted for further proceedings.

Digitized by Google

www.libtool.com.cn

WETHERILL *v.* HARBERT.

In scire facias on a mechanic's claim, the affidavit by the owner, that a release of him had been executed and delivered to the contractor, under an agreement between the owner and contractor, and at request of the contractor; and after exhibition to the owner, the name of plaintiff was struck off without the owner's knowledge: *Held* bad for not averring a delivery to, or to the use of the owner.

ERROR to District Court of the city and county of Philadelphia.

April 6. Harbert filed a claim against three houses, and on a scire facias, the plaintiff in error, who was the owner, filed an affidavit of defence, setting out that the houses were built for him under a contract by Colliday, and that a small balance was still due him, but that liens to a greater amount had been presented, and he was willing to distribute the balance equally. That Colliday agreed to furnish a release of all claims; and plaintiffs, at his (Colliday's) request, did deliver to him a release unto said Wetherill of all claims, &c. Afterwards, and without the knowledge or consent of deponent, the signature of plaintiff was erased from the release by some person unknown to deponent; but not for some time after it had been executed and exhibited to deponent.

The court gave judgment for plaintiff.

Guillou, for plaintiff in error.—The delivery of the release to the contractor was a delivery to the owner; whether it was so intended, is a question of fact.

Perkins, contrà. If the affidavit had asserted that there was a delivery to, or to the use of the defendant, we could have said nothing; but that is cautiously abstained from. It was in fact an escrow, and the conditions not being complied with, the signature was erased. The court construed these affidavits strictly; especially as a supplemental affidavit may be filed for all those points omitted in the original; he cited Bank United States *v.* Thayer, 2 Watts & Serg. 448; Dewey *v.* Depui, 2 Watts & Serg. 553; Ogden *v.* Otherman, 2 Miles, 40, 140; 3 Whart. 281.

April 22. KENNEDY, J., after stating the facts.—We think that the court were right. Mr. Wetherill, being the owner of the land upon which the buildings were put up, for which the lumber was furnished, and although not the immediate contractor therefor, was yet interested, as his estate in the buildings, and the ground upon which they stand, became and still remain liable for the payment of the lumber furnished by the plaintiffs below. Wetherill contracted with Col-

Digitized by Google

liday, his co-defendant, to build the houses for him on his ground, and Colliday, for the purpose of doing so, contracted with the plaintiffs for the lumber which they furnished and claim to be paid for in this suit. Now, under these circumstances, even if Wetherill had paid Colliday in full all that he agreed to pay him for building the houses, it would have formed no defence to the present claim. Nothing short of actual payment of the amount due to the plaintiffs for the lumber furnished, or a release from them of all claim to it, could discharge or bar it. And notwithstanding it is stated in the affidavit of defence, that the plaintiffs did execute and deliver a release to Colliday, at the request of Colliday, releasing Wetherill and the property from all claim for and on account of the lumber furnished by them; yet it was never delivered to Wetherill, as appears from his affidavit; nor does it appear that he ever became entitled to claim it, by his having paid either Colliday or the plaintiffs for it; and yet he complains it was afterwards destroyed or cancelled without his consent. Indeed it is very obvious, from the very guarded manner in which his affidavit is drawn up, in regard to the release mentioned in it, that he did nothing to entitle himself to the benefit of it by paying either to Colliday or the plaintiffs the amount of their claim, without which, for all that he has stated in his affidavit, he had no right to claim any benefit from the release. It cannot be supposed for a moment, that the plaintiffs would agree to relinquish or release their lien upon the buildings, which, it would seem, is the only available security which they have for the payment of their claim. But from the affidavit, it is very evident that Mr. Wetherill was not willing to pay their claim in full, or any more of it, at most, than their proportion of about $560, a balance admitted to be coming from him to Colliday, on his contract with Colliday, to be apportioned among them and the other claimants, whose claims, with that of the plaintiffs below, amounted in all, as Wetherill states in his affidavit, to $800. The inevitable inference, therefore, from the affidavit is, that Wetherill was unwilling and refused to pay the claim of the plaintiffs; so that he has no right to claim to have the buildings discharged from it, either upon the ground of actual payment, or by virtue of the release spoken of in his affidavit.

The judgment is therefore affirmed.

Digitized by Google

www.libtool.com.cn

PEARL *v.* CLARK.

A. informed B. of his intention to draw on him at Philadelphia, and remit funds via Mobile to meet the draft. B. declined entering into the operation, and informed A. the remittance would be wholly at his risk. B. drew and remitted the funds to T., at Mobile, for account of B. T. purchased a draft with these and other funds, and remitted to B., who was informed with what funds the purchase was made. B. cannot apply the proceeds of the draft to T.'s debt, but holds it for A. He should have refused to receive the money had he intended to repudiate the transaction entirely.

CERTIFICATE from the Nisi Prius.

April 7, 8.—This was an action of assumpsit, in which the material point was the right of the plaintiff to the proceeds of a draft of Gracie on Russell, or a proportion thereof. On the trial before Burnside, J.; the plaintiff proved that Toulmin was a commission merchant in Mobile, and on the 7th March, 1842, in good credit, not contemplating a suspension. That he was a correspondent of Clark & Co. of Philadelphia, the defendant, and one of their agents for receiving Alabama and other moneys, and remitting as directed; and also corresponding with Pearl, the plaintiff, as their agent, and on his (Pearl's) own account. The plaintiff then gave in evidence a letter from Pearl to Clark & Co., of the 15th February, 1842, informing them that he would remit, on their account, $1000 Alabama money, to Toulmin, and his intention to draw, requesting acceptance, throwing the hazard of the remittance on him if they should not be willing to take the operation on their own account. The next day he drew, and informed Clark & Co. on the 28th. Clark & Co. declined the operation, and stated that Pearl must consider it on his own account, having no authority to make such remittances, and that they would inform the holders of Pearl's drafts that the funds were on their way from Mobile. On the 16th, Pearl remitted $1000 Alabama money to Toulmin, as for Clark & Co., and $390 on his own account; and on the 12th, $219 as for Clark & Co. On the 19th, he remitted $725 for Clark & Co. and $1500 on his own account. On the 30th March, Clark & Co. wrote Pearl, stating they had received no funds. On the 9th April, Pearl replied, stating his remittance to Toulmin, supposing he would remit under general orders; as he had not, he would specially request him to do so. Toulmin, in his examination, stated that the $219 was received on the 22d February, the $1000 and $725 on the 7th March, said to be on account of Clark & Co. The same day he bought on account of these three sums, and with money received from Pearl,

Digitized by Google

A. Gracie's draft on Russell & Co., at sixty days' sight, for $1700 at twelve and a half per cent. premium 212 50

$1912 50

which he remitted the same day to Clark & Co. in a letter, stating, "I received an hour ago, from Pearl, on your account, $1000 and $725. Enclosed is Gracie's draft, on your account. Also for account of Pearl, five days sight, on Collomb, for $1304, at fifteen per cent. I could only get this and a trifle more,"—which Clark & Co. received March 19th, and acknowledged April 6th; in which letter, complaining of his delay, they request him to pay over the balance in his hands, and demand interest for "the balance due from you, $1000 and $725 you received from Pearl; they are for his account, and your delay may cause the protest of his draft."

On the 8th April, Clark & Co. acknowledged the account current of Toulmin, in which T. debited himself with the three items of cash received from Pearl, and took credit for Gracie's draft. Toulmin stated this account was never objected to.

On the 19th April, Toulmin wrote Clark & Co., after stating the receipts from Pearl of $1000 and $725, "against these remittances I sent you the same day A. Gracie's draft on Russell for $1700. I am astonished, therefore, that on the 30th ult. you should have advised him that nothing had been received against these remittances. I did not keep them two hours on hand, and I know from your letter of the 8th that you received them." He then said he had been obliged to suspend, &c.

On the 3d May, Pearl wrote Clark & Co., saying he had been informed of the remittance by Toulmin, and requesting its application to the payment of his draft.

On the 16th, Clark & Co., in reply, admitting the receipt of the draft from Toulmin and placed to the credit of his account: "This remittance was made in consequence of a strong demand from us on the 22d February, requiring an account, &c.; it did not reach the amount due us at the time. With respect to the remittance by you to him, excepting the $219, we have nothing to do." An extract from Toulmin's account ran thus:—

"Cr. Clark & Co. in account with Toulmin.

"March 7. To A. Gracie's draft on Russell, at sixty days, $1700, at twelve and a half per cent., $212 50		$1912 50
Balance carried over - - - - - - -		1544 81

Digitized by Google

"Dr. February 22. By cash received from D. Pearl, per letter, February 12 - - - - - - - $219
Ditto ditto ditto February 16, 1000
Ditto ditto ditto February 19, 725"

On the 27th May, Pearl wrote to Clark, averring the purchase of the draft was a specific application of the remittance by him on Clark's account.

Plaintiff then proved the payment of Gracie's draft.

His honour said it was fairly to be presumed the $1304 draft in the letter of the 7th March, was part of the money received from Toulmin, on Pearl's account; Clark & Co. having disclaimed his right to remit, they did not recognise his right to receive, and this Pearl knew. They were authorized to place the money as Toulmin, directed and that here T. had directed it to his own account. He did not think the evidence warranted the belief that the $1700 draft was purchased with the identical money received from Pearl, but that Toulmin, being the agent of Pearl, had the right of appropriating the money, being responsible for the appropriation, and that after the direction from him, Clark & Co. were bound to follow it, and it could not be altered without Clark's assent. That it was not the case of confusion of goods, and the plaintiff could not participate in the proceeds of the draft on Russell. There was no laches in Clark which ratified the receipt by Toulmin as his agent.

Gerhard, for plaintiff.—The error of the judge was in assuming a mistaken state of facts; when they are understood, the case is perfectly plain. A few principles will settle this. The rules as to appropriations of payments are all founded on principles of honesty and fair dealing, and common sense. No one is at liberty to apply the money belonging to another to a debt due from a third person. Thompson *v.* Brown, 1 Mood. & Malk. 40; Reed *v.* Boardman, 20 Pick. 441; Tavence *v.* Bennett, 11 East. 36, under this we are least entitled to an apportionment, 6 Cranch, 27; Harker *v.* Conrad, 12 Serg. & Rawle, 305.

This appropriation may be proved from circumstances, Tayloe *v.* Sandiford, 7 Wheat. 13; Shaw *v.* Pickton, 4 Barn. & Cress. 715; Waters *v.* Tompkins, Cro., Mees. & Ros. 723; S. C. 1 T. & G. 137, 15 Wend. 352, as it seems to me at any time after remittance, when this may be done of the Gracie draft before it became due. Hankey *v.* ——, Peake Add. Ca. 107; Pidder *v.* Waters, Id. 41; Gibson *v.* Minet, 1 Carr. & Payne, 147; 2 Greenl. Ev., sect. 531. We are entitled on the ground of a confusion of goods, for the defendant was clearly our agent to pay our draft on receiving the money remitted for

Digitized by Google

www.libtool.com.cn

that purpose; and blending the two accounts, we are entitled to a pro rata share. Barret *v.* Denison, 2 Pick. 123; Cole *v.* Twill. 9 Pick. 325; Blackston *v.* Hill, 10 Pick. 129. There is still another clear ground to maintain the plaintiff's claim. On the 19th of May, Clark & Co. knew that Toulmin had received $1000 and $725 from Pearl, as their agent, and by the suppression of the truth, and untrue allegations, they lulled both Pearl and Toulmin into security; and it was not until the 6th of April that Toulmin received any intimation from Clark & Co., that his receipt of these sums was not to be treated as his act, as their agent. They thus ratified his act in that capacity. Dubarry *v.* Bredin, 14 Serg. & Rawle. In this view of the case, the defendants are liable to the plaintiff for the sum of $1725, received by them through their agent, Toulmin.

Badger, contrà.—The principle of Harker *v.* Conrad is the one we rely on. The money was received generally on account of Toulmin, and applied to his debt by us having had no direction. Whether the identical funds once belonged to Pearl was immaterial, for he kept his funds together, and we could not recognise any ownership but his; this is plain, for the draft on Russell could not be purchased with the money received from Pearl.

April 13. SERGEANT, J.—As the amount for which this suit is brought was originally the money of the plaintiff, it lies on the defendants to show that, under the circumstances, they were authorized to appropriate it to themselves in payment of a debt due to them by Toulmin, on other transactions: otherwise, the plaintiff would be entitled to recover. There may possibly be a case where an agent, sending the money of his principal to a third person for an unauthorized purpose, might so act as to justify the appropriation of it by the latter to himself; though it would undoubtedly be mala fides in the agent to do so. But if there be no act of that kind done by the agent, and the third person to whom the money is sent stands in such relation to the principal that it is mala fides in him so to appropriate it, he cannot retain it. That Toulmin, who is to be considered in this transaction the agent of the plaintiff, did not intend to divert this money from its proper destination, seems apparent from his deposition, in which he states that he bought the Russell draft with the money received on the same day from the plaintiff, and that it was sent to the defendants, to liquidate the remittances received from the plaintiff; and with this statement his letters and account current sent to the defendants seem to concur. Then the question is, whether Toulmin's letter of the 7th March, 1842, spoke differently, and authorized the defendants to treat

Digitized by Google

the remittances as Toulmin's own, and appropriate them to the payment of their debt from Toulmin. The words in this letter on which the defendants chiefly rely are the phrase, "on your account." But to understand the meaning and operation of these words it is necessary for us to take a view of the situation in which the parties stood at that time. Pearl had drawn drafts on the defendants on the 15th and 16th February, 1842, without authority. He was uncertain whether they would accept them: but his design was, as he informed the defendants in his letters, forwarding information of these drafts, to provide for them by remittances to Toulmin at Mobile. On the respective days following these letters, Pearl accordingly remits to Toulmin at Mobile 1725 dollars, "*for E. W. Clark and Co.*," for the purpose of covering the drafts he had drawn upon them, and pursuant to his undertaking in his letters to the defendants. These remittances constitute the fund now in question.

Toulmin received these remittances on the 7th March, 1842, and being ignorant, so far as we know, of the transactions that had occurred between Pearl and the defendants, but acting in strict conformity to the directions of Pearl, immediately sends on the Russell draft, purchased with the money remitted by Pearl, to the defendants, in the letter of that date, in which, after stating the receipt of the money from Pearl an hour before, he says, "enclosed is A. Gracie on C. H. Russell & Co., 60 days' sight, for $1700, at 12½ per cent., *on your account.*" Now the question is, whether this authorized the defendants to take that money to themselves, (the draft being afterwards paid to them,) to pay a debt from Toulmin to them, incurred in other transactions. However that might be if there were nothing in the case but this single letter, yet we think, in looking at this whole transaction from its commencement to its date, these words, "on your account," are not necessarily to be construed as the defendants wish to do, but may imply another meaning. For we find that Pearl, in his first letters to the defendants, tells them he would remit "for *your account*" to Toulmin, *via* Mobile, funds for the drafts, and if they would not accept them, to throw the risk of the remittance *via* Mobile on Pearl. And of this the defendants were apprized on or before the 28th February, 1842, before Toulmin wrote to them, and when they answered; and in this answer it clearly appears they understood the destination of these intended remittances, for they say, "We shall not accept or pay the two other drafts, but shall tell the holders that the funds are on the way from Mobile to meet them." They must, we think, therefore have understood clearly, when these remittances afterwards came, that they were to be applied to the payment of Pearl's drafts on them—by

Digitized by Google

themselves, if they accepted—by the plaintiff or his agents, if they refused the drafts, and that this was the meaning of the phrase, "for your account," used by Toulmin. They did refuse to accept or pay the drafts, telling Pearl they must consider it all on his own account, as he had no authority to make remittances or draw. The consequence of this is, that they were entitled to the remittances if they accepted the drafts, but not that if they refused them, they could apply the remittances, when they came to hand, to any other purposes than to cover the drafts, or, what is the same, for Pearl's account. If the character of these remittances was stamped upon them by the first letter from Pearl to the defendants, it could not be afterwards changed by the defendants' act, because they suspected Toulmin was about to fail. It is true, they might repudiate the act of Pearl in drawing and remitting to Toulmin on their account, and were no way bound to have any thing to do with the drafts and remittances. But they must repudiate the whole. They could not refuse to accept the drafts, and yet take the remittances sent to meet the drafts, and apply them to another purpose than that which they knew they were destined for. This would be mala fides. This would be perverting to the payment of their own debt from Toulmin, a fund that came into their hands for another purpose. They must take the remittances as Pearl sent them, through his agent, Toulmin, or not at all; and it is, we think, evident he sent them to meet his drafts, and that the defendants, in justice and good faith, were bound so to regard it. This being the point of view in which the main features of this case appear to us, the judgment must be reversed, and a venire facias de novo awarded.

Judgment reversed, and venire facias de novo awarded.

ETTING v. The SCHUYLKILL Bank.

1. Protest of a foreign notary not evidence of a demand of payment of a promissory note.
2. A notice dated on the second day of grace, stating a demand on that day, will not bind an endorser.
3. An entire day is allowed for transmitting a notice by every endorser, and a direct notice which reaches an endorser as soon as he would have received it by regular transmission through all the parties, is sufficient, though they live in the same town; but a delay beyond the day by any one endorser, will discharge the prior parties.

ERROR to the District Court of the city and county of Philadelphia.

April 8. This action was against the second by the third endorser of a promissory note. The first three endorsers resided in Philadel-

Digitized by Google

phia; the fourth in New York; the fifth at Newark, N. J.; and the place of payment was Elizabethtown.

The last day of grace was the 4th October, 1839; the sixth, was Sunday. The protest was made on the 4th, and the notice dated the 3d, describing the note by its amount, and the name of the drawer, and the protest "made this evening," was received on the 8th from the notary by defendant. The court left it to the jury to say, whether evidence of the protest on the fourth from the official certificate of the protest, was avoided by the date of the notice. If they did not think the evidence in the notice destroyed that on the face of the protest, they must find for plaintiff on this point. As to the time, every party had twenty-four hours to transmit the notice; hence it was in due time.

Meredith, for plaintiff in error.—The present party is obliged to resort to this, as his prior endorser has notified him of his intention to contest the matter. The right to a day to transmit notice does not prevail where the parties reside in the same town; it is intended to allow time for mailing. But here the notice was defective, because it stated a protest on the day before the last day of grace; and this is a material fact, and must be stated correctly, Story on Promissory Notes, 349, 299, 330. The court erred in leaving to the jury the question, whether the protest was made on that day or on the 4th; the evidence was in writing of equal force, neither being official. The jury could only guess at the truth.

R. Hare, contrà.—It was a mere mistake of the date; no injury was done; in fact, it was perfectly immaterial, 1 Bay. R. 517. If there was no date, certainly it would be a valid notice.

April 14. GIBSON, C. J.—The notarial certificate of protest was evidence of the fact of protest, but of nothing else; for our statute, which declares that the official acts, protests, and attestations of notaries public certified under hand and seal, shall be evidence of the facts certified, is expressly restrained to the certificates of notaries "acting by the authority of this Commonwealth." The certificate before us, therefore, was not evidence of demand on the maker of the note; and as evidence of the mere fact of protest, which is superfluous in the case of a promissory note, it was immaterial. As there was no other evidence of demand and non-payment, either on the last day of grace or any other, the jury ought to have been instructed that the plaintiff had failed in his proof on that ground.

The notice of non-payment also was vicious. It bore date the evening of the day which preceded the last day of grace, and the defendant was consequently informed by it of nothing more than that the note

Digitized by Google

had been presented and protested for non-payment before it was due—a blunder with which he had nothing to do, and which he was not bound to notice. He had a right to presume that it would be discovered, and that the note would be again presented for payment at the day; of the event of which he would be informed, should it be necessary, in due season. Hearing no more about the matter, he had a right to repose on a belief that the note was paid. It is true, that it had in fact been presented for payment at the proper time; and that the notice was misdated by mistake; but how was he to know that? He might as well presume that the notary had mistaken the day of payment, as that he had mistaken the date of the notice. But with any mistake as to either, he had nothing to do. He was entitled to have explicit notice of the very truth; and the consequences of wanting it are not to fall on him who was not the cause of them, but on the holder, by whose agent they were occasioned.

Had the notice been truly dated, the service of it would have been in time. The general rule is, that when it is given by the holder directly, it is soon enough, if it reach the particular endorser, as soon as it would have reached him circuitously through the subsequent endorsers, each of whom are entitled to an entire day, if he chose to insist on it, to hand it on; the only limitation to which, is stated in Marsh *v.* Maxwell, 2 Camp. 210, note, by Lord Ellenborough, who said, "It is enough that the drawer or endorser receive notice in as many days as there are subsequent endorsers, unless it is shown that each endorsee gave notice *within* a day after receiving it; as if any one has been beyond the day, the drawer and prior endorsers are discharged;" in other words, that there shall not be a longer link in the chain than the space of a single day, and that the holder shall not affect the endorser with notice after he has been discharged from liability to the subsequent endorsees. In this case there was no evidence of circuitous notice, and a day was properly allowed for each intervening party.

Judgment reversed.

Digitized by Google

www.libtool.com.cn

TROTTER *v.* SHIPPEN.

An executor holding a mortgage received coal for his private use, from the tenant, who had agreed to keep down the interest as part of the rent; he promised to endorse the amount on the bond, and on accounts, crediting him with the amount of the interest, being rendered, examined them without objection, continually repeating the promise to make an entry on the bond. *Held*, there being no collusion, both parties considering the executor a solvent man, the mortgagors were entitled to this credit for interest on the mortgage.

ERROR to the District Court.

A judgment having been obtained by Trotter, administrator of Aspden, on a sci. fa. upon a mortgage, it was, on motion to set aside the assessment of damages, referred to an auditor to settle the amount due. The question was on the right to certain credits for coal furnished to Nixon, the former administrator of Aspden.

Nixon, in 1829, purchased a bond and mortgage for $5000, which, in 1833, he marked by endorsement, as being the property of Aspden's estate. The property covered by the mortgage was owned by Chauncey et al. In 1835, they demised it to the Little Schuylkill Railroad & Coal Company, for a term, after which the tenant continued in possession. By a separate agreement with the owners, the tenant was to pay the interest on the mortgage, and deduct it from the rent. In the years 1834 to 1840, inclusive, the company furnished Nixon with coal, in small quantities, varying from one to twenty tons at one time. On the 24th August, 1835, there was due on this account, for the two preceding years, $168 50. The total amount for the seven years was $1149 50.

On the 25th August, 1835, Nixon endorsed a receipt on the bond for $766 67, received from the company, which, with other sums from third persons, was in full for interest to July 1, 1835. This payment was in cash, at Nixon's request, being about to have a settlement of the Aspden estate.

In December, 1836, the company furnished Nixon an account of the coal delivered in 1836, and the balance on former account, with a credit for the interest due on the mortgage in that year, and a balance struck. In 1839, an account was furnished of the coal for 1834, to 1839, inclusive, with a credit for four years five months, &c., interest on the mortgage, and balance struck.

In 1838, Nixon was furnished by the company with a bill of the arrears of interest as they became due on the mortgage.

Digitized by Google

www.libtool.com.cn

In the ledger of the company, in 1840, he was charged with his coal account, - - - - - - - - -	$1149 50
And credited with five years' interest, &c., -	1633 33
Balance due H. N., - - - - - -	483 83

Nixon was a stockholder of the company. When the accounts were rendered, he promised to call and settle them; he came to the office and examined the books, and said he would bring the bond and make an entry on it of settlement; nor did he ever make any demand for interest, from the time of the cash payment until his death, though the company was always ready to pay it. One of the owners of the land supposed the interest had been endorsed as paid, under this arrangement. After Nixon's death, his executors settled his accounts as administrator, charging themselves with this amount, as received by him.

The auditor further found, that at the time of these transactions, Nixon was believed, both by himself and them, to be perfectly solvent, but whether his estate will prove to be so, depends on the result of a claim now pending.

These facts were relied on, as showing a payment of the interest by the company, on account of the rent, in coal.

The court gave judgment for the plaintiffs; disallowing the claim of payment by the company.

Chester, for plaintiffs.—The case is a very simple one: can an executor pay his private debts out of the trust estate? It is perfectly well settled he cannot, and the party receiving such money is participant in the fraud, and liable to pay it over again. Petrie *v.* Clark, 11 Serg. & Rawle, 385; Colt *v.* Lasnier, 9 Cow. 320; Marshall *v.* Hoff, 1 Watts, 440.

Williams, contrà.—There can be no question, if there be collusion, all parties are liable as for a devastavit. But if the debt be paid in chattels, and they are then misapplied, the party so paying is not liable. [*Gibson*, C. J.—They included an old debt of the executor at the time of the arrangement.] That was small, and the arrangement was a special one for mere convenience, all parties supposing him perfectly solvent. An unexpected termination of a law-suit, alone rendered the estate of Nixon insolvent.

The mortgage debt did not belong originally to the estate, but was a purchase by the executor; the action on it, therefore, would have to be brought formerly in his own name, or that of his representatives, and this debt could have been set off, 1 Wms. Ex. 569; 1 Baker *v.*

Digitized by Google

Tolcott, 1 Vern. 474; Catherwood *v.* Shambaugh, 1 B. & C. 150; all the cases referred to on the other side, or cited in text books, on this point, go on collusion. [*Gibson*, C. J.—What is collusion?] Something mala fide; something intended to injure the estate; a mere delivery of chattels in payment cannot amount to it, and there is nothing more here. In the cases cited, nothing was actually received by the executor at the time. [*Gibson*, C. J.—The difficulty is this: a purchaser is bound to see to the application of purchase money, but that does not apply in the case of executors; but if he is a trustee, and the dealing is out of the ordinary course, would he not be bound?] The court will observe there is no pretence of any fraud in the parties; the case then comes to this: a perfectly solvent man owes a debt; his creditor owes him one as trustee; they exchange, or mutually extinguish them, merely for convenience, instead of the formality of exchanging checks, which would be perfectly good. It would seem, therefore, the only question is, whether the want of that formality is fatal, and this to a party to whom it was indifferent how the payment was made. Meed *v.* Orrery, 3 Atk. 235; Key *v.* Robberts, 4 Mad. 450; McLeod *v.* Drummond, 14 Ves. 352.

April 25. Gibson, C. J.—An executor differs from a mere trustee so far, that a purchaser from him is not bound to see to the application of the purchase money. Still, as was said in Petrie *v.* Clark, 11 Serg. & Rawle, 386, a person dealing with him will not be protected, if he collude with him in a misapplication of the assets. Was the transaction between the company, or the owners of the property, and Mr. Nixon, the executor, collusive in fact or in law? The company was not a debtor to the fund, but the lessee of premises in which it was invested, on the security of a mortgage; the interest on which, it had agreed with its lessors, the owners of the property, to keep down in payment of the rent; and the extent of its obligation, legal or moral, was to pay it into the hand authorized to receive it. It was responsible to its lessors, standing in the place of the mortgagor; not to those beneficially entitled under the mortgage, with whom it stood in no privity, and to whom it owed no duty. With this contest, therefore, it would have had no concern, had it not been substituted for the owners of the premises as a stockholder in the case stated; and the question is, whether payment of interest in coal, for the executor's private use, would have been good, if made by the owners themselves, instead of by the instrumentality of their lessee.

Had the coal been delivered subsequently to the arrangement, there would not, according to Petrie *v.* Clark, have been a doubt of the

Digitized by Google

validity of the transaction; for payment in coal is certainly as good as payment in coin, being not more readily diverted from its proper destination to the receiver's private use. Part of it, however, had been antecedently supplied, and this is the only part of the case that will bear an argument. The private debt of the executor, for the price of it, was defalcated from the debt due to him in his official capacity; and thus he paid his own debt with the assets. The case then stands as it would have stood had the owners of the property defalcated from the interest due on the mortgage, a private debt due from Mr. Nixon directly to themselves, except that they would have been privy to the act.

Is there a difference in this respect, between a pledge and a payment? There certainly is a difference between a pledge for a previous debt, and a pledge for a present advancement. In the case of the former, the pawnee cannot be said to have received the pawn for value; for the giving of further security for a previous debt without further consideration, is gratuitous. But it was held in Petrie v. Clark, that payment of an antecedent debt with the assets would be a disposition of them for value, and conclusive on the rights of the legatees, unless the transaction were tainted with actual fraud. The question then is, what constitutes it? In Andrew v. Wrigley, 4 Bro. Ch. Rep. 125, the purchase of a term, parted with in payment of the executor's debt, was not disturbed, it would seem, only because there had been long possession under it. This is the strongest case for the plaintiff that has been produced; for Crane v. Drake, 2 Vern. 616, was a case of absolute collusion. But neither of them comes up to the present. The one which most resembles it, is Keane v. Robarts, 4 Mad. Ch. Rep. 357, in which Sir John Leach said, that the rule which subjects a pawnee or purchaser to the consequences of participation in a breach of trust, by receiving the assets in pledge for antecedent advancements, or in payment of the executor's own debt, admits of exceptions; and the retention of moneys to the amount of previous remittances to the executors by their agents, in anticipation of receipts from the assets, was held, in that case, to be one of them. The agents were held not to be answerable for any misapplication of their remittances, because they were not privy to any intention to commit it. Now, what had this company to do with Mr. Nixon, or any preconceived intention on his part? It was merely the instrument of the owners to hand over the rent due to them, in payment of the interest on their mortgage. But if it be considered no more than a stakeholder, the liability of the owners for its dealings will be the same. Sir William Grant said, in McLeod v. Drummond, that "where the inquiry is, whether the party

Digitized by Google

taking the assets by means of such a pledge, (for an antecedent advancement,) is or is not guilty of a fraud, it is very material whether he is endeavouring to procure to himself payment of a debt already due, *and which the executor has no means of paying with his own money*, or is exercising a choice whether he will or will not lend his money on the pledge there offered him. Undoubtedly, suspicion of fraud must always arise, when a party having a debt due to him by the executor, takes, in satisfaction of that debt, the assets which he knows belong to the executor only in that character; but where a man is applied to for a loan of money, there is no *motive* for fraud." According to this learned and most excellent judge, the transaction is good wherever the motive for it is clear; of which the time of the advancement, even in the case of a pledge, is only evidence. Now what inducement had the owners of the property to pay the interest of the mortgage with Mr. Nixon's private debt? As he was believed on all hands, by himself as well as by every one else, to be abundantly solvent, the company would have received prompt payment from him had it been demanded; and as it was itself good to the proprietors of the property for the rent, they could have had no self-preserving purpose to answer in getting it from Mr. Nixon, who owed them nothing. The arrangement was one of mere convenience, to avoid circuity; and the case stood on it as if the proprietors had drawn in his favour on their lessee, with whom he consented to settle the amount in the adjustment of by-gone transactions. How are they responsible for that? Had they paid the interest with their own money, in the first instance, knowing that they would get it back the next instant from the company, as rent, the payment would have been unexceptionable, though they had believed that Mr. Nixon would pay it to their lessee, in discharge of his private debt, because being compellable to pay it in any event, they would have had nothing to do with the application of it; and why should the event of a circuitous transit of it make it otherwise? To hold it to be collusive, would be to hold every one who pays to an executor responsible for the application of money which he could neither withhold nor control: a consequence not less repugnant to convenience than to justice. On the case stated, therefore, the plaintiff is not entitled to recover.

Judgment for defendant.

Digitized by Google

www.libtool.com.cn

CHRISTINE *v.* MANDERSON.

1. Under the acts of 1806 and 1808, a mechanic's claim against a reputed owner, who was also contractor, though not named as such, is valid.
2. And these acts extend to all cases where the goods were furnished before the act of 1836 went into operation.
3. The plaintiff is entitled to judgment, though the real owner be not named in the sci. fa., for he may defend on the same grounds in ejectment by a purchaser at sheriff's sale.
4. The court may strike off a plea, averring or denying facts which the plaintiff must prove or disprove, to entitle himself to judgment.

ERROR to the District Court of the city and county of Philadelphia.

April 16.—Manderson, on the 7th of February, 1837, filed a claim for materials furnished between Dec. 31, 1835, and August 10, 1836, to a house particularly described, against A. Christine, owner or reputed owner. On a sci. fa. the defendant pleaded that the goods were not furnished; payment; that he never was the owner, but that one Bowman was. And also filed a plea averring "the claim is null and void, because it does not state the kind and amount of materials, and the times when furnished, and this he is ready to verify by the record." This was struck off by the court, on motion; and constitutes the first exception. The plaintiff, on the trial, before Stroud, J., proved the delivery of the goods and their value, and the erection of the building by Christine, and gave evidence showing reputed ownership. There was some contradictory evidence on this point. The court refused to admit evidence to prove that the title was in Bowman, and never in Christine.

In answer to defendant's points, the court said that the act of 1806 governed the case, as the materials were furnished before the act of 1836 went into operation. Hence a specification of the materials, or the time of furnishing them, was not necessary. The claim was good, though the owner was not a party. It was not necessary to file the claim against Christine, as contractor, and Bowman, as owner. That if Bowman was the real owner at the time of the commencement of the building, the plaintiff might recover.

These were the errors assigned here.

Norris, for plaintiff in error.—The act of 1836 was prospective, it is true, Davis *v.* Church, 9 Watts, 304, but here the claim was not filed until it went into operation. If, then, this proceeding be under that act, it is clearly void. But, even under the old law, it is void. That of 1806 does not state the parties against whom it must be filed, but

Digitized by Google

the act of 1808 requires the sci. fa. to be issued against the contractor *and the owner*. If filed against the owner only, it is bad, Barnes *v.* Wharton, 2 Whart. 198. Here it purported to be filed against the owner only. The practice has always been to file a bill of particulars, as will be seen in Hills *v.* ———, 16 Serg. & Rawle, 56; Lehman *v.* Thomas, 5 Watts & Serg. 262.

As to the plea, the court had not a right to strike it off; the remedy was by demurrer, 1 P. A. Br. Rep. 78.

McMurtrie and *St. Geo. Campbell*, contrà.—The plea was bad in every way. It was in effect a demurrer, for it stated that the facts we alleged in the sci. fa. did not warrant a judgment. In that aspect it was bad, for it concludes with a verification by a record, but what record is not stated. As a plea, it was the general issue, and bad in that respect. It was moreover tried in fact, for we must have shown that all the matters noticed in that plea were legally performed before we were entitled to recover. The only question is, whether the act of 1806 extends to this case. The act of 1836 is prospective, and affects no rights anterior to the 1st September, 1836, as appears from the last section, and it is decided the commencement of the building is the time at which the act of Assembly operates. Steinmetz *v.* Boudinot, 3 Serg. & Rawle, 541. Our rights had fully vested before the act of 1836, and no construction is to be put on a general act which operates injuriously upon vested interests. Lambertson *v.* McClelland, antè, 22. Under the act of 1806 the claim is valid. No bill was required, Springer *v.* Keyser, 6 Whart. 187. The owner's name need not be specified, and if the contractor be the reputed owner, it is not necessary to mention any one else, Rogers *v.* Kingler, 3 Whart. 335; Linn *v.* Naglee, 4 Whart. 96, 97; Savoy *v.* Jones, 3 Rawle, 343, 350; O'Conner *v.* Warner, 4 Watts & Serg. 225; Bickel *v.* James, 7 Watts, 11; Church *v.* Davis, 1 Watts & Serg. 241. Nor is it necessary to have a plea from the real owner, Sullivan *v.* Johns, 5 Whart. 266, which proves conclusively he is not a necessary party to the action, and that the reputed owner and contractor only, here the same person, are to be made parties.

April 20. SERGEANT, J.—The act of 17th March, 1806, does not require that the claim shall contain the name of the owner or contractor. It makes the building subject to the debt contracted for materials furnished, or work done in erecting it. The claim, therefore, in the present instance would have been good, though it had not stated, as it does, the name of an owner or reputed owner. And this is the answer also to the objection that the claim is defective in not stating the kind or

Digitized by Google

www.libtool.com.cn

amount of materials furnished, and the time when furnished. It was not till the passing of the act of the 16th June, 1836, this was required, and in the present case the work was done before the act went into operation, and does not fall within its provisions, which are prospective. The fourth plea was therefore a bad one, and its deficiency might be taken advantage of in various modes, of which that of striking it off is the most convenient and usual.

As to the objection that Bowman was the real owner of the building, and not Christine, this is properly an objection under the act of 28th March, 1808, to the scire facias, and not to the claim. The second section of this act directs the scire facias to be issued against the debtor and owner, and undoubtedly the plaintiff ought to have made the owner a party, and have service made upon him, where he knows him to be so. That is, frequently, however, not in his power, owing to unknown transfers and apparent ownerships, and hence the practice of proceeding against a reputed owner, since incorporated into the act of 1836. In the present instance, the defendant asserts that Bowman was the real owner, and the evidence offered must be taken to prove that. But the evidence also shows that Christine was contractor for Bowman, and nothing proves the debt paid. The issue joined was, whether Christine was owner or reputed owner. If Bowman procured Christine to appear and act as the owner, and thereby got the benefit of the plaintiff's materials, the scire facias against Christine, as contractor and owner, or reputed owner, would be sufficient. Besides, it is an objection which can only avail Bowman himself, and does not lie in the mouth of the present defendant in a proceeding against the building. In Anshutz *v.* McClellan, 5 Watts, 487, it is held that this provision is merely directory, and the plaintiff may proceed to sell, leaving to the owner the same defence he might have taken had he been party to the scire facias.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

2 366
132 226

KENNEDY *v.* The BOARD OF HEALTH.

1. The District Court has jurisdiction under the act of 1818 and 1830, of all claims for the removal of nuisances by the Board of Health, though less than $100.
2. The form of the claim is regulated by the mechanics' lien acts in force before that of 1836.
3. The board have final jurisdiction in determining the fact of nuisance, which they order to be removed.
4. The 27th section of the act of 1818 has no reference to a nuisance on a vacant lot, so far as it requires a warrant from a justice, and a visit by a committee of the board, before an order for removal be made.

ERROR to e District Court of the city and county of Philadelphia.

April 17.—The Board of health issued a scire facias on a claim for $47 87, for removing a nuisance on defendant's property. The claim, as filed, described the property and the nuisance as a pond of stagnant water, removed by their depositing earth thereon after due notice to defendant and neglect by him; annexed was a bill of particulars to be considered as part of the claim; and averring that the nuisance was removed, and the money paid within six months, immediately before filing the claim. The bill was dated August 30th, year omitted, charging defendant with cash paid, &c., for two hundred and fifty-four loads of earth, at eighteen cents per load, $47 62; probate twenty-five cents, $47 87.

The plea was payment with leave; and that plaintiffs did not expend or direct the moneys to be expended as alleged.

The evidence, to prove the order of the board for the removal, was objected to, and is stated by his honour in considering the third exception.

The fourth error assigned, was a refusal to permit the defendant to show that his lot was higher than the adjoining street, and that the water was collected there by reason of dirt thrown in the street from adjoining houses. A notice to defendant having been proved, the defendant asked the court to instruct the jury: that plaintiffs must show an authority to fill up the lot, and that they acted in pursuance of it; that under the act of 1813, they must have visited the lot by a committee; and that the evidence did not authorize a recovery.

His honour, Jones, J., told the jury the act of Assembly very much restricted the defence; payment, and unnecessary expense in removing the nuisance alone could be inquired into; this was left to them on the evidence. The fact of nuisance must be considered established; that certain formalities, such as visiting under a warrant, &c., were required

Digitized by Google

when a house or enclosure were to be entered; but these had no reference to vacant lots. Whether the lot was sufficiently described in the notice, was for them.

The first exception was to the jurisdiction of the court, the claim being under $100. 2d. Defects in the claim for want of specification of the time when the loads of earth were deposited, and the omission of the year. The 3d and 4th have been stated. 5th. In deciding, an application to a justice was not requisite. 6th. That the fact of nuisance could not be inquired into. 7th. That evidence of an order had been given. 8th. That the 27th sect., act of 1818, January 27th, did not apply to vacant lots. 9th. A visit under warrant unnecessary.

Kennedy, for plaintiff in error.—The court has no jurisdiction in claims under $100. The act of 1818, 7 Sm. Laws, 24, gave it specially, and the court has since been reorganized; it is a different tribunal, and the general jurisdiction of the former court only has been given. The lien is defective, in not stating the time of doing the work which is required, as it is assimilated to mechanics' liens. But there is not a shadow of evidence there was any nuisance; indeed the court considered it unnecessary. [*Sergeant*, J.—The legislature have given the Board of Health final judicial power on that subject.]

J. A. Phillips, contrà.—The act is remedial, not penal; it is essential, for many owners are out of the jurisdiction. As to the jurisdiction.—[*Curiam*.—You need not speak to that.] The claim is filed according to the mechanics' lien act of 1806, which was in force at the time these claims were made liens, and of course governs this case.

April 23. KENNEDY, J., after stating the record.—By the 27th section of the act of the 29th of January, 1818, it is made the duty of the board to cause all offensive or putrid substances, and all *nuisances* which may have a tendency, *in their opinion*, to endanger the health of the citizens, to be removed from the streets, lanes, alleys, highways wharves, docks, or any *other part* or *parts* of the city of Philadelphia. the district of Southwark, and the townships of the Northern Liberties, Moyamensing and Penn. And in the conclusion of the same section, it is enacted, that the expenses attending the removal of such nuisance shall be recovered by the Board of Health in any court having jurisdiction, from all corporate bodies and individuals, in case due notice has been given to remove the same, and a refusal or neglect to do so within the time prescribed by the board. And by a supplement to the said act, passed the 7th of April, 1830, it is further enacted, that the expenses attending the removal of any nuisance shall be and remain a lien upon the premises from which such nuisance has been removed;

Digitized by Google

and it shall be the duty of the said Board of Health to file the claim therefor, against the owner or reputed owner, in the office of the clerk of the District Court for the city and county of Philadelphia, which *said court* shall, in *all cases*, have *jurisdiction* of the same; and the said claims may be filed, recorded, and proceeded on by scire facias, to recover the same, in like manner as mechanics' liens are recoverable, upon the trial of which, the *fact of the nuisance shall not be inquired into*, and the defendant or defendants shall only be permitted to give evidence of payment, or that unnecessary expenses were incurred by the board in the removal of the nuisance.

[His honour then stated the bill filed with the claim.]

This bill or claim was filed by the board, in the clerk's office of the District Court, on the 19th day of October, 1841. The first error assigned is, that the District Court of the city and county of Philadelphia had no jurisdiction over the claim, as it was less than $100. This error has, and can not be sustained; for the act of the 7th of April, already in part recited, declares in express terms, that the said court shall have jurisdiction *in all* such cases, without any limitation as to the amount thereof. The second error is, that the time when the loads of earth were deposited, or the expenses incurred, as alleged in the claim or bill, is not specified; the year is omitted. The act of Assembly, in this behalf, does not require that the date of removing the nuisance, or of paying the expenses incurred for doing the same, shall be stated in the claim made on account thereof, and filed in the clerk's office of the District Court of the city and county of Philadelphia; and in this respect is different from a subsequent act, passed the 16th of June, 1836, relating to the filing of mechanics and materialmen's claims; the 12th section of which directs, in express terms, that every such claim shall set forth the time when the materials were furnished, or the work done. The cases, therefore, of Rehner *v.* Zeigler, 3 Watts & Serg. 258, and Lehman *v.* Thomas, 5 Id. 362, cited for the plaintiff in error, being decided under the mechanics' lien law of the 16th of June, 1836, have no direct bearing on or application to this case. But if the time when the expenses incurred in removing the nuisance were so material, that it ought to appear from the claim itself as filed, it may and can be ascertained from it in this instance; for the month and day are given in the bill, filed with the claim, and it is expressly alleged in the claim, as filed, that the nuisance was removed, and the expenses thereof paid within six months immediately before filing the claim, the date of which is noted by the clerk of the court, who filed it; so that all that is necessary to render *certain* the day, month, and year of removing the nuisance, and paying the expenses thereof, is given in the

www.libtool.com.cn

Digitized by Google

www.libtool.com.cn

bill, and the statement of the claim filed with it. There is nothing, therefore, in the second error.

The third error is, that the court erred in allowing the minute of the order, made in writing in a book kept for that purpose by the board, to remove the nuisance, to be read in evidence. It is not easy to discover what sort of evidence would have been admissible for this purpose, in the opinion of the counsel for the defendant below. For first, the counsel for the plaintiff offered verbal evidence, to prove the order which was objected to by the defendant's counsel, who inquired of the witness produced to prove the order, if the proceedings of the Board of Health had not been committed to writing, and whether a book of the minutes were not kept, to which the witness produced answered in the affirmative; and the book containing the same was instantly produced, and after being testified to, that it was their book containing a registry of their proceedings from time to time, was offered to be read in evidence, for the purpose of showing that the board had made an order directing the nuisance to be removed, which was also objected to by the counsel for the defendant below, but admitted by the court to be read in evidence, for the purpose mentioned, to the jury, to which exception was taken. Now, if neither the verbal or the written evidence offered was admissible to establish the order of the board for removing the nuisance, I must confess, that I am somewhat at a loss to discover or say what species of evidence would be admissible for such purpose. The board was not only an incorporated body, but acted likewise in a judicial character, in ordering the nuisance to be removed, which rendered it highly proper, if not necessary, that their proceeding in such case should be reduced to writing and preserved, for the special purpose of being evidence afterwards, to show, whenever it became necessary, what they had done. It was the very best evidence that could be given, and such as is given every day. Rex *v.* Martin, 2 Camp. 100; 1 Greenl. Ev. 542, 393.

The fourth error is, that the court refused to permit the defendant below to prove the cause of the nuisance. It is not easy to perceive the relevancy of such evidence, unless it was intended to show by it, that there was in reality no nuisance to be removed. But this latter could not be proved, for the act of Assembly on the subject, as recited above, makes the order of the board conclusive, that the nuisance did exist, and expressly enacts that the fact of the nuisance shall not be inquired into. The board decided that the nuisance existed on the lot of the defendant, and the *fact* being so determined, it made no difference from what cause it arose; it was necessary and proper that it should be removed. The evidence was therefore properly rejected.

Digitized by Google

www.hotool.com.cn

The fifth error is, that the court erred in instructing the jury that a nuisance upon a vacant lot might be removed by the board without any application to a justice of the peace. In this we think the court were clearly right. The first part of the 27th section of the act of 1818, which makes it necessary for the board to obtain a warrant from a justice of the peace, is only required when the board have just cause to suspect that a nuisance exists in a *house*, *store*, *cellar*, or *other enclosure*, which it was thought by the legislature ought not to be entered by the board, without their having first obtained a warrant from a justice of the peace, authorizing them to do so. But nothing of the sort is required, if the nuisance exists in a *street*, *lane*, *alley*, *highway*, *wharves*, *dock*, or *other part*, &c., meaning clearly any unenclosed *part* of the city, &c.

There is nothing in the sixth error, and nothing need be said in regard to it more than what has been said already on the exception to the rejection of evidence, which is sufficient to show that the fact, that a nuisance existed on the lot, could not be controverted without contravening the express provision of the act of Assembly in relation to that point.

The seventh error is, that the board gave in evidence the order to remove the nuisance, and gave notice to the defendant of the order. We can perceive no error in this, nor any injury that could possibly result to the defendant from the board having done so.

The eighth error is a repetition of the position, that the court erred in stating to the jury, that the 27th section of the act of 1818 did not apply to a vacant lot. It is not strictly correct, however, to say, that the court stated that this section did not apply to a vacant lot. It is the first part of the section which requires a warrant to be obtained by the board from a justice of the peace, which the court said did not apply to a vacant lot, but that the subsequent part of the section did apply to a vacant lot, and authorized the board to act where a nuisance existed upon it, without such warrant from a justice.

The ninth error relates to the same point, and requires no further notice.

The judgment is affirmed.

Digitized by Google

www.libtool.com.cn

In re Roberts, Rossiter's Appeal.

1. Auditors having been appointed to distribute an estate assigned for creditors, the ward of the assignor permitted to claim funds belonging to her, and loaned by her guardian, which had been received by the assignees.
2. Declarations of the assignor before assignment admissible to identify the fund, though he might have been called.

From Chester Court of Common Pleas.

April 20.—An auditor having been appointed to distribute the funds in the hands of the assignees of Roberts, Susan Rossiter, who was his ward, claimed payment of a sum received by him, and loaned to Thomas Rossiter, which had been received by Roberts' assignees; and offered declarations of Roberts, made before his assignment, to prove the loan was with her money. The auditor and court rejected the testimony, on the ground that Roberts himself might have been called to prove the fact.

This was the only exception argued here.

Pennepacker, for appellant.—The admission was evidence, for the assignor was in privity with his assignee and the creditors; but the court thought the party must be dead to make it competent, Phil. Ev., 660–665. The very point was decided in Woolf *v.* Eichelberger, 2 Penna. 346. In Harrisburg Bank *v.* Tyler, 3 Watts & Serg. 273, money was thus traced through several investments, though it is true the party was dead. But we are not bound to call him as a witness; his declarations are sufficient, and we may not choose to trust him. The declarations of a bankrupt before bankruptcy are good against his assignees, Mark *v.* Barker, 1 W. C. C. R. 185; and this court, in Twelves *v.* Williams, decided, assignees for creditors are in the same situation as the assignor.

Lewis, contrà.—This court must decree, and the evidence is not brought up. The auditor would have taken it down if requested. [*Gibson*, C. J.—It is a great error in the auditor not to take down the testimony, and let the court judge of it; it is not like a case before a jury.] The reason is, it was not asked; the court would have compelled it had that been the case. [*Curiam.*—We would send it back to the auditor if we are satisfied it was admissible.] The question is not with the assignor, but with creditors; and a creditor claiming as such cannot deny the title of his debtor. [*Curiam.*—She does not claim as a creditor.] She has no rights in any other capacity before

Digitized by Google

this auditor. [*Curiam.*—She claims as the owner of this particular fund, and as such may claim; the assignees are mere stakeholders.]

www.libtool.com.cn

April 30. SERGEANT, J.—The admissions of a party against himself have always been considered evidence of a high order, except where obtained by fear or undue influence. It is no objection to receiving such admissions in evidence, that the party making them is living and capable of being called as a witness, as was decided by this court in Gibblehouse *v.* Strong, 3 Rawle, 437. Indeed, in many cases, a party would be estopped by such previous admissions from controverting their truth where it would operate to the wrong of others. On this principle, it would seem that the admissions of Joseph Roberts, that he had loaned to Thomas Rossiter the money of his ward, would be evidence against him that this was the truth. And if they would be evidence against him, there seems to be no reason why they would not be so against assignees under a voluntary assignment made by him after the admissions, who hold merely his title and stand in his place. That they take for the benefit of creditors, does not raise them to a higher grade than that occupied by their assignor, nor discharge the estate in their hands from the equities and trusts which attached to it while he held it, has been frequently decided.

We think, therefore, the court below erred in overruling the first exception taken by the appellant, and for so much the decree is reversed, and for the residue, affirmed.

2 Bro.
137 Ch.

RIDDLE *v.* DIXON.

1. A stranger to a suit for damages occasioned by the erection of a dam, whose land is thereby flooded, is not incompetent as a witness, even though he may have granted the right, of which the party cannot avail himself but by thus swelling the water.
2. Declarations of the owner, to be evidence against his grantee, must be prejudicial to himself at the time; hence, where A., who was the owner of land on which he had erected a mill and dam, was also the owner of tract B., his declarations as to the extent of his right to swell the water on tract B., by means of a dam under a grant of the former tract, are not evidence against the subsequent owner of B.

April 20, 21.—DIXON brought an action on the case against Riddle for swelling the waters of Chester Creek on his land and mill-race, by means of a dam below. On the trial, he called one Peterson to prove that defendant's dam was too high; defendant objected, and showed a deed from witness to himself for a piece of land above the dam, together with the privilege of flooding the land to a certain point, the

Digitized by Google

position of which was the question of fact now in controversy. Defendant alleged witness was thus interested in lowering the dam, thereby diminishing the right of defendant in the easement conveyed. The court admitted the evidence, and this is the first exception. Plaintiff called one Crozer for the same purpose, who was the owner of land on the opposite side of the creek, adjoining and above the defendant's dam; the same objection and decision was made, and is the second exception.

The plaintiff claimed title under one Sharpless, to whom the land on which the mill and dam is erected was conveyed in 1785, "with the privilege of raising the waters of Chester Creek as high as a certain auger-hole marked 1785." Defendant having shown that Sharpless was also owner of part of the land, for an injury to which, the action is now brought, but on which there was then no mill or race-way at the time, and which was separated by other land from that owned by defendant, offered to show that whilst owner of these two tracts, Sharpless took the witness to the rock and pointed out to him the auger-hole, as the one mentioned in said deed, and declared it to be the limit of the right. The rejection of this evidence is the third exception.

Darlington and *Lewis*, for plaintiff in error.—The witnesses, Peterson and Crozer, were clearly interested; for they were swearing for their own interest. [*Kennedy*, J.—The verdict could not be given in evidence for them.] But the necessary consequence was, in the one case, to relieve his land from a charge put on it by himself for valuable consideration, and in the other, his right was increased. [*Curiam.*—He may not choose to abate his dam, notwithstanding the verdict.] A succession of verdicts will compel him, and we are to look to probabilities. [*Curiam.*—Such a possibility is no ground for excluding testimony.] The declarations of Sharpless were evidence as an owner of part of the land averred in the declaration to be injured by this act. It is a well-settled principle that admissions of a fact may always be given in evidence against a party, or those coming under him, Stansbury *v.* Arkwright, 5 Carr. & Payne, 575; Walker *v.* Brodstock, 2 Esp. 469; Hindley *v.* Rickerley, 5 Id. 4; and Wallace's note to 2 Smith's Sel. Lead. Cases, 470; Ashler *v.* Kneesley, 2 Serg. & Rawle, 354.

Edwards and *Tilghman*, contrà.—The witnesses are not to be rejected for such a remote contingent interest, if interest it can be called, which is not in the damages to be recovered, nor in any use which they can make of the verdict, or which can be made against them; a mere interest in a fact in controversy never excludes a witness, Greenleaf

Digitized by Google

Ev. sect. 390, and cases cited, 6 Binn. 319; Moss *v.* Montgomery, 15 Serg. & Rawle, 2. As to the declarations of Sharpless, they were offered to show the extent of his own grant, thereby affecting all the owners on the stream; but a grantee cannot thus establish his own title, Waring *v.* Warren, 1 Johns. Rep. 348; Greenleaf Ev. sect. 147, and cases there collected.

April 27. Gibson, C. J.—The testimony of Peterson was properly admitted. He owned a tract of land on the right bank of the creek, subject to the right of the defendant to flood it, by raising the water to the height of a mark in a rock in the opposite bank, designated in a conveyance to the defendant from the witness; and hence an argument that he was practically, if not theoretically, interested in the maintenance of the action, as it might, perchance, compel the defendant to reduce the height of his dam even below the point licensed by the witness. His interest, however, was not direct but incidental, and not fixed but contingent. He could gain nothing by the verdict which he could enforce. It would be exclusively in the power of the plaintiff to sue out execution of his judgment when he had obtained it; and the defendant might choose to keep up his dam even in despite of it. It is not probable that he would, but he might do so; and instances of invincible obstinacy in similar cases have been met with. The interest of the witness, in the event of the suit, therefore, was not only incidental but contingent; and it was consequently not such as to exclude him. But it has been argued that it would be incongruous to exclude him in an assize of nuisance, because the judgment is quod permittat prosternere nocumentum; and admit him in an action on the case because the judgment is for damages. The supposed incongruity, however, has no existence in fact; for the defendant might still purchase his peace with the plaintiff even after judgment of prostration; and the interest of the witness would be nevertheless incidental and contingent. Besides, it would be enough to obviate the force of the objection that it rested on no principle of law, but on a principle of hydrostatics, which is not a subject of legal adjudication; and that it went, not to the competency of the witness, but to his credibility.

The objection to the testimony of Crozer, who had granted no license, is still less plausible. He had no encumbrance to evade by the practical effect of the plaintiff's action. He had granted nothing; and if his rights were invaded he had an action for the injury, on the trial of which the verdict in the action before us would be inadmissible for any purpose.

