3 2044 078 440 575

www.libtool.com.cn

Digitized by Google

www.libtool.com.cn

HA IBRARY

Digitized by Google

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

PENNSYLVANIA

www.libtool.com.cn

STATE REPORTS.

VOL. XXV.

COMPRISING

CASES ADJUDGED

IN THE

Supreme Court of Pennsylvania.

BY

JOSEPH CASEY,
STATE REPORTER.

VOL. I.

CONTAINING

THE CASES DECIDED IN PART OF MAY TERM, 1855; IN OCTOBER TERMS, 1855; AND PART OF JANUARY TERM, 1856.

PHILADELPHIA:
KAY & BROTHER,
LAW BOOKSELLERS, PUBLISHERS, AND IMPORTERS,
19 SOUTH SIXTH STREET, EAST SIDE.
1857.

Digitized by Google

www.libtool.com.cn

Entered, according to Act of Congress, in the year 1856, by
KAY & BROTHER,
in the Clerk's Office of the District Court of the Eastern District of Pennsylvania.

Printed by T. K. & P. G. Collins.

Rec. Oct. 27, 1892.

Digitized by Google

www.libtool.com.cn

PREFACE.

In presenting the first volume of this series of the "Pennsylvania State Reports" to the profession, it is perhaps proper for me to state, that by the decease of my highly esteemed predecessor, JAMES HEPBURN, Esq., the task of completing what he had already begun, devolved upon me, in the midst of numerous business and professional engagements previously assumed. In consequence of which I have not been able to bestow as much time and labour upon the preparation of this volume as I otherwise would have done, without delaying unreasonably its publication. The matter embraced in the first one hundred and eighty-two pages of the present book, with the exception of three cases, was prepared by Mr. Hepburn, to whose executor, Hon. A. V. PARSONS, I am under obligations for his aid and counsel in arranging that matter for the press.

To the Judges of the Supreme Court respectively, and to many gentlemen of the bar, I am greatly indebted for many kind and valuable suggestions in regard to the Reports, and especially to F. C. BRIGHTLY, Esq., of the Philadelphia bar, whose kindness and courtesy I take pleasure in acknowledging.

It will be the aim of the Reporter to make the work a correct

Digitized by Google

and faithful record of the adjudications of the highest judicial tribunal of our Commonwealth, and, by diligent attention and patient labour, endeavour to render it useful and acceptable to the profession.

In striving to attain these objects he solicits the co-operation of the judiciary and the bar, through their advice and suggestions; and, relying upon their characteristic magnanimity, he hopes for their indulgence and forbearance for the errors and defects the work may contain.

J. C.

PHILADELPHIA, May 1st, 1856.

Digitized by Google

www.libtool.com.cn

JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA

DURING THE PERIOD OF THESE REPORTS.

Hon. ELLIS LEWIS	Chief Justice.
Hon. WALTER H. LOWRIE . .	Justices.
Hon. GEORGE W. WOODWARD* .	
Hon. JOHN C. KNOX . . .	
Hon. JEREMIAH S. BLACK . .	

THOMAS E. FRANKLIN, Esq., Attorney-General.

* Mr. Justice WOODWARD was prevented by sickness from sitting at Pittsburgh, during the month of October, and part of November, 1855.

Digitized by Google

www.libtool.com.cn

Digitized by Google

www.libtool.com.cn

TABLE OF CASES.

	PAGE
Abbey *v.* Dewey	413
Allegheny City, Schenley *v.*	128
Allegheny *v.* Nelson	332
Amick *v.* Oyler	506
Anderson *v.* Hamilton Township	75
Anderson, Wood *v.*	407
Armstrong, Himblewright *v.*	428
Arnold *v.* Cessna	84
Ashford *v.* Ewing	213
Ashworth, Shallenberger *v.*	152
Baker, King & Shoenberger *v.*	186
Bakewell, Robinson *v.*	424
Bank, Marshall *v.*	384
Bank, Meighen *v.*	288
Barclay *v.* The Commonwealth	508
Barr, Sample *v.*	457
Bashline, Guthrie *v.*	80
Baugh, Wheatley *v.*	528
Beale *v.* The Commonwealth	11
Beck *v.* Beck	124
Beck, Smith *v.*	106
Bell's Estate	92
Bell *v.* Ohio and Pennsylvania Railroad Company	161
Bilyeau, Gaule *v.*	521
Blair *v.* McLean	76
Black's Appeal	238
Bluff Mining Co., Woodwell *v.*	365
Bower *v.* Commissioners	69
Bradley, Fuller *v.*	120
Brock, Muhlenberg *v.*	517
Brock, Tyson *v.*	517
Brooks, Brown *v.*	210
Brown *v.* Brooks	210
Brown *v.* Powell	229
Brown, Erie and Waterford Plank-Road Co. *v.*	156
Brownfield *v.* Canon	299
Brush Valley, Wheatfield *v.*	112
Burry, Nesbit *v.*	208
Burke, Crum *v.*	377
Campbell *v.* Fullerton	345
Campbell, Hutchinson *v.*	273
Canon, Brownfield *v.*	299
Carbon Run Improvement Co. *v.* Rockafeller	49
Carr *v.* Chartiers Coal Co.	337
Cassidy *v.* Conway	240
Cessna, Arnold *v.*	84
Charlton, Hogg *v.*	200
Church *v.* Church	278
Clark *v.* Depew	509
Clark *v.* Freeman	138
Clark *v.* Morrison	453
Clark *v.* Smith	137
Clark & Thaw *v.* Wilder	314
Clarke *v.* Porter	141
Clarke & Thaw *v.* Needles	338
Clement, Lower & Barron *v.*	68
Chambers *v.* Marks	296
Chartiers Coal Co., Carr *v.*	337
Commissioners, Bower *v.*	69

Digitized by Google

	PAGE
Commonwealth, Barclay v.	503
Commonwealth, Beale v.	11
Commonwealth, Custer & Lantz v.	375
Commonwealth, Holmes v.	221
Commonwealth, Nusser v.	126
Commonwealth v. Slifer	23
Colgrove, Cummings v.	150
Compher v. Compher	31
Conway, Cassidy v.	240
Corbet v. Evans	310
Cook v. Dunkle	340
Cook v. Shrauder	312
Crow v. Kightlinger	343
Crum v. Burke	377
Cumberland v. Jefferson	463
Cummings v. Colgrove	150
Cummings' Appeal	268
Cummings, Gibson v.	231
Custer & Lantz v. The Commonwealth	375
Depew, Clark v.	509
Dewey, Abbey v.	413
Dodson's Appeal	232
Dorney, Mertz v.	519
Dougherty, Porter v.	405
Downing, Kribbs v.	399
Dunlap v. McKee	84
Dunkle, Cook v.	340
Erie and Waterford Plank-Road Co. v. Brown	156
Erie and Wattsburgh Plank-Road Co., Kennedy v..	224
Essler v. Johnson	350
Evans, Corbet v.	310
Evans, Hendrickson v.	441
Evans v. Myers	114
Ewing, Ashford v.	213
Eyth, Walker v.	216
Faber, McGuire & Fetzer v.	436
Figard, Jacobs v.	45
Filby v. Miller	264
Fisher v. Whoollery	197
Freeman, Clark v.	133
Fulkinson, Smith v.	109
Fuller v. Bradley	120
Fullerton v. Campbell	345
Fulton v. Moore	468
Garrett, Magaw v.	319
Gaule v. Bilyeau	521
Gibson's Appeal	191
Gibson v. Cummings	231
Graham v. Smith	323
Grier & Warner's Appeal	352
Grier & Co. v. Hood	430
Guthrie v. Bashline	80
Hall, Pittsburgh and Steubenville Railroad Co. v.	336
Hamilton Township, Anderson v.	75
Hamilton v. Seitz	226
Harmar v. Holton	245
Harris, McFee v.	102
Hart, Linton v.	193
Haslage v. Krugh	97
Haskins v. Tate	249
Haycock v. Wade	382
Hendrickson v. Evans	441
Henry v. Raiman	354
Himblewright v. Armstrong	428
Hixenbaugh, Waters v.	131
Hoch, Watt v.	411
Hoch, Weiler v.	525
Hogg v. Charlton	200
Holbrook, McNeal v.	189
Hole v. Rittenhouse	491
Holmes v. Commonwealth	221
Holmes & Co., Nimick & Co. v.	366
Holmes v. Pattison	484
Holmes, Shinn v.	142
Holton, Harmar v.	245
Hood, Grier & Co. v.	430
Hood v. Hood	417
Hood, Smith v.	218
Hook, Strawn v.	391
Humes, McClenahan v.	85
Hutchinson v. Campbell	273
Ihmsen v. Negley & Co.	297
Irwin, Shaw v.	347
Irwin v. Wickersham	316
Jacobs v. Figard	45
Jefferson, Cumberland v.	463
Jennings v. McDowell	387
Johnson v. Essler	350
Johnston and Sutton's Appeal	116
Johnston, McCue v.	306
Jordan v. Wilson	390
Keller, Shriner v.	61

Digitized by Google

	PAGE
Kelley *v.* Kelley	460
Kennedy *v.* Erie and Wattsburgh Plank-Road Co.	224
Kennedy *v.* Ross	256
Kiester *v.* Miller	481
Kightlinger, Crow *v.*	343
King & Shrack, Rowen *v.*	409
King & Shoenberger *v.* Baker	186
Koch *v.* Melhorn	89
Kribbs *v.* Downing	399
Krugh, Haslage *v.*	97
Ling, Sutter's Heirs *v.*	466
Linton *v.* Hart	193
Lower & Barron *v.* Clement	63
Lower Salford, Road in	524
Lowry, Shaffer *v.*	252
Ludwig & Kneedler, Truitt & Brothers *v.*	145
Lynch, Weaver *v.*	449
Magaw *v.* Garrett	319
Marks, Chambers *v.*	296
Marshall *v.* Bank	384
McCandless *v.* McWha	95
McClenahan *v.* Humes	85
McConnell *v.* Raiguel	362
McCormack *v.* Russell	185
McCormick, Neely *v.*	255
McCue *v.* Johnston	306
McCullough, Turnpike Co. *v.*	303
McDowell, Jennings *v.*	387
McFee *v.* Harris	102
McGuire & Fetzer *v.* Faber	436
McKee, Dunlap *v.*	84
McKee *v.* Sanford	105
McLean, Blair *v.*	77
McNeal *v.* Holbrook	189
McWha, McCandless *v.*	95
Meighen *v.* Bank	288
Melhorn, Koch *v.*	89
Mertz *v.* Dorney	519
Miller, Filby *v.*	264
Miller, Kiester *v.*	481
Minesinger, Patton *v.*	393
Moore, Fulton *v.*	468
Morgan *v.* Weir	119
Morrison, Clark *v.*	453
Morrison, Thorndell *v.*	326
Moyers, Tiley *v.*	397
Myers *v.* Myers	100
Myers, Evans *v.*	114
Muhlenburgh *v.* Brock	517
Needles, Clarke & Thaw *v.*	338
Neely *v.* McCormick	255
Negley & Co., Ihmsen *v.*	297
Nelson, Allegheny *v.*	332
Nesbit *v.* Burry	208
Nimick & Co. *v.* Holmes & Co.	366
Nusser *v.* Commonwealth	126
O'Hara *v.* Pennsylvania Railroad Company	445
O'Hara & Darlington *v.* Same	445
Ohio and Pennsylvania Railroad Company, Bell *v.*	161
Oyler, Amick *v.*	506
Patterson *v.* Robinson	81
Patterson's Estate	71
Pattison, Holmes *v.*	484
Patton *v.* Minesinger	393
Pennsylvania Railroad Company, O'Hara *v.*	445
Pennsylvania Railroad Company, O'Hara & Darlington *v.*	445
Pennsylvania Railroad Company, Zack *v.*	394
Peterman, Ramage *v.*	349
Pettit *v.* Wingate	74
Philadelphia *v.* Riddle	259
Phillips *v.* Zerbe Run Improvement Company	56
Pittsburgh and Steubenville Railroad Company *v.* Hall	336
Porter, Clarke *v.*	141
Porter *v.* Dougherty	405
Powell, Brown *v.*	229
Raiguel & Co. *v.* McConnell	362
Raiman, Henry *v.*	354
Ramage *v.* Peterman	349
Riddle, Philadelphia *v.*	259
Rittenhouse, Hole *v.*	491
Road in Lower Salford	524
Road Commissioners, Zimmerly *v.*	134
Robinson *v.* Bakewell	424
Robinson, Patterson *v.*	81
Robinson *v.* Snyder	203
Rockafeller, Carbon Run Improvement Company *v.*	49

www.libtool.com.cn

Digitized by Google

	PAGE
Rogers v. Waterman	182
Ross, Kennedy v.	256
Rowan's Appeal	292
Rowen v. King & Schrack	409
Russell, McCormack v.	185
Sample v. Barr	457
Sample, Walter v.	275
Sanford, McKee v.	105
Schenley v. Allegheny City	128
Seitz, Hamilton v.	226
Shaw v. Irwin	347
Shinn v. Holmes	142
Shallenberger v. Ashworth	152
Shaffer v. Lowry	252
Shrauder v. Cook	312
Shriner v. Keller	61
Shriver, Spragg v.	282
Shriver, Stephens v.	78
Slifer, Commonwealth v	28
Smith v. Beck	106
Smith, Clark v.	137
Smith v. Fulkinson	109
Smith, Graham v.	328
Smith v. Hood	218
Snyder, Robinson v.	203
Spragg v. Shriver	282
Steele v. Steele	154
Stephens v. Shriver	78
Stewart v. Stewart	234
Strawn v. Hook	391
Sutter's Heirs v. Ling	466
Tate, Haskins v.	249
Thorndell v. Morrison	326
Tiley v. Moyers	397
Truitt & Brothers v. Ludwig, Kneedler & Co.	145
Turnpike Co. v. McCullough	303
Tuscarora Boat, Wilson v.	317
Tyson v. Brock	517
Wade v. Haycock	382
Walker v. Eyth	216
Walter v. Sample	275
Waterman, Rogers v.	182
Waters v. Hixenbaugh	131
Watt v. Hoch	411
Weaver's Estate	434
Weaver v. Lynch	449
Weaver v. Wible	270
Weiler v. Hoch	525
Weir, Morgan v.	119
Wheatfield v. Brush Valley	112
Wheatley v. Baugh	528
Whoollery, Fisher v.	197
Wible, Weaver v.	270
Wickersham, Irwin v.	316
Wilder, Clark & Thaw v.	314
Wingate, Pettit v.	74
Wilson, Jordan v.	390
Wilson v. Tuscarora	317
Wood v. Anderson	407
Woodwell v. Bluff Mining Co.	365
Wright's Appeal	373
Zack v. Pennsylvania Railroad Company	394
Zerbe Run Improvement Co., Phillips v.	56
Zimmerly v. Road Commissioners	134

Digitized by Google

www.libtool.com.cn

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

MIDDLE DISTRICT—HARRISBURG 1855.

Beale *versus* The Commonwealth.

The law does not require that the oath administered to jurors in criminal cases shall be set forth on the record.

When the record in a conviction for rape states that "the jurors were duly impannelled, sworn, or affirmed, respectively, to try the guilt or innocence of the defendant, of the charge whereof he stands indicted," *Held*, that there is nothing on the record that authorizes the inference that an illegal oath was administered, and that the presumption is, that it was administered in legal form.

On a conviction for rape the prisoner was sentenced to imprisonment at *hard* labour: *Held*, that this sentence was erroneous, and the record was ordered to be remitted, that the Court below may substitute for "imprisonment at hard labour," "*separate* or *solitary* confinement at labour," as the law requires.

This Court, on reversal of a judgment in a criminal case for error in the sentence, has power to pass such sentence as the Court below ought to have passed, and to remit the record for further proceedings in conformity to the judgment of this Court.

ERROR to the Court of Oyer and Terminer and Quarter Sessions of *Philadelphia county*.

On the 27th October, 1854, in the Court of Oyer and Terminer for the city and county of Philadelphia, the plaintiff in error was found guilty of a rape upon Narcissa Emmeline Mudge. A new trial was refused 24th November, 1854, and on the 28th November the defendant was sentenced, as stated below. On the 22d March, 1855, he applied to this Court for a writ of error, which was allowed on special cause shown.

Digitized by Google

[Beale *v.* The Commonwealth.]

www.libtool.com.cn

In the trial of the case below the record states that the jury were sworn to "try the guilt or innocence of the defendant of the charge whereof he stands indicted;" and upon his conviction the Court adjudged him to "undergo imprisonment at *hard* labour in the Philadelphia county prison for the term of four years and six calendar months; that he be fed and clothed and otherwise treated as the law directs."

The exceptions taken were, 1st, to the arraignment of the prisoner, which does not appear to have been pressed or considered by the Court.

2d. Because it appears by the record that the jury by whom the plaintiff in error was tried were sworn or affirmed "*to try the guilt or innocence of the defendant,*" instead of *well* and *truly* to try the "issue joined between the Commonwealth of Pennsylvania and the prisoner at the bar, and a true verdict give according to the evidence."

3d. That the sentence was illegal: 1st, because it condemned the defendant to *hard* labour, which the law does not authorize. 2d. Because it did not condemn him to solitary imprisonment at labour, which the law authorized and required if the conviction was legal.

4th. General errors.

D. P. Brown, for plaintiff in error, cited *Archbold* 198, 1 *Chitty C. Law* 747, showing the strictness required in criminal proceedings; and then proceeded to consider the exceptions.

1st. An oath cannot be changed or departed from, except by Act of Parliament: 2 *Coke's Inst.* 479; 3 *Inst.* 165; 1 *Bulstrode's Rep.* 198; *Viner's Abr.* "Oath," 48; 17 *Ser. & R.* 193. "The form of a juror's oath prescribed by law solemnly points his conscience to the *evidence* as the only legitimate foundation of his verdict." Its language is, "You do swear that *you will well and truly try the issue joined and true deliverance make,*" &c., "and *a true verdict* give according to the evidence, *so help you God*": 2 *Hale* 293; 1 *Chitty* 551; 5 *T. Rep.* 313; *Cro. C. C.* 8; 1 *Archb.* 162; 4 *Black. C.* 354; *Hargrave S. T.* 723, 724, 737. The words "well," "truly," "try," "issue joined," "true deliverance," "according to the evidence," have each, in this connexion, their special signification; and as the *oath* cannot be changed, it is vital and essential in every part.

2d. The oath administered in the case, to try *the guilt or innocence* of the defendant, was wholly unauthorized; it was not the issue. The jury might not be able to find a man innocent, and yet it may be ought not to find him guilty. The verdict rendered must be guilty or not guilty. But the words, "*a true verdict give according to the evidence,*" are entirely omitted, and this takes the very life and soul out of the oath: 2 *Green's Iowa Rep.* 285,

Digitized by Google

www.libtool.com.cn

Harmon *v.* State. As the record stands so must it ever remain, it cannot now be altered: *Co. Litt.* 260; 4 *Rep.* 52; 10 *Yerger* 542; State *v.* Harrison, 1 *Archb.* 186, and note; 2 *Archb. Precedents* 172; 2 *Hawk. C.* 48; 6 *Barr* 385.

3d. The Act 1 July, 1829, requires that "Every person convicted shall be sentenced to undergo imprisonment, and be kept in separate or solitary confinement at labour." Neither the judgment rendered, nor the record, shows such sentence as the law requires. It must not be simply imprisonment, nor imprisonment at *hard* labour; the Act must be strictly pursued, nor can the sentence be amended: *Archb. Precedents* 172; 2 *Hawk. C.* 48; *Russell & Ryland*, 58; 1 *Maule & Selw.* 442; 10 *Yerger* 544.

The sentence is not the determination of the Court, but an announcement by the Court of the punishment provided by law: 1 *Archb.* 180; *Burn's Justice*, title "Judgment," 16; 1 *Chitty* 701.

If the punishment be greater or less than the limitation fixed by law, it is a nullity. When the law appoints a particular judgment for an offence, the Court cannot alter it: 4 *Mod.* 395; *Shower's Parl. Cases* 129.

Where the Court below has passed an illegal judgment, the higher Court will revise it and refuse to send it back to be amended, and will discharge the prisoner: Rex et Regina *v.* Wolcot, 4 *Mod.* 395; *Shower's Cases* 129; Rex *v.* Ellis, 5 *Barn. & Cress.* 395; and see 1 *Barn. & Cress.* 711; Rex *v.* Bourne *et al.*, 7 *Ad. & Ell.* 58; Silversides *v.* Reg. 2 *Gale & D.* 617. See also Kromer *v.* Commonwealth, 3 *Bin.* 577.

Where defendant was sentenced to three years *hard labour* (and the hard labour was legally no part of the sentence), and had been imprisoned nine months under it, the judgment was reversed and the prisoner discharged: 8 *Barr* 225.

The 21st section of Act of 16th June, 1836, will not allow a modification of the judgment; but supposing it should, it can only be where the error is in the judgment *alone;* but when an erroneous judgment is founded upon erroneous proceedings, the modification of the judgment cannot repair the proceedings, nor the sentence be sustained upon an illegal verdict. It is to the judgment the writ of error issues, and this is to be tested by the record. The sentence cannot be right if the record is wrong, though the judgment may be wrong even if the prior record is right; and neither here nor in England can you restore a defective oath, indictment, or verdict, by modifying the sentence based upon them.

This case in England would be reversed on the second exception, on the ground that no sentence could be pronounced; and there is no case to be found in which the Court below had no legal right to pronounce *any* sentence in which the record has been remitted

Digitized by Google

www.libtool.com.cn

or the sentence modified. The counsel compared the English statute of 11 & 12 Vict. c. 78, sect. 5, with our statute of 16 June, 1836; but denied that, under the latter, this Court could disregard the defects excepted to, or that they could affirm, modify, or remit the record; and examined the cases Daniel *v.* Commonwealth, 7 *Barr* 317; Clellans *v.* Commonwealth, 8 *Barr* 223; Dunn *v.* Commonwealth, 6 *Barr* 384; Drew *v.* Commonwealth, 1 *Wh.* 279. In England, where the defendant can enter bail upon appeal after conviction, the available sentence is pronounced in the superior Court, and no punishment is suffered in the mean time; but here there is no bail after conviction, and the sentence goes forthwith into effect. The modification of a sentence in England may work no harm to the defendant; here it would divide the sentence into two branches; under the *first* he is imprisoned, say half the time, at hard labour; under the second, the *other half*, to solitary confinement. Will this Court sustain such an anomaly?

W. B. Reed, District Attorney, and *W. B. Mann*, for the Commonwealth.—The form of the record in this case was specially directed by Judge KING, holding an Oyer and Terminer in 1848, and since that time has been the invariable form in the county of Philadelphia. There are no less than fifteen convicts of homicide alone, not to speak of other crimes, now in the penitentiary, the records of whose convictions are precisely as this is. The entry in this case is that the jurors "were *duly* impannelled, *sworn*, or *affirmed*, to try the guilt or innocence of the defendant, of *the charge whereof he stands indicted.*" The record is never meant to show the precise form in words of the oath administered, and does not comprise a direct reference to the evidence, that being implied; and there is no substantial variance between the record and the oath administered. The mere omission of the words "according to the evidence," would not be error. It is sanctioned by the general practice of the state (and the counsel named some thirty counties in which this was the practice), and the only precedent in which the words are inserted in Pennsylvania, is to be found in the case of Commonwealth *v.* Harris Bell, in Wayne county, tried for murder in 1847; and cited several cases exhibiting peculiarities in the record as to the mode of swearing, but all omitting the words "according to the evidence." In neither of these cases had there been any revision of the records, and this was attempted in but one of them. If a witness is said to be *sworn*, he is presumed to be sworn according to law: 10 *Harris* 353; and see Jewell's Case, 10 *Harris* 98, and 6 *Bin.* 804. In Hamilton *v.* The Commonwealth, 4 *Harris* 129, the record of the oath was in the words, "who upon their oaths and affirmations respectively do say," without other words; yet no allusion was made in the errors assigned as to the

Digitized by Google

www.libtool.com.cn

swearing of the jury, and the judgment was reversed on entirely different grounds.

There is no form of oath for jurors in criminal cases prescribed by statute in Pennsylvania.

In Haneman *v.* The State, 2 *Green's Iowa Rep.* 285, where a common law form was used, it was held erroneous, because the *statute* prescribed a different form.

The recitals of the record never correspond to the forms in the books. See 4 *Blackstone's Appendix, Crown Circuit Companion*, pp. 91, 92, in which they differ as widely as in this case—in one (*Ib.* 87), almost identical. And see The State *v.* Christmas, 4 *Dev. & Battle*, 410.

The Court always presumes that the proceedings as shown by the record of a Court of supreme original jurisdiction, as regards form and manner, are correct: State *v.* Vienkaugh, 2 *Hawks.* 431; State *v.* Leaborn, 4 *Dev.* 305. It is enough that the record be certain to a certain intent *in general*. It is not necessary that it be certain to a certain intent in *particular*. A substantial error must be shown, to reverse a judgment in a criminal case.

But a trial on the merits, on a plea voluntarily pleaded, and his taking the chance of a verdict in his favour, conclude the prisoner: Commonwealth *v.* Immell, 6 *Bin.* 404; *Greene* 285; 9 *Mass.* 107. In our Courts but one rule has prevailed, the *spirit* of the Act of 1814, and the decision in the Commonwealth *v.* Immell, being carried out, though in terms the Act applies only to "drawing, summoning, or returning any juror or panel of jurors:" Commonwealth *v.* Richard Smith, in 1816, 2 *Ser. & R.* 301. Where the prisoner took no exception, but went on to trial on the plea of not guilty, the Act was held to cure all defects alleged as error in the case; and so Commonwealth *v.* Chauncy, 2 *Ashmead* 103; Commonwealth *v.* Dyott, 5 *Whar.* 67; Burton *v.* Ehrlich, 3 *Harris* 236; Commonwealth *v.* Flanagan, 7 *W. & S.* 422.

3d. If a clerical or even judicial error were apparent in the sentence, the duty of this Court is to modify and correct it: Commonwealth *v.* Drew, 1 *Whar.* 280; Cullins *v.* Commonwealth, 8 *Barr* 223; Daniels *v.* Commonwealth, 7 *Barr* 317; Miles *v.* Commonwealth, 1 *Harris* 635; Jewell *v.* Commonwealth, 10 *Harris* 101.

See additional authorities as to the form of the oath administered to the jury as exhibited in the records: 4 *Black. Com.* 111, "Murder;" *Crown Circuit Companion*, pp. 91, 92, conviction for keeping a disorderly house; *Stubb's Crown Circuit Companion*, 87, "Robbery."

D. P. Brown, in reply.—That "writs of error should not be allowed merely for the sake of reversing a judgment, when the merits have been fairly tried," is plain; but how are we to know

Digitized by Google

www.libtool.com.cn

that the merits have been fairly, that is, *legally*, tried, but by recourse to the record to ascertain the legality of the proceedings?

How does it appear that the form of this record was specially directed by Judge KING in 1848? or what if it did so appear? or that there are fifteen cases of homicide in the penitentiary, the records of which are precisely like it? If it did appear, one error cannot be justified by showing fifteen others.

The record shows a different issue and a different oath from those known to the law; and if not required to show the precise form of the oath, it must *not* show, that in form and in substance too, it was wrong; and the record of a case essentially wrong cannot be cured by implication or intendment.

There is in this case an exclusion of the evidence and a creation of an issue never joined.

If it *did* appear that the words, "according to the evidence," had been omitted in several cases, it would not affect the question. The question may not have been made; and they *are* found in the record of the Commonwealth *v.* Harris Bell, tried in 1847.

No record which presents the issue of "guilty or innocent," can be found anywhere, and therein is a substantial difference from the issue required by law. It matters not whether the oath be prescribed by common law or by statute. If by statute, its directions must be pursued; if no statute, the common law must be our guide: 2 *Green's Iowa Rep.* 285.

But it is said that "if the jury were sworn in the words of the record, a trial on the merits, voluntary plea, and taking the chance of a verdict, conclude the prisoner."

If this were the law it would give validity to a worthless indictment, to lynch law, to anything most foreign and adverse to the principles of humanity and justice; and a defendant, put upon his trial—it matters not how—never can revise or reverse the judgment.

Defective indictments are not cured by verdict: 4 *Black. Com.* 375. The Act of 1814 does not make a trial on the merits a waiver of all errors like this; it actually excludes this conclusion, and by pointing out what shall be considered waived, implies more clearly what shall not be waived.

The Act directs that "the trial shall be a waiver of all errors and defects appertaining to the said precept, *venire*, drawing, summoning, and returning of jurors." No exception is taken to any matter cured by the Act.

The cases cited by the District Attorney are decisions upon questions, the waiver of which are authorized by the statute, and have no application to those here excepted to.

The following opinions were delivered.

WOODWARD, J.—This writ of error was allowed for the purpose

Digitized by Google

www.libtool.com.cn

of raising but two questions, the first of which is, Does it sufficiently appear from the record that the jury were duly sworn or affirmed?

We have no statute that prescribes the form of the juror's oath in criminal cases; but in capital cases, and in cases that ever were capital in Pennsylvania, we have retained the common law form of oath, which is as follows: "*You do swear that you will well and truly try, and true deliverance make between the Commonwealth and the prisoner at the bar whom you shall have in charge, and a true verdict give according to the evidence: so help you God.*" This is the oath that ought to have been administered here, for the offence charged was rape, and anciently it was punishable with death, both in England and Pennsylvania. Were we free to resort to presumptions and to evidence *dehors* the record, it is most likely the fact could be established beyond controversy that the jury were sworn in the very words of the above oath; but sitting as a Court of review we can know nothing of the facts that transpired at the trial except what we learn from the record, and therefore the question now to be decided is not the general one, whether that oath was in point of fact administered, but the more special one whether the record proves that it was.

The record informs us that on the 24th of October, 1854, the defendant being present in Court and having been arraigned and pleaded not guilty, a jury was called, examined by the Court and chosen by the defendant, and (after naming them) are duly impannelled, sworn, or affirmed, respectively to try the guilt or innocence of the defendant of the charge whereof he stands indicted, and are placed in charge of the Court's officers."

This is a succinct narrative of what was done, without professing to detail the formularies. We are not told how the defendant was arraigned, how the jury were examined, nor how they were sworn. The general purpose or object of calling and swearing them is described—to try the guilt or innocence of the defendant—and truly described; for the very question submitted to the jury was, Is the defendant guilty or not guilty of the charge whereof he stands indicted? but the oath is not set out, either in form or substance. Nor is it usual to set forth the oath of the jurors in criminal records. The precedents, both English and American, have been examined in vain for an instance. I suppose the form of record which is found in the Appendix to the 4th volume of Blackstone is as high evidence of the law of records in criminal cases as any precedent that can be found; and that does not set forth the oath administered to the jurors, but says, in the same historical manner of this record, that they were "*sworn to speak the truth of and concerning the premises.*" So in the cases cited by counsel from thirty-six different counties in our own state, the records do not, in a single instance, set forth the oath as administered, and

Digitized by Google

www.libtool.com.cn

they exhibit considerable diversity in the mode of announcing the fact that an oath was administered. In most of them the entry is simply, Sworn or affirmed; in one the English form is followed—"sworn to speak the truth of and concerning the premises;" in another, "sworn to try the issue aforesaid;" in another, "well and truly to try, and true deliverance make between the Commonwealth and the prisoner at the bar;" but none of them detail the oath, nor even allege that the jury were *duly* sworn. These diversities relate not to the body of the oath—that has been uniformly the same—but to the mode of docketing the fact that an oath was administered. And such a number of cases occurring in every part of the state, and under the eyes of a great variety of learned judges and counsel, are high evidence of the law. The uniformity with which the records show that the jury were sworn proves that we are to look to them for that fact, whilst the diversity of phrase in which they announce the fact, proves that we are not to look to them for the form of the oath.

How then are we to get at the form of the oath as actually administered? By taking the form prescribed by the common law, and applying the maxims that belong to judicial records—that all things are presumed to be rightly done where the contrary doth not appear—and that judicial records are to be received for verity.

Because the law enjoined an oath in the form I have stated, and because the record says the jury were sworn, we are bound to presume they were sworn in that form. True, this presumption might be rebutted by something contained in the record; but in the case before us it is not, because the words found there do not profess to describe the oath, but the fact and purpose of the swearing. And this presumption, negatived by nothing on the record, is aided, strengthened, and confirmed by the word "duly." That adverb qualifies the act of administering the oath to the jury—they were *duly* sworn. When a party is duly sworn he is sworn according to law: Edge *v.* The Commonwealth, 7 *Barr* 277; Clarke *v.* Benford, 10 *Harris* 355. If this record imports absolute verity, it tells us that the jury were sworn in the forms of the law, because *duly* sworn, and against that no allegation whatever can be admitted.

Thus we are brought by an inspection of the record and the application of the appropriate legal maxims, to the conclusion, that the oath actually administered was the very oath the law furnished for the occasion.

We are not to expect too much from records of judicial proceedings. They are memorials of the judgments and decrees of the judges, and contain a general but not a particular detail of all that occurs before them. If we should insist upon finding every fact fully recorded which must occur before a citizen can be

Digitized by Google

www.libtool.com.cn

punished for an offence against the laws, we should destroy public justice, and give unbridled license to crime. Much must be left to intendment and presumption, for it is often less difficult to do things correctly than to describe them correctly. This record is unusually full,—its fullness indeed is the source of the objections urged against it,—and yet it does not tell us how the defendant was tried, whether in the course of common law trials by jury, or in some of the various other modes that have been known in the world. Is the judgment to be reversed for that reason? By no means. We intend that the trial was by jury and by witnesses confronting the accused, because the record certifies us of a trial; and we know that a jury and witnesses are indispensable to a constitutional and legal trial. In the same manner we infer the presence of the jury throughout the trial, though the record takes no notice of them from the 24th to the 27th of October; and that the testimony was delivered *ore tenus*, though the names of the witnesses in the margin is all that is said about witnesses.