The remaining exception is equally unfounded. The declarations

Digitized by Google

www.inbook.com.cn

of an owner are competent evidence against a successor to the title only on the ground of confession by a predecessor, who had power to affect it while he owned it. Such is distinctly the principle of Ivat *v.* Finch, 1 Taunt. 141; Walker *v.* Broadstock, 1 Esp. Ca. 458, and Gibble-house *v.* Strong, 3 Rawle, 477. But a confession, to be such, must be prejudicial to him who makes it; and for that reason it is, that the sacrifice of interest it involves is allowed to be an equivalent for an oath, the pocket being as good a touchstone of truth as the conscience. Entries by which a deceased person charged himself, are allowed to affect another with whom he had neither privity nor connection; but a privy may be affected by admissions of his predecessor, even while the latter is living within reach of the process of the court. The key to the difficulty which arises out of the difference is, that a privy stands in the shoes of the person he represents, whose admissions, under a consciousness of their effect, are not of inferior degree to his testimony under the influence of an oath. But such admissions must, in the apprehension of the party, be concessions; and what fact detrimental to him did Nathan Sharpless mean to concede, by asserting a right to maintain his dam at the height prescribed in Abraham Pennel's conveyance to him? True, he owned, at the same time, the tract above, on which the plaintiff's mill had since been built; but it was indispensably important to his mill below to maintain his right to flood the property on the opposite bank, the consequences of which, to his property above, seem to have been of less consideration. As he built no mill on it, we must suppose he did not estimate its advantages as a site very highly; nor does it appear that it would have afforded sufficient power, without the easement, for the tail-race, which has since been purchased from the owner of the intermediate tract. He showed the hole in the rock as the landmark of a right, not as the evidence of an encumbrance. To say the least, neither interest preponderated; but it follows not that his declaration would have been competent between these parties, if it had involved him in a sacrifice. Could he have given it in evidence against the plaintiff, had he continued to own the defendant's property? It will not be pretended that he could; yet the defendant stands exactly in his place. But as it was not shown that he considered his interest in the water-power of the upper tract to be the preponderating one, it is independently clear that his declarations were not evidence to affect the interest of his successor in the lower one.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

MARTIN *v.* PENNOCK.

The holder of a check, payment of which had been refused for want of funds, passed the same to his vendor, stating, in answer to inquiries, there was nothing wrong about it. *Held*, the suppression of these facts were fraudulent, and a recovery might be had on the original contract of sale.

If a note be taken by a seller of goods, with an agreement that he will endeavour to collect it or return it within two or three months; it does not imply he is bound to proceed to a suit; nor is he liable as for negligence, even though it be shown a recovery might have been had.

ERROR to the Common Pleas of the county of Delaware.

April 21, 22.—On the first of July, 1843, Pennock received a check from one Matson, who at the time informed him there were not funds in bank sufficient to meet it, but promised to make a deposit, and Pennock agreed not to present it for a week or two. This check was sent for collection by Pennock, and presented at the bank on the 3d and 11th of July, but was returned unpaid for want of funds.

In the following autumn, plaintiff sold a number of cattle to Pennock, who offered the check in payment. Earl, a witness for plaintiff, stated that, finding it was dated some months before, plaintiff inquired why it had not been collected, and defendant replied there was nothing wrong that he knew of; and that plaintiff said he would take the check and try and collect it, and if he could not, he would return it in the course of two or three months; and if defendant took the cattle it must be on these conditions. It did not appear that plaintiff ever presented the check at bank. But he offered to return it to defendant shortly after receiving it.

The defendant called a witness, who swore that at the hearing before the justice, defendant asked plaintiff if he did not remember a conversation previous to the purchase, in which he had said he was satisfied to trust Matson for the amount, and that he took the check "for what it was worth, not for what I am worth." Plaintiff replied, He would stick to his bargain.

Defendant gave evidence, showing the check might have been collected, had it been pressed for; Matson himself contradicted this. The justice, being called by plaintiff, stated he had given judgment for plaintiff, on hearing the conversations of the parties. That defendant asserted plaintiff had agreed to take the check for good. Plaintiff replied he might have said so, but not on the day of sale.

The court instructed the jury that the first question for them was, whether the check had been received in payment and satisfaction of the debt, and that if it had been, whether any fraud had been used, in which case plaintiff was not bound by such agreement.

Digitized by Google

www.libtool.com.cn

But that if the jury believed the check was taken on an agreement that he would endeavour to collect it, he was bound, without a stipulation to that effect, to use due diligence, and if the money was lost by his neglect he was answerable. And, though it was unnecessary that a demand should have been made at the bank, unless there were funds there; the case, on this view of it, was narrowed to a question of fact—Was Matson solvent, and able to pay at any time while the plaintiff held the check?—if so, the plaintiff could not recover.

Lewis, for plaintiff in error. The representations or suppressions of facts, which amount to the same thing, were grossly false, and calculated to deceive the party. It was an assertion that there was nothing wrong about a check which the holder had twice endeavoured to procure payment of and failed. This would have avoided any agreement to receive the note in payment, and it also obviated any duty to endeavour to obtain payment. 1 Com. on Cont. 37; McDowell *v.* Frazier, 1 Doug. 260; Fitzherbert *v.* Mather, 1 T. R. 12; Da Costa *v.* ———, 2 P. Wms. 170; Skinner, 327; Hodson *v.* Richardson, 1 Wm. Black. 465. These considerations show the error of the court on the second main part of the charge. Solvency or insolvency of the drawer was perfectly immaterial and irrelevant, and even had we been bound to collect, it was not by suit but simple demand, already twice made without effect.

Darlington, contrà.—The question of fraud was fairly left to the jury, for there was contradictory evidence, and they have shown by their verdict that plaintiff's witness was disbelieved. As to the court not instructing the jury that the alleged fraud vitiated the whole transaction, there was no prayer for any instruction; and in the absence of that, an omission by the court cannot be assigned for error, Rahn *v.* McElrath, 6 Watts, 151.

May 4. KENNEDY, J., after stating the case.—The only testimony given, which tended in any degree to prove what passed between the parties at the time of the purchase of the cattle, and to show the terms upon which the check was received by Martin, was the testimony of Earl. And it must be taken that he was entitled to full faith and credit, as no attempt whatever was made to impeach his veracity, nor any testimony given, tending in the slightest degree to contradict or impugn his evidence in any particular. The suit was originally commenced before a justice of the peace, who gave a judgment in favour of Martin, for the amount of the check, after hearing the allegations of the parties, without any testimony being given on either side. Lewis

Digitized by Google

Pennock, the brother of the defendant, was present at the hearing before the justice, and was produced as a witness on behalf of the defendant, on the trial of the cause in the Court of Common Pleas, into which it was brought by an appeal from the judgment of the justice. He testified, that on the hearing before the justice, the defendant asked Martin if he did not recollect a conversation at Unionville, before he (the defendant) bought the cattle, in which you (meaning Martin, the plaintiff) stated to me that you knew Westley Matson, and was not afraid to trust him for the amount of the check; and said if he could not pay it in one month, he could pay it in two, if not in two he could pay it in three, and if he could not pay it in three, he could pay it sometime. That Martin replied, "I admit that," but upon a moment's reflection, said, "I will not admit it exactly, either; for," said he, "I always considered you good enough for it." To which the defendant replied, "The day I gave you the check, you took it for what it was worth, not for what I am worth;" to which the plaintiff replied, "he would stick to his bargain;" and this was all the witness recollected about it: but said, further, there was considerable altercation between the parties; that the justice was present: but he did not recollect that Martin said he would stick to his bargain, *and return the check.*

It was argued that this evidence of the brother gave quite a different character to the transaction, from that given by the testimony of Earl, and went to show that the plaintiff had taken the check at his own risk, in full payment of the amount thereof. To my mind, however, it proves nothing of the sort; nor was it evidence which ought to have been considered as having any bearing upon the transaction between the parties; it was not evidence of any conversation that took place at the time the cattle were purchased, and the check given by the defendant to the plaintiff on account thereof: it was evidence of a conversation which, as the defendant himself alleged, took place some time before, but how long, was not mentioned. The testimony of Earl, therefore, stood uncontradicted and unimpeached. But the other testimony given on the part of the plaintiff, when taken in connection with that of Earl's, showed that the defendant did not deal fairly with the plaintiff in giving him the check; that he not only affirmed what was untrue, but suppressed facts in relation to the check which he knew to be true, and which, if he had disclosed to the plaintiff, would most probably have prevented him from taking or receiving it. It appears from the evidence, which is uncontradicted, that the defendant endorsed and passed the check, in a day or two after he received it from Matson, to the Bank of Chester county; that the Bank

Digitized by Google

of Chester county sent it on immediately for collection, or rather payment, to the Union Bank of Delaware, but Matson having no funds there, with which it could be paid, it was returned on the 4th of July, 1843, the third day after its date, to the cashier of the Bank of Chester county, unpaid, with the reason of its being so returned. It was sent a second time by the cashier of the Bank of Chester county, to the cashier of the Union Bank of Delaware, for payment, on the 11th of the same month, and returned unpaid, for the same reason, after which it was given back to the defendant; yet he not only concealed all these matters from the plaintiff, according to the testimony of Earl, but asserted, when inquired of by the plaintiff if there was any thing wrong about the check, and why it had not been collected, as it appeared to be dated some months before, *that there was nothing wrong about it that he knew of, and that it was all right.* Now, if the facts and circumstances thus stated and testified to by the witnesses, and testimony produced on the part of the plaintiff, be true, of which there seems to be no reason to entertain a doubt, it is evident that the defendant, with a view to induce the plaintiff to accept of the check in payment of the price, or part of the price of the cattle, concealed from him what it was material for him to have known in respect to the check. He ought to have told him all that had taken place, and more especially when he was asked the question, why it was that the check had not been paid, though some months had elapsed since it was drawn, and whether all was right in regard to it, instead of saying that all was right, and that there was nothing wrong about it. In short, it is impossible to come to any other conclusion, if the testimony is to be believed, than that the defendant practised a fraud upon the plaintiff, by means whereof he prevailed upon him to take the check: and certainly no ground, or good reason, has been shown for doubting the truth of the evidence on behalf of the plaintiff. And had the court below presented the case to the jury, as we think they ought to have done, under the view which has just been taken of it, the jury could have had no difficulty in finding a verdict for the plaintiff. Instead of doing so, however, the court below presented it first as a question of fact to the jury, to decide whether the plaintiff had not taken the check on his own risk, in absolute payment of the price of the cattle, and if he had done so, their verdict ought to be for the defendant, unless the defendant had fraudulently induced the plaintiff to accept of it. This, as it appears to me, was submitting a question of fact to the jury without any evidence to raise it: for there is not a particle of evidence that I can discover in the cause, which tends to prove that the plaintiff took the check in absolute payment at his own risk; on the contrary, the

Digitized by Google

testimony of Earl, the only witness present at the making and closing of the contract for the purchase of the cattle, shows most clearly that the check was only taken conditionally. And it is a misapprehension, to suppose that the evidence of Lewis Pennock, the brother of the defendant, tends to prove any thing to the contrary. The only part of his testimony which touches on this point at all, is, that the defendant said to the plaintiff, "The day I gave you the check, you took it for what it was worth;" to which the plaintiff replied, he would "stick to his bargain." It would be strange, indeed, if such a reply as this could be construed into an admission that he had taken the check in absolute payment, at his own risk. The utmost that could be made out of it for the defendant, even if the plaintiff said so, would be, "Do you prove that I agreed to take it for what it was worth, or in absolute payment at my own risk, and I will stick to my agreement." It is very possible that the plaintiff said, "I will stick to my bargain, and accordingly return the check;" but Lewis Pennock, the witness, could not recollect this latter part. But it is perfectly preposterous, to suppose that the plaintiff could have made such admission at the very moment when he was claiming to recover before the justice the amount of the check, in direct oposition to his having ever agreed or consented to take the check for what it was worth at his own risk. The justice was present, too, and heard all that passed, and after hearing all that did pass between the parties, rendered a judgment in favour of the plaintiff, for the amount of the check: a thing that he could not well have done, if the plaintiff had admitted, in any way, that he took the check at his own risk. There was, therefore, not a spark of evidence given from which it could be fairly inferred, that the plaintiff had agreed with the defendant to take the check as payment for the amount thereof, at his own risk; and the court, as we conceive, therefore erred, in submitting that as a questionable fact to the jury, when the testimony all showed that it could not be so. There are some other points raised by the court, in their charge to the jury, upon which they instructed them in a manner which was scarcely warranted by the evidence, as we think; yet we are satisfied that the case, from the evidence, as it was given on trial, must ultimately be determined in favour of the plaintiff on the ground of fraud alone, it would seem to be unnecessary to notice particularly the points just alluded to. There is one of them, however, on which I will say a word or two. The court below seem to have thought, from the evidence, that the plaintiff was bound to have collected the check from Matson, if collectable by any means, during the time he held it, before he offered to return it. Now, if the court meant to say, that he was bound to sue, and to use all possible

Digitized by Google

means for the recovery of the amount of the check, unless it appeared that Matson was insolvent, and wholly unable to pay, so that the amount of the check could not be recovered from him, it appears to me that this was going too far: for I think it plainly inferable from the evidence, that it was not the understanding of the parties, at the time that the plaintiff took the check of the defendant, that the plaintiff should enforce the payment of it from Matson by suit, if he could not obtain it without. The plaintiff, according to the evidence, was to return the check within two or three months, if he could not get the amount of it from Matson, which was a much less time than might have been requisite to collect it by a legal proceeding. The sum was such as a justice of the peace could take cognisance of, and if the plaintiff had sued Matson before a justice, and obtained a judgment against him for the amount of the check, Matson, if he were the owner of a freehold estate clear of encumbrances, of sufficient value to be a good security for the payment of the judgment, or if not such a freeholder, he had given good bail for the payment of the judgment, would have been entitled to a stay of execution for *nine* months; so that although perfectly solvent, the money, unless he paid it voluntarily, could not have been obtained or collected of him in two or three months. The impossibility, therefore, of the money, or the amount of the check being collected in any court by suit, provided Matson were solvent, and able to pay, within two or three months, shows clearly that it was not the understanding and agreement of the parties, that the plaintiff should be bound to collect the amount of the check by suit, if he could not obtain payment of it otherwise. The most that he was bound to do in this respect would seem to be, that he was to call upon Matson for payment, and endeavour by this course to get the amount of the check of him in two or three months if he could. This, it appears, he did, but failed to obtain payment, so that, if there were no fraud in the case, he did all that he was bound to do, to entitle him to recover the amount of the check from the defendant, according to the terms of their agreement.

Judgment is therefore reversed, and a venire facias de novo awarded.

Digitized by Google

www.libtool.com.cn

2 382
e204 *507

DOWNING *v.* LINDSAY.

1. An account for work done having been sent, the agent of the party called, and, without objection, promised it would be paid when money was received by the partnership: *Held* to be sufficient evidence of indebtedness for the jury.
2. A. having pleaded a partnership in abatement, the plaintiff commenced suit within a year and a day after the writ was quashed; process was served on the original defendant alone; the statute of limitations does not run since the commencement of the original action.
3. One of several partners being alone served with process, promises and admissions by his agent are evidence in the action.
4. And where the cause of action was alleged to have existed against the firm, and the promise set out was by the partner who alone was served, such a defect cannot be taken advantage of on the trial, and on error after a trial on the merits, the court will direct the declaration to be so amended as to show what was tried. (But, *query*, if the declaration here recited a cause of action against any one but the party served.)

ERROR to the Common Pleas of Delaware county.

April 22, 23.—Lindsay brought assumpsit against Downing to November term, 1841, to which a plea in abatement was filed, alleging the promises, if any there were, were made jointly with Sherer and others named in the plea. Judgment on the plea was given, and the plaintiff commenced a new suit against the parties named in the plea, at the succeeding term in 1843. Process was served on Downing alone.

The declaration was against the party served, reciting that said Downing and Sherer et al., which said Sherer et al. the sheriff returned could not be found, *was* indebted to said plaintiff in the sum of, &c., for the boarding, washing, &c., of the servants and agents of *said Downing*, at his special instance, &c., and for the stabling, &c., of divers horses of said Downing at his request; and being so indebted, *he* promised, &c.

The second count was against Downing alone, without any reference to other parties. The cause of action accrued in 1835. At the trial before King, President, at a special court, the plaintiff proved a promise by Slaymaker, one of the parties set out in the plea in abatement, and his admissions of the correctness of the account; but his honour instructed the jury to disregard this testimony, as a dissolution of the company was proved to have taken place before such admissions and promise were made. Plaintiff then called his attorney, who stated that on receiving the claim for collection, he had written to defendant, stating the account. Shortly after, defendant's son, whom he had known intrusted with the management of his father's business in other matters, called on him, in answer to that letter, and promised that the debts of the company would be paid as soon as a settlement was had for the mail

Digitized by Google

ontract with the government. In consequence of this assurance, suit was delayed.

The statements of the son were objected to, and their admission was the second error assigned.

Another witness proved the admissions by the son, who at that time stated he attended to his father's business; that he had seen the account, and a direct promise by him that his father would pay the debt on receipt of the company's funds from the government.

The third error assigned was the instruction by the judge, in answer to defendant's points, that the evidence was sufficient to take the case out of the statute of limitations. The paper book does not show that such a plea was filed.

The fourth error was, that the judge told the jury the promise was not properly a conditional one; it was but an indication of the source whence the money was to be received. Fifth. That the promise by Downing, the son, as the agent of the only defendant taking issue on the record, warranted a verdict. Seventh. That the declaration sets forth a sufficient *consideration*, and there was testimony sufficient to sustain it. The eighth exception was, that no cause of action against Downing was laid in the declaration.

P. F. Smith and *Lewis*, for plaintiff in error.—The evidence of the agency was hearsay only, and not competent to prove that fact; nor were his admissions in the line of his duty, Hannay *v.* Stewart, 6 Watts, 489; 1 Greenl. Ev. sect. 114; Paley on Agency, 269; Story on Agency, sects. 135, 136. [*Kennedy*, J.—Here is some evidence in the fact, the son called in answer to the letter to his father.]

But the statute of limitations had barred the action before the new suit was commenced. [*Kennedy*, J.—It would be iniquitous that the statute should run, though a suit had been commenced, which was quashed for want of parties.] The admissions of one partner are not sufficient against the firm after dissolution, Bell *v.* Morrison, 1 Pet. 351; Levi *v.* Cadet, 17 Serg. & Rawle, 126; Seeright *v.* Craighead, 1 Penna. 135; 4 Johns. 224; 2 Pick. 177; and here the suit is against the firm, and the judgment will be evidence in a suit for contribution. The statute of limitations was a bar, for an admission of liability, while the former one is in force, has no effect, Case *v.* Cushman, 1 Barr, 241; Longsdale *v.* Brown, 3 W. C. C. R. 406, 407; Angell on Limit. 250, 229. Here also there was no evidence of the original cause of action.

Hemphill and *Darlington*, contrà.—Agents' admissions are evidence, Greenl. Ev. sect. 432; and the presumption is of a continuance of the

Digitized by Google

agency. The evidence to prove the agency was sufficient, 8 Watts, 394. The silence of Downing was sufficient evidence of the cause of action after receiving an account, and promising, by his agent, to settle it, 8 Conn. 179. This promise was not conditional, in the legal meaning of that term, 3 Bing. N. C. 833. The defect in the declaration could only be taken advantage of by demurrer; a cause of action against the only party interested was well set out and proved; the judgment would be no evidence against the parties not served.

May 4. KENNEDY, J., after stating the facts and the declaration.—The cause was tried upon its merits, and as if the promise had been alleged to have been made by all the defendants named as partners in the writ, and as recited in the declaration; so that no possible injury can result to the defendant on account of the defect and informality in the plaintiff's declaration; and in order that it may appear at all times hereafter what was tried, and the cause of action that was decided and passed on by the court, between the parties, we think it right that the declaration should be amended, so as to show distinctly that the promise, for the breach of which this suit is prosecuted, is a promise made by the company, and not by the defendant alone; and accordingly direct that it be so considered. This amendment of the declaration disposes of the fifth, sixth, seventh, and eighth errors assigned by the plaintiff in error, and renders them of no avail; as will be more fully shown in the sequel.

But the writ of summons, commencing this action, was sued out more than six years after the cause of action first accrued, which furnished the defendant below with colourable ground at least for putting in and relying on the plea of the statute of limitations. In order, however, to repel the effect of this plea, the plaintiff below showed, by the records of the court, that a prior action had been brought by the plaintiff, for the same cause, against the defendant alone, within the six years; to which the defendant pleaded, in abatement, that if he was liable at all, he was only so jointly with the persons, naming them in his plea, who are the same joined with him in the writ commencing this action. The plaintiff, believing that the plea was true, and such as the defendant could establish, declined taking issue upon it, but suffered her writ to be quashed, according to the prayer of the defendant in his plea; and to the next succeeding term of the court brought this action. By the second section of our act for the limitation of actions, passed the 27th of March, 1713, it is provided, if judgment is given for the plaintiff, and the same is reversed by error, or a verdict passed for the plaintiff and judgment therein arrested, the plaintiff is

Digitized by Google

www.libtool.com.cn

allowed a year, within which he may commence a new action, notwithstanding the time allowed for bringing the action in the first instance shall have elapsed. Our act, in this respect, is a transcript of the fourth section of the statute of limitations of James I.; in the construction of which it has been held, where a writ is abated by the death of the plaintiff, or by her *marriage*, if a feme sole, the operation of the statute is prevented by the commencement of a *new suit* within a year, by reason of its coming within the principle, or the like reason, which induced the legislature to allow a year in cases of judgments reversed or arrested. See Kinsey *v.* Heywood, 1 Lord Raym. 434, per Treby, C. J.; Forbes *v.* Lord Middleton, Willes, 259, note (*e*); Matthew *v.* Phillips, 2 Salk. 424, 425; Angell on Limitations, 325–330; Huntington *v.* Brinkershoff, 10 Wend. 278; 3 Bing. N. C. 383. We are satisfied that the abatement of the first suit, by a plea of the defendant put in for that purpose, falls within the reason and equity of the act, which allows a year for bringing a new suit in cases of reversals and arrests of judgment, though not within the letter of it; and that the plaintiff is entitled to one year, upon the same principle, within which he or she may bring a second action for the same cause. The plaintiff below, therefore, in this case, by showing the prior action commenced by her, for the same cause, against the defendant alone, and the abatement of it by reason of his plea, took her case out of the act of limitations; and this shows that the first, second, and third points submitted by the counsel of the defendant below to the court, for their instruction thereon to the jury, became wholly irrelevant and unnecessary to be decided by the court. It is self-evident that no new promise was or could be necessary to take the case out of the operation of the act of limitations, where its operation as a bar to the suit had been prevented by the commencement of a prior suit by the plaintiff, and the abatement thereof by the plea of the defendant. This disposes of the plaintiff in error's third error, and shows that there is nothing in it.

The first error is an exception to the testimony of Charles A. Bernitz, which showed that the claim of the plaintiff below was correct and just, according to the statement and admissions of Samuel R. Slaymaker, who, as the defendant alleged in his plea in abatement, was a partner in the stage company. It cannot be questioned but a like admission from each one of the persons, alleged by the defendant below to be partners in the stage company, would have been admissible evidence, yet the admission of one only would be given in evidence at the same time; and whether the admission of one given in evidence could afterwards be regarded as entitled to consideration in the cause, might depend altogether upon whether the like admissions of the other part-

Digitized by Google

www.libtool.com.cn

ners had been subsequently given in evidence. But we think the admissions of Samuel R. Slaymaker were admissible in this case against the defendant below, because he had declared upon record, by his plea in abatement, that Slaymaker was a partner with him in the stage company, against whom the claim was alleged to exist, and was actually made.

The second error is an exception to the declarations of Thomas S. Downing being given in evidence, who was a son of the defendant below, and alleged to be his agent at the time he made the declaration, in the matter to which they related. The evidence showed that when the father was written to, on the subject of the claim in suit here, the son was stating the receipt of the letter by his father, and showing that he was acquainted with its contents, and at the same time communicated what the father said in regard to it. It was also proved that the son had been known to transact business for his father, and to act as his agent in other matters. The evidence of his being agent for his father was clearly sufficient to make his communications and declarations, made in the course of his acting as his agent, admissible as evidence against the father.

The fourth error is, that the court erred in answering the defendant's sixth point. It is difficult to discover why such a point should have been submitted, as it does not seem to be raised by the evidence in the cause, and certainly could not have been the ground upon which the plaintiff claimed to recover from the defendant. Neither can I perceive that the answer given to it by the court could prejudice the defendant in the slightest degree, under any view which the jury could take of the case.

The fifth error is, that the court erred in answering the defendant's seventh point, which was, that the promise of Thomas S. Downing, if made at all, was made as the representative of Joseph M. Downing, and not of the company; and as the suit was against the company, and not against Joseph M. Downing alone, the plaintiff could not recover. To this point the court answered, that they thought the promise of Thomas S. Downing, acting as the agent and representative of the defendant, who has taken issue on the pleadings in the case, warranted a verdict against the defendant. It is abundantly clear from the evidence, that the claim was presented to the defendant, from first to last, as a claim that existed against the company, and that he was only applied to as a member of the company to pay it. The son, his agent, also understood the thing in the same way, and hence they begged for time, in hopes that a claim which the company had made against the United States would be obtained, and enable them to settle the plaintiff's in

Digitized by Google

www.libtool.com.cn

this case. Any promise, therefore, made by the son, as the agent of his father, would, of course, be considered as made on his behalf as a member of the company, and binding only on him as such; and being sued in this case, as a member of the company, such promises might well be regarded as evidence for the plaintiff against the defendant, as a member of the company; and this seems to have been the opinion of the court below, as expressed in their answer. We therefore see no error in it.

The sixth error is an exception to the answer given by the court to the defendant's eighth point; which was, that the plaintiff could not recover on the declaration, there being no evidence to sustain it. The court, however, said, they thought there was evidence to sustain it, the force and credibility of which was to be judged of by the jury. It is not easy to discover the question that was intended to be raised by this point; but as the defendant speaks of this suit in his seventh point, as being against the company, we may presume that he meant by his eighth point, that there was no evidence given of such joint promise as was sufficient to bind each and every member of the company, in the same manner as if each had been served with the writ of summons, and been in court answering to the suit. We, however, do not think that such evidence was necessary to be given to entitle the plaintiff below to recover against the defendant, who alone was answering to this suit, and where the judgment, if rendered against him, could not bind or affect the rights of the others, seeing they were not served with the summons, and had no opportunity afforded them of being heard, and in reality could not be considered parties to any judgment that might be given against the defendant. If the evidence, therefore, given showed that the defendant admitted the existence of the claim as against the company, and that as a member thereof he was liable for it, it was sufficient to warrant the jury in finding a verdict against him. That there was such evidence given, we think is abundantly clear, from which it appears that he was made acquainted with the return of the claim, and the amount of it, and, indeed, furnished with a statement or copy of the account, which he kept without ever denying or attempting to dispute it. This was equivalent to an admission that it was correct, and sufficient to make him liable for it as a member of the company, in the present action, where he is the only one that can be affected by the judgment.

The seventh error is, that the court, in answer to the defendant's ninth point, instructed the jury that a full consideration was set forth in the plaintiff's declaration for the promise there mentioned. We can perceive no error in this. The declaration, as directed to be amended,

Digitized by Google

unquestionably shows a good consideration for the promise of the company, and shows nothing more than what was given in evidence to the jury, and actually tried and determined by them. It was a trial on the merits of the claim against the defendant as a member of the company.

The eighth error has been shown already to have nothing in it; nor would it have been right that the declaration should have stated a cause of action against the defendant individually, because he was sued as a member of the company, and the cause of action shown, ought, of course, to be against him as a member of the company.

The judgment is therefore affirmed.

In re MARSHALL, MARSHALL'S Appeal.

1. Legatee residing in another state entitled to interest from the end of the year; executors not giving notice until that time, and demand being made immediately thereafter.
2. A., by deed, conveyed lands to all the children and grandchildren of B. and C., his children, excepting one grandchild, to whom he bequeathed a legacy in a will made subsequent to the deed; by a codicil, he declared that said property given to the representatives of B. and C. should be in lieu of a provision by the will: *Held* not to revoke the legacy, as the legatee was not one of the representatives provided for.
3. Testator having grandchildren and great grandchildren, descendants of his three children, A. B. and C., by deed conveyed certain land to the representatives of B. and C. He then made his will, devising land to two of the children of A., paying certain amounts to their brothers and sisters. He then made certain specific bequests, and gave the residue of his estate equally among his grandchildren and great grandchildren, who were to take per stirpes; stating it had been his anxious desire to make as equal a distribution as possible. By a codicil reciting the conveyance, he devised, "my will is that said property shall be in lieu of a provision in my will, and shall not be accounted any part of my residuary estate; neither shall any gifts to them be so considered:" *Held*, the codicil was not a revocation of the residuary devise, but was intended to show that the conveyance was not to be considered an advancement. For the opposite construction would produce a great inequality in the distribution of the estate.
4. The court, in deciding upon the intention of testator, receive evidence of the value of the property devised or referred to in the will.

APPEAL from Delaware county Orphans' Court.

April 22.—Thomas Marshall, by his will, in 1842, devised the plantation on which he lived, and other lands in the same county, to his grandsons, Ellis and Thomas P. Marshall, Thomas paying to each of his brothers and sisters, except Ellis, five in number, $500, and Ellis paying to the same $300. The real estate thus given was valued at $13,000.

To his daughter, Edith Scholfield, he bequeathed $400. To the children of his son Samuel, his stock in the Bank of W., in value about $2000. To his great granddaughter, Rebecca Peters, $1000.

Digitized by Google

www.libtool.com.cn

His household furniture, valued at $398, he bequeathed equally among the children of his son Samuel, deceased.

All the rest and residue of his estate he devised and bequeathed among all his grandchildren, and the children of a deceased grandchild, Rachel Stanton, who were to take a grandchild's share equally among them; "the amount which I have advanced to several of my grandchildren, and for which I hold their notes, to be deducted from their several shares in the distribution of the residue of my estate;" the children of any grandchild dying before testator, to take their parent's share. In conclusion he added,

"It has been my anxious desire to make as equal a distribution of my estate as possible among all my children and grandchildren, and with that view I make this present will; therefore, if any one interested in its provisions shall caveat, or attempt to break it, they shall not inherit any part of my estate."

In 1844 he made the following codicil:

"I have by deeds indenture given my real estate in Ohio to the representatives of my daughters Edith Scholfield and Rebecca Chandler, in fee-simple, and my will is, that said property shall be in lieu of a provision in my will, and shall not be accounted a part of residuary estate, neither shall any gifts made during my life to any of my grandchildren be considered a part of said residuary estate.

"I hereby revoke so much of the last clause of the above will as appoints Henry Myers one of my executors, and do hereby constitute and appoint Morris Palmer, my grandson, co-executor with my grandsons Ellis P. and Thomas Marshall, in place of the said Henry Myers."

Testator had three children: Samuel, who died before him, leaving seven children; among whom were Ellis and Thomas P., mentioned in the will. Rebecca Chandler, who also died in tes ator's lifetime, leaving four children and a grandchild, Rebecca Peters. Edith Scholfield, who is still living, and has five children living, and grandchildren, the issue of Rachel Stanton, a deceased child. The deed referred to in the codicil was executed in 1836. By it, lands in Ohio were conveyed to the children of Rebecca Chandler, and the children and grandchildren of Edith Scholfield; but Rebecca Peters, the grandchild of Rebecca Chandler, was not named, and took nothing under it. The value of the property conveyed by this deed was stated by the auditor to be about $13,067. The gifts to the children of Edith and Rebecca amounted to several thousand dollars, for which he took notes.

The executors admitted a receipt of assets to $20,297; and after

Digitized by Google

www.libtool.com.cn

deducting certain claims, and the notes above mentioned, stated the balance for distribution, $9251.

Three questions arose in the case. 1. Whether Edith Scholfield was entitled to interest on her legacy, from August 13th, which was one year after testator's death. She resided in Ohio; the executors gave her notice in September following, on receipt of which she forwarded an order for the amount, but the payment was delayed in consequence of the dispute as to interest. The court allowed her claim. 2. Whether the legacy to Rebecca Peters was revoked by the codicil. The court was of opinion it was not. 3. Whether the codicil revoked the residuary bequest to the children, &c., provided for in the deed of 1836. The court overruling, the auditor decreed an equal distribution. Exceptions were taken to these points.

Wm. Darlington, for appellant.—1. The legatee was notified immediately after the year was up, and it is the rule, that executors are not obliged to seek a foreign legatee, Deardoff's estate, 6 Watts, 161; Merrick's estate, 1 Ashmead, 305. She could not therefore claim interest, until she made a demand. 2. We contend the legacy to R. Peters was revoked by the codicil; for though she was not named in the deed there referred to, yet she is one of the representatives whom the testator considers as sufficiently provided for by that instrument; it is immaterial that she takes nothing, if it be shown he meant to revoke the gift. 3. It is plain the provision in the will for such persons as took under the deed, is revoked by the codicil; it says so in express terms, and can mean nothing else.

Edwards and *Tilghman*, contrà, were confined to the third point. The codicil only means instead of a provision of real estate in my will; that is in lieu of what I would have made in my will, had I not done so by deed. The residuary bequest will stand or fall with Rebecca Peters's legacy; for she is expressly named in the codicil, being one of the class of representatives. The construction contended for would give to the Marshalls the notes of the other branches, which have been released in the will. We construe this, instead of a provision in fee in the will; this will carry out the cardinal intent declared in the concluding paragraph of the will, which is to make a fair and equal distribution; the other would exclude two branches of testator's family from every thing but the Ohio lands; which, at the time he made the will, he was aware he had thus conveyed.

Meredith, in reply.—The two questions are the subject-matter of the codicil, and the persons to whom it applies. It speaks of a provision

Digitized by Google

www.libtool.com.cn

or gift by a deed; this is declared to be substituted for or in the place of what?—the provision in the will, for certain branches of the family; that is for such as are provided for by the deed; as it is to be in lieu of this, both cannot stand, and the will must give way. It is said this construction is not to prevail, because there is a general intent to distribute equally; but the rule of construction by which a general intent is made to control a particular intent, is applied in deciding the quantity of estate notwithstanding a particular intent; but never to the subject of the devise. This would, moreover, produce gross injustice; for the testator, who knew the value of the Delaware county and Ohio lands, has thought this arrangement was most likely to produce equality.

Feb. 27. SERGEANT, J.—It appears the testator, Thomas Marshall, was the owner of lands in Ohio, and in Chester county, Pennsylvania, and of a considerable personal estate. He had three families of grandchildren, by a son and two daughters, besides some great-grandchildren. One daughter, Edith Scholfield, survived. Among these stocks or branches, it seems to have been his design to apportion his estate as equally as he could; for, at the close of his will, made in 1842, he declares, it had been his anxious desire to make as equal a distribution of his estate as possible, among all his children and grandchildren; and with that view he made the will. In 1836, he had conveyed the Ohio lands, consisting of one thousand acres, worth $13,067, to two of the stocks or branches, viz., the Scholfield and Chandler, each one half. These consisted of ten grandchildren, and one great-grandchild. By his will he gives the lands in Chester county, worth also about $13,000, to the Marshall branch, embracing seven grandchildren. He bequeaths $400 to Edith Scholfield, his daughter, and Wilmington and Brandywine Bank stock, and books, furniture, &c., to some of the Marshall branch; and $1000 to his great-granddaughter, Rebecca Peters, of the Chandler branch. He then leaves all the rest, residue, and remainder of his estate, real, personal, or mixed, to all his grandchildren, share and share alike, (the children of one deceased to stand in her place,) and directs that the amount which he had advanced to several of his grandchildren, and for which he had held their notes, should be deducted from their several shares, in the distribution of the estate.

Independent, then, of the residue, in which all are equal, the Scholfield and Chandler branches get, by the will, but $1400; whereas, the Marshall branch get, in land, $13,000, in a legacy of bank-stock upwards of $2000, in books, furniture, &c., $338; total, upwards of

Digitized by Google

$15,000. So that on the face of the will the distribution is any thing but equal, for it gives to the Marshall branch alone more than ten times as much as both the other branches.

This satisfies us that we must look further to discover the intention of the testator; and when we consider that some years before making his will, he had conveyed to the Scholfield and Chandler branches his lands in Ohio, worth $13,000, we may reasonably conclude he had this in view, when he referred to his design of making all his children and grandchildren as equal as possible. In this manner only can we obtain an approximation to equality, which is all we can now expect, being ignorant of the favours or gifts rendered by the testator in his lifetime, to his descendants, from time to time, as is usual with an elderly parent possessing means and numerous descendants.

Two years, however, after his will, he made the codicil, which has given rise to the present dispute, and which, it is contended by the Marshall branch, annuls all the bequests in the will, pecuniary and residuary, in favour of the grandchildren of the Scholfield and Chandler branches. Although, at the first impression, this suggestion appears plausible, yet on more careful examination, we are satisfied it cannot be adopted. I rather incline to think, from the contents of the codicil itself, that the testator had become apprehensive that he had not sufficiently expressed his intention in regard to the Ohio lands, and other gifts to his grandchildren, which were not referred to in his will, and that a difficulty might on that account arise, whether these lands and gifts were not to be treated as advancements, and so brought into hotchpot with the residue. He therefore says, in the codicil, that he had, by deeds of indenture, given his real estate in Ohio to the representatives of his daughters, Edith Scholfield and Rebecca Chandler, in fee-simple, and his will is, that said property shall be in lieu of a provision in his will, and shall not be accounted a part of his residuary estate. Neither shall any gifts, made during his life, to any of his grandchildren, be considered a part of his residuary estate. He does not say the Ohio lands are to be in lieu of *the* bequests in the will; but that these lands, which he had conveyed them by *indenture*, were to be in lieu of a provision by his will, that is, as I understand it, to have the same effect as if they had been contained in his will, and therefore, not to be reckoned part of his residuary estate, or brought by the grantees into hotchpot, but they were to have both. In no other way can I give a meaning, nor has any been suggested, to the direction that they are not to be accounted part of his residuary estate, and that the gifts to his grandchildren are not so to be considered.

Digitized by Google

Besides, the construction contended for by the appellant is attended with extreme perplexity and uncertainty, and tends to overthrow the will, and to subvert the declared plan of the testator, by destroying the equality he so much desired: for it gives to the Marshall branch more than twice as much as the other two branches together, whether the advancements are taken into consideration or not.

We see nothing in the other exceptions.

Decree affirmed.

SERGEANT v. KUHN.

Devise in trust, with power to the tenant for life to sell on irredeemable ground-rents, the tenant for life was authorized, by act of Assembly, to sell on redeemable ground-rents, payable to the trustees; the redemption money also to be received by the trustees, to be invested under the direction of the Orphans' Court, but the purchasers not bound to see to its application. The act is constitutional, and no objection can be made by a purchaser on that account.

ERROR to the District Court of the city and county of Philadelphia.

Elizabeth Powell devised the estate now in question, in trust for the use of J. H. P. for life; remainder to trustees, to support contingent remainders; remainder to S. P., the eldest son of J. H. P., for life; remainder to his first and every other son in succession in tail; remainder to the second and every other son of J. H. P. in tail; and in default of such issue, remainder to S. P. G. in fee, if living at the time of such default of issue; but if he should then be dead, remainder to T. M. W. in fee, with power to any tenant for life to sell on irredeemable ground-rents, which were to be paid to the persons entitled under the uses of the will.

By an act of 1836, the legislature authorized a sale by the tenant for life, on ground-rents redeemable at any time not less than two years from the execution of the deed, on payment of a sum of money, not less than sixteen and two-thirds years' purchase of the rent. The redemption money to be paid to the trustees, or their successors, and to be invested in their names, under the direction of the Orphans' Court, for the same persons, estates, and uses as are declared in the will; but the purchasers were not to be bound to see to the application of the money. The conveyances were to be made by the tenant for life, without the necessity of a joinder by the trustees, but the rents reserved, and moneys made payable thereby, were to be receivable and recover-

Digitized by Google

able from time to time, in the same name or names in like manner and with the same effect as if the said trustees were parties thereto.

In pursuance of the power, J. H. P., the tenant for life, sold and conveyed a lot of ground to defendant, reserving a rent to the trustees under the will, redeemable at any time after two years from the date of the deed, on payment of a certain sum of money to the trustees or their survivor, or their successors duly appointed.

The validity of these acts of Assembly having been doubted, the purchaser declined paying rent, and on a proceeding being had, filed an affidavit of defence, in which it was averred the purchase was for the purpose of building lots, and would not have been made unless the title had been supposed unimpeachable, and that the rent reserved was in lieu of purchase money, an ordinary mode of selling in Philadelphia; for these reasons the validity of the act was submitted to the court.

The court below, after argument by J. Sergeant, for defendant, gave judgment for the plaintiff, and on writ of error, the question having been previously decided at this term, the case was submitted without argument.

April 25. PER CURIAM.—The principles of this case were so fully considered at the present term in Norris *v.* Clymer, antè, 277, that no more is necessary at present than to affirm the judgment. Mrs. Sergeant will have a title on which she may rely with implicit confidence, and she will doubtless pay the stipulated price for it with cheerfulness. The facts stated in her affidavit constituted no defence; and the plaintiffs were clearly entitled to recover.

Judgment affirmed.

OFFERMAN *v.* STARR.

1. Lessor of a coal mine not liable for injuries to a house on the surface, occasioned by the working of the mine by his tenant.
2. The owner of a mine demised the right to mine at a rent payable on each ton of coal taken out, reserving the right to view and examine the mine, and to re-enter on non-payment, neglect, &c.; he is a landlord, and is not liable for an injury resulting from the prosecution of the work by the tenant.

April 27.—THIS was an action on the case against Offerman, Biddle and Patterson, for negligently working their mine, and thus injuring the house of plaintiff. The title-deeds were not in the bill of excep-

Digitized by Google

tions, but the declaration averred a possession of a coal mine in the land on which plaintiff's house stands. The only question raised in the case was, whether defendants were liable for the injury. In 1837, before the damage was done, the defendants demised to one Lewis, for a term of fourteen years, the right to mine and take coal within certain limits particularly described; in consideration of which the tenant covenanted to sink a shaft, erect a rail-way, steam engine, &c., for which an allowance was to be made out of the first rent falling due. He also covenanted to mine in a proper manner, and to prop and secure the mines sufficiently. Rent was to be paid at so much per ton taken away, and the lessors reserved the right by themselves or their agents to examine said mines at any time they might think proper; and on refusal to furnish statements of the coal taken away, or to pay rents, or permitting water to remain in the mines, or neglect or abandonment, &c., the lessors reserved a right of re-entry. It appeared that plaintiff's house was cracked, and the jury, on the evidence, found it was occasioned by the working of the mine below by the tenant. Whether the defendants, notwithstanding the demise, were liable, was the question which was decided affirmatively by the court below.

Parry, for plaintiff in error.—The court seemed to think, as was contended below, this was not a lease; but any words which are sufficient to show an agreement will constitute a lease, Watson *v.* O'Hern, 6 Watts, 362; and here possession passed to the lessee, and he was in possession, and caused the injury. It is immaterial whether a lease be in fee or for years, or how the rent is paid; the landlord in all cases is equally liable, Wood's Inst. b. 2, c. 3, 266; Jac. Dic. tit. *Lease*. The tenant would have to bring trespass for any injury, 3 T. R. 767; Holt's N. P. Cases, 543, where the cases are collected; Paine *v.* Rogers, 2 H. Bl. 349; Lesley *v.* Pounds, 6 Taunt.; and of course he is liable for any injury done by himself, which the landlord cannot prevent; same cases, and 6 T. R. 411; Littlesdale *v.* Lonsdale, 1 Bos. & Pull. 404; Lafter *v.* Pointer, 5 Barn. & Cress. 547; Quarman *v.* Barnet, 6 Mees. & Welsby, 499; 2 Man. & Ry. 1; 2 Miles, 309; 15 E. 386; 2 New Rep. 446; 4 Maule & Selw. 101; 2 Stark. Rep. 438; 1 Per. & Dav. 103; 8 Adol. & Ellis, 835; Earl *v.* Hall, 2 Metc. 353, where all the cases are cited and commented on, and the principle settled that the owner of real estate is not liable, unless the business is under his orders and direction. There is no right reserved but such as is common in every lease, to enter and view, Prowd *v.* Hollis, 1 Barn. & Cress. 8; 3 Watts & Serg. 106.

Læser and *Greenough*, for defendants.—The question is whether

Digitized by Google

this is a lease or not, and we contend it is not, but a mere grant of a right to work, reserving an interest in the profits; the right of entry shows this. It is of vast importance in the mining districts if irresponsible men are to be alone liable for injuries to property. But even if a lease, if it was for an unlawful purpose, or if the injury resulted from the prosecution of the intent of the lease, or if a probable consequence of the business, the owner of the land is responsible, 5 Barn. & Cress. 547; Stone *v.* Cartwright, 6 T. R. 411; 4 Burr. 2108; Leslie *v.* Pounds, 4 Taunt. 649; Paine *v.* Rogers, 2 H. Bl. 350; Bush *v.* Steinman, 1 Bos. & Pull. 404; King *v.* Peddle, 1 Adol. & Ellis; Earle *v.* Hall, 2 Metc. 353.

The court declined hearing *Williams* in reply.

May 2. GIBSON, C. J.—The principal question was fully discussed and well decided in Earle *v.* Hall, 2 Metcalf, R. 353, and nothing is contested here except its application to the matter in hand. It is conceded that if the defendant's agreement with Hill is a lease, the maxim of respondeat superior is inapplicable to it; but it is contended that the thing granted is not the mine, but a license to work it. The words are: "The said party, of the first part, for and in consideration of the rents and covenants hereinafter mentioned, to be paid and performed on the part of the said party of the second part, hath demised, leased, and let, unto the said party of the second part, the *right* to mine and take away coal from the Salem Vein, &c.," and a distinction is attempted between a grant of license to work a mine, and a grant of the mine itself; which, however, if a distinction at all, is a very thin one. A right to use a mine necessarily implies a right to possess it; and a grant of the use and possession, in consideration of something to be rendered, is exactly what constitutes a lease of the thing to be possessed. But what would have been the difference had it been a license in terms? Respondeat superior is inapplicable to an owner of land, for acts of negligence in a business not conducted by him and for his account. What had these defendants to do with the direction of the business or the coal when it was mined? Lewis covenanted to sink the slope, erect the engine, to take out a certain number of tons each year, according to the most approved method of mining, and carry it to the landing; and to pay a certain sum per ton for it. So far the defendants had nothing to do with the business, but to receive their rent. But they reserved a right to visit and examine the manner in which the business should be carried on in the mine; and to resume the possession should the tenant refuse to furnish statements of the amount taken out, or pay the rent. These clauses do not constitute a

www.libtool.com.cn

Digitized by Google

reservation of the possession or a right to interfere with the direction of the business. The right of visit was to enable them to see whether the tenant was performing his engagements, in order to found process against him if he were breaking them; and the right to resume the possession was to put an end to the business altogether. The lease was analogous in all respects to the lease of a farm with a clause of re-entry for bad farming, or non-payment of rent. On no principle, then, could the acts of Lewis be imputed to his lessors.

Judgment reversed.

DUBBS v. FINLEY.

Conveyance in consideration of the assumption of a lien on the land, renders the grantee liable to pay it, and is a valuable consideration. But whether the remedy be in covenant, or in another form of action, *Quære.*

ERROR to the Common Pleas of Schuylkill county.

April 27, 28.—But one point was argued here, viz., whether the court were right in ruling a conveyance by Hipple, who was insolvent at the time, was fraudulent as to creditors. The conveyance was "as well for and in consideration of the assumption of the proportional part of the mortgage debt hereinafter named, as for, &c." The mortgage covered other property, and the plaintiff in error, as the purchaser under the above deed, claimed the surplus of the proceeds of a sheriff's sale. On the trial of a feigned issue, the court instructed the jury, that as the other land was not discharged from this lien, Hipple being still liable for the whole, United States *v.* Mertz, 2 Watts, 406, ruled the case, and the conveyance was void as matter of law.

Hughes, for plaintiff in error.—The only question is, whether the conveyance is fraudulent under the 13 Eliz. In the case relied on by the court, as ruling this, there was no stipulation or agreement to discharge the remaining property of the debtor from that which was a lien on the land conveyed. If this be so here, undoubtedly it is fraudulent. But there is an express stipulation in this case to pay a proportionate part of the debt, which may be enforced, and the debtor and his property be discharged pro tanto, Johnston *v.* Harvey, 2 Penna. 82. In Patterson *v.* Stewart, 6 Watts & Serg. 72, there was a mere covenant to pay debts, and it was considered sufficient. In Campbell *v.* Shrum, 3 Watts, 60, a purchase, subject to a lien, which is estimated as part of the purchase money, amounts to a covenant or agreement to pay by the vendee.

Digitized by Google

Læser, for defendants.—If the court were wrong, this court will direct them what is the proper instruction to give at the next trial, and referred to United States *v.* Mertz; McKee *v.* Gilchrist, 3 Watts, 230.

April 30. SERGEANT, J.—This case differs from United States *v.* Mertz, 2 Watts, 406, on which the court below ruled it. For here the grantee, when he took the property, did so expressly on his written assumption of the proportional part of the mortgage debt, and also stipulated by the same instrument, that it should be subject to such proportional part, amounting to the sum of $2040, which he assumed thereby and agreed to pay. This undertaking would make him liable for the amount in a proceeding against him by Hipple. Whether covenant would be the proper form of action, where it appears that he had not executed the deed, but was a party to it and held under the conveyance, it is unnecessary to decide; for if covenant would not lie, an action on the case would, and the agreement in writing would be sufficient evidence. In United States *v.* Mertz there was no agreement to pay the encumbrances.

Judgment reversed, and venire facias de novo awarded.

LAUDERBRUN *v.* DUFFY.

Under the 12th section of the charter of the Reading Railroad Company, the contractors were authorized to enter and occupy with temporary dwellings, stables, blacksmith's shops, &c., the lands adjoining the line of the road, provided no more was taken than was necessary for such purpose, while engaged in the performance of their contract.

April 27.—THE plaintiff in error brought ejectment in December, 1841, and proved title to the property. The defendant was a contractor for the Reading Railroad Company, and had agreed to complete his work in July, 1841; but it was shown that it was not finished until January, 1842. He claimed no title to the premises, but rested his defence on the right to enter and occupy for the necessary accommodation of his workmen, family, horses, &c., under the charter of the corporation, the 12th section of which provides that the company shall have power, by their engineers "and workmen, to enter in and upon, and occupy all land on which the railroad or its depots may be located, or which may be necessary for the erection of its engine and water stations, &c., or any other purpose necessary or useful in the construction and repairs of said road." Compensation by the company, and a mode of assessment was provided. The defendant erected a tempo-

Digitized by Google

rary building called a shantee, on a stone foundation, for the accommodation of his family, and thirty-five labourers; a blacksmith's shop, stables, wagon-house, and hog-pen, all of the same character with the shantee. He kept several working horses, a cow, and ten hogs. The buildings were not more than ten and a half perches from the road; and it was shown that the house could not have been placed any nearer without danger from the blasting of rocks on the railroad. There was evidence that the ground occupied was that most convenient for plaintiff, and that he had himself selected it for the shantee. The plaintiff requested a direction to the jury in substance as follows. 1. The contract with the company did not authorize such occupation as was proved. 2. The consent to the erection of the shantee did not authorize an erection of the stable, &c., nor an occupation by the animals as proved. 3. The consent must be presumed to have been limited to the time mentioned in the contract. 4. Such consent being without consideration, the plaintiff could remove the shantee as soon as other buildings were erected. 5. Defendant, even with the consent of plaintiff, was a mere tenant at will, and could be removed at any time.

The court told the jury the broad question was, whether the charter authorized this occupation by defendant. That if defendant was employed as a contractor on the road, and only occupied so much ground as was necessary for the purpose of constructing the road, he was authorized to do so, especially if the plaintiff had himself indicated the ground. That he might lawfully erect the shantee for the accommodation of his family, a stable, &c. &c.; and if these were necessary for the purpose of carrying on his work, the plaintiff, having brought suit before the contract was completed, could not recover. If they were unnecessary, he was entitled to a verdict.

Bannan, for plaintiff in error.—The real question is, whether the charter authorized such an entry. The clause giving a right to enter for *other purposes*, must be confined to the land required for the location of the road four rods in breadth, and for the purposes of the engines; for so much only is the company bound to make compensation; they are not bound for the trespasses of the families or cattle of their contractors. It is no answer, that the occupation was necessary, for the parties accepting the charter may not contest its expediency, 8 Serg. & Rawle, 222. And these privileges are not extended beyond the letter and spirit of the charter, as was said in 4 Peters, 168, when a similar clause in a charter was discussed.

St. Geo. Campbell, contrà.—No other meaning can be put on the

Digitized by Google

clause, *for other purposes* than this. The right of location of every part of their works is expressly given; then the right to enter *for other purposes* is given, and compensation is directed. The jury have found the occupation was necessary, reasonable, and proper; hence the charter is a complete defence.

May 4. KENNEDY, J., after stating the case.—Although it appeared pretty clearly from the evidence, that the plaintiff had, before the defendants took possession of the land, consented to their doing so, and to their putting up the buildings thereon, and occupying the whole as they did, that they might the more conveniently grade their section of the railroad; yet the main question is, Were they not authorized to do so by the act of Assembly of the 4th of April, 1833, entitled "An act to authorize the governor to incorporate the Philadelphia and Reading Railroad Company," Pamph. Laws of 1833, page 144? We are decidedly of opinion, that according to the spirit and true meaning of the 11th, 12th, and 13th sections of that act, the defendants, under their contract with the company for grading the road, had full power and authority to enter upon and occupy the plaintiff's land adjacent to their section of the road as they did. Indeed, it might, in many instances, be utterly impracticable to accomplish the construction of a railroad without such authority. The legislature having granted, in express terms, the right, with the power and authority to construct the road, must be presumed to have granted likewise every incidental power and authority necessary to be exercised, in order to carry the power expressly granted into effect; subject, however, to such qualifications as may be mentioned in the act. Generally we consider the instruction given by the court below to the jury correct, as also their reasoning in support of the same, and therefore are willing to adopt it as our opinion on the case presented. We can perceive no error in the charge of the court below, or in their answers to the plaintiff's points; nor can we discover that any of his points have been omitted to be answered.

We therefore affirm the judgment.

Digitized by Google

www.libtool.com.cn

DAILEY *v.* STRAUS.

Execution may be issued after the year and a day has elapsed, on original as well as on revived judgments, since the act of 1845, section 4.

ERROR to the Common Pleas of Schuylkill county.

April 28.—Dailey, having recovered a judgment before a justice, filed a transcript in October term, 1842. In September term, 1845, he issued a fi. fa., which the court, on motion, set aside.

Hughes, for plaintiff in error.—The only question is the construction of the 4th section, act 1845, p. 538. The meaning of this is, that there must have been a judgment within five years before execution be issued. The court considered it confined to judgments on sci. fa. to revive.

Cumming and *Læser*, contrà.—The intent was merely to dispense with a sci. fa., where the judgment is more than five years old, and has thus been revived. There will be no mode of trying the fact of payment, but at the discretion of the court, unless a sci. fa. must first issue.

May 2. PER CURIAM.—There is no imaginable reason why the revival of a judgment should keep it alive for execution during the space of five years to come, if the original rendition of it were not to have the like effect. The judgment on a scire facias, like the one it is employed to revive, is quod recuperet; and the same presumption of payment from time follows the one as the other. Why, then, should the legislature be thought to have made a difference? The word revived is inadvertently used for the word alive; and hence the difficulty and the argument. But the case is too clearly within the intent of the act to admit of a doubt; and the execution, therefore, ought not to have been set aside.

Order of the court below reversed.

Digitized by Google

www.libtool.com.cn

COMMONWEALTH ex rel. GEAR *v.* CONROW.

Indenture of apprenticeship, binding a boy for a term of years, during which the master, in lieu of the common covenants for lodging, &c., agreed to pay him a certain sum per week, for at least nine months in each year, held valid.

The master is bound to take charge of the conduct of the apprentice during the whole term, and if he neglect it, the parent has authority.

April 29.—GEAR presented a petition for a habeas corpus to bring up the body of his son, stating he had bound him in 1841, at the age of fifteen, to defendant to learn the trade of a bricklayer. That pursuant to the indenture, the boy commenced and continued working for nine months in each year, but was discharged by the defendant for the remaining three months; by means whereof his morals are becoming corrupt. For which reason the indenture was void, and the restraint illegal.