These legal intendments are made in favour of Courts of particular and inferior jurisdiction. When such a Court assumes to proceed it must set forth such facts as show that it has jurisdiction, but it need not set forth all the facts out of which its jurisdiction arises. If it appear anywhere upon the face of the proceedings that the inferior Court has jurisdiction, it will be intended that the proceedings are regular.

But here we have to deal with the record not of a Court of inferior and limited jurisdiction, but of one of the constitutional tribunals of the Commonwealth—a Court of large common law powers, and of general criminal jurisdiction; and surely the presumptions in favour of such a record are not to be less conclusive than those which apply to the records of inferior Courts.

These views result necessarily in overruling the error assigned in regard to the oath of the jurors; and it is well for public justice that they do, for if we should reverse this judgment on the ground assumed, we should throw open prison doors to a large number of culprits now suffering the just penalties of the law under records equally defective. It is stated by the district attorney, and the fact is unquestioned, that there are now in the penitentiary, serving out their sentences, no less than fifteen convicts of homicide alone, not to speak of other aggravated crimes, the records of which are precisely like this. A review of all the prisons of the state would doubtless exhibit a vast amount of penal justice that would be arrested and cancelled at once if this judgment should be reversed. We are called on virtually to make a general jail delivery—to decide that the criminal records of the state from the beginning have been defective, and that the many felons who have paid the forfeit of their crimes on the gallows have been put to death contrary to law. Serious as these consequences are, they

Digitized by Google

www.libtool.com.cn
are not, I agree, sufficient ground for withholding from this defendant our judgment of reversal if he were entitled to it under the law of the land. Justice, according to law, is to be done, though the heavens fall. But these numerous convictions on similar records are expressive indications of the measure of exactness required in criminal records; precedents which we are not only justified in following, but which we have no right to disregard to the detriment of the community. A prudent judge will always look to consequences before he subverts a long-established practice, or gives his sanction to a new rule of criminal law. In my opinion there is no occasion for innovation here. It would be neither wise, nor just, nor safe.

The only remaining error has reference to the sentence. The 11th section of the Act of 8th April, 1842, relating to the Philadelphia county prison, upon which the sentence was founded, provides for "imprisonment by separate or solitary confinement at labour," but the defendant was simply sentenced to undergo "hard labour in the Philadelphia county prison" for four years and a half. This is a departure from the statutory rule, not so much in the use of the word *hard*, for that perhaps is implied hy the statute, as in omitting the qualification of separate or solitary confinement, which was a new system in Peunsylvania, and which must be strictly followed where it is plainly enjoined. It has its advantages to the prisoner himself, and where he claims them he is entitled to them. The sentence, therefore, must be reversed. It cannot be amended. It might have been during the term, but not afterward.

Lewis, C. J.—In a criminal case we have no power to review the decisions of the Court below, in admitting or rejecting evidence, or in charging the jury. Nor can we reverse for errors of the jury, however gross. If the forms of the law have been observed, and the proceedings, as stated on the record, are legal, we have no more power to relieve the defendant from an unjust verdict against or without evidence, than "any other five citizens of the state:" Jewell *v.* The Commonwealth, 10 *Harris* 99. We may, in such cases, feel it our duty, *as citizens*, to perform the common obligations of humanity, by presenting our views to that department of the government which alone can grant relief. But, *as judges of the Court of review*, we must confine ourselves to the record; and, as already intimated, neither the evidence nor the instructions submitted to the jury form any part of it.

Among the errors assigned, there are but two which deserve consideration. One has relation to the oath administered to the jury; the other to the sentence pronounced by the Court. The first is of some importance to the prisoner, because, if sustained, he will be entitled to a new trial. The law requires that the jurors, in a criminal case, shall be sworn or affirmed that they will

Digitized by Google

www.libtool.com.cn

"well and truly try, and true deliverance make between the Commonwealth and the prisoner at the bar, whom they shall have in their charge, and a true verdict give according to the evidence:" 1 *Chit. Crim. Law* 552. But the law does not require that this oath shall be set forth on the record. On the contrary, when a record is made up in the ancient and approved form, it is sufficient, if it state that the jury were sworn to "speak the truth of and concerning the premises:" 4 *Blackstone's Com. App.* 332; or "of and upon the premises:" *Crown Circuit Companion* 87, 91, 92. In the case before us, the record states that the jury were "*duly* impannelled, sworn or affirmed respectively, to try the guilt or innocence of the defendant of the charge whereof he stands indicted." Is there any substantial difference between this entry and that which has been sanctioned by authority and immemorial usage? When the record informs us that the jury have been sworn to "speak the truth of and concerning the premises," we are bound to understand that the oath prescribed by law has been properly administered to them. Why are we not bound to understand the same thing from the entry made in this case? We are informed by the record that the jury were "*duly*" sworn to try the guilt or innocence of the defendant." How could they be "*duly*" sworn in any other way than in the form prescribed by law? The word "duly" means "properly," "fitly," "regularly," "in a suitable or becoming manner." But to administer an oath to a jury, which was contrary to that prescribed by law, could not have been *proper*, *fit*, *regular*, or *becoming*. A substantial departure from the oath prescribed would have been very *improper* and grossly *irregular*. Such an oath could not, in any true sense, be said to have been duly administered and taken. It is true that we might, by a nice construction, understand this record to mean that an illegal and void oath was administered to the jury with all the proper formalities required by law. But would this be a fair construction of the entry? We think not. A void and unlawful oath cannot be duly or regularly, or properly administered. After careful consideration, we construe the entry to mean that the jury were sworn in the manner prescribed by law; and that they were required by their oaths to "try the guilt or innocence of the defendant" properly and regularly according to law. The entry before us as plainly means this as does the ancient one which has been sanctioned by usage and precedent. Our constitution gives the people the right of electing the clerks of the several Courts of original jurisdiction, and of bestowing these offices from time to time upon inexperienced men. If the records made up by these public servants are not construed with great liberality, justice cannot be administered. On the whole, we are of opinion that there is nothing on the record which authorizes us to infer that an

Digitized by Google

www.libtool.com.cn

illegal oath was administered to the jury. The presumption from the entry is the other way.

But the sentence is clearly erroneous. It imposes "*hard*" labour without statutory authority, and omits to require that the imprisonment shall be "solitary," in disregard of the positive directions of the Act of Assembly. We are bound to presume that every convict has a deep interest in his own reformation. He has, therefore, a right to all the means, provided by law, to produce that desirable result. Social intercourse has its pleasures and advantages; but there is a personal discomfort, as well as a moral injury, to every prisoner who is condemned to indiscriminate intercourse with convicts of every shade of guilt. The plaintiff in error has a right to have these errors in the sentence corrected. The record will therefore be remitted, in order that the Court below may substitute for "imprisonment at *hard* labour," "*separate* or *solitary* confinement at labour," as the law requires.

The doubts which formerly existed respecting the power of the Supreme Court, upon reversing a judgment in a criminal case, are entirely dissipated. We have authorities to show that the Supreme Court, on reversal of a judgment in a criminal case for error in the sentence, has power to pass such sentence as the Court below ought to have passed: Drew *v.* The Commonwealth, 1 *Wharton* 281; Daniels *v.* The Commonwealth, 7 *Barr* 375; Commonwealth *v.* Ellis, 11 *Mass.* 465; Kane *v.* The People, 8 *Wend.* 211. It has also the power to award a *procedendo* in a criminal case: Rex *v.* Kenworthy, 1 *B. & C.* 711; and it may, in its discretion, remit the record with orders to proceed on the indictment after the reversal of an erroneous judgment: Commonwealth *v.* M'Kisson, 8 *Ser. & R.* 422; Commonwealth *v.* Church, 1 *Barr* 110. The Act of 16th June, 1836, conferred no new powers in this respect. It was designed to remove doubts which had arisen in consequence of conflicting decisions. The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine, that a prisoner whose guilt is established by a regular verdict is to escape punishment altogether, because the Court committed an error in passing the sentence. If this Court sanctioned such a rule, it would fail to perform the chief duty for which it was established. Our duty is to correct errors, and to "minister justice." But such a course would perpetuate error, and produce the most intolerable injustice.

It is considered that the judgment of the Court of Oyer and Terminer, for the city and county of Philadelphia, in this case, be reversed and annulled. And it is ordered that the record be remitted to said Court, for further proceedings in conformity with the opinion of this Court herein expressed.

Digitized by Google

www.libtool.com.cn

Commonwealth of Pennsylvania *ex rel.* George W. Bowman *versus* Eli Slifer, State Treasurer.

An officer has authority to act until notice of the revocation of his commission, and this whether the revocation be express or implied by the appointment of another person to the same office.

But when an officer holds for a special term, "*if he shall so long behave himself well*," there is no implied misbehaviour, nor implied removal, arising from that cause, by the appointment of another to fill the same office.

When by the fair construction of the commission of an officer it is clear that it was intended to give him the right to the office for three years, if he so long behaved himself well, the failure to give the bond and security required by law for the faithful performance of his duties, previous to his entering upon their discharge, and he enters upon, and otherwise discharges the duties without objection; there is nothing in the omission to give the bond to deprive him of the office; and he may file a bond when objection is made to the omission.

But such officer before giving the security required by law, is not the officer *de jure*—but merely *de facto*—and when the law prohibits the performance of the duties, before the security is given, it will not aid him in compelling payment for services thus rendered against its direction.

THIS was an application by the relator to this Court for a *mandamus* on the state treasurer to compel payment of the arrears of his salary, as adjutant-general of the militia of this Commonwealth.

The petition sets forth that, on the 28th of October, 1853, the relator was duly commissioned and qualified as adjutant-general of the militia of the Commonwealth of Pennsylvania, for the term of three years, if he should so long behave himself well. That his said commission was issued by William Bigler, then governor of the Commonwealth of Pennsylvania, in pursuance of authority contained in the militia laws of the Commonwealth, under the seal of the state, attested by the secretary of the Commonwealth; and avers that ever since the 28th October, the petitioner has exercised the privileges, and performed the duties of said office, and has, as he believes, continued "to behave himself well, and perform the duties required by law." That the laws of the Commonwealth provide that the adjutant-general shall receive for his services at the rate of $800 per annum. That a part of this salary had been paid the petitioner, but that, on the 28th day of April, 1855, there was a balance due him of $150. That, by "The Act to provide for the ordinary expenses of the government," approved the 9th May, 1854, and another Act, approved the 7th May, 1855, there was appropriated a sum sufficient to pay the compensation due the petitioner, for his services rendered as aforesaid, and by said Acts such sum was specifically appropriated for that purpose. And further states that, on the 28d day of May, 1855, the petitioner presented a bill of the balance due to him as aforesaid to the Hon. Eli Slifer, treasurer of the state of Pennsylvania, who wholly

Digitized by Google

[Commonwealth *ex rel.* Bowman *v.* Slifer.]

refused, and still doth refuse to pay the same: and prays for a *mandamus* against the said Eli Slifer, commanding him to show cause why a peremptory *mandamus* should not issue, &c., commanding him to pay the said petitioner the said sum, &c.

The defendant answered (8th June, 1855), and admitted that about the 23d day of May, 1855, the petitioner had presented his bill as stated in his said petition, and that respondent had refused payment thereof, and still refuses to pay the same, and alleges for cause that he could not legally pay the same, because the relator has not, since the 28th October, 1853, exercised the duties, &c., of the said office of adjutant-general. But that, on the 3d February, 1855, Governor Pollock issued a commission of that date, in due form, appointing Thomas J. Power to be adjutant-general, &c. That said Power, on the 5th February, 1855, gave bond with sureties, in manner and form required by law, which was, on the same day, approved by the governor, and filed in the office of the secretary of state, and that thereupon the said T. J. Power entered upon and became possessed of the said office, &c., and has from that time hitherto exercised and performed the duties of the said office. And that, on the 3d May, 1855, one quarter's salary became due to said Power for his services, &c., and that respondent paid him the sum of $75, in full thereof, which payment was approved and the account thereof confirmed by the auditor-general, and denies that any sum of money was specifically appropriated to pay any compensation to the said George Bowman, for services rendered by him as adjutant-general, &c.; and he submits that a writ of *mandamus* is not the legal remedy to try the alleged title of the relator to the said office.

And further respondent says that the relator was not, on the 28th day of May, 1853, duly commissioned, &c., qualified as adjutant-general, &c., for the term of three years, if he should so long behave himself well and perform the duties, &c.; but, on the contrary, that the commission of the relator, in express terms, was granted to him to hold the said office, to fill the vacancy occasioned by the resignation of General James Keenan, who was appointed on the 2d February, 1852, for the term of three years, and that the said commission expired by its own limitation on the 2d February, 1855.

And further, the respondent says that the relator has not continued to behave himself well, and perform the duties required by law, as set forth in the said writ, but failed, &c., and did not at any time give bond with one or more sufficient sureties to be approved by the governor, as required by law, conditioned for the true and faithful performance of his duties, &c., and did not cause any such bond to be filed in the office of the secretary of state, as required by law, but failed so to do; and, therefore, J. Pollock, then governor, did, on the 3d February, 1855, remove him from

Digitized by Google

[Commonwealth *ex rel.* Bowman *v.* Slifer.]

www.libtool.com.cn

office, and appoint and commission the said Thomas J. Power, as above stated.

The relator, for replication (August 8, 1855), admits the appointment, &c., of T. J. Power by Governor Pollock, but affirms that the commission so issued was null and void, for the reason that the replicant was then, and still is, in possession of the said office, and in the discharge of its duties, by virtue of the commission issued to him, and has been ever since the 28th October, 1853, and has all the books and records, &c., of the said office in his possession; and denies the possession of the said office by Power or the exercise by him of any of the duties thereof, or that he has any right to receive the salary appropriated to the payment of the said office.

And denies that he was appointed in the manner and upon the terms stated by the respondent in his answer; and avers that he was commissioned on the 28th October, 1853, for the term of three years, if he should so long behave himself well; and relies on the Acts of Assembly, authorizing the governor to appoint and commission an adjutant-general of the militia, &c., and on his commission.

On the 14th August, 1855, the relator filed an additional replication, which states that about the first of May, as soon as he heard of the allegation of respondent that he had failed to give bond with surety for faithful performance of his duties, &c., he had prepared and executed a bond with sureties in the sum of $1000, conditioned as the law directs, which said bond was yesterday forwarded to the governor to be filed, &c.

And further avers that the respondent consented and agreed to pay to him (the relator) the amount of salary due and unpaid up to the 2d day of February, 1855.

Cessna, for the relator, stated the facts of the case as they appear in the petition and replication, insisting that there was no removal by Governor Pollock of the relator, whose appointment was for three years from the date of the commission. That he had been guilty of no misbehaviour upon which to base a removal, and that he was yet the adjutant-general, and entitled to his salary, which the respondent withheld in violation of law, and which this proceeding by mandamus was the proper mode to compel the payment of.

Franklin, Attorney-General, for respondent.—The purpose of this proceeding is to convert the writ of *mandamus* in affect into a suit against the Commonwealth. The money appropriated to the payment of the salary of the adjutant-general, by the Act of 9th May, 1854, has been already paid out by the state treasurer, under the direction of the 8th section of the Act of 30th March, 1811, ordering payment of salaries without warrant, and has

Digitized by Google

been approved by the auditor-general. The account, therefore, has been closed, in accordance with law, and the state treasurer has received credit for the payment. This Court cannot review and open the account by this writ, and an order for a second payment to the relator would be in contravention of the 22d section of the 1st article of the Constitution, which prohibits the drawing of money from the treasury without appropriation made by law.

In the case of the Commonwealth *v.* Mann, 5 *Watts & Ser.* 403, the Court do not allude to the objection that the treasurer can make no payment without appropriation by law, and the case does not sanction the doctrine that the Court can order money to be paid out of the treasury, without such sanction, or when the appropriation has been exhausted.

2d. The relator is out of possession of the office. His right to it cannot be determined by this writ, to which the incumbent is no party. His only proper course is by *quo warranto*, to try the right.

Before a *mandamus* will be granted to compel payment of a salary, the Court will require that there should be judgment of *ouster* against those actually performing the duties of the office: 5 *Rawle* 75, Com. *ex rel.* Leslie *v.* County Commissioners; 3 *Johns. Cases* 79, The People *v.* The Corporation of New York.

The relator's commission refers to the time and term of appointment of his predecessor, to wit, three years from the 2d February, 1852. It is, at best, doubtful if the 12th section of the Act of 2d April, 1822, will authorize a more extended appointment; and it is fair to presume that Governor Bigler had in view the limitation of the term of the relator to the time when General Keenan's commission would expire.

But the governor has the power, and it is made his duty by the 12th section of the Act of 1822, to remove an adjutant-general who, in his opinion, fails faithfully to perform his duty; and the relator did fail in his first and preliminary duty, in not giving the bond required by the section of the Act above recited: see *Pamph. Laws of* 1822, p. 233–4: "Whenever, in the opinion of the governor, the said adjutant-general fails and neglects faithfully to perform the duties of his office, the governor shall remove him from office." The relator insists "that he has behaved himself well;" yet does not deny his failure to give the bond required, or to evade the effects of his omission.

The action of the governor in the premises is subject to no revision. His *opinion* is conclusive ground for such action, pursuing the words of the Act. He is not bound to record his reasons for such opinion. It is enough to know that the removal was made, and the officer superseded by the appointment of another: *Wallace* 125, Bowerbank *v.* Morris.

But, if the relator had never been removed, he could not in this

Digitized by Google

www.libtool.com.cn

proceeding compel payment of the salary, never having given the bond required: see Riddle *v.* Bedford County, 7 *Ser. & R.* 389; Dillon *v.* Myers, 3 *Penna. Law Journal* 168; *Brightly* 426.

Cessna, in reply, urged that there was no removal of the relator; that he was appointed for three years from the date of his commission, which term had not expired when the commission was issued to Power. That the commission to the latter was void, because there was no vacancy by death or resignation, loss of time, or removal. That he was only liable to removal within the time limited by his commission by misbehaviour, and of this there was no pretence; and that a bond had been executed with sufficient sureties, and forwarded to the governor, as stated in his replication, thus remedying what has been properly called by the respondent the mere omission of the relator in this particular.

And that the words of the Act, authorizing the governor to remove when, *in his opinion*, the officer should fail in his duty, must be taken in connexion with the words continuing the officer for three years, if the officer should so long behave himself well; and these words, taken in this connexion, cannot be taken to mean a mere arbitrary opinion, but an opinion founded upon the fact of misbehaviour. No such fact has been shown or set up in the pleadings.

The refusal of the respondent, therefore, to pay is without authority on his part, and in violation of the Acts of Assembly cited. And if he has paid to another the money due to the relator, he has done so in his own wrong, and such payment forms no defence to this claim.

Mandamus is the proper remedy.

The opinion of the Court was delivered by

Lewis, C. J.—This is an application for a *mandamus* to compel the state treasurer to pay the relator the arrears of salary alleged to be due to him as adjutant-general of the Commonwealth.

The parties have argued the case on its facts and merits, without requesting an issue, and we proceed to dispose of it accordingly.

The objections to the *mandamus* are:—

1. That General Bowman was not appointed for the term of three years, but only to fill the vacancy occasioned by the resignation of General James Keenan, whose commission expired by its own limitation on the 2d February, 1855.

2. That General Bowman omitted to give security for the faithful performance of the duties of the office, and therefore Governor Pollock, on the 3d February, 1855, removed him and appointed Thomas J. Power his successor, who has ever since performed the duties of the office and received the salary.

Digitized by Google

It does not appear to be averred in the pleading that Governor Pollock removed the relator *because* he omitted to give the required security. Nor is any other cause of removal set forth. It is merely pleaded that he failed to perform the duties of the office, and did not, at any time, give bond, with one or more sufficient sureties, &c., and "*thereupon*" he was removed. No neglect of duty is specified, except the failure to give bond; and from what seemed to be admitted on the argument, no other neglect of duty is pretended. No removal is shown or alleged, except that which is implied by the simple appointment of a successor. And when it is seen that this took place on the day after General Keenan's commission expired by its own limitation, it is but a fair construction of the act of Governor Pollock, to hold that he intended no more than the appointment of a successor, under the impression that General Bowman's appointment had expired by its own limitation.

We are unwilling to believe that the governor intended, without cause to remove an officer appointed for a term of years, before the term had expired. That he possessed the power of removal is conceded; but the power is to be exercised *upon cause shown.* It exists only where "the officer fails and neglects faithfully to perform the duties of his office." It is true that the executive is made the judge; and that his "opinion" or judgment is conclusive, so far as relates to the question of removal. But that judgment is not to be pronounced without notice, without any charge or specification, and without any opportunity given to the officer to make his defence. The reputation and the right of the incumbent to the office for the term specified in his commission are involved; and he has a right to know the accusation and to be heard in his defence. The present executive understood these rights too well, and appreciates them too highly, to be guilty of violating them. If he was on his trial before the Senate, on impeachment for doing so, it would be difficult to convince any one that he intended to commit any such act of oppression.

The appointment of General Power would be understood there as it should be here. It was nothing more than an appointment to fill a vacancy supposed to exist in the office. The Act of Assembly requires the adjutant-general to give bond *before he enters on the duties of his office.* So that the giving of the bond is not an *official duty*, but a *preliminary* to *entering upon official duties.* It is made so by the very section which gives the governor power to remove for neglect of official duty. The omission to give bond is, therefore, not a neglect of official duty for which the governor is authorized to remove an incumbent duly commissioned for a term of years. This power of removal is a special authority, and must be strictly pursued.

It was not pretended at the argument that there was any other removal of General Bowman than that which may be implied from

Digitized by Google

www.nbloof.com.cn

the appointment of General Power. In setting forth that appointment it is not averred that it was intended as a removal of General Bowman, or that any notice of it was given to the latter, for the purpose of terminating his authority. Where an office is held *during the pleasure of the appointing power*, a removal may be either *express*, that is by a notification that the officer is removed, or *implied*, by the appointment of another person to the same office. But it has been decided that in either case the removal is not completely effected until notice actually received by the person removed. An office held *during pleasure* is not distinguishable from other cases of revocable authority. The officer has authority to act until *notice* of revocation: Bowman *v.* Morris, *Wallace U. S. C. C. Rep.* 124; Cren *v.* Vernum, *Cro. Car.* 97; 1 *Ven.* 400; 2 *P. Wm.* 194; 19 *Vin. Abr.* 451, pl. 3; 3 *Rep.* 71; *Cro. Eliz.* 440; *Id.* 14; 13 *Peters* 260; 2 *Bing.* 692.

But when an officer holds for a specified term of years, "if he shall so long behave himself well," there is no implied conviction of misbehaviour, nor any implied removal for that cause arising from the appointment of another person to fill the same office. This was decided in the People *v.* Carrigne, 2 *Hill* 104, but the principle of justice on which the rule is founded is too clear to require the aid of authority. There is, therefore, neither removal nor intention to remove General Bowman. The question is, whether his commission was void, or had expired, at the time when General Power was appointed. The clerk who filled it up was certainly not very judicious in the selection of words to express the meaning of the executive. There is an ambiguity of expression in it, which has probably produced the present difficulty. But the acts of public officers, where the rights of the public require it, should be construed with liberality. There is always a presumption that they are in accordance with the law. The presumption can be repelled only by clear evidence of illegality. The Act regulating the militia of the Commonwealth declares that the appointment of the adjutant-general shall be "for the term of three years, if he so long behave himself well, and faithfully performs the duties of his office." The commission accordingly states that the executive has appointed George W. Bowman adjutant-general "in pursuance of the authority contained in the militia laws of this Commonwealth." An appointment for a shorter term could not be "in pursuance of that authority." This part of the commission must, therefore, be understood as some evidence that the appointment was made for the term of three years, as the law requires. In the *habendum*, when fairly construed, it is stated that he is to have and to hold the office for the term of three years, if you shall so long behave yourself well, &c. Rejecting the imperfect sentence which relates to the vacancy occasioned by the resignation of General Keenan, the meaning is perfectly plain. That this imper-

Digitized by Google

www.libtool.com.cn

fect sentence was introduced as a mere parenthesis, and forms no part of the *habendum*, seems manifest from the whole language of the commission. That the "term of three years" is to be read as fixing the term of General Bowman's commission, seems reasonable, because, without so reading it, no term whatever is specified. If no term be specified, the words "if you shall *so long* behave yourself," would be senseless. They would have nothing to which they could have relation. The parenthetical statement that he is commissioned "to fill the vacancy occasioned by the resignation of General Keenan," does not cut down his term below the period prescribed by law. These words are very frequently introduced where an appointment is made to fill a vacancy occasioned by death or resignation. They do not, of themselves, import limitation of the term of the appointee. It is only in cases where the law declares that an appointment to fill a vacancy shall be for the unexpired term of the previous incumbent, that they have any effect whatever. In this case the law allows of no appointment for a shorter period than three years. The reference to the vacancy occasioned by the resignation of General Keenan is, therefore, merely surplusage. It did neither good nor harm. It was like similar language contained in the commissions of Judges Cowan and Brownson, of the Supreme Court of New York. They were appointed to fill vacancies occasioned by resignations, and the fact was so stated in their respective commissions, but it was never supposed that this had the effect of cutting down their judicial term. The official term, established by law, is not to be changed in such vague and unnecessary surplusage in a commission. We are unanimously of opinion that on a fair construction of the commission granted to General Bowman, it was intended to give him the right to the office for the term of three years, if he should so long behave himself well. But it seems that he neglected to give the security required by law. He has faithfully performed the duties of the office, however, without complaint; and, since these proceedings were instituted, he has tendered the security. The omission seems to be an inadvertence. There is nothing wilful in it, so far as we see. It does not appear that security was ever demanded, or that the state has suffered any injury for the want of it. If the omission furnished ground for refusing to permit General Bowman to take possession of the office, or for imposing any penalty upon him, it does not appear that the executive, or other authorities, did either the one or the other. He was permitted to enter upon the duties, take charge of the public property, perform his public duty, and to receive the salary provided by law. Under these circumstances, his tender of security, as soon as the omission was brought to his notice, is sufficient to entitle him to hold the office.

But for the period during which he performed the duties of the

Digitized by Google

[Commonwealth *ex rel.* Bowman *v.* Slifer.]

www.libtool.com.cn

office without having given the required security, he was not strictly the officer *de jure*. He was merely the officer *de facto*. His acts are good so far as others are concerned. But the rule seems to be established, that none but the officer *de jure* can successfully claim compensation for official services: Riddle *v.* Bedford Co., 7 *S. & R.* 389; Dilton *v.* Myers et al., 3 *Penn. Law Jour.* 169; *Brightly's N. P. Rep.* 326. It follows that General Bowman is not entitled to the *mandamus*. The performance of the duties of the office before giving the security was prohibited by law. The law must, therefore, refuse to aid him in compelling payment for services thus rendered against its direction.

This view of the case renders it unnecessary to express any opinion on the question whether the title to an office can be determined in a *mandamus* for the salary.

Mandamus refused.

Mary E. Compher *versus* A. Compher *et al.*

The widow has a right to retain real or personal property to the amount of $300 from the estate of her deceased husband under the Act of 1851, whether he died testate or intestate, solvent or insolvent.

It is the duty of the personal representative to set aside this amount to the widow upon request made—to be approved as prescribed by the Act of 1849.

Acceptance by the widow of a provision under the will of her husband does not deprive her of this right. So much of the estate is withdrawn from the general course of administration, and appropriated by law to the use of the "widow and family."

When the executors refuse to allow the property to be appraised and remain with the widow, she may sue in the Common Pleas for damages for the injury.

ERROR to *Bedford county*.

Philip Compher died in November, 1853, leaving a widow, and real and personal estate which he disposed of by his will, dated 2d November, 1853, admitted to probate 18th November, 1853.

By his will he gave to his wife, the plaintiff, "to the amount of $300, to be taken by her at the appraisement or valuation of his estate" directed to be made by the will. Before the appraisement, and at the sale, the widow gave notice to the executors that she claimed (in addition to the legacy) $300 worth of the personal property, under the exemption laws of the Commonwealth, which they refused to allow. On the day of the appraisement the executors handed over to her, and she received, the $300 worth of property bequeathed as above, for which she gave a receipt, which contained the following clause: "This receipt in no way to affect or impair my right to retain $300 worth of property, under the exemption laws of this Commonwealth relating to widows and children, November 19, 1853, if any such right I have."

Digitized by Google

www.libtool.com.cn

The testator left real estate worth from three to four thousand dollars; and the appraisement of his personal estate amounted to about $900.

The will also directed the brother of the testator, to whom the real estate was devised, to pay the widow $40 (yearly) during her widowhood.

This suit was brought to recover the $300 claimed by virtue of the exemption acts, exclusive of, and in addition to, the above legacies.

Judgment for plaintiff.

King and *Jordan*, for plaintiff in error.—The Act of March 14, 1851, exempts $300 worth of property from execution, &c. The Act of 1851 provides that "hereafter the widow and children of any decedent dying in this Commonwealth, *testate* or *intestate*, may retain either real or personal property belonging to the estate, to the value of $300, and directs that the said property shall be appraised in the manner prescribed by the Act of 1849. 1st. The testator had a right to dispose of all his estate by will under the Act of 8th April, 1833, and did so dispose of it. The defendant has received her legacy under the will, and her annuity, so far, has been paid to her; can she now recover adversely to the will?

By the spirit of the 11th section of the Act of 8th April, 1833, and of the 11th section of the Act of 1848, the widow cannot take under the will of her husband and the intestate laws. She must take under one or the other. To this effect are numerous authorities: Benedict *v.* Montgomery, 7 *W. & Ser.* 238; Hinnershits *v.* Bernhard's Executors, 1 *Harris* 518; Melizet's Appeal, 5 *Harris* 449.

If the words "*testate* or intestate" in the Act of 1851 will enable the plaintiff to recover, they must operate a repeal of the Act of 1833 in this respect; and this although the Act of 1851 has no repealing clause or negative words. As to the implied repeal of one statute by another, see The Easton Bank *v.* The Commonwealth, 10 *Barr* 448; 2 *Dwarr. on Statutes* 638, 673; 4 *T. R.* 2, 4; Rex *v.* Boston, 12 *A. & E.* 470; 24 *Pick.* 296–7–8; *Bac. Abr. Stat.* D.; Forte's Case, 11 *Coke* 63; Watson's Case, *Dyer* 847.

Apparently conflicting statutes are to be reconciled, and validity given to each: Beals *v.* Hale, 4 *How. U. S. Rep.* 37. The Act of 1851 can only apply to cases of testacy when the whole estate is not disposed of. And see 9 *Harris* 43.

By taking under the will the plaintiff was estopped from recovery in the present action. See Benedict *v.* Montgomery, 7 *W. & Ser.* 238; Shoble *v.* Smith, 8 *Watts* 280; Wilson *v.* Bigger, 7 *W. & Ser.* 117.

Digitized by Google

[Compher *v.* Compher *et al.*]

www.libtool.com.cn

The remedy of the plaintiff, if any, is in the Orphans' Court. The claim is one upon the assets of the estate in the hands of the executors, and comes within the jurisdiction of that Court. See Withers *v.* Weaver, 10 *Barr* 390–1.

Cessna, for defendant in error.—The whole law regulating wills and inheritances is of the creation of the legislature. If the laws anterior to 1851 had the power to give the widow, in the case of issue, one-third of the personal estate of decedent, and on failure of issue one-half, what was there to restrain the legislature from adding thereto $300 in 1851? See Lancaster *v.* Bonnmarter, and Gilman's Estate (Orphans' Court, Philadelphia).

The claim is not adverse to the will. The property claimed is not embraced by its provisions. If it should reduce the legacies, this is no reason why it should not be allowed.

The argument relating to the report of the statute of 1833 has no application.

2d. As to the remedy. By the Act of 1849, the sheriff serving the writ was required to appraise the property. By the Acts of 1850 and 1851, this duty is imposed upon the executor or administrator, and to *set apart* the property. In all the acts the object is declared, to *exempt* property, and not to give money. And in Hammer *v.* Freese, 7 *Harris* 255, it was decided that the only remedy against the *officer*, if he fails to comply with his duty, is by action. The party cannot come upon the fund. Under the Act of 1851, the executor is the officer. We do not seek this property from him or them as assets of the decedent; we seek to make them pay because they have disregarded a plain duty. They were bound to *set apart* the property for the widow. If they took it they were trespassers, and are liable in this action.

The opinion of the Court was delivered by

Knox, J.—The right of a widow to retain real or personal property to the amount of $300 from the estate of her deceased husband, is given by the 5th section of the Act of 14th March, 1851, and that too whether her husband dies testate or intestate, solvent or insolvent. So much of the estate belongs to her and her children, if she has any, for the use of the family. If she has no children, it is hers absolutely; and it is the duty of the personal representatives to set aside this amount for the widow upon request made, to be appraised in the manner prescribed by the Act of 1849. Her right to this is superior to that of creditors, unless in cases of liens for the purchase-money of real estate elected to be retained, and of course it is to the exclusion of the legatees.

Where a widow accepts a provision made for her in the will of her husband, she cannot claim her rights under the intestate laws; but this does not apply to the $300 which she is authorized to

Digitized by Google

www.libtool.com.cn

retain by the Act of 1851. So much of the estate is withdrawn from the general course of administration, and specifically appropriated by law to the use of the "widow and family;" and this is so whether the widow elects to take under the will, if there be one, or prefers her statutory rights in the distribution of the estate.

By the Act of 9th April, 1849, $300 worth of property is exempted from levy and sale on execution, or warrant of distress for non-payment of rent; and by the Act of 14th April, 1851, property to the same amount is preserved to the widow or children, for the benefit of the family after the decease of the husband. This is a highly beneficial provision, and we will not lessen its value by construing its claim to work a forfeiture of other independent rights.

As to the question of jurisdiction; ordinarily, the benefit to be derived from the Act of 1851 should be under the supervision of the Orphans' Court, but where, as in the case in hand, the executors refuse to allow the property to be appraised and remain with the widow, and convert the whole estate into money, we can see no good reason why she may not bring suit in the Common Pleas to recover damages for the injury sustained.

Judgment affirmed.

Peter Arnold *versus* John Cessna.

A joint purchase of land by two persons, by articles of agreement, vests in them an equitable title to the land, as tenants in common, with a right to demand a conveyance of the legal title, upon payment of the purchase-money.

In such case, parol evidence is not admissible to show that one of the parties signed the agreement as surety for the other; because, 1st. It would contradict the written instrument. 2d. It would be a violation of the Statute of Frauds and Perjuries.

A judgment in an action of covenant, for the unpaid purchase-money against one of the vendees, and a levy and sale of the land upon proceedings on that judgment, would not divest the estate of the other vendee in the land.

Such judgment would not be a lien on the interest of the vendee, who was not a party to the suit.

The ejectment in this case was brought in the Common Pleas of *Bedford county*, to November Term, 1854.

Verdict for plaintiff November 25, 1854.

The facts are somewhat complicated. The title to the land in dispute was in Ann Lehman. On the 7th of April, 1818, Ann Lehman and Abraham Lehman entered into articles of agreement for the sale of the land, together with another tract, with Philip Moser and John Exline. In consideration whereof, the said Moser and Exline bound themselves, *jointly*, to pay to the said Ann and Abraham the sum of $1000.

Digitized by Google

www.libtool.com.cn

Upon these articles of agreement an action of covenant was brought to No. 84 of August Term, 1832, in which Ann and Abraham Lehman were plaintiffs, and Philip Moser and John Exline were defendants. Philip Moser died in 1835, and a judgment was obtained against John Exline, surviving covenantor, on the 10th of November, 1842, for $854.23, the balance of the purchase-money with interest due upon said agreement. To No. 197 of November Term, 1842, a *fi. fa.* was issued and the land in dispute levied upon, and a *vend. ex.* was issued to No. 72 January Term, 1843, by virtue of which the said land was sold to S. M. Barclay for $100, who, on the 13th of May, 1843, conveyed the same to the defendant, Peter Arnold, for the consideration of $500.

S. M. Barclay died on the 3d of January, 1852, and letters of administration, with the will annexed, were issued to Job Mann and J. E. Barclay.

Proceedings were commenced in the Orphans' Court by the heirs of Ann Lehman, deceased, under the direction of John Cessna, the plaintiff below, acting as their attorney, and carried on by him as administrator *de bonis non*, with the will annexed, of the said Ann Lehman against the representatives of S. M. Barclay, which resulted in making the estate of Barclay responsible to the heirs of Ann Lehman for the value of the land purchased by him at the sheriff's sale, being about $1100; which proceedings were affirmed in this Court at last May Term.

In 1853, and before the meeting of the auditors in said proceedings, the plaintiff had a conversation with William M. Hall, who had been employed by Moser's heirs to look after their interests, in which said plaintiff said that he also had been spoken to by some of the Mosers. Said plaintiff then employed Mr. Hall to assist in the prosecution of the claim of the heirs of Ann Lehman, and induced a delay of the assertion of the claim of the Mosers for the purpose of better insuring a recovery of the claim of Ann Lehman's heirs against the estate of Barclay.

The plaintiff claims the land under and by virtue of conveyances dated in 1854, from the heirs of Philip Moser, deceased.

On the trial of the cause, it was proved that Ann Lehman admitted to the witness that the land in dispute had been paid for by Philip Moser.

Moser went into possession in 1818, and continued in possession of the tract in dispute until his death in 1835, excepting three years, during which time it was leased by him to his brother. After his death, his widow and children continued in possession till 1843, when S. M. Barclay obtained the possession under his purchase at sheriff's sale, and sold to defendant, Arnold, who moved on the land and continues thereon.

Abraham Miller, a witness for plaintiff, proved the possession

Digitized by Google

www.libtool.com.cn
of Moser of the tract in controversy, and after his death by his widow and children from 1818 down to the period possession was taken by Barclay.

Mary Exline, the widow of John Exline, proved that John Exline never lived on the tract; that she remembered well when Moser bought it; that her husband had bailed Moser when he bought, and that Moser had paid for the farm, and not Exline; that her husband had often told her this; that Moser went on to the land after he bought. Before he bought, he lived with her and her husband, and was their son-in-law; that she had seen Moser pay money on the land, but could not say how much.

Defendant excepted to the testimony of the above witnesses.

There was also evidence that Abraham Lehman, the son of Ann Lehman, and John Exline, the father-in-law of Moser, signed the agreement as sureties for the faithful performance of their principals.

On this statement of facts, the Court below charged the jury:—

"This is a controversy between the purchasers of the interests of Moser and Exline, as to what title they acquired by their respective purchases. This title as between Ann and Abraham Lehman and Moser and Exline remained unfinished; no deed ever passed, and by the conveyance to the plaintiff by the heirs of Moser, he took no better position in the contract than was held by the heirs through their father; and by the sheriff's sale Barclay became vested with the rights of John Exline. Neither can claim to be an innocent purchaser without notice. If they choose to buy without inquiry, they took the risk of the title, and if the jury believe that Philip Moser was the purchaser of this land from Ann Lehman—John Exline signing the agreement only as the surety of his son-in-law—and that Philip Moser paid the purchase-money to Ann Lehman in his lifetime, then the plaintiff must recover."

The counsel for plaintiff in error (defendant below) submitted the following points:—

1. That the action of covenant against Moser and Exline was well brought, they being joint covenantors, and that Moser having died before judgment, the further prosecution of the action could be maintained only against the surviving defendant.

2. That a sale of the land under a judgment, against the surviving covenantor, obtained in an action for the unpaid purchase-money, upon the articles of agreement, settles definitely the rights of all parties connected with, or having an interest in, the purchase, and passes the title of both covenantors, Moser and Exline, to the vendee of the sheriff.

3. That the interest of the plaintiff in this case is, at best, an equitable interest, and he cannot ask the Court to enforce his equity until he has done what equity requires at his hands, and therefore he cannot recover without having first paid or tendered

Digitized by Google

www.libtool.com.cn

to pay the balance of the purchase-money due under the agreement.

4. That if the jury believe that the defendant in this case had no notice of the claim, now set up by the plaintiff, under the Mosers, and that there is nothing in the case that would put him upon such inquiry as would necessarily lead to a knowledge of that claim, he is an innocent purchaser, without notice, and is protected against the latent title, under which the plaintiff seeks to recover.

5. That the purchaser at sheriff's sale became the owner of Exline's interest in the land in dispute, and, as by the terms of the agreement Exline was a joint owner with Moser, the defendant, as alienee of the sheriff's vendee, became therefore entitled to at least one-half of the land—if the Court should be of opinion that he is not entitled to the whole—in the absence of full proof showing knowledge of the want of title in Exline.

6. That if the jury believe that the plaintiff in this case, being the attorney of the heirs of Ann Lehman, and administrator *de bonis non* of her estate, recovered, with a full knowledge that said Ann Lehman had been paid and satisfied, from the estate of Samuel M. Barclay, who was executor of said Ann Lehman and vendee of the sheriff of the land in dispute, the value of said land, and induced a delay of the assertion of the claim of the Mosers, for the purpose of better insuring a recovery of the claim of Ann Lehman's heirs against the estate of Barclay, equity will not permit him to recover as vendee of the Mosers against the defendant, an innocent purchaser, without notice of the title thus purposely concealed by the plaintiff.

To which the Court answered as follows:—

1st, 2d, and 5th. We have already said that the sale to Barclay upon the judgment obtained on the articles of agreement against Exline passed no greater interest to the sheriff's vendee than was in Exline at that time, and if the jury believe, from the evidence, that Exline was a principal—*prima facie* he was one—then the sale passed the one-half of the land to Barclay; but if Exline was the security only—it is not alleged that he paid any part of the consideration—and the purchase-money was paid by Moser to Ann Lehman in his lifetime, then the sale passed no title to Barclay.

3d. If the jury believe that Moser paid the purchase-money, then there was no necessity for a tender.

4th. Answered in the charge.

6th. Answered in the negative.

To this opinion and charge of the Court, the defendant excepts, and prays that a bill may be sealed; which is accordingly now done.

The following errors were assigned in this Court: 1st. The Court erred in admitting the evidence of Mary Exline and Abra-

Digitized by Google

ham Miller. 2d. The Court erred in their answer to the 1st, 2d, and 5th points of the defendant below. 3d. Also, in their answer to the 3d point. 4th. Also, in answer to the 4th point. 5th. Also, in answer to the 6th point.

King, for the plaintiff in error.—It was argued that the evidence of Mary Exline and Abraham Miller ought not to have been admitted, because, 1st, It contradicted a written agreement under seal; and, 2d, It was not accompanied with an offer to prove, or followed by proof that defendant, Arnold, had notice or knowledge of the relation of principal and surety alleged to have existed between Moser and Exline.

2d error. If two enter into a bond, and one die before judgment, the survivor will be charged alone: Reed *v.* Garon's Executors, 7 *Ser. & R.* 363; Gore *v.* Clark, 6 *Hill* 350.

But a judgment was obtained against the surviving covenantor for the balance of the purchase-money of lands agreed to be conveyed to Moser and him. How does this affect the survivor? He is made responsible for the purchase-money, and we say there is a trust resulting in his favour, conferring upon him the equitable interest of the lands purchased. He would have been entitled to a deed on payment of the judgment, and had, therefore, such an interest as could be levied upon and sold. The sheriff's vendee was in the same, if not a better, condition than Exline: Love *v.* Jones, 4 *Watts* 405.

The 5th, which was answered in connexion with the 1st and 2d, should have been explicitly answered. It asserts that Exline was a joint purchaser and owner with Moser. The contrary nowhere appears in a shape that would affect anybody with notice; and, if so, Arnold became the purchaser of the land without notice; and, therefore, is protected to the extent, at least, of half the land. He was not bound to look beyond the instrument by which Ann Lehman parted with her title. If, therefore, the defendant in error is entitled to recover at all, he will be limited to an undivided moiety.

3d error. There was error in the answer of the Court to this point:—"that, if the jury believed that Moser paid the purchase-money, there was no necessity for a tender." If the evidence of John Exline and A. Miller was inadmissible, then there was no evidence of the payment to go to the jury. The declarations of Exline and Ann Lehman, testified to by their witnesses, was long prior to the judgment in the action of covenant. Will these declarations be allowed to contradict the agreement and the fact established by the judgment? The knowledge of the witnesses was confined to themselves—the record was notice to all the world—so the agreement treats both tracts as one, and provides for the payment of a stipulated sum for both, and with this the judgment

Digitized by Google

[Arnold v. Cessna.]

www.libtool.com.cn

corresponds—and it was also in proof that the value of the other tract was totally inadequate to satisfy the balance due on the agreement in 1842. There was, therefore, money due from Moser on account of the land in dispute, and this the plaintiff below was bound to pay, or to tender before he can recover; and the jury should have been so instructed.

4. Arnold was an innocent purchaser without notice. Moser's title was imperfect at best. The record showed he had not paid for the land—that judgment had been obtained against his co-covenantor, and the land sold under it; and, having no notice, he is entitled to protection.

5. The defendant in error prosecuted the Lehman claim against Barclay, in the double capacity of attorney and as administrator of Ann Lehman, knowing, at the time, of the outstanding claim of the Mosers. The prosecution of the latter claim was delayed, as is alleged, through his procurement, and thereby a larger amount was recovered for Lehman's estate of Barclay, than would have been recovered if the claim of the Mosers had been duly prosecuted. Barclay was the executor of Ann Lehman, at the time he purchased the land in controversy on the judgment against Exline, surviving covenantor in the purchase with Moser, for $100. He subsequently sold the land for $808.80 to Arnold, the defendant below, under covenants of general warranty, which sum he was charged with in the settlement of his administration amount, and paid with interest to the estate of Ann Lehman, of which the plaintiff below was then the administrator *de bonis non*. In the mean time, and pending the controversy, the plaintiff below bought out the title of Moser's heirs to the land, and brought this ejectment afoot, having obtained the judgment against Barclay's estate for Lehman's estate. Is it consistent with public policy, and due administration of justice, that he should recover? Rush *v.* Cavenaugh, 2 *Barr* 197.

Barclay's estate has paid the whole sum received of Arnold for the land to Lehman's estate; if plaintiff recovers, his estate will be liable to an action on the covenant of general warranty to Arnold, should the latter be evicted.

Cessna, for defendant in error.—The plaintiff in error mistakes in saying that the proceedings against Barclay's estate were carried on by defendant in error as administrator. He was employed by the heirs as attorney, and only administered at a late period, when an administrator was necessary to effect a distribution.

1. As to the admission of the evidence objected to: There was no contradiction of the deed. See Mann's Appeal, decided at May Term, 1854, and the opinion of Lowrie, Justice.

Arnold stands in the place of Barclay. The purchaser of an inchoate title at sheriff's sale takes the title of the defendant and

Digitized by Google

nothing more. His alienee is in no better condition. See the case of Morrison *et al. v.* Funk, decided at May Term, 1854; 2 *Rawle* 188; 7 *Barr* 165; 7 *Watts* 167; 8 *Barr* 187.

No one denies the first point. Barclay, as executor of Lehman, had a remedy, by ejectment, against Moser, although he had none on the covenant. It is not true, as plaintiff asserts, that Exline would have been entitled to a deed for the land on payment of the judgment; nor is it true that there was a resulting trust in favour of Exline. From what could it result? From the fact that Moser had all the money and that Exline had nothing?

2. The second point the Court below properly refused. Moser's heirs could not be affected by a sale of Exline's interest. Moser died in 1835. The judgment was taken in 1842; not against Moser, his administrators, or his heirs. The case Torr *v.* Jones, 4 *Watts* 465, is not disputed; but there the judgment was recovered by the vendor against the vendee. There was a union of the legal and equitable interests, and by this arrangement the parties to the *record* did definitively settle their relations. In this case there was no such proceeding; there is no disclosure of the relation between the vendors, nor of that of the vendees. The relation between the vendors and vendees only is declared. The true relation between Moser and Exline is disclosed by the evidence. Moser owning the equitable title, there was no union of the legal and equitable estates by the sale of Exline's interest in the land; no definitive settlement of the rights of the parties, as in the case cited, which is not, therefore, in point. The case is, as stated in the Court below, "a controversy between Moser and Exline." Plaintiff in error is entitled to Exline's interest; defendant in error to that of Moser. The jury have determined their relative value. By the decision of the Court, in May last, Barclay, in the purchase, took the risk upon himself. Arnold is in no better position; and, aside from this, it is plain that Arnold had notice. The only title Barclay could show in Exline was the agreement of April, 1818. Did that show to Arnold what share was Moser's? what Exline's? On the contrary, the record on which the land was sold showed that Moser paid all the money that ever was paid, and there was enough upon the record to put any man upon inquiry.

3. The third error assumes that the title of defendant in error was equitable, and requires that a tender should be made to entitle him to recover. The loss of time, thirty-seven years, and continued possession for twenty-seven years, and the evidence of payment, as proved by witnesses, raise the presumption of payment so as to dispense with a tender. And this is not rebutted by the judgment, for the reasons that the articles of agreement embraced two tracts, and Moser was no party to the judgment.

But the rule requiring a tender is confined to actions between

Digitized by Google

www.libtool.com.cn

the vendor and vendee; either may recover against the other or against a stranger without tender: 7 *Watts* 43; 4 *Barr* 482; 2 *Harris* 249.

4. The fourth error assigned is founded on a misapprehension of the facts of the case. This is, emphatically, a controversy between Moser and Exline; their alienees occupy the same position that they would occupy if now present.

5. As to the conduct of defendant as attorney at law: 1. In increasing the delay of Moser's heirs in the prosecution of their claim. 2. In the prosecution of an unjust judgment. Was this an unjust judgment? Who says so? The representatives of J. Barclay. Who obtained it? Who was attorney in 1832? Who executor of one plaintiff in 1833? Who the assignee of the other plaintiff in 1811? Who issued execution, controlled the levy and sale, and became the purchaser? Surely Mr. Barclay should not complain that we have been collecting the judgment he took so much pains to obtain. If the purchase-money of this land was all paid, no one ever told this to the defendant in error. He knew nothing of this till the day Miller's deposition was taken.

But if he had known that this land had been paid for, the agreement embraced two tracts; the other was not paid for. For this balance Barclay obtained the judgment. Barclay was executor from 1833 to 1853; and the prosecution of Moser's claim five years ago would have had no effect upon his liability in the former action. Between him and Lehman's heirs it could make no difference. If he bought and sold the land, and received the money, he was liable. If he did not, then the debt was lost through his gross negligence as executor. So far as can be now seen, there was a valid claim against Moser and Exline, to the amount of the judgment for the balance due on another tract. Why was this claim permitted to slumber for twenty years? Barclay was bound to collect it from Moser or pay it himself. The whole case was on record and freely discussed on a former trial in the Court below, before auditors, and in this Court; in all of which defendant in error took the ground that Abraham Lehman was only bail for Ann, and that Exline was only bail for Moser, and so proved it to the satisfaction of Court and auditors, and before a jury in a feigned issue; and all this before defendant in error bought a single share of Moser's heirs.

When a trustee purchases land at his own sale, he cannot retain it. Barclay denied the trust, claimed adversely, and took the risk of the title. If he had conveyed to Lehman's heirs, as he should have done, they would have been entitled to just what was finally decreed to them by this Court.

Our purchases from Moser's heirs were made openly, and the deeds recorded as they were made; one of them by sheriff's sale.

Digitized by Google

www.libtool.com.cn

Why did not plaintiff in error buy? Because he denied Moser's title, and does so yet.

The ejectment was delayed, not for the purpose of securing judgment in the other suit, but until the defendant in error had obtained the entire title, when it was immediately brought.

The opinion of the Court was delivered by

KNOX, J.—This was an action of ejectment. Previous to April, 1818, the title to the land in dispute was in Ann Lehman. On the 7th of April, A. D. 1818, Ann Lehman and her son, Abraham Lehman, sold by articles of agreement to Philip Moser and John Exline two tracts of land—the one for which this action was brought, and a mountain tract—for the consideration of one thousand dollars.

In 1823, an action of covenant was brought by Ann and Abraham Lehman against Philip Moser and John Exline, to recover the unpaid purchase-money. Moser died in 1835, and in November, A. D. 1842, a judgment was obtained against Exline, in the action of covenant, for the sum of $854.23. Upon this judgment the tract in dispute was sold in January, 1843, to Samuel M. Barclay, the executor of Ann Lehman, who conveyed it to the defendant Arnold in May, 1843. Philip Moser went into possession in 1818, and remained until his death in 1835, leaving a widow and children, who continued the possession until 1844; since which time the tract has been occupied by the defendant, under his purchase from Barclay. The plaintiff has the title of the heirs of Philip Moser.

The important point in the case is the effect of the sheriff's sale upon the judgment obtained in the action of covenant. The plaintiff denies that this judgment was a lien upon the land, averring that the purchase was really for the benefit of Moser, and that Exline was a party to the articles of agreement, not as purchaser, but merely as security for the payment of the purchase-money. He further alleges that the purchase-money for the tract in dispute had been paid by Moser to Ann Lehman in her lifetime. The defendant's position is, that the judgment, although against Exline alone, having been recovered in a suit brought on the articles of agreement for the sale of the land, was a lien upon the whole equity outstanding, and that the sale extinguished all the interest which Moser and Exline, or either of them, had in the land. The Court of Common Pleas permitted the plaintiff to prove by parol testimony that the purchase was made for the benefit of Moser, that Exline signed the agreement as surety, and that Ann Lehman had said in her lifetime that the tract in dispute had been fully paid for by Moser; and instructed the jury that if they found these facts their verdict should be for the plaintiff.

By the articles of agreement an equitable title passed to Philip

Digitized by Google

[Arnold v. Cessna.]

www.libtool.com.cn

Moser and John Exline, as tenants in common, with the right to demand a conveyance of the legal title upon the payment of the purchase-money. The equitable title of Exline could not be destroyed by parol evidence that he was a surety instead of a purchaser, first, because this evidence could not gainsay the written instrument under seal, and, second, because it would be a violation of the statute of frauds and perjuries to permit one who has purchased by writing jointly with another to prove by parol that his co-purchaser has no interest in the purchase. The rule is well settled in Pennsylvania that an equitable title to land is within the statute of frauds: Murphy *v.* Hubert, 7 *Barr* 423. And it is equally well settled that a transfer from one tenant in common to another can only be by writing, and that the possession of the one is the possession of both: Galbreath *v.* Galbreath, 5 *Watts* 146. At the time when the action of covenant was commenced, as well as when the judgment was entered against Exline as between the parties to the agreement, Exline was a tenant in common as to one-half of the equitable interest in the land in dispute, and the judgment against him was unquestionably a lien upon this interest; but no case goes so far as to hold that a judgment obtained against one tenant in common, in an action of covenant brought on articles of agreement for the sale of land against two, is a lien upon the interest of the deceased obligor or covenantor. The rule would doubtless be otherwise as to joint tenants, as the entire interest or estate would pass to the survivor, and be bound by the lien of a judgment obtained against him alone; but the real estate of a deceased tenant in common, whether held by articles of agreement or by deed of conveyance, passes upon his death directly to his heirs or devisees, and cannot be encumbered by a judgment against another where neither the heir, devisee, or personal representative is made a party. The cases cited by the plaintiff in error do not sustain his position, that the judgment bound the interest of Moser as well as that of Exline. Love *v.* Jones, Day *v.* Lowrie, and Harbach *v.* Riley were all cases where the action was brought and the judgment had against the vendee; and they simply decide that a sale upon such a judgment passes to the purchaser the entire estate, legal and equitable; but in nothing that is said in either case is there warrant for the position here assumed.

As Mr. Barclay, the purchaser, represented the holder of the legal title, Ann Lehman, and as the judgment against Exline was a lien upon the one-half of the outstanding equity, a sale upon this judgment vested the entire title, legal and equitable, in the purchaser, to a moiety of the property sold; and, as to this moiety, the defendant has a perfect title; and, as to the other half, the equitable interest still remains in the heirs of Philip Moser, or the plaintiff who claims under them, with the right to demand

Digitized by Google

a conveyance, or recover the possession of the undivided moiety, upon paying or offering to pay the one-half of the purchase-money, if this has not already been paid.

As the sale upon the judgment against Exline united the equitable interest in an undivided moiety of the estate with the legal title, it left the other moiety free from the one-half of the purchase-money, so that if Moser in his lifetime, or his heirs since his death, has paid upon this purchase five hundred dollars and its interest, the plaintiff is entitled to recover in this action the one undivided half of the land in dispute. Taking the amount recovered in the judgment against Exline as the true amount then due, it would seem that more than one-half had been paid, for the judgment is for a sum considerably less than the one-half of the purchase-money, and its interest from the date of the contract, in 1818, to the rendition of the judgment in 1842; but, as this judgment is not conclusive between the parties to the present suit, as to the amount then due, the question is still open for inquiry; and, if it should be found upon another trial that Moser, or those claiming under him, had not paid the one-half of the purchase-money, a conditional verdict should be given in favour of the plaintiff for the one undivided moiety of the land, upon his paying to the defendant within such time as the jury should fix any residue of the one-half of the purchase-money, and interest, after deducting what has already been paid by Moser, the defendant, to be entitled to the money so paid only upon conveying to the plaintiff the legal title to the one-half of the land. The conveyance should be made by the defendant, because the legal title passed to the whole estate from Ann Lehman to Samuel M. Barclay, by virtue of the sheriff's sale and the subsequent proceedings against the estate of Mr. Barclay by the estate of Mrs. Lehman; and being so in Mr. Barclay, it would enure to the benefit of his vendee, the defendant in this suit. If, however, the jury should find, as they probably will, upon a second trial, that Moser had paid his part of the purchase-money, a verdict in favour of the plaintiff for the undivided half of the tract is all that the case requires.

It is unnecessary to pass upon the assignments of error more particularly than we have already done; but, to prevent misconstruction, we will add that there is nothing in the view of the case we have taken, inconsistent with the decision of this Court in Mann's Appeal, not yet reported. There we permitted the representatives of Ann Lehman to show that Abraham Lehman had no interest in the purchase-money due on the articles of agreement with Moser and Exline, although he was, on the face of the agreement, one of the vendors; but this was in accordance with the legal title which was in the name of Ann Lehman alone; here the proposition was to show, in direct contradiction to the written agreement, that Exline was not a purchaser, but a surety, and that too,

Digitized by Google

www.libtool.com.cn

to affect the title of the defendant, without proof that he had notice of any relation between the parties other than what appeared upon the face of the agreement. The difference between this case and Mann's Appeal is manifest, and we only notice it to avoid the conjecture that we have overlooked our former decision.

There is nothing in the allegation that the plaintiff below is estopped from claiming title to the land in controversy, under the heirs of Moser, because, as attorney for Ann Lehman's estate, he recovered its value from the estate of Samuel M. Barclay, deceased.

Judgment reversed and *venire de novo* awarded.

Jacobs *versus* Figard.

Under the Act of the 30th December, 1786, continuity of actual residence and possession is the vital principle of a pre-emption right, and a part of its legal definition.

If the settler should be compelled to quit his residence on the land by any extraordinary or occasional occurrence, he must return as early as convenient, or it will be deemed an abandonment: he cannot substitute *claim* for *residence*, and *convenience* for prosecution of the title.

By returning "as early as convenient," the law means, as early as he reasonably can.

To keep possession without a residence, for the purpose of preventing others from making a settlement on the land, is not a compliance with, but a fraud upon the law.

Where the question of abandonment depends upon mere lapse of time, and there is no dispute as to the length of it, it is a question of law to be decided by the Court, without regard to the intention of the party.

Relinquishment of actual residence for five years and nine months, without any circumstance to bring the case within the equity of the statutory excuses, would be an abandonment irrespective of the intention of the claimant.

ERROR to the Common Pleas of *Bedford county*.

This was an ejectment for sixty acres of land. The facts appear to be as follows:—John Whitehead, in March, 1831, made an improvement on the land, and on the 26th November, 1834, had it surveyed, and the lines marked, embracing 60 acres and 148 perches. The improvement was made and the possession continued in strict accordance with the Act of Assembly, until between the 1st and 15th December, 1847. This is not disputed.

By deeds duly executed, Whitehead's title to the land became vested in the plaintiff, to whom a warrant was granted on the 2d September, 1853, upon which a survey was made the 27th of the same month, against the acceptance of which a *caveat* was entered by the defendant.

The defendant claimed under a warrant issued on the 14th February, 1853; upon which a survey was made on the 7th March, 1853, which was accepted by the board of property.

Digitized by Google

[Jacobs v. Figard.]

www.libtool.com.cn

J. W. Wesley, who was the last actual resident upon the land under the plaintiff, left it in December, 1847, when it was leased to William Lowry and others, by those under whom the plaintiff in error claims, who have paid the taxes up to this time. Neither Lowry nor the other lessees ever resided on the land, but on adjoining tracts; but set up a claim of possession, sleeping in the house a few nights, using the house, which was in bad repair, to keep hay in, and for the purpose, as Lowry testified, of keeping other people out.

Points submitted by the plaintiff in error:—

1. That the law raises no presumption of the abandonment of an improvement, from the relinquishment of the possession, for a period of time less than seven years.

2. That, if the jury believe that the plaintiff and those under whom he claims, either by themselves or their tenants, occupied the land in dispute and the house thereon erected, having designated the boundaries by an actual survey, with the intention to make it a place of abode and supporting a family, and that the occasional absence therefrom was always attended with the intention to return, the said plaintiff had a right by improvement, and that his perfection of that right, by a warrant and survey, entitles him to recover in this action.

Errors assigned: 1st. The Court erred in not answering the points submitted by the plaintiff in error. 2d. The Court erred in charging the jury as follows, viz.: "The question for the jury to determine is, was this improvement abandoned after December, 1847? If it was, the plaintiff cannot recover. The plaintiff says the improvement was kept up by Evans and Lowry, tenants of the then owners, and the payment of taxes. Evans seems to have had a lease for one year. Lowry for four years. Both were men of families, and had their homes with their families as well as their property elsewhere than on the land. Neither of them ever resided upon the land, and Lowry says that by the terms of his lease he was not required to reside on the land; that he had a few bedclothes and articles of property in the house, and that he slept there a few nights, and this was done to prevent other persons from going upon the land. If these facts are believed by the jury, then this was not such a continued residence settlement upon the land as the law requires, and the defendant was right in treating it as abandoned, and he is entitled to your verdict."

Russell, for plaintiff in error.—First cited Noble *v.* McClintock, 6 *W. & Ser.* 58; Brentlinger *v.* Hutchinson, 1 *Watts* 46. Where the question of abandonment arises from a relinquishment of the possession for a period less than seven years, accompanied by circumstances indicating an intention to abandon, it is then a

Digitized by Google

www.libtool.com.cn

mixed question of law and fact to be left to the jury. In the case at bar, all the circumstances indicate a contrary intention, and if the question of intention had been left to the jury, they must have so found.

2d. A *bona fide* improvement was made in 1831, which was kept up for sixteen years; the owners leased it to their tenants, occupied and used it, totally inconsistent with any intention to relinquish their right; had it surveyed and marked in 1834, long before the seven years had expired. Do these facts show any intention to abandon?

See Wilson *v.* Watterson, 4 *Barr* 214; *Ib.* 219.

Hall, for defendant in error.—The Court properly left the facts to the jury. The case (1 *Watts* 46) cited by plaintiff, fails them entirely: the Court in that case say, "to constitute a settlement right to land, a settler is required to make the land his place of *abode*, and continue it. And see Wilson *v.* Watterson, 4 *Barr* 214; McDonald *v.* Mulholland, 5 *Watts* 175. And see Cluggage *v.* Duncan, 1 *Ser. & R.* 120; Watson *v.* Gilday, 11 *Ser. & R.* 340; Pfouts *v.* Steel, 2 *Watts* 410; Wyncoop *v.* Heath, 10 *Watts* 420; 4 *Barr* 219; Heath *v.* Biddle, 9 *Barr* 278.

The opinion of the Court was delivered by

Lewis, C. J.—The Act of 30th December, 1786, defines a "settlement," under the pre-emption laws, to be "an actual personal *resident* settlement, with a *manifest* intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or by going into the military service of this country during the war." Under this Act it has been held that continuity of actual residence and possession is the vital principle of a pre-emption right, and a part of its legal definition. Settlements must not have the smallest cast of abandonment: Watson *v.* Gilday, 11 *Ser. & R.* 340. Short intervals of non-residence, such as may frequently happen between the going out of one tenant and the coming in of another, or a temporary absence on business, so that the *animus revertendi* exists, will not be considered a discontinuance of the personal residence after it has been once fully completed. Nor will it be so where the settler is expelled from his residence on the land by private force, provided that he resort to proper means, within a reasonable time, to have himself restored. If he should be compelled to quit his residence on the land by any extraordinary or occasional occurrence, he must return as early as convenient, or it will be deemed an abandonment: Pfouts *v.* Steel, 2 *Watts* 412. He must not "substitute *claim* for *residence*, and *convenience* for prosecution of the title:" M'Donald *v.* Mulholland, 5 *Watts* 175. By returning "as early as convenient," the law means as early as

Digitized by Google

www.libtool.com.cn

he reasonably can. He has no right to keep possession without a residence, for the mere purpose of preventing others from making a settlement on the land. Such conduct, instead of being an honest compliance with the law, is a fraud upon it which it is the duty of the Courts to discountenance. It is a mistake to suppose that the law raises no presumption of abandonment, from the relinquishment of the possession for a period of time less than seven years. Mr. Justice KENNEDY'S dictum, that "the limitation of time ought not to *exceed* seven years," is not to be understood as sanctioning an abandonment for that period of time. On the contrary, in the case of M'Donald *v.* Mulholland, 5 *Watts* 173, an absence of five years, although accompanied with a continued assertion of claim by the settler, was held as a matter of law to be an abandonment. It was there held that "continuance of residence, with such occasional exceptions of *temporary* but *indispensable* interruption of it as circumstances may require, of which it may be the province of the Court to judge, is the groundwork of the title." Where the question of abandonment depends upon mere lapse of time, and there is no dispute as to the length of it, it is a question of law to be decided by the Court, without regard to the intention of the party: Brentlinger *v.* Hutchinson, 1 *Watts* 51.

In the case before us, there was an actual abandonment of the residence for five years and nine months. The abandonment is not excused by any circumstance which would bring the case within the equity of the statutory excuses of interruption by the enemy, or military service of the country by the settler during war. Under these circumstances, an intention to reside on the land could not be substituted for actual residence. But, in this case, there was no intention to reside on it. The tenants who occupied the place for the five years preceding the defendant's acquisition of title from the state, had their residences notoriously elsewhere, during the whole period, without the slightest manifestation of an intention to remove to the land to reside. On the contrary, the evidence is that the tenant who had a lease for four years of that time, "was not to move into the house or on to the land." He "got the property for the purpose of keeping other persons out." The few bed-clothes and articles of property kept in the house, and the idle formality of sleeping there a few nights, do not constitute an actual residence, when the proof is that the residence was on another tract, and that the object of all this show was merely "to keep others out."

Under the evidence, the plaintiff had no title to recover; and the instructions of the Court were more favourable to him than he had a right to demand.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

NORTHERN DISTRICT—SUNBURY 1855.

The Carbon Run Improvement Company *versus* William M. Rockafeller.

A holder of land by warrant and survey, may, with the sanction of the Board of Property, contract the lines of his survey and throw out part of his land, so that he do not prejudice other interests; and the part excluded relapses into the general mass of public lands, and may again be appropriated by warrant and survey, as vacant land.

Where the part thrown out lies within the lines of another survey, it does not become vacant land, but relieves that survey from the consequences of an interference.

An older survey cannot be changed, contracted, or enlarged by the adjustment of the lines of a junior survey.

Whether a line was actually run upon the ground, or left by the surveyor as an open line, was a question of fact for the jury, and their finding will not be reviewed in this Court.

ERROR to the Common Pleas of *Northumberland county.*

This cause was tried at a Special Court, held by Hon. A. S. WILSON, in January, 1855, and was an action of ejectment brought by William M. Rockafeller, to recover a tract of land in Coal township, Northumberland county, containing 98 acres and 83 perches and allowance.