The master returned, that he held the boy by virtue of an indenture of apprenticeship; a copy of which he annexed to his return. By this instrument the boy was bound for six years and four months, in the usual form and with the common covenant. The clause relied on by relator was the covenant by the master, in lieu of the common one for meat, drink, lodging, washing, &c., "that the master would give him $2 50 per week, for at least nine months in every year during the term, and two quarters night-schooling."

Wm. Dickerson, for the relator.—The instrument, and the construction it receives by the master is, that the boy is to work and be paid for nine months in the year, and during the three winter months to be master of his own time. The father has no control over him in the interval, for he is bound for the term of six years; and the master has fulfilled his covenants by payment of the stipulated wages. There is no one bound to supply his necessities during the three months of idleness, and if improvident he may starve. But the father is in this case particularly anxious to obtain the control necessary for the moral training of the boy, or to compel some one to undertake the responsibility.

Brightly, contrà.—This indenture is in accordance with the universal practice in this city, and it has been thought by the Quarter Sessions the only proper one for a city. The boy remains in the charge and under the control of his parents, when not in the employ of his master; and if the father be really desirous to restrain the boy from vice, he has only to act. No one will interfere, provided the master receives the benefit of five years' instruction for the residue of the term.

Digitized by Google

May 4. GIBSON, C. J.—It was doubtless supposed by the legislature, when the statute of 1770 was enacted, that an apprentice bound pursuant to it would be an inmate of his master's house. In the country he is still a part of the family; and the penalties for desertion seem to have been provided on that basis. But it is not said in terms that he shall be so; and it is our duty to interpret statutes so as to fit them, as far as we may, to the business and the habits of the times. The covenants in this indenture are those into which every master bricklayer enters in this city, or perhaps elsewhere; and they differ from those in other indentures simply in not binding the master to provide the apprentice with meat, drink, washing, and lodging; but in binding him to pay, in lieu, a weekly allowance in order to enable the apprentice to provide them for himself. Even where the master covenants to provide them, it follows not that he must furnish them in his family; for he may have more apprentices than could be accommodated in one house, and in such a case necessity would compel him to board them out. Besides, his business may carry him to a distance from home, as often happens in the country, and his apprentices must accompany him. There is nothing, then, in the statute or the usages of the country to forbid such binding. But it is objected in this instance, that the binding is not for the whole term, but for nine months in each year—an allegation which is disproved by the express words of the indenture. Again, it is objected that the apprentice is left at large, without provision or control for three months in the year. But the weekly stipend bargained for was thought by him and his father to be sufficient for the year, and if frugally managed would doubtless be so; and the authority of the master, in contemplation of law, endures throughout the term. It is his duty at all times to attend to the deportment of the apprentice, and restrain him from vicious courses; and if that were otherwise, the authority of the father or guardian would supervene. Nor does it follow that the interval must be lost; for it may be profitably employed at school, or in some other useful occupation. Nothing is more frequent than are attempts like the present. When the apprentice has gained a sufficient insight into his trade to enable him to repay his master for the burden of maintaining and instructing him when his services were worthless, the temptation to cut him loose from his indenture becomes too strong to be resisted. In the case before us the apprentice and his father were blind to the supposed illegality of the binding, till the term of it was within two years of its expiration; and their application deserves no favour.

Apprentice remanded.

Digitized by Google

www.libtool.com.cn

MAULE *v.* SHAFFER.

On appeal from the Nisi Prius, executors not bound to give security.

CERTIFICATE from the Nisi Prius.

April 19.—The action was originally against Weaver, on whose death the present defendants were substituted as executors. Judgment having been entered for plaintiff, defendants appealed.

Hopkins moved to quash the appeal, for want of security. The Nisi Prius act makes no difference in regard to the capacity of the parties sued. A special provision was required in writs of error, but here costs are required in all cases. Dawson *v.* Ryan, 4 Watts & Serg. 403.

St. Geo. Campbell, contrà.—The estate is insolvent if this judgment stands, hence it is impossible to have a review on these terms. It will be the only instance known to our law that executors are compelled to subject themselves to such a risk. A question similar in principle was decided in Seibert *v.* Hocker, 1 Miles, 263, that executors are not bound to file an affidavit of defence.

Williams, contrà.—Writs of error and appeals are of statutory, not common right, and the terms on which they are to be enjoyed apply to all cases but those specially excepted. Dawson *v.* Ryan shows the affidavit and the recognisance are in the same category; if the latter is not required, neither is the former. Though the act says appeals shall be allowed in the same manner, yet the subsequent clause prescribing the *terms* shows this only applies to the *cases* in which it is allowed.

May 2. KENNEDY, J.—This cause was brought into this court by an appeal, taken by the defendants, Shaffer and Warner, as the executors of Thomas Warner, deceased, from a judgment rendered against them as executors, by the court of Nisi Prius of the city and county of Philadelphia, without giving "security, with two sureties, by recognisance, for the absolute payment of all damages and costs, in case the proceedings should not be affirmed in the manner then practised and allowed in cases of writs of error, to the courts of Common Pleas of this state." Because no such security has been given, it has been moved on behalf of the plaintiff, and a rule obtained to show cause why this appeal should not be quashed. This motion is alleged to be founded upon the 6th section of the act of the 26th of July, 1842, Pamph. Laws, p. 431, 432, which directs, among other things, that the party

Digitized by Google

appealing shall give "absolute security, with two sureties, by recognisance, for the payment of all damages and costs, in case the proceedings shall be affirmed in the manner now practised and allowed in cases of writs of error, to the courts of Common Pleas of this state." By this section of the act an appeal is allowed to be taken by either party to the Supreme Court, in place of, and as a substitute for a writ of error, to bring up for review a judgment of any of the courts of Common Pleas. And the words contained in the section "in the manner now practised and allowed in cases of writs of error, to the courts of Common Pleas of this state," may be regarded as throwing some light on the question, whether it was intended that, if an executor or administrator appealed from a judgment of the court of Nisi Prius, he should give the security therein mentioned. If we refer to the law relative to the issuing of a writ of error from the Supreme Court to a court of the Common Pleas, the 7th section of the act of 16th of June, 1836, directs that an "execution shall not be stayed upon any judgment in any civil action or proceeding, by reason of any writ of error from the Supreme Court to any court of this Commonwealth, unless the plaintiff, in such writ, or some one on his behalf, with sufficient sureties, shall become bound by recognisance, to the party in whose favour such judgment shall be given, with condition to prosecute such writ of error with effect, and if the judgment be affirmed, or the writ of error be discontinued, or non-prossed, to pay the debt, damages and costs (as the case may be) adjudged, accruing upon such judgment, and all other damages and costs that may be awarded upon such writ of error." But by the 8th, the following section of the same act, it is expressly provided, "that the preceding section shall not extend to any writ of error brought by an executor or administrator, or by any guardian in behalf of his ward, or by any other person suing or defending in a representative character." Whether the legislature had the sections of the act of the 16th of June, 1836, just referred to, in their view or not, at the time they gave the right of appeal from a judgment of the court of Nisi Prius, we feel satisfied that they could never have intended to require of an executor or administrator, that he should give security for the payment of all damages and costs, in case the proceeding should be affirmed. It would be most highly unjust and unreasonable to require such security of an executor or administrator, who may have no assets of the estate in his hands, wherewith to pay the damages and costs, which he might be bound to do, were he suing or defending in his own right. The inevitable consequence would be, almost in every case where a judgment shall be rendered against an executor or administrator as such, though highly unjust and

Digitized by Google

illegal, that it would have to be submitted to, and have to be paid, sooner or later, if assets belonging to the estate of the decedent should ever come to the hands of the executor or administrator sufficient to pay it. It would, in effect, deprive those interested in preserving the estates of deceased persons, and entitled to the benefit of the same, of having judicial decisions made against such estates reviewed, and, if erroneous, reversed or corrected—a right or privilege which every citizen is entitled to claim.

The rule is therefore discharged.

www.libtool.com.cn

CHURCHMAN *v.* PARKE.

On appeal from the Nisi Prius, there being a certificate for defendant, the plaintiff must give security for that amount, and costs.

April 29.—ON the trial before Kennedy, J., at Nisi Prius, the jury found for defendants, and certified there was due to them from the plaintiffs $1692 86. A certificate of error was taken, and recognisance in $100 for costs given.

A rule to dismiss the certificate was taken.

Perkins, for the rule.—The act of 1842, Pamph. Laws, 431, sect. 6, directs security shall be given; and it was intended to prevent unnecessary appeals. It has been said the oath and the security were equally necessary, Dawson *v.* Ryan, 4 Watts & Serg. 405; and though this be not a part of the judgment, it is to be set aside or affirmed in effect by this proceeding.

McIlvaine and *Watts*, contrà.—It has never been the practice to give security for the amount of the certificate on writs of error by plaintiff. It is embraced by no act of Assembly. Under the act of 1705, originating the remedy, it is not a judgment nor even part of the verdict, and so it was decided in Bayne *v.* Gaylord, 3 Watts, 401. The causes are distinct after it is found, and are to be prosecuted separately. When a writ of error is taken on the trial of the sci. fa. we will be bound to give the security, but not before. The act does not compel us, and our right is not to be taken away by implication; that speaks of damages and costs; which are defined, 2 Bl. Com. 438, "That acquired or lost by suit at law, and ascertained by judgment." Jacob. L. Dic. tit. *Damages*. So the recognisance is, that he will pay debt and damages, &c. But this is not damages until final judgment on

Digitized by Google

sci. fa. No other mode of recovery is allowed but this; whereas the court will give a new one on the recognisance.

In Dawson *v.* Ryan, it is said the appeal is from the judgment, of which this constitutes no part.

Meredith, in reply.—The principle of that case is, that wherever security is required in ordinary cases to constitute a supersedeas, absolute security must be given on these appeals. This certificate is in the nature of a judgment. The intention is, that the bail shall pay the amount found due by the proceeding. But it is said he will do this on the trial of the sci. fa. But nothing can be inquired into there but the amount of the certificate, which has been settled by a jury, and is a debt of record. Can we proceed with our sci. fa. when it may be set aside on this proceeding, as in Bayne *v.* Gaylord? The same rule prevails in replevin, under our practice of assessing the value on a verdict for defendant, for which the plaintiff is immediately liable. Security is always given there.

April 30. SERGEANT, J.—As this case now stands, the plaintiff has a judgment against him, and also a certificate by the jury, under the defalcation act of 1805, of a debt due by him to the defendant. From the effects of both these he seeks to be relieved in this court, and therefore it seems right that he should give security as to both. The certificate, it is true, is not a judgment, but it would be as conclusive as a judgment in a scire facias sued out upon it, and this proceeding in error, if duly taken, though it might not stay the scire facias, would supersede an execution on the judgment upon it. The language of the act of 26th July, 1842, does not interfere with this construction, and we think it is entirely consonant with its spirit.

Rule absolute.

Digitized by Google

www.libtool.com.cn

FLEMING *v.* BEVAN.

1. An agreement by a shipper, with the captain, that he shall be interested to the extent of $5000 in the profit and loss of the shipment, gives no special or general property in the goods, but a mere right to participate in the profits.
2. The owner of a vessel, who also shipped a large part of the cargo, by his letter of instructions stated the names of third persons who would be interested in the return cargo. The next day he agreed the captain should be interested to the extent of $5000 in the profit and loss in the shipment. The consignees, at the request of the captain, purchased goods for him to the amount of $5000, with the money of defendants, and consigned them to defendants, stating the agreement, and that they had been induced to make the purchase under that, at request of the captain; but if it was wrong, defendants could correct the mistake. Defendants entered the goods, and made oath to the invoice, without stating the name of the owner. On demand by plaintiff, they denied his right, alleging they had advanced to the shipper more than the value of the goods. *Held*, the plaintiff could not recover, either under the agreement, purchase, and invoice, or the subsequent acts of defendants.

ERROR to the District Court of the city and county of Philadelphia.

April 29.—This was an action of trover for three hundred and forty-one packages of teas, marked I L F, by the plaintiff in error, against Bevan & Humphreys.

At the trial before Stroud, J., the plaintiff, having added two counts for not accounting, gave in evidence the register of the ship Venice, dated June 26, 1839, by which it appeared that John McCrea was the sole owner. On the 5th of October, 1840, this was surrendered, and a new one taken out in the name of Matthew L. Bevan, one of the defendants.

He then proved two letters of instruction by John McCrea to himself, as captain of the vessel, dated June 27, 1839. In the first, he was directed as to his voyage to Valparaiso, at which place his consignees were named, to obtain dollars for his voyage to Canton. Shipments from Valparaiso to Canton, on account of parties here interested in her voyage, were to pay no freight. The letter continued: "On your arrival at Canton, you will consign the vessel to Russel & Co., who have orders to load her with a full cargo for this place." Then followed an estimate of the particular amounts of freight expected to be taken by individuals named, making, in all, 1150 tons, at $33. The two last items were—

"Thomas P. McCrea, - - - - - - - 25
Bevan & Humphreys, balance, - - - - 60."

John McCrea was not mentioned in this estimate. The second letter, of the same date, directed the collection of the freight and passage-money, and the payment of the balance, after deducting ship's expenses, to Thomas P., the son of John McCrea.

Digitized by Google

The outward manifest was sworn to, June 26, 1839, by which it appeared John McCrea had shipped goods to the value of $40,083 54.

On the 28th June, 1839, John McCrea and plaintiff signed a paper in the following words: "It is agreed that Capt. Fleming is interested to the extent of $5000 in the profit or loss on the shipment made in the Venice, on her present voyage, for account of John McCrea."

Plaintiff then gave in evidence the homeward manifest, in which the goods in question were marked I L F, (which were the same marks as were on other property shipped by plaintiff;) the manifest stated these were shipped by Russel & Co., and consigned to Bevan & Humphreys. Also, an invoice of teas shipped by Russel & Co. on board ship Venice, for account and risk of whom it may concern, and consigned to Bevan & Humphreys, describing them by the marks I L F. This was endorsed as examined by the custom-house officers at Philadelphia.

Annexed to this was the following:

"The above invoice of teas is shipped for account of Capt. William Fleming, by virtue of an agreement between Mr. John McCrea and Capt. Fleming in these words:" the agreement before referred to, of June 28th, was then recited. A letter from Russel & Co. to Bevan & Humphreys, dated May 18, 1840, referred to by one of plaintiff's witnesses, was read by defendants; as it explains these documents, it is given here:

"GENTLEMEN:—We hand you enclosed invoice and bill of lading of I L F, 341 packages of teas, costs $5023 04, shipped on board the Venice to your order. This investment of teas has been purchased by, and for account of Capt. William Fleming of the Venice, and we have furnished him with the sum of $5000, *out of the funds provided through yourselves, for the payment of ship expenses, and the purchase of an invoice of teas, cassia, &c.*, to be marked D F, *for account of the owners of the Venice.* Being aware of the intimate relations existing between Mr. McCrea and Capt. Fleming, we have been induced to accede to the request of the latter, by the mention of an agreement between the two gentlemen last named, and which runs thus:" (here the agreement was copied.)

"We are aware that the transaction is not strictly regular, but is put in such a shape, that if we have misapprehended the nature of the agreement between Mr. McCrea and Capt. Fleming, you will have it in your power to put the matter as it should be—the only difference being, in the marking of the packages I L F, instead of D F. You will note that the funds provided for this account were found insufficient to do more than costs of disbursements of ship, and the invoice of teas for Capt. Fleming."

Digitized by Google

Plaintiff then proved the original entry of these goods at the custom-house, October 5, 1840, with the oath of one of the defendants to the bill of lading and invoice, "for account of any person for whom I am authorized to enter the same, and that ——— ——— was owner of the goods, &c., mentioned in the annexed entry."

The custom-house officer stated, on cross-examination, a permit would not be granted, if the invoice had been altered, unless the alterations were satisfactory to the collector.

Plaintiff then called *Allen Robinett*, who said that about the 20th or 23d of December, 1841, he called with Capt. Fleming. He had a written demand. Called at defendants' counting-house. He left that paper with Mr. Bevan. He handed it to Mr. Cabot. Cabot said, "Captain, are you going to make a fool of yourself?" Mr. Bevan said, "Captain Fleming has no claim on us; he has made no consignment to us; we owe him nothing." Two or three days subsequently, Capt. Fleming, Mr. Colesbury, and I went again to defendants' counting-house. Saw Mr. Stern Humphreys. Capt. Fleming demanded the surrender of an invoice of teas, consigned by Russel & Co. to defendants, on account of Capt. Fleming. He tendered to them $650, in bank-notes, to pay costs and charges. He would not take it in any shape, gold or silver. Would not deliver up the teas. Mr. Humphreys called me back. Said I had better persuade the captain that Mr. McCrea had no right to make that arrangement with him. That they had made advance on the goods. He showed me some book that he said was an entry of the goods on which the advance had been made.

Daniel Smith, Jr.—Capt. Fleming said he had some teas by the Venice. He requested me to look at the teas, and sell them. I called on Bevan & Humphreys. I asked them in relation to Capt. Fleming's teas. Mentioned what the captain had said to me. I asked Cabot if the teas were Fleming's. He said they were anybody's who would pay them back the advances made to Mr. McCrea. I endeavoured to sell them from time to time; and conferred with the defendants in relation to prices. They thought the market was advancing, and they declined selling. I called on Bevan & Humphreys immediately after the arrival of the ship Venice. I offered ninety-five cents for one hundred half-chests of young hyson, at a credit of six months, and ninety cents for the other hundred.

Cross-examined.—They did not admit to me, previous to the commencement of suit, that Fleming had any interest in these teas. I never spoke to them before that. They then said, Capt. Fleming had no interest whatever in the shipment, unless there would be enough to

Digitized by Google

cover all their advances, and leave a profit to Mr. McCrea. He stated the agreement was made with McCrea as he went down in the steamboat. That McCrea had told them that he had entered into an agreement with Capt. Fleming to give him an interest in the profits on the whole shipment; and if Capt. Fleming knew what he was about, he would be careful not to mention this business at all, because he was interested in the profit and loss of the whole purchases of McCrea, and that on the whole shipment there was a loss.

They showed me a letter from the house of Russel & Co., dated 18th May, 1840, (this is the letter.) They remarked, at the time, that it was strange that Russel & Co. had given the bill of lading as they did. The letter was then read, which is noticed above.

Re-cross-examined.—I told them what Capt. Fleming had told me, that he persisted in his opinion that he was entitled to the profits on those teas. He claimed the whole of the teas—the ownership of them. Bevan & Humphreys told me that they had delivered up these very teas to John McCrea—he having paid the advances. Don't know when the teas were delivered. The letter, I presume, came by the Venice.

Isaac G. Colesbury, sworn.—Went twice with Capt. Fleming to Bevan & Humphreys. Fleming said he had called fifty times about the matter, and could get no satisfaction; that he would take legal measures; Cabot said he was a fool. On the second time, he told Humphreys he came to pay him the costs and charges—made a tender. Humphreys said he would not accept it if they were gold or diamonds. Fleming asked him if he hadn't received the teas; if he had not said to me there is the key, and I could have access and might sell; didn't you say, "I am glad you have hit upon a trump card, and will make some money by it?" Can you deny all that? Humphreys said, "I'll not say any thing about that now," or, "I will not argue it one way or the other."

Cross-examined.—Mr. Humphreys was ashamed when Capt. Fleming put the question, and backed out—went away.

Plaintiff then proved a purchase of the teas, at sixty-five cents, from him, a refusal to deliver them by defendants, and a subsequent rise to eighty-five cents.

John H. Irvin.—I purchased, from John McCrea, the forty-eight chests of Shoulang, eighty-one cents cash. McCrea told me, when I was ready, to take the check down and pay Bevan & Humphreys. I took the check down, $996 30. The teas rose subsequently to eighty-five cents.

Cross-examined.—I had no intercourse with Capt. Fleming.

Digitized by Google

Francis H. Tiers.—Bought in November, 1840, from John McCrea, shortly after the Venice arrived, four hundred half-chests of Shoulang teas, at fifty-five cents, eighty-eight boxes of Young Hyson, at one dollar, I L F. Deduction afterwards made by McCrea of $20 on bill. I think he remarked they belonged to his son.

His honour, the judge, thinking the evidence did not warrant a verdict, directed a nonsuit, which the court in banc refused to set aside, and plaintiff sued out a writ of error.

Randal, for plaintiff in error.—A nonsuit having been directed, the question is, whether there was any evidence given by the plaintiff which, standing alone, warranted a verdict. It will be observed, we knew no one as owner of the vessel until her return, excepting J. McCrea, who was also the owner of the greatest part of the cargo. Bevan & Humphreys were unknown to us in the transaction. And whatever interest they had was satisfied, as we proved a delivery of this property to McCrea by them before suit brought. If the agreement of the 28th June was doubtful, it was susceptible of explanation by the subsequent transactions; and it might fairly be inferred something else was understood—that he was interested in the cargo to that extent. This agreement between the owner of the vessel and cargo and the captain, who was also supercargo, existed without change until the shipment by Russel & Co. in Canton. These consignees represented the shipper, and by their conduct consummated the agreement. If there was any fraud in this, the party was bound to disavow it promptly, Bredin *v.* Dubarry, 14 Serg. & Rawle, 27. And not having done so, they ratified it. The subsequent conduct of the parties thus ratifying the act of the consignee, was evidence for the jury on the construction of the original agreement. The evidence of ratification is plain; the invoice showed on its face that Russel & Co., and the captain, thus understood the agreement; but to prevent suspicion, an opportunity was given to disavow the act by the letter accompanying the invoice, directing a change of the marks if the shipment was for an improper party. Did they make a change, or do any thing which looked like a disavowal? So far from it, the invoice was sworn to be correct; and the form of the oath is material; it is that taken by a consignee, being factor; not that directed by law in case of an owner. The name of the owner is omitted, which is a very material question at the custom-house on the amount of duties. This is followed up by the parol evidence of Colesbury, showing that defendants admitted the right of plaintiff, but set up a claim for an advance to McCrea, which we also showed had been paid. There is

Digitized by Google

no evidence of advances, nor any right by defendants. So far as appears, they were mere trespassers; for no right from McCrea to them is shown. It may be when they show their case, we will be bound to account for the $5000, but not until they prove some title.

As to the right of property, Smyth v. Craig, 3 Watts & Serg. 14, settled that; the goods were, in the language of the court, segregated from the mass. And without the aid of the agreement, the purchase and shipment vests the right in us, subject to an account.

Williams, contrà.—To sustain this suit, a right to the specific articles must be shown. What was the agreement? not an interest in the cargo, but in the profit and loss. If there were no profits, he could have no claim. It was, that the profits were to be divided in the ratio of $5000 to $40,000 and expenses. Any other construction of the agreement would be absurd; it would be a gift without consideration of an eighth of the whole shipment.

The first letter of instruction shows who is entitled, for the return cargo was to be purchased by the outward one; and McCrea says, he is to have no interest in that; the plaintiff must have seen, from this, the right of McCrea had been transferred, and after this information the agreement was made.

The letter of R. & Co. shows the invoice was purchased with the money of B. and H., not of McCrea. The invoice is made conditional, by the accompanying letter; if right it is to stand, if not, B. and H. are to alter it, and make it right. The only question then is, whether R. & Co. were right in making such an invoice; for an error in that cannot transfer property to the party causing the error. It was for whom it may concern, and with that contingency they made the entry, not stating the owner, as the custom-house did not require it.

If the plaintiff's construction be the correct one, he is a partner, and cannot sue for these goods. He must settle the accounts first; his tender was merely of the charges on the goods; as to the transfer of the vessel, that could not be made until its return.

Have the acts of the defendants, since the arrival, changed the property? if so, it will surprise them very much. They had no right to alter the marks on the goods; for the custom-house regulations forbade that; and they knew R. & Co. had, without authority, appropriated their money to the purchase of goods for another; was it not sufficient, having the right of possession, simply to retain it and deny the right of the other party? The clause at the foot of the invoice was not sworn to, though they could not separate the papers. Possession, or the right

Digitized by Google

which draws possession, is necessary to trover, Matther *v.* Trinity Church, 3 Serg. & Rawle, 512; special property requires actual possession. The bill of lading does not give property when it explains on its face who is entitled, Griffith *v.* Ingledew, 6 Serg. & Rawle, 444. And the master waives his right by signing the bill, Stoughton *v.* Rappalo, 3 Serg. & Rawle, 562, 563. Nor has the master any possession except in that character, by the fact the goods are on board of his vessel, and our lien for advances is a defence to an action of trover. Hutton *v.* Bragg, 7 Taunt. 14; Jarvis *v.* Rogers, 13 Mass. 105; Montague on Lien, 8.

May 1. KENNEDY, J.—From a careful examination of the evidence, given on the part of the plaintiff on the trial of the cause, in the court below, we cannot discover the slightest tendency in it, going to prove or show such right in the plaintiff to the tea in question, as could entitle him to recover in this action. The evidence given by him only went to show, at most, that by his agreement, bearing date the 28th day of June, 1839, made with John McCrea, the owner of the ship Venice, by whom the plaintiff was employed to take charge of the ship as the captain and commander thereof, he acquired an interest to the extent of $5000 in the *profit* or *loss* on the shipment made in the ship, then in the Delaware river, on her voyage by way of Valparaiso to Canton. If a profit were made on the shipment, then the plaintiff was to participate therein; but if a loss should arise therefrom instead of a profit, then he was to bear his proportion of it. But from the agreement taken per se, it does not appear that he was to have a right, in any event, of either a special or general property in the shipment of the vessel, either outward or homeward, or in the tea in question. Neither can we perceive, from any of the other testimony given in the cause, that it was the intention of McCrea, or of any of those who had an ownership in the cargo, of which the tea in question formed a part, that he should have a right of property, or any other right to the tea, that would entitle him to the possession of it, so as to enable him to recover it from the defendants. It does not appear from the evidence, that McCrea ever consented that the plaintiff should have a right of property in the tea, or even the possession of it. On the contrary, it appears that McCrea sold part of the tea to Francis H. Tiers, in the month following the arrival of the vessel, saying it was his son's tea. Nor does it appear that the defendants ever acknowledged or admitted any right or claim of the plaintiff to the tea; they, when spoken to on the subject, said, that the plaintiff had no interest whatever in the shipment unless there should be enough to cover all their advances, and

Digitized by Google

www.libtool.com.cn

leave a *profit* to Mr. McCrea; that McCrea had told them that he had entered into an agreement with the plaintiff to give him an interest in the *profit* on the whole shipment. And although Russel & Company of Canton were intrusted with the purchase of the cargo put on board of the ship Venice at Canton, of which the tea in question was a constituent part, and state in their letter of the 13th day of May, 1840, to the defendants, that the investment of teas had been purchased by, and for account of Captain William Fleming, the plaintiff, at the request of the latter; yet the purchase was made with $5000 furnished by Russel & Co., out of the funds provided by the defendants for the payment of the ship's expenses, and the purchase of an invoice of teas, cassia, &c.; remarking also, that the *transaction* was *not strictly regular*, but was put in such a shape that if they had misapprehended the nature of the agreement between Mr. McCrea and the plaintiff, (of the nature and effect of which I have spoken above,) they would have it in their power to put the matter as it should be; so that from all that Russel & Co. said and wrote on the subject, the plaintiff was to have no *right of property* in the tea as a purchaser thereof, unless, according to the agreement made between him and McCrea, he was entitled to it. But that agreement, as has been already shown, provides merely for an interest in the *profits* of the cargo, and not for a right of property in it to any extent whatever. Besides, Russel & Co. were acting, in what they did, as the agents of McCrea and the defendants, using the funds furnished by the defendants, and had no power or right, even if they had been so disposed, to invest the plaintiff with the right of property, in equity at least, to the tea, by giving him the money belonging to the defendants to buy it, that he might make it his property, and a part of the cargo of the vessel, to the exclusion of those for whom they were instructed, and consequently bound to purchase with the same money or funds, and thus make up a cargo for the vessel to the full extent of its tonnage.

We therefore think the judgment ought to be affirmed, and accordingly affirm it.

Digitized by Google

www.libtool.com.cn

2 416
199 25

LEWIS *v.* HANCHMAN.

The drawer of an accommodation note is not entitled to the privileges of a surety, as between himself and strangers, having, by the instrument, agreed to be considered the principal; nor does he acquire the rights of a surety by subsequently giving a bond for the amount of the notes.

May 4, 5.—THIS was a motion to open a judgment entered on a sci. fa., to revive a judgment entered on warrant of attorney against defendant, in which a rule was granted on the affidavit of defendant's executor.

The facts were: defendant, who was executrix and devisee of John Hanchman, appointed George Witman her attorney in 1830, with general powers over that estate.

In 1837, Witman had obtained her notes for his accommodation, which, by subsequent payments, were reduced to about $2600. For a valuable consideration, Lewis, the plaintiff, advanced money to Witman on these notes, knowing their character.

To induce Witman to build on a lot on Spruce street, Lewis agreed to advance him $3000 on mortgage thereon, subject to a ground-rent of $300 per annum. This mortgage was dated May 16, 1838, and was given to Lewis, cashier of the Girard Bank, to secure the above-mentioned sum, to be advanced in instalments, and the two notes of defendant before mentioned, payable, in one sum, on the 17th August, 1839. On the same day Lewis covenanted with defendant and Witman not to demand payment of the notes before August, 1839.

This mortgage was not recorded until the 14th April, 1840.

In December, 1839, Witman mortgaged the same property to Lindsay for $10,000, with part of which the ground-rent was redeemed. The property rented, when finished, in the spring of 1839, for $1350 per annum; and evidence was given, tending to show its value, at the time of the mortgage to Lewis, which was the only encumbrance except the ground-rent, was about $23,500.

Lewis having loaned Witman an additional sum of $1000 on his check, in 1841, December 1st, placed all these securities in the hands of his attorney, Mr. Ashmead, for collection.

Mr. Ashmead wrote to Mr. Witman and Mrs. Hanchman on the subject, leaving the letters at the house of Witman, who called the next day, and stated he had seen defendant, and if two years could be given, satisfactory arrangements could be made to secure the money by defendant's bond and warrant of attorney, (the one now in ques-

Digitized by Google

tion.) Mr. Lewis consenting, a statement of the accounts was made, including defendant's notes before mentioned, the amount advanced on the mortgage, and the check, with interest; these amounted to near $8000: the balance was paid by Lewis to Witman, after deducting the costs of searches against defendant. For this sum of $8000, defendant gave her bond and warrant of attorney to confess judgment, dated December 7, 1841, on which the judgment now in question was entered the same day. When the bond of defendant was delivered to Mr. Ashmead by Witman, he signed a paper, as attorney for Lewis, reciting the mortgage by its date and place of record, and that suit was not to be commenced on it or the other securities for two years; that these securities, i. e. the notes, were for the same debt for which the bond was given; and that when the $8000 were paid, Lewis would satisfy the mortgage, and surrender to defendant her notes, and to Witman his check.

On the 14th May, 1842, defendant procured searches to be made on her own property, in which this judgment for $8000 was mentioned.

In June, 1842, defendant appointed Auner, who is now her executor, and makes the present application, her attorney, to let her real estate, receive rents, interest, dividends, &c., and to pay taxes, &c., and *all other debts, &c.*

In July, 1842, Auner paid Lewis the semi-annual interest due on defendant's bond.

On the 20th September, 1842, Rundle, as trustee for M. Dyott, petitioned the Orphans' Court, stating that about $7000 trust funds was due from the Girard Bank, which he expected to receive, and praying permission to invest in this judgment against defendant. The court, after examination of the security, made the order for investment. Mr. Ashmead proved that he called on Auner, at the request of Rundle, relative to this investment, and asked his opinion as to its security. Auner stated he was pleased the transfer would be made, as the money was not likely to be wanted immediately, and he would make every effort to pay the interest punctually; and promised to make a statement of the property securing the bond. This was furnished the following day, with a specification of the location and size of the buildings, with the encumbrances. Auner was informed of the intention to make the application to the court; he afterwards proposed substituting a mortgage.

In December, 1841, Witman conveyed the property, mortgaged to Lewis, to defendant. In November, 1842, it was sold by the sheriff, at which time Auner was present, and expressed a hope it would sell for sufficient to reach the mortgage to Lewis.

Digitized by Google

Witman proved that at the time defendant gave the $8000 bond, there was nothing said about the mortgage to Lewis; but some time afterwards he mentioned it to her.

Defendant died in December, 1842, up to which time Auner, as her attorney, and subsequently as her executor to December, 1845, paid the interest on the bond to Rundle. On a petition for an order to release a ground-rent, Auner, as executor, filed an answer, averring this judgment was one of the liens thereon.

The motion to open the judgment was rested on the ground that defendant, being but a surety for the debt secured by her bond, was entitled to the benefit of all securities given by the principal debtor; and the loss incurred by the neglect to register the mortgage was a defence pro tanto.

T. J. Wharton, for the motion.—The application is merely for a trial by jury of the fact of an injury by the delay; no loss can accrue from the delay necessary for such trial. If we have shown a primâ facie case, we are entitled. This power of opening judgments is liberally exercised; neither time nor successive revivals interfering, Colback *v.* Fisher, 1 Rawle, 323, where the judgment was in 1820, and a revival by consent in 1825; Kellogg *v.* Krauser, 14 Serg. & Rawle, 143.

The fact that defendant was but a surety is proved, and also that this was known to the plaintiff. And the paper signed by Mr. Ashmead, affirming it was recorded, means it was duly recorded—recorded in such a manner as to be a benefit; no other rational construction can be given to such a recital. That it has been lost by the neglect to register, is equally plain; for a mortgage for $10,000 has intervened in consequence. This delay was known to Mr. Ashmead at the time of the arrangement for the bond, and he was bound to communicate the whole facts or say nothing. The rule that a surety is entitled to the benefit of other securities, and that any act of the creditor impairing them is a discharge pro tanto, is familiar law, Pitman on Princ. & Sur. 113; 2 Swanst. 185; Ex parte Muir, 2 Cox, 63; Commonwealth *v.* Miller, 8 Serg. & Rawle, 452; Com. *v.* Haas, 16 Serg. & Rawle, 282.

But it will be said, the present owner of the judgment is a stranger. This is immaterial, for it is a familiar principle, an assignee must have applied beforehand, and to the party capable of giving information, not to a newly-appointed agent; and he must be a purchaser for value. Here the evidence shows it was in payment of a precedent debt, 1 Penna. 262.

J. M. Read, contrà.—The mortgage was not to secure her, but him-

Digitized by Google

www.libtool.com.cn

self; and he had a right to do with it as he pleased, as is shown by the agreement, in the event of payment. The rule as to sureties does not apply to drawers of accommodation notes, and the mortgage was on record nearly two years before defendant gave her bond. There was, moreover, a conveyance of the same property to her; so that she has had every advantage she could have had under any circumstances. The recital in the written paper cannot be extended, as contended for; it declares the facts as they exist, and if inquiry had been made, the time of the registry would have been known. But the parties have precluded themselves from any such objection by the conduct of Auner, who was a general agent before the purchase, and by the subsequent payment of interest without objection; there is a great difference between the assignee and the original creditor, 1 Binn. 429; 4 Serg. & Rawle, 177; 1 Penna. 24, 476; 16 Serg. & Rawle, 18–21; 16 Mass. 397; 8 Watts & Serg. 311; 7 Har. & Johns. 320. Whether through ignorance or design is immaterial, if the party is silent and permits another to act, 16 Serg. & Rawle, 21. We gave notice of our intention, and that the court had sanctioned it. The defendant was put on inquiry by the notice of the registry of the mortgage, or had notice in law, Lodge *v.* Liminton, 2 Penna. 439; Barnes *v.* McGlinton, 3 Penna. 67; 1 Story Eq. sect. 400.

T. J. Wharton, in reply.—The payment of interest is immaterial, Harper *v.* Jeffries, 5 Whart. 26. Inquiry should have been made of the facts we were acquainted with, 1 Penna. 262. Rose *v.* Brotherton, 10 Wend. 85, applies, if we have laid a ground for supposing it was in payment of a precedent debt.

May 6. KENNEDY, J., after stating the facts as to original indebtedness.—The interest which fell due on the judgment in her lifetime, was paid by her attorney in fact, J. G. Auner; and after her death, by the same, as her executor, down to the 16th of December, inclusive of the year 1845. Thus recognising the validity and force of the judgment: nor does any objection appear to have been made to it before the 21st of March, 1846, when upon the affidavit of J. G. Auner, the executor of C. Hanchman, a rule to show cause was entered why the judgment should not be opened, and the executor let into a defence. The ground of the defence is, that the notes included in the mortgage given by Witman to the plaintiff, though drawn by Mrs. Hanchman, were drawn by her for the accommodation of Witman, and therefore she must be regarded as the surety for Witman; and that this fact was known to the plaintiff, when he took the mortgage as a security for the debt included in the notes, but by neglecting to record

Digitized by Google

the mortgage until it was rendered worthless, by the giving and recording of a subsequent mortgage, he has thereby lost the benefit of the judgment pro tanto. The principle, however, adopted and settled by this court in the case of Walker *v.* The Montgomery County Bank, 12 Serg. & Rawle, 382, shows that she, by agreeing to become the drawer of the notes, thereby agreed to become, and that she should be considered as the principal, and not a surety or endorser for the benefit of Witman. Hence the neglect of the plaintiff to have the mortgage recorded until it was too late to be worth any thing, cannot prejudice Mrs. Hanchman or her estate, because, she being the principal debtor, would not have been entitled to the benefit of the mortgage, as she would certainly have been had she been a mere surety; and as such had paid the debt. But besides, it has not been shown that she was not informed of the date of the recording of the mortgage before, or at the time she gave the judgment bond; and if she was, that would be sufficient to preclude her from setting up such defence as is now offered. This will apply to any other moneys included in the mortgage, which were advanced by the plaintiff to Witman, and for which, if embraced in the judgment, Mrs. Hanchman would only be a surety. But if she or her agent, Mr. Witman, who attended to, and made the arrangement, under which the judgment was given, knew the date of the recording of the mortgage, there is no pretence for saying that she was deceived or imposed on by the omission or conduct of the plaintiff; she was bound to know the law on the subject, and cannot be excused on that account, if the facts were not concealed from her. It was incumbent on the defendant to show, on this application, that a good defence existed. The burden of proof as to this rested upon him; for the judgment must be considered good and satisfactory evidence of the debt, until the contrary be shown. But there is evidence, as we think, from which it may be fairly inferred, that Mr. Witman, the agent of Mrs. Hanchman, knew before, and at the time of giving the judgment bond, that the mortgage was not recorded before the 14th of April, 1840; for the receipt given to him, on the 7th of December, 1841, the same day on which the judgment bond was executed, recites the date of the mortgage, together with the book and page of its record in the recorder's office, which rather goes to show that the mortgage itself was present at the time, from which the day of its having been recorded would appear, by the endorsement made thereon for that purpose; and that Mr. Witman, in all probability, saw it, which would leave the defence offered to be set up, without the shadow of any thing like a good ground to stand on.

We therefore think this rule ought to be discharged, and accordingly discharge it.

Digitized by Google

www.libtool.com.cn

CHAMBERS v. DENIE.

8 Casey 328

Judgment cannot be entered on warrant of attorney before the warrants are actually filed in the Prothonotary's office.

A MOTION was made in the above case, with others, to amend the record by entering a judgment in favour of plaintiff as of the 10th April, 1846, which appeared to have been entered on the 9th. It was directed by the court to be heard at Nisi Prius.

It appeared that Joseph Fleming, for whom the motion was made, had entered judgments against defendant on the morning of the 9th of April during the hours of business. That the present plaintiffs had, on the same day, filed their warrants of attorney, &c., with the prothonotary at his dwelling-house at eleven o'clock P. M., and of course after the office was closed; they were then endorsed, filed on the 9th, and a similar entry was made on the accompanying bonds. The warrants did not reach the prothonotary's office until the next morning at eight or nine o'clock. The plaintiffs proved by the deposition of the clerks in the office of this court, the District Court, and the Recorder's office, that the custom had always prevailed of receiving warrants of attorney at any time before midnight, endorsing them as of that day, and entering the judgment on the day following as of the preceding day.

Williams and *Meredith*, for the motion.

R. R. Smith and *Hopper*, contrà.

ROGERS, J., directed the judgments to be entered as of the 10th, on the ground the entry was made before the warrants reached the office.

Digitized by Google

www.libtool.com.cn

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

MIDDLE DISTRICT, MAY TERM, 1846.

HARRISBURG.

BEESON *v.* MCNABB.(*a*)

An executor on a sale by the Orphans' Court, retained a sum of money in his hand to meet the demand for dower or thirds chargeable on the estate of the testator; the widow is entitled to recover; and the executor is the only party chargeable.

ERROR to the Common Pleas of Fayette county.

This was an action of debt for a devastavit against the executors of H. Beeson, on a judgment recovered against them in 1841, in which a verdict was taken for the plaintiff, subject to the opinion of the court on the evidence. The court below gave judgment against the acting executor, in whose hands only assets had been proved.

It appeared that, in 1816, defendant's testator purchased, at an Orphans' Court sale, a house of the deceased husband of plaintiff, and a sum of money was left in his hands to meet the demand for dower or share under the intestate law; the interest on this was paid to plaintiff until the purchaser's death in 1824, and by his executors until 1833. In 1836, she filed a claim or statement of these facts in the Common Pleas, in an action against the executors.

In 1839, she recovered a judgment by confession for three years' arrears; and in 1841, the judgment now sued on.

Plaintiff proved a petition in 1836 by defendant, as acting executor of Beeson, praying a sale of his real estate, in the schedule annexed to which, was the statement of the principal sum retained for her thirds stated as a debt. This was objected to, probably for want of connec-

(*a*) This case was argued at the last term at Pittsburg.

Digitized by Google

tion with the other defendants, against whom, however, no judgment was given.

She then proved a supplemental account by the same person in 1839, showing a balance retained to meet her claim.

Beeson the testator died in 1832, having devised this land to his son.

Patterson and *Beech*, for plaintiff in error, contended the debt in this case had lost its lien under the act of 1807; as this money thus remaining in the hands of the executors after the sale under the Orphans' Court decree was real estate, and is so declared by the acts of 1834, sect. 33; 1833, sect. 18. But the heirs, or devisee and widow, have not been made parties, which is expressly required by the act of 1834, sect. 74; if the debt is to be levied out of the real estate. It had been paid up to the end of seven years, but neither that fact nor the filing of the account, admitting a debt out of abundant caution, was sufficient to charge the real estate, which this was, as the executor was a mere stakeholder, 5 Watts & Serg. 373, having no personal interest. But the case is stronger; for even had the admission been by an heir, it would not have bound the estate, Hemphill *v.* Carpenter, 6 Watts, 22.

Howell and *Biddle*, contrà.—The act of 1807 has nothing to do with the case; the money was received by the executor, for the payment of this particular debt; after which he became trustee for us, and no statute could affect our right, 8 Watts, 504; 9 Watts, 523. Beeson *v.* McNabb, 2 Watts, 106, is a case deciding the purchaser becomes a trustee for the widow for this money; or at all events liable to pay her; and then the accounts of the executors are evidence of admissions of a receipt of the fund or money for the same purpose. The act had been complied with by filing the statement.

This fund, moreover, ceased to be real estate on the Orphans' Court sale, Clauser's estate, 1 Watts & Serg. 215; and from that time it remained personalty, as to which there is no limitation; this rule prevails from the time of the application to the Orphans' Court, Greider *v.* McClay, 11 Serg. & Rawle, 224; Milligan *v.* Aughanbaugh, 4 Watts, 424.

But could more be done than we did, even to charge real estate; a plain statement was filed, and a judgment recovered for so much as was due at the time; but the true point is, this was our specific fund.

Burnside, J.—The object of the act of the 4th of April, 1807, 3 Smith L. 297, sect. 4, was to protect bonâ fide purchasers, who could not have notice of debts due by a deceased; debts being a lien on the real estate of a deceased person by the common law for an indefinite period of time. To remedy the evil, the legislature provided,

Digitized by Google

"That no debts except they were secured by mortgage, judgment, recognisance, *or other record*, should remain a lien on the lands and tenements of a deceased person longer than seven years after the decease of the debtor, unless an action for the recovery thereof be commenced, and duly prosecuted against the debtor, or the executors, or administrators of the debtor, within the period of seven years; or a copy or particular statement of the bond, covenant, debt, or demand, when the same is not payable within the said period of seven years, shall be filed within the said period in the office of the prothonotary of the county where the lands lie."

No case has decided, that dower is within the provisions of this act. The widow brought her actions, as the evidence shows, and stated her case minutely in her declarations, some before, and some after the seven years succeeding the death of Henry Beeson. Her right to dower was early contested. The case of Beeson *v.* McNabb, 2 Watts, 106, settled the question, and established her claim. The executors and representatives of Henry Beeson knew that they owed this dower, and they had part of the real estate sold by order of the Orphans' Court of Fayette county to pay it. In settling their account of the sale, the executor claimed, and the Orphans' Court allowed him to retain in his hands a sufficient sum to pay the widow and her children at her decease. Payment was made until seven years after the death of Henry Beeson; and although the money is in the hands of the executor for this special purpose, by the consent of the heirs and the decree of the Orphans' Court, the plaintiff in error refuses to pay over the dower due the widow—contending that this action cannot be maintained, because the heirs of Henry Beeson were not made parties in this action, and no formal specification of the claim was filed in the Common Pleas, with the prothonotary.

The dower being in the hands of the defendant below for the purpose of payment, the refusal to pay is clearly a devastavit. It is so suggested in this action. The suit is not against the estate. It is against the person who had been the acting executor of the estate, who received the money to pay *this widow her mite*, by order of the Orphans' Court, and of which the heirs of the estate must be presumed to be consenting, as they filed no exceptions to the final confirmation of the administration account. An executor may be a trustee for the creditors as well as heirs. The law is settled, that in all cases of promises, express or implied, made to, or by an executor, or administrator, after the death of the testator, or intestate, the action must be brought by or against the executors or administrators individually, Greer *v.* Huston, 8 Serg. & Rawle, 402.

www.libtool.com.cn

Digitized by Google

www.hbtool.com.cn

This executor is a trustee for the widow and her children since the decree of the Orphans' Court, leaving the money in his hands for their use. It is the debt of the executor. It has ceased to be due by the estate of Henry Beeson, deceased. That estate has paid it to the executor for the widow and her children, and he is legally bound to pay the widow her interest annually, and the principal to her children at her decease. It is not a case in which the act of limitations is a bar to an action against an administrator founded on a devastavit, 7 Watts & Serg. 350.

The judgment is affirmed.

MUIRHEAD v. KIRKPATRICK.

1. A set-off was offered to be proved before arbitrators, who rejected the witness. The counsel and party then left the room, stating they would dispense with further attendance on the arbitration. An award unappealed from is conclusive on the subject of the claim offered to be set off.
2. To admit a suit for a matter once offered to be proved as a set-off and rejected, there must be clear proof it was withdrawn by the party.
3. Assignor of a debt incompetent to prove it as a set-off by his assignee.

ERROR to the District Court of Lancaster county.

May 11.—This was an action on a promissory note, in which there was a special plea of set-off, and a replication of a former recovery of the matter intended to be set-off. After the proof of the note, the defendant called his brother, who proved a claim due him by plaintiff, assigned for value to defendant, with a release, &c., to witness. He was objected to, but admitted. It was then shown that in a former action between the parties, in which no plea of set-off was filed, arbitrators were appointed, before whom the same debt was offered by way of set-off, with the same witness to prove it; that after argument the arbitrators declined hearing the testimony; whereupon, as the whole defence was thus excluded, the counsel for defendant said, "We will dispense with our further attendance on the arbitration," took up the copy of the account and other papers, and with defendant left the room. An award was then made. There was contradictory evidence whether the arbitrators took the account with them in retiring to consult on their award, one of their number stating positively it was not considered.

The court left it to the jury whether it had been taken into the estimate, or withdrawn from the arbitrators, saying, if not, it was a good matter of set-off here.

Digitized by Google

Frazier, for plaintiff in error.—The witness was incompetent to support an assignment of a claim to be used as a set-off, which, under our act, is a cross-action; and the same objections prevail in regard to testimony in support of such a claim as if it were an original suit; Post *v.* Avery, 7 Watts & Serg. 509; Kelley *v.* Eichman, 3 Whart. 419; Kelley *v.* Eichman, 5 Whart. 446; Pattison *v.* Reid, 7 Watts & Serg. 145; Reading *v.* Johnson, Id. 317; Phiney *v.* Tracey, 1 Barr. 173. It is, therefore, perfectly immaterial that he is not a party to the record, for this rule, which is founded in policy, is not to be broken through by a contrivance of this sort.

The court were also in error in leaving it to the jury to decide whether the same matters had been passed upon; they should have said, it must have been distinctly withdrawn, and that no evidence existed of such a fact. It was in fact not withdrawn, but the party was bound by the award and the decision, respecting the witness, by not appealing; Kirkpatrick *v.* Muirhead, 5 Watts & Serg. 506; 11 Mass. 445. This very question, whether the evidence warranted finding a withdrawal, had been decided by this court in the former case cited.

Stevens, contrà.—No decision goes the length of excluding the assignor of a chose in action, not a party to the suit, and without interest in the event, from being a witness, (but see Clover *v.* Painter, and Smyth *v.* Craig, antè.) Was there any evidence this matter had been passed on by the arbitrators? The counsel said he intended to prove a set-off, but their decision rejecting his testimony precluded the possibility of his doing so, and renders it certain it was not decided upon. There was some evidence, though not record, of the withdrawal of the defence, precisely the same that proved it to have been set up.

May 23. SERGEANT, J.—The defendant, when before the arbitrators, did not deny the note on which suit was brought, but claimed a set-off, and with that view his counsel opened his case, and produced a paper containing a number of items, with an assignment to the defendant. In support of it he called a witness, Johnston, who proved the execution of the assignment. He then offered the assignor to prove the items. He was objected to by the plaintiff's counsel, and the counsel for both parties addressed the arbitrators, who, after consulting, said they had agreed to dispense with the testimony of the witness. The defendant's counsel then said they would dispense with their further attendance on the arbitrators, and retired. The claim was thus placed before the arbitrators for their decision: it was offered

www.libtool.com.cn

Digitized by Google

www.jbtool.com.cn

and insisted on by counsel, some evidence was given to support it, and more was offered, which was rejected. Unless, therefore, the claim was afterwards explicitly withdrawn, the arbitrators were bound to decide upon it, and might, if they saw fit, have allowed it, notwithstanding the defendant chose to decline attending upon them. To prevent that, and take it away from the jurisdiction of the arbitrators, the party was bound to exercise a clear and express act, equivalent to a nonsuit, otherwise it must be taken to have been considered examined, and decided by the tribunal to whom it was regularly committed. It is impossible to find any evidence here of such express withdrawal of his claim by the defendant. He declined further attendance, but he took the chance of decision on the case in his favour by leaving it as it stood, within the power of the arbitrators. The case is, indeed, in no respect different from what it was when brought here on a former writ of error, as reported in 4 Watts & Serg. 506, where this court say, there is no evidence of withdrawal to warrant the leaving of the fact to the jury. That it is error to leave a matter as a question of fact to the jury, where there is no evidence to sustain it, has been repeatedly determined. The proper remedy of the party, if he did not choose to withdraw his claim, was by appeal from the award. In Smith *v.* Whiting, 11 Mass. 445, the plaintiff had in a former action offered evidence in support of a count for money had and received, which was rejected, and the cause went to the jury without striking out the count. In a subsequent suit for the same cause of action, the court held the plea of a former recovery good, it appearing the demand had been once had and determined, and it is never permitted to overrule the judgment of a court having jurisdiction by another action. The exception is where no evidence is offered. To sustain a new action where evidence was offered and rejected, would throw all judgments into uncertainty and confusion.

The objection to the competency of E. Kirkpatrick, as a witness, is equally decisive. He was the original creditor and assignor of the debt claimed by the defendant to be set off, and the case falls within the rule of recent decisions, by which it is now settled that such assignor cannot be called as a witness for his assignee; Phiney *v.* Tracey, 1 Penna. State Rep. 173; McClelland *v.* Mahon, Id. 364. This rule is founded on reasons of policy and justice, and was imperiously demanded by the experience of the frauds and corruption to which the former doctrine led, where a party might create or establish a contract for his own benefit, and derive an advantage from enforcing it by his own oath. A creditor may assign a debt, and the assignee may sue in the name of the assignor, under equitable principles, applied here

Digitized by Google

in common law proceedings, but the assignee must take the claim as the assignor held it; and as he could not establish it in one case by his own oath, so neither can he in the other.

Judgment reversed, and a venire facias de novo awarded.

In re Barr's Estate, Stoner and Barr's Appeal.

1. Testator devised all his estate among his seven brothers and sisters, nominatim, or their survivors. Four of them were dead, leaving issue at the time he made his will, and the fact was known to him. *Held*, survivors meant representatives; it being clear the will was written by an illiterate man.
2. The court receive evidence of facts and circumstances relating to the family of testator, known to him, in construing a will. See Marshal's Appeal, antè.

From the Orphans' Court of Lancaster county.

May 11.—John Barr, in June, 1840, made a will, of which the material parts are as follows:

"*Imprismise:* It is my will that all my just debts shall be paid and satisfied, as soon as conveniently after my decease.—Item, I do hereby authorize, direct and empower my executor hereinafter named and appointed, or the survivor of him, as soon as conveniently may be after my decease, to sell to the highest and best bidder or bidders, all my real and personal property that I do possess at my decease; and further it is my desire, or will, that all the moneys due to me after my decease, by bonds, &c., or otherwise whatever, shall be collected and divided in the manner and form hereinafter directed, to wit:

"*Item First.*—I give and bequeath unto Margaret Barr, daughter of Elizabeth Barr, and formerly Elizabeth Clows, the full sum of six cents for ever. Item second, and further, it is my will that the residue of my property shall be equally divided among my brothers and sisters, which I shall hereinafter mention, or their survivors. Item first, Margaret Stoner; item second, Elizabeth Ferree; item third, Owen Barr; item fourth, George Barr; item fifth, Jacob Barr; item sixth, Nancy Spangler; item seventh, Francis Snider; and lastly, I do nominate, constitute and appoint Thomas Huston of East Donegal township, Lancaster county and state of Pennsylvania, or the survivor of him, to be my executor."

This will was proved in 1843. Margaret Stoner died in 1797, leaving one child now living, one of the appellants.

Elizabeth died in 1841, leaving several children and grandchildren by a child who died in August, 1840.

Digitized by Google

George died in 1830, leaving children and great grandchildren by a grandchild, who died in 1843.

Jacob died in 1834, leaving children.

Margaret, George, and Jacob, died in the village in which testator resided, and he knew of their death when he made his will.

Margaret Barr was the only daughter of testator.

The court considered Margaret the daughter entitled to the lapsed legacies of all those who were dead before the will took effect, and the legatees who survived the testator to one-seventh each.

Frazier, for the children of Margaret Stoner, of Elizabeth Ferree, of George Barr, and of Jacob Barr, appellants.

The question is, have the legacies to four of the legatees named in the will lapsed by reason of their death? He contended that it was not a case of a lapsed legacy. The construction of the will mainly depends upon the meaning to be attached to the word *survivors*. In one part of the will, the testator speaks of his "executor hereafter named and appointed, *or the survivor of him.*" And he nominates "*Thomas Houston, or the survivor* of him," to be his executor. Here *survivor* is tantamount to successor, Gittings *v.* McDermott, 7 Eng. Ch. Rep. 263, 266, and 267; Mylne and Keene's Rep. 69.

But the chief and important question arises in the following direction of the testator. *It is my will that the residue of my property shall be equally divided among my brothers and sisters*, which I shall hereinafter mention, *or their survivors*. Three of the persons named as legatees were dead at the making of the will, and another died after the date of the will and before the death of the testator. Here *survivors* means, the children, the issue of the deceased brothers and sisters. He knew at the time he made his will, that three of the persons named as legatees therein were dead. *Survivors*, therefore, could not mean his surviving brother and two sisters; for they were, in fact, the survivors when he made his will; but it means the surviving children of the deceased brothers and sisters. He intended to give the shares or legacies in the first place to his brothers and sisters; and in the event of their death, or of any of them being dead, to their children: or, in other words, to the children of those who were dead, and to his brothers and sisters then living. In the event of the death of the brothers and sisters, who were living at the time, then to his or their children. He cited Dickinson *v.* Lee, 4 Watts, 82; 18 Law Lib., Ward on Legacies, 90, 163, 169, 170.