The plaintiff claimed by virtue of a warrant to himself, dated 29th March, 1853, and a survey in pursuance of the same on the 7th April, 1853. The defendants alleged that the land had been previously appropriated by warrant and survey, and showed a warrant to Esther Cramer, for 300 acres, dated the 27th Decem-

Digitized by Google

[The Carbon Run Improvement Company v. Rockafeller.]

www.libtool.com.cn

ber, 1792, and survey thereon for 319½ acres, dated the 20th October, 1794, returned and accepted the 12th of March, 1803, and a patent to the warrantee on the 17th of September, 1812; and contended that the land in dispute was embraced within the lines of this Esther Cramer Survey.

They further proved that the land in dispute had been embraced within the lines of a survey made for John Carson, on the 28th of October, 1794, in pursuance of his warrant dated November 18, 1793; and that Robert O'Neil became the owner of this Carson survey, and on the 5th of March, 1824, presented his petition to the Board of Property, in which he set forth: that he was the owner of the John Carson survey, "and that the said survey is interfered with by a survey made on a warrant in the name of Esther Cramer, dated December 27, 1792. Your petitioner being desirous of obtaining a patent for his land clear of said interference, prays that an order may be given to the deputy surveyor, authorizing him to make a resurvey of said tract of land, surveyed in the name of John Carson, and exclude therefrom the interference aforesaid," &c. On the following day the order of resurvey issued, and was executed on the 26th of May, 1824. This resurvey contained 131 acres 54 perches, and was returned and accepted on the 12th of June, 1824, and a patent for the land embraced in it was issued to Robert O'Neil on the 6th of September, 1824. This survey and patent does not include the land in dispute.

The Esther Cramer survey, by running the north and south lines from known and admitted monuments on the ground, the courses and distances marked on the official draft, would have embraced *all* the land in controversy: or resting at the pine corner of James Hepburn on the south line, and giving the north line the *full* call of the official survey, would have included all the land embraced within the Rockafeller survey, with the exception of a few acres at the south-east corner.

The plaintiff below alleged, that the land was vacant at the date of his application, and relied upon his warrant and survey.

Certain points were presented to the Court, and their instruction to the jury prayed upon them. The points, and the answers of the Court upon them, and the general charge, so far as they are the subject of the assignment of error, are given below.

Plaintiff's 1st point: "That if the jury believe that the Pine (the north-eastern corner of the James Hepburn, in the line of Luke Hoglin) is the south-eastern corner of Esther Cramer, and that the northern line of Esther Cramer, running from the White Oak, the south-eastern corner of Magdalena E. Leverson, N. 88° E., was not originally run on the ground, then the survey of Esther Cramer must be closed by a line running from the said Pine corner N. 2° W. to intersect the said northern line."

Digitized by Google

www.libtool.com.cn

Answer of the Court: "We answer the point as requested, and will refer more particularly to the principle applicable to it on the evidence presented in the case in our answer to sixth point submitted by counsel for defendant."

Defendant's 2d point: "If the jury believe from the evidence that the land claimed by plaintiff in this suit was included in the original survey of John Carson given in evidence by defendant in this cause, that the plaintiff is not entitled to recover the same in this suit."

To the 2d point the Court answer: "This we do not agree to. John Carson, or rather Robert O'Neille having his claim, procured the resurvey, and if by that excluded lands in his original survey patenting the portion included in the original survey only, what he excluded by his resurvey would be subject to the warrant and survey of a subsequent applicant, unless it is contained in the survey of Esther Cramer."

Defendant's 4th point: "That the proceedings before the board of property on the petition of Robert O'Neille, the owner of the John Carson warrant and survey for a resurvey, and the making of the resurvey and the return thereof by Henry Donnel, deputy surveyor of the county by order of the board of property and the surveyor-general, the same having been acquiesced in by all parties, is conclusive to establish the survey of Esther Cramer as well as that of John Carson, that the Commonwealth is bound by the act of her officers in that proceeding, and could not again grant the land thus appropriated to Esther Cramer; and if the jury find from the evidence that plaintiff's survey is covered and included by the Esther Cramer as established by Henry Donnel in the resurvey of John Carson, that they should find for defendant."

To defendant's 4th point the Court answer: "The return of resurvey is of the John Carson warrant, and the acquiescence of the parties merely when the land was unoccupied by the claimants would not in our judgment establish the survey of the Esther Cramer if the part thrown out was not originally included in the Esther Cramer survey. The Commonwealth is bound by the acts of her officers; but if the act in this instance threw out land of the John Carson survey that was not included originally in the Esther Cramer survey, it would not be an appropriation of the part thrown out to the Esther Cramer survey. But its being so thrown out by Mr. Donnel when his attention by the order of resurvey was especially called to the subject of an interference between those two surveys, and at a time when in the course of things the chances of ascertaining the true state of the case from monuments on the ground was better than at the time of later examinations, his throwing it out of the Carson survey as belonging to the Esther Cramer, is a circumstance to be considered by

Digitized by Google

[The Carbon Run Improvement Company v. Rockafeller.]

www.libtool.com.cn

you in determining whether the part thrown off the Carson was not a part of the Esther Cramer survey; and if it was, then as stated in the latter part of the propositions, your verdict should be for defendant. But this fact is to be determined from all the evidence submitted to you."

Defendant's 6th point: "That, as matter of law, under the evidence in this case, the owner of the Esther Cramer warrant and survey is entitled to the full length of official distance called for on the north line from the white oak, the south-east corner of the Leverson survey, running the official distance north 166 perches to the post called for, and if the jury should believe from the evidence that the pine stump at the corner of James Hepburn is the south-east corner of Esther Cramer, and that the east line was left open, the legal and proper way of closing the survey would be to run a line from the pine stump to the north-east official call of Esther Cramer."

To defendant's 6th point the Court answer: "A survey returned and accepted in the land office and undisturbed or not interfered with for twenty-one years, will give the title to the warrantee of all the lands within the lines shown by the return of survey; and if in this case the survey returned had shown a line from the pine to the end of the 166 perches, where a post is called for on the north line of the Esther Cramer, from the white oak referred to, it would designate the point of intersection at the end of the 166 perches, although the lines might never have been run on the ground. Or, if the evidence satisfies you that the north line of the Esther Cramer was run on the ground the 166 perches from the white oak or further, it would designate that as the point of intersection for the closing line from the pine, although the latter line was never run on the ground, and would entitle the Esther Cramer to the full length of 166 perches on the north line; and if you should find that the pine stump at the corner of the James Hepburn is the south-east corner of the Esther Cramer, and the east line of the Esther Cramer was left open, the legal and proper way of closing the survey would be to run a line from the pine stump to the end of the 166 perches on the north line of the Esther Cramer and south line of the re-survey of the John Carson. And if you should be satisfied that the north line of the Esther Cramer was run on the ground and establish the pine stump as the extension of the southern line of Esther Cramer, your verdict, if you find for the plaintiff, should be for that portion of the land outside of the Esther Cramer adopting the eastern boundary by a line from the pine to the end of the 166 perches on the north line, and included in Rockafeller survey; and, in case of your so finding, you will designate in your verdict the part you so find for the plaintiff by identifying it on the draft where that portion is represented. But, if there is not evidence to show that the north line

Digitized by Google

[The Carbon Run Improvement Company v. Rockafeller.]

www.libtool.com.cn

was run the 166 perches, then you determine the cause on the evidence intrusted to you in relation to whether there was any vacant land there upon which Rockafeller's warrant could be located, to which we have directed your attention as the main question in the case."

Defendants' 7th point: "That from all the evidence in the cause the defendants are entitled to the verdict."

To defendants' 7th point the Court answer: "We refuse to withdraw the case from you as indicated by this point.

"You will determine the facts on the evidence before you, without regard to who are the parties, and apply them to the principles of law we have stated govern the case. Your duty is to return a verdict according to the evidence."

To opinion and answers to points defendant excepts.

Extract from the general charge of the Court: "Any difficulty which arises, is from establishing the pine on the north-eastern corner of the James Hepburn as a south-west corner of the Esther Cramer. The draft and patent of the Esther Cramer call for a pine at that corner, but giving the courses and distances of both patent and survey; by adopting this pine the south line of Esther Cramer would be shortened just the breadth of the William M. Rockafeller survey and exclude from the Esther Cramer survey the quantity of land included in the Rockafeller survey; and the important question in this case is whether the pine corner spoken of by the witnesses is the pine corner of the Esther Cramer called for on her return of survey. If it is, being a monument on the ground, it would govern the survey notwithstanding the lines would not hold out their official distance, and would establish the extent of the Esther Cramer at that point and throw out the land east of it; and the plaintiff would be entitled to recover."

The jury found a verdict for the plaintiff, and the defendants sued out this writ of error.

Error was assigned to the answers of the Court to the foregoing points, and to so much of the charge as above set forth.

Maynard and *Donnell*, for plaintiff in error.—We requested the Court to say that if the land claimed by plaintiff in this suit, had been previously appropriated by warrant and survey, duly returned and accepted, that it was not subject to a second warrant. It was not disputed that the Rockafeller survey was included in the John Carson survey. But it is contended that O'Neille abandoned to the Commonwealth all that was not included in his resurvey. The Court being of that opinion, ruled the point against the plaintiff in error. The doctrine of abandonment does not apply to a case like this: 11 *Ser. & R.* 340; 4 *W. & Ser.* 78; 5 *Ib.* 196.

Digitized by Google

www.libtool.com.cn

The Cramer survey was the oldest, and O'Neille, in petitioning the board of property, set forth an interference with it, and desired to have patented all that was not in the Cramer survey. He desired to give it up to her.

Abandonment is said to be a question of intention. The lines were comparatively new and fresh at that time; they were familiar with them, and it is admitted by O'Neille that this land excluded from his survey belonged to Esther Cramer. How can an intention to abandon to the Commonwealth then be inferred?

It was not possible to make the resurvey of the Carson without first establishing the lines of the Cramer survey. The presumption of law, from the great lapse of time and all the other circumstances, establish it conclusively.

The original monuments found on the ground on three sides, north, west, and south, the blocks of the trees, the re-examinations by Montgomery in 1802, and by Donnel in 1824, entitled the defendants, both in law and fact, to the verdict of the jury.

It was returned for a period of almost sixty years, and the defendants were entitled to a distinct instruction that after so long a time the lines shown by the official draft returned were conclusive. But the Court submitted both the law and fact to the jury, and leave the jury to find whether the lines were actually run upon the ground. The Court submit the whole question of whether there was any vacant land there, upon which plaintiff's warrant could be located. On the subject of the survey, they cited 13 *Ser. & R.* 118 and 382; 8 *W. & Ser.* 142.

The presumption is, that the survey has been regularly made after twenty-one years: 7 *Barr* 67; 1 *W. & Ser.* 79.

If there had been an interference, it was the duty of the surveyor to note it: 7 *W. & Ser.* 211.

In order to show a vacancy of a small strip between two old surveys, it must be shown affirmatively that the lines were run and marked upon the ground: 1 *Harris* 459; 8 *Ib.* 80.

Comly and *Casey*, contrà.—We conceive that the only question involved was one of fact, which we submit was properly left to the jury. Was the land vacant when the plaintiff's warrant was laid? The first survey of John Carson covered it; his warrant is relocated, no difference for what purpose; and the part excluded, if within the original lines of the Cramer survey went to her; if not, it reverted back to the state. If not in her survey, it could not enure to her benefit. She was no party to the proceeding, and could be neither benefited nor bound by it. It could not operate as a conveyance or transfer of John Carson's right to her. He was relinquishing a claim instead of transferring a right. It did not remain in the owner of the John Carson, for his rights were fixed and ascertained by the resurvey to which he was a party,

Digitized by Google

www.libtool.com.cn

and in which he was an active participant. The point has been ruled by this Court: 4 *Yeates* 218; 5 *Watts* 465.

The answer of the Court to defendants' 4th point was full and fair. The order of resurvey was of the John Carson tract only. The deputy had no order or authority to resurvey the Cramer; it had been returned, accepted, and patented. The surveyor could not affect her rights or limit or extend her lines. The answer was more favourable than the defendants had a right to expect.

The 6th point turned on a disputed fact in the cause, viz., whether the lines referred to had been run upon the ground, and the learned Judge could not have withdrawn its decision from the jury. His Honour adopted not only the rule, but almost the precise words of the law as settled by this Court, that the marks and monuments upon the ground govern and control the location of the survey: 4 *Harris* 232; 4 *Ser. & R.* 456.

The opinion of the Court was delivered by

WOODWARD, J.—The only questions of law in this case relate to the proceedings of the Board of Property on the petition of Robert O'Neille, as the owner of the John Carson tract; and we think the Court apprehended and stated the effect of these proceedings correctly. A holder by warrant and survey may, with the sanction of the Board of Property, contract the lines of his survey and throw out part of his land, so that he do not prejudice other interests; and the part excluded relapses into the general mass of public lands, and may again be appropriated by warrant and survey as vacant land. But when the exscinded portion is within the lines of another survey already made, it does not become vacant land, but belongs to that survey and is simply relieved of the consequences of an interference.

Whether the part cut off from the Carson survey became vacant land or not, depended on the location of the Esther Cramer warrant.

It was vacant land and open to Rockafeller's warrant unless it was within the lines of Esther Cramer; but whether within these lines or not was a question of fact for the jury upon all the evidence. The counsel for the plaintiff in error insisted that the resurvey of the Carson warrant must have fixed the lines of the Cramer survey, and that as O'Neille asked only for the exclusion of the interference, whatever was excluded from the resurvey of the Carson must have fallen within the lines of the Cramer.

A fair answer to this argument is, that the owner of the Esther Cramer was not a party to the proceedings before the Board of Property, and could not be affected by them, either for good or ill. Esther Cramer was moreover an older survey than John Carson, and the adjustment of the lines of a younger survey never can affect the location of the elder. It lies where it was put by the

Digitized by Google

[The Carbon Run Improvement Company *v.* Rockafeller.]

www.libtool.com.cn

surveyor; and, whilst it may help to locate surrounding surveys that are younger, it is not to be changed, contracted, or enlarged, by what may be done in the location of them.

For these reasons we think the answers of the Court to the several points were substantially correct, and that they were right in submitting the whole case to the jury on the question whether the disputed territory lay within or without the lines of the Cramer survey. On that question, the pine corner so much discussed was calculated to exert a very material influence. If the jury were satisfied from the evidence that that was really the south-eastern corner called for in the Cramer survey, and that the north line from the white oak was not run on the ground, they might well locate the survey so as to exclude the disputed territory; but if they found that north line, the closing line from its extremity to the pine would take part of the land in controversy into the survey. In regard to this north line, the instructions given in answer to the defendant's 6th point were as favourable to the defendants as they had reason to expect, and if the judge mistook them, the remedy was a new trial, and not a writ of error.

On the whole, we see nothing in the law laid down to correct, and we have neither the inclination nor the power to review the finding upon the facts.

The judgment is affirmed.

Robert Phillips *versus* The Zerbe Run and Shamokin Improvement Company.

A conveyance of land to a trustee, in trust, with power to sell in two years for payment of a creditor named in the deed, "and if any balance remain after payment of said creditor, then to pay over the same to the grantor," is not void as regards subsequent creditors.

If the power to sell in such deed is not executed within the time limited, the trust is not thereby ended, nor is the land subject to levy and sale by the subsequent creditors of the grantor.

Where land conveyed in trust had been sold for taxes, the legal effect of payment of the purchase-money to the purchaser, by the grantor in the deed, or his *cestui que trust*, was simply to discharge the tax sale.

Where the defendant in an execution had no title to the land in question when the plaintiff's judgment was entered, nor when the sheriff's sale was made, it was error in the Court not to instruct the jury peremptorily that plaintiff could not recover.

ERROR to *Northumberland county*.

The land for which this ejectment was brought, was surveyed on a warrant granted to John Kreighbaum and Henry Reed, June 15, 1804, and by several intermediate conveyances became vested, on the 25th September, 1829, in Joseph Lyon, under whom both parties claimed.

Digitized by Google

[Phillips v. Zerbe Run and Shamokin Improvement Company]

www.ftbtool.com.cn

Phillips, the plaintiff, obtained judgment against Lyon on the 23d December, 1837, on which the land was levied and sold by the sheriff, and bought by the plaintiff, to whom the sheriff conveyed it August 2, 1841. The plaintiff entered upon the land, and remained in possession until 1846.

The defendants then showed that, on the 13th July, 1831, Lyon and his wife conveyed the land to Burd Patterson, "in trust that he should, in two years from the date of the said deed, sell by public or private sale the said land, and with the proceeds thereof pay to the Miners' Bank of Pottsville all moneys due by him to the said bank in full, if sufficient, and the balance, if any, remain to him, the said Lyon."

Patterson did not sell within the two years; but, with Lyon's consent, and under the power in the deed of trust, exposed the said land to public sale on the 27th May, 1847, and by his deed of 30th November, 1847, conveyed the same to the Miners' Bank, under whom defendants claim.

The plaintiff then adduced evidence to show that the taxes upon the tract in question for the years 1832 to 1835, remaining unpaid, it was sold by the treasurer of the county in 1836 to Hugh Bellas, Esq., who testified that he held the deed from the treasurer, dated the 30th July, 1836; that he had paid the treasurer the taxes and costs, $10.17; that he informed Joseph Lyon of the purchase, and what he had paid, and he promised to repay Mr. Bellas (as appears by a letter exhibited by Mr. Bellas, dated Philadelphia, June 28, 1836), and added: "I am satisfied he repaid me what I had paid, as above stated. I was agent and attorney for Joseph Lyon in 1836, and for a number of years before and afterwards."

The defendants gave in evidence a deed from Hugh Bellas and wife to the Miners' Bank, Burd Patterson, Joseph Lyon, and H. Holkins, dated June 30, 1838, for two undivided third parts of eleven tracts, among them the tract in controversy—consideration $1—to have and to hold their respective interests therein.

And John Shippen, president of the Miners' Bank, testified "that, from the time the trust deed was made to Patterson, the Miners' Bank paid all the taxes on the tract in dispute;" and gave in evidence a draft, dated 21st June, 1836, drawn by Charles G. Donnel on John Shippen, president of the Miners' Bank, in favour of H. Bellas, for $52.02, "for land-taxes paid by him for you and J. Lyon;" and testified that the amount was paid by the bank on its own account, and that the $10.17 paid by Mr. Bellas on the tract in dispute, was included in this draft, and paid by the bank.

In the course of the trial below, the defendants gave evidence of title out of the Commonwealth, granted by warrant to Benjamin F. Young, in 1793, accompanied by proof that the survey made and returned upon it, included the Reed and Kreighbaum

Digitized by Google

[Phillips *v.* Zerbe Run and Shamokin Improvement Company.]

www.libtool.com.cn

survey, and traced the title through divers intermediate conveyances to the defendants; but in view of the preceding facts, the Court deemed this evidence immaterial.

The Court charged the jury on the material facts, in substance, that the purchase of the tract in controversy by Mr. Bellas for taxes, was a purchase in trust for Joseph Lyon; that the plaintiff's purchase at sheriff's sale of Lyon's interest on the 2d August, 1841, and his deed of 6th January, 1842, which were had upon his judgment against Lyon, would only be a lien upon what interest Lyon had in the tract at the date of the judgment, and the purchaser at sheriff's sale would take no greater interest. The interest Lyon then held was the title to the tract from the Commonwealth, and this was bound by plaintiff's judgment, if the title had not been divested by Lyon's deed to Patterson of July 13, 1831, in trust (as above stated). This deed limited the power of Patterson to sell in execution of the trust to two years, and he not having executed the power for near fifteen years, the land would be subject to levy and sale by the creditors of Lyon. But Mr. Bellas holding as trustee for Lyon, or Lyon redeeming the tax title within two years, the title never was divested by the tax sale.

Verdict for defendant.

Rockafeller and *Comly*, for plaintiff in error.

Packer and *Maynard*, for defendant in error.

For the plaintiffs it was urged that the purchase of Bellas for taxes was made for Lyon, Bellas being the agent of Lyon at the time; that the deed of Bellas to Lyon did not operate as a redemption, although it was within one day of two years from the sale, and Lyon must be considered as the original purchaser from the treasurer—the act of the agent being the act of the principal.

2d. The purchase by Bellas for Lyon at treasurer's sale did not operate as a redemption, if the position of defendants be true that Lyon had no interest in the *land*, but only to the *surplus* reserved to him upon a sale under the deed of trust. If Lyon had no title, or but an imperfect one, what was there to prevent him from becoming the purchaser at treasurer's sale? He did not purchase the Reed and Kreighbaum title, but the *land* itself.

3d. After the expiration of the two years limited for the sale of the tract in dispute under the deed of trust, the trustee had no power to sell, and the time limited for the execution of the trust having expired, the deed conveyed no title. The deed of trust was fraudulent on its face, in limiting the surplus, after payment of the debt specified to the grantor. The object was to cover the property.

For defendant: Joseph Lyon was the undisputed owner of the

Digitized by Google

www.libtool.com.cn

tract when he conveyed it to Patterson. The trust created by the deed was a subsisting continuing trust. No length of time can be a bar to a *direct* trust, and the privity existing between the trustee and the *cestui que trust* makes the possession of the one the possession of the other: 24 *Law Library* 310. The failure to sell in two years could not operate a forfeiture or abandonment of the trust estate. An assignment for the benefit of creditors, once accepted by the assignee, is vested for their benefit, and a subsequent renunciation by the grantee does not affect the validity of the conveyance: Klapp's Assignees *v.* Shirk, 1 *Harris* 592. The trust was fair and valid at its inception, and was a fraud on no one, much less on plaintiff, whose claim did not commence till 1837. Its terms were not for all creditors *in futuro*, but for payment of a specified debt; and the only parties having interest in it were, Lyon the grantor, the trustee Patterson, and the *cestui que trust*, the Miners' Bank.

2d. As to the tax sale. Mr. Bellas proves no more than a general agency for Lyon, and not specific, for the purchase of the land in question, and the payment of the purchase-money to him by the bank is fully proved. The deed of Bellas to the bank, Lyon, and Patterson, shows the understanding of the parties at the time, and this was before the period allowed for redemption had elapsed, and the conveyance was, in effect, a redemption: 9 *Harris* 480.

The opinion of the Court was delivered by

KNOX, J.—In our view of this case, several of the errors assigned are immaterial, and they will not be particularly noticed.

The plaintiff has no title to the land in dispute, unless he can establish, 1st, That the deed of 13th July, 1831, from Joseph Lyon and wife to Burd Patterson in trust, to sell and pay the proceeds to the Miners' Bank of Pottsville, did not pass the title, as regards the subsequent creditors of the grantor; or, 2d, That the purchase at the treasurer's sale by Mr. Bellas, in July, 1836, divested the title of the trustee, Burd Patterson, and restored that of the former owner, Joseph Lyon.

The conveyance from Lyon and wife to Patterson is assailed because it is alleged to be fraudulent as to creditors, for the reason that, after the payment of the debt due to the Miners' Bank, the proceeds of the sale of the land were to be paid to the grantor; and it is also claimed by the plaintiff that, upon a failure to sell within the time mentioned in the deed, the trust was at an end, and the property was subject to levy and sale by the creditors of Lyon, the grantor in the deed of trust.

We are of opinion that neither of these positions can be sustained.

By the deed of trust, the tract of land in dispute was dedicated

Digitized by Google

[Phillips v. Zerbe Run and Shamokin Improvement Company.]

www.libtool.com.cn

to the payment of the debt due to the Miners' Bank, and there is nothing to show at that time, or for several years after, that the plaintiff in the action was a creditor of Joseph Lyon; and if he were not, he cannot complain that property was placed in the hands of a trustee to sell for the benefit of a *bonâ fide* creditor; and neither can he say that the trust was discharged, because it was not fully executed within the time mentioned in the deed.

As Joseph Lyon was entitled to the proceeds of the sale after payment of the debt due to the Miners' Bank, it is possible that a purchaser at sheriff's sale of his interest in the land, would stand in his shoes in claiming the fund; but this is of no moment in the case before us, as the land did not sell for a sum sufficient to pay the debt due to the bank.

There was no evidence given upon the trial from which the jury could have found that Mr. Bellas purchased the land at treasurer's sale for Mr. Lyon, so as to divest the title of the trustee. Even if Mr. Lyon repaid to Mr. Bellas the taxes and costs paid by the latter on the purchase, it would have amounted to a redemption and nothing more, and that such was the intention of the parties is clear from the conveyance subsequently made by Mr. Bellas to the parties in interest, in which the tax sale was treated in no respect as affecting the title which the several parties had, before it took place. Under the evidence it was pretty clear that the taxes and costs were repaid to Mr. Bellas by the Miners' Bank, the beneficiary in the trust deed; but the legal effect of the payment, coming from Lyon or the bank, was simply to discharge the tax sale.

As Joseph Lyon had no title to the land in dispute when the plaintiff's judgment was entered, nor when the sheriff's sale was made, the plaintiff took nothing by his purchase, and of course cannot recover in ejectment, whether the defendants showed title or not. The instructions of the Court should have been peremptory against the plaintiff. The case was submitted on a question of location, and although there was error in this, the plaintiff cannot take advantage of it.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Shriner *versus* Keller.

Where the purchaser of goods pays for them with the note of a third person, given to him for a real consideration, and passes the note to the vendor by endorsement, the vendor can only recover on the note; and to enable him to recover against the endorser he must show that the note was regularly dishonoured.

But where the note was made for the mere accommodation of the purchaser, and to get him a credit, and he endorses it to the vendor of goods, the maker of the note stands in the relation of surety for the endorser; and the latter, in an action against him on the endorsement, cannot set up by way of defence that the vendor held the note and never demanded payment of the maker.

Where the vendee of goods was sued on an accommodation note made for his credit, and endorsed by him over to the vendor, and the case was arbitrated, appealed from, tried in court and reversed on error; on the second trial below the plaintiff amended his declaration by joining a new count for goods sold and delivered, no exception being taken, or anything appearing in the record to show objection on the part of the defendant. *Held*, that after a defendant goes to trial and takes the chance of a verdict on a declaration thus amended, it is too late to object.

Error to the Common Pleas of *Union county*.

This action was brought to recover of Shriner, the defendant, a promissory note given by John Plank to H. and D. Keller, the plaintiffs below, for $600, dated January 25, 1851, payable one year after date, and endorsed "Charles H. Shriner."

A statement was filed against the defendant as *endorser*. The case was arbitrated, appealed from and tried, and verdict for plaintiff for $648.20; and the judgment was reversed on error, on the ground that defendant was not liable upon his endorsement, for the reason that he had no notice of the non-payment of the note by the maker. The record was remitted, and on the 26th September, 1853, by leave of the Court below, the plaintiffs' counsel filed an amended statement for 39 Hathaway stoves, sold and delivered by plaintiffs to defendant between the 14th May, 1850, and 8th October, 1850, at $18 per stove, making $702, with interest from six months after delivery, alleging the said note was given for the said stoves. A jury was called on the 16th February, 1854, when the defendant first had notice of the amended statement. A verdict was rendered for plaintiffs for $800; $200 more than the face of the note. The Court refused the defendant a new trial, provided the plaintiffs released the excess. This was done accordingly, and defendant sued out this writ of error.

Plank, the maker of the note, was examined as a witness for plaintiffs in the case, to show that Shriner was the original debtor, and Plank only surety.

Digitized by Google

[Shriner *v.* Keller.]

www.libtool.com.cn

The errors assigned were, 1. That the Court erred in permitting the amended statement to be filed and passed upon by the jury.

2. In instructing the jury that if Shriner was the original debtor, and Plank only surety, the plaintiff was entitled to recover; and that the giving of the note would not be a bar to a recovery on the original cause of action.

Linn, for plaintiff in error.—The note was for $600, and suit brought against the endorser; the amended statement was for stoves to the amount of $702, delivered to defendant, and for an entirely different cause of action, and for an amount beyond the note of $102. This was not the matter arbitrated, nor the case appealed from, and would subject the defendant and his bail on the appeal to responsibilities not within the scope of their obligations.

Plaintiff taking the note from Plank in payment with Shriner as endorser, and failing to give notice of protest and non-payment to the endorser, was a discharge of the endorser; and is in law an acceptance of another security in satisfaction of the original debt: 5 *W. & Ser.* 33; 2 *Binney* 446; 2 *Whar.* 11; 2 *W. C. C. R.* 24; 1 *W. C. C. Rep.* 262, 264; 5 *Whar.* 487; 4 *W. R.* 208.

Casey, for defendant in error.

The opinion of the Court was delivered by

Black, J.—The defendant below was the endorser of a note. But there was no sufficient evidence given to show that payment had been demanded of the maker. There was also a count in the declaration for goods sold and delivered, and on that the plaintiff was permitted to recover.

When the vendee of goods endorses to the vendor in satisfaction of the price, a promissory note made by a third person for a real debt, the vendor must recover on the note or not recover at all. He cannot entitle himself to a judgment against the endorser without showing that the note was regularly dishonoured. The cases cited by the plaintiff in error establish this principle, and they establish nothing more that is pertinent to the case. But where the note was made for the mere accommodation of the purchaser of the goods, in order to get from the seller a credit which might otherwise have been refused, and the goods are sold to the endorser on the joint credit of the maker and endorser, the equitable relation subsisting between them is simply that of surety and principal. In such a case, the endorser, who is the principal, has no right to complain that his surety has not been pursued before he himself was called on for payment. Though the vendor

Digitized by Google

www.libtool.com.cn

cannot recover on the note, he may join a count for the price of the goods, as he did here; and on such a count, the fact that he holds the note and never demanded payment from the maker will be no bar to a judgment in his favour.

The charge of the Court below was in perfect accordance with these rules. The jury found that the maker of the note was but a surety of the endorser, and that the endorser was the purchaser of the goods, of which the price was claimed in one count of the declaration.

One of the errors assigned is that the Court permitted the plaintiff to amend his declaration (a statement) by adding or substituting the count for goods sold, after appeal from the award of the arbitrators, and after a trial and a reversal of the judgment, or rather, that the jury were permitted to pass on it. It was not until a short time before the last trial that any statement other than one which charged the defendant as endorser, was filed. But the filing of it does not seem to have been opposed. There is no trace of an objection to it to be found on the record. There was no motion to strike it off, though there appears to have been an affidavit of the defendant and his counsel, that they did not know of any change in the statement at the time it was made. It does not appear that the Court was requested to say anything on the subject to the jury. After a defendant goes to trial on a declaration amended in this way, pleading to it, and taking his chances of a verdict, it is too late to object. But even if the objection had been made, and the question had been fairly raised in this Court, whether a plaintiff in such circumstances has a right to amend his declaration or statement in the way allowed here, we would have been obliged to decide it in the affirmative.

Judgment affirmed.

Lower & Barron *versus* Clement.

The defendant, who was a country merchant, proposed to compound with his creditors in Philadelphia, upon terms stipulated in a written instrument, which contained the condition that it was to be void if not signed by *all his Philadelphia* creditors. The plaintiffs and several others signed the agreement, and afterwards the plaintiffs brought suit on the original indebtedness; to which defendant set up the compromise as a defence, but gave no evidence that, the instrument had been signed by *all the Philadelphia creditors*. *Held*, that to defeat a clear legal liability under such an instrument, the defendant was bound to prove performance of every condition necessary to give it effect.

Where such instrument proposed new sureties to the creditors, it was for the defendant to show that they had been proposed and tendered, as well as that all the designated creditors had assented to it.

To submit a fact set up by the defence to the jury, of which there was no evidence, and which the plaintiff disproved, was error.

Where an instrument of release stipulates that it shall be void if not agreed

Digitized by Google

to by *all* creditors in a given place, and it was signed by several, the party setting it up must show that those who assented comprised *all* the creditors designated.

Where the party makes *one* objection to the compliance with the terms of a compromise, where there are several, this is not a waiver of all others, but they remain open and may be asserted at the proper time.

ERROR to the Common Pleas of *Northumberland county.*

Defendant being engaged in mercantile business became indebted to plaintiffs, merchants in Philadelphia, and other merchants of the same place. On the 27th January, 1848, defendant gave to plaintiffs three promissory notes at six, twelve, and eighteen months, amounting in the whole to $598.58.

On the 9th August, 1848, Clement wrote to plaintiffs that he could not meet his liabilities, and proposed a compromise. On the 11th August, plaintiffs sent the above notes to Mr. Packer for collection. In the same month Clement proposed the following agreement to his creditors in Philadelphia:—

"Philadelphia, August 24, 1848.

"We, the undersigned, creditors of Ira T. Clement, do hereby agree to release our claims on condition that he gives his notes for 35 per cent., payable in twelve months, and 15 per cent., payable in eighteen months, with approved security, and bearing interest from date: also, his own note for 25 per cent., payable in five years, without interest.

"The condition of the above agreement is this: that *all his Philadelphia creditors will agree to the same, otherwise to stand null and void.*"

This paper was signed by the plaintiffs, and thirteen other of the Philadelphia creditors.

On the 6th September, Mr. Packer wrote to plaintiffs that D. Mets, J. Siesholtz, and S. Savage had agreed to go security for Clement, to his Philadelphia creditors, upon the terms proposed in the above agreement, and that he had taken notes for their debts, but to have no binding effect until accepted and approved by them. On the 15th September, plaintiffs wrote to Mr. Packer, declining to accept the notes. On the 3d October, 1848, Packer wrote to plaintiffs that he had been informed that they and some other creditors had agreed to take Clement's own judgment-note, in addition to the other security; and that he had taken the same subject to their (the plaintiffs',) approval, to which, on the 14th November, 1848, plaintiffs replied, refusing to accept the notes. On the 6th December, 1848, Packer again wrote to plaintiffs, that as other judgments were about being entered against Clement, he had entered the one taken in their names, but with the agreement that it was not to be binding unless approved by them, and that he had retained their original notes. On the 19th December,

Digitized by Google

[Lower & Barron v. Clement.]

www.libtool.com.cn

1848, plaintiffs wrote to Mr. Packer that they would not accept this proposition, and that he should proceed to obtain judgment on their three notes as speedily after maturity as possible. Plaintiffs also ascertained, as alleged, that all the creditors in Philadelphia had not signed the agreement of 24th August, 1848, or assented to it; and Packer offered to return to Clement the subsequent notes and judgment, informing him that the plaintiffs would not accept his propositions, which Clement refused to receive, and Mr. Packer then brought suit on the original notes.

The defence was that the notes had been compromised by the agreement of 24th August, 1848, and the judgment against Clement.

It was further in evidence that three of the creditors in Philadelphia had not acceded or assented to the said agreement, and Mr. Packer testified that before he agreed to enter the judgment, he told Clement he would only take it subject to the ratification of plaintiffs, and that he had no special authority from plaintiffs to take the judgment, and offered to return the papers, &c., which he refused.

The sureties offered by the defendant were not approved by the plaintiffs.

The court below charged the jury, "that, if they believed, from the evidence, that all the Philadelphia creditors of defendant had agreed to the terms of the composition of 24th August, 1848, and that the notes therein stipulated for, with 'approved security,' were given to defendant, or offered to his counsel, the plaintiffs were not entitled to recover. The legal definition of approved security is such security as ought to have been approved."

To which plaintiffs excepted.

Miller, for plaintiffs in error.—The agreement does not purport to be signed by all the creditors; and, unless signed by all, it was to be *null* and *void* by the condition expressed upon its face. But plaintiffs proved, by three creditors who came within the condition, that they had not released.

It was error in the Court to submit, as a question of fact, that of which there was no evidence: 8 *Harris* 351; 6 *Harris* 351. Defendant was bound to show performance of the condition before he could call upon plaintiffs to perform.

The judgment taken by Packer was not to be of any validity till approved by plaintiffs.

An accord must be fully executed to give it effect: 5 *Co.* 79 b; 2 *H. B.* 319; 1 *Taunt.* 526, Fitch *v.* Sutton; 5 *East* 230; 1 *Saund. Pl.* 29. So actual acceptance of the satisfaction must be shown: 1 *Ld. Raym.* 122; 2 *N. R.* 148; 3 *East* 251; and see 5 *J. R.* 66, 9 *Ib.* 350; 4 *Watts* 126, Spruneberger *v.* Dentler.

Digitized by Google

[Lower & Barron v. Clement.]

www.libtool.com.cn

Pleasants, for defendant in error. Cited *Chit. on Cont.* 601, 4th ed., notes *f* and *j*; 4 *Barr* 514.

The question was one of fact, and the Court submitted it to the jury: 8 *Harris* 214.

The plaintiffs made themselves a party to the agreement by signing it; and as several other creditors signed it also, the presumption is that these were *all* the creditors designated; and the defendant asserting the contrary, was bound to show it. The burden of proof was on him, and not on the plaintiff: *Chit. on Cont.* 601. The plaintiff attempted to make this proof, but failed, as the jury found. If he failed to satisfy the jury, he must take the consequences. But there was no proof that a single *Philadelphia creditor* did not agree to the arrangement. There was no proof that the persons who, it was in evidence, did not sign, came within the description as to locality, time, or fact; all of which were questions for the jury. Was the evidence on the part of the plaintiffs in error so certain, positive, and preponderating as to make it error in the Court to submit it to the jury?

"Approved security is such security as should be approved:" 4 *Ser. & R.* 1; 2 *W. C. C. Rep.* 180; 1 *Whart. Dig.* 230, pl. 224. A special objection is a waiver to other objections, if not mentioned, as to payment tendered in money not specie; and if the objection to the notes tendered was on the ground of insufficient security, and no other objection was made, this was a waiver of all other objections, and was so properly left to the jury: 1 *Raw.* 408; 5 *Watts* 509; 8 *Raw.* 400; 1 *Pa. Rep.* 454; 1 *Whart. Dig.* 228, pl. 158.

The opinion of the Court was delivered by

WOODWARD, J.—This was an action on promissory notes, the execution of which being admitted, the plaintiffs' case was made out, when they were put in evidence.

The defence was, that the plaintiffs had compounded with the defendant, and released him from liability on the notes in suit, in consideration of other notes with approved security, for fifty per cent. of the debt, at twelve and eighteen months, and his own note for twenty-five per cent. at five years. The defendant was a country merchant, having several Philadelphia creditors, and the instrument of release, dated August 24, 1848, was evidently drawn with a view of being signed by all those creditors. It stipulated, indeed, that all of the defendant's Philadelphia creditors should agree to the same, otherwise it was to stand null and void.

Now nothing can be more plain, than that a defendant seeking to defeat a clear legal liability under such an instrument, was bound to prove performance of every condition on which its effect was limited. It was for him to show, that the new securities mentioned in the release had been prepared and tendered, and that all

Digitized by Google

www.libtool.com.cn

his Philadelphia creditors had assented to the composition. Had the case been subjected to the severe logic of special pleading, it would have become manifest to the defendant himself that the burden of the proof was on him. He would have had to plead the release, and to aver performance of its conditions, which are not alleged to have been in the release at all. Without this material averment his plea would have been no defence whatever to the plaintiffs' action. It would have carried its own condemnation on its face; for the release by its terms was to be null and void, unless all the Philadelphia creditors assented to it. Obliged therefore to allege their assent in order to give effect to the instrument, he would have been bound to prove what he alleged, for such is the general rule both of reason and law. And the fact was peculiarly within his knowledge. He knew who his Philadelphia creditors were—he knew them all; and his books and bills, such as all merchants keep, would have proved them. But neither of these creditors had any means of acquiring this knowledge. It was his duty to make out his case in proof precisely as he would have spread it on the record, if he had been held to special pleading. He was to prove the execution of the release by the plaintiffs, the tender of the notes therein mentioned, and the fact that all his Philadelphia creditors had assented thereto.

Of the execution of the release by the plaintiffs and some thirteen other creditors, and of the tender to the counsel of plaintiffs of notes, such as the instrument stipulated for, he gave evidence; but of the assent of all of his Philadelphia creditors, he submitted not a particle of proof, nor did he attempt to show that the thirteen creditors were *all* of his Philadelphia creditors. There was a total failure of the defence. The release was null and void when the defendant rested his case. The plaintiffs had never agreed to be bound by it, unless all the creditors assented to it, and the defendant had not shown who all his Philadelphia creditors were, nor that they had assented. To give him the benefit of the release, in the absence of such proof, was to pervert it from the purpose plainly expressed on its face, to another and different purpose never contemplated by the parties.

But the plaintiffs gave evidence, by three Philadelphia creditors of the defendant, that they refused to sign the release, and did not assent to it. Here, then, was a defence involving a fact indispensable to its completeness—a fact peculiarly and exclusively within the power of the defendant to prove, and which it was his legal duty to prove, in support of which he submitted not a tittle of evidence, but which the plaintiffs disproved by three unimpeached and uncontradicted witnesses; and yet the Court submitted that fact to be found by the jury, and they found it.

Now, the law of new trials is not to be administered upon writs of error; nor are we to be betrayed, even by a gross case, into an

Digitized by Google

attempt to correct the blunders of the jury box; but we think there was clear error in law on the part of the Court, in submitting a case so circumstanced to the speculations of the jury, especially when called on, as they were, by plaintiffs' first point, to say that under the evidence the plaintiffs were entitled to a verdict. Times without number it has been ruled to be error to submit a question to the jury of which there was no evidence. Was there any evidence here that all of the Philadelphia creditors had assented to the release? None. The release imported only the assent of the signers, and not that they were all. But it is said there was evidence on the point which the Court could not properly withdraw from the jury. The answer is, that that evidence was all against the fact alleged; and if it be error to submit a fact with no evidence to support it, much more is it error to submit a fact to be found, where the only evidence touching it is directly against it. Disproof cannot stand for proof. Suppose the merchant witnesses were not believed by the jury; their evidence then was set aside, and that left the case denuded of all proof on the point in question. Even if the jury believed, in direct opposition to the oaths of these witnesses, that they did assent to the release, still there was no evidence that they and those who signed the release were all of the defendant's Philadelphia creditors. That point was destitute of proof, and it was fatal to the defence, and the Court should so have ruled.

We see no objection to the definition which the Court gave of the expression "approved securities," and the question, whether those tendered were sufficient, was properly submitted to the jury; but we think the Court's unqualified affirmance of the defendant's second point was calculated to mislead the jury. Packer's failing to urge any other objection to the notes, than the inadequacy of the security, was not a waiver of all other objections. It was still open to his clients to allege that all of the Philadelphia creditors had not assented to the release. But from the manner in which the point was put and answered, the jury might well infer that the Court considered the objection waived, and that, whether all the creditors had assented or not, the plaintiffs were bound by the release, if the securities tendered to Packer were such as ought to have been approved. We repeat, that they were not bound without that universal assent stipulated in the release.

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

Black, J., and Knox, J., dissent from so much of this opinion as holds that it was error to leave to the jury the question of fact, whether or not all the creditors had released.

Digitized by Google

www.libtool.com.cn

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

WESTERN DISTRICT—PITTSBURGH 1855.

Bower and Others *versus* Commissioners of Washington County.

An erroneous publication by the commissioners of a county, mistaking the condition of the accounts of a collector of taxes, for one year, is no ground for the discharge of the sureties in the bond of the same collector for the following year.

ERROR to the Common Pleas of *Washington county*.

This was an application, by the sureties upon the bond given to the commissioners of Washington county by G. Kinnan, who was collector of state and county taxes in Peters township for the year 1849, to be relieved from their said obligation, on the ground of misrepresentation and fraud in procuring the same.

Kinnan had been appointed collector for Peters township for 1848, and was reappointed for 1849. On the 15th March, 1849, Bower and Philips, the petitioners, became his sureties for the year 1849, and judgment was entered upon the bond.

On the 1st January, 1849, Kinnan was in arrear on the county duplicate for 1848, $306.04, and on the state duplicate for the same year, $748.35. On the 3d of February the commissioners made their annual publication of receipts, disbursements, and outstanding taxes, in conformity to law, in all of which it was represented that Kinnan, subsequent to the 1st January, 1849, had paid the balance against him in full, when in fact he was, on the 3d of February, in arrear on the county duplicate for 1848, $305.20, and on the state duplicate for the same year, $633.35.

Digitized by Google

www.libtool.com.cn

The petition of Bower and Philips sets forth the above facts, and avers that they had seen the said publication over the signature of the commissioners, before entering into the bond as sureties for Kinnan, and confiding in the statement therein contained, executed the bond in the full belief that Kinnan was not a defaulter, but had paid all arrears for the preceding year; and for these reasons prayed that the judgment upon the bond should be discharged as regards them. The Court refused the rule applied for, and defendant excepted.

Acheson and *Wilson*, for plaintiff in error, distinguished between the case at bar and that of Borland *v.* Washington County, 8 *Harris* 150, 9 *Wheat.* 720, United States *v.* Vanzandt, 11 *Wheat.* 184, and like cases, which refer to matters of laches or neglect subsequent to the liability of the sureties.

But acts done by the officer after the surety's liability has attached, may operate to his relief: United States *v.* Howell, 4 *W. C. C.* 629, *Wh. Dig.* ed. 1850, *Surety*, § 95; 3 *W. C. C.* 70.

This case presents stronger ground for relief. The matter complained of was a false representation made by the commissioners *before* the execution of the bond, which rendered the liability of the sureties.

Is government absolved from all responsibility on account of the false representations of her authorized agents? and are individuals entering into obligations with her bound under all circumstances to fulfil them? The rule that fraud vitiates every contract should have no exception: Goepp's Appeal, 3 *Harris* 428, 4 *Wash. C. C.* 26; 6 *Wheat.* 680.

Watson and *Montgomery*, for defendant in error.—The publication was a mere mistake, a typographical error. The state cannot be injured by the laches of its agents: 9 *Wheat.* 720; 1 *Harris* 619. As to the distinction taken that in this case there was a positive unauthorized act done, see the case United States *v.* Vanzandt, 6 *Cond. Rep.* 267, and Borland *v.* Washington County, 8 *Harris* 150.

The defendants should have shown that the publication caused their loss, and brought on them this liability. The same rule will govern the case at bar as if the case was between the plaintiffs in error and the state: Commonwealth *v.* Brice, 10 *Harris* 211.

The opinion of the Court was delivered by

Lowrie, J.—The sureties of a tax collector ask to be relieved from their bond, because they were induced to enter into it by seeing a newspaper publication of the accounts of the county, in which it was erroneously stated that the collector had settled up his previous year's duplicate in full: an error, it seems, of the

Digitized by Google

www.libtool.com.cn

printer. We think that the learned judge of the Common Pleas was right in deciding that this is not a ground of relief. Such publications are intended for the general information of the public on the subject of the annual receipts and expenditures, and as such are valuable. But they are subject to mistakes, and therefore to correction, and the county is not bound by any representations in them. It cannot be regarded as prudent for any person to rely upon any fact therein stated as a motive for action. When information is wanted relative to the state of any account, prudence would require that it be sought at the office of the commissioners, and we should not like to say now that this relief could be granted, even if this erroneous information had been obtained there. Usually those who suffer by the mistakes and misconduct of public officers must look to them for compensation, and not to the public.

Judgment affirmed.

Patterson's Estate.—Appeal by Colver *et al.*

A sale by the sheriff on a judgment obtained against a vendor of land, after sale of the land by articles of agreement, passes only the estate left in the debtor after the contract of sale, and conveys to the vendee a right to the purchase-money unpaid—but he takes the estate subject to the payment of liens against the vendor prior to the contract of sale.

A sale on such subsequent judgment cannot discharge the lien of those prior to the contract of sale.

Error to the Common Pleas of *Greene county.*

Robert Patterson was the owner in fee of a tract of land in Jefferson township. On the 12th September, 1854, he sold the land to M. Colver, by articles of agreement, for $6000 in instalments, the deed to be made when $5000 should be paid. Before the sale to Colver, four judgments were had against Patterson, which were liens upon the land, the last of which had been entered on the 8th April, 1853. And several judgments were obtained against him after the said sale in favour of M'Nealy and others, a further description of which is unnecessary, the only question in the case arising out of the judgments entered *before* and those entered *after* the said sale to Colver.

On one of the judgments had after the sale, in favour of M'Nealy and others, a *fi. fa.* issued to the sheriff, who levied on "all the defendant's interest in and to a tract of land in Jefferson township, containing 50 acres, more or less, as the property of Robert Patterson;" and the question was as to distribution of the fund.

The Court distributed the proceeds of sale to the judgments which

Digitized by Google

www.libtool.com.cn

were entered after the said sale to Colver, and the prior judgment-creditors took this appeal.

Purman, *Flenniken*, *Black*, and *Phelan*, for appellants.—A judgment is a lien on every kind of equitable estate in land, as well as legal: 3 *Barr* 69; 2 *Barr* 42; 3 *Binn.* 5; 1 *Yeates* 427.

The judgments, before the sale to Colver, were liens on the entire estate of Patterson. Does this sale alter the rule of appropriation?

It is contended that the sale by the sheriff discharged only the liens of the judgments entered after the sale to Colver by articles of agreement. If so, it does not follow that the fund shall *only* be appropriated to those judgments; for whatever was bound by the subsequent judgments was equally bound by the prior ones; and, although the sheriff could not sell as great an *estate* on the subsequent as on the prior judgments, yet he sold what was bound by the prior judgments, and they are entitled to the proceeds of the sale to the extent of that interest, whatever it was. The sale was of all Patterson's interest in the land, and the fund must be appropriated to the judgments in the order in which they stood against him, whether they are liens on the fee simple or fee defeasible, as all claim as the creditors of Patterson, whose interest was sold: see 9 *Ser. & R.* 397; 16 *Ser. & R.* 20, 294; 2 *Watts* 378. Patterson could do nothing to prevent this after the judgments were entered. 2d. A judicial sale frees the land from all liens, encumbrances, &c., which are certain, or may be readily reduced to a certainty against the person as whose estate it is sold: 6 *Watts* 169; 1 *Watts & S.* 235; 1 *P. R.* 96; 8 *W. & Ser.* 444; 1 *Barr* 92; 5 *Barr* 420.

The money, therefore, should have been appropriated to the judgments in their order, as they stand against the defendant: Custer *v.* Detterer, 3 *W. & Ser.* 28; 3 *Binn.* 358; 7 *Ser. & R.* 290. Clear of all encumbrances whatever: Fickes *v.* Essick, 2 *Rawle* 166; Hellman *v.* Hellman, 4 *Rawle* 447.

Downey, *Lindsey*, and *Lazear*, for appellees.—The rule that a judicial sale discharges all liens existing at the time, which are certain, and may be reduced to certainty, has its exceptions: Swarr's Appeal, 1 *Barr* 92. Where land is held subject to a judgment, and is afterwards sold by articles of agreement, subsequent to which sale another judgment is entered against the defendant, and his interest is levied on and sold upon such subsequent judgment, does such sale discharge a lien prior to the sale by articles?

After a sale by articles, the vendor holds the title in trust for the vendee, subject to existing liens; and a judgment against him subsequent to such sale binds the interest he had at the date

Digitized by Google

www.libtool.com.cn

of the judgment, and the sheriff's vendee can call on the private purchaser for the unpaid purchase-money and no more: M'Mullen *v.* Wenner, 16 *Ser. & R.* 20; Catlin *v.* Robinson, 2 *W. & Ser.* 273. The interest in the vendee may be separately sold on execution, leaving the legal estate and the equitable estate unpaid for, untouched in the vendor, and a judgment against the latter binds the legal estate but to the value of the purchase-money, and just so much can be levied on and sold, and a purchaser under judgment against either succeeds to the interest the debtor had power to encumber. If then the sheriff's vendee can demand no more from the private vendee than the purchase-money unpaid at the entry of the judgment on which the sale was made, it would seem that the funds of each sale should be appropriated to the judgments in the order they were obtained after the agreement. For, if the purchaser can obtain no greater interest than the unpaid purchase-money, his bidding will be regulated accordingly.

If the sheriff's sale discharged *only* the judgments entered after the private sale, are not *they only* entitled to the proceeds? Shall the prior judgments be paid to the extent of the proceeds, and still continue a lien for the remainder? There is no case analogous to this. A charge or an encumbrance cannot be payable in part out of the proceeds of a sheriff's sale, and at the same time remain a lien on the land for the residue, in the hands of the purchaser. Inadequacy of funds to satisfy the judgment does not vary the rule; but the *right to apply them to the judgment* is, of itself, a total discharge of the lien.

The opinion of the Court was delivered by

Lowrie, J.—After a man has contracted to sell his land, he holds a very different title to it from that which he held before; for, after that, he holds the legal title in trust to convey it to the purchaser on his performance of the contract. Judgments obtained after such a contract are therefore liens upon a different estate in the land, from those obtained before it; and a sale on them cannot have the same effect as a sale on the prior judgments, else they would sweep away the title created by the contract. A sale on them affects only the estate left in the debtor after his contract of sale, which may be very small, depending upon the amount of the purchase-money remaining upaid—it conveys a right to receive this so far as the judgment debtor himself could demand it. But he could not demand it, without paying off the liens that were prior to the contract of sale, or suffering the purchaser thus to apply so much of it as might be necessary. It is very plain, therefore, that a sale on the judgments subsequent to the contract of sale, cannot discharge the lien of those that

Digitized by Google

www.libtool.com.cn
were prior, and these are not entitled to share in the distribution of the proceeds.

The decree of the Common Pleas is affirmed, and the appeals are severally dismissed at the costs of the respective appellants, and record remitted.

Pettit *versus* Wingate.

An action upon a recognisance of bail for stay of execution may be referred to arbitrators under the compulsory rule.

Error to the Common Pleas of *Greene county*.

A *sci. fa.* on a recognisance of bail for stay of execution on a judgment to September Term, 1854, issued December 23, 1854. March 23, 1855, the plaintiff entered a rule to choose arbitrators, which was served on defendant's attorney, who refused to appear. The plaintiff's attorney and the prothonotary met and referred the case.

The only question considered by this Court was, whether a suit on a recognisance of bail could be arbitrated.

Downey and *Lazear*, for plaintiff in error, cited the Act of 16th June, 1836, section 39, which excepts from arbitrations, *inter alia*, "actions upon bail-bonds and recognisances." The reason of the exception is, that sometimes special relief may be afforded, and in cases of securities, official bonds, or trust responsibilities, where relief could not be so well determined by arbitrators. It is because the writ is founded upon the recognisance that it cannot be arbitrated; and why depart from the plain language of the law?

Sayers, for defendant in error.—The exception in the 36th section of the Act of 16th June, was only intended to apply to bonds and recognisances taken for the personal appearance of a party in such criminal and civil cases wherein the Court can mitigate and give equitable relief: 10 *Watts* 443; 6 *Watts* 324; 3 *Watts* 176; 4 *Harris* 251.

If the exception be construed to embrace this case, it would also embrace all contracts for bail, if the contract be by bond.

The opinion of the Court was delivered by

Lowrie, J.—The decision below was that an action on a recognisance of bail for stay of execution, may be referred to arbitrators under a compulsory rule; and we do not think that this is erroneous. True, the arbitration Act of 1836, in defining what actions may be thus referred, excepts "actions upon bail-bonds or

Digitized by Google

www.libtool.com.cn

recognisances;" but the commissioners who reported the Act, say that they intended only to embody the principles already decided by the courts, and we have no doubt they were so understood. It is not allowed on bail-bonds and recognisances for the appearance of parties, because they must be subject to the usual equitable relief by the Court: 6 *Ser. & R.* 542; 3 *Pa. Rep.* 396; but it is allowed on a recognisance of bail in error: 3 *Watts* 176; and on a forfeited insolvent bond: 6 *Watts* 324; because they are subject to no such relief. A recognisance of bail for stay of execution falls within this last reason. The record raises no other question.

Judgment affirmed.

James A. Anderson *versus* Hamilton Township.

Where a suit was brought in the name of H. township upon a bond given to the road commissioners of the township, who were individually named in the bond, to secure funds advanced by the township; *Held*, that the suit was well brought.

Work done by a private citizen on a public road without authority or request of the authorities, although beneficial, affords no legal cause of action for compensation. That the work was necessary does not alter the case.

Error to the Common Pleas of *McKean county*.

This suit was originally brought by Hamilton township against the defendant, before a justice of the peace, for the recovery of a bond or contract signed by defendant (and a surety not named), dated 25th June, 1850. The defendant had contracted to make about 200 rods of a new road for plaintiffs, at 72 cents per rod. No money was to be paid until the job was completed. The road commissioners, however, agreed to advance to the defendant $40 of funds they had on hand, and required him to give the above bond with surety, which was conditioned for making the road according to the contract: in that event the $40 to be deducted from the amount to be paid him, otherwise to remain in full force and virtue. Defendant did some $50 worth of work on the road, and then finding it more expensive than he expected, abandoned and never completed it. And this suit was brought to recover the $40 thus advanced.

The bond was made payable to Libby, McManus, and Stanton, Road Commissioners of Hamilton township. And when offered in evidence, the defendant objected to its being read in this suit, brought in the name of Hamilton township as above stated, which was overruled, and the bond was read.

The defendant then offered, by way of set-off (under his plea of set-off), to prove that he had done necessary work on one of the public roads of the township at a time when extraordinary

Digitized by Google

www.libtool.com.cn
floods had rendered it entirely impassible, for which the township had never paid him, although it had adopted and used the repairs so made by him, which evidence was rejected. Verdict for the plaintiff for the whole bond and interest.

Johnson and *Brown*, for plaintiff in error.—An action on a deed can only be in the names of the parties to it: 6 *Barr* 292; Greenleaf *v.* Yeates, 2 *R.* 158. In actions at common law the parties must be legally and not merely equitably entitled to the cause of action: 5 *Barr* 520; 1 *Chitty's Plead.* 4.

2. Acquiescence in the work done, or the party availing himself of the benefit of the service, will render him liable on *quantum meruit*: 2 *Stark. Ev.* 940. So if he know of it and tacitly assent to work done: James *v.* Bixby, 11 *Mass.* 34. The work was done upon an emergency. The road was impassable and dangerous, and prompt action was required: see Overseers *v.* Bunn, 12 *Ser. & R.* 292; Overseers of Milton *v.* Williamsport, 9 *Barr* 46; 7 *Watts* 290.

Wetmore, for defendant.

The opinion of the Court was delivered by

KNOX, J.—Neither of the assignments of error is sustained.

The suit was rightly brought in the name of the township, although the agreement was with the road commissioners, who were individually named. The commissioners did not contract for themselves, but for the township, whose officers they were; and the proper party to the action was the corporation.

The work which the defendant proposed to set off against the claim of the township, was done without authority from the commissioners, or either of them, and could not therefore be charged against the township.

A voluntary act, although beneficial to another, performed without request, affords no legal cause of action for compensation. That the work was necessary to be done, can make no difference. The road commissioners were the proper persons to determine the necessity for the repairs, and to direct the manner in which they should be made. It will not do to permit the unauthorized expenditure of labour or money to be recovered from the township.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Blair *versus* McLean.

In a suit pending before a justice, where the parties appear and submit their proofs and allegations, the plaintiff may become nonsuit at his own motion, or may if he please discontinue or withdraw his action; and such proceeding will be no bar to another suit for the same cause of action.

ERROR to the Common Pleas of *Crawford county*.

Blair brought suit before a justice of the peace against defendant on a due-bill for $52.93, with credits endorsed thereon of $46. At the hearing, the plaintiff withdrew the suit, and confessed judgment for defendant's costs, which he paid.

The above suit was brought February 25, 1853, and terminated as above, 4th March, 1853.

On the 9th March, 1853, Blair brought another suit on the same due-bill, for the same balance claimed in the former suit. The defendant claimed a deduction and balance of a book account, and contended, at the same time, that the proceeding of the plaintiff in the former action, being unappealed from, was a bar to this action.

These facts were embodied in a case stated, and the Court below entered judgment for defendant.

Church, for plaintiff in error.—There was no pretence of adjudication by the justice upon the merits in the first suit. He considered it a case of nonsuit under the 6th sect. of the Act of 1810, by allowing 50 cents costs to defendant: *Purd. Dig.* 484–8, 49. The case was withdrawn after hearing a witness, and this the Court below held a judgment on the merits or a technical *retraxit*. A like proceeding held substantially to be a *non-pros.* or discontinuance: Gibson *v.* Gibson, 8 *Harris* 9. See 8 *Barr* 163, 410; 5 *Id.* 307.

Pettis, for defendant in error, cited Gould *v.* Crawford, 2 *Barr* 89. The justice had no power to enter a nonsuit; the remedy of plaintiff was by appeal. After hearing, it was obligatory on the justice to give judgment for or against the plaintiff. See also 5 *Harris* 75. When the plaintiff fails to appear, judgment of nonsuit may be given, but the moment he appears no such authority exists. *Before* hearing he may withdraw or discontinue, but *after* he can do neither; and the justice's record in aid of either cannot help him.

The opinion of the Court was delivered by

BLACK, J.—When the parties, in a suit pending before a justice, appear, and submit their proofs and allegations, the justice cannot order the plaintiff to become nonsuit. If he attempts to do so, and enters his judgment in that form upon the record, it will be consi-

Digitized by Google

www.libtool.com.cn

dered equivalent to a judgment in proper form for the defendant. No other suit can afterwards be brought for the same cause of action. It does not matter whether the magistrate's decision against the plaintiff be founded on want of evidence to support the claim, or on a successful answer to it by the defendant. This was ruled in Gould *v.* Crawford, 2 *Barr* 89, and in Lawver *v.* Walls, 5 *Harris* 75.

But there is no case which decides that the plaintiff may not become nonsuited on his own motion, or that he may not, if he pleases, discontinue or withdraw his action. We held, in Gibson *v.* Gibson, 8 *Harris* 9, that a record which showed that the plaintiff withdrew his suit, and confessed judgment for costs, was no bar to another suit for the same cause.

In the case before us, the suit was brought to recover a small balance due on a note. The only defence in the Court below was, that the plaintiff had previously brought suit before another justice for the same money, and that proceeding was set up as a bar. It seems that in the first suit the parties appeared, and after some progress was made in the hearing, the plaintiff being surprised by some evidence which the defendant produced, asked for a continuance, and failing in that, withdrew the suit, and confessed judgment. This is exactly like the case of Gibson *v.* Gibson, except that there the withdrawal was before the day of trial, and here it was after the trial had began. This makes no material difference. The plaintiff has a right to withdraw or discontinue his suit at any time before the justice pronounces upon it. The cases which decide that the justice cannot give judgment of nonsuit against him after he appears, have no application.

The judgment of the Court of Common Pleas is reversed, and judgment is now here given in favour of the plaintiff for the amount of the judgment which he recovered before Justice TUCKER, with interest thereon. Amount to be liquidated by prothonotary of Common Pleas.

Stephens *versus* Shriver.

Where there is in fact a partition fence, the duty of contribution to maintain it exists—and neither party can excuse himself from this duty by alleging that the line is in dispute.

The jurisdiction of a justice of the peace under the fence law to enforce contribution is not ousted by raising a question of title to the land.

ERROR to the Common Pleas of *Greene* county.

This was an appeal from a justice of the peace. The plaintiff below claimed $10 awarded to him by fence viewers, for work done in making a partition fence. The declaration was in *assumpsit;* the plea *non assumpsit:* verdict for plaintiff, $12.30.

The auditors who viewed the fence reported that it would cost $10 to make a sufficient fence.

Digitized by Google

[Stephens v. Shriver.]

The plaintiff below built the fence, but removed it from the foundation on which it had stood many years, westward, about a rod, more or less, into the field of Stephens, the defendant below, and took from Stephens's field a rod of land in breadth and sixty rods in length, and a row of cherry-trees. The parties differed as to the line and corners. The defendant contended for the old line, and the plaintiff for the new one. But it was insisted that as the title to land came in question, the justice had no jurisdiction.

It was in proof that, while the line was running and being staked out, the defendant below made no objection to it.

Montgomery and *Sayers*, for plaintiff in error.—The proceeding originated under the fence law of 1842, and is to be conducted under the Act of 1810, giving jurisdiction to justices in all actions on contracts, *excepting when the title to land may come in question*, and under this statute it is not necessary to make affidavit to take the exception. By the words, if the title *may* come in question, this will oust the jurisdiction: 3 *P. R.* 388; 3 *Whart.* 110; 6 *Harris* 240; 6 *Watts* 337.

Where the party had stipulated not to raise the question of jurisdiction, still judgment was given in his favour for want of jurisdiction: Dudley *v.* Mayhew, 3 *Comst. Rep.* 9.

And see 3 *Caine's Rep.* 129; 6 *Pet.* 276; *McCord* 79; 3 *Blackford* 48.

The removal of the fence by plaintiff caused the present difficulty. The meaning of the Act is to keep in repair partition fences as they stood, and not to allow one party for building a fence on his neighbour's ground without his consent.

Downey and *Wiley*, for defendant in error.—The case arises under the Act of 11th March, 1842, for regulating and maintaining line fences. The Act of 1810 does not apply to it. Under the former the justice had jurisdiction; and if there were conflict between the two acts, the latter repeals the former. The question is, whether the fence was a *line* fence, and of this there was full testimony. See a former decision in this case, 8 *Harris* 138.

The opinion of the Court was delivered by

Lowrie, J.—It is not at all necessary that partition fences should go to ruin because of the owners being in litigation about their lines; indeed, this could only add to their difficulties. If there be, in fact, a partition fence, the duty of contribution to maintain it exists, and neither party can excuse himself from this duty by alleging, whether sincerely or falsely, that the line is in dispute; and the law relating to fences contemplates no such mode of suspending the remedy which it provides. The jurisdiction of a justice of the peace to enforce contribution under the fence law is not

www.hotbot.com.cn

Digitized by Google

ousted by raising a question of title to the land. If the lines need correction, let it be made; and then it is easy to set the fence right. It seems that the parties did correct this line before the repair was made.

We need not say what the law of the case would have been, had the plaintiff below been proceeding in the ordinary form of an action upon a contract; for this action commenced not thus, but according to the directions of the fence law.

Judgment affirmed.

Guthrie *versus* Bashline.

Payment of a judgment to the nominal plaintiff after actual notice that it has been assigned to another, is not a payment to the proper person. It is not necessary that direct notice of the assignment be given by the assignee or his agent—it is sufficient if the information be given under circumstances and in terms calculated to arrest the attention of the debtor.

Error to the Common Pleas of *Clarion county.*

Bashline, the plaintiff below, on the 7th February, 1852, obtained judgment against Guthrie; on the 16th February a *fi. fa.* issued; on the 9th March, 1852, the defendant, Guthrie, paid Bashline, the plaintiff, the debt, interest, and costs, and took his receipt in full, and filed it of record in the case, and satisfaction was entered on the judgment. On the 10th December, 1852, a rule was entered to show cause why the satisfaction should not be stricken off; and on the 7th May, on the hearing of the case, the court ordered a *scire facias* to issue, to determine if the judgment had been paid or not. On the trial the defendant relied upon the plaintiff's receipt above mentioned; and the plaintiff, to rebut this, read in evidence an assignment of the original judgment, dated March 9, 1851, and filed in the case 7th May, 1853, from Philip Bashline to Samuel Johnson; and proved by C. Brown, that he wrote the assignment from Bashline to Johnson, and told Guthrie of the assignment, but did not recollect distinctly the time he had told him.

The Court instructed the jury "that if Guthrie had actual notice of the assignment to Johnson, before the payment to Bashline, it was sufficient, and it was not necessary that the notice should have been given to him by a party in interest, or an agent of the party."

To which defendant excepted.

Campbell and *Lamberton*, for plaintiff in error.—In conveyances of real estate, to affect a person with notice, it must come from a party in interest or his agent; there is no good reason why a different rule should be applied to *choses in action*. A prior

Digitized by Google

www.libtool.com.cn

assignment, not filed of record, is postponed to a subsequent one: Fisher *v.* Knox, 1 *Harris* 622. The plaintiff in error would not have parted with his money in this case if the assignee had filed his assignment of record, and he ought for this omission to be postponed.

Latha, for defendant in error.—Actual notice was sufficient; it need not be in writing or entered of record: Kellogg, Assignee, *v.* Krauser, 14 *S. & R.* 143.