Stevens, for the surviving brother and two sisters, appellants.—Evidence not admissible to show that the testator knew of the death of the

Digitized by Google

persons named as legatees at the time of making his will. Ward on Legacies, 164, 18 Law Lib.; Comfort *v.* Mather, 2 Watts & Serg. 450.

From what time a will speaks, 7 Eng. Ch. Rep. 264; 21 Law Lib. 176, 181; Dawson *v.* Clark, 15 Ves. 408; Powel on Devises, 283 and 307, in notes. As to residue, Kennett's case, 4 Ves. 810, and 15 Ves. 417.

Where there are persons fully answering the description in a will, others are never let in; but where there is a total failure of such persons, others may be admitted. Lord Oxford *v.* Churchill, 3 Ves. & Bea. 67, 68; Gittings *v.* Dermott, 2 Mylne & Keene, 69.

Reigart, for the children of Margaret Barr, deceased, only child of the testator, appellees, contended that the legacies, which by the will were given to Elizabeth Ferree, George Barr, Jacob Barr, and Margaret Stoner, brothers and sisters of the testator, who died before the testator had lapsed, and being undisposed of by the will, go to the next of kin. Law Library, Ward on Legacies, 166, 167. He also contended that implications by which the laws of descent are suspended shall be avoided, and cited Sloan *v.* Hanse, 2 Rawle, 28.

Nor does it make any difference whether the testator knew of the decease of the particular legatee, before he made the will; and cited Comfort *v.* Mather, 2 Watts & Serg. 450.

The words made use of by the testator, "*or their survivors*," does not mean children. Dickinson *v.* Lee, 4 Watts, 82; Opinion of Chief Justice, 2 Rawle, 32.

May 21.—Burnside, J.—John Barr, late of Lancaster county, deceased, by his will, dated the 2d of June, 1840, directed his executor therein named to sell his real estate, and collect his personal property, and then devises the whole sum, viz.:

"Item first.—He gives and bequeaths to Margaret Barr, daughter of Elizabeth Barr, formerly Elizabeth Clows, the full sum of *six cents for ever*.

"Item second.—It is further his will, that the residue of his property shall be equally divided among his brothers and sisters, '*which I shall hereinafter mention, or their survivors.*' Item first, Margaret Stoner; item second, Elizabeth Ferree; item third, Owen Barr; item fourth, George Barr; item fifth, Jacob Barr; item sixth, Nancy Spangler; item seventh, Francis Snider; and lastly, he nominates Thomas Houston, of East Donegal Township, in Lancaster county and state of Pennsylvania, *or the survivor of him*, to be his executor."

Digitized by Google

The will was proved the 16th of May, 1843, and letters testamentary issued to the executor, who sold the testator's real estate, and collected the personal property as the will directed, and settled his administration, exhibiting a balance of $3005 24, for distribution, subject to the collateral inheritance tax.

The will was evidently written by some person who did not know the meaning of legal terms, most probably an Irish schoolmaster, with a book of forms before him that he did not understand. The testator names his brothers and sisters, and he leaves them all equal. They all lived, or had lived, near him, and he knew that some of them were many years dead. He put the dead and the living on the same footing. He directed his residuary estate to be *equally* divided among them by name, *or their survivors*. He knew they had families; for they all had issue. It is not given to the survivors of the seven, but to each individual and their survivors. He clearly intended that each one named should take a seventh part, and that that part, when the devisee was dead, should go to his or her family.

I am aware, that in strict legal sense, the word *survivor* means the longest liver of two joint-tenants, or of any two persons joined in the right of a thing; he that remains alive after that the other be dead, 3 Com. Law Dic. 55; Brooke, 33.

It has ever been held to be the law in Pennsylvania, that the intention of the testator shall govern in the construction of a will, in all cases, except the law overrule the intention, and this is reducible to four instances. 1. Where the devise could make a perpetuity. 2. Where it would put the freehold in abeyance. 3. When chattels are limited as inheritance. 4. Where a fee is limited on a fee. From the whole will the intention is to be collected, Kuster *v.* Kuster, 2 Dall. 244; 2 Yeates, 60.

The law requires every sentence and word in a will to be considered in forming a judicial opinion upon it, Turbett *v.* Turbett, 3 Yeates, 187. The intention is deemed the fundamental rule in its construction, Riddle *v.* Riddle, 3 Bin. 149. These rules have at all times been scrupulously maintained, and without departure in our judicial decisions. To me, the intention of the testator is clear. He directed his whole estate to be turned into personal after his death. For reasons best known to himself, the girl that bore his name was disposed of with six cents *for ever*. He then gave an equal portion to each brother and sister by name; knowing that some of them were dead, and *their survivors*, that is, their legal representatives, on his death, when the will took effect. So he empowers his executor Houston, or *the survivor of him*, to execute the trust.

Digitized by Google

Even in deeds, the intention of the grantor has been carried as far as in this case. In McWilliam *v.* Martin, 12 Serg. & Rawle, 269, it was held that a deed, conveying all debts, dues, and demands, real, personal, or mixed, which are due and owing, or of right belonging to the grantor by virtue of inheritance, legacies, bonds, notes, book-debts, or otherwise to the grantor and his heirs and assigns, passes real estate.

The primary inquiry, then, being the intention of the testator, and that appearing on the face of the will, and is not contrary to any rule of law, the court is bound to construe it according to the intention.

He gave the estate *equally* to his brothers and sisters, a special devise to each by name *or their survivor;* each took the portion devised. The intention was that the heir of each should take, although dead before the testator, and this I gather from the whole will.

The decree of the Orphans' Court is reversed; and this court decree the estate to be divided into seven parts, and the executor pay over one of the parts to each of the devisees in the will, or their legal representatives.

In re SEICHRIST, BOWER'S Appeal.

Administrators having settled an account which neither on its face nor in the decree purported to be a partial account, cannot, by a subsequent account, open the matters contained therein, nor claim credit for non-payment of a debt with which they charged themselves, even though it was stated that the balance of the former account was composed in part of the bond securing such debt.

How an administration account, which is not intended to be final, should be stated.

FROM the Orphans' Court of Lancaster county.

May 12.—Jacob Seichrist died in 1839, and appellants were appointed his administrators, and filed an inventory of the goods, &c., valued at $9745.

In 1840, they filed "an account of Sener and Bower, administrators, &c." They charged themselves with the inventory, including two bonds, with interest, one of which was, by George Hecker, for $2200. They also charged themselves with "cash received on the sale of the real estate of said deceased, $9218," showing a total of $19,913, and claiming various credits, including a charge for "settling the estate," of $765, leaving a balance of $14,242. A note at the foot of the account stated this consisted of George Hecker's bond, another small bond, a debt, and cash. This account was confirmed in September, 1840.

Digitized by Google

In September, 1844, the appellants filed a paper in the Orphans' Court, stating the balance on the former account, and how it was made up, and claimed a credit:

1. For $9218, cash received from the real estate which had been paid to the heirs as per releases.

2. After stating the bond, and the debit therefor, with interest in the former account, and that $469 had been received from Hecker's assignee, they claimed a credit for the balance unpaid, $1863.

3. For various small expenditures and payment of debts due by the estate before filing the former account.

This left a balance due the estate of $2993; one-half due the widow, and one-half for distribution among representatives.

Exceptions were filed to the allowance of the credits on this second account.

The bond of Hecker was given to the intestate in 1838, with a warrant to confess judgment, under an agreement that it should not be entered until notice to the obligor. One year's interest was paid after the death of testator to appellants, but suit was not commenced, nor judgment entered, until the 15th May, 1840. It seemed they were ignorant that it was a judgment bond until that time. On the 11th May, Hecker made an assignment for creditors. He was possessed of large real estate, and had judgment been entered before the assignment, the debt would have been secured.

The court below (Lewis, President) considered the fair inference of the law to be, that some effort must be made to collect the debts within a year, and none having been made, and the debt being lost, the appellants were chargeable. Besides, the account originally filed was a final account, and this last one, therefore, irregular, and must therefore be set aside.

After the appeal was taken to the Supreme Court, appellants proved they demanded the debt in March or April, 1840, and received a promise of payment in a few weeks. Hecker then discovered his inability to meet his engagements, and made the assignment. All this evidence was objected to as inadmissible. They also proved the existence of the warrant was unknown at the time the inventory was made, the bond not having been examined except as to its date and amount.

The error assigned was the rejection of the supplemental account. The paper book does not show that the second account was so styled, except in the exceptions filed thereto.

Reigart, for appellants.

Frazier, for appellee.

Digitized by Google

May 18. PER CURIAM.—The time has been when there was a simple and very convenient system of practice in the settlement of administration accounts; but it has so long gone by, that the present generation of lawyers and judges seem to be uninformed of it, and in its place we have nothing but confusion. If an account was intended to comprise the whole administration, it was called the administration account of the estate, in general terms; and the court, in confirming it, decreed that there was so much (naming the sum) in the hands of the accountant, subject to distribution according to law, or to the terms of the will. If the account was intended to be a partial one, it was so headed, and the balance was decreed subject to further settlement. A subsequent partial account was called the further account, on which there was the same decree. The final account was called such at the head of it, and the decree was the same as on a general and final account. If assets came to hand after the final account, they were included in what was called a supplemental account. All these were integrant parts of a whole, constituting one account, and while the system lasted, the courts knew what they had to deal with. Under the present practice of designating nothing on the face of the account or by the decree, it is impossible to tell when the administration is closed, and the uncertainty opens the door to fraud. In the case before us, as the original account does not appear to have been partial, we must take it to have been final. The attempt is thus to open it, after the time for appeal or review has gone by, by filing something in the form of an account, which however contains no supplementary matter; and that this cannot be done, appears satisfactory in the case of Shenck's administration account, 5 Watts, 84, but more explicitly in the case of Downing's estate, 5 Watts, 90. The proposed account, therefore, was properly rejected.

Order affirmed.

Digitized by Google

www.libtool.com.cn

WITHERS v. HAINES.

Refusal to stay proceedings until payment of costs of former suit, not the subject of writ of error. Refusal to open a judgment or grant an issue on the ground that the same point had been decided in a former suit, to which no appeal was taken, not the subject of a writ of error.

A rule of reference cannot be withdrawn by the party entering it, without leave.

If the record show the plaintiff named one arbitrator, the prothonotary for defendant one, and plaintiff a third, the presumption the number was fixed by the prothonotary, shown from his not appointing more, satisfies the law requiring him to fix the number.

An award may be made pending demurrer.

Judgment on the merits on sci. fa. to revive a judgment by an improper party, may be pleaded as a former recovery in a subsequent proceeding by the legal representative, it being in his favour.

ERROR to the Common Pleas of Lancaster county.

May 13.—Haines, administrator of H. Share, issued a sci. fa. to revive a judgment obtained by H. Share & Co., against plaintiff in error, intestate in 1815. A former proceeding had been commenced in the name of Mehaffy, surviving partner of H. Share & Co., which, on writ of error, was reversed on the ground that the words "& Co." should have been treated as surplusage in a court of law. The case is reported in 7 Watts & Serg. 276. A motion was made to stay the present proceedings until the costs of the former one had been paid. The court declined it for various reasons; but this point was not considered as the subject of a writ of error by the court here.

To the sci. fa. the defendant pleaded, first, payment; second, that the original warrant had been altered before judgment and after execution. A motion was then made to set aside the original judgment for the same reasons as are alleged in the second plea. The court refused it, and also refused an issue to try the facts alleged, on the ground that a similar application had been made the year before, and decided in the sci. fa. by Mehaffy.

Defendants then replied non solvit, and to the second plea the former recoveries specially. Plaintiff demurred, and for cause showed: 1. Duplicity in pleading both the judgments. 2. The judgment was not between the same parties. 3. Was the same in substance, averring the record pleaded as verification was between different parties. 4. The second decision could only be available by demurrer, being in this very cause. 5. The motion was not discretionary, and the defendant was entitled to a jury, and exception to the charge of the court.

The plaintiff then amended by striking out the replication of the second judgment.

Digitized by Google

Defendant then entered a rule of reference, and, on motion, amended his rejoinder by averring the former recovery would not be a bar, because decided in an erroneous suit by sci. fa. He then withdrew his rule for reference without motion or consent.

At the time appointed in the original rule, plaintiff attended, and plaintiff and prothonotary, for defendant, named arbitrators, the plaintiff commencing, and the prothonotary naming one. "Time and place fixed by prothonotary."

Defendant then moved to strike off the appointment of the arbitrators, having been erroneously made by the plaintiff and prothonotary, the reference having been withdrawn. The court (Lewis, President) refused the motion for the following reasons, which are affirmed by the court here:

"On the 10th March, 1845, and more than thirty days before the ensuing term, at which the cause was ordered for trial, the defendant entered a rule of reference, expressing his determination to have arbitrators chosen on the 17th of April, 1845. On the 22d March, 1845, the pleadings were amended, with leave of the court. On the 12th April, 1845, the defendant filed a rejoinder. On the 17th April, 1845, (the time appointed to choose arbitrators,) the defendant made an entry that he 'withdraws his application to have arbitrators chosen,' and on the same day, the plaintiff attended to choose arbitrators, and the defendant not attending, the arbitrators were chosen by the plaintiff and the prothonotary, in the manner required by law where only one of the parties attends. The question is, whether the appointment of arbitrators should be stricken off. The entry of a rule of reference, under the compulsory system of arbitration, is a proceeding which *either* party may adopt, and in which *both* have an interest, when adopted. The entry of the rule by one, prevents the other from making a similar entry—two proceedings of the kind cannot progress together. The entry of the rule also has the effect of taking the cause off the trial list for the ensuing term, if placed there; or, if not, of preventing it from being placed on the list. This is the constant effect in practice. It follows, from these considerations, that the rule, when entered, cannot be withdrawn without the consent of the opposite party, and without leave of the court. The reason assigned for withdrawing the rule may have been a good one, for a *continuance*, if the party was taken by surprise by the amendment of the pleadings, but it is no reason for changing the jurisdiction, or withdrawing from the tribunal previously selected for the trial of the cause. The entry withdrawing the rule was irregular, and the appointment of

Digitized by Google

arbitrators, in disregard of it, seems to be according to law. The rule is therefore discharged."

The plaintiff then filed a surrejoinder, averring the judgment was made with direct reference to the judgment now sought to be revived.

An award for plaintiff was then filed, and a motion made by defendant to set aside the proceedings, &c. 1. Because the application for a reference had been withdrawn. 2. Their number had not been fixed by the prothonotary. 3. Because the arbitrators decided the demurrer erroneously. 4. If the arbitrators had no authority to decide the demurrer, then the court were asked to decide that issue and the legality of the award.

The court delivered the following opinion on this motion:

"This is a second motion to strike off the appointment of arbitrators. On the 17th April, 1845, the arbitrators were chosen, and on the next day the defendant moved to strike off the appointment for the reason set forth in the motion. On the 19th April, 1845, this motion was overruled. On the 3d May, 1845, an award was filed, in favour of the plaintiff, for the sum of $9329 20; and on the 10th May, 1845, the present motion was made to strike off 'the arbitration proceedings and award.' The reason assigned on the former motion is again urged on the present occasion. Several additional reasons are also relied upon. The ground that the party entering the rule had withdrawn it has been specifically determined, and nothing further remains to be said upon that part of the case. The additional objection is now, for the first time, made, that "the number of the arbitrators was not fixed by the prothonotary." It is conceded, that if it appears by the record that one party, in the absence of the other, was permitted to participate in fixing the number, the objection is fatal, according to the decisions in 6 Watts, 260, and 7 Watts & Serg. 183. In those cases, the illegal participation of the attending party was distinctly affirmed upon the record. But this is not the state of the fact upon the record before us. It is stated, in this case, that the party attending, and the prothonotary, *chose* the arbitrators, and that, after choosing three, the *prothonotary fixed* the *time* and *place* of meeting. The record is silent upon the question of fixing the *number*, and we are not informed of the method by which that was decided, unless it be inferred from the fact that the prothonotary arrested the further proceedings, after *three* had been chosen, by fixing the time and place of meeting; and thus, by his own act, limiting the number to three. There is a presumption in this, as in all similar cases, that the officer, acting under oath, has performed his duty according to law, and this presumption is certainly not diminished in strength by the certificate,

Digitized by Google

in the rule issued to the arbitrators, upon which they acted, that they were '*appointed according to law.*' This presumption acquires additional force when it is considered that, on the former motion to set aside the appointment, no allegation was made that the prothonotary had not fixed the number, but the objection to the appointment was placed and decided upon a different ground. Under the circumstances, it is fair to presume that the appointment was properly made in this respect, or, if not, that the objection now taken, and all other objections which might have been urged upon the first motion, are waived.

"Since the appointment of the arbitrators, and before the time for hearing, the parties filed a rejoinder—a surrejoinder, a demurrer, and a joinder in demurrer—thus making up an issue in *law*, in addition to the issue in *fact*, on the plea of payment with leave. If the issue in law discloses a legal ground of defence, the award should be set aside, or judgment should be rendered for the defendant non obstante. As the demurrer brings into examination all the previous pleading upon which it is founded, it will be sufficient for the decision of this application to inquire into the validity of the plea 'that the bond and warrant of attorney upon which the original judgment of 1815 was entered, was altered in material parts without the consent of the obligor.' It is not necessary to consider the lapse of time, the proceedings upon the judgment, the several motions to set it aside upon this ground, and the decisions of the court against them. It is sufficient to say, that so long as the judgment remains of record, it must be taken for verity, and cannot be impeached in this proceeding by the matters set forth in the plea. It is settled that in cases of mistake, fraud, want of authority to make the entry, and even forgery, the remedy is to apply to the court in which the proceedings or judgments were had, to have them opened, referred, or vacated, as may be requisite. But under no circumstances can the objection be taken in the manner proposed by the plea, which stands as the foundation of this demurrer; Withers *v.* Livezey, 1 Watts & Serg. 433; Morris *v.* Galbraith, 8 Watts, 166; Hoffman *v.* Carter, 2 Wheat. 452; Clark *v.* McComman, 7 Watts & Serg. 470; 5 Serg. & Rawle, 65; Cowp. 727; 8 Johns. 77; 5 Watts & Serg. 474.

"The motion to set aside 'the arbitration proceedings and award' is, therefore, denied, and the rule for that purpose discharged."

The errors assigned were:

1. In not staying proceedings till costs in former suit were paid.

2. In denying the motion to set aside the original judgment, and refusing to grant an issue to try whether material alterations were made

Digitized by Google

in the judgment bond and warrant, after execution and before judgment entered thereon, without the assent or knowledge of defendant's intestate.

3. In granting plaintiff leave to amend his replication by striking out his second replication.

4. In refusing to strike off appointment of arbitrators.

5. In refusing to strike off arbitration proceedings, and award.

6. In refusing to decide the demurrer, either because the arbitrators had decided it, or that the demurrer was unsound, it is not certain which.

7. In refusing to strike off an award made while demurrer was pending.

Frazier and *Parke*, for plaintiffs in error.—This case was before this court some two years since. The present scire facias is on the same original bond. This court reversed the judgment in the former action; and when the present scire facias was issued, we made an application to stay the proceedings until the costs of the former action were paid. Before issuing a second, they were bound to pay the costs of the first scire facias. They were bound to do this by the recognisance of bail in the appeal from the award of arbitrators in the first scire facias. The plaintiff did not recover a sum greater or a judgment more favourable to him than the award of the arbitrators: he, in fact, recovered nothing, the court having reversed the judgment.

We alleged that the judgment bond and warrant were altered after execution and before judgment entered thereon, in material parts, without the assent and knowledge of the defendant's intestate, and asked an issue to try the truth of these allegations. An issue was denied us.

The compulsory arbitration law gives to either party the right to enter a rule of reference; and they argued that the party entering the rule had a right to withdraw it before arbitrators were chosen. The party entering the rule has a right to withdraw it without any reason given, but in this case good reasons existed, (the state of the pleadings having been changed since the entry of the rule,) and they were assigned in the written withdrawal of the rule entered of record before the arbitrators were chosen. An issue in law forced upon us by the plaintiff had in fact been joined after the rule was entered, and this arbitrators could not try. Purdon's Dig. 76, act of 1836, sec. 39; Roop *v.* Meek, 6 Serg. & Rawle, 545.

A party entering a rule has a right to withdraw it for the purpose of returning it for the action of the court. The rule is his, and all the duties incident to entering the rule devolve upon him. If withdrawn

Digitized by Google

before the arbitrators are chosen, the other party is not injured in law. If harassed or delayed by repeated entries and withdrawals of a rule, he can enter a rule himself.

The arbitrators were not chosen legally, because the rule of reference had been withdrawn; nor were they chosen according to the act of Assembly, because the prothonotary did not fix the number of the arbitrators, which is a preliminary duty to be performed by that officer.

The defendant was not present; and the record shows that the prothonotary did not fix the number of the arbitrators; he only fixed the time and place of meeting. Mitchell *v.* Wilhelm, 6 Watts, 259; Freetner *v.* Rudy, 7 Watts & Serg. 183. The prothonotary must fix the number of the arbitrators. The act of Assembly requires it. If it do not appear on the record that this was done by the prothonotary, the presumption is that it was omitted. This duty is made so requisite that it is error if omitted. An application was made to the court at the earliest opportunity to strike off the appointment of arbitrators, which was refused.

Stevens, for defendant in error.—The first scire facias was reversed on error to this court, because it was sued out by wrong parties. The present scire facias is not between the same parties. We did not owe any costs. There was but a simple reversal, and this was never known to carry costs.

The principal point is the refusal by the court to strike off the appointment of arbitrators. In this there was no error. The withdrawment of the rule to choose arbitration was, it is true, entered on the record by the prothonotary. But after a party has entered and acted upon a rule of reference, he cannot withdraw it. Kilkeffer *v.* Herr, 17 Serg. & Rawle, 319; Barnet *v.* Hope, 5 Binn. 518; 2 Serg. & Rawle, 188. The first rule must be stricken off by leave of the court, on motion to that effect, before a second can be entered. 5 Serg. & Rawle, 68, 69; 4 Watts, 475; 8 Johns. Rep. 77; 1 Bing. 291; 6 Cranch, 187; The Mechanics' Bank *v.* Fisher, 1 Rawle, 343.

A plaintiff is not permitted to discontinue where it will give an advantage, or tend to vex and oppress the defendant.

He admitted that it was the duty of the prothonotary to fix the number of the arbitrators; and if it did not appear that he did so, it would be error. This objection not raised on the argument to strike off the appointment of arbitrators. It should have been made then.

There is enough on the record to show that when three arbitrators were chosen, the prothonotary stopped choosing, and thus showed

Digitized by Google

that the number, in fact, was fixed and limited to three. The law will therefore presume that he did fix the number of the arbitrators.

May 18. ROGERS, J.—We are of opinion the judgment should be affirmed, for the reasons given by the President of the Court of Common Pleas. We refer to the 2d, 3d, 4th, 5th, 6th, and 7th errors assigned. We give no opinion on the 1st and 2d errors, as we do not deem them the subjects of a writ of error.

Judgment affirmed.

GEIST *v.* GEIST.

A bond by a minor son to a father, in consideration of permission to leave home and work for himself, or for his board whilst at home and working on his own account, if bonâ fide, is neither against the policy of the law nor fraudulent on creditors.

The practice of opening judgments on the motion of creditors is improper; an issue should be directed when the money is brought into court by the sheriff. Per ROGERS, J.

ERROR to the District Court of Lancaster county.

May 13.—A judgment having been entered on bond and warrant by the son to the father, it was on motion opened, and the creditors of the son let into a defence.

On the trial it was proved, that the son, at seventeen years of age, having learned his trade, agreed with his father to go west, and work for himself, for which he was to pay $200. Subsequently, he returned home, and agreed for the board to be paid to his father whilst living at his house, where he continued until he came of age; at which time there was a settlement, and the bond in question given for the debt.

Several points were submitted for the court to instruct the jury on, which resolved themselves into two: whether the bond was voluntary; and whether the consideration was contrary to the policy of the law.

The court instructed the jury, the transaction must have been bonâ fide, for value, and not intended to defraud creditors. There was nothing contrary to the policy of the law in such an arrangement between parent and child.

The sixth point noticed particularly by the court here, with the answer thereto, was as follows:—

If the jury believe that the bond operated directly or virtually to delay, defraud, or deceive creditors, or that there is no good consideration for it or for any part of it, the payment of the whole must be postponed until the claim of Jacob Loos is satisfied.

Digitized by Google

www.libtool.com.cn

Answer: This is true, if the bond was not bonâ fide, and was without a good consideration.

Landis, for plaintiff in error.—1. The right of the father to receive his son's labour is correlative to the duty of maintaining him, 1 Black. Com. 452, M. P. If he dissolves that connection which exists, or ought to exist, between the father and the son, he is no longer entitled to receive them, but they must go, from necessity, to the support of the son, 1 Black. Com. 453, M. P.; 2 Kent's Com. 193, 194, S. P. The mother is not entitled to the services of her minor child, as she is not bound to maintain him, 2 Watts, 477. If a parent drives a minor child from his home, and the minor marries, the father cannot sustain an action against a clergyman, to recover the penalty of £50, under the acts of Assembly, for marrying him, as he does not stand in such a position as to sustain an injury, 7 Watts & Serg. 364.

2. Two things are necessary to make an instrument of writing good, so far as to affect creditors: 1st. It must be given in good faith; 2d. For a valuable consideration. If either of these requisites are wanting, it is void, stat. 13 Eliz. ch. 5; 4 Bacon's Abr. 401, 402. The same doctrine is found also, pp. 403–410; 1 Burr. 474–476; 2 Cowp. Rep. 434, 435; Story on Equity, 374, sect. 369.

3. No consideration was given for this bond. By the father entering into the agreement with his son, he absolved him from filial allegiance, and therefore was no longer entitled to his services. If, however, there was a consideration, it was an illegal one, and therefore void; especially so far as it affects creditors. Or if part of the consideration was illegal, the whole is void, and must fall to the ground, 2 Penna. Black. 213; 8 Johns. 253.

4. If the bond was given for more than was justly due, it is void as to creditors, 11 Serg. & Rawle, 328.

5. The conduct of the father was virtually an abandonment and desertion of the child. It is contrary to law, sound policy, good morals, and duty, and therefore void. The whole transaction makes out a case of constructive fraud, 1 Story's Equity, 268, sects. 258, 309, 349. If a father would be permitted to treat in this manner with his son, the whole community would be subject to be defrauded by them.

Stevens, for defendant in error.—The bond was given bonâ fide, and upon a good consideration. The settlement and contract, upon which the bond was based, was a fair and honest transaction, and cannot be considered as against public policy. The son was of age when he gave the bond.

Digitized by Google

May 18. ROGERS, J.—If the account of the agreement between the father and the son be true, and the jury have so found, there is nothing in it contrary to law, or against the principles of public policy or good morals; for, in no just sense, can the father be said to have abandoned and deserted his child.

Whether a parent may be said to discharge his duty to his children, depends on circumstances. It is impossible for a father always to keep his child under the paternal roof; and frequently he consults the interest of both by allowing the son to serve another, the father receiving compensation for his services. An arrangement such as was made here, we cannot say was injudicious, much less illegal, as the propriety of it will depend on a variety of considerations, of which alone the father can judge. It must be left to his discretion. Although the contract was made during the minority of the son, yet a moral obligation, at least, rested on the son, which is a sufficient consideration for a subsequent promise. A settlement was made, including various items, viz. for services, estimated at two hundred dollars, boarding him and his apprentice, and cash lent, which resulted in a debt, for which it was agreed that the bond for three hundred dollars should be given. The court was therefore right in instructing the jury that there was nothing illegal in the consideration, if the contract was bonâ fide. The jury having found that the contract was made in good faith, and without any design of defrauding creditors, we see no reason to disturb the verdict. The court has answered all the defendant's points correctly, except the sixth; but the defendant is not injured by the answer, as there can be no question as to the consideration, under the instruction of the court. Indeed, from the whole tenor of the charge, there is no reason to believe the jury was misled, from an inadvertence merely in using the copulative instead of the disjunctive conjunction.

It is proper to remark, that the practice which has obtained of opening judgments, and letting creditors in to defend, is irregular. The proper course, when money is brought into court, is to direct an issue.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

CRAWFORD *v.* GABLE.

A party, after entering a rule to choose arbitrators, may alter the day for selection, if before notice be given.

May 13.—IN this case a rule was entered to choose arbitrators on 17th May, at which time defendant not appearing, they were named and an award made. A motion was made to set aside the proceedings, which was based on an affidavit, that the date had been altered in the rule from the 10th to the 17th, after it was filed, which facts were admitted, but the court refused to set aside the proceedings, as no injury was alleged to have accrued by the alteration.

Ford and *Parke*, for plaintiffs in error.—This is a question of practice, under the Arbitration Act, and the power of the party taking out a rule of reference to alter the time specified in the notice, after it has been fixed, the rule entered, and the record made, to a more remote period. Act of June 16, 1836, Pamph. Laws, 715, sect. 8, c. 57.

The party cannot alter the time either in the notice or upon the record, after having been once entered. Having taken his rule, he is bound to abide his time—the time fixed by himself. If he has made a mistake, or does not choose to proceed to the choice of arbitrators at that time, he may allow it to pass, and upon a full expiration of the same, may then strike it off or treat it as a nullity, and commence de novo by taking out another rule.

The propriety, as well as the reason of this, is sufficiently obvious. If a different rule were to prevail, then there would be no certainty in the rights of parties. They would be subjected to continual inconvenience. For if one party taking out a rule of reference may alter the time of choosing arbitrators, after being once entered, to a more remote period, then he may do it again, and so on ad infinitum, to the prejudice and great inconvenience of the other. This surely was not the intention of the legislature, and ought not to be recognised in practice by the courts. Hence the judgment of the court below is erroneous. 2 Troub. & Haly's Prac. 560.

The plaintiff gained an advantage by this irregular proceeding, and the defendant was injured. By the alteration complained of, he avoided the costs which had accrued by his own neglect on the rule, and threw them upon the defendant.

The admission by the plaintiff of the alteration is on the record; and the court, in their opinion, which is part of the record, recognised the

Digitized by Google

affidavit and the admission. The alteration and the admission thereof is, therefore, a part of the record.

This strange and irregular proceeding is plainly error, unless, indeed, parties can do as they please with our records.

Franklin, for defendant in error.—The notice of our rule declaring our determination to choose arbitrators was placed with the summons in the hands of the sheriff for service upon the defendants. Rule entered 23d of May, 1845, to choose arbitrators on the 10th of May. The sheriff neglected to serve the notice. This was discovered on the 1st of May, when the plaintiff's attorney changed or altered the 10th to the 17th of May, and gave notice accordingly. The alteration made before notice given.

They admitted that the notice, after the alteration, was properly served upon them.

The record is perfect, and this court must take it as it is.

No one was injured, and there is therefore no ground for the error assigned.

PER CURIAM.—There was no sufficient ground to strike off the rule of arbitration and award, and as no one was or could be injured by the alteration of the original entry. It was found impracticable to go on with the proceeding, at the time originally fixed for choosing the arbitrators; and no more was done by the clerk than to insert a more distant day. Had the opposite party already received notice, it is possible the case might have been different; but as the notice was given after the alteration, the same thing was effected as if the rule had been discharged, and a fresh one entered. The defendants received due notice of the true time, and every thing was regular.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

WINDER *v.* NORTHAMPTON Bank.

After award and appeal, a new count varying the cause of action cannot be filed.
Count in trover states a different cause of action from one for deceit, under this rule, though they might have been originally joined.

ERROR to Common Pleas of Lancaster county.

The declaration in this case contained originally but one count, which charged the defendant with having obtained, with intent to defraud the Northampton bank of $80,000, in the mortgage loan of the Lehigh Coal and Navigation Company, and of $27,000, in notes of the Northampton bank, and $1500 in the funds of that bank, by means of certain fraudulent transactions with John Rice; but at the trial, the plaintiff was permitted to file a count in trover, for the same claims and funds, though the defendant resisted the plaintiffs' right to do so, as the cause had been arbitrated, an award made, and an appeal taken.

At the trial of the cause, on the 30th day of April, and 1st of May, 1845, there was no evidence whatever given of any assignment to the use of Gibbons; and there was a verdict for the plaintiff, for $2456 21, on the count in trover, and generally for the defendant on the first count of the declaration.

Judgment having been rendered upon the verdict for the plaintiff, the defendant moved for a rule "to show cause why the verdict and the judgment should not be received in Northampton bank notes, and that an order to that effect should be endorsed on any fieri facias that may issue," which, after argument, was discharged on the 3d day of May, 1845, the discharge of which rule is assigned for error, as also that the court permitted the count in trover to be added against the consent of the defendant.

Errors assigned:—1. That the court below erred in not making the rule to show cause "why the verdict and judgment should not be received in Northampton bank notes," absolute. 2. Because the court below allowed a count in trover to be added at the trial, against the consent of the defendant.

Meredith and *Stevens*, for plaintiff in error.—On the second point, the only one decided here. This cause was arbitrated, an award made, and an appeal taken. The declaration originally contained but one count; but, at the trial, the court permitted a second count to be filed.

The first count alleges a conspiracy between Rice, the cashier of the Northampton bank, and Winder, the defendant; and charged the defendant with having obtained the property of the Northampton bank, with intent to defraud the said bank. This was the gist of the action.

Digitized by Google

On the original count, there was a verdict for the defendant, founded upon that part of the charge of the court which instructed the jury that defendant had sold a portion of the mortgage loan after five days' notice instead of ten days, which was the contract between Rice and Winder. They referred to Reynolds *v.* Irwin, (argued at the last term, and to be reported,) in which it was decided, that after appeal from an award, the plaintiff must go upon the count filed before arbitration.

They cited to the same point, Stock *v.* McChesney, 4 Yeates, 507, and Reitzel *v.* Franklin, 5 Watts & Serg. 33.

Franklin, for defendant in error.—We were not able to prove any fraudulent conduct between Rice and Winder, in obtaining the property of the bank, as charged in the declaration originally, which contained but a single special count in case. We therefore added a second count. The second count was in trover, and entirely consistent with the first. It does not allege the fraudulent taking, but the wrongful conversion of the property or funds of the bank. The second is therefore a part of the first count. And as it requires us to prove less, the responsibility of the sureties is not enlarged.

Trover may be joined with special action on the case, and counts not incompatible. 1 Chitty's Pleadings, 200, refers to Brown *v.* Dixon, 1 Term Rep. 274; Smith *v.* Rutherford, 2 Serg. & Rawle, 358; McCahen *v.* Hirst, 7 Watts, 175.

Under act of 1806, amendment must adhere to same cause of action or controversy, but may substantially differ from other counts; Cassel *v.* Cooke, 8 Serg. & Rawle, 287; Rodrigue *v.* Curcier, 15 Serg. & Rawle, 81.

There having been an arbitration, makes no difference, as same rule holds in respect to amendments after arbitration as in respect to those under act of 1806. Rule laid down in Reitzel *v.* Franklin, 5 Watts & Serg. 33, refers to amendments at common law; in which a new cause of action is added.

Here plaintiff in error admits, on the face of his paper-book, that the cause of action is the same. On this ground the writ should be quashed, if this were the only error assigned. See opinion of the court below in this case, reported 5 Penna. Law Jour. 185.

May 18. SERGEANT, J.—That a plaintiff, after an appeal from an award of arbitrators, cannot vary the nature of his demand by filing a new count, seems settled by former decisions. In Tryon *v.* Miller, 1 Whart. 11, the plaintiff had declared in trover for a bond, and the cause was referred to arbitrators, under the act of 1810, who made an award in favour of the plaintiff, from which the defendant appealed;

Digitized by Google

and it was held that the plaintiff ought not, after the appeal, be permitted to withdraw the original declaration, and substitute one alleging the conversion to have been of certain instruments of writing not under seal, though of the same import as the bond. So in Reitzel *v.* Franklin, 5 Watts & Serg. 35, it was determined that although the plaintiff might have joined his new count to the other, before the cause was referred; yet he could not do so afterwards, as it varied the nature of his claim, and of the evidence in regard to it, to the prejudice of the defendant and his surety on the appeal, who would thereby be subjected to responsibilities not within the scope of the arbitration or appeal. Indeed, the provision of the arbitration act, requiring the plaintiff to file a declaration before referring, could easily be evaded if it could be substantially changed after the award. Besides which, it may be added, that the act of 1806 authorizes amendments on or before trial; and I know not why a hearing before referees should not be deemed, so far as respects this point, as much a trial within the meaning of the act as a trial by jury.

It is plain that trover is a different mode of stating the plaintiff's complaint, from an action of deceit, and is sustained by different evidence, and on different principles, and though they might be joined before the reference, yet they could not afterwards.

This renders it unnecessary to decide the other points arising on the execution.

Judgment reversed.

COMMONWEALTH *v.* KENDIG.

A bond is not perfected until delivery; hence, a mere signing on Sunday does not render it void, if not delivered until the day following.

Whether an official bond, signed on Sunday, is void as to parties to be thereby protected, being strangers to the breach of the law; *Query.*

Surety of justice liable for all moneys received by him on suits or claims to be put in suit or on execution, or received from a constable on execution; but not for any thing received on claims to be collected as an agent, and without suit.

Acknowledgments of principal, evidence against the surety, unless there be proof of combination.

ERROR to the District Court of Lancaster county.

May 14.—This was an action, on an official bond, against a justice of the peace and his surety, in which suggestions of breaches were made, by non-payment of moneys collected by defendant, as justice

Digitized by Google

of the peace, for the three parties to whose use the action was brought.

On the trial, plaintiffs proved that Kendig (the justice) brought the bond to house of the surety, where it was signed on Sunday, having been previously executed by himself. It was received and filed by the prothonotary on a subsequent day, after approval. The evidence was objected to, but admitted.

They then proved defendant exercised the office until a short time before suit brought, when he resgined.

They then proved a notice to produce the docket of the justice, and an attachment against Kendig as a witness, judgment by default having been previously taken.

Plaintiffs then offered a paper, purporting to be a bill of costs, collected by Kendig for one of the plaintiffs, a constable, signed by him after resignation of his office. It was objected to, but admitted. Next, a paper signed by the same, stating a suit by one of the present plaintiffs, judgment, execution, and a payment to defendant, by the defendant there, of part of the debt, and by the constable of the balance; this was objected to, and admitted. The next was a certificate by him of accounts put into his hands, and collected by him, as justice of the peace, for the third of the present plaintiffs. The objection to this was, that the claims had never been in suit, and hence the surety was not bound. The surety, defendant, proved these admissions were recently obtained from Kendig when in infirm health; and then proved his resignation of his office was occasioned by a petition for his removal for intemperance, signed by defendant, his surety, and showed a letter to the surety from Kendig, telling him if he did not pay the money collected by him, he would confess judgment.

The defendant presented seven points to the court: That the surety was not liable for moneys received by the justice before judgment, or on claims without suit, or for money paid on execution, or received from the constable on execution, or for constable's costs. If the admissions were procured by exciting his displeasure against his surety for his petition, &c., in order to charge the surety, he being insolvent, it was fraudulent. The bond being executed by the surety on Sunday, was void as to him. Neither the docket nor transcripts being produced, nor evidence that they could not be, there was no legal evidence of the claims. The court (Hayes, President) told the jury, the surety was liable for all moneys received in suits before the justice, but not for claims which were to be collected by him without suit, and were so collected; also for the costs. If the money was due, there was no fraud in procuring the admissions of the fact. If the

Digitized by Google

bond, though signed on Sunday, was not delivered to the prothonotary nor approved by the judge until Monday, and the prothonotary and plaintiffs were not informed of the fact of signing on Sunday, it was valid. The evidence produced was legal evidence.

The evidence admitted, and the answers of the court, were the errors assigned.

Parke, for plaintiff in error.—Suit brought against Kendig, a newly elected justice of the peace, and Good, his surety, on the official bond of the former; the bond was signed by the surety on Sunday. The question is, is the bond void at common law, or by statutory enactment? 3 Smith's Laws, 177; Sunday Act, 1 Bin. 117, 118; 4 Serg. & Rawle, 159; 1 Br. Rep. 171; Kepner *v.* Keefer, 6 Watts, 231; Hollman *v.* Johnson, Cowp. Rep. 343; Fox *v.* Mensel, 3 Watts & Serg. 446. The official bonds of justices of the peace are to be taken by the prothonotary, Pamph. Laws, 1839, 378. In this case, the prothonotary deputed Kendig to take it. The taking is the execution of the bond; the prothonotary took it by another. The bond was therefore taken by the prothonotary on Sunday, and is void and invalid by statute.

The surety is not liable for money received by a justice upon claims, before judgment obtained; or upon executions issued; nor for claims collected without suit; nor for money not collected by him as a justice of the peace.

A justice of the peace is not entitled to fees for collecting money without suit; he is considered as a mere private collector. The surety is only liable for the acts of the justice as such; but not where he receives or collects money unofficially, or in a private capacity.

There was no legal evidence before the jury, against the surety, of the claims set forth in the declaration. The docket should have been produced, or certified transcripts therefrom.

Stevens, for defendant in error.—The bond was dated the 8th day of May, (Saturday,) 1841, and signed by Daniel Good, the surety, on the 9th day of May, Sunday. It was not, however, approved by the judge until Monday, the 10th day of May; nor delivered to the prothonotary until the 5th day of June, 1841. The bond took effect from the delivery, and it was but an escrow until delivered to the prothonotary, who received it for the Commonwealth, and filed it. Neither the plaintiffs nor the prothonotary knew any thing of its having been signed by Good on Sunday. They had no participation in having it signed on that day. It was the surety's own act; the bond is his,

Digitized by Google

and good and valid for the use of the plaintiffs. The surety cannot take advantage of his own unlawful act.

The plaintiffs only sought to recover the amount of the moneys collected by suit, or collected or received by the justice, without suit, in his official capacity. Of the claims, thus collected or received, there was legal evidence; and the court very properly left it to the jury, to take it for what it was worth.

There is no error, therefore, in the answer of the court to the defendants' seventh point, in which they say that there was legal evidence of the claims set forth in the declaration, without the production of the dockets, or certified transcripts therefrom.

May 20. ROGERS, J.—This is an action on an official bond, taken in pursuance of the sixth section of the act of the 21st of June, 1839, at the suit of the Commonwealth, for the use, &c., against John Kendig, a justice of the peace, and his surety, Daniel Good. Pleas, non est factum, and payment.

The bond was signed by Kendig on Saturday, and by Good on Sunday, but was not delivered to the prothonotary until the Monday following.

Under the construction given to the act of the 22d of April, 1794, which prohibits, under a penalty, any worldly employment or business whatever on Sunday, it is decided in Kepner *v.* Keefer, 6 Watts, 231, that a contract entered into on that day is void. And in Fox *v.* Mensch, 3 Watts & Serg. 446, a bond actually made on Sunday is ruled to be void. But when was this bond executed? Certainly not until it was delivered, for delivery is of the essence of a deed. It takes effect only from execution on delivery, and, until delivery, it is of no further value than the paper on which it is written. The business began on Saturday, was continued on Sunday, and finally completed on Monday. Now, although this exposes the parties to the penalty imposed by the act, yet it does not avoid the bond, for the statute cannot destroy that which had no existence. But, granting that the bond was signed and delivered on Sunday, yet I am by no means satisfied that it is void, as against those who are injured by the official misconduct of the justice. They are innocent parties, and ought not to be affected by the folly or turpitude of the prothonotary and obligors. Such a construction of the act would enable the obligors to take advantage of their own wrong, as against persons who cannot, by any possibility, protect themselves. When both parties are in default, as in the cases ruled, there is a propriety in holding the bond void.

A penalty in such a case amounts to a prohibition; but we cannot

Digitized by Google

perceive the justice, on any principle of policy, which requires that the same result should follow when the effect is to deprive of all remedy those who are and cannot be in any default whatsoever. It may be executed on Sunday by design, for the express purpose of shielding themselves from responsibility in case of necessity, and thus enable them to commit a fraud. The intention of the legislature will be obtained by imposing a penalty on the guilty party, without avoiding the bond. General principles must not be so applied as to work injustice to the innocent.

The affirmation of some general principles will dispose of most of the errors assigned.

Under the proper construction of the act of the 21st of June, 1839, the surety in the official bond is liable for the faithful application of all moneys and costs received, which came into the hands of the justice as a justice, in suits brought on claims before him. But if it should appear (of which the jury must judge) that no suit was brought, and that the claims were put into his hands to collect as agent merely, it is otherwise. But when put into his hands as a justice, the surety is liable, notwithstanding the money is paid without suit. The money being received in his official capacity, the liability is incurred. The object of requiring bond with surety is to protect the rights of suitors, and that should receive a liberal construction. The principles are plain, as well from the spirit as the letter of the act. The sixth section of the act provides that the bond shall be taken by the prothonotary, in the name of the Commonwealth, with conditions for the faithful application of all moneys that come into his hands, as an officer; and such bond shall be held in trust, for the benefit of all persons who may sustain injury from the justice or alderman in his official capacity.

If, therefore, the money be received by the justice as justice, the surety is liable, whether received before or after suit brought.

It is said the court erred in admitting in evidence the papers with the signature of John Kendig, the justice, without producing the docket or a transcript of the docket of the justice. But the suit is against both justice and surety, and surely the acknowledgment of the justice in writing is primâ facie evidence against himself and surety. If there was a combination between the justice and plaintiff, which has been insinuated, but not proved, it was a matter for remark to the jury, but cannot be allowed as a reason for excluding the testimony.

Judgment affirmed.

www.libtool.com.cn

Digitized by Google

www.libtool.com.cn

KIRK *v.* EWING.

One of two defendants in ejectment, on whom the writ had been served, and who had pleaded, cannot by disclaimer (his plea having been permitted to be withdrawn) make himself a competent witness for his co-defendant; for he may still be liable for costs and mesne profits.

ERROR to the Common Pleas of Lancaster county.

May 14.—But one point of any importance was raised in this case. In 1840, Miley conveyed the land, for which this ejectment was brought, to the wife of K. Ewing. In 1843, K. Ewing conveyed his life-estate in the property, which had been purchased with his wife's money, to J. Ewing, who, in 1844, 24th February, conveyed it to Brown, in trust for the separate use of M. Ewing, the wife of K. Ewing. On the 5th of August, 1843, plaintiff recovered a judgment against K. Ewing, levied on the estate, and became the purchaser in August, 1844. On this title he instituted ejectment against K. Ewing, J. Ewing, and Hamilton, which was returned "served," in November, 1844. A plea of not guilty was entered by all the defendants. K. and J. Ewing, in December, 1844, disclaimed all title, having obtained leave to withdraw their plea, and Hamilton pleaded to issue. Hamilton was the tenant of Brown, the trustee, from April, 1844, previous to which the land was occupied by one who leased from K. Ewing.

On the trial of this ejectment, J. C. Ewing was called as a witness by defendant, objected to, and admitted by the court. There was a motion for judgment for want of plea by K. and J. Ewing, after the disclaimer. The verdict was for defendant. Judgment for costs up to time of disclaimer was then entered against K. and J. Ewing. Whether J. Ewing was a competent witness was the question.

Ellmaker and *Franklin*, for plaintiff in error.—Court erred in admitting James C. Ewing as a witness. Party ought not to be admitted in any case. 2 Tidd's Pract. 802, 803; People *v.* Bill, 10 Johns. 95; Stein *v.* Bowman, 13 Peters, 219. In Wakely *v.* Hart, 6 Binn. 319, defendant under rule to plead, incompetent. Stub *v.* Leis, 7 Watts, 43, one of several defendants in ejectment, by disclaiming and abandoning premises, does not become competent witness for co-defendant. His liability for mesne profits continues. Bratton *v.*

Digitized by Google

Mitchell, 5 Watts, 69, court should compel defendant, who disclaims, to plead instanter the general issue. 3 Starkie's Evid., Defendant in ejectment, *who has suffered judgment to go by default*, is competent witness for other defendants, p. 1061–1064. 2 Starkie's Evidence, 767, to the same effect. But these, it will be recollected, are under the English practice in ejectment, which entirely differs from ours. Wolf *v.* Fincks, 1 Barr, Rep. 435, per Rogers, J., p. 440, rule excluding party does not depend on his interest in event of suit.

J. C. Ewing was not in the position of a party against whom no evidence was given. It was shown that he was acting as agent of the trustee of Mrs. Ewing. Nor is it by any means clear that he was disinterested. How can we recover mesne profits from J. C. Ewing on present state of this record? Judgment is only against him for costs. It is important that the line should be strictly drawn by court on competency of witnesses. Nothing was gained by the plaintiff in making James C. Ewing a defendant. It has frequently been decided that, in actions of tort, where there are several defendants, and no evidence against one of them, judgment in favour of such defendant will be entered on application, for the purpose of giving the other defendants the benefit of his testimony.

Stevens, for defendant in error.—It has been urged that as James C. Ewing was one of the parties (defendants) on the record, he was not a competent witness. James C. Ewing was not a party to the issue, although a party on the record. Hamilton was the only person residing on the property when the writ was served. And, although the summons was also served upon James C. Ewing and Kirkpatrick Ewing, the other defendants, they entered a disclaimer of all title to the property, a short time after service of the writ upon them, and at the trial the jury were sworn between the plaintiff and John Hamilton, who had pleaded not guilty. The technical ground, therefore, of Ewing's being a party on the record, was not sufficient to reject him as witness. Wakely *v.* Hart et al., 6 Binn. 319; Stub *v.* Leis, 7 Watts, 43; Worrall *v.* James, Baker et al., 7 Bing. 395.

If the doctrine contended for should, for the first time, be extended to actions of tort, the plaintiff could easily prevent any one from being a witness against him, by making him a party defendant.

A purchase by a married woman from her husband, through the medium of trustees, for her separate use and appointment, may be sustained against creditors, if bonâ fide, though the husband is indebted at the time. Lady Arundell *v.* Phipps, 10 Ves. 139.

Digitized by Google

May 18. ROGERS, J. — There is no rule better established, than that a party to the record cannot be examined as a witness, and this not on the ground of interest, but from considerations of policy, 5 Watts & Serg. 333; Given *v.* Albert, 3 Wend. 119; 4 Wend. 451; 10 Pick. 57; Wolf *v* Fink, 1 Barr, 439. The defendants joined in the plea of not guilty, but at the trial, two of them, disclaiming all title to the property, were permitted to withdraw their plea; but without more they do not cease to be parties to the suit. They may still be liable to the plaintiff for costs, and also for mesne profits, which can only be ascertained by trial, or by judgment by default. It appears by the return of the sheriff, the defendants who disclaimed were in possession at the time suit was commenced, and as such were primâ facie liable, if the title to the property was in the plaintiff. It is true that if the plaintiff includes persons in a suit, against whom no evidence is offered, they may be witnesses, but that cannot be alleged here. Besides, if wanted as witnesses, the jury should have passed on their case before they were examined. The circumstance of being a co-defendant is an exclusion, although a verdict in his favour would remove the objection of incompetency. We are therefore of opinion there was error in receiving the testimony of James C. Ewing.

In the other bills, we perceive no error, nor is there any in the charge; nor do they involve any principle which requires particular notice. Whether the levy on the property, as the property of the husband, is constructive notice to the wife, we do not undertake to determine, as that point does not seem to have been brought to the attention of the court below.

Judgment reversed, and a venire de novo awarded.

Digitized by Google

www.libtool.com.cn

PATTERSON *v.* FORRY.

The presumption is, a lost deed was in conformity to the articles.

Parol evidence inadmissible to establish a lien by admissions of a party claiming under a lost deed, when the articles stipulate for a deed without a lien, even though subsequent conveyances be subject to a lien, but what lien was not stated. (But note, there was no offer to prove that the lost deed contained any such stipulation for a charge upon the land.)

ERROR to the Common Pleas of Adams county.

May 18.—This was an action of debt on bonds due in 1844–5, executed in 1816, against the administrators of the obligors, with notice to terre-tenants of certain lands. The declaration averred, that by the agreement of the parties, and the deed conveying the land, now owned by defendant, these bonds were a charge; that defendant purchased with notice, and subject to the lien.

On the trial plaintiff proved articles for the sale of the land to Chronister, from his father Henry, at £10 per acre, payable in annual instalments of $100 each, for which bonds (two of which are the subject of the present suit) were to be given by the purchaser. A clear deed to be given to Caspar, (the purchaser,) on payment of the hand money, he giving his bonds for the yearly *gales*.

The deed itself could not be found after diligent search; whether it ever existed, is not stated on the record to have been proved. In 1822, a judgment was recovered against the purchaser under these articles, on which a sale was made by the sheriff, and a conveyance of his estate, "subject to a lien," &c., not specifying what it was, to Wert, who agreed to convey, in 1825, subject to all legal claims on the land; and by a deed granted all the interest vested in him by the sheriff's deed.

Plaintiff then offered to prove by Wert, that Caspar Chronister, while owner of the land, admitted that the land in controversy was charged with the payment of the bonds given for the purchase money, and that at the sheriff's sale to him this fact was known, and he became the purchaser with the full knowledge of it. That the land was at the time worth from $3000 to $4000, and only sold for $700, in consequence of the encumbrance of these bonds, which was known at the time by the bidders. That he agreed to sell the same land to defendants for $1000, which was greatly below the value of the land, because of the said charge upon it, with which they were acquainted at the time, and that the reservation in the article of agreement read, referred to the alleged encumbrance of the bonds for the purchase money.

Digitized by Google

And further, that the defendants, after their purchase from Wert, acknowledged that they held it subject to the encumbrance of paying these bonds, and that they went on to pay, and did pay, several of the same series of bonds, in accordance with the alleged encumbrance; also several other deeds, made by Henry Chronister, to others of his sons, about the same time, having inserted a positive stipulation that the lands sold were charged with the payment of the bond given for the purchase money, &c.

The court (Durkee, President) rejected the testimony, and directed the jury to find in favour of the terre-tenants, as there was no evidence the land was charged with the bonds.

Reed, for plaintiff in error.—We offered to prove that there was a bonâ fide lien subsisting at the time of the sheriff's sale, known by and assented to by all the parties. The bonds were made a lien on the land by the deed which is lost. Lien may be charged on land by a vendor to secure the payment of the purchase money; Whistler *v.* Bear, 7 Watts, 144. Purchase money remaining due on the face of a deed, preserves the lien against purchasers at sheriff's sale. Irwin *v.* Campbell, 6 Binn. 118.

A written acknowledgment by an executor of a trust *created by parol*, was held to be a lien on the estate of the testator, conveyed by the executor as trustee, to a voluntary purchaser with notice. 1 McCord's Ch. 119; Rutledge's Adm'r *v.* Smith's Ex'ors, 2 Eq. Dig. 203, pl. 26.

Character of vendor's lien for the purchase money. Garson *v.* Green, 1 Johns. Ch. 308.

Lien for purchase money after deed made in equity. Sugden on Vendors, 386—392.

The equitable rule may be adopted in Pennsylvania either in writing or by parol. It is not within the statute of frauds; it is not transferring title.

Hellman *v.* Hellman, 4 Rawle, 448, 449. The sheriff, of his own mere motion, or in virtue of his office and his duties, may not be able to sell on any other terms than indicated in the levy and the process in virtue of which he sells.

Barnet *v.* Washabaugh, 16 Serg. & Rawle, 413, adopts the general rule, &c., and continues: "We have no doubt that lands may be sold subject to legacies, and that in such cases the lands go into the hands of the sheriff's vendee, charged with their payment, but that it is so sold should expressly appear. It should be the express understanding of all the parties.

Digitized by Google

Conclusion. "It is the opinion of the court, that where lands are sold by the sheriff, the vendee takes the land discharged of the lien of the legacy, unless it should expressly appear that the land was sold subject to the legacy."

3 Watts & Serg. 259, and Umbhauer *v.* Aulenbaugh, 8 Watts, 48. Both cases are distinctly limited to cases where there is no lien, and the sheriff, on his own authority, contrary to the process, contrary to his official duty, undertook to raise a lien and to sell subject to it.

Our offer was to prove there was a bonâ fide subsisting lien, known and assented to by all the parties.

Difference established by a large number of decisions—between the sheriff, in execution of his process, undertaking to sell subject to encumbrances contrary to his duty; and a sale, where a bonâ fide lien exists subject to it, by consent of parties, for their own convenience and interest.