The opinion of the Court was delivered by

Lewis, C. J.—Payment of a judgment to the nominal plaintiff, after actual knowledge that it had been assigned to another, is not a payment to the proper person. It is not necessary that direct notice of the assignment be given by the assignee or his agent. It is sufficient if the information be given under circumstances and in terms calculated to arrest the attention of the debtor. In this case the knowledge was acquired during the trial of the cause in which the justice of the demand was the matter in controversy, and it was communicated by the person who had drawn the assignment and witnessed its execution. This was sufficient, although the transfer was not filed of record. The omission to file it might turn the scale in favour of a subsequent purchaser of the judgment who had no notice of it: Fisher *v.* Knox, 1 *Harris* 622. But the payment to Bashline, after full knowledge that he had no right to the money, was an act of bad faith, which is not to be justified by such omission. Actual knowledge of the transfer was more effective in guarding the defendant against a mispayment than the filing of the instrument of record without notice.

As the jury have found against the whole defence on the ground of mispayment, it is unnecessary to notice the second assignment relative to the docket costs.

Judgment affirmed.

Patterson *versus* Robinson.

A married woman may purchase real estate and give her judgment for the purchase-money; and when such judgment is charged on the land purchased, by the terms of the conveyance, the payment of the money is the condition upon which she accepts the property.

Such judgment is not void on the ground of coverture.

Error to the District Court of *Allegheny county*.

This was an action of debt on a bond given by Arabella Patterson, the plaintiff in error and the defendant below, to William Robinson, Jr., for the purchase-money of two lots of ground in

Digitized by Google

[Patterson v. Robinson.]

www.libtool.com.cn

Allegheny City. In 1848, the plaintiff below conveyed the lots to the defendant, Arabella Patterson. Eighty dollars were paid in hand, and for the balance, the purchaser, who was a married woman, gave her own judgment-bond. The deed recited that the conveyance was subject to the payment of the bond. Judgment was entered on the bond by virtue of the warrant of attorney, which was opened, and defendant permitted to plead coverture. The fact of coverture was admitted, and the facts above set forth were submitted in a case stated. The Court below, WILLIAMS, J., gave judgment for the plaintiff.

The case was argued by *T. J. Fox Alden*, for plaintiff in error; and *Robert McKnight*, for defendant in error.

The opinion of the Court was delivered by

LEWIS, C. J.—The power which a married woman exercises over her real estate, is not a mere naked power; nor is it altogether analogous to a power coupled with an interest. It is the right of disposition incidental to ownership. The disability of coverture is thrown around her for the protection of the rights of herself and her husband. It is a shield for defence—not a weapon for mischief. When that disability is removed, or, what is the same thing, whenever the law permits her to act in relation to her estate, she acts as proprietor, and may exercise the rights of one. She has a right, by law, to sell her estate, with the consent of her husband, provided there is no coercion. To secure the one, and at the same time to guard against the other, she is required to *unite* with him in the execution of the conveyance, and to *separate* from him in the acknowledgment of it: 6 *Harris* 506; 7 *Harris* 361. If she exercises, in this form, her right to sell, she may dispose of her estate upon such terms and conditions as she deems most advisable. She may, therefore, mortgage it for her husband's debts; for a mortgage is but a sale on condition: 3 *Johns. Ch. Rep.* 144; 7 *Harris* 402. And, for the same reason, she may prescribe such terms, and waive such privileges, as she thinks proper to prescribe or waive, so long as her acts are essentially a part of the contract of sale, and bind nothing but the property sold. This has just been decided in the case of Black and Wife *v.* Galway. By the common law, she may be grantee in a deed, without the consent of her husband. He may, it is true, divest the estate by his dissent. But if he neither agree nor disagree, the purchase is good: Baxter *v.* Smith, 6 *Binn.* 427; 4 *Cruise's Dig.* 25. She may even be the grantee *upon condition*, and she will be bound to perform the condition, "because it does not charge her person but the land:" 1 *Roll. Abr.* 421; 2 *Cruise's Dig.* 35.

In the case before us, the husband has not disagreed to the

Digitized by Google

[Patterson v. Robinson.]

www.libtool.com.cn

conveyance, and the estate is, therefore, vested in the wife. Under the operation of the Act of 1848, it is to be "owned, used, and enjoyed as her separate property." But the same Act that gives her these advantages, attaches conditions in *law* to the grant. The estate is to be liable for "debts contracted by herself, or in her name, by any person authorized so to do." It is also to be liable "for debts contracted for the support and maintenance" of her "family," "if no property of the husband can be found." She cannot take the benefits without performing the conditions. Even under the law, as it stood before the Act of 1848, she could not retain the estate conveyed, without paying the judgment given for the purchase-money: Heacock *et al. v.* Fly, 2 *Harris* 540. But in this case, the judgment-bond for the purchase-money is expressly charged upon the land by the terms of the conveyance. The payment of the money is the condition subject to which she accepted the property, and upon no just principle can she hold it without performing the condition.

Under the Act of 1848, her power to purchase gives her a right to contract for the payment of the consideration-money, so far as to charge the property with such encumbrances as may be agreed upon to secure its payment. A judgment given for this purpose is, therefore, not void on the ground of coverture, and the application to deprive the creditor of the security for his money, was properly denied. If a Court permitted her to retain the property, and at the same time refuse to pay the consideration-money, it would no longer deserve its designation of "a place where justice is judicially administered." It is not proposed to charge the woman personally with the judgment; nor are we prepared to say that her other property is chargeable with the debt. But clearly, the property purchased is bound by a judgment given for the consideration-money.

It is considered and adjudged, that the judgment of the District Court be affirmed, to be levied of the two lots numbered 85 and 86, on Buena Vista plan, Second Ward, Allegheny, being the same which were conveyed by the said William Robinson to the said Arabella Patterson by deed of the 1st August, 1848, recorded in vol. 81, page 599, in consideration, in part, of the judgment aforesaid.

Digitized by Google

www.libtool.com.cn

Dunlap *versus* McKee.

If a party enter a rule of reference under the Act of 16th June, 1836, entitled "An Act relating to reference and arbitration," and fail to serve a copy of the rule on each of the arbitrators, and on the opposite party, his agent or attorney, as required by the said Act, he is liable to the penalty prescribed therein.

It is not necessary to sustain a suit for the penalty, that the party suing shall show an injury sustained by him; the penalty is inflicted as a punishment for the default.

ERROR to the Common Pleas of *Jefferson county*.

The opinion of McCALMONT, P. J., of the Court below, contains the facts and the law of the case, and was delivered as follows:—

"The 36th section of the Act of 16th June, entitled 'An Act relating to Reference and Arbitration,' enacts that 'If the party by whom a rule of reference shall be entered, his agent or attorney, shall fail to cause a copy of the certified rule, or of the record containing the names of the arbitrators, and of the time and place of meeting, to be served as hereinbefore required, he shall, for every such default, forfeit and pay the sum of twenty-five dollars, one-half to the use of the county, and the other half to the use of the person who will sue for the same; Provided, That nothing herein contained shall be deemed to deprive the Court of the right of setting aside any award obtained without due notice as aforesaid, or shall interfere with the right of the party to recover such damages as he may have sustained.'

"The 16th section of the same Act recites that 'It shall be the duty of the party by whom the rule of reference shall have been entered, to procure from the prothonotary a certified copy of the record containing the names of the arbitrators, and the time and place of their meeting, and to serve a copy of the same on each of the arbitrators, and also on the opposite party, if he reside within the city or county, and if not, upon his agent or attorney, giving at least ten days' notice previous to the day of meeting.' The defendant's counsel has contended that the 36th section of the Act above cited does not authorize a recovery unless some injury has been sustained by the party suing; and that when the arbitrators do not meet, or the rule is subsequently stricken off by the Court, the party having received no injury is not entitled to recover the penalty. We do not so regard the terms of the Act. The penalty was evidently intended as a punishment on the party whose default should prevent the meeting of the arbitrators chosen in the impartial manner prescribed by the Act. If the arbitrators meet, the party has an interest in having the same arbitrators sit who have been fairly chosen. Should there be no meeting of the arbitrators, in consequence of the want of

Digitized by Google

www.libtool.com.cn

service of the notice, the party against whom the rule has been entered, has been injured by the loss of his time, and the trouble of preparing for a trial; which time and trouble might frequently be more than the penalty.

"The Act, however, fixes a certain penalty, not to the extent of the actual grievance, but as a punishment for the neglect; and be the damages greater or smaller than the penalty, the Act in no wise interferes with the right to recover them; and therefore evidence of them in the penal action would be out of place. The only inquiry is whether the default has been made without sufficient excuse. The jury having passed upon this, was warranted by the evidence in so finding, none having been offered by the defendant.

"It has been objected that the plaintiff sued in his own name before the justice, and that, therefore, the action cannot be sustained. But it is sufficient if the record of the Common Pleas shows the action to be *qui tam*. Here the *narr.* sets forth the character in which the plaintiff sues, which has been decided to be sufficient: Megargell *v.* Hazleton Coal Company, 8 *W. & Ser.* 342.

"Judgment ordered to be entered in favour of the plaintiff upon payment of the jury fee."

Coxson, for plaintiff; *Barclay*, for defendant.

The opinion of the Court was delivered by

Lewis, C. J.—The point reserved is not stated in conformity with the rules of law as heretofore explained by this Court. But the answer of the learned judge who presided in the Common Pleas contains a sound exposition of the law on the question discussed.

Judgment affirmed.

McClenahan *versus* Humes.

A levy of real estate, free from ambiguity, fraud, or misrepresentation, cannot be impeached or contradicted by parol evidence.

Where an offer does not specify the kind and manner of proof to be given, to impeach or contradict a record, the Court will presume it to be by something *dehors* the record, and therefore irrelevant and incompetent.

Under the law prior to 1836, a sheriff's sale made at the succeeding Term after the return day of the *venditioni exponas*, conferred a good title on the purchaser.

Error to the Common Pleas of *Crawford county*.

This was an ejectment, brought by Humes *v.* McClenahan, for 21 acres of land, each party claiming under a distinct sheriff's sale. In May, 1831, Thomas Ford conveyed to his son Charles 121 acres, subject to a reservation of 21 acres during the lives of

Digitized by Google

www.libtool.com.cn

his parents, and which they occupied until they both died—the last four years ago, when this suit was brought. Against Charles Ford, the common source of title, a judgment was obtained in 1834, on which a *fi. fa.* was issued to February Term, 1835. The sheriff returned that he had levied on 100 acres of land, more or less, bounded on the north by Humes, west by James Ford, south by Swift & Moodie, and east by J. Greenlee, with a frame dwelling and barn thereon. To April Term following, a *vend. ex.* was issued, and the sheriff returned, sold on the 10th August to John Sargeant, to whom a deed was acknowledged 15th August. Sargeant conveyed to Humes, the plaintiff below. Evidence was given to show that the boundaries given in the levy would include the whole 121 acres, and that there was a frame dwelling and barn on the 100 acres, and a house and barn on the 21 acres.

The defendant gave in evidence another judgment against Charles Ford, in favour of R. T. Trask, in 1835, on which a *fi. fa.* was issued, the land in controversy levied upon in 1839, and sold in 1841 to Trask, whose title became vested in McClenahan, the defendant. He then offered to prove that when the levy was made on the writ in Flough *v.* Ford (under which Humes claimed), the land in dispute was excluded, and that, at the time of the sale, it was publicly declared that it was not selling—to be followed by other proof that the plaintiff said that he had not bought it of Sargeant; to this plaintiff objected, and the Court rejected the offer. The defendant also submitted the point that the sale on the *vend. ex.*, in Flough *v.* Ford, having been made after the return day of the writ, passed no title; which the Court answered in the negative.

Derrickson and *Finney*, for plaintiff.—The plaintiff below did not rest his case on the record evidence of return and description in the sheriff's deed, but called witnesses to prove the land was actually included. Was it not competent to the defendant to controvert and rebut this by the same kind of proof? The exclusion or inclusion of the land could not be determined by the levy only. The western boundary of each being land of a contiguous owner, even if the 100 acres were bounded by that owner, it would not necessarily follow that the other piece was also included. The offer did not specify the *kind* of proof to show the exclusion, but merely to establish the fact, and to rebut the parol proof of inclusion given by the plaintiff below.

Was the sale good? The *vend. ex.* was returnable to April Term, 1835; the sale was made on the 10th August, the day on which the August Term commenced, a full term intervening. In the cases, 2 *Bin.* 1; 1 *Ser. & R.* 92; 10 *Ser. & R.* 261; a second term had not intervened.

Digitized by Google

[McClanahan, a. Humes.]

G. Church, for defendant in error.—The plaintiff below offered no evidence to enlarge or affect the levy, but only showed that it included the *locus in quo*. Parol evidence of what is embraced in a descriptive levy such as this, is not competent. Sergeant *v.* Ford, 2 *W. & Ser.* 125. The levy was by metes and bounds, plain and explicit, and its construction and extent was matter of law. It is only in cases of patent ambiguity that parol evidence is admissible to affect the extent and meaning of a levy; and then not by evidence of the character here offered. The offer was an entirety, and if any part was incompetent, a general objection to it is good: Sennett *v.* Johnson, 9 *Barr* 337. The offer proposed to exclude the 21 acres by something *dehors* the record—this was clearly incompetent: Sergeant *v.* Ford, *ante;* Beeson *v.* Hutchinson, 4 *Watts* 443. And where the offer did not disclose the manner, means, or kind of proof, when its competency would depend upon them, it was right to reject it: Stub *v.* Stub, 3 *Barr* 255.

A second term had not intervened in legal contemplation. The sale was advertised on Saturday before the return day of the writ, and continued by adjournment to the day of sale, and this was in accordance with the law as it stood before the Act of 1836: 1 *W. & Ser.* 526.

The opinion of the Court was delivered by

WOODWARD, J.—The description in the levy was the legal evidence of what land was sold on the judgment of Flough's executors against Ford, and that that embraced the whole 121 acres, is shown by the diagram submitted by the counsel of the plaintiff in error. It was a description by the adjoining owners which was said by Judge HUSTON in this very case, 2 *W. & Ser.* 126, to be equivalent to a description by courses and distances all round. This levy, thus free from all ambiguity, and exempt also from any alleged fraud or misrepresentation, the defendant below attempted to impeach by offering to prove that when it was made, the land in dispute was excluded; and, at the sale, it was publicly declared it was not selling; to be followed by other proof that the plaintiff said he had not bought it of Sergeant.

How excluded? By whom declared at the sale it was not selling? To these pertinent questions there was no response in the defendant's offer.

The levy on its face, as we have seen, did not exclude, but did include the 21 acres. The offer, therefore, must have been to show the exclusion by something *dehors* the record; and, as that something was not specified, the Court did well to presume that it was irrelevant and incompetent. It was an attempt to contradict and impeach a record by evidence, for which the party offering it must have had but little respect, or he would have exposed its character.

Digitized by Google

www.libtool.com.cn

And then, as to the declaration at the time of the sale, if it was not made by a bystander—if it was the declaration of the sheriff; or the creditor, or the defendant, why was the offer silent on the point? Did counsel expect the Court would admit *any* declaration of that sort by whomsoever made? It may be well doubted whether such a declaration, even when made by a party in interest, would be evidence against a clearly expressed levy; but, with the questionable shape in which this offer came, it was properly rejected.

The supplemental offer that Humes said he had not bought the 21 acres of Sergeant was irrelevant, except as it tended to contradict the levy; and, for this purpose, it was inadmissible.

The defendant's counsel justified this offer, on the ground that the plaintiff had given parol evidence of the boundaries of the land; but that was evidence of location, which was consistent with the levy and not contradictory of it.

2. The second error assigned is, that the Court erred in charging that a sheriff's sale, after the return day of the writ, was good.

The Act of 1836 requires that all sheriffs' sales of land shall be made on or before the return day of the writ, but this sale was made in 1835, and is not affected by the statutory provision. The *venditioni exponas* was returnable to April Term, 1835, but the sale, continued by adjournments, did not take place till the 10th of August—the first day of the next succeeding term. Under the Acts of Assembly, in force before the Act of 1836, this practice obtained very generally throughout the state, and received the sanction of this Court in numerous cases, which will be found cited in Blythe *v.* Richards, 10 *Ser. & R.* 161. It is too late now to raise a question upon it.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Koch *versus* Melhorn.

Where a note is transferred by a debtor to a creditor in payment of a debt, with a guarantee that it is good as gold, and will be paid when due, and it proves worthless, the contract is broken as soon as made, and the creditor is under no obligation to pursue the note.

To warrant a debt as good as gold and silver, is to warrant that it is founded on a legal consideration, that the debtor is of competent ability, and that the debt will be paid on demand.

Where a debtor had transferred a note to his creditor, which he guarantied to be good, payment of which was refused by the maker at maturity, and the creditor demanded payment of the guarantor, who asked him to wait the event of a suit then pending, and he would be sure to be paid, and he waited accordingly: *Held*, that the creditor could recover against the debtor on the guarantee without previous resort to the maker of the note.

ERROR to the Common Pleas of *Erie county*.

This was an action of *assumpsit*. The declaration set forth that defendant, Koch, being indebted to Melhorn, the plaintiff, in $107, transferred to him a note or obligation of the borough of Erie, given to H. Dewey, for $100, payable in two years, with interest, on account of said indebtedness; and that Koch, the defendant, at such transfer undertook and promised to the plaintiff that said note was good, and that it would be paid when due; but plaintiff avers that said note was not good, and was not paid when due, and was wholly worthless at the time of the transfer.

There was some conflict in the testimony as to the fact whether the guarantee was made at the time, or after the transfer; and hence arose a question as to the consideration of the guarantee; but this was settled by the verdict.

It was proved on the trial, by J. Melhorn, that the parties had a settlement, and Koch was found indebted to Melhorn; and that, *after* the settlement, Koch proposed that Melhorn should take the note on the debt thus found due to him, assuring him that it was just as good as gold for the amount, and guarantying that it would be paid when due: that Melhorn, upon these assurances, took the note: that, when due, payment was demanded, and refused by the corporate authorities on the ground that the note had been given in part payment of a town clock, warranted to be good, but which proved worthless: that the plaintiff then went to Koch and informed him of the demand and refusal, produced the note, and said that defendant had insured the payment of it: that defendant replied, "Just wait till the suit I have brought against the borough of Erie, on another note for the same clock, is over, and then you will get your money; for I will gain that suit as sure as the sun shines:" that plaintiff did wait till that suit was tried, and decided against defendant, Koch; and he still refusing to take back the note and pay the amount, this suit was brought.

Digitized by Google

[Koch v. Melhorn.]

www.libtool.com.cn

Plaintiff offered to prove the warranty and utter worthlessness of the clock for which the note was given, which was objected to by defendant, and rejected by the Court.

Plaintiff also gave in evidence the record of a suit, Dewey, for the use of Koch, *v.* the Borough of Erie, on a note of the same tenor and date as the one in question, except payable in one year, which recites the note as stating that it was in part payment of a town clock. Verdict for defendant. Affirmed on error in this Court.

The defendant proved by J. C. Spencer that he was not present when Melhorn got the note, but that he came with it to Koch, and insisted upon an assignment of it (as he said, by direction of Mr. Ball, the town clerk); and, by direction of Koch, the witness wrote upon the note the words, "I assign all my right and title to Mr. Melhorn," to which Melhorn assented.

There was also evidence of the loss of the note guarantied, which was supplied by parol; to which exception was taken.

The foregoing are the material facts presented in the case. Those bearing specially on the questions raised will be found stated in the opinion of the Court. The verdict was for the plaintiff below, and defendant below took this writ of error.

_____, for plaintiff in error.—The note was under the corporate seal of the borough of Erie, and therefore a specialty, and an endorsement in blank would not make the endorser liable: 5 *Whart.* 325, Frevall *v.* Fitch. If there was a guarantee by Koch, it was *special*, and cannot be treated as a blank endorsement. The maker must be pursued in the first place: 1 *W. & Ser.* 203; and this, with due diligence, even if there was a warranty: Johnson *v.* Chapman, 3 *Penn. Rep.* 18. If a guarantee, it was of secondary character, and conditional, and plaintiff's remedies against other parties must be exhausted before he can have recourse to defendant: Parker *v.* Culverson, 1 *Wallace, Jr., Rep.* 149; 7 *W. & Ser.* 429. Parol evidence cannot be given to prove other agreements than those reduced to writing, unless fraud or mistake be shown: Sennett *v.* Johnson, 9 *Barr* 335; Brown *v.* Nickle, 6 *Barr* 390; Heagy *v.* Umberger, 10 *Ser. & R.* 339.

Babbitt, for defendant in error.—The transfer of the note of a third party is not payment, if the party has been induced to take it by misrepresentations of his debtor as to its goodness: Pierce *v.* Drake, 15 *Johns.* 475; 6 *Johns.* 110.

If Koch had a suit pending involving the validity of both notes, and requested plaintiff to await the result, and as inducement assured him that he would then be paid, the jury might infer a waiver: McClurg *v.* Fryer, 3 *Harris* 293.

The contract of Koch was more than a guarantee. It is an

Digitized by Google

www.libtool.com.cn

express *insurance* of the obligation to be as good as gold or silver. Nothing short of payment in coin would satisfy this, and the moment payment was refused, defendant had a right to his action for the breach of contract.

A sealed note, endorsed "I hereby agree to be security for the within amount," imports liability as surety, and not as guarantor: Marberger *v.* Pott, 4 *Harris* 9. But if no more than a guarantee, plaintiff would be excused from suing by showing that from *any cause* such suit would be of no avail, as insolvency of the principal: McDoal *v.* Yeomans, 8 *Watts* 361; McClurg *v.* Fryer, 3 *Harris* 293; for the law requires no man to do a vain thing.

The opinion of the Court was delivered by

WOODWARD, J.—This was an action upon a parol guarantee of a sealed note which Koch held against the borough of Erie, and which he transferred to Melhorn on account of stone delivered in 1846. There was an apparent discrepancy between the testimony of Samuel Melhorn and Myron Sanford, as to the time when the plaintiff below got the note, and out of this there grew up at the trial an embarrassing question as to the consideration of the alleged guarantee; but the jury settled the difficulty by finding, as the testimony of the Melhorns abundantly authorized, that the contract of guarantee was made at the time of the transfer of the note, and upon the same consideration. The assignment written by Spencer must have been subsequently made, and there was nothing in its terms to exclude the parol evidence of the guarantee.

Granting the guarantee to have been duly proved, it is insisted that the plaintiff was not entitled to recover without showing that recourse had been had to the makers of the note, and due diligence used to enforce payment from them.

The guarantee of Koch, as proved by Samuel Melhorn, was, that the note was "*just as good as if he would give him* (the plaintiff) *the money—that he would insure it as good as gold and silver.*" There was no condition expressed that Melhorn should sue the makers; and, under the circumstances of the case, none can be implied. This note and another were made by the borough of Erie to one Dewey, for a town clock, with a condition expressed that the said clock should perform to the satisfaction of the borough officers. Koch held both notes; and, having transferred one to Melhorn, brought suit on the other against the borough, when it was proved that the clock was worthless, and Koch was defeated. Now this evidence tended to show that the note transferred to Melhorn was also worthless, and incapable of being recovered; and, if the jury so believed, the contract of guarantee was broken as soon as made, and Melhorn was under no obligation to pursue the borough. To warrant that a debt is as

Digitized by Google

www.libtool.com.cn

good as gold and silver is to warrant that it is founded on a legal consideration—that the debtor is of competent ability, and that the debt will be paid on demand. If the debtor be insolvent (3 *Harris* 293), or, for any other reason, the debt cannot be recovered, an action against him is not necessary to fasten the guarantor. But there were other circumstances in proof, in this case, which, if believed by the jury, relieved Melhorn from all necessity to sue the borough. After he had demanded payment of the note, and learned that the consideration had failed, he offered to return it to Koch, who begged him to wait till his suit against the borough on the other note was decided, when he (Melhorn) would be sure to get his money—assuring him that that suit would collect both notes, and added that he would "gain the suit as sure as the sun shines." Like many other over confident litigants, Koch was disappointed by the event of his suit. His note proved to be worthless, and that, the test of his own proposing, established the worthlessness of the note he had guarantied to Melhorn. Under such circumstances, the Court were very clearly right in holding that Melhorn might recover in this action, without proving a resort to legal remedies against the borough.

These observations dispose of all the errors assigned upon the charge of the Court, that were pressed in the argument, or are worthy of notice.

The bills of exception to evidence are groundless. Full proof of the loss of the note having been made by Mr. Babbitt, into whose hands it was traced, the secondary evidence was properly admitted.

The record of the unsuccessful suit, on the note retained by Koch, was most pertinent evidence as establishing, in connexion with the parol evidence, the failure of consideration of both notes.

The judgment is affirmed.

Bell's Estate.

If an executor includes in the inventory his own note to the testator, it does not preclude him from making defence to it; nor is this such an acknowledgment of the debt as takes it out of the Statute of Limitations.

APPEAL from the Orphans' Court of *Greene county*.

John Bell, senior, made his will, October 1st, 1845, wherein he appointed his son, John Bell, junior, his executor, and died 2d November, 1853.

The executor accepted the trust, proved the will, &c., and directed the appraisers in taking an inventory of the notes, to set

Digitized by Google

[Bell's Estate.]

down the original amount of the notes, and then calculate the interest, and add that to the principal to ascertain the value of the estate. When the appraisers came to this note,

"Borrowed and received of John Bell $661, payable sixty days after date with interest from date. April 1, 1845. John Bell, junior," he called out the date and amount, as he had done with the other notes, and the appraisers, in his presence, and by his direction, inserted as follows:—

"John Bell's note,	$661.00
"Interest, April 5, 1845,	342.06
	$1003.06."

When the executor settled his account, he refused to charge himself with this note, alleging that it was barred by the Statute of Limitations—and whether or not he is bound to account for it is the question before this Court.

Purman, *Lindsey*, and *Buchanan*, for appellants.—The executor, by accepting the trust without protest, precludes himself from the protection of the statute. 2d. His act in filing the inventory (as stated above) is a direct acknowledgment of the debt, which takes it out of the statute.

The statute takes away the remedy only, it does not extinguish the debt: *Chit. on Contracts*, 6th Am. ed., 806, 2 *Bouv. Inst.* § 2002, 488.

If the note had not been barred by the statute at the time he accepted the trust, yet, by his acceptance, the remedy would have been suspended, and the debt discharged by operation of law: Eichelberger *v.* Morris, 6 *Watts* 42; Wankford *v.* Wankford, 1 *Salk.* 306; Thompson *v.* Thompson, 2 *Johns.* 473. If the statute takes away the remedy only; and if the appointment of a debtor to be his creditor's executor merely suspends the remedy, when the debt is not barred by the statute; and if equity allows the estate to help itself when the remedy is suspended, and treats the debt as paid and the amount as assets; for what reason should equity refuse to allow the estate to help itself, even if the debt were barred by the statute, when the claim comes to the hands of the executor? In support of these principles the counsel cited Dalton *v.* Pool, 1 *Ventris' R.* 318; Brooks *v.* Smith, 2 *Young & Colyer* 58, where it is said, "The statute does not absolutely bind courts of equity;" and the Orphans' Court is absolutely a court of equity: Lewis *v.* Pratt, 2 *Whart.* 81; Irwin *v.* Dunwoody, 17 *Ser. & R.* 61, 2 *Dall.* 190; Glover *v.* Wilson, 6 *Barr* 290; Harrisburg Bank *v.* Foster, 8 *Watts* 12. Equity will not allow the bar of the statute to prevail in aid of manifest injustice: Deloraine *v.* Browne, 3 *Brown's Ch. Rep.* 633, 646; Raw *v.* Potts, *Precedents in Chancery* 35, 2 *Vernon's Rep.* 239. So when a party accepts

Digitized by Google

www.libtool.com.cn

a place inconsistent with his denial of his liability, he is estopped: The East India Company *v.* Campion, 11 *Bligh R.* 158, 186, 187; 3 *Bligh R.* 1; 3 *Mass.* 201. The statute cannot be pleaded on a trust.

The filing the note as stated was equivalent to a renewal of it between the parties.

Black and *Phelan*, *Donney* and *Sayers*, for defendant in error. —The statute does not merely take away the remedy. The debt itself is virtually blotted out by the legal bar. A promise does not revive the old debt, but is evidence of a new obligation, resting in a moral duty to pay. At law the appointment of a debtor executor was a discharge of the debt: 11 *Ser. & R.* 146. But our Act of 24th February, 1834, keeps alive a valid claim, and directs each debt to be included in the inventory. Nor does the appointment and acceptance of the office by the debtor suspend the remedy: the 22d section provides that no executor shall be compelled to *pay* for one year. But in this there is no suspension; the creditor may have his action though he may not compel payment for a year.

The statute would have been an insuperable bar if John Bell, senior, had been living; the debt was eight years old when the appellee became executor. His devisee cannot do that which he would have been harmless to do himself; and if the appellee had declined the executorship, the acting executors could not have collected it. By what reason can he be then held liable by the mere force of his position, unless it can be shown that his acceptance deprived the devisee of some right?

Where a party has his remedy at law and lies by, and then resorts to equity, he is bound wherever he would be at law: Kane *v.* Bloodgood, 7 *Chan. Rep.* 90; and see 20 *Johns. Rep.* 585; *Story's Eq.* § 1520; Smith *v.* Clay, 3 *Bro. Ch. R.* 640. Cited 2 *Story's Eq. Jur.* § 1521 and note. See specially the case of App Executor of App *v.* Driesbach, 2 *Raw.* 287. An executor cannot be considered a trustee unprotected by the Statute of Limitations for money which he denied to be due.

So a creditor, who has been appointed executor, cannot take credit for a claim barred by the statute. A testamentary trust for payment of debts does not revive debts barred by the statute; but, when clear and not merely implied, suspends the statute on debts due at testator's death: Agnew's Administratrix *v.* Fetterman's Executors, 4 *Barr* 56; Burke *v.* Jones, 2 *V. & Beames* 275. The whole position of the appellants is based upon an implied trust.

In placing his note in the inventory, the appellee acted in conformity to the requirements of the Act of 1834. See sections 2, 5, and 6.

See Christy *v.* Flemington, 10 *Barr* 129. An acknowledgment

Digitized by Google

[Bell's Estate.]

www.libtool.com.cn

to take a case out of the statute must be clear, plain, unambiguous, and express: 9 *Watts* 380; 6 *Id.* 172; 10 *Id.* 19; 9 *Barr* 258; 6 *W. & Ser.* 213; 2 *Jones* 264; 10 *Watts* 152.

The opinion of the Court was delivered by

Lewis, C. J.—It is the duty of an executor to produce to the appraisers "all evidence of debt" and "all claims for money," in order that they may be included in the inventory. The object of the inventory is merely to enable the parties interested in the estate to call the executor to account. It precludes no one from making defence against the claims included in it. The executor has an equal right with others to protect his own interests; and the insertion of a note against himself in the inventory, with his assent, does not preclude him from making defence against it. It is not such an acknowledgment of the debt as takes it out of the Statute of Limitations. Independent of the special circumstance, showing that the justice of the demand was not acknowledged by the executor, the case was properly decided in his favour.

Decree affirmed.

McCandless *versus* McWha.

If the relevancy of facts offered in evidence depends upon special scientific principles, they must be offered in connexion with, or after evidence is given of, the principles that reveal their importance, or their relevancy cannot appear.

Where scientific evidence had been admitted to show that the broken limb of a man of intemperate habits is more difficult of cure than one of temperate habits, and testimony was given as to the plaintiff's habits for a period of seven years, and further testimony was offered to show the continuance of like habits for a longer period, *Held*, that the Court properly refused to allow the patient's habits and character to be put in issue for an indefinite period, and it was enough, if not too much, to lay it open for some years.

Error to the Common Pleas of *Beaver county*.

This action was brought in 1848, by McWha, the plaintiff below, to recover of the defendant damages for alleged negligence and unskilful treatment as a surgeon of the broken leg of the plaintiff.

Evidence had been offered to prove that, from 1840 to the time of the injury, the habits of the plaintiff had been intemperate; and medical and scientific evidence from both sides had shown that, in proportion to the extent of such habits and the length of their duration, so would be the difficulties in the management, not only of the special fracture, but of the patient himself; and if he, by reason thereof, disobeyed instructions, the consequences should fall on himself, and not on the surgeon.

And to show long-continued intemperate habits, and the difficulties arising therefrom, Dr. Smith, who practised near the plain-

Digitized by Google

tiff's residence, was offered by defendant to prove that plaintiff was of intemperate habits as early as 1838, '39, and '40, and that such habits were continued up to the time of the injury.

The plaintiff objected, that evidence to his habits in 1838, '39, and '40 was too long before the injury, and irrelevant; which the Court sustained: and which forms the only point in the case.

Cunningham, for plaintiff in error, cited 10 *Harris* 268. There was no conflict of opinion among physicians as to the tendency of intemperate habits; all concurred in saying that they increased the difficulty of treatment. But the testimony of Dr. Smith as to plaintiff's habits in 1838, '39, and '40, was rejected, because it was too long before the injury. That these habits were of so long standing, and continued up to the period of the injury, gave weight and relevancy to the offered evidence. The longer such habits continue, the greater is the waste committed on the defences of nature, and the less able will the patient be to resist attacks of disease or violence. The testimony was clearly relevant: 2 *Harris* 469. Testimony *conducive*, or that has a *tendency*, to prove the issue, is admissible: *McLean* 596; 11 *Maine Rep.* 139; 7 *Ala. Rep.* 457; *Ib.* 798; 3 *Ala. Rep.* 16; 33 *Maine Rep.* 367.

Roberts, for defendant in error.—There was no offer to follow up the evidence rejected by proof that the intemperate habits of defendant in error *had* rendered a cure more difficult. Evidence had been admitted as long as the habits in question could have the slightest effect upon the system, or influence on the cure. The evidence was cumulative, and within the discretion of the Court. But the plaintiff in error had the full benefit of proof of the plaintiff's habits during seven years before the leg was broken. Was more necessary to establish his position? The difficulties of cure during habits of intemperance are occasioned by instability, the consequence of the sudden withdrawal of the accustomed stimulant. The habits of the patient at the time, or immediately before the accident, was the essential fact to be ascertained. The Court admitted testimony to this, and further allowed the same inquiry a wide range of seven years antecedent to the occurrence. Longer than this would be irrelevant. Habits existing anterior would be too remote to affect the case. Chitty, in his Medical Jurisprudence, says, "that division of time by the number 7 has in many respects worked as well in nature," as by custom and law: page 436. A complete renovation of the system takes place in a much shorter period: *Chit. Medical Jurisp.* 42, 43, and authorities referred to; *Rees's Analysis of Physiology* 27.