Cooper, for defendant in error.—There was no proof, or offer to prove, that a deed was ever made by Henry Chronister to Caspar Chronister. The offer was, therefore, properly rejected.

There was no proof, or offer to prove, that there was any agreement made by parties competent to make such an agreement, that the land was sold subject to any lien or charge. Loose declarations, made either before or at the sale, is not sufficient to charge the land with the payment of the bonds. 16 Serg. & Rawle, 413; 4 Rawle, 449; 8 Watts, 50; Mode's Appeal, 6 Watts & Serg. 280.

If there were a charge upon the land, it was extinguished by the sheriff's sale. 1 Watts & Serg. 142.

It is enough, in the present instance, that there was no evidence given, or offered, that the alleged deed ever existed.

May 25. SERGEANT, J.—The court below were right in rejecting the evidence offered by the defendant. Nothing appears in it by which the plaintiff could sustain his allegation of a lien on the land, which, to be valid, must appear in writing, and usually by matter of record, and cannot be established merely by parol evidence of the understanding of parties. No such reservation appears by the original deed to Caspar Chronister, as it was not produced, and the presumption is, it was conformable to the articles of agreement, which stipulated that a clear deed should be given at the time the hand money was paid, and bonds should be given for the yearly gales.

The next item of evidence is the return of sale of the land by the sheriff, as the property of Caspar Chronister, for $700, subject to a lien, not specifying what; and the sheriff's deed itself is without any allu-

Digitized by Google

sion even to this, and conveys the property merely as Caspar Chronister held it. The next sale to J. & K. Albert, is by articles of agreement, for $1000, to convey the same title that Wert had, $400 to be paid in money, and bond given for the $600, and the deed is so made subject to all legal claims on said bond. If the lien claimed then is to be established at all, it must be by parol evidence showing the understanding and verbal admissions of the parties at different times, a mode of substantiating a lien on land which the policy and principles of our laws forbid.

This case cannot be distinguished in principle from those of Umbhauer *v.* Aulenbaugh, 8 Watts, 48, and 3 Watts & Serg. 259; Modes Appeal, 6 Watts & Serg. 280; Koufelt *v.* Bower, 7 Serg. & Rawle, 64, and Bear *v.* Whistler, 7 Watts, 144, and various others, in which the law of Pennsylvania on this subject has been discussed and determined.

Judgment affirmed.

BITTINGER *v.* KEYS.

Plaintiff having released surplus to insolvent assignee not a competent witness.

ERROR to the Common Pleas of Adams county.

May 18.—This action was brought in November, 1844, to the use of the trustee of one of the plaintiffs, who were formerly partners in trade, to recover a debt guarantied by defendant to the plaintiffs' firm.

On the trial, Keys, having been objected to as a witness for plaintiff, exhibited his certificate of discharge as an insolvent in Maryland, and the appointment of a trustee to whose use this action was brought. The petition was filed immediately after this suit was commenced. Witness then executed a release to his trustee, and was admitted as a witness.

As this question has been so often decided within the last three terms, it is conceived unnecessary to detail the arguments of counsel.

Cooper, for plaintiff in error.

Reed, for defendant in error.

And now, May 26th, the opinion of the court was delivered by

BURNSIDE, J.—The only question worthy of consideration in this case is, whether William M. Keys is a competent witness. Keys &

Digitized by Google

McCormick were grocers in Baltimore; Keys became insolvent, and was discharged as an insolvent debtor in the state of Maryland. By the insolvent laws of that state, a person there legally discharged, holds after-acquired property from his creditors, unless he obtains it by descent, gift, devise, bequest, or in course of distribution. Pollet *v.* Parmer, 2 Harr. & Johns. 61. The Maryland insolvent act partakes of the character of a bankrupt law, but is not as favourable to the debtor as a general bankrupt act. The law was early held in England, that no release could make the bankrupt a witness to his own act of bankruptcy, 2 Strange, 132. A bankrupt who has obtained his certificate, is not a competent witness to prove the debt of the petitioning creditor, 2 H. Bl. 279; nor is a bankrupt a competent witness to increase the divisible fund in an action by his assignees, unless he has obtained his certificate, and released the surplus and proportional allowance; for otherwise his interest is obvious, 2 Starkie, tit. *Bankrupt*, 211.

Here the insolvent was a party to the action, and was the only material witness to charge the defendant below with goods sold to his son. There was no writing on the part of Jacob Bittinger; no assumption by parol proved, by any person but Keys. To affirm this judgment, would be establishing a precedent more injurious to the community than Steel *v.* Phœnix Insurance Company, which had introduced so much injustice into our courts, supported by the basest of all crimes, wilful and corrupt perjury.

Wolf *v.* Fink, 1 Barr, 435, settles this case. It is there held that a certified bankrupt who had not a particle of interest in the event of the suit, but who, at the impetration of the writ, was a party to the action, is not a competent witness.

In the case before us, I think Keys had an interest in increasing the fund, which must be settled by his assignee with McCormick his copartner. We do not think an interest necessary in a case like the present. Every consideration of policy renders Keys, who was a party to the record, an incompetent witness.

The judgment is reversed, and a venire de novo awarded.

www.libtool.com.cn

Digitized by Google

www.libtool.com.cn

COMMONWEALTH v. MONTGOMERY.

Docket entries of transcript and judgment, on certiorari to a justice, evidence, on loss of the writ being proved.

ERROR to the Common Pleas of Mifflin county.

May 21.—This action was against three persons, who, it would appear, were a constable and his sureties, (though they are not so named on the record,) in which the plaintiff proved the bond, and the entry on the docket "Sworn," with the endorsement, "approved," &c., in the handwriting of the judge.

Defendant made three objections. 1. It was not shown the constable was sworn. 2. Because the bond was not taken by the clerk. 3. Because no party was suggested according to the act of 1836. This defect was in the writ only; and the court amended it from the præcipe. Plaintiff then offered the docket entries of a transcript on certiorari to a justice, of a suit against defendant for neglect of duty on an execution delivered to him, affirmed in the Common Pleas, after proving the loss of the certiorari and transcript.

It was not mentioned on these proceedings, that J. M. was a constable. Defendant objected until the original judgment was produced.

These points of evidence were argued here by

Banks, for plaintiff in error.—Errors to admission of testimony. We objected to the bond, after it was proved, that the constable was not sworn.

As to the bond being admitted in evidence, act of 15th April, 1834, McKin. Dig. 180, sect. 112, under the heads *Constables*, and *Bond to be given by the constable.*

The bond does not appear to have been taken by the clerk. The act directs that the constable shall be sworn; this was not done. McKin. Dig. 128.

Suit not brought according to directions of act. It was brought in the name of the Commonwealth; but at whose suggestion is not mentioned in the writ. Not subject to amendment. Not provided for by the act of 1806, in relation to amendments. The omission to name, in the original writ, the party at whose suggestion the suit was brought, is fatal on error.

Montgomery not named as constable in the whole proceedings on the docket of the justice, nor on the transcript. He should have been so named.

Digitized by Google

We therefore allege that the evidence was improvidently received, and that the charge of the court was wrong.

The court declined hearing *Benedict*, for defendant in error.

May 25. BURNSIDE, J.—The first error assigned is to the admission of the constable's bond in evidence, because it was not shown that the constable was sworn, or the bond taken by the clerk of the Sessions. This objection is not sustained. The bond is in the clerk's office in Mifflin county. The clerk at the April term received the bonds, and submitted them to the court. The judge saw that the form was in accordance with the act of Assembly, and he judged of the sufficiency of the bail. The endorsement on the bond shows it was APPROVED. The records of the Sessions also show that the constable was sworn, and the clerk placed the bond on file in his office.

The second objection is equally unfounded. The justice's docket, on which was entered the whole proceedings in the case of John Stine *v.* John Montgomery, for neglect of duty, was given in evidence. On this judgment, Montgomery sued a certiorari from the Common Pleas. The judgment of the justice was affirmed, and that record was also given in evidence. It was further shown, that Montgomery had taken the benefit of the insolvent laws. An execution had issued against him, on which there was but a small portion of the money made. All this, the counsel for the plaintiff in error contends, was insufficient evidence to enable the plaintiff to recover, unless the original judgment, on which the execution issued to Montgomery, was produced and shown on the trial.

The record of the justice given in evidence was sufficient, without producing either the former judgment, or the original execution, in order to charge the constable and bail on his official bond.

The amendment of the writ by the præcipe and the docket was strictly proper.

The judgment is affirmed.

www.libtool.com.cn

Digitized by Google

www.libtool.com.cn

In re Brown's Estate, Myers' Appeal.

2 463
159 283

Purchase, by general agent for heirs, of the land of their ancestor from the vendee at a tax sale, instead of redeeming, enures to their benefit. (*Query*, if made with trust funds; it seems it was.)

Land having been sold under judgment against A., B. & C., the auditor and court, in the distribution, must decide on their respective titles, and whether one is entitled by purchase of the whole, or there is a resulting trust for the others.

Unless an issue be demanded on distribution of sheriff's sales, before decree, the want of one cannot be assigned for error.

From the Common Pleas of Huntingdon county.

May 21.—This was an appeal from a decree distributing the proceeds of the estate of John Brown, under the following circumstances, found by the auditor, and which do not appear to have been disputed.

John Brown died seised of the tract in question, leaving five sons and two daughters. Zachariah Brown, one of the sons, is stated to have been acting under a power of attorney from the other heirs to transact their business at the time of the purchase by him, presently stated. In June, 1840, after J. B.'s death, the land was sold for taxes to S. R., for $10; taxes and costs being $4 28, and a bond given for the surplus. In the spring of 1842, Z. B. refused to redeem the land as attorney for the other heirs, but took an assignment thereof from S. R. for $10, and the previous taxes. Nothing is said in the report as to whether Z. B. had any money of the heirs in his hands; nor are any other facts stated than are mentioned here, unless, as is stated in third exception in this court, the land was purchased with trust funds. This, however, was not found by the report.

After this assignment, a fi. fa. on a judgment against Z. B., at a suit assigned to appellants' use, was levied on the land. Subsequently, a fi. fa. for costs on a nonsuit of the heirs of J. B. was levied by the defendants therein, and the land in question extended at $75 per annum; at which the heirs refusing to accept, the land was sold, and the money arising thereunder paid into court for distribution. The auditor, considering Z. B. had been guilty of a breach of trust, by reason of which no title had passed to him as against the heirs of J. B., distributed the fund—1st. To the costs of the nonsuit; 2d. Dividing the residue into seven parts, he gave Z. B.'s portion to appellants, under their judgment, and the other six portions among the other heirs of J. B., or their representatives, equally.

The exceptions filed in the court below merely assigned error in de-

Digitized by Google

ciding on the facts as found. After decree and appeal, additional exceptions were taken—1. That the question of fraud did not necessarily arise from the facts, but must be tried by a jury. 2. The court erred in not directing an issue. 3. If there was a resulting trust, it only extended to the amount taken from the trust funds to make the purchase with, to wit, $14 28.

Blair, for appellants, argued the sale and purchase by Z. Brown might have very well been fraudulent, as to the heirs of his father, his principals; it was, nevertheless, perfectly good as to his judgment creditors, to entitle them to receive the money arising from such sale, Foulk *v.* McFarlane, 1 Watts & Serg. 297. The permitting a sale for taxes will not in any way affect the title if the owner become the purchaser, 2 Watts & Serg. 247; but this is not so when it is uncertain whether the principals will ratify the act done by the agent, Id. No resulting trust arises from the purchase with the trust funds, if in the name of the purchaser; but the court will merely raise the amount out of the land, Wallace *v.* Duffield, 2 Serg. & Rawle, 329; Lloyd *v.* Spillat, 2 Atk. 150. It would be in the teeth of the statute to decree an agent to purchase, a trustee, from purchasing in his own name, and with his own funds, Bartlett *v.* Pickersgill, cit. 4 Burr. 2255; Sugden's Vend. and Pur. 411; Peebles *v.* Reading, 8 Serg. & Rawle, 492.

Under the act of 16th of April, 1827, relative to the distribution of money arising from sheriffs' and coroners' sales, the court has a right, when the estate has been sold as the property of R., under process against him, but is alleged to have been really the property of T., to direct a feigned issue, to try the right of a judgment creditor of T. to the money in court, Stiles *v.* Bradford, 4 Rawle, 394.

Wilson and *Bell*, for appellees.—Where an agent acts in a representative capacity, although in his own name, his acts will inure to the benefit of his principal. The land was sold as the property of all the heirs, and upon a judgment against all the heirs, of whom Zachariah G. Brown was one. They cited Smilie *v.* Dixon, 1 Penna. Rep. 442; Rankin *v.* Porter, 7 Watts, 390. The appellants should have asked, in the court below, for an issue, to try who was entitled to receive the proceeds of sale, but this was not done. If a motion to this effect were made in the court below, it was not entered of record, and this court will decide the matter in controversy by the record.

And now, May 27, 1846, the opinion of the court was delivered by

Rogers, J.—Had the estate been sold by the sheriff as the property

Digitized by Google

of Zachariah G. Brown, on a judgment against him alone, his creditors would be entitled to receive the money arising from the sale, without any regard to opposing titles, well or ill-founded. And the reason is, that in such case the sheriff sells the interest of the debtor only; the right of the claimants to the land remaining unimpaired. It would be open to them, notwithstanding the sale, to assert their title by action of ejectment against the sheriff's vendee, the maxim being caveat emptor. But where, as in this case, the judgment on which the sale is had is against several, as the sheriff's sale passes to the sheriff's vendee the rights of all against whom the judgment is rendered, the necessity of the case requires a different rule. The money raised by the sale, by the operation of law being substituted for the land, the proceeds (after paying the joint judgments) must be distributed to the owners of the real estate, whether the title be legal or equitable. In this way only can justice be done. Thus, when, on a joint judgment against two, the land of one is sold, the residue, after paying the joint debts, must be paid over to the owner of the estate sold, in exclusion of the other joint debtor and his creditors. The land is only liable in respect to the joint liens, and when they are paid, the remainder belongs to the owner of the estate. This is so obviously just as not to need the aid of either authority or argument.

In the case in hand, the land was sold on a judgment against all the heirs of John Brown, from whom the estate descended, and consequently, on the principle stated, the fee in the premises passes to the sheriff's vendee, the title of all the joint debtors being divested by the sale. This state of facts makes it necessary to examine the extent and nature of the title of Zachariah G. Brown. The land being converted into money, it is impracticable, by any other mode, to protect the equitable interest of the joint debtors to the estate sold by the sheriff.

The facts of the case, which are well stated by the auditor, in the absence of contradictory proof, we must take to be true.

John Brown, deceased, who in his lifetime owned the tract of land sold by the sheriff, and died seised of the same, left five sons, viz., Allen, John, (since deceased, leaving heirs,) Thomas, George, and Zachariah; and two daughters, Mary Ann and Elizabeth, (which last mentioned intermarried with James Ross, who is dead, leaving nine children.) The tract of land was sold by the Treasurer of Huntingdon county, on the second Monday of June, 1840, to Thomas Reed, for the sum of ten dollars. The taxes and costs were four dollars and twenty-eight cents, and the bond of Thomas Reed was given for the overplus, and filed in the prothonotary's office. In the spring of 1842, Zachariah G. Brown, acting under the authority of a general power of

Digitized by Google

attorney from all the heirs of John Brown, refused to redeem the land as the attorney for the heirs, but obtained from Thomas Reed an assignment of the treasurer's deed to himself, and for his own use, for the consideration of ten dollars, and the payment of the previous taxes and costs. The auditor correctly decided that, by this proceeding, Z. G. Brown acted in dereliction of the trust reposed in him, and the duty he owed the other heirs, and that the equitable title was not divested. By virtue of the treasurer's sale, and the conveyance of the purchaser, Zachariah G. Brown, it is true, became seised of the legal title, but in trust for his constituents, viz., himself and the other heirs. For their benefit alone had he authority to purchase. Courts of justice exact the most scrupulous good faith from agents of every description during the continuance of the agency. To prevent fraud, they cannot purchase the estate of their principals for their own benefit, but in trust. If the principal ratifies the purchase, with a full knowledge of all the circumstances, it validates it, for the sale is not void, but voidable. But that cannot be urged here, for the heirs took the earliest opportunity to assert their rights as the equitable owners, in part, of the land, and as such entitled, after payment of the joint debts, to a fair distribution of the proceeds of sale. These principles are enforced in many cases. Thus it is rule, that one of two devisees cannot purchase an encumbrance on their joint estate, and use it to sell the land, and deprive the other of his property. In that case, he is but a trustee. So when two tenants in common had heard of an adverse title, and agreed to join in defending against it, or in purchasing, they are bound to deal fairly with each other. The purchase of one accrues to the benefit of both. If one purchases the title for a small sum, he must hold it in trust for the other. These principles are fully stated by Mr. Justice Huston in Smiley *v.* Dixon, 1 Penna. Rep. 441, and are supported by the authorities. When confidence is reposed, the law forbids it shall be abused. To prevent abuse, it turns the purchaser into a trustee, Rankin *v.* Porter, 7 Watts, 390.

It is an elementary principle, that creditors are placed in no better situation than the debtor; so that the creditors of Zachariah G. Brown stand in his place, and have a lien on the proceeds only to the extent of his interest in the estate sold.

The appellant complains that an issue was not directed; but the court is not bound to direct an issue unless requested. That an issue was desired by either party nowhere appears *in the record.*

Decree affirmed.

Digitized by Google

www.libtool.com.cn

2 467
173 194
Penn. St.
2 467
193 421

OESLAGER v. FISHER.

1. In 1829, executor purchased land of a debtor to the estate under his judgment, for an amount equal to his own and prior liens. He settled his account, charging himself with the amount of the judgment, and the profit of a subsequent sale by him, showing a balance still due from the estate. A purchaser from his vendee, in 1843, cannot set up the equity of the representatives or legatees, on the ground of conversion, as a defence to the payment of purchase money.
2. Conveyance to executor in trust for the estate, is a trust for himself representing the estate, per SERGEANT, J., and he may convey.
3. Purchase of land of debtor to the estate, by executor, under a judgment to secure the amount due the estate, not a conversion, but a mere temporary investment. Per Id.

ERROR from the Common Pleas of York county.

May 19.—This was an action on a bond for the purchase money of a house and lot, dated in May, 1843, in which the defence set up was a defect in the title. The circumstances relied on were these:

In the year 1825, Elizabeth Koons, by her will, gave to the children of her son Jacob, a legacy, to be deducted out of bonds due by him to her, and appointed John Koons and G. Spangler her executors. In 1826, an action of debt was instituted by the executors of Elizabeth, against Jacob, in which judgment was recovered, in 1828, for $466. The statement was lost. A fi. fa. and vend. ex. issued in 1829, and the lot in question was sold to John Koons, in trust for the estate of Elizabeth Koons, for $800. It appeared there were other judgments against Jacob Koons, prior to that of the executors, amounting to about $332, so that the total amount of liens were $798, which amount must have been bid to cover the executor's lien.

John Koons, executor of Elizabeth Koons, in 1832, conveyed this lot to Connelly, who, in 1837, assigned it to plaintiffs below, in trust for creditors, by whom the sale was made to plaintiff in error, and the bond now in question taken for the purchase money. Defendant was in possession at the time suit was brought; whether under a conveyance is not stated. Plaintiffs further gave in evidence the account of John Koons, as executor in 1835, wherein he charged himself with the amount of the judgment against Jacob, and interest thereon, and with $245 profit on the sale of the house. He took credit, among other matters, for the amount paid on the prior judgments, and showed a balance due him from the estate.

They also showed an ejectment by John *v.* Jacob Koons and another, for the lot, with a judgment and a hab. fac. poss. in 1831. All this evidence was objected to.

Digitized by Google

The court (Irvine, President) instructed the jury as follows:

"The defendants contend that the plaintiffs are not entitled to recover in this suit, because John Koons had no title in the property which he could convey, he being a mere trustee for the estate of Elizabeth Koons, and could not sell without express authority; the persons interested in the estate of Elizabeth having the right to elect to take the purchased property if they thought proper to do so, and asked the court so to charge the jury. The court charge the jury, that John Koons could, under the circumstances, sell the property for the benefit of the estate of Elizabeth Koons, and that the jury accordingly must find for the plaintiff."

The admission of the evidence, and the charge of the court, were the errors assigned.

Ramsey, for plaintiff in error, insisted there was such a defect of title here that equity would not enforce the contract, and would even enjoin an action for the purchase money. The purchase by the executor, with the funds of the estate, was a conversion (and a breach of trust) and a trust at election immediately vested in the representatives; Peirce *v.* McKeehan, 3 Watts & Serg. 280; Lewin on Trusts, 201, 202; Burdett *v.* Willett, 2 Vern. 638; Harrisburg Bank *v.* Tyler, 3 Watts & Serg. 376; and these cases settle the principle that the cestui que trust may follow the fund into the land, and consider the purchase made for himself; Philips *v.* Crammond, 2 W. C. C. R. 445; Willis on Trustees, 63, 64. Here the funds were not the general funds of the estate, but the specific legacy (Walker's estate, 3 Rawle, 237) of the children of Jacob Koons, with which this purchase was made; and the deeds giving notice of a purchase by the executor, in that capacity, purchasers under him had notice of the will and all other matters of which they might have informed themselves by inquiry.

Campbell and *Hambly*, for defendants in error.—The only question is, whether John Koons, having, as the executor of Elizabeth Koons, deceased, bought in the house and lot to prevent a sacrifice at sheriff's sale, and having taken a deed to himself, "in trust for the estate of Elizabeth Koons," could sell the property again?

That he had the right to bid the property up cannot be disputed. Billington's estate, 3 Rawle, 55, &c.

It was the duty of the executor, under the will, to pay the legatees in *money*, and having the right to buy, and being obliged to pay in money, it follows that he must have the right to sell again in order to get the money.

Digitized by Google

In his administration account he charged himself with what he gained by the sale of the property, as well as with the original debt. He made nothing by the purchase and sales, but the legatees did, and to allow them to take the land after having already got the price of it in the account, would be unjust.

Calculation will show that the executor bid the property no higher than was necessary to cover his judgment and prior liens.

May 27. SERGEANT, J.—We are of opinion that no valid objection to this title appears to be made out on the part of the defendant below. As far back as 1827, Koons, one of the executors, bought the lot at sheriff's sale, on an execution issued upon a judgment which he and the other executor obtained against Jacob Koons the then owner, and took the deed to himself in trust for the estate of Elizabeth Koons, deceased. This was in fact a deed in trust for himself as executor, for he, as such, represented the estate of the deceased. No other cestui que trusts are named or referred to by description. By this deed the title passed out of the defendant, in the execution to him, and of course he could convey it. Three years afterwards he did convey it to Connelly, and it is to be presumed received the purchase money. Connelly's title was, four years afterwards, conveyed to Fisher and Dietz, who, in 1843, conveyed to the defendant, taking his bond, on which this suit is brought for the purchase money. These transactions have passed long since, without any claim or pretence of title to the lot on the part of the heirs, or of John Koons, as cestui que trusts: whilst, at the same time, it appears the executor charged himself, in his account filed in 1835, with the debt due on the judgment and interest, and also with the advance obtained on the resale, applying these moneys to the payment of debts and charges on the estate, and, notwithstanding which, he brings the estate into debt, so that it would seem that the lot could not have been held as land, but must have been eventually sold to pay the debts of the estate, and that, in fact, there was no conversion of money into land, nor could such a thing be properly done by the executor, but the transaction was rather as a temporary investment of the money, or perhaps a measure adopted to prevent a sacrifice of the lot by a sale at an undervalue, which would not transcend the power or duty of an executor, when done for the benefit of the estate. Billington's Appeal, 3 Rawle, 55.

To what liability, however, he may have subjected himself, or how far on fresh pursuit his acts might have been drawn in question, it is certainly too late now to inquire, after he has conveyed the title for valuable consideration, and so great a lapse of time has occurred with-

Digitized by Google

out any movement on the part of the heirs; but they have received the benefit of all the money with which he was chargeable.

The full legal title being thus in him, there is no equity which would take it away from a purchaser for a valuable consideration under circumstances; and the title transferred by Fisher and Dietz was derived from such a purchaser, and it has the same character in their hands as those of their vendee.

Judgment affirmed.

Flory *v.* Becker.

2 470
j 211 378

Wife's distributive share survives on death of her husband, and if not reduced into possession, his debt cannot be set off.

Allowance of a credit for payment of a debt of a husband of distributee in the settlement of an administration account does not affect the right of the wife surviving her husband.

May 20.—The question here was as to the right of administrators to set off a debt due by the husband against the wife's distributive share. The plaintiff brought a sci. fa. on an account settled by the administrators of her father's estate in 1825, showing a balance due by them. This was composed of the proceeds of real estate sold for payment of debts. The husband of plaintiff was at that time insolvent, and died in 1833. On the trial, defendants proved under objection by plaintiff, that on the settlement of their account they claimed and received a credit for $319 paid by them for John Flory, the plaintiff's husband. The evidence of this debt was a joint note of the intestate and John Flory, which was paid by the defendants, and an assignment taken. In answer to plaintiff's points, the court instructed the jury, 1. The debt must have been John Flory's, to entitle defendants to a credit. 2. If so, it was a good defence pro tanto.

Ramsey, for plaintiff in error.—The marital rights of the husband, in relation to his wife's choses in action, is a right which he may exercise or not, at his pleasure. If he do not think proper to exercise this right over the distributive share of his wife out of her intestate father's estate, during coverture, by reducing it into possession or claiming it, his right to it ceases at his death, and he must be regarded as a stranger to her estate. It belongs absolutely to the wife at his death, free and discharged of all debts due and owing by her deceased husband to her father's estate. Lodge *v.* Hamilton, 2 Serg. & Rawle, 493; Fink *v.* Hake, 6 Watts, 131, 132; 3 Whart. 415.

Digitized by Google

Barnitz, for defendant in error.—This is an old transaction of twenty years' standing. The case is imperfectly brought up. Twenty years after the administrators, the defendants in error, of Michael Baymiller had settled their accounts, a transcript of the balance, which then appeared to be in their hands, after the payment of all debts, was taken and filed in the Court of Common Pleas, on which the sci. fa. issued. Flory was the son-in-law of Baymiller, and the husband of the plaintiff. Baymiller became his surety in a note to Imenheiser, dated 17th May, 1817. In 1825, Flory was insolvent. The administrators of Baymiller were called upon to pay this note, and paid it, taking an assignment of the note from Imenheiser. The money due on the note was a debt of the intestate, and they were bound to pay it. The administrators, therefore, had a right, and very properly made the note a set-off to the sci. fa. on the transcript for the share of the plaintiff, out of the balance in the hands of the administrators, in 1825. He cited Yohe *v.* Barnitz, 1 Binn. 358; Lahman's Appeal, 3 Watts & Serg. 350; Mansfield's estate, 5 Watts & Serg. 340.

May 25. ROGERS, J.—The intestate, Michael Baymiller, was surety for John Flory, the husband of Catharine Flory, in a note to Jacob Imenheiser, and on payment of the debt by the administrator, Flory became indebted to the estate to the amount paid. If, therefore, Flory had brought suit to recover his wife's distributive share, the administrators would, according to the case of Yohe *v.* Barnitz, 1 Binn. 364, have had a defence; for Flory would not be entitled to recover, except on the terms of paying the debt to the estate, particularly when he was insolvent. Whenever a husband seeks the aid of the court he will be compelled to do justice, by allowing the set-off. But until he reduces his claim into possession, the right of survivorship exists, and on his death she takes them discharged from his debts. Marriage is only a qualified gift to the husband, of his wife's choses in action, viz. upon condition that he reduce them into possession during its continuance; for if he happens to die before his wife, without having reduced such property into possession, she, and not his personal representatives will be entitled to it. Co. Lit. 351; Roper, Husband and Wife, 204. On his death, her right is the same as dum sola. The husband may, but he is not bound to reduce his wife's choses into possession, and even in a suit against her he cannot be compelled to make the set-off.

This case is not distinguishable from Fink *v.* Hake, 6 Watts, 131. In that case the principle is recognised that a wife's distributive share is a chose in action. It is also expressly ruled, that the debt of a husband, during coverture, cannot be set off after divorce, against the dis-

Digitized by Google

tributive share of the wife in her father's estate, although the decree of divorce was subsequent to the death of the intestate. No difference is perceived in principle, whether the marriage is destroyed by death, or by the sentence of the law.

Did, then, the husband reduce his wife's distributive share into possession during the continuance of the marriage? This is not pretended, and consequently she is entitled to a distributive share of her father's estate, unaffected by the debts of her husband.

In 1825, on settlement of the accounts, as administrators, the defendant obtained a credit of $319 39, paid by them on this account. But this cannot alter the right of survivorship, for the money being paid on a note, which was a debt against the intestate, the administrators were entitled to a credit for money paid, for it necessarily forms part of the administration account. It is the common case of the loss of a debt due the estate, and must be borne equally by all the heirs, although one happens to be the wife of the insolvent debtor. The settlement referred to was nothing more than an ordinary administration account, and cannot justify the act of the administrators in attempting to exclude the wife, who survived her husband, from her distributive share. The decree of the Orphans' Court merely affirms the administration account. There is no decree of that court distributing the estate among the heirs, to the exclusion of the plaintiff. Had the Orphans' Court, on notice, decreed that the debt of the insolvent husband should be deducted from the wife's share, as it would seem from the case of Yohe and Barnitz they would have power to do, it would present a different question. But this has not been done, and the plaintiff's claim stands on the principle of survivorship, unaffected by the action of the husband, or the decree of the court. The distribution of the estate was the act of the administrators, without the intervention of the Orphans' Court, and as they have misapplied the assets, they are personally answerable.

Judgment reversed, and a venire de novo awarded.

Digitized by Google

www.libtool.com.cn

LLOYD v. HART, Administrator of EVANS.

A sale of real estate by the committee of a lunatic, for payment of his debts under a decree of the court, works no conversion of the surplus, but that remains real estate and is distributed as such according to the rules of descent.

ERROR to the Common Pleas of Lancaster county.

May 12.—Case stated for the opinion of the court. Caleb Evans, the elder, died in 1802, leaving a widow and one son, Caleb the younger. The widow married again, and died in 1825, leaving issue of the second marriage.

In 1833, C. Evans, the younger, was duly found a lunatic, and that he had been so for fifteen years past.

In 1839, his committee petitioned the court for a sale of the land of the lunatic for payment of his debts, which was ordered, and the land sold for upwards of $6000.

The account then filed showed a surplus, after payment of debts, exceeding $3000.

In 1845, the lunatic died unmarried, without issue. The brothers and sisters of the half-blood claimed the money as next of kin, entitled to the personal estate. The children of his father's brother claimed as heirs. If the former were entitled, judgment to be for plaintiffs; if the latter, contrà.

The court (Lewis, President) gave judgment for plaintiffs for the following reasons:

"The real estate was regularly converted into personal estate under the direction of a court of competent authority. The heirs are not entitled to relief, unless there has been a breach of trust in the committee, which would exist where it was shown that they had acted for their own interest and not for the interest of the lunatic; Ex parte Bromfield, 1 Ves. jun. 953. But where the conversion has taken place under the authority of the court, it cannot be taken to be a wrongful conversion, and the heir has no such equity as will induce the court to inquire into the origin of the fund. The parties must take it as they find it; Flanagan *v.* Flanagan, 1 Br. C. C. 500; Ex parte Ludlow, 2 Atk. 407; Orenden *v.* Compton, 2 Ves. jun. 69, 74."

Stevens, for plaintiff in error, contended, that if Caleb Evans had died before the act of the 8th of April, 1833, the case would be clear of all difficulty, for by the act of 1794, (11th sect. of the act of 19th April, Purdon, of 1830, 404,) both the real and personal property of

Digitized by Google

www.libtool.com.cn

an intestate went to the heirs of him from whom it came. In this case, the property all came from the ancestor of defendants. The act of 1833 was not intended to divert the succession of any property which came as land from the ancestor, but only to alter the course of what came from him as personal property. This is evident from the 9th and 18th sect. of that act.

The whole spirit of the law of descents, in Pennsylvania, shows the intention of the legislature to have been to confine the inheritance of real estate to the blood of the ancestor from whom it came. This is carried into the act of 1833. See 9th sect. Pamphlet Laws, 315. It specially provides for the surplus of real estate sold for the payment of debts, and leaves it as real estate; sect. 18.

It is a general rule of equity, that if land be sold for a specific purpose, and that purpose fail in part, or in whole, or be fully accomplished, the balance of the money shall be considered as land, as between the heirs and next of kin. Leigh and Dalzel, 5 Law Lib. 182, 92; 2 Kent Com. 230; 1 Bro. Ch. R. 86; Id. 497; Id. 503, 515, in note; 2 Story Eq. 793, in note; 3 P. Wms. 20; 2 Ves. 686, 687.

When the land of an infant, or feme covert, is converted, even with their consent, it seems to be admitted that the surplus would go to the heir-at-law. "Infants can by no means take from the realizing fund the character of land, because they are incapable of making an election." Seely *v.* Jago, 5 Law Lib. 182, 91, Leigh and Dalzel; Merivale, 296, Ashley *v.* Palmer. Mr. S. also cited Anon., 1 P. Wms. 17; 5 Whart. 44, Tilghman's case.

The case of Greider *v.* McClay, 11 Serg. & Rawle, 224, was decided under our acts relative to intestates, without regard to equity principles. But there, in its first descent, it went to the same heirs of the intestate as the land would have gone; but in the second descent it went as money. There the land was sold as the ancestor's.

1 Johns. Ch. R. 119. The surplus of mortgaged premises sold for the payment of debts, after paying the mortgage, is land, and goes to the heir, and not to the administrator.

It has been said, that where land has been converted by order of a court of chancery, the heirs next of kin shall take it in the state in which the death of the intestate finds it, as there is no equity between the heir and next of kin. Flanagan *v.* Flanagan, 1 Bro. Ch. R. 500. There the order was to sell for the payment of the debts of a sister of the elder Flanagan, whose grandson claimed as his heir; and the order directed that any surplus should go to him, (the grandfather,) who would have been entitled to the land. Of course it went to him

Digitized by Google

www.hbtool.com.cn

as money, standing in the place of land; but *from* him it would go to those entitled to the personal property, its *real* quality being exhausted in his hands.

By the English bankrupt laws, the surplus is ordered to be "paid to the bankrupt, or his executors, administrators, and assigns," treating it as personal property; and yet only that which was sold in his life-time can be considered personal, and that converted after his death is to be treated as real estate. In a lunatic's case, none of the surplus is to be paid to the lunatic or his executors. It remains in the hands of the committee, subject to the law. 8 Ves. 590; vide 5 Madd. 493, 299, Am. ed.

Guardians cannot change an infant's property, and if they do so, even without a special order to have it vested as unchanged, equity will still consider it unchanged as regards the heirs next of kin. 5 Law Lib. 75, 76; Leigh and Dal. 150, 151; 11 Ves. 257.

The money of an infant, laid out by his trustees in land, after his death, would not go to the heir as land. Id.; 1 Vern. 434; vide 5 Law Lib. 182.

In 2 Law Lib. 144, (Shelford, 226,) it is said, "that the claims arising after the death of lunatics, between their heirs and personal representatives, in consequence of the alteration or investment of their property by their committees, have occasioned several decisions, all of which cannot be reconciled."

Mr. S. here went into an argument to show that the commentator was mistaken, and that misapprehension arose from misunderstanding the leading case; Flanagan *v.* Flanagan. He cited, in addition, 2 Ves. 192; 2 Freeman, 114; 1 Ves. 462; 12 Ves. 165, note; 13 Ves. 337, 338; 10 Ves. 138; 3 Wheat. 579.

But suppose the doctrine were sound in England, that there "is no equity between the heir and next of kin," it seems, upon grounds of natural equity, it could have no application here. There the contest is between the eldest son and his brothers and sisters of the whole blood, and it seems but natural justice to say, that between them there can be no equity, and that each *ought* to take the converted property in the state, in which accident left it, on the death of the intestate. The principle of "no equity" has only been held against the heir-at-law. It is a righteous effect of natural justice to overcome or soften the evil policy of primogeniture.

But here the same principle of natural justice requires that the "equity" can never operate between the descendants of the ancestor from whom the property came, because *all* of them are the *heirs-at-law*. The only operation is between the blood of such ancestor and

Digitized by Google

those who are utter strangers and alien to his blood. Every principle of natural feeling and justice requires, that whenever it can be done, equity should enforce the spirit of the law confining the descent to the stock of the ancestor.

No case can be found in England, where land of a lunatic was converted by the same means as in this case, in which the succession had been charged. This was converted by the committee, under an order of court, according to the act of Assembly, sitting in lunacy, for the payment of debts alone.

Mr. S. went into a history of the English acts of parliament relative to the real estate of lunatics. He cited 2 Law Lib. 236, 373, 117, 148, 149. They showed great anxiety to protect the next of kin against primogeniture.

In conclusion, he thought there was no case in England, or Pennsylvania, where the court in lunacy *can* make an order to change the succession of real estate. But above all, in Pennsylvania, there is an overwhelming equity in favour of the heir-at-law, (in case of real estate,) as that heir includes the whole descendants of the ancestor from whom it comes.

Franklin, for defendant in error.—The money was the personal estate of the lunatic, and distributable among the brothers of the half-blood, by the act of 1833, sect. 4. If it is to be considered real estate, the plaintiffs are excluded by the 9th sect. Was this personalty? It depends on the law of conversion, which is, that where it is under a power, the surplus remains real estate, but if in auter droit, it is out and out, Leigh & Dal. 1, 2, as are all conversions under order of a court. This rule is particularly applied to cases like the present, Leigh & Dal. 159, 164, 165, 166; and the authorities support the position there taken, Ex parte Grimston, Amb. 706; Ex parte Bromfield, 1 Ves. jun. 453; Oxenden *v.* Crompton, 2 Ves. jun. 69, where it was said there was no equity in these cases between real and personal representatives. S. C., 4 B. C. C. R. 231, and in Walker *v.* Denn, 2 Ves. jun. 176, it is said their rights are purely legal. Chitty *v.* Parker, Id. 271; Attorney General *v.* Bowyer, 5 Ves. 303; Sergeson *v.* Seely, 2 Atk. 413; Brown *v.* Groombridge, 4 Mad. 262; Shelford on Lunat. 226. This rule is recognised in Ex parte Phillips, 19 Ves. 122; and Ex parte Salisbury, 3 Johns. C. R. 347; and the same rule prevails in cases of bankruptcy, Leigh & Dal. 147, 148, 140; Bromley *v.* Gooden, 1 Atk. 75; Banks *v.* Scott, 5 Mad. 493. The next point to be established is, that this, being a sale under a decree of a court, is a conversion out and out, and this is settled, Leigh & Dal. 164, 165,

Digitized by Google

citing Flanagan v. Flanagan, 1 Br. C. C. R. 500; Yohe v. Barnet, 1 Bin. 358, a case of partition; Newbold v. Pritchett, 2 Whart. 49; Grider v. McClay, 11 Serg. & Rawle, 224. It being then converted into personalty in the life of the lunatic, and there being no equity between the representatives, it is to be distributed according to the 18th sect. of the act of 1833, among the next of kin, without distinction of blood, Clipper v. Livergood, 5 Watts, 113; Wharton v. Shaw, 3 Watts & Serg. 124; Commonwealth v. Mateer, 16 Serg. & Rawle, 416. The English stat. 1 Will. 4, c. 65, has made a provision against this change of succession, and it is usual for courts to make it in their decrees. So in cases of infants, which are, however, dependent on different principles. There has been no such provision in our act, or in the decree here, and this case must be decided without regard to such rules.

Gibson, C. J.—The present is not a case which depends on an arbitrary exercise of will by the party who made the conversion, or upon an election to reconvert the property by the party for whom it was made; but it is one of those cases of conversion by persons in auter droit, which are treated of by Leigh & Dalzell, in the seventh chapter of their disquisition. Even under the head to which it belongs, no analogy applicable to it can be drawn from conversion by assignees in bankruptcy, or from conversion by guardians; or even from the conversion of land into money by the committee of a lunatic in England, for the effect of it there is regulated by statutes. The conversion of a lunatic's personal estate into real, seldom calls for a chancellor's interference with its legal consequences, because it is the principal, if not the only, duty of the committee to provide for the lunatic's personal comfort and interest, without regarding the ulterior and conflicting interests of those who may be entitled to the succession; a respect for which, it is said, might divert the attention of the committee from its proper object. It would be the interest of the next of kin to have the lunatic put on the smallest possible allowance out of the personal estate and the profits of the land, while it would be the interest of the heir to have as much of it as possible expended in improvements and repairs; and by attempting to do justice between these eventual interests, the present interest of the lunatic, who is entitled to the produce of the whole estate, in the way most beneficial to himself, might be prejudiced. Besides, it is said, if those interests were respected, there would be a running account between the personal and the real estate which it would be almost impossible to adjust on any equitable principle whatever. For these reasons they are for the most part put out of view, and the property is allowed by

Digitized by Google

the chancellor to retain the legal character stamped on it by the committee. But the principle of non-intervention does not universally hold, for a wanton conversion to favour the heir or the next of kin will be undone, and the delinquent committee perhaps punished for a breach of his trust; but, it is said, there is no equity on any narrower ground. A committee is a bailiff whose power is limited to the mere care of the estate under the direction of the court; and he had no power to sell the land for payment of debts charged on it, till it was given to him by the 43 Geo. 3, c. 75, which, however, expressly directed that the surplus remaining after payment, should be applied as the estate would have been applied had the statute not been enacted, and consequently as if the land had not been converted. The same conservative provision is found in the 11 Geo. 3, c. 20, the 11 Geo. 4, and the 1 Will. 4, c. 65; so that it seems to be a principle of policy indicated by acts of legislation in England, to protect the lunatic's land from unnecessary conversion; and in this respect there would seem to be a difference there between real and personal estate. Our own statute, empowering the committee to sell the land for maintenance and payment of debts, was evidently not copied from the English one, or suggested by it; and it follows not that the omission of the English provision in it was purposely intended to mark a departure from the English policy. The case before us, therefore, is unaffected by precedent; and we are left at large to interpret our own statute by the principles of reason and justice. Adverting, then, to what we may suppose would have been done had it been presented to the legislature for special provision, we cannot think that power to convert beyond the exigencies of the occasion would have been conferred, since, had it not been for those exigencies, the legislature would have conferred no power at all. The power was to be exercised, not for the sake of conversion merely, but for a purpose beyond it; and beyond the accomplishment of such a purpose it is not to be supported. This interpretation of our statute coincides with the interpretation put upon wills, directing lands to be sold for a special purpose, which raised a resulting trust, for the heir, of the unexpended surplus in Emblyn *v.* Freeman, Prec. in Ch. 541; and Roper *v.* Radcliff, 10 Mod. 230; S. C., 9 Mod. 167, 181, on the ground that the divisor intended that his land should be no further converted than the end should require. In Hill *v.* Cock, 1 V. & B. 173, when the purpose of the conversion was disappointed, the whole produce of it was treated as land; and in Leigh & Dal. ch. 5, a multitude of cases to the same effect are collected. From these it appears that the equitable character of the property, when legally converted, depends on the will of the devisor, collected from the purpose to be answered by it; but

Digitized by Google

the committee had, in this instance, no will to exercise, or power to convert, as a devisor has, for motives of mere caprice, or for any motive at all not authorized by the statute. The sale was for maintenance of the lunatic and payment of his debts; consequently what remained when that was accomplished retained the impress of real estate.

Judgment reversed, and entered for defendant.

FURNESS v. EWING.

A conveyance, fraudulent as to creditors, is rendered valid by their receipt of a dividend under a subsequent assignment of the consideration of the conveyance, with notice to the creditors.

ERROR to Lancaster county.

May 15.—The plaintiff, as administrator of A. Ewing, brought trover for goods belonging to the estate. The defendant showed title, under a conveyance from his father, A. Ewing, in March, 1843, in consideration of food, clothing, &c., during his life, and an annuity of $100. The plaintiff proved that at the time of this conveyance, A. Ewing was indebted far beyond his ability to pay.

Defendant showed an assignment, in June, 1843, by A. Ewing, to one Balance, in trust for creditors, of all his estate. An inventory was filed, in which the annuity was estimated at $25.

In 1844, Balance filed an account, giving a credit for $60 55, advance of the annuity. In December, 1844, the distribution was reported by the auditor, and the dividends paid by the assignee. A. Ewing died in the preceding January. There was no evidence on the record of an insolvent discharge, or of any other assignment than is here stated.

The court directed a verdict for defendant.

Ellmaker and *Franklin*, for plaintiff in error.—The assignment being without doubt fraudulent, the creditors represented by the administrator are not barred by the assignment, or the proceeding under it, for that trustee being a volunteer, had no power to avoid the previous voluntary assignment; Vandyke *v.* Christ, 7 Watts & Serg. 373; nor are they bound by an acceptance of a dividend, it being given by the law—not by a party with whom they are in privity. This is in effect decided by McKee *v.* Gilchrist, 3 Watts, 230; Wood *v.* Jackson, 8 Wend. 9; Menges *v.* Oyster, 4 Watts & Serg. 20. Adlum *v.* Yard, 1 Rawle, 163, does not apply, for we do not desire to avoid the assignment under which we received a dividend.

Digitized by Google

Smith and *Stevens*, for defendant in error.—There are but two points in the case:

1. Was the agreement of March, 1843, between Alexander Ewing, the father, and Samuel S. Ewing, the son, and the assignment or sale of the property, therein stated, by the father, to the son, in consideration of the future maintenance of the father, fraudulent?

2. Can the creditors, after having accepted a dividend under the general assignment, come in and contest the validity of this agreement?

The consideration stated in the agreement for the assignment or sale of the property therein mentioned, is a good and valuable one. There was no evidence of fraud, and it cannot be presumed.

Creditors having accepted a dividend under a deed of assignment for the benefit of creditors, cannot afterwards contest its validity. To this point they cited Share *v.* Anderson, 7 Serg. & Rawle, 63; McPherson *v.* Cunliff, 11 Serg. & Rawle, 426, 427; Stroble *v.* Smith, 8 Watts, 280; Adlum *v.* Yard, 1 Rawle, 171; 7 Watts & Serg. 125, 126.

June 1. Per Curiam.—It is not contested that the debtor's assignment to his son, in consideration of maintenance and an annuity, was originally void as to creditors, but it is contended that it was ratified both by the act of the assignees under the insolvent laws, who received the outstanding arrears of the annuity at the father's death, and by the creditors, who took them as a part of their dividends.

It is said, the difficulty is to see how they could have avoided it. The assignees might have rejected it, because to receive it as a part of the debtor's estate, was inconsistent with their title to the property, which had been fraudulently given for it, and they ought to have done so. But being actually received, and a dividend declared, of which it was a component part, how were the creditors to reject it? Simply by objecting to its being charged as a part of the fund at the settlement of the trustee's account, of which the creditors must have had notice. It is true that the first assignment was good against the debtor's subsequent voluntary assignment for the benefit of his creditors, and that Balance, the assignee, might have received the arrears without confirming it, as he would have been simply answerable to the administrator for so much as a part of the intestate's property. But as the assignees, under the insolvent laws, had a right to contest the original assignment, they had a right, with the assent of the creditors, to ratify it; and they cannot have at the same time the property given for the annuity and the fruits of it.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

KITCHEN *v.* DEARDOFF.

Payment or acknowledgment of part of a specialty debt, within twenty years, rebuts the presumption of payment as to the whole.

ERROR to the Common Pleas of Adams county.

May 19.—This action was brought in February, 1844, on two sealed instruments, dated in 1820, which were written on one sheet of paper. To rebut the presumption of payment, the plaintiff showed endorsements of payments in 1824 and 1840, by one of the two obligors. He also gave in evidence receipts for these sums, produced on demand, by the administrator of the party who paid the amounts, and an admission by one of the parties to the instrument, within sixteen years, that the debt had not been paid. The defendant also gave evidence of an assertion by himself, uncontradicted by plaintiff, that but a small balance, if any, remained due. The plaintiff's exceptions were to the answer of the court to the second and third points proposed, which in substance were:

1. The presumption of payment goes to the *whole* of the debt. If any part remains unpaid, and defendants have not shown what part, plaintiffs may recover the whole.

Ans.—When the presumption of payment has arisen, such presumption may be repelled so far as plaintiff's testimony may authorize the jury so to do.

2. If there was a payment of part, and an acknowledgment of the debt within twenty years, the burden of proof is on defendant; and if other circumstances are relied on, to raise a presumption of payment, and it appears from these facts that a part did remain unpaid, such evidence raises no evidence of presumption against the claim, there being no distinct evidence what the balance was.

Ans.—When a legal presumption of payment has arisen, the burden of proof is on the obligee, and it is for the plaintiff to satisfy the jury that he is entitled to recover the whole or a part of his demand.

Smyser, for plaintiff in error.—The main question is, whether, on the face of the record, it appears that the court answered the second and third points of the plaintiff. It is admitted there was a reply; but we deny that there was a legal and sufficient answer.

The defendants undertook to prove that the balance alleged to be due and owing on the obligation, over and above the two direct payments made thereon, had been extinguished and satisfied in law. This

Digitized by Google

they did not attempt to do by direct evidence, but by inference to be drawn from an inference. The circumstances relied upon by the defendants, taken in connection with the lapse of time, do not raise a legal presumption of payment, so as to constitute a bar. This ground was taken in our points in the court below, but the court did not answer them. He cited Geiger *v.* Welsh, 1 Rawle, 349; Noble *v.* McClintock, 6 Watts & Serg. 62; Slaymaker *v.* St. John, 5 Watts, 27; Freeman *v.* Pennock, 1 Watts, 405.

Cooper and *Durkee*, for defendant in error.—The case is imperfectly stated in the paper-book. The general charge of the court is not here.

The burden of proof, to repel the presumption of payment raised by lapse of time, rested upon the plaintiff.

We insisted, in the court below, that all the proof went to show that the notes were paid in full.

It has been contended by the plaintiff's counsel, that where more than twenty years had elapsed from the time a note under seal became payable, and the bringing suit thereon, and there had been payments made (and proved) within that time thereon, he was placed in the same position as if suit had been brought within twenty years. This we contend is not the law. That there was a presumption of payment arising from lapse of time, and when this presumption arose, the plaintiff, in addition to proving his bond, was bound to show additional circumstances tending to prove that the bond was not paid.

June 1. PER CURIAM.—The points were not distinctly propounded, but the direction prayed seems to have been, that as the presumption of payment from lapse of time goes to the whole debt, the rebuttal of it, by proof that any part of the debt was outstanding within the twenty years, goes to the whole presumption. The law is undoubtedly so; but the direction actually given, though accurate in most particulars, did not entirely respond to the prayer. Payment of interest, or a part of the principal, within the twenty years, repels the presumption entirely; and any acknowledgment that a part of the debt is due, entitles the plaintiff to recover, not only that part, but the whole, unless payment is proved by other evidence than lapse of time. It casts the proof of payment on the defendant, as if no presumption of payment had taken place.

Judgment reversed, and a venire de novo awarded.

Digitized by Google

www.libtool.com.cn

HINKLE *v.* EICHELBERGER.

3 483
126 281
2 483
35 SC 364

An executor, having paid a legacy, is incompetent as a witness to establish the will on an issue of devisavit vel non.

ERROR to the Common Pleas of Adams county.

May 19.—The question arose, in this case, on the trial of an issue of devisavit vel non, in which the plaintiffs called one of the executors as witness; he was objected to. The facts were these: the will contained a power to sell lands, and a direction to pay a legacy to the widow of testator. It was shown a sale had been made, but releases from the purchasers were produced. An account filed by the executors in the Orphans' Court was then produced, taking a credit, among other things, for the payment of the legacy. The court admitted the witness. This was the only point argued here.

Fisher, for plaintiff in error.

Mayer and *Evans*, for defendant in error.

June 1. GIBSON, C. J.—The official character of an executor, independent of acts done in it, is not enough to exclude him as a witness on the trial of an issue like the present. But it is said, that as the executor, in this instance, paid a legacy to the widow, he has an interest to that extent in establishing the will. What would be the legal effect of revoking the probate? Where a grant of administration is originally void, all acts done under it will be also void. In Wolley *v.* Clark, 5 B. & Ad. 744, trover was maintained by the executor of a subsequent will against the executor of a previous one, whose probate had been revoked, even on citation; and it was consequently held, that the disposal of the assets by the first executor was, in point of legal effect, a conversion of them to his use, and an act done without authority. And the defendant was not allowed to show, even in mitigation of damages, that he had administered assets to the amount. In like manner, detinue was maintained in Graysbrook *v.* Fox, Plowd. 267, by an executor against a purchaser of assets from one who had obtained letters of administration before the executor had proved the will. If this probate be revoked, therefore, the payment of the legacy will be void, and the witness will be liable, without regard to it, for whatever came from the personal estate, unless the neglect of the register to grant administration pendente lite, at the entry of the caveat,

Digitized by Google

should make a difference. It is one of the sore evils of our plan of selecting the executive officers of the law, and of the popular principle of rotation, that the knowledge and skill which are imparted by experience alone are nowhere to be found, and that the routine of the most ordinary duties is forgotten. This executor was, it seems, suffered to proceed under his testamentary letters; and what validity will his acts have should the probate be revoked? Strictly, none; but, by the most benign interpretation, no more than those of an administrator pendente lite, whose power is limited to collection of the assets and payment of the debts. It is his business, not to consult the will, but to hand over the assets to his successor; and that he has no authority to pay legacies was determined in Ellmaker's estate, 4 Watts, 34; The Commonwealth *v.* Materr, 16 Serg. & Rawle, 416; and Adair *v.* Shaw, 1 Sch. & Lef. 254; though it was said, in the last of those cases, that he is to be allowed for a bonâ fide payment, but, of course, only when the will is established. Now, the revocation of the probate in this instance would certainly burden him with the loss of the money paid to the widow, unless he could recover it back. But he paid it voluntarily, as well as with full knowledge of the circumstances; and she might retain it as conscientiously as did the creditor in Carson *v.* McFarlane, 2 Rawle, 218, who had received a voluntary payment of more than his proportional part of the assets of an insolvent estate. Though the action for money had is a liberal one, and lies, it is said, whenever a party has received money which he is bound by natural justice to refund, it has never been extended to money received without unfair practice or deceit, though the receiver could not have recovered it by law. Such is the principle of Irvine *v.* Hanlen, 10 Serg. & Rawle, 219; Morris *v.* Tarin, 1 Dall. 148; Bogert *v.* Nevins, 6 Serg. & Rawle, 369; Farmer *v.* Arundel, 2 Bl. R. 285; and Lowry *v.* Bourdieu, 1 Doug. 468. In the last of these, it was ruled that a person insured without interest could not recover back the premium, on the ground that the risk had not attached; and though Lord Mansfield put the decision on the maxim of pari delicto, there is no doubt that such a case would be ruled in the same way here, though we have no statute which declares such a policy to be illegal. The argument that a witness might set up his payment as a defence to an action by the widow, who would be entitled to administration, is without force, for he could make no defence against her suing, as she would sue, in auter droit, which he would not make against any one else; and he would be compelled to account to her as if nothing had been paid. This objection to his competency, therefore, is decisive; not so the objection to it for his original liability on the covenant, that

Digitized by Google

www.libtool.com.cn

he and his colleagues had authority to sell the decedent's land, from which he was released. If he were not liable to the purchasers, he could not be liable to any one else.

Judgment reversed, and a venire de novo awarded.

---

2 485
127 378
2 485
170 378

PARGET v. STAMBAUGH.

A life-estate in improved lands cannot be sold by the sheriff since the acts of 1836 and 1840.

ERROR to the Common Pleas of Adams county.

May 18.—This was an ejectment against a purchaser at sheriff's sale, in August, 1842, of the property of the plaintiff. The title shown was a conveyance to the wife of the plaintiff. Defendant had entered under his deed from the sheriff. It was shown the land yielded a rent.

The court (Durkee, President) charged the jury, that "The sale of John Stambaugh's life-estate in the premises in dispute, on the fi. fa., issued against him, was void. The defendant, therefore, acquired no title under it, and the plaintiffs are entitled to recover."

Smyser, for plaintiff in error, contended that John Stambaugh, the defendant, had such an estate in the property, as, independent of and prior to any statutory provision, changing the remedy, was the subject of levy and sale on execution.

That although the act of 16th June, 1836, sects. 68—71, (Pamph. Laws, 1835, 1836, pp. 778, 779,) took away this right, and substituted, in lieu of a sheriff's sale on execution, a delivery of the premises to the plaintiff by liberari facias, at a rent to be fixed by an inquest, or a sequestration of the rents, issues, and profits, at the option of the plaintiff; yet, that subsequently, this was all repealed by the act of 13th October, 1840, sect. 9, (Pamph. Laws, 1841, page 3,) and the old law, as it existed prior to 1836, revived thereby, except so far as it is altered by the act of 1840. He referred to the 6th, 7th, 8th, and 9th sections, to show that the court are now only bound to appoint a sequestrator, *on the application of a lien creditor*, and that if the creditor makes no such application, he may proceed in the old way by levy and sale.

He then referred to act of 16th July, 1842, (Pamph. Laws, 1842, page 408, sect. 3,) providing a stay of execution in certain cases, to

Digitized by Google

www.libtool.com.cn

show that the act of 1840 had received a legislative construction, in conformity with the doctrine now maintained by the plaintiff in error.

All these proceedings took place after the act of 1840, and are therefore governed by it.

The language of the 3d sect. of 1840 is general, and embraces all species of estates for life, whether in improved lands yielding rents, issues, and profits, or not. It, therefore, embraced such an estate as the one in controversy here.

Reed, for defendant in error.—1. Could the life-estate of the husband be sold? By act of 16th June, 1836, sects. 68—71, life-estates are not *to be sold*, but to be *appraised*, to be delivered to *plaintiff* at the appraisement; sequestrator may be appointed. He had power to *rent* or to *sell*, to be applied to liens, according to priority. This was in substitution of, and repealed all other laws.

The act of 13th October, 1840, in Pamph. Laws of 1841, p. 3, sects. 6, 7, 8, 9, forms a new system as to life-estates; and *repeals* all the above sections, specifically. Where life-estates in improved lands are levied on, the *rents*, *issues*, and *profits* are to be sequestered, and sequestrator to be appointed. This does not apply to unimproved land. This system is still in force, and it is *inconsistent* with the right to buy and sell on execution by the sheriff any improved lands, &c., which produce rents, issues, and profits.

But unimproved lands could produce no rents, issues, and profits, and cannot be the subject of this proceeding; for it is the *rents*, *issues*, and *profits*, that are to be sequestered, and not the *estate*.

The act of 16th July, 1842, section 3, has reference to such life-estates as may be sold; not such as do not produce annual rents, &c.

It requires an appraisement of the estate; not the *rents*, &c. &c. And if the estate should not sell for two-thirds its value, proceedings were to be stayed, &c.

This act is now repealed by act of 17th February, 1845, Pamph. Laws, 42.

On general principles, the general acts, rendering lands liable to be taken in execution, and sold for the payment of debts, so far as regards life-estates in improved lands, are repealed by the act of 13th October, 1840.

A statute may be repealed, 1. By the express words of a subsequent statute. 2. By implication.

"Every *affirmative* statute is a repeal by implication of a precedent *affirmative* statute, so far as it is contrary thereto." Dwarris on Statutes, 673, in 9 Law Lib. p. 30, and 1 Ashmead, 179.

Digitized by Google

Then a life-estate, producing annual *rents*, *issues*, and *profits*, cannot be sold; a life-estate on unimproved lands may be sold as formerly.

Per Curiam.—The very point in contest was ruled by this court in Denniston's Appeal, (1 Penna. State Rep. 201,) a case not published when the cause before us was tried. This cause, however, was properly decided on principle.

Judgment affirmed.

Reigart v. Small.

A judgment confessed in contemplation of bankruptcy, between the date of the passage of the bankrupt act, and the date when it is to go into operation, is not void as to creditors; though it may prevent the party confessing the judgment availing himself of the bankrupt law.

Error to the Common Pleas of York county.

May 19.—On the 22d of December, 1841, Slaymaker confessed a judgment to the York Bank. Other judgments were subsequently obtained against him to a large amount. On the 9th of December, 1842, he filed his petition in bankruptcy, which was decreed finally, April 29, 1843. The sheriff of the county having sold his land, paid the money into court, and on the 5th of December, 1843, an auditor was appointed to distribute the fund. One of the judgment creditors objected to the award being made to the judgment of the bank, on the ground that it was a fraud on the bankrupt act. An issue was directed, on the trial of which his honour, (Durkee, President,) instructed the jury, the judgment must have been in contemplation of bankruptcy, and voluntarily given to render it void under that act.

These are all the facts material in the decision by the court here.

Fisher, *Hambly*, and *Ramsay*, for the excepting creditor, plaintiff in error.

Chapin, *Mayer*, and *Evans*, contrà.

Rogers, J.—This is an issue directed to try whether a judgment, The York Bank *v.* Henry Y. Slaymaker, entered the 22d December, 1841, on a note of the same date, for $18,000, was confessed in fraud of the bankrupt law of the United States. Also, how much if any thing was due on said judgment.

Numerous errors have been assigned which it is useless to consider,

Digitized by Google

as one exception goes to the plaintiff's right to sustain the action. The exception to which I refer is, that admitting the judgment was confessed in contemplation of bankruptcy, yet, under the circumstances of this case, it cannot be impeached.

The judgment of the York Bank was entered on a note of the same date, on the 22d December, 1841, a time intermediate between the passage of the act and the time the act went into effect, viz. the 1st of February, 1842. In Weiner *v.* Farnum, antè, 146, two points are ruled, particularly the last, which govern this case. 1st. That the bankrupt law has no operation, on an assignment for the benefit of creditors, valid by the previous laws of the state, until the 1st of February, 1842. That the words "future conveyances" contained in that act, mean those made after the act went into effect. 2d, which is most pertinent to this case, that where a judgment is confessed in contemplation of the passage of the bankrupt law, although it prevents the party from availing himself of the benefit of the act, yet it does not avoid the judgment.

The latter point rules this case, for, as the judgment was confessed before the bankrupt law went into operation, and subsequent to the passage of the act, although it may be construed to have been in contemplation of the bankrupt law taking effect, or of the passage of the law, it is a valid judgment, which cannot be avoided or impeached by the creditors of Henry Y. Slaymaker, whatever effect such a proceeding might have had on his petition for the benefit of the act.

Judgment affirmed.

2 488
157 396
2 488
19 SC 1457

Dysart *v.* Leeds.

A partition fence may be erected by either owner at pleasure, and his occupation of the requisite land of his neighbour for that purpose is not adverse, but by permission.

When the owner of the adjoining tract clears, and encloses to a fence already erected on the boundary line, he may insert the rails of his new fence into the partition fence, and if they project a short distance the injury falls within the maxim de minimis, &c.

Error to the Common Pleas of Huntingdon county.

May 22.—This was an action of trespass—pleas, non cul. and lib. ten. It appeared that Dysart, the plaintiff below, was the owner of a tract of land on which was a worm fence erected many years since.

The defendant owned the adjoining tract, and had placed a fence near that of plaintiff, and in a line with it, leaving a narrow lane between them, closed by a fence at one end. The trespass complained

Digitized by Google

of was the continuation of a fence on defendant's land, across the unenclosed end of the lane, up to the fence on plaintiff's land, and inserting rails therein, in the middle of a panel, extending through and over plaintiff's land.

The first question was, whether plaintiff's fence stood on the boundary line. This was left to the jury. The second, which is the only matter of exception here, was the charge of the court, (Durkee, President,) that even if the fence had stood in the same place for twenty years, defendants were not liable as trespassers, unless it was exclusively on plaintiff's land. But if it was on the line, defendants could at any time extend their enclosure up to it, and use it as they had done; and this the court considered a fair construction of the act for regulating partition fences.

Fisher, for plaintiff in error, contended that, as Dysart's fence had stood upon the ground occupied by it for upwards of twenty-one years, the ground and fence were absolutely his, and were not, after that period, held in common between them as a division line and fence; and that the defendants, by running the rails of an adjoining fence, which they were erecting, through the plaintiff's fence, and over his land, became trespassers. He admitted the right of the defendants to come to the plaintiff's fence; but denied that they had any right to join their fence to it, or to run the rails or poles of their fence through it. [*Rogers*, J.—There can be no adverse right, by lapse of time, to a division line or fence, or to a party wall. If it were a division line or fence, then the defendants had a right to join; if it were not, then they had no such right.] He cited Marks *v.* Hartley, 4 Watts, 261; Brown *v.* McKinney, 9 Watts, 567; 2 Sel. N. P. 482, 483.

Wilson, for defendant in error, was not heard.

June 1. PER CURIAM.—An occupant is not bound to join in a division-fence. He may set his fence, if it please him, not on the line of division but within it; and if his neighbour extend his fence across the line to join it, it is a trespass.

But if the one party set his fence on the very line, the other may not only join a panel of his fence to it, but insert the rails into it so as to extend a few inches beyond it; for when the charge assessed by the fence-viewers is answered, it becomes common property, and the use of it beyond the strict bounds of the license falls within the bounds of the maxim *de minimis*. Nor can the mutual privileges of the parties be taken away by the Statute of Limitations, or non user for twenty or more years. An occupant has a right to place his fence exactly on his

Digitized by Google

boundary, in anticipation of its becoming a division-fence; and consequently as much on his neighbour's land as on his own. His occupancy of so much of it as happens to be necessary, like the possession of a tenant in common, is not adverse, but for the benefit of both; and, as it is not an ouster, it can neither give nor take away a right. As the statute itself does not run, no presumption from non-user in analogy to it can have any effect; for conterminous owners are no more bound to clear and fence their lands within a particular period, to preserve their interest in a division-fence, than they are bound to build within a particular time to preserve their interest in a partition wall. Such, in substance, is the exposition of the act of 1700, by the court below, and it is a sound one.

Judgment affirmed.

Bell *v.* Ingram.

A judgment having been recovered in 1818, against executors, an execution was issued and levied on land in 1821. Writs of liberari facias were issued and returned not executed in 1823, 1824, and 1825. In 1828, a sci. to revive issued and judgment was obtained in 1829. The lien of the judgment continued and a sale by the sheriff passed a good title.

Error to the Common Pleas of Mifflin county.

May 26.—The plaintiffs below were the heirs of George Bell, in whom the title of the land was originally vested. The defendants claimed as purchasers at sheriff's sale, and the only question was, the validity of that sale.

In September, 1818, judgment was recovered against the executors of George Bell, with stay of execution for one year, and a fi. fa. issued in November, 1819, and was returned not executed.

In November term, 1821, an al. fi. fa. issued, which was returned, "extended." A liberari and an alias and pluries were issued in April and August, 1823, April, 1824; November, 1824, and January, 1825, which were returned not executed. In November, 1828, a sci. fa. to revive issued, on which judgment de bonis was confessed by the executors and terre-tenants.

In January, 1829, a fi. fa. issued, under which the property was subsequently sold to one under whom defendant claims.

The court, (Hepburn, President,) who tried the case at a special court, directed a verdict for the defendant.

Digitized by Google

Woods and *J. T. Hale*, for plaintiff in error.

Benedict, for defendant in error.

June 6.—SERGEANT, J.—The only question raised in this case is, whether the title passed by the sheriff's deed of 24th April, 1830. The plaintiffs allege that the lien acquired by the first levy under the alias fieri facias to November term, 1821, was abandoned by the issuing of the second fieri facias to January term, 1829. Supposing that it be so, yet if the lien of the original judgment entered on the 18th September, 1818, with a stay of execution for one year, continued, the title acquired under the second execution, issued on the judgment, reviving the former judgment, was valid. As the law stood before the act of Assembly, of the 26th March, 1827, a fieri facias duly issued and levied on land continues the lien of the judgment more than five years from the judgment, as was held in the Commonwealth *v.* McKisson, 13 Serg. & Rawle, 144, and Young *v.* Taylor, 2 Binn. 342. And that was the case here: a fieri facias within the year; an alias levied on the land, which was extended, and writs of liberari issued from year to year down to January term, 1825. Then came the act of Assembly of 26th March, 1827, the effect of which was to compel the plaintiff, if he wished to continue the lien of his judgment, to have it revived by agreement or scire facias, or else it would have been lost. Ebright *v.* The Bank, 1 Watts, 397. For that purpose the act gave two years for those judgments which were then liens according to existing law.

This limitation was extended one year by the act of 23d March, 1829. Under this provision, it would seem this judgment was duly revived within the year last allowed.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

GILLESPIE *v.* HEWLINGS.

Special bail discharged by act of 1842, abolishing imprisonment for debt.

Where defendant in custody of his bail, after the passage of that law, but before it was known, gave bond to take the benefit of the insolvent law, and an exoneretur was entered on the recognisance; *held* no recovery could be had against the sureties; for the arrest by the bail was illegal, and the bond could not legally have been demanded.

ERROR to the Common Pleas of Mifflin county.

May 26.—This was an action against a surety on an insolvent bond, in which the jury found a special verdict: viz., that judgment was obtained against Cornwell in 1839, before a justice, and an appeal taken with defendant as his bail, conditioned to surrender, &c., if judgment was had and not paid. After award, judgment was obtained, bail having been entered, on appeal from the award under the compulsory arbitration act, in April, 1842. A bond conditioned to apply for a discharge as insolvent, was approved on the 13th of July, 1842, and on the 1st of August, the defendant in the execution being then in custody of his bail, an exoneretur was entered as to the bail, it appearing said bond had been given to appear and abide all orders, &c. But, whether, &c.

The court (Wilson, President) gave judgment for the defendant for the following reasons:

After deciding that the arrest was illegal, for reasons which it is considered unnecessary to repeat, as the point has since been settled by Kelly *v.* Henderson, 1 Barr. 495, his honour continued—

"The bond in this case was taken on the application of Cornwell, (who was detained on a bail-piece,) under the act of 1836, authorizing courts to grant relief in cases of persons held in custody by their bail. And the jurisdiction of the judge was exercised under the provisions of the 4th section, authorizing him to discharge a debtor so detained, on his giving bond with security approved of by the judge, with the condition prescribed by the 6th section of the same act. Such arrest by a bail-piece was taken away by the legislature before the arrest was made. The act of Assembly abolishing imprisonment for debt virtually repealed that part of the act relating to insolvent debtors which authorizes the jurisdiction of the courts to be exercised in the case of a person held on a bail-piece, issued in any civil suit or proceeding for the recovery of any money or damages upon contract. The act takes away the right of the bail to arrest on a bail-piece, and, of course, does not contemplate such case thereafter to exist (whereas in this case it was on a civil contract for the recovery of money) upon

Digitized by Google

which the judge should exercise the power given by the 6th section of the act relating to insolvent debtors, under which this bond was taken. And I am of opinion that the bail in such bond will be relieved in all cases where the bond is given by the principal to procure his discharge from an arrest that was illegal.

"The act of 12th July, 1842, was intended, and does take away the remedy of creditors (except in the few enumerated cases in the act) against the body of the debtor, instead of the money, or the estate and effects of the debtor, out of which to realize the amount of his judgment. All such recognisances or obligations authorized by law to secure to the creditor the body, whether they authorized the bail to surrender the principal or the principal to surrender himself in discharge of the obligation, were by the act abolished, and any such obligation given under an unauthorized arrest, may, on a plea in bar, by the bail be defeated.

"In the case of Mason v. Benson, 9 Watts, 287, a 'defendant, arrested on a capias ad satisfaciendum, gave bond conditioned for his appearance at the next term, to take the benefit of the insolvent law. During that term, the court, on motion, set aside the capias ad satisfaciendum, and the defendant did not apply by petition for the benefit of the insolvent laws. Held, that the bond was not forfeited, but became inoperative, when the process was set aside.' Here also the bond was inoperative, in consequence of the act passed, relieving the body of the defendant from arrest. The basis upon which this bond was given had been taken away by the legislature, but this was not known to the parties at the time. The basis being gone, there was nothing to support the bond. In the case referred to, the Supreme Court say 'the bond was but a substitute for the imprisonment.' So in this case, the bond was but a substitute for the imprisonment, and had the defendant been detained in prison when arrested on the bail-piece, on hearing that an act had been passed relieving him from arrest, he could have at once been discharged. The act of Assembly had relieved him from imprisonment, where he might be held to answer the judgment of the plaintiff, as the law stood at the time the recognisances were entered into, and as understood by the parties, at the time the bond conditioned to take the benefit of the insolvent laws was given. This remedy against the body was directly taken away by the legislature, and a surrender of himself on the bond would have been merely nominal. In the case of Beers v. The West Branch Bank, 7 Watts & Serg. 365, the Supreme Court say, 'When the legislature abolished imprisonment for debt, in all but a few excepted cases, it virtually abolished special bail in all but those cases, and consequently every recognisance

Digitized by Google

with condition to surrender the body.' And in Russell *v.* Champion, 9 Wend. 462, a case arising under the statute of New York, abolishing imprisonment for debt, where an exoneretur was ordered on a bail-piece, on it being shown that the action was such as under the act exonerated the defendant from arrest, the court say, 'there cannot be any reason for refusing an exoneretur, to which the bail might, at any moment, entitle themselves by surrendering the defendant, or to which the defendant might entitle them by surrendering himself in discharge of his bail. Whenever it is shown that a defendant is not subject to arrest, it is matter of course to order an exoneretur.'

"The same thing is effected by a plea in bar by the bail, where the bond upon which the bail is sued is but a substitute for imprisonment, and conditioned that the principal shall surrender himself, and such right of the creditor to imprisonment of the body, to answer the judgment, is taken away by legislative enactment.

"With these principles in view, governing the cases we have referred to, without the aid of the second matter of defence relied on, we are of opinion and direct, that judgment be entered for the defendant on payment of verdict fee, secundum regulam."

Candor, for plaintiff in error.—Hewlings the defendant, the bail in the insolvent bond, was also bail on both appeals. He, and not the plaintiff, arrested Cornwell, contrary to the act of Assembly of the 12th of July, 1842, abolishing imprisonment for debt; and may, under all the circumstances, be presumed to be in collusion with Cornwell.

Cornwell might have availed himself of his proper remedy, by a writ of habeas corpus. But instead of resorting to this writ, he allowed himself to be held under the arrest, without objection or claiming his privilege. He, by this course of conduct, waived his rights and privilege. Any one can dispense with a privilege or right given for his own benefit. Winder *v.* Smith, 6 Watts & Serg. 429, 431.

Although the arrest was illegal, Hewlings is estopped from asserting it. Egbart *v.* Darr, 3 Watts & Serg. 517.

If Cornwell could take advantage of it, Hewlings cannot, Johnston *v.* Coleman, 8 Watts & Serg. 71.

If a bail-bond be given in common and proper form, it would admit, as a fact, the arrest of the principal, and the sureties would not be allowed to deny that fact, against their own admission, under seal. Bean *v.* Parker, 17 Mass. R. 601.

A voluntary surrender of one, who has given bond, will not release the bail, 1 Watts & Serg. 379. He also cited Lilley *v.* Torbet, 8 Watts & Serg. 89.

Digitized by Google

Fisher, for defendant in error.—The bond was dated the 13th of July, 1842, the day after the act abolishing imprisonment for debt had been passed; the arrest of Cornwell was a trespass, the act of the 12th of July, granting him immunity from arrest in civil cases, having been passed and gone into operation the day previously. The bond was therefore given after the passage of the act, and after it took effect. It was given under the belief that Cornwell was liable to arrest and imprisonment; to free him from which, it was given. The bond was therefore without consideration, and void, 9 Watts, 287.

June 6, 1846. ROGERS, J.—We think the court was right on both points. We order that the judgment be affirmed for the reasons given by Judge Wilson.

Judgment affirmed.

---

2 495
192 339

TAYLOR v. JACOBY.

A note payable one day after date, is not due, for the purpose of commencing suit or entering judgment, until after the termination of the day of payment, though by commercial usage it may be demanded at a reasonable time on that day.

May 27.—The plaintiffs in error gave a note to plaintiffs below, dated July 30, 1845, promising to pay to plaintiffs below, their executors, administrators, and assigns, one day after the date thereof, without defalcation, for value received, with a power of attorney annexed to confess judgment in favour of the payees for the "above" amount. On the 31st of July, judgment was entered by virtue of the warrant of attorney, for the amount of the note, "with interest from the 31st July." An execution was issued on the same day, which the court (Woodward, President) refused to set aside on motion.

Burnside, *Curtin*, and *J. T. Hale*, for the plaintiffs in error.—The note was dated the 30th of July, 1845, and payable *one day after date*. This note was given when Taylor was not bound to give it, as the bills for goods had not become due. Taylor had the whole of the 31st of July to pay the note, and execution could not issue until the day after. Such was the understanding of Taylor, and the meaning and intentions of the parties. They cited Markley *v.* Swartzlander, 8 Watts & Serg. 177, to the point, that whatever took place at the time of the execution of the note might be given in evidence. The execution issued prematurely. The plaintiff has put a construction

Digitized by Google

upon the words in the note, "*one day after date*," in his statement, by calculating interest from the 31st day of July, and he cannot now controvert it. The statement and warrant to confess judgment is signed by the counsel, as attorney for the plaintiff. If one have money to pay, or a duty to perform on a certain day, he has until the last moment of that day to pay the money or perform the duty. Pugh *v.* Duke of Leeds, Cow. R. 714; 2 Campb. N. P. 294; Harris *v.* Blen, 16 Maine Rep. 175, and the authorities there cited, which are full to the point; Osbourne *v.* Robinson, 3 Wend. 170; Thomas *v.* Shoemaker, 6 Watts & Serg. 181; Henry *v.* Jones, 8 Mass. 453. As to computation of time, in a statute, they cited Ex parte Dean, 2 Cow. R. 605; Avery *v.* Stewart, 2 Conn. R. 69, 83; Homan *v.* Lizwell, 6 Cow. R. 659. Note payable *one day from date*, the day of the date is excluded, and the payer has the whole of the next day, even to the last instant, to pay; Presby *v.* Williams, 15 Mass. 193; Shoemaker *v.* Shurtliff, 2 Dall. 133; 9 New Hamp. R. 304. They also cited Chitty on Contracts, 80, as to the meaning and intention of the parties to a contract.

McAllister, for defendant in error.—The debt, for which the note and warrant to confess judgment was given, was due. The legal question is, was the day on which the note was executed to be excluded or included? The defendant gave the plaintiff power to issue execution against him, "*one day after date.*" Judge Washington ruled, in Pierpont and Lord *v.* Graham, 4 W. C. C. R. 240, that where the expressions are *from* the date, he understood the rule to be, that if a present interest was to commence *from the date*, the day of the date was included; but if they were used merely to fix a terminus, from which to compute time, the day was in all cases excluded. Powell on Pow. 433 and 450, where the case of Pugh *v.* The Duke of Leeds is reviewed. The words "*after date*," and *from* the day of the date, bear the same legal signification. Pow. on Pow. 502. [*Rogers*, J.—Is not the question, after all, one of intention? Was it intended that Taylor was to pay on the 30th, or had he the whole of the 31st to pay? If he were to have the whole of the 31st to pay the note, the execution issued prematurely.] In Lysle *v.* Williams, 15 Serg. & Rawle, 136, this court held, that where a bond was executed on the 22d of July, 1818, payable in five years *from* the date, a scire facias, on the judgment confessed on the warrant, issued on the 22d of July, 1823, was not too soon. An action on a note against the endorser, on the day it became due, was sustained. Stead *v.* Brett, 1 Pick. R. 402.

Digitized by Google

www.libtool.com.cn

GIBSON, C. J.—It is indisputable, that a bond cannot be put in suit on the day appointed for the payment of it, and that the obligor has the whole of it for performance of the condition. It looks like an affectation of learning to quote authority for a principle so familiar; but we may be allowed to say, that it was established at least so early as Anderson *v.* Barton, 1 Roll. R. 189, and recognised so late as Leftly *v.* Mills, 4 Term Rep. 173. It is a general principle of the common law, and it is applicable not only to cases in which payment is performance of a condition to save a forfeiture, but also to rent, which is shown by Clun's case, 10 Rep. 127, and by Duppa *v.* Mayo, 1 Saund. 288 c, to be demandable only at the last instant of the day. The only exception to it is the case of a bill of exchange, which may be protested within a reasonable time before the end of the last day of grace; but the exception stands, as the days of grace themselves stand, on arbitrary and inveterate usage, which makes up the body of the commercial law. On what day then was the debt in question payable? for, till it was ended, the plaintiff could no more sue out an execution on his judgment, than he could have sued out an original writ on his bond, had it been a plain one. The thing that causes the mind to pause at the threshold of the inquiry, is our own decision in Lysle *v.* Williams, 15 Serg. & Rawle, 135, which, however, is right in principle, whatever may have been its application to the particular case. It is certain that the questionable words in this bond are to be received in the sense which the parties ascribed to them, the question being, in every case of the kind, one of intention. But the intention is to be ascertained by rules of interpretation established by precedent. It is entirely clear, from Pugh *v.* The Duke of Leeds, Cowp. 714, that the words from, or after, the date, or the day of the date, include the day when they are used in a conveyance to create an estate; but it is just as clear, from other cases about to be noticed, that they exclude it when they are used in an instrument to perpetuate the evidence of a debt. Indeed, it seems from what is said in Preston on Conveyancing, p. 387, that the distinction sprung out of that decision, previous to which the general rule was to exclude the day in both cases. There are, however, some anomalous and apparently discordant decisions, which belong to neither class, and which are reducible to no particular head, from which, depending as they do, for the most part, on special enactment, no principle can be extracted; at least, none was extracted from them by Sir William Grant, in Lester *v.* Garland, 15 Ves. 253, when he passed them in review. But it is now a settled rule, that as the law rejects fractions of a day, it views it, for most purposes, as an indivisible point, and consequently, that "the date," or "the day of

Digitized by Google

the date," being coextensive with the entire day, excludes it when it occurs in a bill, note, or bond. The law is certainly so in the case of a bill of exchange, Bayley on Bills, 154; and though Mr. Chitty puts the rule which governs it on commercial usage, it was applied, in May *v.* Cooper, Fortescue, 376, to a note *where the days of grace were not allowed.* It was dated the 21st of July, and was payable ten days after date. The money was tendered on the 1st of August, and the court said it was one day too late. It is scarce necessary to remark, that the tenth day, the date being excluded, was the last day of the month. In like manner it was applied in Coleman *v.* Sayer, 1 Barnard. B. R. 303, S. C., 2 Stra. 289, to the day of sight, in a bill of exchange, though the contrary had been held by Powell and Neville, in Bellasis *v.* Heister, L. Raym. 240, but against the opinion of Chief Justice Treby. Hitherto we have had no application of it to a bond, probably because the words seldom occur in such an instrument; but it was applied in Henry *v.* Jones, 8 Mass. 453, to a promissory note, and in Avery *v.* Stewart, 2 Connect. 72, to a note *which was not negotiable;* in both it was said to be applicable also to a bond. In both, too, it was said—in the latter by Mr. Justice Gould—that a different interpretation would make a note payable a day after date, demandable instanter; and he might have added, that such a note is not made payable on demand, for the very purpose of giving the party an entire day to collect the means of meeting his engagement. The case put to illustrate the consequences of a different rule, is the very case before us; and to say that the day of payment is not the day after the date, but the day of the date itself, would be contrary to the plain meaning of the words and obvious design of the parties, who evidently intended that the debt should be payable on the second day; and as the defendant was entitled to the whole of it for performance of his engagement, he could not be called on by process, original or judicial, before it had expired.

Judgment reversed.

Digitized by Google

www.libtool.com.cn

INDEX.

A.

ABATEMENT.

1. The death of defendant, between verdict and judgment, if not more than two terms intervene, cannot be averred for error, since the statutes 17 Ch. 1, c. 8; 1 Ja. 2, c. 17, s. 5. *Chase* v. *Hodges*, 48.
2. A. having pleaded a partnership in abatement, the plaintiff commenced suit within a year and a day after the writ was quashed; process was served on the original defendant alone; the statute of limitations does not run since the commencement of the original action. *Downing* v. *Lindsay*, 382.

See FOREIGN ATTACHMENT, 4.

ABATEMENT OF NUISANCE.

See NUISANCE.

ACCORD AND SATISFACTION.

1. Mere receipt of payment, for one item of an entire contract, is no waiver of a demand for the residue. *Tompkins* v. *Haas*, 74.
2. An account for liquor, sold on credit by a tavern-keeper, is null within the act; hence the allowance in a settlement of accounts will be no bar to an action. *Driesbach* v. *Keller*, 77.

ACCOUNT STATED.

1. A credit prohibited by statute allowed in a settlement of accounts, no bar to an action. *Driesbach* v. *Keller*, 77.
2. A copy of an account taken from a book, from which a settlement had been made, was delivered to the party, and retained five months without objection; a copy of that copy, and the book from which it was taken, showing the same balance, are evidence. *Phillips* v. *Tapper*, 323.

ACTION.

1. The school directors of a district should sue in their public capacity. *Kingsley* v. *The School*, 28.
2. In an action for breach of promise of marriage, seduction cannot be given in evidence in aggravation. *Weaver* v. *Bachert*, 80.

Digitized by Google

www.libtool.com.cn

ACTION.

3. Mutual promises must be proved; at least, circumstantially. Consent to intercourse, and purchase of furniture, &c., are not evidence of a promise by the woman. Nor will his admissions of a promise, which it is uncertain as to what act it referred, be evidence against the man. *Id.*
4. The court are not to strain evidence against a seducer; and evidence of a promise by the woman, in her action, must be such as would support an action against her by the man. *Id.*
5. The guardians of the poor must make the complaint for desertion of wife and children under 6th section of the act of 1812. *Commonwealth* v. *Nathans*, 138.
6. It should be before two magistrates. *Id.*
7. And the guardians, not the Commonwealth, should be plaintiffs.—Per KENNEDY, J. *Id.*
8. The right to hold to bail given to one magistrate is auxiliary to the proceeding before two justices. *Id.*
9. By landlord, treating tenant holding over as tenant or trespasser. *Hemphill* v. *Flynn*, 144.
10. Cannot be maintained on an instrument forbidden by law to be issued. *Southern* v. *Morris*, 175.
11. To call an attorney a cheat is actionable, even though an indictable offence be not imputed. *Rush* v. *Cavenaugh*, 137.
12. A conveyance, reserving a rent in fee, was altered by the insertion of material words, after delivery, by the agent of the grantor; the land passes discharged of the covenants. *Arrison* v. *Harmstead*, 191.
13. Nor can a recovery be had on the original contract, independent of the deed. *Id.*
14. Nor by an action for use and occupation; for the grantee is the owner of the land. *Id.*
15. The holder of a certificate of deposit having commenced a suit by foreign attachment, surrendered it and took new certificates, the action cannot be maintained thereon. *Manuel* v. *The R. R.* 198.
16. Trespass for an injury to timber during the possession of the lessee for years cannot be maintained by the landlord. *Greber* v. *Bleckner*, 289.
17. A landlord cannot maintain trespass for cutting timber as to which his lessee was restricted.—*Aliter*, had it been expressly *reserved* in the lease. *Id.*
18. Fraudulent suppression of facts or false assertion respecting a note given in payment, gives an action on the original contract. *Martin* v. *Pennock*, 376.
19. By grantor against grantee, in consideration of assumption of a lien on the land, whether covenant or case, *Quære*. *Dubbs* v. *Finley*, 397.
20. A note payable one day after date, is not due, for the purpose of commencing suit or entering judgment, until after the termination of the day of payment, though by commercial usage it may be demanded at a reasonable time on that day. *Taylor* v. *Jacoby*, 495.

See FOREIGN ATTACHMENT.

Digitized by Google

ACTS OF ASSEMBLY AND STATUTES CITED AND COMMENTED ON.

13 Eliz. Fraudulent conveyance. *Kimmel* v. *McRight*, 38.

17 Chas. 2, c. 8. } Error. *Chase* v. *Hodges*, 48.
1 Jas. 2, c. 17, s. 5. }

Congress.—1842. Bankrupt. *Weiner* v. *Farnum*, 146; *McMullen* v. *The Bank*, 343; *Reigart* v. *Small*, 487.

Constitution.—Courts of Quarter Sessions. *Commonwealth* v. *Martin*, 244.

1700. Partition fences. *Painter* v. *Reece*, 126; *Dysart* v. *Leeds*, 488.

1713. Limitations. *Downing* v. *Lindsay*, 382.

1770. Apprentice. *Commonwealth* v. *Conrow*, 403.

1772. Landlord and tenant, summary proceedings. *Hohly* v. *German*, 293.

1780. } Vacant city lots. *Farr* v. *Swan*, 245.
1781. }

1794. Sunday. *Commonwealth* v. *Kendig*, 448.

1798. Judgments, revival of. *Philadelphia Fire and Inland Navigation Company's Appeal*, 263.

1805. Defalcation act, certificate for plaintiff. *Churchman* v. *Parke*, 407.

1806. Warrants of attorney. *Meyer* v. *Littell*, 177.

1806. Amendment. *Rush* v. *Cavenaugh*, 190; *Winder* v. *Northampton*, 447.

1806. Mechanics' lien. *Christine* v. *Manderson*, 363.

1807. Ejectment. *Man, Jun.*, v. *Drexel*, 202; *Drexel* v. *Man, Jun.*, 207; *Drexel* v. *Man*, 271; *Freedley* v. *Mitchell*, 100.

1808. Mechanics' lien. *Christine* v. *Manderson*, 363.

1810. Justices, constable's return. *Burkholder* v. *Keller*, 51.

1810. Justices, costs on appeal. *Haines* v. *Moorhead*, 65.

1810. Arbitration. *Winder* v. *Northampton*, 447.

1812. Desertion of wife. *Commonwealth* v. *Nathans*, 138.

1815. Notaries. *Etting* v. *Schuylkill*, 355.

1818. Nuisance, Board of Health. *Kennedy* v. *Board* 366.

1820. } District liens. *Council* v. *Moyamensing*, 224.
1821. }

1823. Official documents, evidence. *Farr* v. *Swan*, 245.

1827. Issue on distribution of sheriff's sale. *Myers' Appeal*, 463.

1830. Mortgages, lien of. *Kuhn's Appeal*, 264.

1830. Nuisance, Board of Health jurisdiction. *Kennedy* v. *The Board*, 366.

1832. Register. *Sarkie's Appeal*, 159.

1833. Wills. *Jackson* v. *Jackson*, 212; *Baptist* v. *Robbarts*, 110.

1834. Warrants of attorney. *Meyer* v. *Littell*, 177.

1834. County commissioners. *Wilson* v. *Clarion*, 17.

1834. To charge decedents' land. *Atherton* v. *Atherton*, 112.

1834. Tavern act. *Driesbach* v. *Keller*, 77.

1836. Mechanics' lien. *Christine* v. *Manderson*, 363.

1836. Bonds. *Thornton* v. *Bonham*, 102.

1836. Executions. *Parget* v. *Stambaugh*, 485.

1836. Costs on appeal from awards. *Merrit* v. *Smith*, 161.

1839. Official bonds of justices. *Commonwealth* v. *Kendig*, 448.

Digitized by Google

ACTS OF ASSEMBLY AND STATUTES CITED AND COMMENTED ON.

1840. District liens. *Council* v. *Moyamensing*, 224.
1840. Executions. *Parget* v. *Stambaugh*, 485.
1842. Nisi Prius act. *Lavery* v. *The County*, 232; *Catherwood* v. *Konn*, 341; *Maule* v. *Shaffer*, 404; *Churchman* v. *Parke*, 406.
1842. Mobs. *Donoghue* v. *The County*, 230.
1842. Imprisonment for debt abolished. *McFadden* v. *Dilley*, 61; *Gillespie* v. *Hewlings*, 492.
1842. Partition fences. *Painter* v. *Reece*, 126.
1842. } Tax sales. *Lamberton* v. *McClelland*, 22.
1843. }
1843. Transferring jurisdiction of the Criminal Sessions. *Commonwealth* v. *Nathans*, 138; *Commonwealth* v. *Martin*, 244.
1843. District liens, defence to. *Kensington* v. *Keith*, 218.
1845. March 20. Appeals from justices. *Merrit* v. *Smith*, 161.
1845. Executions. *Dailey* v. *Straus*, 401.
1845. False pretences. *Commonwealth* v. *Burdick*, 163.

ADMINISTRATORS.
See EXECUTORS.

ADMISSIONS.
See EVIDENCE, 32, 33, 56.

ADVERSE POSSESSION.
See LIMITATIONS, STATUTE OF.

ADVERTISEMENT.
See SHERIFF'S SALE, 8.

AFFIDAVIT OF DEFENCE.
1. In scire facias on a mechanic's claim, the affidavit by the owner, that a release of him had been executed and delivered to the contractor, under an agreement between the owner and contractor, and at request of the contractor; and after exhibition to the owner, the name of plaintiff was struck off without the owner's knowledge: *Held* bad for not averring a delivery to, or to the use of the owner. *Wetherill* v. *Harbert*, 348.

AFTER-BORN CHILDREN.
See WILLS, 9, 10.

AGENT.
1. Evidence of authority from calling in reply to letter to the principal. *Downing* v. *Lindsay*, 383.
See POWER, 1.
ATTORNEY, 3.

Digitized by Google

www.libtool.com.cn

ALTERATION OF INSTRUMENTS.

1. The erasure of the name of one obligee, and substitution of another, avoids the instrument as to parties not consenting. *Smith* v. *Weld*, 54.

See DEEDS.

AMENDMENTS.

1. A. being devisee in fee of a moiety of a house, and executory devisee of the other moiety, a fieri facias was levied on both estates and returned unsold for want of buyers; a venditioni, reciting this levy, commanded a sale of the vested moiety; the return was of a sale in obedience thereto, and the sheriff conveyed both estates.—*Held*, that both moieties passed. For the court will amend the writ according to the levy, it appearing clearly from the deed, that all the land levied on was actually sold, and forty years having elapsed. *De Haas* v. *Bunn*, 335.
2. And where the cause of action was alleged to have existed against the firm, and the promise set out was by the partner, who alone was served, such a defect cannot be taken advantage of on the trial, and on error after a trial on the merits, the court will direct the declaration to be so amended as to show what was tried. (But, *query*, if the declaration here recited a cause of action against any one but the party served.) *Downing* v. *Lindsay*, 382.

APPORTIONMENT.

See DISTRICT LIENS.

APPRENTICE.

1. Indenture of apprenticeship, binding a boy for a term of years, during which the master, in lieu of the common covenants for lodging, &c., agreed to pay him a certain sum per week, for at least nine months in each year, held valid. *Commonwealth* v. *Conrow*, 402.
2. The master is bound to take charge of the conduct of the apprentice during the whole term, and if he neglect it, the parent has authority. *Id.*

APPROPRIATION OF PAYMENTS.

1. A. informed B. of his intention to draw on him at Philadelphia, and remit funds via Mobile to meet the draft. B. declined entering into the operation, and informed A. the remittance would be wholly at his risk. B. drew and remitted the funds to T., at Mobile, for account of B. T. purchased a draft with these and other funds, and remitted to B., who was informed with what funds the purchase was made. B. cannot apply the proceeds of the draft to T.'s debt, but holds it for A. He should have refused to receive the money had he intended to repudiate the transaction entirely. *Pearl* v. *Clark*, 350.

ARBITRATION.

1. A rule of reference cannot be withdrawn by the party entering it, without leave. *Withers* v. *Haines*, 435.
2. If the record show the plaintiff named one arbitrator, the prothonotary for

Digitized by Google

www.lutool.com.cn

ARBITRATION.
defendant one, and plaintiff a third, the presumption the number was fixed by the prothonotary, shown from his not appointing more, satisfies the law requiring him to fix the number. *Id.*
3. An award may be made pending demurrer. *Id.*
4. A party, after entering a rule to choose arbitrators, may alter the day for selection, if before notice be given. *Crawford* v. *Gable*, 444.
5. After award and appeal, a new count varying the cause of action cannot be filed. *Winder* v. *Northampton*, 446.
6. Count in trover states a different cause of action from one for deceit, under this rule, though they might have been originally joined. *Id.*
See RES JUDICATA.

ARTICLES.
See EQUITY.
VENDOR AND VENDEE.

ASSIGNMENT FOR CREDITORS.
1. Bankrupt act had no operation on until February 1st, 1842. *Weiner* v. *Farnum*, 146. *Schuylkill Navigation Company's Appeal*, 148, n.
2. Auditors having been appointed to distribute an estate assigned for creditors, the ward of the assignor permitted to claim funds belonging to her, and loaned by her guardian, which had been received by the assignees. *In re Roberts*, 371.
3. Declarations of the assignor before assignment admissible to identify the fund, though he might have been called. *Id.*

ASSIGNEES, COMMISSIONS ALLOWED.
See TRUSTS, 11.

ASSUMPSIT.
A guarantee without the request of the debtor is without consideration as to him. *Kean* v. *McKinsey*, 30.

ATTACHMENT IN EXECUTION.
1. *Semble:* a note deposited in pawn may be attached as a debt under an attachment and execution against the owner; but it is proper to return specifically what goods, &c., were attached. *Rhoads* v. *Megonigal*, 39.
2. An attachment in execution and scire facias having been served on the original defendant, and the garnishee; the jury should be sworn as to the garnishee alone, on the trial of the issue on the plea of nulla bona; for though both parties are required to be served, the proceedings are distinct. *McCormack* v. *Hancock*, 310.
3. Money in the hands of an attorney at law may be levied on by attachment in execution under a judgment against his client. *Riley* v. *Hirst*, 346.

Digitized by Google

ATTORNEY.

1. The sheriff is entitled to the same privilege, in his communications with his attorney, as other persons. *Paxton* v. *Steckel*, 93.
2. The proper course, on failure to file a warrant of attorney, is to stay proceedings, not quash the writ. *Meyer* v. *Little*, 177.
3. Where a general authority was given by the owner and chief of a trading "institution," to a factor residing abroad, as chief of a branch house, on all matters connected with the house, he is authorized to institute a suit in the individual name of one of his principals, without evidence that the property belonged to the "institution." *Id.*
4. To call an attorney a cheat is actionable, even though an indictable offence be not imputed. *Rush* v. *Cavenaugh*, 187.
5. Counsel, employed by a prosecutor, acts for the attorney-general; and, in assenting to the discharge of an accused, must be guided by his own judgment on the evidence, of the innocence of the party, even though it be contrary to the oath of the client. *Id.*
6. And in such case he is entitled to compensation. *Id.*
7. Practice on entering judgment against husband and wife, on warrant by wife, dum sola. *Enue* v. *Clark*, 234.
8. Money in the hands of an attorney at law may be levied on by attachment in execution under a judgment against his client. *Riley* v. *Hirst*, 346.

ATTORNEY-GENERAL.

See ATTORNEY, 5.

AUCTION.

Purchases at an auction constitute an entire contract. *Tompkins* v. *Haas*, 74.

AUDITORS.

1. Duty to take down evidence for the court to judge of its effect. *Woelper's Appeal*, 72. *In re Roberts*, 371.

Auditors having been appointed to distribute an estate assigned for creditors, the ward of the assignor permitted to claim funds belonging to her, and loaned by her guardian, which had been received by the assignees. *Id.* 371.

AWARD, COSTS ON APPEAL FROM.

See COSTS, 1, 2.

B.

BAIL.

1. For stay of execution, entitled to have proceeds of sheriff's sale applied to the judgment for which he is security, in preference to a younger lien. *Carneghan* v. *Brewster*, 41.
2. A bond to take the benefit of the insolvent law is now discharged by the act of July 12th, 1842. *McFadden* v. *Dilly*, 61. Unless given after the

Digitized by Google

BAIL.

passage of that act, and when it was not lawfully demandable. *Gillespie* v. *Hewlings*, 492. Special bail discharged by that act. *Id.*

3. Proceedings cannot be sustained on an insolvent's bond, after an order to answer for fraudulent insolvency, during the pendency of the indictment, there being an appearance by defendant. *Potts* v. *Fitch*, 173.
4. Where the bail has been reduced by a subsequent order, the latter is the only one which can be recognised as obligatory. *Id.*

BANKRUPTCY.

1. One of two obligees having been discharged as a bankrupt, the plaintiff may enter a nol. pros. as to him, and proceed to trial against the other. *Commonwealth* v. *Nesbitt*, 16.
2. The Bankrupt Act has no operation on an assignment for the benefit of creditors, valid by the previous law of this state, until the 1st February, 1842. The words, "future conveyances," contained therein, mean those made after the act went into operation. *Weiner* v. *Farnum*, 146.
3. The liability of a principal to his guarantee, not having paid the money, is not discharged by the bankrupt law. *McMullin* v. *Bank*, 343.
4. Debt payable in books and labour, discharged under the bankrupt law. *Id.*
5. A judgment confessed in contemplation of bankruptcy, between the date of the passage of the bankrupt act, and the date when it is to go into operation, is not void as to creditors; though it may prevent the party confessing the judgment availing himself of the bankrupt law. *Reigart* v. *Small*, 487.

BEQUEST.

See WILLS.

BILLS OF EXCEPTIONS.

See PRACTICE, 19.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Endorser is liable for interest on a bill according to the law of the place on which it is drawn. *Mullen* v. *Morris*, 85.
2. Endorsee of an over-due note takes it, subject to the equities arising out of the note itself, and not to set-off generally. *Hughes* v. *Large*, 103.
3. *Semble:* The commercial law governs negotiable notes in Pennsylvania; they are not dependent on the acts of Assembly. *Id.*
4. An endorser is not liable on a promissory note of a corporation which it could not lawfully issue. *Southern* v. *Morris*, 175.
5. Even though the instrument purported to be a certificate of deposit, which it was lawful to issue: for the properties of promissory notes, which are forbidden, cannot be given to lawful instrument. *Id.*
6. An endorser "without recourse," of a treasury note which had been paid, and afterwards stolen, and put in circulation, the marks of payment having been fraudulently obliterated, is liable to his endorsee; for these

www.libtool.com.cn

Digitized by Google

BILLS OF EXCHANGE AND PROMISSORY NOTES.
words merely limit his responsibility by the law-merchant in the event of the instrument being dishonoured. *Frazer* v. *D'Invilliers*, 200.
7. United States Treasury notes are negotiable instruments. *Id.*
8. Drawee cannot refuse acceptance, and receive funds with notice that they were provided to meet the draft; he must reject the whole or none. *Pearl* v. *Clark*, 355.
9. Protest of a foreign notary not evidence of a demand of payment of a promissory note. *Etting* v. *Schuylkill Bank*, 355.
10. A notice dated on the second day of grace, stating a demand on that day, will not bind an endorser. *Id.*
11. An entire day is allowed for transmitting a notice by every endorser, and a direct notice which reaches an endorser as soon as he would have received it by regular transmission through all the parties, is sufficient, though they live in the same town; but a delay beyond the day by any one endorser, will discharge the prior parties. *Id.*
12. The holder of a check, payment of which had been refused for want of funds, passed the same to his vendor, stating, in answer to inquiries, there was nothing wrong about it. *Held*, the suppression of these facts were fraudulent, and a recovery might be had on the original contract of sale. *Martin* v. *Pennock*, 376.
13. The drawer of an accommodation note is not entitled to the privileges of a surety, as between himself and strangers, having, by the instrument, agreed to be considered the principal; nor does he acquire the rights of a surety by subsequently giving a bond for the amount of the note. *Lewis* v. *Hanchman*, 416.
14. A note payable one day after date is not due, for the purpose of commencing suit or entering judgment, until after the termination of the day of payment, though by commercial usage it may be demanded at a reasonable time on that day. *Taylor* v. *Jacoby*, 495.

BOARD OF HEALTH.
The District Court has jurisdiction, under the act of 1818 and 1830, of all claims for the removal of nuisances by the Board of Health, though less than $100. *Kennedy* v. *The Board*, 366.
The form of the claim is regulated by the mechanics' lien acts in force before that of 1836. *Id.*
The board have final jurisdiction in determining the fact of nuisance, which they order to be removed. *Id.*
The 27th section of the act of 1818 has no reference to a nuisance on a vacant lot, so far as it requires a warrant from a justice, and a visit by a committee of the board, before an order for removal be made. *Id.*

BONDS, ASSESSMENT OF DAMAGES ON.
See FOREIGN ATTACHMENT, 2.
DEED, 9.

BREACH OF PROMISE.
See ACTION.

Digitized by Google

www.libtool.com.cn

C.

CANAL BOAT.
See SHIPPING.

CASE.
See ACTION.

CASES DOUBTED OR OVERRULED.
1. The 2d section of the syllabus in Martz *v.* Hartley, 4 Watts, 261, and the dictum on which it is founded, is not warranted by the case then before the court, and is an erroneous statement of the law. *Walker* v. *Smith*, 43.
2. Dic. in Paul *v.* Frazier, 3 Mass. 73; Con *v.* Wilson, 2 Overton, 233, overruled. *Weaver* v. *Bachert*, 80.
3. Hunt *v.* Rousmanière, 8 Wheaton, 173, commented on. *Tyson* v. *Passmore*, 122.
4. Cornwell's Appeal, 7 Watts & Serg. 305; Anon., 1 Law Journ. 326; Hutchins *v.* Taylor, 5 Law Rep. 289, overruled, so far as they decided the bankrupt act had operation on assignments, prior to February 1, 1842. *Weiner* v. *Farnum*, 146.
5. Presbyterian Corporation *v.* Wallace, 3 Rawle, 109. Pennell's Appeal, 217.
6. Anon., 1 Salk. 399, 117. *Enue* v. *Clark*, 235.
7. Bomburger *v.* Clippenger, 5 Watts & Serg. 311. *Norris* v. *Clymer*, 277. Sed *quære.*
8. Hervey *v.* Thomas, 10 Watts, 66, Dic. *Norris* v. *Clymer*, 279, 283.
9. Brown *v.* Metz, 5 Watts, 164. Syllabus is incorrect. 1 *Hawke* v. *Greensweig*, 297.

CERTIFICATE FOR DEFENDANT.
On appeal from the Nisi Prius, there being a certificate for defendant, the plaintiff must give security for that amount, and costs. *Churchman* v. *Parke*, 406.

CHANCERY.
See EQUITY, 14, 15.

CHATTELS, (SALE OF.)
1. In trover, the plaintiff must show that he is entitled to the property by a complete performance of his contract of purchase. *Farmers* v. *McKee*, 318.
2. A. agreed to employ B. to carry coal in boats, which were delivered to him; certain portions of the freight were to be retained until they equalled the value of the boats, when they were to be transferred to B. In trover against the purchaser of A.'s interest, B. is not entitled to recover to the extent of the payments made, if they are less than the price. *Aliter*—had the price been paid according to the agreement, or in any other way. *Id.*

CHOSE IN ACTION.
1. A bond or note cannot be levied on and sold by the sheriff; nor will such sale and delivery pass any title. *Rhoads* v. *Megonigal*, 39.

Digitized by Google

www.libtool.com.cn

CHOSE IN ACTION.
2. A husband may reduce into possession a wife's legacy, in remainder, during the existence of a life-estate in the property, and thereby acquire an absolute property therein. *Woelper's Appeal*, 71.
3. And this, though he be trustee for the tenant for life. *Id.*

CITY LOTS.
1. The act of 1781 was directed against intruders without colour of right, not against persons in possession, or entering within seven years thereafter, and holding under first purchasers. *Farr* v. *Swan*, 245.
2. Warrant and survey not necessary to title of a first purchaser to an appurtenant city lot. *Ibid.*

COLLATERAL SECURITY.
1. Offer to return claims received, to be collected and applied to payment of debts, is sufficient, unless some be lost through negligence in proceeding thereon. *Mullen* v. *Morris*, 85.
2. If a note be taken by a seller of goods, with an agreement that he will endeavour to collect it or return it within two or three months; it does not imply he is bound to proceed to a suit; nor is he liable as for negligence, even though it be shown a recovery might have been had. *Martin* v. *Pennock*, 376.

COMMISSIONERS TO TAKE TESTIMONY.
The court may appoint any one commissioner under the common rule, and false swearing before him would be perjury. *Contrà*, of depositions taken by consent before unauthorized persons, or out of the state. Per GIBSON, C. J. *Phillipi* v. *Bowen*, 20.
See DEPOSITIONS.

COMPENSATION.
See EQUITY, 4.

COMPOSITION DEED.
Unless a party claim a benefit under a composition deed, he is not bound to notify the creditors that he holds securities of the debtor. *In re Thorn, Smith's Appeal*, 331.

CONSIDERATION.
1. Guarantee without request of debtor, is without consideration. *Kean* v. *McKinsey*, 30.
2. Judgment, of which the consideration is a previous unsatisfied judgment, good against creditors. *In re Thorn*, 331.
3. See PARENT AND CHILD.

CONSTABLE.
1. The sureties of a constable are only responsible where an execution is delivered to him in his official capacity by the magistrate. *Snapp* v. *The Commonwealth*, 49.

Digitized by Google

www.libtool.com.cn

CONSTABLE.

2. To charge the surety, the action should be against the constable as such. *Id.*
3. A return of "served" by a constable to an execution is insufficient; and on a scire facias and plea of nul tiel record, judgment was entered for plaintiff. *Burkholder* v. *Keller*, 51.

CONSTITUTIONAL LAWS.

1. Where an act of the legislature has received a construction, a remedial act will always be construed to extend to future cases: And *semble*, The legislature have not the constitutional power, by such acts, to impair or affect rights acquired or existing under such a construction. *Lambertson* v. *Hogan*, 22.
2. Devise in trust, with power to the tenant for life, to sell on irredeemable ground-rents; the tenant for life was authorized, by act of Assembly, to sell on redeemable ground-rents, payable to the trustees; the redemption money also to be received by the trustees, to be invested under the direction of the Orphans' Court, but the purchasers not bound to see to its application. The act is constitutional, and no objection can be made by a purchaser on that account. *Sergeant* v. *Kuhn*, 393.
3. Under the constitution, a single judge is competent to hold a Court of Quarter Sessions, when so directed by the legislature. *Commonwealth* v. *Martin*, 244.
4. Devise of land in trust for A., B. and C. for life, remainder to their respective children according to appointment; and in default thereof, equally among them, with cross-remainders. A private act authorized a sale on ground-rents, redeemable or irredeemable; the trustees giving security on receipt of the money paid in redemption, to be applied according to the trusts of the will. The act is constitutional, and the court will enforce a contract of purchase from the trustees. *Morris* v. *Clymer*, 237.

See PRIVATE ACTS, 1.

CONSTRUCTION OF STATUTES.

1. The act of April 12, 1842, and March 11, 1843, relative to tax sales, has no effect on cases already adjudicated, for explanatory acts cannot alter or impair vested rights; they are to be so construed as to affect future cases under doubtful statutes. *Lambertson* v. *Hogan*, 22.
2. Where an act of the legislature has received a construction, a remedial act will always be construed to extend to future cases: And *semble*, The legislature have not the constitutional power, by such acts, to impair or affect rights acquired or existing under such a construction. *Id.*
3. A limitation of authority, by a proviso, is a negation thereof. *Commissioners* v. *Keith*, 218.
4. Statute providing a future day for it to take effect, has no operation in the mean time. *Weiner* v. *Farnum*, 146.
5. Goods furnished after statute, giving new remedy, and providing new

Digitized by Google

CONSTRUCTION OF STATUTES.
forms, which is not to take effect until a future day, are subject to the old law merely. *Christine* v. *Manderson*, 363.
See BILLS, 4.
READING RAILROAD, 1.

CONTINGENT REMAINDERS
Cannot be destroyed by fine and recovery, by trustees, to preserve. *Norris* v. *Clymer*, 284.
See LIENS, 15.

CONTRACT, CONSTRUCTION OF.
1. A. and B. contracted to purchase three tracts, C., D. and E., and in consideration of services by B., which were rendered, A. agreed to sell C. and D., and after deducting expenses, to pay one-half of the proceeds to B., and to convey one-half of E. to such person as he should name —costs and expenses to be deducted from the proceeds of the other two tracts. On the sale of these, less was received than had been expended by A. *Held*, that B., having performed his services, was entitled, under the contract, to a conveyance, without regard to the profits or loss on the sale of the other two. *Altemus* v. *Elliott*, 62.
2. Purchases at an auction constitute an entire contract. *Tompkins* v. *Haas*, 74.
3. Plaintiff purchased bills on London, at one hundred and eighty days' sight, not to be negotiated, unless eastward of the Cape of Good Hope, by giving his note at twelve months, on the maturity of which the amount was to be adjusted on stipulated principles. This was done, new notes given and paid after knowledge of all the facts: *Held*, The interest paid during the time the bills were outstanding could not be recovered, because, 1. He was bound to pay the notes at maturity, at all events. 2. Because voluntary payments, with knowledge of facts, could not be recovered. *Keener* v. *The Bank of the United States*, 237.
4. Evidence of mercantile usage that the interest, during such period, was for the benefit of the purchaser of the bills, was inadmissible, as tending to alter the express agreement of the parties. *Id.*
5. If a note be taken by a seller of goods, with an agreement that he will endeavour to collect it or return it within two or three months; it does not imply he is bound to proceed to a suit; nor is he liable as for negligence, even though it be shown a recovery might have been had. *Martin* v. *Pennock*, 370.
See MERCANTILE LAW.