The opinion of the Court was delivered by

Lowrie, J.—The ordinary science, like the ordinary language

Digitized by Google

www.libtool.com.cn

and customs, of everyday life is presumed, in the trial of causes, to be known to both Court and jury; and they make use of it in weighing the evidence submitted to them, and in estimating the importance of the ascertained facts. But if there be facts, which are really of influence and importance in a cause, and their influence and importance are not recognised by the Court as matters of legal science, or do not fall within the province of the science of common life, then, by themselves, they must be practically irrelevant, and can be used only by appealing to mere prejudice; for they can have no intelligent application to the matter in dispute. If their relevancy depends upon special scientific principles, of which the Court is not expected to take judicial notice, and of which the jury are most probably ignorant, then, without those principles, their relevancy cannot appear. When, therefore, such facts are offered to be proved, they must be rejected, unless offered in connexion with or (better still) after sufficient evidence of the scientific principles that reveal their importance.

In this case it was not thought prudent to rely upon the ordinary science which the jury is expected to possess for the principle, that a fractured limb of an intemperate man is more difficult to cure than that of a temperate one; but we have evidence of it from men of science; and such is the usual practice. Now very certainly it is not a well known principle of ordinary science that, in judging of the difficulty of such a cure, it is important to know, not only the degree of intemperance then existing, but how long it has lasted: and this principle was neither proved nor offered to be. It was therefore proper for the Court, under these circumstances, to refuse to allow the patient's habits and character in this respect to be put in issue for an indefinite period backward. It was surely enough to lay it open for the seven years previous to the injury, if not too much.

Judgment affirmed.

Haslage *versus* Krugh, Guardian of Wenk.

Lands descend to heirs, and not to administrators; and the heirs, as owners, have the right to the rents.

Where a party was in possession under a decedent, and took a lease after his death from the administrator, whether through ignorance of the law or otherwise, the lease was void, and the tenant remained under his old lease as tenant from year to year, by holding over.

A tenant in paying debts of the estate out of the rents is a mere volunteer; and if at the request of the administrator, his recourse must be to the latter, and he has no defence to an action brought by the guardian of the minor heirs for recovery of the rent.

ERROR to the District Court of *Allegheny county*.

Digitized by Google

[Haslage *v.* Krugh.]

www.libtool.com.cn

This was an action of *assumpsit*, brought for use and occupation by the defendant in error, who was the guardian of the minor children and heirs of Frederick Wenk, deceased. The defendant pleaded *non assumpsit*. Verdict for plaintiff.

Frederick Wenk died intestate about the 1st of April, 1849, seised of the premises; Haslage, the plaintiff in error, then being in possession as his tenant. A. Hartz, upon the decease of Wenk, administered upon his estate, and directed Haslage to pay the rent then due, as well as that falling due thereafter in payment of the debts of the deceased; and the rent was thus applied by Haslage until Krugh, the defendant in error, was appointed guardian of the children, on the 25th June, 1851, when he repudiated all that had been done and brought this suit.

The testimony offered on the trial and bills of exceptions were as follows:—

"Defendant offers to show by testimony that Wenk, the intestate, was indebted to different parties at the time of his decease; that Hartz, the administrator, gave order to Haslage, the defendant, to pay certain of these debts out of the accruing rents, and that Haslage accepted and paid those ordered, and for which he now claims credit.

"To which offer the plaintiff objects, on the ground that the testimony offered does not tend to prove payment to the plaintiff, who, as the guardian of the heirs of Wenk, was the only person legally authorized to receive the rents accruing subsequently to Wenk's death; and that payments of rents by the defendant to the administrator, cannot be set off in the present action."

The Court sustained the objections and rejected the evidence.

"Defendant offers further to show that he leased the premises of Hartz after the decease of Wenk, and paid his rent in full to Hartz in pursuance of his lease, and which rent is the same now claimed in this action; and that at the time of so leasing and paying there was no guardian legally appointed for said minors, and that Hartz acted as such guardian.

"To which offer the plaintiff objects for the reason assigned to the former offer, and want of power or authority on the part of administrator to lease the premises."

Evidence overruled and exception taken.

Mellen and *Negley*, for plaintiff in error.—We do not claim that the administrator, as such, had power to receive the rents, but that equity will give Haslage the benefit of the payments offered to be proved. They were made for the defendant's wards, in payment of their debts, in the absence of a legal guardian; nor were the payments voluntary; the debts were liens upon the demised premises, and they were paid by direction of the administrator. It is against equity that Haslage should be compelled to

Digitized by Google

www.libtool.com.cn

pay this money again. If Haslage had taken an assignment of the debts so paid, he could have recovered them of the administrator. Will not equity, therefore, subrogate him to the rights of the creditors whose claims he paid; and, to avoid circuity of action, will not equity allow him a credit in this suit?

C. Shaler, *Stanton*, and *Umstetter*, for defendant.—In the case of Hartz, appellant, *v.* Krugh, guardian of the minor children of Wenk, argued in this Court, the principles of this case were settled. The Court decided that the sureties of Hartz, in his administration-bond on the estate of Wenk, were not answerable to the defendant in error in this case, who sued as the guardian of the heirs of Wenk for the rents collected by Hartz of Haslage, on the ground that Hartz had no right to rent the property of the heirs, nor to receive the rents. That the administration-bond did not cover the subject-matter; that a lease by the administrator was a nullity; and he had no authority as administrator to receive the rents.

Lands are only assets for payment of debts when the personal estate is insufficient; and till made available they descend to the heir: 10 *Barr* 471. See also Commonwealth *v.* Gilson, 8 *Watts* 214; Reed *v.* The Commonwealth, 11 *Ser. & R.* 442.

A person who voluntarily discharges obligations of the nature and validity of which he is incompetent to judge, and thereby converts the real estate of a decedent into personalty, in a case where the administrator himself had no such authority, can have no equity.

Payment by the tenant, whether to the administrator or to creditors, was in his own wrong; and he is liable over to the guardian as a trespasser, or in an action for use and occupation: McGinn *v.* Shaeffer, 7 *Watts* 413.

The opinion of the Court was delivered by

Lowrie, J.—We think that this evidence was properly rejected. Land descends to heirs and not to administrators; and the heirs, as owners, have the right to the rents. The tenant has no excuse for paying the rent to the administrators, except his ignorance of the law; and he alone, and not the heirs, ought to suffer for that. He says he rented from the administrator after the death of Wenk; but that lease was void for want of title in the lessor. And he therefore remained under his old lease as tenant from year to year by holding over. He was a mere volunteer in paying the debts of the estate out of the rents. And if he did it at the request of the administrator, he must look to him to be refunded. If he were allowed thus to pay debts and charge the heirs, he might aid the administrator in wasting the estate, in such a way as to leave the heirs no remedy; for the surety of the adminis-

Digitized by Google

www.libtool.com.cn
trator is not bound for these funds, and such was the result in this case.

Judgment affirmed.

George W. Myers *versus* Butler Myers.

The plaintiff contracted for the purchase of real estate, paid for it, and afterwards assented by parol, that the deed contracted for should be made by the vendor to the defendant in consideration of the latter assuming certain liabilities for plaintiff. The deed was made accordingly: *Held*, that the deed so made is to be regarded as the deed of the plaintiff himself, and that the legal title passed by it to the defendant.

In such case the defendant is not in possession under a mere parol title. He has the legal estate; and may rebut any supposed equity of the plaintiff without violating the Statute of Frauds.

If defendant fail to perform his agreement, an action will lie for damages. But a party who delivers a deed without taking a mortgage, or otherwise securing a lien for the purchase-money, by written evidence of it, cannot enforce the performance of the contract by ejectment.

Error to the Common Pleas of *Indiana county*.

This was an ejectment for a lot in the borough of Saltsburg.

In March, 1847, Butler Myers contracted with William P. Gregg for the purchase of the lot in question for the consideration of $100, for which he paid in two notes, on Thompson McCrea, to that amount. Gregg gave a receipt in full for the consideration, stipulating to make to said Butler Myers a warranty deed for the same. After making the contract, Butler Myers agreed by parol with the defendant, his son, that Gregg should make the deed to him, provided defendant would pay certain debts of the said Butler. The deed was made accordingly, and, at the request of the plaintiff, made to the defendant; and defendant retained the possession of the lot which he then held.

The plaintiff now seeks to recover the said lot, alleging that the defendant is a trustee of the legal title for his use.

The Court below held that the defendant's title rested altogether in parol, and was within the statute of frauds, and, therefore, a nullity.

Drum, for plaintiff in error.—The Court erred in holding that the title of defendant rested merely in parol. The plaintiff has the legal title. The object of the statute was to prevent the transfer of real estate without some written evidence of such transfer. When this is done the statute is satisfied, and this has been done in this instance. That the defendant procured the equitable estate in the first place by a parol contract, can make no difference, having subsequently procured the legal estate by deed: Jackson ex dem. Ledge *v.* Morse, 16 *Johns.* 197; Knouff

Digitized by Google

www.libtool.com.cn

v. Thompson, 4 *Harris* 357; Boyce *v.* McCulloch, 3 *W. & Ser.* 429; Espy *v.* Anderson, 2 *Harris* 310; Hawthorn *v.* Bronson, 16 *Ser. & R.* 278; 5 *Watts* 525; 6 *Barr* 228; *Story's Eq.* 79; *Ib.* 80; 2 *Harris* 200.

Stewart and *Foster*, for defendants.—When one buys land and pays for it with his own money, but permits the conveyance to be made in the name of another, a trust results in favour of him who paid the money, and that is this case. The father, by permitting the conveyance to be made in the name of the son, did not divest himself of the title. It was no abandonment, but merely created a resulting trust in favour of the father. The amount or character of the debts he was to pay, or that he paid anything whatever, was not shown. Whatever interest the defendant had was under this indefinite agreement, and was in substance nothing more than a parol sale or gift, and could confer no title. The case 16 *Johnson* 197 does not sustain the plaintiff's doctrine—there the party, to whom the purchaser directed the deed to be made, was the creditor of the latter; and the deed was directed to be made to him in satisfaction of the debt. The debt was the consideration, and the original purchaser ceased to have any interest in the premises. In this case there was no such agreement or interest in defendant; and plaintiff, at the time the conveyance was made, still retained his interest. No money was paid by defendant for plaintiff, nor was the deed made in consideration of any debt due from the plaintiff to defendant. A trust, therefore, resulted to the father, the plaintiff: Jackman *v.* Ringland, 4 *W. & Ser.* 149.

Possession must be taken in pursuance of the gift, to take a case out of the statute of frauds: 2 *Harris* 260; Murphy *v.* Hubert, 7 *Barr* 420.

The opinion of the Court was delivered by

Lewis, C. J.—George W. Myers is in possession of the land in controversy, under a conveyance from Gregg of the legal estate. Butler Myers, the plaintiff below, claims the land under a previous contract with Gregg, and the payment of the purchase-money.

This would give him an equitable title, if nothing existed to rebut his equity. But there is evidence to show that the conveyance was made by Gregg to George W. Myers, with the assent of Butler Myers, in consideration of the assumption of liabilities by the latter. This, if established to the satisfaction of the jury, was sufficient to rebut the equity of the plaintiff below; and the jury should have been instructed accordingly. The defendant is not in possession under a mere parol title. He has the legal estate, and he may rebut any supposed equity of the plaintiff by parol evidence, without violating the statute of frauds. Such

Digitized by Google

www.libtool.com.cn

evidence is in support of the written title, and not in opposition to it.

If George W. Myers failed to perform his agreement, an action may be brought upon it for damages; but the party who delivers a deed, without taking a mortgage, or otherwise receiving a lien for the purchase-money, by written evidence of it, cannot enforce the performance of the contract by ejectment. The deed of Gregg, if the evidence be believed, is to be regarded as a deed from Butler Myers himself.

Judgment reversed and *venire facias de novo* awarded.

McFee *versus* Harris.

After acknowledgment of a sheriff's deed in open Court, the title of the sheriff's vendee cannot be affected by mere irregularities however gross.

When both parties claim by sheriff's sale, made under several executions against the same party, the oldest sale passes the title when there is no evidence of fraud in the case.

ERROR to the District Court of *Allegheny county*.

The facts of the case are stated in the opinion of the District Court, of which the opinion of this Court is merely an affirmance.

Opinion of the District Court:—

"The evidence in this case raises but one question, viz.:—Whether the sheriff's sale to Miller, of the 19th of June, 1849, conveyed to him the title of John McFee, under whom both parties claim. If it did not, the plaintiff is entitled to recover, otherwise the defendant will be entitled to judgment.

"This is said to be, and perhaps is, a hard case on part of the plaintiff, or his ancestors; but this, if true, can and ought to have no influence on our decision. Hard cases, as it is truly said, make bad precedents, and bad precedents, in their turn, make hard cases; the only safe rule, therefore, is, to abide by and administer the law as we find it, leaving the responsibility resting on those who alone have the power to alter it.

"Both parties claim title under John McFee, who owned the land in dispute. The plaintiff derived his title as follows:—On the 22d of June, 1846, one Arthur A. Anderson obtained a judgment against John McFee, in the Common Pleas of this county, for $35.23, and issued an execution thereon to December Term following, on which the land in dispute was levied upon, inquisition held and extended at $20 per annum, retaining notice served on the defendant, and on the 24th December, 1846, he agrees to retain the property at the valuation fixed by the inquest. On the 31st of October, 1849, the affidavit of plaintiff's

Digitized by Google

www.libtool.com.cn

attorney was filed, setting forth the default of the defendant to pay according to the provisions of the Act of Assembly, and thereupon a *venditioni exponas* was issued to December Term, 1849, and on the 24th of December, the property was sold by the sheriff to Matthew Long, and on the 26th of January, 1850, the deed for the same was acknowledged. On the 15th of February, 1851, Matthew Long conveyed the land to John J. McFee, the present plaintiff.

"The defendant claims title as follows:—On the 25th of February, 1846, John H. O'Brien obtained a judgment against John McFee, in the Common Pleas, for $20, with costs, and issued an execution thereon to June Term, 1847. The sheriff's return showed a levy on the land in dispute, notice of inquisition served, and, by *consent of parties*, inquisition and property extended, and valued at $40 per annum. On the 16th of October, 1847, a rule was obtained to show cause why the levy and inquisition should not be set aside; which was *discharged by consent* on the 23d of October. On the 24th of June, 1848, a retaining notice was served on the sheriff, and on the 7th of August, 1848, the same was served by him on the defendant. September 4, 1848, the defendant, by his agent, agreed to retain the property at the valuation. On the 23d of May, 1849, J. H. O'Brien filed his affidavit, setting forth the defendant's default to pay the half-yearly instalment according to the provisions of the Act, and the same day a *venditioni exponas* was issued, and the property sold to A. H. Miller, on the 18th of June. September 22, 1849, the sheriff acknowledged his deed for the same. January 31, 1850, A. H. Miller and wife conveyed the property to J. H. O'Brien, who, together with his wife, on the 2d of January, 1851, conveyed to Robert Palmer, and on the 3d of September, 1851, Robert Palmer and wife conveyed to William S. Harris, the present defendant.

"By the records in evidence, it appears that while the property was under extension, and retained by the defendant at the valuation, under a retaining notice, an execution was issued on another judgment; and after notice of inquisition by the sheriff, the defendant *consented* to an inquisition, extension and valuation at $40 per annum; and, after moving the Court to set it aside, the rule was discharged by *consent*, and he agreed to retain the property at the valuation. No objections appear to have been made to the sheriff's sale, or acknowledgment of the deed; nor is it easy to perceive what objections could have been made which could have availed him, after consenting to all the previous proceedings leading to the sale. By consenting to the proceedings, he waived all objections to any real or supposed irregularities that might have intervened, and became as absolutely bound to pay the half-yearly instalments, or suffer the property to go to

Digitized by Google

www.libtool.com.cn

sale, as if no former inquisition or extension had taken place. This position is clearly established by the 3d section of the Act of 18th October, 1840, which, *inter alia*, provides:—'If the said defendant, or defendants, or other person claiming the said real estate as aforesaid, shall signify his or their willingness to retain the same at the valuation and appraisement, in pursuance of the first section of this Act, he or they shall thereby become liable to pay to the plaintiff the amount of the said annual valuation and appraisement, in half-yearly instalments, until the debt, interest and costs of the said *fieri facias* be fully paid, &c., &c.; and on failure to make payment for a period of thirty days after any half-yearly instalment shall become due, it shall be lawful for the plaintiff, his agent or attorney, upon making affidavit thereof, and filing the same in the prothonotary's office, to issue a writ of *venditioni exponas* for the sale of the said real estate, as fully, and with like effect, as though a condemnation thereof had taken place.'

"Without the binding efficacy of the statute here given, the sheriff's deed, under which the defendant claims, would be good and valid under the well-considered doctrine laid down by the Supreme Court in the case of Shields *v.* Miltenberger, 2 *Harris* 76.

"Without going into a careful analysis of that case, it is only necessary to quote a single paragraph, viz.:—'The absence of authority or the presence of fraud, utterly frustrates the operation of the sale as a means of transmission of title, and avoids it from the beginning. But mere irregularities, whether of omission or commission, which do not render the officer powerless or taint the transaction with turpitude, may be cured by the tacit acquiescence of those who ought to speak in time:' 2 *Harris* 78.

"The prothonotary is directed to enter judgment for the defendant, on the question reserved, *non obstante veredicto.*"

Plaintiff's counsel excepted.

Wood and *Hepburn*, for plaintiff in error.

F. Williams, for defendant in error.

The arguments of the counsel on both sides were confined to the irregularities alleged in the proceedings of the sheriff's sales, and which are not specially considered in the opinion of this Court.

The opinion of the Court was delivered by

Lewis, C. J.—The second error is to the rejection of evidence; but no bill of exceptions is to be found in the paper-book. It is a waste of time to assign errors without verifying them by the record.

Digitized by Google

[McFee v. Harris.]

www.libtool.com.cn

Both parties claim under sheriffs' sales by virtue of executions against John McFee. The question is whether the youngest or the oldest sale passes the title. The Court below decided in favour of the oldest sale. This was correct. The sheriff had authority to sell, and there is no evidence of fraud in the case. After acknowledgment of the sheriff's deed in open Court, the title of the sheriff's vendee cannot be affected by mere irregularities however gross. Nothing but fraud in the sale, or a want of authority to sell, can defeat his title: 2 *Harris* 79.

Judgment affirmed.

McKee *et al. versus* Sanford.

The decision of the District Court of Allegheny county, on an application to open a judgment by confession, is not the subject of revision in this Court.

Consent of parties cannot give this Court a jurisdiction which the law has placed in the discretion of Courts of original jurisdiction.

Error to the District Court of *Allegheny county*.

This was a *scire facias quare executionem non* upon a judgment, which was entered against defendants, March 6, 1855, for $255.64. On the 28th June, 1855, the defendants obtained a "rule to show cause why the judgment should not be opened, and the defendants let into a defence." This rule was discharged by the Court on the 7th July, when a statement of facts was agreed to by the parties, and submitted to the Court, with a stipulation "that either party should have the right to take a writ of error to the judgment of this Court."

The only question considered by this Court was, whether the judgment of the District Court on an application to open a judgment by confession is the subject of review here?

Marshall and *Brown*, for plaintiffs in error.

Geyer, for defendant in error.

The arguments of counsel were confined to the facts in the case stated.

The opinion of the Court was delivered by

Lewis, C. J.—The decision of the District Court on an application to open a judgment by confession, is not the subject of revision here. We have no authority to interfere in such cases, and the parties cannot give us, by consent, a jurisdiction which the law has not conferred. An agreement on the facts, with a provision for a writ of error, does not give us jurisdiction to review

Digitized by Google

the decision of questions which the law places under the discretion of the courts of original jurisdiction.

Judgment affirmed.

Smith *versus* Beck.

Actual residence is absolutely indispensable to the validity of a title by settlement, and this must be continued until the title is taken out of the land office.

Improvements on the land, and the erection of a dwelling-house, though by mistake, on an adjoining tract, will not dispense with the imperative requisition of actual residence.

Residence by tenants will continue the pre-emption right.

If actual residence be discontinued for five years, and not accounted for, it is an abandonment, and should be so pronounced by the Court as matter of law.

Quære, if a shorter period will produce the same effect.

If a settler entitled to 400 acres, sell a part of his claim, including his residence, and separate it by survey and possession from the residue, the latter is abandoned, unless a separate residence be commenced and continued thereon within a reasonable time.

If a settler divide and sell portions of his right to several persons, one of whom keeps up an actual residence on his part, and the purchaser of another part does not reside thereon, a presumption of abandonment may arise against the latter in consequence of his non-residence, and the Court erred in affirming the contrary doctrine.

ERROR to the Common Pleas of *Venango county*.

This was an ejectment brought by Beck against Smith for 100 acres of land in the purchase of 1784. Both parties claimed by actual settlement.

The land in dispute is part of a larger tract settled by one Moorhead in 1833, who excluded it from his claim by an official survey made that year; after this, Kennedy commenced a settlement on the land, but did not pursue it. Moorhead then having sold his other land, commenced a clearing on this, and gave it up or sold it to one Shannon, who, after deadening some trees, left without doing more. Early in 1839 Avery raised a cabin up to the square, and in the spring or next fall of the same year, Beck, the plaintiff below, had an acre or more cleared and moved on to the land with his family, and fixed up the cabin and lived in it five or six weeks, and then moved back to his farm in Clarion county, twenty miles from the land, where he has resided ever since. Shortly after he put a tenant on the land who occupied it five or six months and then went off; and after this he put Brown into possession, who left in 1843 or '44, the cabin then being partly down, and no one actually residing on the land afterwards until the defendant below moved on in 1853 with his family. After Brown left, the cabin was usually left open, became roofless and dilapidated—fences, &c., in bad condition, and the land used for pasture and otherwise at intervals, by persons living adjacent. It was

Digitized by Google

[Smith v. Beck.]

www.libtool.com.cn

wholly vacant in 1852, and until the time defendant below took possession in March, 1853. He then fixed up the cabin and moved into it, planted potatoes and other crops, and procured an official survey to be made of the whole land embraced in his actual settlement.

This ejectment was brought to August Term, 1853, and served July 1853.

There was considerable discrepancy between the respective parties in their several statements of the facts. The defendant in error stated that Beck claimed by purchase from the assignees of Moorhead, who had settled the whole tract of which the land in controversy was a part. That the object of Moorhead's survey was to ascertain its contents; that after selling to Shannon that part of the land he lived on, he improved the residue, being the land in dispute, and asserted his claim to it, having no intention to abandon it, and afterwards sold to Sanford, who sold to Beck; and that Beck had ever since kept up his occupancy and personal residence, by himself and tenants, until 1852, when he leased the land to Maitland for five years, who neglected to go on the land for a year and did not inform Beck of his neglect; and in the mean time, Smith, the plaintiff in error, moved on the land, had a survey made, immediately occupied the house Beck had built, and claimed to hold it as abandoned by Beck, and open to settlement. And defendant in error affirmed that there was not a particle of evidence to show anything else than a continuity of possession and residence by Beck and his tenants.

It will be seen in the opinion of the Court that they lay down the general doctrine governing claims by settlement, without special application to the facts; except to the answer of the Court below to the plaintiff's 4th point.

The plaintiff's fourth point was—"That when a person commences an actual resident settlement on vacant land in Pennsylvania, he acquires an inceptive title to 400 acres; that after having his boundaries marked, including that quantity, he may subdivide it into as many parts as he pleases, and if he does divide and sell to different persons, one of whom keeps up an actual personal resident settlement such as is required by the Act of 1786, no presumption of abandonment can arise against a *bonâ fide* purchaser of any other part of said tract in consequence of his not residing on his part of said tract." Which point the Court answered in the affirmative.

Church, for plaintiff in error—as regards the 4th point said—That upon a subdivision and sale of part of a settlement right, the vendee's residence on his portion is exclusive of the residue, and leaves no room for inference of the necessary *manifest intention* of continuing the owner's personal residence, and making the same a place of abode and the requisite means of supporting his

Digitized by Google

family. When Moorhead procured a survey of a part only, there was clearly a presumption of abandonment of the residue, but the Court instructed that no such presumption could arise.

The fact that various persons commenced a settlement successively on the land, is not evidence that they purchased each others' rights, and yet this alone is all that the Court submit to the jury as evidence to find the fact.

E. C. Wilson, for defendant in error, argued the doctrine of abandonment generally, and contended that the evidence did not sustain the presumption; that the possession of Beck and his tenants had such a continuity that an abandonment would not be presumed from lapse of time; that the whole question of settlement and occupancy was one of fact, and was properly left to the jury under the instructions of the Court: Brentlinger *v.* Hutchinson, 1 *Watts* 46; Starr *v.* Bradford, 2 *P. R.* 384; Heath *v.* Biddle, 9 *Barr* 273.

The opinion of the Court was delivered by

Lewis, C. J.—A title by settlement differs in many essential particulars from one acquired under the Statute of Limitations. The first is by right, the last by wrong. The occupier in the first case is a purchaser, in the last a disseisor. The first exists only where the land is vacant, the last where it has been previously appropriated. In the first an actual residence is absolutely indispensable; in the last possession alone, without residence, is sufficient. In the first the residence must be continued until the title is taken out of the land office; in the last the continuance of the possession for twenty-one years completes the title without more. In the first case the claimant purchases and pays the price agreed upon; in the last his title is perfected without purchase or payment. So imperative is the requisition for actual residence, as the foundation of title by settlement, that if the dwelling-house, even by mistake, is located on an adjoining appropriated tract, the pre-emption right fails, although the principal part of the improvements be on the vacant land. Porter *v.* McGinnis, 1 *Barr* 413, recognises the distinction indicated in what has been said; but as that was the case of a title, under the Statute of Limitations, a residence was not required.

One man cannot be a settler on two tracts: 4 *Yeates* 537; but he may hold the pre-emption right of several, if actual residence be kept up and continued on each by his tenants: 8 *Watts* 430. Where the residence has been discontinued for the period of five years, and the discontinuance is not accounted for, it is an abandonment of the pre-emption right, and should be so pronounced by the Court as matter of law. This has been more than once determined by this Court. Whether absence for a shorter period will produce the same effect, has not yet been decided. If the claimant

Digitized by Google

www.libtool.com.cn

be driven off, or be compelled to leave on business, he must return as soon as he reasonably can. The mere intention to commence or to continue a residence, at some future period, when it may suit his convenience, cannot be substituted for performance. If one entitled by settlement to 400 acres, sell a portion of his claim, including his residence, and separate it by survey and possession from the residue, the latter is abandoned unless a separate residence be commenced and continued thereon. When any portion of the claim is thus severed from the actual residence which gives it vitality, its existence as a pre-emption right is, to say the least of it, so precarious that it cannot be preserved without an actual residence commenced upon it within a reasonable time after such severance, and duly continued as the law requires. If a settler divide and sell portions of his claim to different persons, one of whom keeps up an actual residence on his part, a presumption of abandonment may arise against a purchaser of one of the other parts of the tract, in consequence of his not residing on his part; and the Court fell into error in affirming the contrary doctrine in answer to the plaintiff's fourth point. So far as the principles herein stated have been negatived, the instructions are erroneous. We are not able to say how far the Court submitted questions of fact to the jury without evidence. To do so is of course error. But to enable us to review a question of that kind, the recent decisions require that the evidence on the point shall be particularly specified in the Court below, and placed on the record here. It is the duty of the party who alleges that there is evidence of a particular fact, to set it forth specially on the demand of the opposite party.

We see no error except those already indicated.

Judgment reversed and *venire facias de novo* awarded.

Smith *versus* Fulkinson.

The devise to testator's wife was as follows: "This is to be understood, that my wife is to have all the benefit of the farm during her life, and the disposal of one-half at her pleasure, and the proceeds of the other half to be divided among my living children: but should my wife choose, she may have the farm sold, and the products used as before mentioned." *Held*, that by this devise the widow took a fee in one half of the farm, together with a power over the whole farm to sell it, and appropriate one-half of the proceeds to herself absolutely, the other half to herself for life, and after her death to her children.

Error to the Common Pleas of *Lawrence county*.

This was an ejectment which grew out of a devise in the will of W. Espy. The devise out of which the controversy arose is set forth in the opinion of the Court. The plaintiffs are the heirs

Digitized by Google

www.libtool.com.cn
of Eleanor Espy, the devisee, who was the second wife of the testator. By a former marriage he had children, through whom the defendant claims, and who alleges that by the will, the wife took only a life estate, and not in fee; and that upon her death the whole descended to and vested in testator's children by his first wife as his heirs at law.

McGuffin and *Ayres*, for plaintiffs in error.—Do the subsequent clauses in the devise, after the express devise of an estate for life to the wife, give her a fee simple in one-half the land, or a mere naked *power* in connexion with the life estate, to dispose of the fee at her discretion?

The counsel contended that the language used gave no more than a *power*, and examined the peculiar phraseology of the will in reference to this view, and urged that if she took any estate under the power, it was not an estate in fee in one-half the land, but an estate in the one-half of the proceeds in personalty. That the life estate was willed to her without question, and if any estate was given to her, it depended upon her own act in exercising the power she had under the will. But having died without exercising it, her estate ceased with her life, and descends in accordance with law.

No estate will pass by implication under a power when a special interest or limited estate in the same property is given to the same person by express words. In this case if a fee is raised it must be by implication, and this is rebutted by the express words, and contradicted by the limited estate; and the words, "and the disposal of the one-half at her pleasure," is but a naked power connected with the life estate, and shows an intention to place it in the alternative. But the bequest of a life estate would not conflict with the conveyance under the power of an estate in the proceeds of one-half of the realty; for one is realty, the other personalty.

So the bequest of "proceeds" was in her own election, and was therefore contingent; and having died without electing, the estate never came into existence. And in support of the positions taken, cited 1 *P. Wms.* 149; *Ib.* 54; Sole *v.* Cook, 1 *P. Wms.* 78; *Cro. Car.* 367; 1 *Jones* (Eng.) 342; 3 *Lev.* 71; 2 *Lev.* 104; 1 *Mod.*; Reed *v.* Shergold, 10 *Ves. Jr.* 270; Thornley *v.* Thornley, 10 *East* 433; 1 *Pick.* 318; 17 *Pick.* 342; Holmes *v.* Coghill, 7 *Vesey, Jr.* 500; *Sto. Eq. Jur.* § 169; *Ib.* § 170; 1 *P. Wms.* 490; Loffts *v.* Cornwallis, 2 *Vern.* 465; 1 *Mod. R.* 618; 1 *Cox's Eq. Cas.* 131; 4 *Cruise's Dig.* title 32, 319; *Sug. on Pow.* ch. 6, § 8, p. 315; Bender *v.* Deitrick, 7 *W. & Ser.* 287; Fisher *v.* Herbell, 7 *W. & Ser.* 63; 10 *Wheat.* 227; 6 *Watts* 87.

Johnston and *Dana*, for defendants in error.—The question is,

Digitized by Google

www.libtool.com.cn

not what effect certain words may have, but from all parts taken together what disposition was intended by the testator? "Eleanor to have the use of the farm during her life, and the disposal of one-half at her pleasure; the proceeds of the other half to be divided amongst my living children. If Eleanor chooses she may have the farm *sold*, and the products used as above mentioned." The general devise is in words that alone carry the fee. She is to have *all* for life, and the disposal of *one-half;* and this discloses the intention not to include the *one-half* in the limitation, but to except it from the previous clause devising *all* for life. And there is nothing inconsistent in the devise of the fee in one-half, and a life estate in all. The general power of disposal does not follow an express limitation, as in all the cases cited by counsel; but it is a part of the phrase giving the limitation itself, and hence cannot be applied to the whole property.

A gift of the proceeds is a gift of the thing itself: Carlyle *v.* Cannon, 3 *R.* 489; Anderson *v.* Greble, 1 *Ash.* 136. It is obvious the testator intended to distribute his estate into three parts, viz., a life estate to Eleanor, and the remainder to be equally divided between his wife and children; and by joining these two gifts, the disposal of one-half to her, and the other to them, it is evident he intended more than a power—a disposition of all the parts, and not of two only, with a power to her to appoint the other.

The counsel further enforced the above views by an actual examination of the words and clauses of the will, and urged that there was no devise over in the case of the non-execution of the alleged power. That no presumption to die intestate as to any part would arise if the testator's words would carry the whole: 1 *Watts* 446. That the construction contended for harmonized all parts of the will, and that language should have its natural meaning. Cited Fisher *v.* Herbell, 7 *W. & Ser.* 63; Matthis *v.* Rhea, 1 *Iredell* 394; *U. S. Dig.* vol. 1, p. 564; Jackson *v.* Coleman, 2 *Johns.* 391; Morris *v.* Phaler, 1 *Watts* 389; *Cowp.* 299; 2 *Blk. Com.* 381; 4 *Kent. Com.* 319, 536; 16 *Ves.* 135.

The opinion of the Court was delivered by

Lowrie, J.—"This is to be understood that my wife is to have all the benefit of the farm during her life, and the disposal of one-half at her pleasure, and the proceeds of the other half to be divided among my living children; but should my wife choose, she may have the farm sold, and the products used as before mentioned."

The Common Pleas considered that by this devise the widow took a fee in one-half of the farm, and it seems to us that this is right. When a life estate is expressly devised, and then a right of disposal of the same thing is given to the same person, we are

Digitized by Google

www.libtool.com.cn
naturally inclined to suppose that two ideas were intended to be expressed, as, for instance, an estate and a power; for we do not readily admit that the testator would be thinking of giving a life estate to a person in a thing of which he was intending to grant him the fee. But here this reason cannot apply, because the fee is granted in only one-half of the thing which is made a subject of the life estate; and these two ideas need two distinct clauses to express them.