CONVERSION.
A sale of real estate by the committee of a lunatic, for payment of his debts under a decree of the court, works no conversion of the surplus, but that remains real estate, and is distributed as such according to the rules of descent. *Lloyd* v. *Hart*, 473.
See EXECUTORS, 13, &c.

Digitized by Google

www.hzbook.com.cn

CONVEYANCE.

1. Deed by husband to wife void at law.—*Stickney* v. *Borman*, 67, and when equity will not aid. See EQUITY, 8, 9.
2. The assignment executed by an insolvent on his discharge by a foreign court, having apt words, will pass land in Pennsylvania. *Lamb* v. *Fries*, 83.
3. By one out of possession. *Drexel* v. *Man, Jun.*, 268.
4. An expectation as devisee of one yet living may be *settled* on marriage. *John Wilson's estate*, 325.
5. In consideration of assumption of a lien. *Dubbs* v. *Finley*, 397.

Presumption of—see EVIDENCE, 42, 43.

CORPORATION.

1. A turnpike company, having erected a toll-house partly on the land of another, under license in consideration of user of the road by such owner, abandoned the house as a toll-house, and removed the gate. *Held:* It becomes a nuisance both on the road and on the land, and may be removed by any one injured. *Lancaster* v. *Rogers*, 114.
2. To make the agreement by the president of a private corporation evidence, it should be shown to be within the scope of his authority. *Farmers* v. *McKee*, 318.

See READING RAILROAD.

COSTS.

1. A plaintiff, who appealed from an award in his favour, and recovered more than the sum awarded to him, but less than such amount with interest added for the immediate time, allowed to recover full costs. *Haines* v. *Moorehead*, 65.
2. Costs accrued are to be paid on appeal: the 2d art. of sect. 27, of the act of 1836, not being altered by the act of March 20, 1845. *Merrit* v. *Smith*, 161.

COUNTY.

1. An accidental destruction by fire communicated from a building fired by a mob, is within the act giving a remedy against the county. *Donoghue* v. *The County*, 230.

For the notice, &c., requisite to an action, see MOBS.

COUNTY AUDITORS.

How they must proceed to make balances due by county commissioners' liens. *Wilson* v. *Clarion*, 17, and see COUNTY COMMISSIONERS, 1.

COUNTY COMMISSIONERS.

1. Under the act of April 15, 1834, to give to the report of county auditors of a balance due by the commissioners, &c., the effect of a judgment, the officer charged must be summoned to appear at the audit. *Wilson* v. *Clarion county*, 17.
2. *Semble* these proceedings must be made a part of the report. *Id.*

Digitized by Google

COURTS.

1. One judge holding a court of quarter sessions has no jurisdiction of cases arising under the poor laws. *Commonwealth* v. *Nathans*, 138.
2. In my opinion, two judges of the Common Pleas are required to hold a court of quarter sessions. Per KENNEDY, J. Sed vide Commonwealth v. Martin, post, contrà.
3. Under the constitution, a single judge is competent to hold a court of quarter sessions, when so directed by the legislature. *Commonwealth* v. *Martin*. 244.
4. The Nisi Prius is a distinct court from the Supreme Court, and may arrest a judgment after verdict. *Catherwood* v. *Konn*, 341.
5. The District Court has jurisdiction under the act of 1818 and 1830, of all claims for the removal of nuisances by the Board of Health, though less than $100. *Kennedy* v. *The Board*, 366.

See REGISTER.

CRIMINAL LAW.

1. The false assertion of possession of money on the credit whereof goods were obtained, is a false pretence within the act of July 12th, 1842. *Commonwealth* v. *Burdick*, 163.
2. Writs of error not granted for technical matters not going to the merits. *Commonwealth* v. *Martin*, 244.
3. A bond is not perfected until delivery; hence, a mere signing on Sunday does not render it void, if not delivered until the day following. *Commonwealth* v. *Kendig*, 448.
4. Whether an official bond, signed on Sunday, is void as to parties to be thereby protected, being strangers to the breach of the law; *query*. *Id.*

See ATTORNEY, 5.
DEPOSITIONS, 3.

CUSTOM.

Evidence of mercantile usage inadmissible to alter or impair written agreement. *Keener* v. *Bank United States*, 237.

D.

DAMAGES.

A creditor of the vendor of a chattel, of which it was uncertain that the price was fully paid, levied and sold; profits which might have been made by the use of the chattel, or loss from incapacity to employ men and horses, by reason of its detention, are speculative, and cannot be estimated, there being no other circumstances showing oppression, or calling for vindictive damages. *Farmers* v. *McKee*, 318.

DECEDENT'S DEBTS.

1. *Semble*, The mere payment to executor, by devisee, of the amount of decedent's debts, will not discharge the land; nor will a refusal to accept the amount, because it was paper money, impair the right of the creditor. *Hunt* v. *Moore*, 105.

Digitized by Google

www.libook.com.cn

DECEDENT'S DEBTS.

2. Judgment having been obtained, at the suit of one heir against the administrator, who was the only other heir, execution issued on the ancestor's land, in the hands of an alienee of the heir; it was set aside for want of a judgment against the heir as such, under the 34th section of the act of 1834. *Atherton* v. *Atherton*, 112.
3. The creditor is not bound, under this act, to elect in the first instance to proceed against the heirs; his proper course is to proceed to judgment against the representative, and then obtain judgment de terris by scire facias against the heirs. *Id.*
4. In such a proceeding the heirs may contest the judgment on original grounds, or that the lien of the debt is lost. Per GIBSON, C. J. *Id.*

DEED.

1. The erasure of the name of one obligee, and substitution of another, avoids the instrument as to parties not consenting. *Smith* v. *Weld*, 54.
2. A deed was executed and left with the magistrate before whom it was acknowledged, and taken away by a brother of the grantee for him: *Held*, to be proper evidence of delivery to leave to a jury. *Arrison* v. *Harmstead*, 191.
3. A conveyance, reserving a rent in fee, was altered by the insertion of material words, after delivery, by the agent of the grantor; the land passes discharged of the covenants. *Id.*
4. Nor can a recovery be had on the original contract, independent of the deed. *Id.*
5. Nor by an action for use and occupation; for the grantee is the owner of the land. *Id.*
6. Nor will equity relieve and compel a redelivery of the premises, or payment of the rent. *Id.*
7. The estate of the person making the alteration is destroyed, as the penalty of his fraud. Per ROGERS, J. *Id.*
8. The deed being avoided by such alteration, a purchaser bonâ fide, without notice, is in no better situation than the original parties. *Id.*
9. A bond is not perfected until delivery; hence, a mere signing on Sunday does not render it void, if not delivered until the day following. *Commonwealth* v. *Kendig*, 448.
10. The presumption is, a lost deed was in conformity to the articles. *Patterson* v. *Torry*, 456.

DEPOSITIONS.

1. Notice to take depositions under a common rule on three consecutive days, held good, there being many witnesses; the substance of the notice being that the examination would be commenced on the first day, and continue during the specified period until finished. *Phillipi* v. *Bowen*, 20.
2. Appearance and cross-examination waives any objection to the authority of the examiner. *Id.*
3. The court may appoint any one commissioner under the common rule,

Digitized by Google

DEPOSITIONS.
and false swearing before him would be perjury. *Contrà*, of depositions taken by consent before unauthorized persons, or out of the state. Per GIBSON, C. J. *Id.*
4. Where a witness has no home or family, his deposition taken out of the jurisdiction, at a place where he was at work, when last heard of, may be read. *Gould* v. *Crawford*, 89.

DESERTION OF WIFE.
See ACTION, 5.

DISTRIBUTION ACCOUNT.
1. Incidental expenses of an administration may be allowed on the settlement of a distribution account. *Aliter*, of claims for debts due from the estate. *John Wilson's Estate*, 325.
2. On a distribution account, an executor allowed to retain the amount of a balance due a co-executor, to whose account, and the auditor's report thereon, exceptions were pending. So of partial payments to distributees. *Id.*

DISTRIBUTION OF THE PROCEEDS OF SHERIFFS' SALES.
1. On the sale of the equitable interest of a vendee under articles, the proceeds are to be distributed, according to the priority of the liens. *Carneghan* v. *Brewster*, 41.
2. Nor is this rule altered by the fact, that on the first of two judgments for instalments of the purchase money, bail in stay of execution has been given, and the plaintiff has received the money on the second judgment, and execution. *Id.*
3. Ground-rent is payable out of proceeds of sheriff's sale, under a lien acquired before the rent became due, but without interest. *Ter Hoven* v. *Kerns*, 96.
4. Though judgment be entered on bond, accompanying a first mortgage, and a sale take place on a lien intervening between the mortgage and the judgment, the lien of the mortgage is not disturbed, but the money is distributed among the liens according to priority, including the judgment. *Kuhn's Appeal*, 264.
5. Land having been sold under judgment against A., B., and C., the auditor and court, in the distribution, must decide on their respective titles, and whether one is entitled by purchase of the whole, or there is a resulting trust for the others. *Brown's Estate*, 463.
6. Unless an issue be demanded on distribution of sheriff's sales, before decree, the want of one cannot be assigned for error. *Id.*

DISTRICT COURT.
See COURTS.

DISTRICT LIENS.
1. Where curbing, paving, and laying pipes is done by the district authorities opposite land owned by one person, but divided into several lots;

Digitized by Google

www.hbook.com.cn

DISTRICT LIENS.
each lot is subject to a lien for the amount of the work done opposite to it. The lien is not joint on the whole property. *Pennell's Appeal*, 216.
2. Commissioners of Kensington have no claim for curbing, paving, &c., on the property adjacent, when the improvement exceeds the limit allowed by the legislature. *Kensington* v. *Keith*, 218.
3. Nor does the act of 1843 disable the party to plead such excess of authority in defence. *Id.*
4. The lien for curbing, &c., given to the districts, is not limited by the act for limitations of personal actions, there being no personal liability therefor. *Council* v. *Moyamensing*, 224.
5. Nor did the act of 1820 require an apportionment, but the whole lot was bound, though there be several buildings thereon. *Id.*
6. The act of 1840 only provides a remedy. *Id.*

DWELLING-HOUSE.
1. Homicide in defence of, justifiable—so of the introduction of arms and men with or without apprehension of danger. *Donoghue* v. *The County*, 231.

DYING WITHOUT ISSUE.
1. Bequest of interest to A., and if she died without lawful issue, the principal to B., is a vested interest in B. *Hopkins* v. *Jones*, 69.
2. In cases of personalty the words "dying without issue" are construed to mean without *leaving* such, if in accordance with testator's intent. *Id.*
3. Devise to my daughter A. for life, remainder to her children in fee, A. then having a child, "provided if she die without issue to my son B.," an executory devise, and not too remote, the word issue being confined to children previously referred to. Per GIBSON, C. J., and KENNEDY, J. *De Haas* v. *Bunn*, 335.

E.

EJECTMENT.
1. Is improper by the purchaser at sheriff's sale of the share of one tenant in common, unless there have been an ouster; partition is the remedy. *Knox* v. *Herod*, 27, 28.
2. Plaintiff in ejectment may waive proceeding against defendants added by the sheriff, under sect. 2, act 1806. *Freedly* v. *Mitchell*, 100.
3. It is not error to enter a nol. pros. as to some of the defendants after verdict, there being no contribution. *Id.*
4. Plaintiff in ejectment aliens after suit brought; he is entitled to judgment for nominal costs and damages. *Id.*
5. Judgment in ejectment is conclusive as to mesne profits between the parties, from the day of the issuing of the writ, even though defendant entered by a habere facias possessionem, under a former judgment in ejectment between the same parties. *Man, jun.* v. *Drexel*, 202.
6. The rule is the same under the act of Assembly, in this respect, as formerly. *Id.*
7. Two verdicts and judgments in ejectment on the same title, between the

Digitized by Google

www.libtool.com.cn

EJECTMENT.

same parties or their assigns, are conclusive of the title, under the act of Assembly. *Drexel* v. *Man, jun.* 267.

8. A verdict and judgment in ejectment is conclusive of the right to mesne profits from the time of the service of the writ, though the defendant's title is established by two verdicts and judgments, between the same parties and on the same title, one of which was prior, and the other subsequent to the term for which the recovery was sought. *Drexel* v. *Man*, 271.

9. One of two defendants in ejectment, on whom the writ had been served, and who had pleaded, cannot by disclaimer (his plea having been permitted to be withdrawn) make himself a competent witness for his co-defendant; for he may still be liable for costs and mesne profits. *Kirk* v. *Ewing*, 453.

As to equitable remedies by—see EQUITY.

ELECTION.

A landlord may, at his election, treat a tenant holding over, after a term, as tenant from year to year, or as a trespasser. *Hemphill* v. *Flynn*, 144.

ENTRIES, ORIGINAL, (BOOK OF.)

Where there was a contract for the purchase of a boat, to be paid for in freights, entries made by the purchaser of the delivery of goods to strangers, coupled with proof that during the time when the entries were made the purchaser carried for no one but the vendor, are not evidence; no charge being made against the vendor, and entries of the party not being generally admissible to prove performance of a special contract. *Phillips* v. *Tapper*, 323.

EQUITY.

1. A vendee, by articles of agreement, is not bound to restore the possession to the vendor and give up the contract, before he can make objections to the title in an action brought for the purchase money. *Gans* v. *Renshaw*, 34.

2. He cannot keep both the estate and the price of it; but it is the vendor's business, if he finds that he cannot make such a title as the vendee is bound to accept, to refund what has been paid, and bring an ejectment for the property. *Id.*

3. The vendee is not bound to accept a title depending on a conveyance to a creditor, where there is evidence to raise a suspicion that the object of the conveyance was to elude other creditors who were pressing for judgments. *Id.*

4. Nor, if there be a covenant for title, clear of encumbrances, where there are unextinguished ground-rents; and it is error to instruct the jury, that the defect may be compensated by a deduction from the purchase money. *Id.*

5. A. and B. contracted to purchase three tracts, C., D. and E., and in consideration of services by B., which were rendered, A. agreed to sell C.

Digitized by Google

www.libtool.com.cn

EQUITY.
and D., and after deducting expenses, to pay one-half of the proceeds to B., and to convey one-half of E. to such person as he should name—costs and expenses to be deducted from the proceeds of the other two tracts. On the sale of these, less was received than had been expended by A. *Held*, that B., having performed his services, was entitled, under the contract, to a conveyance, without regard to the profits or loss on the sale of the other two. *Altemus* v. *Elliott*, 62.

6. Trustee, having advanced for the trust, entitled to reimbursement, which will be enforced by an ejectment and conditional verdict. *Id.*
7. Conveyance by husband to wife void at law. *Stickney* v. *Borman*, 67.
8. Equity will not aid, in favour of purchaser under such deed, against assignee for the creditors of an heir, where the provision was unfair or unreasonable as to husband's creditors. *Id.*
9. Valuable or meritorious consideration and fairness essential to obtain the aid of chancery to perfect a conveyance void at law.—Per ROGERS, J. *Id.*
10. An executor, being a man of business, and a neighbour of a creditor of the decedent, who was an aged, weak, and illiterate woman, induced her to take his own bond in lieu of one creating a lien on the estate of a devisee, falsely representing the amount of the liens against his own estate. A court of equity would set aside the transaction, and hence she may sue on the original bond. *Hunt* v. *Moore*, 105.
11. *Semble*, Such a false representation would have avoided the contract between persons in equal situations.—Per ROGERS, J. *Id.*
12. Nor is ignorance as to the truth or falsehood of the assertion, in the person making it, of any consequence. *Id.*
13. Ignorance or mistake in law may afford some inference of imposition, though in itself it cannot be relieved against. *Id.*
14. Where the Court of Common Pleas, deciding on a case under the chancery powers vested in it by act of Assembly, direct an issue, writ of error will not lie to the proceedings thereon in a court of law. *Baker* v. *Williamson*, 116.
15. The remedy is on appeal from the final decree by the court in chancery. *Id.*
16. Party must make good a false representation, though innocently made. *Tyson* v. *Passmore*, 124.
17. Trust created by words of desire, &c. See WILL, 6, 7, 8.
18. The court will compel a feme covert trustee by descent, to acknowledge that she executes the deed voluntarily, &c. *Dundas* v. *Biddle*, 160.
19. Equity will not relieve and compel a re-delivery of the premises, or payment of the rent, where the conveyance reserving a rent has been altered by the grantor. *Arrison* v. *Harmstead*, 191.
20. The estate of the person making the alteration is destroyed, as a penalty of his fraud.—Per ROGERS, J. *Id.*
21. The deed being avoided by such alteration, a purchaser bonâ fide, without notice, is in no better situation than the original parties. *Id.*
22. The court will enter judgment specially, so as to make it appear that it

Digitized by Google

www.libtool.com.cn

EQUITY.

does not bind the defendant's property, but only such as is held in trust; to reach which was the object of the suit, being in the nature of a bill in equity. *Aycinena* v. *Peries*, 286.

23. Where the vendor sues on his legal title, the vendee defends under the articles as on a bill to restrain the action at law, and less proof is required in such case than if the vendee were seeking specific performance; and the verdict is to be so moulded as to give the same relief which a court of equity would give under similar circumstances. *Hawk* v. *Greensweig*, 295.

24. A vendor having agreed to convey, by a day certain, in consideration of certain acts to be done to himself, and payments to a third person, without tendering a deed, brought ejectment, alleging non-performance by vendee, who had entered and made improvements; the court should direct a conditional verdict in such amount as on performance would compensate the plaintiff for neglect of the vendee; to be levied on delivery of a deed to be so drafted as to secure all the covenants thereafter to be performed. *Id.*

25. Where the action is in the nature of a bill, to compel performance of articles, or the vendee defends thereon in the nature of a bill to restrain the proceedings at law, delivery of a deed, though a condition precedent, need not be made or tendered before bringing suit. The court will direct a verdict, conditional on delivery of a proper conveyance. *Id.*

26. In the distribution of an assigned estate, lien creditors let in pro rata with general creditors on the personal property: retaining their liens on the realty for the residue. *Shunk's Appeal*, 304.

27. A. conveyed to B. by a deed absolute on its face; B. entered; subsequently a creditor of A. purchased his estate at sheriff's sale, at which B. gave notice that A.'s title was vested in him by the deed. On ejectment, the purchaser proved the conveyance was for the purpose of enabling B. to raise money on his bond and mortgage, which was done: *Held*, the proceeding was in the nature of a bill to redeem, hence a tender previous to suit was unnecessary. *Eshbach* v. *Zimmerman*, 313.

28. The notice of claim to the absolute title precluded B. setting up any other title against the purchaser. *Id.*

29. Purchase, by general agent for heirs, of the land of their ancestor from the vendee at a tax sale, instead of redeeming, enures to their benefit. (*Query*, if made with trust funds; it seems it was.) *Brown's Estate*, 463.

EQUITABLE ESTOPPEL.

See ESTOPPEL.

EQUITABLE TITLE.

1. On the sale of the equitable interest of a vendee under articles, the proceeds are to be distributed according to the priority of the liens. *Carneghan* v. *Brewster*, 41.

Digitized by Google

www.hbook.com.cn

EQUITABLE TITLE.

2. Nor is this rule altered by the fact, that on the first of two judgments for instalments of the purchase money, bail in stay of execution has been given, and the plaintiff has received the money on the second judgment and execution. *Id.*

3. A purchaser from one of several trustees for A. for life, remainder in trust, to sell and pay to B., entered under his deed. The statute of limitations commenced running against the whole estate, and twenty-one years adverse possession bars as well the trustee as the cestui que trust tenant for life, and those in remainder. *Smilie* v. *Biffle*, 52.

ERASURE.

See DEED.

ERRORS AND APPEALS.

1. Costs on appeal from justices. See COSTS, 1.

2. Construction of rules of court subject of writ of error. *Rentzheimer* v. *Bush*, 88.

3. Practice on feigned issue in equity. *Baker* v. *Williamson*, 116.

4. One objection to a witness being assigned at Nisi Prius, none other can be taken on error. *Smyth* v. *Craig*, 153. *Farr* v. *Swan*, 245.

5. Costs accrued are to be paid on appeal: the 2d art. of sect. 27, of the act of 1836, not being altered by the act of March 20, 1845. *Merrit* v. *Smith*, 161.

6. Refusal to permit defendant to withdraw a plea of justification to an action of slander, is not a subject of writ of error. *Rush* v. *Cavenaugh*, 187.

7. That the verdict was against the weight of evidence, cannot be assigned for error on certificate from the Nisi Prius. *Donoghue* v. *The County*, 237.

8. An answer to a point stating facts, assumed without evidence, if calculated to mislead the jury, is error. *Greber* v. *Kleckner*, 289.

9. The court will allow a certificate to a judgment at Nisi Prius to be taken after the first day of the next term, under special circumstances supported by affidavit. *Catherwood* v. *Konn*, 341.

10. On appeal from the Nisi Prius, executors not bound to give security. *Maule* v. *Shaffer*, 404.

11. On appeal from the Nisi Prius, there being a certificate for defendant, the plaintiff must give security for that amount, and costs. *Churchman* v. *Parke*, 406.

12. Refusal to stay proceedings until payment of costs of former suit, not the subject of writ of error. Refusal to open a judgment or grant an issue on the ground that the same point had been decided in a former suit, to which no appeal was taken, not the subject of a writ of error. *Withers* v. *Haines*, 435.

ESTATE FOR LIFE.

See SHERIFF'S SALE, 15.

Digitized by Google

www.libtool.com.cn

ESTOPPEL.

1. Judgment to cover future advances is valid, but if the creditor gives a statement of the amount then due, to enable the defendant to borrow from another, he is estopped claiming beyond that amount. *Ter Hoven* v. *Kerns*, 96.
2. It seems, future advances will not be preferred to liens attaching before such advance is made. Per KENNEDY, J. If there be an obligation to make the advance, *Query*. *Id.*
3. Whether the estoppel is waived by not being pleaded when it can be done; but relied on as evidence merely, *Query*. *Semble*, it is equally valid being pleaded or as evidence. *Man, Jun.* v. *Drexel*, 204, 11.
4. By notice of one title at sheriff's sale from setting up any other. *Eshbach* v. *Zimmerman*, 313.

EVIDENCE.

1. The court were right in instructing the jury that an omission to state facts proving fraud, before arbitrators, was not *strong* evidence to rebut it. *Clark* v. *Partridge*, 13.
2. Evidence to prove an omission from a written agreement by fraud, or under a promise to consider it inserted, cannot be received, unless the circumstances be set out, and the fraud averred on the record. *Id.* And see PLEADING, 1. FRAUD, 1.
3. Papers out of the jurisdiction may be proved as lost papers, if the party having them in his possession refuses to deliver them. *Rhodes* v. *Seibert*, 19.
4. To authorize a copy of a paper beyond the jurisdiction of the court to be read in evidence, the existence and authenticity of the original must first be clearly proved. *Id.*
5. Depositions, notice to take on three consecutive days, held good. *Philkpi* v. *Bowen*, 20.
6. Appearance and cross-examination waives objection to authority of examiner. *Id.* And see PRACTICE, 2. DEPOSITIONS, 1.
7. Authority of the court to appoint examiners. *Id.* And see COMMISSIONERS TO TAKE TESTIMONY, 1.
8. The judgment against the original debtor is conclusive against the guarantor of the judgment as a party. *Kean* v. *McKinsey*, 30.
9. Evidence of contradictory statements, to discredit a witness examined at the trial, not admissible, unless he is first examined as to such statements, so as to give an opportunity for explanation. *McAteer* v. *McMullen*, 32.
10. So of an omission by the witness to state facts in a previous trial between other parties, unless it be shown to have been pertinent to that issue, and then subject to the rule above stated, § 9. *Id.*
11. Declarations of a father at the time he made a purchase in the name of his natural child, admissible in evidence against the child at the suit of his father's creditors. *Kimmel* v. *McRight*, 38.
12. One who has acquired an interest in a debt by assignment is incompetent

Digitized by Google

www.libtool.com.cn

EVIDENCE.
as a witness in a suit for its recovery, even though he has re-assigned his interest, and pays all the costs into court. *Clover* v. *Painter*, 46.
13. The proceedings before a justice are to be tried by inspection; for the plea of *nul tiel record* to a writ, setting them out, raises an issue of law to the court. *Burkholder* v. *Keller*, 51.
14. Declarations, at the time of doing any act, uncertain as to its effect, admissible to prove intent. *Jones* v. *Brownsfield*, 55. S. P. *Woelper's Appeal*, 72.
15. Where an improvement was made by tenant, who was employed by his landlord as a charcoal-burner, on the land; the declarations of the landlord, that he intended to settle and improve the land, are admissible. *Id.*
16. Judgment creditor of one who may be insolvent is a competent witness for him, in a suit for the recovery of land. *Id.*
17. Whether an improvement was made for the purpose of a continual residence, &c., is for the jury. *Id.*
18. Parol evidence inadmissible to prove a description in a mechanic's lien was intended to apply to another house, with owner's knowledge. *Simpson* v. *Murray*, 76.
19. In an action for breach of promise of marriage, seduction cannot be given in evidence in aggravation. *Weaver* v. *Bachert*, 80.
20. Mutual promises must be proved; at least, circumstantially. Consent to intercourse, and purchase of furniture, &c., are not evidence of a promise by the woman. Nor will his admissions of a promise, which it is uncertain as to what act it referred, be evidence against the man. *Id.*
21. The court are not to strain evidence against a seducer; and evidence of a promise by the woman, in her action, must be such as would support an action against her by the man. *Id.*
See PRESUMPTIONS.
22. The recital of notice to endorsers, in a foreign protest, is no objection to its going to the jury. *Mullen* v. *Morris*, 85.
23. Printed books, professing to be the statutes of a sister state, admissible as primâ facie evidence of the law of that state. *Id.*
24. The evidence of a deceased witness may be stated in substance; the precise words are unnecessary. *Gould* v. *Crawford*, 89.
25. Whether a witness is competent, by reason of intoxication, is in the discretion of the court. *Id.*
26. One not made a party defendant, cannot be objected to as a witness, on the allegation that he is liable to plaintiff. *Id.*
See DEPOSITIONS.
27. The sheriff's return is conclusive on himself. *Paxton* v. *Steckel*, 93.
See FOREIGN ATTACHMENT, 1.
28. An executor, defendant, cannot be a witness to charge himself, thereby discharging the land of a devisee, co-defendant, of the decedent's debts. *Hunt* v. *Moore*, 105.
29. The onus to show accident, mistake, &c., in a will of which the signature was erased, lies on the party offering it for probate. *Baptist* v. *Roberts*, 110.

Digitized by Google

EVIDENCE.

30. Declarations of intent, and condition, and circumstances of families, are not sufficient to rebut the presumption. *Id.*
31. It is not sufficient to admit an insolvent petition from one under whom the other party claims, that the names are identical, and twenty-five years having elapsed since the filing thereof. *Sailor* v. *Hertzogg*, 182.
32. When the title is incomplete, under the statute of limitations, in one either a trespasser or with colour, admissions of facts by him are evidence to show possession is not held adversely.
33. Admissions of independent facts, even though in an offer of compromise, are evidence, though concessions for the purpose of a compromise in a treaty would not be so. GIBSON, C. J. *Id.*
34. A deed was executed and left with the magistrate before whom it was acknowledged, and taken away by a brother of the grantee for him: *Held*, to be proper evidence of delivery to leave to a jury. *Arrison* v. *Harmstead*, 191.
35. Of verdict and judgment in ejectment in an action for mesne profits. See MESNE PROFITS.
36. Conclusiveness of a judgment, though not pleaded as an estoppel, but relied on as evidence merely, discussed by KENNEDY, J. *Man, Jun.* v. *Drexel*, 204, 11.
37. In an action against the county for damages by a mob, evidence of unlawful conduct by men assembled within a church, of which the plaintiff was pastor, properly excluded as irrelevant, it being shown he was absent from the city at the time. *Donahue* v. *The County*, 230.
38. Transactions during the riot properly excluded as irrelevant, unless the plaintiff can be implicated. *Id.*
39. Even as cross-examination of a witness, stating so much as related to the destruction of the property. *Id.*
40. Of mercantile usage inadmissible as tending to alter written agreement of the parties. *Keener* v. *The Bank*, 237.
41. Gazetteer not admissible to prove relative distances of places. *Spalding* v. *Hedges*, 240.
42. An allottment on Schuylkill Front street, on Holmes's map, to a first purchaser, with proof of an allotment of a square, according to the present plan, to twenty-five persons, of whom this first purchaser was one, with title from him and possession had for forty years, is evidence of a possession sufficiently ancient to support the title without proof of actual location by warrant and survey. *Farr* v. *Swan*, 245.
43. But such ancient possession merely is not sufficient to raise a presumption of a grant in favour of the same party in his own right, for more than his own quantity, as a first purchaser, against the Commonwealth or its grantee, for, per SERGEANT, J., this would require another presumption, namely, of a conveyance from some other first purchaser, which cannot be made from a mere possession encroaching on the proprietary or Commonwealth. *Id.*
44. An extract from a paper in the land-office, if it appear to contain all that relates to the subject in controversy, (as an entire square,) is evidence. *Id.*

Digitized by Google

EVIDENCE.

www.libtool.com.cn

45. Nor is it necessary it should show by whom or when made, for the presumption is in favour of regularity. *Id.*
46. An objection that a paper "is not original" is a waiver of any defect in the acknowledgment, when the paper is a certified copy of a deed from the recorder's office. *Id.*
47. A surveyor permitted to state where he would locate a warrant similar to that under which defendant held. *Id.*
48. Two verdicts and judgments in ejectment on the same title, between the same parties or their assigns, are conclusive of the title, under the act of Assembly. *Drexel* v. *Man*, *Jun.* 267. *Drexel* v. *Man*, 271.
49. A book of entries, which would be evidence against the owner of a chattel, will also be evidence against a purchaser of his right at sheriff's sale. *Farmers* v. *McKee*, 318.
50. To make the agreement by the president of a private corporation evidence, it should be shown to be within the scope of his authority. *Id.*
51. Where there was a contract for the purchase of a boat, to be paid for in freights, entries made by the purchaser of the delivery of goods to strangers, coupled with proof that during the time when the entries were made the purchaser carried for no one but the vendor, are not evidence; no charge being made against the vendor, and entries of the party not being generally admissible to prove performance of a special contract. *Phillips* v. *Tapper*, 323.
52. A copy of an account taken from a book, from which a settlement had been made, was delivered to the party, and retained five months without objection; a copy of that copy, and the book from which it was taken, showing the same balance, are evidence. *Id.*
53. Two papers being produced on a call by the other party, both or neither must be read. *In re Thorn*, 331.
54. Protest of a foreign notary not evidence of a demand of payment of a promissory note. *Etting* v. *Schuylkill*, 355.
55. Declarations of the assignor before assignment admissible to identify the fund, though he might have been called. *In re Roberts*, 371.
56. Declarations of the owner, to be evidence against his grantee, must be prejudicial to himself at the time; hence, where A., who was the owner of land on which he had erected a mill and dam, was also the owner of tract B., his declarations as to the extent of his right to swell the water on tract B., by means of a dam under a grant of the former tract, are not evidence against the subsequent owner of B. *Riddle* v. *Dixon*, 372.
57. A stranger to a suit for damages occasioned by the erection of a dam, whose land is thereby flooded, is not incompetent as a witness, even though he may have granted the right, of which the party cannot avail himself but by thus swelling the water. *Id.*
58. An account for work done having been sent, the agent of the party called, and, without objection, promised it would be paid when the money was received by the partnership: *Held* to be sufficient evidence of indebtedness for the jury. *Downing* v. *Lindsay*, 382.

Digitized by Google

EVIDENCE.

59. One of several partners being alone served with process, promises and admissions by his agent are evidence in the action. *Id.*
60. Of agency from calling in reply to a letter to the principal. *Id.*, 383.
61. The court, in deciding upon the intention of testator, receive evidence of the value of the property devised or referred to in the will. *In re Marshall, Marshall's Appeal*, 388.
62. The court receive evidence of facts and circumstances relating to the family of testator, known to him, in construing a will. *Barr's Estate*, 428.
63. Acknowledgments of principal, evidence against the surety, unless there be proof of combination. *Commonwealth* v. *Kendig*, 448.
64. Parol evidence inadmissible to establish a lien by admissions of a party claiming under a lost deed, when the articles stipulate for a deed without a lien, even though subsequent conveyances be subject to a lien, but what lien was not stated. *Patterson* v. *Forney*, 456.
65. Docket entries of transcript and judgment, on certiorari to a justice, evidence, on loss of the writ being proved. *Commonwealth* v. *Montgomery*, 461. And see WITNESS.

EXECUTION.

1. The court will not interfere, to stay execution by executors against legatee, but where it is clear the estate is sufficient to pay the legacy. *Dunn* v. *The American*, 75.
2. Execution on land of heir set aside, judgment not having been obtained against him. *Atherton* v. *Atherton*, 114.
3. A. being the owner of part of a large lot of land, and also of rents reserved out of another part, the marshal, under a levy upon a judgment against him, describing by metes and bounds the larger lots, with the *rents, issues, and profits thereof*, made a sale of the same at public vendue: *Held*, that under the word *rents*, the ground-rents reserved passed to the purchaser. *Hartley* v. *Beam*, 165.
4. And this, though the advertisement described the land only, for defective description therein can have no effect after the deed is acknowledged. *Id.*
5. That the word *land* sufficient to pass them, *arg.* *Id.*
6. Whether the execution creditor really mean to obtain his money, is the question, in deciding whether it is fraudulent as to other creditors. *In re Thorn*, 331.
7. The estate of one claiming by executory devise during the continuance of the previous estate, is the subject of levy and sale. *De Haas* v. *Bunn*, 335.
8. Execution may be issued after the year and a day has elapsed, on original as well as on revived judgments, since the act of 1845, section 4. *Dailey* v. *Straus*, 401.

Case of amendment of a venditioni exponas. *Id.* See SHERIFF'S SALE, 14.
See ATTACHMENT IN EXECUTION—SHERIFF'S SALE.

Digitized by Google

www.libtool.com.cn

EXECUTORS AND ADMINISTRATORS.

1. Where A., who was a foreigner and a male representative of the decedent, and had mortgaged his share, after residing here some years, absented himself for nine months, the court granted letters testamentary to an inhabitant, at the instance of the attorney of a sister of decedent, appointed to collect her share, and of the mortgagee, and this court refused to interfere on behalf of A. on his return. *Sarkie's Appeal*, 157.
2. Residence and title to a share in the estate are material qualities for an administrator, and want of these will authorize the register, in his discretion, to appoint the nominee of one otherwise having less title to the office, under the act of Assembly. *Id.*
3. An administrator, permitting goods to remain with the widow, is chargeable at the appraisement; nor is evidence admissible to show they were of less value. *Reiff's Appeal*, 256.
4. Incidental expenses of an administration may be allowed on the settlement of a distribution account. *Aliter*, of claims for debts due from the estate. *John Wilson's estate*, 325.
5. On a distribution account, an executor allowed to retain the amount of a balance due a co-executor, to whose account, and the auditor's report thereon, exceptions were pending. So of partial payments to distributees. *Id.*
6. Executors were declared trustees by a will; the offices being inseparable, security can only be demanded as executor, and not as trustee. *Id.*
7. An executor holding a mortgage received coal, for his private use, from the tenant, who had agreed to keep down the interest as part of the rent; he promised to endorse the amount on the bond, and on accounts, crediting him with the amount of the interest, being rendered, examined them without objection, continually repeating the promise to make an entry on the bond. *Held*, there being no collusion, both parties considering the executor a solvent man, the mortgagors were entitled to this credit for interest on the mortgage. *Trotter* v. *Shippen*, 358.
8. Legatee residing in another state entitled to interest from the end of the year; executors not giving notice until that time, and demand being made immediately thereafter. *In re Marshall, Marshall's Appeal*, 388.
9. On appeal from the Nisi Prius, executors not bound to give security. *Maule* v. *Shaffer*, 404.
10. Effect of revocation of probate. *Hinkle* v. *Eichelberger*, 483.
11. An executor, on a sale by the Orphans' Court, retained a sum of money in his hands to meet the demand for dower or thirds chargeable on the estate of the testator; the widow is entitled to recover, and the executor is the only party chargeable. *Beeson* v. *McNabb*, 422.
12. Administrators having settled an account which neither on its face nor in the decree purported to be a partial account, cannot, by a subsequent account, open the matters contained therein, nor claim credit for non-payment of a debt with which they charged themselves, even though it was stated that the balance of the former account was composed in part of the bond securing such debt. *In re Seichrist*, 432.

Digitized by Google

EXECUTORS AND ADMINISTRATORS.

13. How an administration account, which is not intended to be final, should be stated. *Id.*
14. In 1829, executor purchased land of a debtor to the estate under his judgment, for an amount equal to his own and prior liens. He settled his account, charging himself with the amount of the judgment, and the profit of a subsequent sale by him, showing a balance still due from the estate. A purchaser from his vendee, in 1843, cannot set up the equity of the representatives or legatees, on the ground of conversion, as a defence to the payment of purchase money. *Oeslager* v. *Fisher*, 467.
15. Conveyance to executor in trust for the estate, is a trust for himself representing the estate, per SERGEANT, J., and he may convey. *Id.*
16. Purchase of land of debtor to the estate, by executor, under a judgment to secure the amount due the estate, not a conversion, but a mere temporary investment. Per Id. *Id.*
17. Wife's distributive share survives on death of her husband, and if not reduced into possession, his debt cannot be set off. *Flory* v. *Becker*, 470.
18. Allowance of a credit for payment of a debt of a husband of distributee in the settlement of an administration account does not affect the right of the wife surviving her husband. *Id.*

As to inventory, see INTESTATE, 2.

See DISTRIBUTION ACCOUNT.

EXECUTORY DEVISE.

1. The estate of one claiming by executory devise during the continuance of the previous estate, is the subject of levy and sale. *De Haas* v. *Bunn*, 335.

EXPERT.

A surveyor permitted to state where he would locate a warrant similar to that under which defendant held. *Farr* v. *Swan*, 245.

F.

FALSE PRETENCES.

The false assertion of possession of money on the credit whereof goods were obtained, is a false pretence within the act of July 12th, 1842. *Commonwealth* v. *Burdick*, 163.

FEME COVERT.

1. Trustee by descent will be compelled to acknowledge a deed in the form required by the law of the place where the trust-estate is situate. *Dundas* v. *Biddle*, 160.
2. Power of husband over choses in action. See HUSBAND AND WIFE.

FENCES.

1. A partition fence having been destroyed by a flood, either party may re-

Digitized by Google

www.libtool.com.cn

FENCES.
cede from the former line, and erect a fence on his own land, leaving the intervening space open to the public; in which case he is not bound to maintain the former fence. *Painter* v. *Reece*, 126.
2. *Semble:* He is entitled to do so only in the event of a destruction of the former fence by an accident. *Id.*
3. A partition fence may be erected by either owner at pleasure, and his occupation of the requisite land of his neighbour for that purpose is not adverse, but by permission. *Dysart* v. *Leeds*, 488.
4. When the owner of the adjoining tract clears, and encloses to a fence already erected on the boundary line, he may insert the rails of his new fence into the partition fence, and if they project a short distance the injury falls within the maxim de minimis, &c. *Id.*

FIRST PURCHASER.
As to evidence of title and presumption of conveyance from possession. See LANDS, 6, 7, 8, 9.

FORBEARANCE.
See GUARANTY.

FOREIGN ATTACHMENT.
1. The return "attached," where the goods are the property of a stranger, subjects the sheriff to an action of trespass. Manual occupation, touching, or removal, is not essential. *Paxton* v. *Steckel*, 93.
2. Judgment having been recovered, in foreign attachment, on a bond for appearance, damages must be assessed under writ of inquiry, before scire facias can issue against the garnishee; and in default of such assessment the writ abates. *Thornton* v. *Bonham*, 102.
3. The garnishee may take advantage of the irregularity on the trial, under the scire facias. *Id.*
4. The holder of a certificate of deposit having commenced a suit by foreign attachment, surrendered it and took new certificates, the action cannot be maintained thereon. *Manuel* v. *Mississippi*, 198.
5. Attorney may be made garnishee. *Riley* v. *Hirst*, 347.

FOREIGN STATUTES.
See EVIDENCE, 23.

FRAUD.
1. Where an omission in a contract is not corrected by reason of the parties agreeing to consider it inserted, and advantage be taken thereof, it is fraud, and as such must be distinctly averred in the pleadings; it is not sufficient to aver facts from which the jury may infer fraud, &c. *Clark* v. *Partridge*, 13.
2. Evidence to prove facts amounting to fraud is inadmissible under the pleadings, averring it was through mistake and on the suggestion by defendant that he could not deny his agreement. *Id.*

Digitized by Google

www.libtool.com.cn

FRAUD.

3. The court were right in declining to instruct the jury, that the omission to state these facts when the referees met and decided the case, was a *strong* circumstance to rebut the presumption of fraud. *Id.*
4. A stranger or remainder-man cannot object to the acquisition of a title, that it would have been a breach of trust, the cestui que trust not complaining. *Woelper's Appeal*, 71.
5. An account for liquor, sold on credit by a tavern-keeper, is null within the act; hence the allowance in a settlement of accounts will be no bar to an action. *Driesbach* v. *Keller*, 77.
6. Release obtained without payment or consideration (as for a debt void at law) is tantamount to fraud, and would be set aside by a court of equity. *Id.* 80.
7. An executor, being a man of business, and a neighbour of a creditor of the decedent, who was an aged, weak, and illiterate woman, induced her to take his own bond in lieu of one creating a lien on the estate of a devisee, falsely representing the amount of the liens against his own estate. A court of equity would set aside the transaction, and hence she may sue on the original bond. *Hunt* v. *Moore*, 105.
8. *Semble*, Such a false representation would have avoided the contract between persons in equal situations. Per ROGERS, J. *Id.*
9. Nor is ignorance as to the truth or falsehood of the assertion, in the person making it, of any consequence. *Id.*
10. Ignorance or mistake in law may afford some inference of imposition, though in itself it cannot be relieved against. *Id.*
11. *Semble*, One cannot take advantage of a release or discharge obtained through the fraud of a third person, even though he was not a party thereto. *Id.*
12. A. agreed to sell the whole of a tract of vacant land, alleging a warrant he held would entitle him to obtain a title from the state. Articles were then drawn for the land to be acquired under said warrant. The law only permitted him to acquire a part under this warrant, which he did, and offered to convey. He then procured a warrant, &c., for the residue; and the vendee was held entitled to recover in ejectment, in the nature of a bill for performance, the part thus subsequently acquired. *Tyson* v. *Passmore*, 122.
13. On an agreement to convey, equity will turn the party into a trustee when he subsequently acquires the property. *Id.*
14. Misrepresentation of the effect of a written agreement, at the time of execution, must be made good. Per GIBSON, C. J. *Id.*
15. It is immaterial that the party have correct sources of information, when the plaintiff has made false representations of facts relating to land situated in a distant country. *Spalding* v. *Hedges*, 240.
16. Judgment, of which the consideration is a previous unsatisfied judgment, good against creditors. *In re Thorn* v. *Smith's Appeal*, 331.
17. Unless a party claim a benefit under a composition deed, he is not bound to notify the creditors that he holds securities of the debtor. *Id.*

Digitized by Google

www.libtool.com.cn

FRAUD.

18. Whether the execution creditor really mean to obtain his money, is the question, in deciding whether it is fraudulent as to other creditors. *Id.*
19. When dealing with an executor is fraudulent on the estate. *Trotter* v. *Shippen*, 360, 361.
20. The holder of a check, payment of which had been refused for want of funds, passed the same to his vendor, stating, in answer to inquiries, there was nothing wrong about it. *Held*, the suppression of these facts were fraudulent, and a recovery might be had on the original contract of sale. *Martin* v. *Pennock*, 376.
21. Practice proper in case of judgment, fraudulent as to creditors. See PRACTICE, 40.

FRAUDULENT CONVEYANCE.

1. A purchase by one indebted, in the name of a natural child, being intended to delay, &c., under 13 Eliz., may be avoided by a purchaser at sheriff's sale of the title of the father. *Kimmel* v. *McRight*, 38.
2. Declarations of intentions, in making such purchase, admissible in evidence. *Id.*
3. Equity will not aid a conveyance void at law as against the heirs of the grantor, there being strong ground to suspect it was fraudulent on the creditors of the grantor. *Stickney* v. *Borman*, 67.
4. Conveyance in consideration of the assumption of a lien on the land, renders the grantee liable to pay it, and is a valuable consideration. But whether the remedy be in covenant, or in another form of action, *Quære*. *Dubbs* v. *Finley*, 397.
5. A conveyance, fraudulent as to creditors, is rendered valid by the receipt of a dividend under a subsequent assignment of the consideration of the conveyance, with notice to the creditors. *Furness* v. *Ewing*, 479.

FUTURE ADVANCES.

See LIENS, 4, 5.

G.

GROUND-RENT.

1. As to sheriff's sale, and by what words they will pass—see EXECUTION, 3, 4, 5.
2. A power to sell in fee, on ground-rent or otherwise, is well executed by a sale on ground-rent with a clause in the deed allowing a redemption of the rent by the purchaser, on payment of a sum of money. *Ex parte Huff*, 227.
3. Where a sale on ground-rent has been made under such a power, and the right to extinguish the rent is given on payment of a sum certain to the grantors, they are entitled to receive the money and release the rent, even though the estate in the rent has become executed in others by virtue of the reservation in the deed and the statute of uses. *Id.*

Digitized by Google

GROUND-RENT.

4. *Semble*, That the donees of the power would not have the right to release the rent but for the express reservation.—Per KENNEDY, J. *Id.*

See DISTRIBUTION OF SHERIFF'S SALE.

GUARANTEE.

1. A promise to pay a judgment, if the plaintiff would not proceed further, is a promise in consideration of general forbearance, and on a loss ensuing the guarantor is liable. *Kean* v. *McKinsey*, 30.
2. The judgment is conclusive against the guarantor as a party. *Id.*
3. A guarantee without the request of the debtor is without consideration as to him. *Id.*
4. Liability of principal to surety, not having paid the debt, not discharged by the bankrupt law. *McMullen* v. *Bank*, 343.
5. Guarantors for equal amounts entitled to credits for equal shares of payment by debtor. *Id.*

H.

HEIR.

Practice to charge land of, for ancestor's debt—see PRACTICE, 15, 16, 17.

See DECEDENT'S DEBTS.

HIGHWAY.

See NUISANCE.

HOLMES'S MAP.

Circumstances relating thereto. *Farr* v. *Swan*, 252.

See EVIDENCE, 42, 43.

HUNDRED.

See COUNTY and MOBS.

HUSBAND AND WIFE.

1. Conveyance by husband to wife void at law, and when equity will not aid. *Stickney* v. *Borman*, 67.
2. A husband may reduce into possession a wife's legacy, in remainder, during the existence of a life-estate in the property, and thereby acquire an absolute property therein. *Woelper's Appeal*, 71.
3. And this, though he be trustee for the tenant for life.
4. The foundation of the husband's right is his power over his wife's chose coupled with an exercise of ownership, of which reduction into possession is but an evidence. *Id.*
5. User as his own, at a time he might have reduced it into possession, will amount to reduction, even if the money was unlawfully converted in the first instance. *Id.*
6. The guardians of the poor must make the complaint for desertion of

Digitized by Google

HUSBAND AND WIFE.
wife and children under 6th section of the act of 1812. *Commonwealth* v. *Nathans*, 138.
7. It should be before two magistrates. *Id.*
8. And the guardians, not the Commonwealth, should be plaintiffs. Per KENNEDY, J. *Id.*
9. The right to hold to bail given to one magistrate is auxiliary to the proceeding before two justices. *Id.*
10. If a feme give a warrant of attorney to confess judgment on her bond, and afterward marries, judgment may be entered against husband and wife. *Eneu* v. *Clark*, 234.
11. The practice is to move the court for leave on filing an affidavit of the facts and a declaration, and unless loss would accrue, to give notice also to the husband; but that was not required in this case. *Id.*
12. Wife's distributive share survives on death of her husband, and if not reduced into possession, his debt cannot be set off. *Flory* v. *Becker*, 470.
13. Allowance of a credit for payment of a debt of a husband of distributee in the settlement of an administration account does not affect the right of the wife surviving her husband. *Id.*

I.

INCUMBRANCES.
Purchaser not bound to accept title with perpetual incumbrance, even with compensation. *Gans* v. *Renshaw*, 34.

INSOLVENT.
1. A bond to take the benefit of the insolvent law is not discharged by the act of July 12th, 1842. *McFadden* v. *Dilly*, 61.
2. Where defendant in custody of his bail, after the passage of that law, but before it was known, gave bond to take the benefit of the insolvent law, and an exoneretur was entered on the recognisance; *held*, no recovery could be had against the sureties; for the arrest by the bail was illegal, and the bond could not legally have been demanded. *Gillespie* v. *Hewlings*, 492.
3. Presumption arising from no act being done under assignment for twenty years—see PRESUMPTION, 1.
4. As to conveyance under foreign assignment—see CONVEYANCE.
5. Proceedings cannot be sustained on an insolvent's bond, after an order to answer for fraudulent insolvency, during the pendency of the indictment, there being an appearance by defendant. *Potts* v. *Fitch*, 173.
6. Where the bail has been reduced by a subsequent order, the latter is the only one which can be recognised as obligatory. *Id.*

INTEREST.
1. What payable by endorser—see BILLS OF EXCHANGE, 1.

Digitized by Google

INTEREST.
2. Interest on purchase money, not recoverable from vendee, never having been in possession. *Tyson* v. *Passmore*, 122.
3. Widow's legacy does not bear interest until the expiration of the year—there being no estate of which she was dowable. *Gill's Appeal*, 221.
4. Nor would it, if there was real estate of the husband.—Per GIBSON, C. J. *Id.*
5. Interest not payable by county commissioners on damages awarded for opening a street, until the land is entered on. *Stewart* v. *The County*, 340.
6. On legacy from end of year—foreign legatee not having previously received notice from executors. *In re Marshall, Marshall's Appeal*, 388.

INTERLINEATION.
See DEED.

INTESTATE.
1. An administrator permitting goods to remain with the widow, is chargeable at the appraisement; nor is evidence admissible to show they were of less value. *Reiff's Appeal*, 256.
2. The debts are not properly a part of the inventory. The proper practice is for appraisers to add a list of debts, marking them speedy or desperate; the former is a primâ facie charge, the latter not. *Id.* 257.

INVENTORY.
See INTESTATE.

INVOICE.
See MERCANTILE LAW, 3, 4.

J.

JEOFAILS.
1. Omission to set out in the narr. the ward in which the property is situated, is cured by verdict. *Donoghue* v. *The County*, 230.

JUDGMENT.
1. A general judgment, on a scire facias to revive judgment sur claim, reciting a former general judgment, does not constitute a judgment in personam or extend the lien. *Simpson* v. *Murray*, 76.
2. Effect of judgments to cover future advances. See LIENS, 4, 5.
3. Poverty alone will not rebut the presumption of payment of a judgment after a lapse of twenty years. *Taylor* v. *Megargy*, 225.
4. Proof of positive inability during the whole period would do so. *Id.*
5. A judgment on a scire facias post annum et diem revives the lien, as well as if entered on a writ directed by the act of 1798. *Philadelphia Fire and I. Ins. Company's Appeal*, 263.

Digitized by Google

JUDGMENT.

6. Lien on estate by executory devise before vesting. *De Haas* v. *Bunn*, 335.
7. Special, to give equitable relief, practice on. See EQUITY, 22.
8. Judgment cannot be entered on warrant of attorney before the warrants are actually filed in the prothonotary's office. *Chambers* v. *Denie*, 421.
9. Plea of fraud in obtaining judgment, bad on scire facias to revive. *McKinney* v. *Shaw*, 440.
10. When judgments fraudulent as to creditors. See PRACTICE, 40.
11. A judgment having been recovered in 1818, against executors, an execution was issued and levied on land in 1821. Writs of liberari facias were issued and returned not executed in 1823, 1824, and 1825. In 1828, a sci. to revive issued, and judgment was obtained in 1829. The lien of the judgment continued, and a sale by the sheriff passed a good title. *Bell* v. *Ingraham*, 490.

See NONSUIT, 1.
PRESUMPTIONS, 2, 3.

JURISDICTION.

1. Board of Health has final jurisdiction as to fact of nuisance removed by them. *Kennedy* v. *The Board*, 366.
2. Of auditors to receive claims to specific property or funds which had come into the hands of assignees, but belonged to third persons. *In re Roberts*, 371.

See COURTS.

JUSTICES OF THE PEACE.

1. A plaintiff, who appealed from an award in his favour, and recovered more than the sum awarded to him, but less than such amount with interest added for the immediate time, allowed to recover full costs. *Haines* v. *Moorehead*, 65.
2. A compulsory nonsuit of a justice is conclusive of the suit, unless appealed from; for, having no power to enter such a judgment, it is equivalent to a judgment that the plaintiff has no cause of action. *Gould* v. *Crawford*, 89.
3. Proceedings before. See EVIDENCE, 13.
4. Surety of justice liable for all moneys received by him on suits or claims to be put in suit or on execution, or received from a constable on execution; but not for any thing received on claims to be collected as an agent, and without suit. *Commonwealth* v. *Kendig*, 448.

L.

LANDLORD AND TENANT.

1. A landlord may, at his election, treat a tenant holding over, after a term, as tenant from year to year, or as a trespasser. *Hemphill* v. *Flynn*, 144.
2. A demise at will, in consideration of services rendered annually to a re-

www.libtool.com.cn
Digitized by Google

LANDLORD AND TENANT.
ligious society as foresinger and organist, is not within the act of 1772, for uncertainty in the rent. *Hohly* v. *German*, 293.
3. Under this act, the determination of the term must be distinctly found; it is not sufficient for the inquest to find a tenancy at will, and a notice to quit prior to the commencement of the proceedings. *Id.*
4. Lessor of a coal mine not liable for injuries to a house on the surface, occasioned by the working of the mine by his tenant. *Offerman* v. *Starr*, 394.
5. The owner of a mine demised the right to mine at a rent payable on each ton of coal taken out, reserving the right to view and examine the mine, and to re-enter on non-payment, neglect, &c.; he is a landlord, and is not liable for an injury resulting from the prosecution of the work by the tenant. *Id.*
See ACTION, 16, 17.

LAND OFFICE.
See EVIDENCE, 44, 45.

LANDS.
1. The lines marked on the ground constitute the actual survey, and control the return of the surveyor, even where that calls for a natural or other fixed bounday, though the space between the two be but twelve perches in breadth. *Walker* v. *Smith*, 43.
2. Whether an improvement was made for the purpose of a continued residence, &c., is for the jury. *Jones* v. *Brounsfield*, 55.
3. Where an improvement was made by a tenant, who was employed by his landlord, as a charcoal-burner on the land, the declarations of the landlord, that he intended to settle and improve the land, are admissible. *Id.*
4. If the settlement was with a design to use the land for making charcoal, or for cutting timber, it would not give an improvement right. *Id.*
5. Settler entitled to a tract in a reasonable shape about his improvement, even though he may not have marked the lines or boundaries. *Id.*
6. An allotment on Schuylkill Front street, on Holmes's map, to a first purchaser, with proof of an allotment of a square, according to the present plan, to twenty-five persons, of whom this first purchaser was one, with title from him and possession had for forty years, is evidence of a possession sufficiently ancient to support the title without proof of actual location by warrant and survey. *Farr* v. *Swan*, 245.
7. But such ancient possession merely is not sufficient to raise a presumption of a grant in favour of the same party in his own right, for more than his own quantity, as a first purchaser, against the Commonwealth or its grantee, for, per SERGEANT, J., this would require another presumption, namely, of a conveyance from some other first purchaser, which cannot be made from a mere possession encroaching on the proprietary or Commonwealth. *Id.*
8. The act of 1781 was directed against intruders without colour of right,

www.libtool.com.cn
Digitized by Google

www.libtool.com.cn

LANDS.
not against persons in possession, or entering within seven years thereafter, and holding under first purchasers. *Id.*
9. Warrant and survey not necessary to title of a first purchaser to an appurtenant city lot. *Id.*

LEGACY.
1. Widow's legacy does not bear interest until the expiration of the year—there being no estate of which she was dowable. *Gill's Appeal*, 221.
2. Nor would it, if there was real estate of the husband.—Per GIBSON, C. J. *Id.*
3. Bequest of household furniture to widow, residue to executors, to pay her the interest so long as she remained his widow, and bore his name. "Should she marry again, then she shall have so much of my property as the laws of the land will give her, and yet $200." On a second marriage of the widow, the payment of interest ceases, and she is left to her rights at law, and can claim the absolute gift of the furniture, and $200 only. *Stahl's Appeal*, 301.
4. Legatee residing in another state entitled to interest from the end of the year; executors not giving notice until that time, and demand being made immediately thereafter. *In re Marshall, Marshall's Appeal*, 388.
See WILLS.
Practice to stay execution against legatee. See EXECUTION, 1.

LEX LOCI.
Endorser is liable for interest on a bill according to the law of the place on which it is drawn. *Mullen* v. *Morris*, 85.
Evidence of—see EVIDENCE, 22.

LIENS.
1. Balances due by county commissioners, how made. *Wilson* v. *Clarion*, 17; and see COUNTY COMMISSIONERS, 1.
See DISTRIBUTION OF SHERIFF'S SALES.
2. General judgment of revival on a judgment sur claim does not extend the lien or become a judgment in personam. *Simpson* v. *Murray*, 76.
3. Ground-rent is payable out of proceeds of sheriff's sale, under a lien acquired before the rent became due, but without interest. *Ter Hoven* v. *Kerns*, 96.
4. Judgment to cover future advances is valid, but if the creditor gives a statement of the amount then due, to enable the defendant to borrow from another, he is estopped claiming beyond that amount. *Id.*
5. It seems future advances will not be preferred to liens attaching before such advance is made. Per KENNEDY, J. If there be an obligation to make the advance, Query. *Id.*
6. Of decedent's debts not discharged by payment to executors by the heir. *Hunt* v. *Moore*, 105.
7. Where curbing, paving, and laying pipes is done by the district authorities opposite land owned by one person, but divided into several lots,

Digitized by Google

LIENS.

each lot is subject to a lien for the amount of the work done opposite to it. The lien is not joint on the whole property. *Pennell's Appeal*, 216.

8. Commissioners of Kensington have no claim for curbing, paving, &c., on the property adjacent, when the improvement exceeds the limit allowed by the legislature.
9. Nor does the act of 1813 disable the party to plead such excess of authority in defence. *Kensington* v. *Keith*, 218.
10. The lien for curbing, &c., given to the districts is not limited by the act for limitations of personal actions, there being no personal liability therefor. *Council* v. *Moyamensing*, 224.
11. Nor did the act of 1820 require an apportionment, but the whole lot was bound, though there be several buildings thereon. *Id.*
12. The act of 1840 only provides a remedy. *Id.*
13. Of judgment may be revived on sci. fa. post annum et diem. *Philadelphia Fire and Inland Navigation Company's Appeal*, 263.
14. Land was sold on a lien obtained after the registry of a mortgage, which was the first encumbrance, and before the entry of the judgment on the bond, accompanying the mortgage. The lien of the mortgage is not discharged, and the proceeds are to be applied to the judgments and liens according to priority. *Kuhn's Appeal*, 264.
15. Of judgment on estate of executory devisee. *De Haas* v. *Bunn*, 335.
16. Of Board of Health—see BOARD OF HEALTH.
17. Parol evidence inadmissible to establish a lien by admissions of a party claiming under a lost deed, when the articles stipulate for a deed without a lien, even though subsequent conveyances be subject to a lien, but what lien was not stated. *Patterson* v. *Forry*, 456.

LIMITATION.

A bequest durante viduitate ceases on marriage. *Stahl's Appeal*, 301.

LIMITATIONS (STATUTE.)

1. A purchaser from one of several trustees for A. for life, remainder in trust, to sell and pay to B., entered under his deed. The statute of limitations commenced running against the whole estate, and twenty-one years adverse possession bars as well the trustee as the cestui que trust tenant for life, and those in remainder. *Smilie* v. *Biffle*, 52.
2. As respects strangers, the legal and equitable estates are one, so as to be barred by adverse possession to the legal estate. *Id.*
3. When the title is incomplete, under the statute of limitations, in one either a trespasser or with colour, admissions of facts by him are evidence to show possession is not held adversely. *Aliter*, had the title by possession been complete, for then nothing less than a conveyance would have revested it. *Sailor* v. *Hertzogg*, 182–184.
4. Admission that will prevent the statute running. *Id.*
5. District liens, or the debts secured thereby, are not included in the statute of limitations. *Council* v. *Moyamensing*, 224.
6. A. having pleaded a partnership in abatement, the plaintiff commenced

Digitized by Google

LIMITATIONS (STATUTE.)

suit within a year and a day after the writ was quashed; process was served on the original defendant alone; the statute of limitations does not run since the commencement of the original action. *Downing* v. *Lindsay*, 382.

7. There can be no adverse possession by the erection of a party wall or fence. *Dysart* v. *Leeds*, 489.

See PRESUMPTIONS.

LUNATIC.

1. Where a trust is already created by the lunatic, the committee of his person and estate has no right to the control of the property. *Wilson's Estate*, 325.
2. A sale of real estate by the committee of a lunatic, for payment of his debts under a decree of the court, works no conversion of the surplus, but that remains real estate and is distributed as such according to the rules of descent. *Lloyd* v. *Hart*, 473.

M.

MALA PROHIBITA.

See ACTION, 19.

BILLS OF EXCHANGE, 4.

MARSHALLING ASSETS.

1. In the distribution of an assigned estate, lien creditors let in pro rata with general creditors on the personal property: retaining their liens on the realty for the residue. *Shunk's Appeal*, 304.
2. After a fi. fa. issued, A., who held collaterals in trust for an execution creditor, and was also assignee of the debtor, received money on account of the collaterals; a subsequent execution creditor cannot compel the application of that money to the debt thereby secured, but the assignee may retain it for the general creditors, subject to the obligation to satisfy any deficiency under the execution. *In re Thorn, Smith's Appeal*, 331.

MECHANICS' LIEN.

1. A sale under a claim against a house in A. street will not pass a house in B. street, against the original owner. *Simpson* v. *Murray*, 76.
2. Nor is parol evidence admissible, to prove the description was intended to apply to the house sold, with knowledge of the owner. *Id.*
3. A general judgment, on a scire facias to revive judgment sur claim, reciting a former general judgment, does not constitute a judgment in personam or extend the lien. *Id.*
4. Certainty to common intent sufficient in mechanic's claim. *Driesbach* v. *Keller*, 77.

"That the contract was made on the 16th April, 1841, and the work done between said 16th and 29th August, 1842," is sufficient, it being a

Digitized by Google

www.ibtool.com.cn

MECHANICS' LIEN.
question for the jury, whether filed within six months after completion. *Id.*
5. Repairs and additions may constitute a new erection within the act. *Id.*
6. The addition of one story, and a new building beside the old house, of equal dimensions, the whole being new roofed and weatherboarded, with interior communications, constitutes a new erection. *Id.*
7. Under the acts of 1806 and 1808, a mechanic's claim against a reputed owner, who was also contractor, though not named as such, is valid. *Christine* v. *Manderson*, 363.
8. And these acts extend to all cases where the goods were furnished before the act of 1836 went into operation. *Id.*
9. The plaintiff is entitled to judgment, though the real owner be not named in the sci. fa., for he may defend on the same ground in ejectment by a purchaser at sheriff's sale. *Id.*

MERCANTILE LAW.
1. A. informed B. of his intention to draw on him at Philadelphia, and remit funds via Mobile to meet the draft. B. declined entering into the operation, and informed A. the remittance would be wholly at his risk. B. drew and remitted the funds to T., at Mobile, for account of B. T. purchased a draft with these and other funds, and remitted to B., who was informed with what funds the purchase was made. B. cannot apply the proceeds of the draft to T.'s debt, but holds it for A. He should have refused to receive the money had he intended to repudiate the transaction entirely. *Pearl* v. *Clark*, 350.
2. "On your account," in a remittance, construction of. *Id.* 354.
3. An agreement by a shipper, with the captain, that he shall be interested to the extent of $5000 in the profit and loss of the shipment, gives no special or general property in the goods, but a mere right to participate in the profits. *Fleming* v. *Bevan*, 408.
4. The owner of a vessel, who also shipped a large part of the cargo, by his letter of instructions, stated the names of third persons who would be interested in the return cargo. The next day he agreed the captain should be interested to the extent of $5000 in the profit and loss in the shipment. The consignees, at the request of the captain, purchased goods for him to the amount of $5000, with the money of defendants, and consigned them to defendants, stating the agreement, and that they had been induced to make the purchase under that, at request of the captain; but if it was wrong, defendants could correct the mistake. Defendants entered the goods, and made oath to the invoice, without stating the name of the owner. On demand by plaintiff, they denied his right, alleging they had advanced to the shipper more than the value of the goods. *Held*, the plaintiff could not recover, either under the agreement, purchase, and invoice, or the subsequent acts of defendants. *Id.*

See APPROPRIATION OF PAYMENTS.
COMPOSITION DEED.
CONSTRUCTION OF CONTRACTS.

Digitized by Google

MESNE PROFITS.

1. Judgment in ejectment is conclusive as to mesne profits between the parties, from the day of the issuing of the writ, even though defendant entered by a habere facias possessionem, under a former judgment in ejectment between the same parties. *Man, Jun.* v. *Drexel*, 202.
2. The rule is the same under the act of Assembly, in this respect, as formerly. *Id.*
3. A verdict and judgment in ejectment is conclusive of the right to mesne profits from the time of the service of the writ, though the defendant's title is established by two verdicts and judgments, between the same parties and on the same title, one of which was prior, and the other subsequent to the term for which the recovery was sought. *Drexel* v. *Man*, 271.
4. Jury not confined to mere rent of premises in estimating damages. *Id.* 276.

MINES.

1. The owner of a mine demised the right to mine at a rent payable on each ton of coal taken out, reserving the right to view and examine the mine, and to re-enter on non-payment, neglect, &c.; he is a landlord, and is not liable for an injury resulting from the prosecution of the work by the tenant. *Offerman* v. *Starr*, 394.

MISTAKE OF LAW.

See FRAUD, 10. *Tyson* v. *Passmore*, 125.

MOBS.

1. In an action against the county for damages by a mob, evidence of unlawful conduct by men assembled within a church, of which the plaintiff was pastor, properly excluded as irrelevant, it being shown he was absent from the city at the time. *Donahue* v. *The County*, 230.
2. Notice under the act need only be given, when the owner has knowledge of the intended attack. *Id.*
3. Verbal notice "that it was expected the church would be attacked, and if so, the school-house would go too," is sufficient in case of the destruction of the school-house.—Per SERJEANT, J. *Id.*
4. Whether an agent for sale merely, can give such notice, *Quære?* *Id.*
5. Transactions during the riot properly excluded as irrevelant, unless the plaintiff can be implicated. *Id.*
6. Even as cross-examination of a witness, stating so much as related to the destruction of the property. *Id.*
7. An accidental destruction by fire communicated from a building fired by a mob, is within the act giving a remedy against the county. *Id.*

MORTGAGE.

1. Lien of first mortgage not impaired by sheriff's sale, though judgment be entered on the bond secured thereby. *Kuhn's Appeal*, 264.
2. Mortgagee in possession not entitled to tender before suit in the nature of a bill to redeem. *Eshbach* v. *Zimmerman*, 313.

www.ftbtool.com.cn

Digitized by Google

www.libtool.com.cn

N.

NISI PRIUS.
See COURTS,
ERRORS AND APPEALS.

NONSUIT.
A compulsory nonsuit of a justice is conclusive of the suit, unless appealed from; for, having no power to enter such a judgment, it is equivalent to a judgment that plaintiff has no cause of action. *Gould* v. *Crawford*, 89.

NOTICE.
1. A purchaser from a vendee at a tax sale, having notice, actual or constructive, by ancient improvements, which puts him on inquiry, that the land was seated, not entitled to retain for improvements made by himself. *Lambertson* v. *Hogan*, 22.
2. Purchaser under devisee has notice of a subsequent devise in the same will of a part of the subject of the first devise, though uncertain until election. *McAteer* v. *McMullen*, 32.
3. Notice by registry does not avoid the effect of a false representation. *Hunt* v. *Moore*, 107.
See BILLS OF EXCHANGE, 10, 11.

NUDUM PACTUM.
See CONSIDERATION.

NUISANCE.
1. A private nuisance may be abated by any one whose property is injured, and entry for such purpose is justifiable. *Turnpike* v. *Rogers*, 114.
2. A public nuisance may be abated by any one. *Id.*
3. A turnpike company, having erected a toll-house partly on the land of another, under license in consideration of user of the road by such owner, abandoned the house as a toll-house, and removed the gate. *Held:* It becomes a nuisance both on the road and on the land, and may be removed by any one injured. *Id.*
4. The board have final jurisdiction in determining the fact of nuisance, which they order to be removed. *Kennedy* v. *The Board of Health*, 366.
5. The 27th section of the act of 1818 has no reference to a nuisance on a vacant lot, so far as it requires a warrant from a justice, and a visit by a committee of the board, before an order for removal be made. *Id.*

O.

OFFICIAL BONDS.
Whether an official bond, signed on Sunday, is void as to parties to be thereby protected, being strangers to the breach of the law; *Query*. *Commonwealth* v. *Kendig*, 448.
See DEED, 92.

Digitized by Google

www.hzbook.com.cn

OFFICIAL PAPERS.

1. An extract from a paper in the land-office, if it appear to contain all that relates to the subject in controversy, (as an entire square,) is evidence. *Farr* v. *Swan*, 245.
2. Nor is it necessary it should show by whom or when made, for the presumption is in favour of regularity. *Id.*

ORPHANS' COURT.

See AUDITORS, 1.
EXECUTORS, 4, 5, 6, 10.
DISTRIBUTION ACCOUNT.

P.

PARENT AND CHILD.

A bond to a father, in consideration of permission to a minor son to leave home and work for himself, or for his board whilst at home, and working on his own account, if bonâ fide, is neither against the policy of the law nor fraudulent on creditors. *Geist* v. *Geist*, 441.

See APPRENTICE, 2.

PARTNERSHIP.

1. A., the partner of B., assigned all his interest in the partnership effects to B. with power to settle and compromise. B. may set off a debt due to the firm against a debt due by himself alone. *Craig* v. *Henderson*, 251.
2. One of several partners being alone served with process, promises and admissions by his agent are evidence in the action. *Downing* v. *Lindsay*, 382.
3. Effect of plea in abatement for non-joinder as to the statute of limitations. *Id.*

PARTY WALL.

See FENCES.

PAWN.

See ATTACHMENT IN EXECUTION, 1.

PENAL ACTS.

See CRIMINAL LAW.

PERJURY.

May be committed before any examiner appointed by the court within the state. *Contrà*, of depositions by consent, or out of the state. *Phillipi* v. *Bowen*, 20.

PLEADING.

1. An omission from a written contract procured by fraud, must be set out

Digitized by Google

www.libtool.com.cn

PLEADING.

on the record to have been so obtained; it is not sufficient to aver facts from which fraud may be presumed. *Clark* v. *Partridge*, 13.

2. The proceedings before a justice are to be tried by inspection; for the plea of *nul tiel record* to a writ, setting them out, raises an issue of law to the court. *Burkholder* v. *Keller*, 51.
3. Non est factum goes to the original execution of the deed and to its continuance; hence, on a subsequent alteration being apparent, evidence of consent is necessary to admit it in evidence. *Smith* v. *Weld*, 54.
4. Omission to set out in the narr. the ward in which the property is situated, is cured by verdict. *Donahue* v. *The County*, 230.
5. In scire facias on a mechanic's claim, the affidavit by the owner, that a release of him had been executed and delivered to the contractor, under an agreement between the owner and contractor, and at request of the contractor; and after exhibition to the owner, the name of plaintiff was struck off without the owner's knowledge: *Held* bad for not averring a delivery to, or to the use of the owner. *Wetherill* v. *Harbert*, 348.
6. The court may strike off a plea, averring or denying facts which the plaintiff must prove or disprove, to entitle himself to judgment. *Christine* v. *Manderson*, 363.
7. Plea of fraud in obtaining a judgment to a scire facias to revive, bad. *McKinsey* v. *Shore*, 438.

POLICY OF THE LAW.

See PARENT, CHILD, 1.

POOR LAWS.

1. One judge holding a court of quarter sessions has no jurisdiction of cases arising under the poor laws. *Commonwealth* v. *Nathans*, 138.

See HUSBAND AND WIFE.

POWER.

1. Where a general authority was given by the owner and chief of a trading "institution," to a factor residing abroad, as chief of a branch house, on all matters connected with the house, he is authorized to institute a suit in the individual name of one of his principals, without evidence that the property belonged to the "institution." *Meyer* v. *Littell*, 177.
2. A limitation of authority, by a proviso, is a negation thereof. *Kensington* v. *Keith*, 218.
3. A power to sell in fee, on ground-rent or otherwise, is well executed by a sale on ground-rent, with a clause in the deed allowing a redemption of the rent by the purchaser, on payment of a sum of money. *Ex parte Huff*, 227.
4. Where a sale on ground-rent has been made under such a power, and the right to extinguish the rent is given on payment of a sum certain to the grantors, they are entitled to receive the money and release the rent,

Digitized by Google

www.libtool.com.cn

POWER.

even though the estate in the rent has become executed in others by virtue of the reservation in the deed and the statute of uses. *Id.*

5. *Semble*, That the donees of the power would not have the right to release the rent but for the express reservation. Per KENNEDY, J. *Id.*
6. Coupled with an interest, cannot be destroyed by the voluntary act of the party, as marriage. *Eneu* v. *Clark*, 236.

W

PRACTICE.

1. One of two obligees having been discharged as a bankrupt, the plaintiff may enter a nol. pros. as to him, and proceed to trial against the other. *Commonwalth* v. *Nesbitt*, 16.
2. Notice to take depositions under a common rule on three consecutive days, held good, there being many witnesses; the substance of the notice being that the examination would be commenced on the first day, and continue during the specified period until finished. *Philippi* v. *Bowen*, 20.
3. Appearance and cross-examination waives any objection to the authority of the examiner. *Id.*
4. The death of defendant, between verdict and judgment, if not more than two terms intervene, cannot be averred for error, since the statute 17 Ch. 1, c. 8; 1 Ja. 2, c. 17, s. 5. *Chase* v. *Hodges*, 48.
5. The court will not interfere, to stay execution by executors against legatee, but where it is clear the estate is sufficient to pay the legacy. *Dunn* v. *The American*, 75.
6. Proof of items of set-off, before arbitrators, no waiver of the necessity of special notice under the rules of court. *Rentzheimer* v. *Bush*, 88.
7. If the court err in entering judgment with costs, the right judgment will be entered on writ of error, without reversing the judgment below. *Id.*
8. If plaintiff files two declarations, defendant may demur, or the court may refuse to try, or nonsuit, should plaintiff refuse to indicate which he relied on. *Gould* v. *Crawford*, 89.
9. The evidence of a deceased witness may be stated in substance; the precise words are unnecessary. *Id.*
10. Plaintiff in ejectment may waive proceeding against defendants added by the sheriff, under sec. 2, act 1807. *Freedley* v. *Mitchell*, 100.
11. It is not error to enter a nol. pros. as to some of the defendants after verdict, there being no contribution. *Id.*
12. Plaintiff in ejectment aliens after suit brought; he is entitled to judgment for nominal costs and damages. *Id.*
13. Judgment having been recovered, in foreign attachment, on a bond for appearance, damages must be assessed under writ of inquiry, before scire facias can issue against the garnishee; and in default of such assessment the writ abates. *Thornton* v. *Bonham*, 102.
14. The garnishee may take advantage of the irregularity on the trial, under the scire facias. *Id.*
15. Judgment having been obtained, at the suit of one heir, against the ad-

Digitized by Google

PRACTICE.

ministrator, who was the only other heir, execution issued on the ancestor's land, in the hands of an alienee of the heir; it was set aside for want of a judgment against the heir as such, under the 34th section of the act of 1834. *Atherton* v. *Atherton*, 112.

16. The creditor is not bound, under this act, to elect in the first instance to proceed against the heirs; his proper course is to proceed to judgment against the representative, and then obtain judgment de terris by scire facias against the heirs. *Id.*

17. In such a proceeding the heirs may contest the judgment on original grounds, or that the lien of the debt is lost. *Id.*

18. Where the Court of Common Pleas, deciding on a case under the chancery powers vested in it by act of Assembly, direct an issue, writ of error will not lie to the proceedings thereon in a court of law. *Baker* v. *Williamson*, 116.

19. The remedy is on appeal from the final decree by the court in chancery. *Id.*

20. Where an objection to a witness is taken at nisi prius, and a reason assigned, none other can be noticed on a writ of error, the facts of the case being known to the parties. *Smith* v. *Craig*, 153; *Miller* v. *Stem*. 287, *post* 24.

21. The proper course, on failure to file a warrant of attorney, is to stay proceedings, not quash the writ. *Meyer* v. *Littell*, 177.

22. If a feme give a warrant of attorney to confess judgment on her bond, and afterward marries, judgment may be entered against husband and wife. *Eneu* v. *Clark*, 234.

23. The practice is to move the court for leave on filing an affidavit of the facts and a declaration, and unless loss would accrue, to give notice also to the husband; but that was not required in this case. *Id.*

24. An objection that a paper "is not original" is a waiver of any defect in the acknowledgment, when the paper is a certified copy of a deed from the recorder's office. *Farr* v. *Swan*, 245.

25. The court will enter judgment specially, so as to make it appear that it does not bind defendant's property, but only such as is held in trust; to reach which was the object of the suit, being in the nature of a bill in equity. *Aycinena* v. *Peries*, 286.

26. A vendor having agreed to convey, by a day certain, in consideration of certain acts to be done to himself, and payments to a third person, without tendering a deed, brought ejectment, alleging non-performance by vendee, who had entered and made improvements; the court should direct a conditional verdict in such amount as on performance would compensate the plaintiff for neglect of the vendee; to be levied on delivery of a deed to be so drafted as to secure all the covenants thereafter to be performed. *Hawk* v. *Greensweig*, 295.

27. An attachment in execution and scire facias having been served on the original defendant and the garnishee, the jury should be sworn as to the garnishee alone, on the trial of the issue on the plea of nulla bona; for

Digitized by Google

www.libtool.com.cn

PRACTICE.
though both parties are required to be served, the proceedings are distinct. *McCormac* v. *Hancock*, 310.
28. Two papers being produced on a call by the other party, both or neither must be read. *In re Thorn, Smith's Appeal*, 331.
29. The court will allow a certificate to a judgment at Nisi Prius to be taken after the first day of the next term, under special circumstances supported by affidavit. *Catherwood* v. *Konn*, 341.
30. The Nisi Prius is a distinct court from the Supreme Court, and may arrest a judgment after verdict. *Id.*
31. The court may strike off a plea, averring or denying facts which the plaintiff must prove or disprove, to entitle himself to judgment. *Christine* v. *Manderson*, 363.
32. Before auditors as to testimony. See AUDITORS.
33. And where the cause of action was alleged to have existed against the firm, and the promise set out was by the partner who alone was served, such a defect cannot be taken advantage of on the trial, and on error after a trial on the merits, the court will direct the declaration to be so amended as to show what was tried. (But, *query*, if the declaration here recited a cause of action against any one but the party served.) *Downing* v. *Lindsay*, 382.
34. Execution may be issued after the year and a day has elapsed, on original as well as on revived judgments, since the act of 1845, section 4. *Dailey* v. *Straus*, 401.
35. On appeals from Nisi Prius, executors not bound to give security. *Mauie* v. *Shaffer*, 404.
36. On certificate for defendant, plaintiff must give security on writ of error. *Churchman* v. *Parke*, 406.
37. Judgment cannot be entered on warrant of attorney before the warrants are actually filed in the prothonotary's office. *Chambers* v. *Denie*, 421.
38. A rule of reference cannot be withdrawn by the party entering it, without leave. *Withers* v. *Haines*, 435.
39. If the record show the plaintiff named one arbitrator, the prothonotary for defendant one, and plaintiff a third, the presumption the number was fixed by the prothonotary, shown from his not appointing more, satisfies the law requiring him to fix the number. *Id.*
40. An award may be made pending demurrer. *Id.*
41. The practice of opening judgments on the motion of creditors is improper; an issue should be directed when the money is brought into court by the sheriff. *Geist* v. *Geist*, 441.
42. After award and appeal, a new count varying the cause of action cannot be filed. *Winder* v. *Northampton*, 446.
43. Count in trover states a different cause of action from one for deceit, under this rule, though they might have been originally joined. *Id.*
44. A party, after entering a rule to choose arbitrators, may alter the day for selection, if before notice be given. *Crawford* v. *Gable*, 444.
45. Unless an issue be demanded on distribution of sheriff's sales, before

Digitized by Google

www.libtool.com.cn

PRACTICE.

decree, the want of one cannot be assigned for error. *Brown's Estate*, 463.

Papers which may go to a jury. See EVIDENCE, 22.

PRESUMPTIONS.

1. Where nothing was done under an assignment for more than twenty years, presumption arises of payment of debts, and that the beneficial interest of property had all along remained in assignor. *McMullen* v. *Morris*, 84, 85.
2. Poverty alone will not rebut the presumption of payment of a judgment after a lapse of twenty years. *Taylor* v. *Megargy*, 225.
3. Proof of positive inability during the whole period would do so. *Id.*
4. The presumption is, a lost deed was in conformity to the articles. *Patterson* v. *Forney*, 456.
5. Payment or acknowledgment of part of a specialty debt, within twenty years, rebuts the presumption of payment as to the whole. *Kitchen* v. *Deardoff*, 481.

Of Conveyance. See EVIDENCE, 42, 43.

PRINCIPAL AND SURETY.

1. The sureties of a constable are only responsible where an execution is delivered to him in his official capacity by the magistrate. *Snapp* v. *The Commonwealth*, 49.
2. To charge the surety, the action should be against the constable as such. *Id.*
3. To discharge a surety by extension of the time of payment, there must be not only a sufficient consideration, but the time must be definitely fixed; hence an agreement to delay for an uncertain period—as until some time in the summer—will not discharge him. *Miller* v. *Stem*, 286.
4. The liability of a principal to his guarantee not having paid the money, is not discharged by the bankrupt law. *McMullen* v. *The Bank*, 343.
5. Several sureties for parts of one debt entitled to equal shares of a payment by the debtor. *Id.*
6. The drawer of an accommodation note is not entitled to the privileges of a surety, as between himself and strangers, having, by the instrument, agreed to be considered the principal; nor does he acquire the rights of a surety by subsequently giving a bond for the amount of the notes. *Lewis* v. *Hanchman*, 416.
7. Surety entitled to a security given by the principal, though under an agreement, satisfaction should be entered on it (a mortgage) when the debt was paid. *Id.* 420.
8. Surety of justice liable for all moneys received by him on suits or claims to be put in suit or on execution, or received from a constable on execution; but not for any thing received on claims to be collected as an agent, and without suit. *Commonwealth* v. *Kendig*, 448.
9. Acknowledgments of principal, evidence against the surety, unless there be proof of combination. *Id.*

See EVIDENCE, 8.

Digitized by Google

www.ibtbol.com.cn

PRIVATE ACTS.

1. The legislature cannot take the property of A., and give it to B., even for a full equivalent. *Lambertson* v. *Hogan*, 24.
2. Nor can it, after A. has been decided to have no right, give him one under colour of a construction of a previous statute. *Id.* 25.
3. Devise of land in trust for A., B. and C. for life, remainder to their respective children according to appointment; and in default thereof, equally among them, with cross-remainders. A private act authorized a sale on ground-rents, redeemable or irredeemable; the trustees giving security on receipt of the money paid in redemption, to be applied according to the trusts of the will. The act is constitutional, and the court will enforce a contract of purchase from the trustees. *Norris* v. *Clymer*, 277.
4. Devise in trust, with power to the tenant for life to sell on irredeemable ground-rents; the tenant for life was authorized, by act of Assembly, to sell on redeemable ground-rents, payable to the trustees; the redemption money also to be received by the trustees, to be invested under the direction of the Orphans' Court, but the purchasers not bound to see to its application. The act is constitutional, and no objection can be made by a purchaser on that account. *Sergeant* v. *Kuhn*, 393.

PRODUCTION OF PAPERS.

See PRACTICE, 27.

PROFIT AND LOSS.

See MERCANTILE LAW, 3, 4.

PROMISSORY NOTES.

See BILLS OF EXCHANGE.

PURCHASER.

1. His rights, when in possession, and vendor cannot make a title clear of encumbrances. EQUITY, 1, 2, 3, 4.
2. Not bound to accept a title with a perpetual encumbrance, even though compensation be made. *Gans* v. *Renshaw*, 34.
3. *Semble*, one out of possession cannot convey a better title than he himself has. *Drexel* v. *Man*, *Jun.* 268.
4. Under an avoided conveyance, no better than his grantor. *Arrison* v. *Harmstead*, 191.

See VENDOR AND VENDEE.

Q.

QUARTER SESSIONS.

See COURTS.

R.

READING RAILROAD.

Under the 12th section of the charter of the Reading Railroad Company, the contractors were authorized to enter and occupy with temporary dwellings, stables, blacksmith's shop, &c., the lands adjoining the line

Digitized by Google

READING RAILROAD.
of the road, provided no more was taken than was necessary for such purpose, while engaged in the performance of their contract. *Lauderbrun* v. *Duffy*, 398.

REDUCTION INTO POSSESSION.
1. The foundation of the husband's right is his power over his wife's chose, coupled with an exercise of ownership, of which reduction into possession is but an evidence. *Woelper's Appeal*, 71.
2. User as his own, at a time he might have reduced it into possession, will amount to reduction, even if the money was unlawfully converted in the first instance. *Id.*

REGISTER.
1. Where A., who was a foreigner and a male representative of the decedent, and had mortgaged his share, after residing here some years, absented himself for nine months, the court granted letters testamentary to an inhabitant, at the instance of the attorney of a sister of decedent, appointed to collect her share, and of the mortgagee, and this court refused to interfere on behalf of A. on his return. *Sarkie's Appeal*, 157.
2. Residence and title to a share in the estate are material qualities for an administrator, and want of these will authorize the register, in his discretion, to appoint the nominee of one otherwise having less title to the office, under the act of Assembly. *Id.*
3. The register has a discretion in the selection of an administrator from among those directed by the law. *Id.* 159.

RELEASE.
Obtained by fraud or without consideration—see FRAUD, 6, 8, 11.

RENT.
See LANDLORD.

RES JUDICATA.
1. A set-off was offered to be proved before arbitrators, who rejected the witness. The counsel and party then left the room, stating they would dispense with further attendance on the arbitration. An award unappealed from is conclusive on the subject of the claim offered to be set off. *Muirhead* v. *Kirkpatrick*, 425.
2. To admit a suit for a matter once offered to be proved as a set-off and rejected, there must be clear proof it was withdrawn by the party. *Id.*
3. Judgment on the merits on sci. fa. to revive a judgment by an improper party, may be pleaded as a former recovery in a subsequent proceeding by the legal representative, it being in his favour. *Withers* v. *Haines*, 435.

RIOT.
See MOBS.

Digitized by Google

RULES OF COURT.
Construction of, will be examined on error. *Rentzheimer* v. *Bush*, 88.

www.libook.com.cn

S.

SCHOOLS.
1. A trustee of the owners of a building leased to the directors of schools, held liable in trespass for entry before the expiration of the term; nor is it material that the public school had no funds, or that the teacher had not been examined for that year, if he have a certificate and had been examined on a previous occasion. *Kingsley* v. *The School*, 28.
2. Unless the inhabitants choose a teacher, the board of directors may appoint one. *Id.*
3. The school directors of each district should sue in their public capacity. *Id.*

SEDUCTION.
See ACTION, 2.

SELF-DEFENCE.
See DWELLING-HOUSE.

SET-OFF.
1. Proof of items of set-off, before arbitrators, no waiver of the necessity of special notice under the rules of court. *Rentzheimer* v. *Bush*, 88.
2. Endorsee of an over-due note takes it, subject to the equities arising out of the note itself, and not to set-off generally. *Hughes* v. *Large*, 103.
3. A., the partner of B., assigned all his interest in the partnership effects to B. with power to settle and compromise. B. may set off a debt due to the firm against a debt due by himself alone. *Craig* v. *Henderson*, 261.

See RES JUDICATA.

SETTLEMENT.
An expectation as devisee of one yet living may be *settled* on marriage. *John Wilson's Estate*, 325.

SETTLEMENT (RIGHTS.)
1. If the settlement was with a design to use the land for making charcoal, or for cutting timber, it would not give an improvement right. *Jones* v. *Brownfield*, 55.
2. Settler entitled to a tract in a reasonable shape about his improvement, even though he may not have marked the lines or boundaries. *Id.*

See LANDS, 2, 3.

SHERIFF.
The sheriff is entitled to the same privilege, in his communications with his attorney, as other persons. *Paxton* v. *Steckel*, 93.

Digitized by Google

www.libtool.com.cn

SHERIFF'S SALE.

1. In ejectment, under a sheriff's deed, it is error to exclude evidence of a tenancy in common between the debtor and one admitted to defend as landlord to the tenant, who came in under the debtor. *Knox* v. *Herod*, 26.

See SUMMARY PROCEEDINGS TO OBTAIN POSSESSION.

2. And in such case ejectment is improper; the remedy is by partition. *Id.* 28.

3. A bond or note cannot be levied on and sold by the sheriff; nor will such sale and delivery pass any title. *Rhoads* v. *Megonigal*, 39.

4. *Semble:* a note deposited in pawn may be attached as a debt under an attachment and execution against the owner; but it is proper to return specifically what goods, &c. were attached. Per ROGERS, J.

5. A sale under a claim against a house in A. street will not pass a house in B. street, against the original owner. *Simpson* v. *Murray*, 76.

6. Nor is parol evidence admissible, to prove the description was intended to apply to the house sold, with knowledge of the owner. *Id.*

7. A. being the owner of part of a large lot of land, and also of rents reserved out of another part, the marshal, under a levy upon a judgment against him, describing by metes and bounds the larger lots, with the *rents, issues, and profits thereof*, made a sale of the same, at public vendue:—*Held*, that under the word *rents*, the ground-rents reserved passed to the purchaser. *Hartley* v. *Beam*, 165.

8. And this though the advertisement described the land only, for defective description therein can have no effect after the deed is acknowledged. *Id.*

9. The word *lands* sufficient to pass rents, *arg.* *Id.* 168–170.

10. Though it discharges the lien of the judgment on the bond, does not discharge the lien of the mortgage, if it be a first encumbrance. *Kuhn's Appeal*, 264.

11. Notice of the mortgage given by a judgment creditor, at the sale, and that the judgment had been entered, and was in process of collection, is immaterial, for the purchaser had constructive notice by the registry and record. *Id.*

12. Notice of absolute title at sale, precludes setting up any other. *Eshbach* v. *Zimmerman*, 313.

13. A book of entries, which would be evidence against the owner of a chattel, will also be evidence against the purchaser of his right at sheriff's sale. *Farmers* v. *McKee*, 318.

14. A. being devisee in fee of a moiety of a house, and executory devisee of the other moiety, a fieri facias was levied on both estates and returned unsold for want of buyers; a venditioni reciting this levy, commanded a sale of the vested moiety; the return was of a sale in obedience thereto, and the sheriff conveyed both estates:—*Held*, that both moieties passed. For the court will amend the writ according to the levy, it appearing clearly from the deed, that all the land levied on was actually sold, and forty years having elapsed. *De Haas* v. *Bunn*, 335.

15. A life-estate in improved lands cannot be sold by the sheriff since the acts of 1836 and 1840. *Parget* v. *Stambaugh*, 485.

See DISTRIBUTION OF PROCEEDS OF SHERIFF'S SALE.

Digitized by Google

www.libtool.com.cn

SHIPPING.
The owner of a canal boat is liable for provisions and necessaries furnished and charged to the captain of the boat. *Phillips* v. *Tapper*, 323.

SLANDER.
1. To call an attorney a cheat, even though an indictable offence be not imputed, actionable. *Rush* v. *Cavenaugh*, 187.
2. Refusal to permit defendant to withdraw a plea of justification to an action of slander is not a subject of writ of error. *Id.*

SPECIFIC PERFORMANCE.
See EQUITY.
PRACTICE, 26.
VENDOR AND VENDEE. *Gans* v. *Renshaw*, 34.

STATUTE OF LIMITATIONS.
See LIMITATION OF ACTIONS.

STREETS.
Interest not payable by county commissioners on damages awarded for opening a street, until the land is entered on. *Stewart* v. *The County*, 340.

SUMMARY PROCEEDINGS TO OBTAIN POSSESSION.
A tenant in common admitted to defend may set up his title, though the tenant have entered under a demise, from his co-tenant, the debtor. *Knox* v. *Herod*, 26.

SUNDAY ACT.
See CRIMINAL LAW.

SURETY.
See PRINCIPAL AND SURETY.
CONSTABLE.

SURVEY.
The lines marked on the ground constitute the actual survey, and control the return of the survey, even where that calls for a natural or other fixed boundary, though the space between the two be but twelve perches in breadth. *Walker* v. *Smith*, 43.

T.

TAVERNS.
See ACCORD AND SATISFACTION, 2.

TAX SALE.
1. The act of April 12, 1842, and March 11, 1843, relative to tax sales, has no effect on cases already adjudicated, for explanatory acts cannot alter

Digitized by Google

www.libtool.com.cn

TAX SALE.
or impair vested rights; they are to be so construed as to affect future cases under doubtful statutes.
2. A purchaser from a vendee at a tax sale, having notice, actual or constructive, by ancient improvements, which puts him on inquiry, that the land was seated, not entitled to retain for improvements made by himself. *Lambertson* v. *Hogan*, 22.

TENDER.
See VENDOR AND VENDEE.
EQUITY, 25.

TIMBER.
See ACTION, 16, 17.

TREASURY NOTES.
United States Treasury notes are negotiable instruments. *Frazer* v. *D'Invilliers*, 200.

TRESPASS.
1. Trespass for an injury to timber during the possession of lessee for years cannot be maintained by the landlord. *Greber* v. *Kleckner*, 291.
2. A landlord cannot maintain trespass for cutting timber, as to which his lessee was restricted.—*Aliter*, had it been expressly *reserved* in the lease. *Id.*
See ELECTION.
FOREIGN ATTACHMENT, 1.

TROVER.
1. In trover, the plaintiff must show that he is entitled to the property by a complete performance of his contract of purchase. *Farmers* v. *McKee*, 318.
2. A. agreed to employ B. to carry coal in boats, which were delivered to him; certain portions of the freight were to be retained until they equalled the value of the boats, when they were to be transferred to B. In trover against the purchaser of A.'s interest, B. is not entitled to recover to the extent of the payments made, if they are less than the price. *Aliter*—Had the price been paid according to the agreement, or in any other way. *Id.*

TRUST. TRUSTEES.
1. One of three trustees has not authority to put an end to a lease of the property of the charity. *Kingsley* v. *The School*, 28.
2. As respects strangers, the legal and equitable estate are one, so as to be barred by adverse possession to the legal estate. *Smilie* v. *Biffle*, 52.
3. Trustee having advanced for the trust entitled to reimbursement, which

Digitized by Google

www.libtool.com.cn

TRUST.
will be enforced by an ejectment and conditional verdict. *Altemus* v. *Elliott*, 62.
4. A stranger or remainder-man cannot object to the acquisition of a title, that it would have been a breach of trust, the cestui que trust not complaining. *Woelper's Appeal*, 71.
5. Words of desire, expectation, or confidence, create a trust, whether the subject be real or personal estate. *Coates' Appeal*, 129.
6. The court will compel a feme covert trustee by descent, to acknowledge that she executes the deed voluntarily, &c. *Dundas* v. *Biddle*, 160.
7. A direction that a legatee shall have the guardianship and tuition of after-born children is a provision for them within the act of 1833, 8th April, it being a trust created for the purpose of maintenance and education. *Jackson* v. *Jackson*, 212.
8. And it seems this would be so, even had the children no pecuniary benefit from the will. *Id.*
9. Settlement of trustees' accounts, charges and commissions allowed. *Pennell's Appeal*, 216.
10. Executing a covenant personally bound. *Hawke* v. *Greensweig*, 297.
11. Two and a half per cent. commissions allowed on sale by assignees of real estate, the purchase money being about $44,000, of which $13,000 came into their hands, the residue continuing a lien, by agreement between a mortgagee and the purchaser. *Shunk's Appeal*, 204.
12. Devise that executors should have the management, control, and leasing of a farm, and that testator's daughter should be permitted to remain thereon during her life at a moderate rent, in the discretion of executors; after the death of the daughter the land was given to her children; at the death of the daughter, the estate vests in the children, who may maintain ejectment in their own name. *Vanartsdalen* v. *Vanartsdalen*, 312.
13. A. conveyed to B., by a deed absolute on its face; B. entered; subsequently a creditor of A. purchased his estate at sheriff's sale, at which B. gave notice that A.'s title was vested in him by the deed. On ejectment, the purchaser proved the conveyance was for the purpose of enabling B. to raise money on his bond and mortgage, which was done: *Held*, the proceeding was in the nature of a bill to redeem, hence a tender previous to suit was unnecessary. *Eshbach* v. *Zimmerman*, 313.
14. The notice of claim to the absolute title precluded B. setting up any other title against the purchaser. *Id.*
15. Executors were declared trustees by a will; the offices being inseparable, security can only be demanded as executor, and not as trustee. *John Wilson's Estate*, 325.
16. Where a trust is already created by the lunatic, the committee of his person and estate has no right to the control of the property. *Id.*
17. An executor holding a mortgage received coal for his private use, from the tenant, who had agreed to keep down the interest as part of the rent; he promised to endorse the amount on the bond, and on accounts,

Digitized by Google

www.libtool.com.cn

TRUST.
crediting him with the amount of the interest, being rendered, examined them without objection, continually repeating the promise to make an entry on the bond. *Held*, there being no collusion, both parties considering the executor a solvent man, the mortgagors were entitled to this credit for interest on the mortgage. *Trotter* v. *Shippen*, 358.

18. Purchase, by general agent for heirs, of the land of their ancestor from the vendee at a tax sale, instead of redeeming, enures to their benefit. (*Query*, if made with trust funds; it seems it was.) *Brown's Estate*, 463.

Case of a purchase and sale of land by executors. See EXECUTORS, 13.

U.

USAGE.
See CUSTOM.

USE AND OCCUPATION.
See ACTION, 14.

VENDITIONI.
See AMENDMENT, 1.

V.

VENDOR AND VENDEE.

1. Purchaser from vendee at tax sale, having notice actual or constructive, as by ancient improvements, not entitled to retain for improvements made by himself. *Lambertson* v. *Hogan*, 22.
2. Purchaser under devisee has notice of a subsequent devise in the same will of a part of the subject of the first devise, though uncertain until election. *McAteer* v. *McMullen*, 32.
3. A vendee, by articles of agreement, is not bound to restore the possession to the vendor and give up the contract, before he can make objections to the title in an action brought for the purchase money. *Gans* v. *Renshaw*, 34.
4. He cannot keep both the estate and the price of it; but it is the vendor's business, if he finds that he cannot make such a title as the vendee is bound to accept, to refund what has been paid, and bring an ejectment for the property. *Id.*
5. The vendee is not bound to accept a title depending on a conveyance to a creditor, where there is evidence to raise a suspicion that the object of the conveyance was to elude other creditors who were pressing for judgments. *Id.*
6. Nor, if there be a covenant for title, clear of encumbrances, where there are unextinguished ground-rents; and it is error to instruct the jury

Digitized by Google

VENDOR AND VENDEE.
www.ibtool.com.cn
that the defect may be compensated by a deduction from the purchase money. *Id.*

7. A. agreed to sell the whole of a tract of vacant land, alleging a warrant he held would entitle him to obtain a title from the state. Articles were then drawn for the land to be acquired under said warrant. The law only permitted him to acquire a part under this warrant, which he did, and offered to convey. He then procured a warrant, &c., for the residue; and the vendee was held entitled to recover in ejectment, in the nature of a bill for performance, the part thus subsequently acquired. *Tyson* v. *Passmore*, 122.
8. On an agreement to convey, equity will turn the party into a trustee when he subsequently acquires the property. *Id.*
9. Misrepresentation of the effect of a written agreement, at the time of execution, must be made good.—Per GIBSON, C. J. *Id.*
10. Interest on purchase money, not recoverable from vendee never having been in possession. *Id.*
11. Purchaser rescinding an agreement for conveyance, need not surrender the agreement until he has been repaid, and he may do it on the trial. *Spalding* v. *Hedges*, 240.
12. Where the vendor sues on his legal title, the vendee defends under the articles as on a bill to restrain the action at law, and less proof is required in such case than if the vendee were seeking specific performance; and the verdict is to be so moulded as to give the same relief which a court of equity would give under similar circumstances. *Hawk* v. *Greensweig*, 295.
13. Where the action is in the nature of a bill, to compel performance of articles, or the vendee defends thereon in the nature of a bill to restrain the proceedings at law, delivery of a deed, though a condition precedent, need not be made or tendered before bringing suit. The court will direct a verdict, conditional on delivery of a proper conveyance. *Id.*
14. Conveyance in consideration of the assumption of a lien on the land, renders the grantee liable to pay it, and is a valuable consideration. But whether the remedy be in covenant, or in another form of action, *Quære.* *Dubbs* v. *Finley*, 397.

See EQUITABLE TITLE.

VOLUNTARY CONVEYANCE.
See EQUITY, 7, 8, 9.

VOLUNTARY PAYMENTS
Cannot be recovered back. *Keener* v. *Bank of the United States*, 237.

Digitized by Google

www.libtool.com.cn

W.

WARRANT OF ATTORNEY.

See ATTORNEY.

WILL.

1. Bequest of interest to A., and if she die without lawful issue, the principal to B., is a vested interest in B. *Hopkins* v. *Jones*, 69.
2. In cases of personalty the words "dying without issue" are construed to mean without *leaving* such, if in accordance with testator's intent. *Id.*
3. A paper, purporting to be testamentary, being found with the signature obliterated, the presumption is, it was obliterated by the testator. *Baptist* v. *Robbarts*, 110.
4. The onus to show accident, mistake, &c., lies on the party offering it for probate. *Id.*
5. Declarations of intent, and condition, and circumstances of families, are not sufficient to rebut the presumption. *Id.*
6. On bequest to wife of personalty absolutely, having full confidence that she will leave the surplus to be divided, at her decease, justly among testator's children, the widow is entitled to the income for life merely, and is a trustee for the children of the principal. *Coates's Appeal*, 129.
7. There being a previous devise for payment of debts, the word "surplus" construed to mean all that shall remain thereafter, and not to give any right of disposition to the widow during her life. *Id.*
8. Words of desire, expectation, or confidence, create a trust, whether the subject be real or personal estate. *Id.*
9. A direction that a legatee shall have the guardianship and tuition of afterborn children is a provision for them within the act of 1833, 8th April, it being a trust created for the purpose of maintenance and education. *Jackson* v. *Jackson*, 212.
10. And it seems this would be so, even had the children no pecuniary benefit from the will. *Id.*
11. Interest on widow's legacy. See LEGACY, 1, 2.
12. Testator bequeathed to his debtor legacies larger in amount than the debt; the payment of which, he directed, was to be made when entirely convenient, free from the charge of interest, and named him executor; he also released another debtor from interest for twelve months after his decease.—*Held*, the amount of the executor's debt could not be deducted from the commissions charged on filing his third account. *Smith's Appeal*, 258.
13. A bequest durante viduitate ceases on marriage. *Stahl's Appeal*, 301.
14. Bequest of household furniture to widow, residue to executors, to pay her the interest so long as she remained a widow, and bore his name. "Should she marry again, then she shall have so much of my property as the laws of the land will give her, and yet $200." On a second

Digitized by Google

www.libtool.com.cn

WILL.

marriage of the widow, the payment of interest ceases, and she is left to her rights at law, and can claim the absolute gift of the furniture, and $200 only. *Id.*

15. Devise that executors should have the management, control, and leasing of a farm, and that testator's daughter should be permitted to remain thereon during her life at a moderate rent, in the discretion of executors; after the death of the daughter, the land was given to her children; at the death of the daughter, the estate vests in the children, who may maintain ejectment in their own name. *Vanartsdalen* v. *Vanartsdalen*, 312.

16. Devise to my daughter A. for life, remainder to her children in fee, A. then having a child, "provided if she die without issue to my son B.," an executory devise, and not too remote, the word issue being confined to children previously referred to. Per GIBSON, C. J., and KENNEDY, J. *De Haas* v. *Bunn*, 335.

17. A., by deed, conveyed lands to all the children and grandchildren of B. and C., his children, excepting one grandchild, to whom he bequeathed a legacy in a will made subsequent to the deed; by a codicil, he declared that said property given to the representatives of B. and C. should be in lieu of a provision by the will: *Held* not to revoke the legacy, as the legatee was not one of the representatives provided for. *In re Marshall, Marshall's Appeal*, 388.

18. Testator having grandchildren and great grandchildren, descendants of his three children, A., B., and C., by deed conveyed certain land to the representatives of B. and C. He then made his will, devising land to two of the children of A., paying certain amounts to their brothers and sisters. He then made certain specific bequests, and gave the residue of his estate equally among his grandchildren and great grandchildren, who were to take per stirpes; stating it had been his anxious desire to make as equal a distribution as possible. By a codicil reciting the conveyance, he devised, "my will is that said property shall be in lieu of a provision in my will, and shall not be accounted any part of my residuary estate; neither shall any gifts to them be so considered:—*Held*, the codicil was not a revocation of the residuary devise, but was intended to show that the conveyance was not to be considered an advancement. For the opposite construction would produce a great inequality in the distribution of the estate. *Id.*

19. The court, in deciding upon the intention of testator, receive evidence of the value of the property devised or referred to in the will. *Id.*

20. Testator devised all his estate among his seven brothers and sisters, nominatim, or their survivors. Four of them were dead, leaving issue at the time he made his will, and the fact was known to him. *Held*, survivors meant representatives; it being clear the will was written by an illiterate man. *Barr's Estate*, 428.

21. The court receive evidence of facts and circumstances relating to the family of testator, known to him, in construing a will. *Id.*

Digitized by Google

www.libtool.com.cn

WITNESS.

1. Evidence of contradictory statements, to discredit a witness examined at the trial, not admissible, unless he is first examined as to such statements, so as to give an opportunity for explanation. *McAteer* v. *McMullen*, 32.
2. So of an omission by the witness to state facts in a previous trial between other parties, unless it be shown to have been pertinent to that issue, and then subject to the rule above stated, § 1. *Id.*
3. One who has acquired an interest in a debt by assignment is incompetent as a witness in a suit for its recovery, even though he has re-assigned his interest, and pays all the costs into court. *Clover* v. *Painter*, 46.
4. Judgment creditor of one who may be insolvent is a competent witness for him in a suit for the recovery of land. *Jones* v. *Brownsfield*, 55.
5. Whether a witness is competent, by reason of intoxication, is in the discretion of the court. *Gould* v. *Crawford*, 89.
6. One not made a party defendant cannot be objected to as a witness, on the allegation that he is liable to plaintiff. *Id.*
7. Where a witness has no home or family, his deposition taken out of the jurisdiction, at a place where he was at work, when last heard of, may be read. *Id.*
8. An executor, defendant, cannot be a witness to charge himself, thereby discharging the land of a devisee, co-defendant, of the decedent's debts. *Hunt* v. *Moore*, 105.
9. Competency of arg. *Smith* v. *Craig*, 154, 155.
10. A party to a sealed note is competent to prove an extension of time to himself, thereby discharging another party who was a surety, under the pleas of payment, and of this fact specially. *Miller* v. *Stem*, 286.
11. On an issue of nulla bona, the original defendant is a competent witness for the garnishee, in attachment of execution; for they have contrary interests. *McCormack* v. *Hancock*, 310.
12. A stranger to a suit for damages occasioned by the erection of a dam, whose land is thereby flooded, is not incompetent as a witness, even though he may have granted the right, of which the party cannot avail himself but by thus swelling the water. *Riddle* v. *Dixon*, 372.
13. Assignor of a debt incompetent to prove it as a set-off by his assignee. *Muirhead* v. *Kirkpatrick*, 425.
14. One of two defendants in ejectment, on whom the writ had been served, and who had pleaded, cannot by disclaimer (his plea having been permitted to be withdrawn) make himself a competent witness for his co-defendant; for he may still be liable for costs and mesne profits. *Kirk* v. *Ewing*, 454.
15. Plaintiff having released surplus to insolvent assignee not a competent witness. *Bittinger* v. *Keys*, 459.
16. An executor, having paid a legacy, is incompetent as a witness to establish the will on an issue of devisavit vel non. *Hinkle* v. *Eichelberger*, 483.

Digitized by Google

www.libtool.com.cn

WRITS.

1. A return of "served" by a constable to an execution is insufficient; and on a scire facias and plea of nul tiel record, judgment was entered for plaintiff. *Burkholder* v. *Keller*, 51.
2. The return "attached," where the goods are the property of a stranger, subjects the sheriff to an action of trespass. Manual occupation, touching, or removal, is not essential. *Paxton v. Steckel*, 93.
3. The sheriff's return is conclusive on himself. *Id.*
4. Amendment of venditioni by the fi. fa. and deed, by inserting a property. *De Haas* v. *Bunn*, 330.

See, as to returns, SHERIFF'S SALE, 4.

Ex. G. C. C.

END OF VOL. II.

Digitized by Google

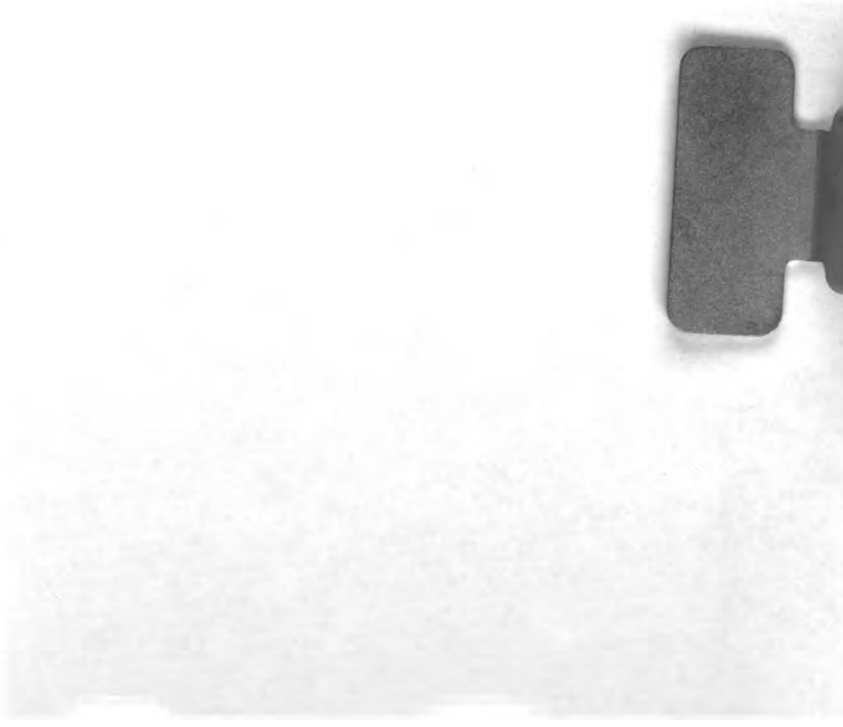
www.libtool.com.cn

Digitized by Google

www.libtool.com.cn

Digitized by Google

www.libtool.com.cn



HARVAR[redacted]RY

Digitized by Google

www.libtool.com.cn

Digitized by Google