Besides this, there is a power given to the widow over the whole land in the last clause, and this excludes the supposition that the previous clause was intended as a power over the half of it. By this power she may sell the land and dispose of the proceeds "as before mentioned," that is, so that half of it shall be her own absolutely, and the other half for her benefit for life, and after that for the children.

Judgment affirmed and record remitted.

Wheatfield Township *versus* Brush Valley Township.

Where one party volunteers to pay a debt for another, the latter is under no obligation to reimburse him.

Where a debt is due from several parties, and one of them pays it after it is barred by the Statute of Limitations, he cannot maintain an action for contribution against the other debtors.

ERROR to the Common Pleas of *Indiana county*.

The facts of this case show that the township of Brush Valley was created in June, 1835, out of a portion of Wheatfield township. Before the creation of Brush Valley township, the original township of Wheatfield was indebted to various persons for balances due to them as supervisors of said township; and among others to John Carney, the sum of $231.58, as shown by settlement of 15th April, 1824. Carney afterwards brought suit against Wheatfield township to Sept. Term, 1839; the jury brought in a special verdict, upon which judgment was entered in Carney's favour for $350, which was paid by Wheatfield township on the 30th June, 1847. This suit was brought to March Term, 1852, by Wheatfield township against Brush Valley township, to recover contribution for the amount paid to Carney's judgment, as above stated, by the former. Defendant pleaded *non assumpsit* and the Statute of Limitations.

The Court instructed the jury that the Statute of Limitations was a bar to the recovery of the plaintiffs—to which they excepted.

Banks, for plaintiff in error.—The statute was no bar. Wheat-

Digitized by Google

www.libtool.com.cn
field township did not pay voluntarily. Suit was brought by Carney before the statute had began to run against him. He recovered and enforced payment, and before payment by Wheatfield. She could not enforce the claim against Brush Valley, for the money was not payable to the old township, but to her creditors. As soon as the money was paid a right of action accrued, and then, and not till then, did the statute begin to run: 4 *W. & Ser.* 552; 10 *Barr* 274, Wesley Church *v.* Moore.

Foster, *Stewart* and *Laird*, for defendant.—Wheatfield, prior to 1824, and when these liabilities were incurred, was liable to be sued; and if so liable, the Statute of Limitations, if interposed, would bar a recovery after six years. The erection of Brush Valley into a corporation, rendered her directly liable, if at all, to creditors of the whole for her proportionate part of the common burden; and to that extent Wheatfield was discharged. If the latter paid more than her part, to that extent she was a *volunteer*, and the law would not, by implication, make Brush Valley liable over to her; and if this claim was barred by the statute, and there was no joint responsibility, the payment of it by Wheatfield cannot revive or take it out of the statute.

The opinion of the Court was delivered by

Lewis, C. J.—The action for contribution is founded upon the equity arising from the payment by the plaintiff of more than his share of a liability existing at the time against both. Where the plaintiff is not liable for the debt, he has no right to volunteer a payment for the purpose of making the defendant his debtor. And where the defendant is not bound for it, the payment confers no benefit upon him. He is, therefore, under no obligation to reimburse the plaintiff. If the claims of Carney, Bracken and Elliott, against Wheatfield township had been paid by the latter before they were barred by the Statute of Limitations, a right of action for contribution would have arisen, and the action might have been brought at any time within six years from the time of payment. But they were all barred by the statute before the payment. And Wheatfield township is, therefore, not entitled to recover. The judgment recovered against that township does not vary the case, because that action was brought more than six years after the cause of action accrued, and from what appears in the paper-book it might have been successfully defended. An erroneous decision in that case is no reason for perpetuating the error in this.

This view of the case renders it unnecessary to notice the questions of evidence raised on the trial.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Evans *versus* Myers.

Where a contract was made for a given number of tons of iron, since the Act of 15th April, 1854, which declares that "2000 pounds shall make one ton," the contract must be taken to have been made in reference to it, and it was error to admit evidence of a local custom to control the statute.

ERROR to the District Court of *Allegheny county*.

This was an action on an agreement under seal, in which "Edmund Evans of Clay Furnace, agrees to weigh off and deliver, on the bank of the Allegheny river at said furnace to the order of Myers & Hunter 40 tons of pig metal, at $20 per ton.

The breach alleged was, that the defendant had not delivered the said 40 tons, and had delivered but 34½ tons. And defendant then offered to prove by J., "that the universal custom with dealers in all pig metal is to buy and sell by the gross ton of 2268 pounds, and that defendant has always sold according to that weight and usage."

The defendant objected to the offer, because the agreement and the Act of Assembly are the legal evidence of the contract between the parties, and cannot be altered, changed, or modified by parol evidence, or by any evidence of usage or custom; and because no evidence could be received which contradicts the Act of Assembly of 1834. The Court overruled the objection, admitted the evidence, reserving the question whether "if the offer should be fully made out by proof it would be sufficient to entitle the plaintiff to recover." The evidence adduced was, that for 24 years, the custom both at Pittsburgh and up the Allegheny river was universal to give 2268 pounds sand mould metal to the ton. The Court instructed the jury that if they believed the evidence of the custom, and that the contract was made in view of it, they might find for the plaintiff, subject to the question reserved; to which defendant excepted. The Court subsequently entered judgment in favour of the plaintiff on the point reserved, to which defendant excepted.

The 17th section of the Act of 15th April, 1834, makes the ton to consist of twenty hundred, Avoirdupois weight.

The only question in the case was whether the custom alleged should overrule the provision of the act, where the contract was silent in this respect.

A. B. McCalmont, for plaintiff in error.—The terms of the contract were to be understood as the statute defined them, and evidence of usage was inadmissible: 3 *T. R.* 271; Hocken *v.* Cooke, 4 *T. R.* 314; 6 *T. R.* 338.

Digitized by Google

www.libtool.com.cn

In Pennsylvania contracts are construed with as little reference to local usages as possible: Gordon *v.* Little, 8 *Ser. & R.* 533; Snowden *v.* Warder, 3 *Rawle* 103. See also 7 *Harris* 243, Coxe *v.* Heishley, and the authorities cited therein; and Wetherill *v.* Neilson, 8 *Harris* 448. These cases show that particular customs cannot be given in evidence to change the common law. And the reason is stronger that such evidence will not be admitted to vary the construction put upon particular terms by statute. These usages have always been regarded as inconvenient: 1 *Term Rep.* 466.

McCandless, for defendant in error.

The opinion of the Court was delivered by

Lewis, C. J.—This was an action for the breach of a covenant to deliver 40 tons of pig-metal. If "twenty hundred pounds make a ton," the defendant had delivered before suit brought, the quantity required by his covenant. But the plaintiff claimed 2268 pounds to the ton, and the Court, on proof of a custom "among those dealing in metal throughout the iron region up the Allegheny river, where the contract was made, and where the metal was to be delivered," permitted the jury to find that the contract was for the number of pounds claimed by the plaintiff.

"Divers weights and divers measures" were found to be "an abomination" in the days of Solomon: *Prov.* xx. 10. "One greater to buy and another less to sell" was an evil resulting so naturally from the absence of a statute regulation on the subject, that it was one of the provisions of *Magna Charta* that there should be but "one weight and one measure throughout the realm of England:" 8 *Evan's British Statutes* 806. The pertinacity with which the statutes on this subject were disregarded in England, produced repeated prohibitions and regulations from the reign of Henry III. to that of George III., with a view to guard the people against defective and uncertain weights and measures. The example of evasion in England is an abomination to us. Like all other evil customs it ought to be abolished. It is "more honoured in the breach than in the observance." Considering the commercial spirit of the age, it is of great importance to guard against fraudulent practices, and to furnish a standard of weight and measure which shall be uniform throughout the state, and which shall be binding upon all men within our jurisdiction. If every section of the country may have its own weights and measures, to be established by its own customs, strangers would be entrapped into liabilities which they never intended to incur, and no one could know with precision the extent of his obligations. Such customs would frequently depend upon the opinions of wit-

Digitized by Google

www.libtool.com.cn
nesses and juries drawn from sections of country inhabited chiefly by the parties who had an interest in establishing them in a particular way. Uncertainty would produce constant litigation, and the substance of industrious and enterprising men would be wasted in unprofitable controversies, instead of being employed for the advancement of their own interest and the general welfare of the country.

The Act of 15th April, 1834, expressly directs that "twenty hundreds make one ton." The contract in question was made since the enactment of that law, and must be intended to have been agreed to with reference to it. The Act of Assembly entered into the contract and formed an essential part of it. The contract was in writing, and it was the duty of the Court to give it a construction. A custom may be abolished by an Act of Assembly, and it was the purpose of the Act to produce that result in this case. The sound policy which dictated it cannot be doubted. It is a statute which ought to be enforced, and the local customs up the Allegheny river are certainly insufficient to repeal it: Noble *v.* Darell, *et al.*, 3 *T. R.* 271; St. Cross *v.* Howard, 6 *T. R.* 338; Paull *v.* Lewis, 4 *Watts* 402. It was an error to admit the evidence of custom to control the statute, and to permit the jury on such evidence to find the contract to be different from its legal import. It was also an error to sustain the action of the jury by rendering judgment for the plaintiff below on the point reserved.

Judgment reversed, and judgment for the plaintiff in error *non obstante veredicto*, with the costs of suit.

Johnston and Sutton's Appeal.

The defendant in an execution had waived his right to the benefits of the Exemption Act of 1849, and afterwards gave notice in due time to the sheriff that he claimed the exemption. There were several other judgment creditors of the defendant who claimed distributive shares. The auditor to whom the case was referred, reported 1st, in favour of a creditor whose claim originated anterior to 1849, $28.44. 2d, in favour of the creditor in whose claim the waiver had been made, $43.35, and awarded the balance of the fund, $40.50, to the defendant on his claim of exemption; and that all other lien creditors were barred by the claim of exemption. The fund arose from the sale of defendants real estate: *Ordered*, that the decree of the Court be reversed, and that the fund be distributed according to the report of the auditor.

THIS was an appeal by Johnston and Sutton from a decree of the Court of Common Pleas of *Lawrence county*, in the distribution of the proceeds of the real estate of Alphonso Keys. Keys owned certain real estate encumbered by divers judgments, all of which were obtained subsequent to the Act of 9th April, 1849—the Exemption Act.

Digitized by Google

[Johnston and Sutton's Appeal.]

On the 23d April, 1852, defendant gave to Johnston and Sutton a judgment for $25, waiving the right of exemption in favour of plaintiffs. Execution issued to No. 5, July Term, 1852. On the 17th May, 1852, Keys, the defendant, gave notice to the sheriff that he claimed the $300 under the Act of 1849. The sheriff appointed appraisers, who reported that the land would not divide, The land sold for $131. An auditor appointed by the Court reported in favour of the plaintiffs' judgment—the judgment of Cowden and Gaily—the contract upon which it was founded being before the Act of 1849; and gave the residue of the fund, $40.50, to the defendant, declaring all other lien creditors barred by defendant's claim of exemption. Exceptions were taken to the report, which were sustained, and the whole fund was ordered to be distributed: 1st, to pay the expenses of the audit; 2d, costs of sheriff's sale; and 3d, to the lien creditors in order of priority. To which decree Johnston and Sutton, Cowden and Gaily, and Keys, the defendant, excepted and appealed.

The opinion of the Court below was, that the waiver of the defendant of his exemption under the Act of 1849, placed the fund in the hands of the sheriff for distribution generally, and therefore that no distinction existed as to claims before and after the Act took effect; and cited Boyer's Appeal, 9 *Harris* 210.

Johnson, for appellants.—The contract of waiver was not to convert the real estate into money, and out of the fund to pay the plaintiffs' judgment, but, in effect, to permit that portion of the estate set apart to him by the Act of 1849, to remain as assets for the security and payment of his claim. But, according to the doctrine of the Court below, the defendant must either *accept* and *retain* the *entire bounty* of the legislature, or run the risk of losing the *whole*.

2d. There was no waiver as to other creditors. As regards these, he had none to recall. Can he recall it as regards Johnston and Sutton? If he cannot, then his waiver is good *pro tanto*.

The opinion of the Court was delivered by

Lewis, C. J.—In this case the benefit of the exemption law was claimed in due time—the appraisers returned that the land could not be divided without prejudice to or spoiling the whole, so that the sale took place and the proceeds amounted to $131. As that sum is less than $300, the sum allowed to the debtor under the exemption law, it follows that the whole of it must be paid to him, under the provisions of that law, unless some of the creditors can show a better claim to it. Those whose demands originated subsequent to the 4th July, 1849, and who have no waiver of the benefit of the law from the debtor, can have no claim to the fund.

Digitized by Google

Cowden and Gaily's judgment was for a debt contracted before the Exemption Act took effect. It is therefore saved from its operation, and is entitled to be paid out of the money raised. The residue of the money belongs to the debtor, unless he has deprived himself of it by his own act. He has done so to the extent of the judgment of Johnston and Sutton, because it was part of the contract, when that debt was contracted, that he would not claim the benefit of the exemption law against it. That debt must therefore be paid out of the fund. These are the only claims upon the fund superior to the right of the debtor under the exemption law. After satisfying them, the residue of the money should be paid to the defendant in the execution. There is no difficulty whatever in arriving at this conclusion. Nothing stands in the way of it except the principle supposed to have been adopted in Boyer's Appeal, 9 *Harris* 210. That case was misunderstood by the learned judge of the Common Pleas. The debtor, after a levy on the land, agreed to a condemnation and that a sale might be made on the *fi. fa.* without a *vend. ex.* The plaintiff proceeded to advertise the property for sale. On the day of the sale, and not before, the debtor claimed the benefit of the exemption law. It happened that the appraisers returned that the property could not be divided so as to set off any of it to the debtor, and the sale went on. It was decided by this Court that the claim for the benefit of the exemption law came too late, and that the appointment of the appraisers and their return were altogether invalid. It followed that the proceeds were brought into Court entirely unembarrassed by any rights of the debtor under the exemption law. In such a case, the lien creditors were entitled to be paid in the order of their priority. One of the creditors attempted to subvert this order and to gain an advantage over the others, on the ground that, by his contract with his debtor, the exemption law was waived. This claim he might well assert against the debtor himself, or against any fund in Court to which the debtor would otherwise be entitled under the exemption law. But his right grows out of and subsists upon that of the debtor. It is a scion which dies when the parent stock is destroyed. The creditor had an interest by his contract in claiming the benefit of the exemption law. He trusted his right to the care of the debtor, and the latter neglected to make the claim at the proper time. The result was that the rights of both under the exemption law were lost, and the proceeds of the sale were to be distributed among the lien creditors according to priority.

It was absurd to suppose that the waiver of the debtor, under such circumstances, could change the order of priority. Nothing more than this was intended by this Court, when the chief justice, in delivering the opinion in Boyer's Appeal, declared that such a

Digitized by Google

www.libtool.com.cn

waiver was void, "so far as it was intended *to affect others*," and that it "could not put *one who has no legal right* in the place of *one who has*."

It is ordered and decreed that the decree of distribution made by the Court of Common Pleas be reversed. It is further ordered and decreed that the fund in Court be distributed according to the report of the auditor.

BLACK, J., dissented.

Morgan *versus* Weir.

This Court will not reverse a judgment for error in an immaterial matter, and the party complaining must show, not only that an error has been committed, but that he has been injured by it.

ERROR to the District Court of *Allegheny county*.

Rogers and *Burke*, for plaintiff in error.

Penney and *Sterrett*, for defendant in error.

The opinion of the Court was delivered by

LEWIS, J.—It may be that, where a bond is given as collateral security for the payment of a negotiable promissory note, "to whoever may be the holder" of it, no defence can be made against the bond which could not be made against the note in the hands of the holder. The Court below, in expressing a different opinion, may have fallen into an error; but we should fall into a greater one, if we reversed the judgment without seeing that the error was material, and injured the plaintiff in error. We cannot reverse for an error in an immaterial matter. We have no way to guard against such a mockery of justice, but by requiring the party complaining to show, not only that an error has been committed, but that he has been injured by it. We do not see how this can be done, without spreading the evidence before us, duly authenticated by the Court below. If the case is not worth this trouble, it is not worth while to take a writ of error at all.

So far as we can form a conjecture respecting the defence relied on, it was as available against the note in the hands of the holder as against the bond. If so, the error of the Court did the plaintiff in error no harm. If, under our duty to presume everything in favour of the judgment, we have been mistaken in regard to the nature of the defence, the consequences of the mistake have fallen where they belong. We are also asked to reverse this judgment because the Court told the jury that, "if they believed the testimony of *Cassiday*, the plaintiffs cannot recover." And the testi-

Digitized by Google

www.libtool.com.cn

mony of Cassiday, on which the whole question depends, is not furnished to us in the paper-book of the plaintiff in error. We do not understand how his counsel preserves the gravity of his countenance while preferring such a request.

Judgment affirmed.

Fuller *et al. versus* Bradley.

One who holds himself forth to the public to carry for hire, is a common carrier as much in his first trip as in any subsequent one, and has a lien on the cargo for freight.

One not a common carrier, but who specially undertakes to carry a particular load for hire, has no lien for freight unless he reserve it by agreement.

It is a question for the jury from all the evidence to decide whether the contract is one of affreightment as a common carrier, or a mere hiring for the job.

Where the defendant was the carrier of freight for a round trip, to a given place and back, taking in and putting out freight, at different places on the route, as plaintiff might direct, for a stipulated sum per day, the defendant has a lien on the freight remaining on board on the return of the boat, for the whole amount unpaid at the stipulated rate.

ERROR to the Common Pleas of *Lawrence county*.

This was a replevin for 100 barrels of salt. The plaintiffs in error were dealers at New Castle, Lawrence county, in country produce of various kinds. Bradley, the defendant in error, who was the owner of a boat, horses, &c., agreed to go to Erie for plaintiff with his boat, team, and hands on a trading voyage, stopping by the way, and receiving and discharging lading on the route, as he should be directed by the plaintiffs, and they agreed to pay him for said services $6 per day, for every day on the route to Erie; and if a return load should be furnished at Erie, to pay a like sum per day until defendant's return to New Castle. The boat was partially loaded at New Castle, and cargo discharged and taken on board at several places, and wholly discharged at Erie, where a full load of salt and other matters were put on board, and the boat was started on her return trip. At several places on the return, portions of the salt were discharged by plaintiffs' order; and the residue of the cargo, except 100 barrels of salt, was discharged at New Castle: these 100 barrels the defendant refused to deliver until the plaintiffs paid him the balance due him according to the contract.

The Court below charged the jury as follows:—

"A common carrier is one who holds himself forth to the public, to carry for hire from place to place: 1 *W. & Ser.* 286.

"Though the number of instances employed in carrying may be evidence of the character of a common carrier, it is not the rule which constitutes it. The law has fixed no number of

Digitized by Google

www.libtool.com.cn

instances which shall stamp him with the character. If he holds himself forth to the public to carry for hire, he is a common carrier as much in his first trip as in his second, third, or fourth.

"Did the defendant undertake as a common carrier? If he did not, he had no lien upon the salt. One who is not a public or common carrier, but specially undertakes to carry a particular load for hire, has no lien for freight unless he specially reserves it by agreement. The first question for the jury is, therefore, whether the plaintiffs contracted with the defendant as a common carrier? Was he a common carrier, and did he, as such, make the contract? This you will decide on all the evidence. If satisfied the defendant was a common carrier, the next question to be determined by the jury is, whether the contract in this case was one of affreightment as a carrier, or whether the defendant merely chartered or hired his boat, his hands, and himself to the plaintiffs, placing all in their control, they running the boat on their own account, and only paying him wages for the hire of the boat, himself, and hands.

"If it was a contract of affreightment as a common carrier, and the agreement to pay at the rate of $6 a day was only the mode of ascertaining the compensation for carrying, a lien would exist on the articles carried. But, if the defendant specially hired his boat, hands, and himself for daily pay, placing them under the control and disposal of the plaintiffs themselves, he would have no lien for his daily wages: *Angell on Carriers*, § 376, 377, 378, 379.

"If the defendant was the carrier of the freight for the round trip from New Castle to Erie and back to New Castle, carrying such freight as the plaintiffs chose to put aboard and take off at different points, and was to be paid the affreightment at the rate of $6 a day, for the time employed until his return; the fact that some of the freight was delivered at Erie and other places, and the salt taken on at Erie and brought to New Castle, the final destination and termination of the trip, would make no difference as to the lien. Under these circumstances the salt remaining on board at New Castle, would be liable for the whole unpaid freight at $6 a day for the round trip. It would be otherwise if the trip did not end at New Castle. For this portion of the charge, we give the following reasons: James Leslie was the only witness present at the final bargain, and he stated that Bradley was positive that he should have $6 a day till he should return. On cross-examination, he repeated that the price of $6 a day, for himself, boat, and hands, till he returned, was stipulated; he also stated that the time it would take to go to Erie and back was stated; and for time unnecessarily spent, defendant was to be paid at the same rate. Warnock, the witness on the part of the plaintiffs, stated that he referred defendant to Leslie, and that he was not

Digitized by Google

present at the conversation in Leslie's presence. Leslie's testimony, therefore, evidences the final agreement. But even upon Warnock's testimony, there would be no real difference, because according to his statement, if the plaintiffs got a back load from Erie, the defendant was to have the same daily pay back to New Castle, and the evidence shows that they loaded the boat with salt. Therefore, though a contingency might have terminated the trip at Erie, yet by the very terms of the contract itself, as proved by him, it did not terminate there, because the contingency did not take place. The jury are therefore instructed, if the trip was to terminate at New Castle, and the price of the freight, measured by the time spent in making it, the last articles remaining on board there, to wit, the salt, would be subject to the lien for the whole amount of freight unpaid: *Angell on Carriers*, § 373; 7 *W. & Ser.* 468, Steinman *v.* Wilkins."

To this charge the plaintiffs excepted.

The jury found "for the defendant; and found that a balance of $71 was due and owing by the plaintiffs for freight, for which defendant had a lien on the salt replevied, and that the value thereof was $212.50."

And judgment was entered accordingly.

The questions presented to this Court were—

1. Did the Court err in submitting to the jury upon the evidence in the case, whether the contract was one of affreightment or of mere hiring?

2. Whether or not defendant was a common carrier?

3. In affirming that the trip was a *round trip*, from New Castle, *via* Erie and back, to New Castle.

The evidence, so far as material, is embodied in the statement of the case.

Taylor, for plaintiff.—It was error to submit to the jury for their deliberation an alleged fact, of which there was no evidence: Jones *v.* Wood, 4 *Harris* 25; Harris *v.* Staufer, 10 *Barr* 365.

Without proof the presumption would be, that defendant was but a private person, and not responsible as a common carrier: *Story on Bailments* 495; 5 *R.* 188.

2d. What facts will constitute a contract of affreightment is for the Court: and the Court, by submitting the whole matter of law and fact to the jury, left it to them to say whether or not, on all the evidence, defendant was entitled to a lien.

The contract does not come within the legal definition of an affreightment: *Angell on Carriers*, § 391. The "*actual transportation* of goods" was not the consideration for which defendant was to receive $6 per day; but for his boat, horses, and hands, whether the boat was loaded or light. It was an ordinary contract of hiring.

Digitized by Google

[Fuller *v.* Bradley.]

Possession is the basis of lien. The goods loaded at New Castle were delivered at Erie, and another cargo was shipped thence to New Castle. The Court affirms this to be a *round trip*, although it was in proof that part of the cargo was to be delivered at Erie: and that the salt brought to New Castle was liable for the whole unpaid freight. The fact as to the terminus of the trip at Erie should have been left to the jury.

If it was a *round trip*, no freight was due till it was completed, and defendant could not detain for freight that portion of the cargo which he was bound to deliver at Erie, and had no lien upon it. And if he had no lien on this, for its own carriage, he could have none on the cargo shipped *from* Erie for it.

McGuffin, for defendant.—The Court properly submitted the evidence to the jury: 1 *Smith's Leading Cases* 224; Turney *v.* Wilson, 7 *Yerger* 340–2; Murer, *et al.*, *v.* Nixon, 4 *N. H.* 314; 4 *Pick.* 50; Tennett *v.* P. Pilzhen, 2 *Henning* 49; 1 *W. & Ser.* 285; *Chitty on Contracts* 479; 3 *Story* 349; 2 *Watts* 443; 5 *East* 439; 3 *Esp.* 74; *Story on Bailments* 504.

2d. The question whether the contract was one of affreightment or hiring was properly left to the jury; and, if affreightment, then the defendant had a lien.

The defendant retained control over his boat and crew, furnishing all expenses, &c., himself. The fixing a stipulated sum per day does not affect it, provided no credit was given, and the price was payable at the end of the trip; the defendant continuing in control of the boat until it was completed: 6 *Pick.* 248; 4 *Greenl.* 412; 2 *B. & Ald.* 503; 15 *Mass.* 370; 16 *Mass.* 354; 4 *Cowen* 470; 4 *Wash. C. C.* 100; 2 *Story* 16; *Story on Bailments* 505.

If the jury was satisfied that defendant retained the control of his boat and hands, &c., until the terminus of the trip, he had a right to retain the cargo till paid: 4 *Mass.* 91; 6 *Mass.* 422; 11 *Mass.* 72, 415; 2 *Cain.* 77; 4 *Esp.* 22; 7 *Cow.* 670; 3 *Cranch* 140; *Abbott on Shipping*, 3d ed., 282, note 1; 1 *Rep.* 186; 6 *East* 662; 7 *W. & Ser.* 466.

The opinion of the Court was delivered by

Black, J.—We affirm this judgment for the full and satisfactory reasons given in the charge of the learned judge who ruled the cause in the Common Pleas.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Daniel Beck *versus* David Beck.

Where the defendant refused to allow the plaintiff's claim to be deducted out of the purchase-money due to him by a third person, when requested so to do at the instance of the plaintiff, saying that the money received by him from the plaintiff was a *present*; that what he owed the plaintiff he would pay to the plaintiff himself, when he needed it, or when his necessities required; *Held*, that this was not an admission that he owed the plaintiff anything, nor such a promise as would take the case out of the Statute of Limitations.

ERROR to the Common Pleas of *Lawrence county*.

The question decided in this case grew out of a proceeding in foreign attachment—in which defendant pleaded the statute of limitations.

The plaintiff alleged that he loaned the defendant, in 1837 or 1838, $100; and proved, that, in 1841, at his request, A. Leimer (the witness) called upon defendant, and requested payment of the demand of plaintiff—that defendant said he could not raise the cash then, and asked for time, and said he would pay with 5 per cent. interest. Andrew, son of defendant, testified that, in 1847, he requested the plaintiff (by letter) to pay a debt which he owed to him, and that plaintiff answered him in 1847, by a request, that he would call on his father, the defendant, and ask him to pay the money which he (the defendant) owed the plaintiff, or make a turn-over with Andrew of the debt, which he owed his father, for purchase-money of land bought of him. His father, the defendant, refused to pay or make the turn-over, and alleged that what money he had received of the plaintiff was a present made to him—that he would pay David himself what he owed to him, if his necessities required it.

The Court below instructed the jury that the declarations made to Andrew Beck, if believed, were sufficient to prevent the operation of the statute, and to entitle the plaintiff to recover.

McGuffin, for plaintiff in error.—The promise was to pay when plaintiff *needed* it. The promise to take a case out of the statute must be clear and unconditional: Harbold's Executors *v.* Kuntz, 4 *Harris* 200; Nixon *v.* Bromfield, 2 *Harris* 310; Oakes *v.* Mitchell, 15 *Maine Rep.* 360; Jones *v.* Smart, 6 *B. & C.* 459; Murray *v.* Wheeler, *N. H.* 486; 8 *Shep.* 433; *Miss.* 256; 4 *Dev. & Bat.* 129; 1 *Pet.* 351; 7 *Hill* 45; 3 *Barr* 418; 1 *Richardson* 210; 5 *Shep.* 144; 2 *Pick.* 368; 11 *Wheat.* 310; 1 *H. & Gill* 204; 7 *Halstead* 339; 3 *Wend.* 187; 7 *Verm.* 54; 2 *Jones* 264; 6 *W. & Ser.* 213; Suter *v.* Sheeler, 10 *Harris* 308.

Digitized by Google

www.libtool.com.cn

Johnson, *Dana*, and *B. B. Prickett*, for defendants, cited Kensington Bank *v.* Patton, 2 *Harris* 479; 4 *Barr* 323; Harbold's Executors *v.* Kintz, 4 *Harris* 210.

When called on first, defendant asked for time, and said he had no money, and promised payment with interest; and, in his conversation with Andrew, promised payment when, or if, plaintiff needed it; and every different statement was mere subterfuge, to get away from the immediate discharge of the debt. *Payment* can only be predicated of a subsisting debt: *American Law Register*, *October*, 1855. The creditor depositing (or loaning) money determines his own necessities, and the right to withdraw when needed, is implied; and a promise to pay when needed, is equivalent to a promise to pay on demand. The demand was evidence of the necessity.

The opinion of the Court was delivered by

Lewis, C. J.—The demand on which this suit is brought was barred by the statute of limitations, unless taken out of the statute by a new promise within six years. The Court instructed the jury that "the promise of 1848, as testified to by Andrew Beck, if the jury believe the testimony, is sufficient to take the case out of the bar of the statute." Andrew Beck had purchased a place from the defendant, and was indebted for the purchase-money. By directions from the plaintiff, Andrew applied to the defendant to allow the plaintiff's claim to be deducted out of the purchase-money. This the defendant positively refused, saying that the money received from the plaintiff was a present—that what he owed to the plaintiff he would pay to the plaintiff himself when he needed it, or when his necessities required. This was not an admission that he owed the plaintiff anything, nor a promise which assumed the form or the substance of a legal contract to pay him anything. It was a mere indication of intention to repay one kindness by another, when the occasion seemed to require it. This disposes of the first assignment of error. The second is not presented in such a way as to be considered here.

Judgment reversed and *venire facias de novo* awarded.

Digitized by Google

www.libtool.com.cn

John Nusser *versus* The Commonwealth.

The Act of 14th April, 1851, imposes a fine of $50 for selling liquors on the Sabbath day within the county of Allegheny, and authorizes a summary conviction before a single justice of the peace. The Act of 25th February, 1855, imposes the same penalty for the same offence committed anywhere within the state, and prescribes the mode of proceeding for the recovery thereof: and further authorizes the offence to be punished by indictment, fine, and imprisonment. The latter Act repeals the former.

A general Act prescribing the mode of punishment of a specific offence throughout the state, operates the repeal of an Act, limited to a single county, prescribing the mode of punishment of the same offence within the designated county.

ERROR to the Common Pleas of *Allegheny county*.

On the 6th July, 1855, the plaintiff in error was summarily convicted before a justice of peace, under the 2d section of the Act of 14th April, 1851, relating to the granting of tavern licenses in Allegheny and Clarion counties, of selling malt liquor on the Sabbath day.

The case was taken by *certiorari* to the Common Pleas of Allegheny county, and there affirmed.

Carnahan, for plaintiff in error.—The proceeding was had before the justice without a summons having previously issued; and this process is indispensable in all penal proceedings: Rex *v.* Dyer, 1 *Salk.* 181; 6 *Mod.* 41; and see all the cases collected 8 *Mod.* 154. The object of the summons is to set forth the charge and fix a day, and thus afford the accused the means of making his defence: 1 *Stra.* 260. A summons to appear immediately is insufficient: 2 *Burr.* 681; 1 *Stra.* 261; 4 *Black. Com.* 283, n. 5.

The 2d section of the Act of 1851 is superseded and repealed by the Act of 1855. The former was local and restricted to Allegheny county, the latter is general and extends throughout the state: 1 *Ashmead* 181, Commonwealth *v.* Cromley; Foster's Case, *Coke's Rep.* 681; Rex *v.* Eaton, 4 *Burr.* 2026; King *v.* Davis, *Leach's Cases*, 228; 4 *Black. Com.* 89; Peace *v.* Whitney, 5 *Mass.* 380. A subsequent statute intended as a substitute for a former one, repeals it *pro tanto*: Bartlett *v.* King, 12 *Mass.* 545.

Shannon, for defendant, cited 3 *Ser. & R.* 48.

The judgment of the Court was delivered by

LEWIS, C. J.—It is a familiar principle that a subsequent statute is a repeal of all repugnant provisions in a prior one. This is

Digitized by Google

www.libtool.com.cn

horn-book law, and it needs neither maxims nor authorities to support it. Where the prior enactment is local, and the new one general in its operation, the maxim applies with undiminished force; because the whole includes the several parts, and all local laws establishing one rule for one portion of the community, and a different one for the remaining portion, are inconvenient and of doubtful propriety except where they relate to matters which are local in their nature, and are enacted by the proper municipal authorities of the territory over which they are designed to operate; and where the first enactment sanctions a course of proceeding which deprived the citizen of the inestimable privilege of trial by jury, there is certainly no reason growing out of its provisions in this respect to exempt it from the general rule. The Act of 14th April, 1851, authorizes a summary conviction by a single justice of the peace, and the imposition of a fine of $50 for selling liquors on the Sabbath day within the county of Allegheny. The Act of 25th February, 1855, imposes the same penalty for the same offence committed anywhere within the state, but directs that the penalty be recovered "before any mayor, alderman, burgess, or justice of the peace, *as debts of like amount are now by law recoverable in any action of debt*, brought in the name of the Commonwealth, as well for the guardians of the poor (or overseers of the poor of the township, ward, or borough, as the case may be), as for the person suing." The chief difference between the two statutes is in the remedy for the recovery of the penalty. The first is by summary conviction, in which the defendant is deprived of the right of appeal and the trial by jury. The last is by action of debt, in which he is entitled to both. It is therefore a very material and substantial objection to the proceedings below that they are instituted in a form which deprives the defendant of his dearest rights, and under a statute which has been repealed. The Act of 1855, *in addition to the penalty of fifty dollars*, to be collected by *action of debt*, authorizes the offence to be punished by *indictment*, *fine*, and *imprisonment*. This is exposing the offender to a double punishment for the same offence; and is surely sufficient. To hold that he may be punished a *third time* for the same act, would be a measure of severity in the construction of penal statutes, which would shock the most ordinary sense of justice.

Judgment reversed.

Digitized by Google

www.libtool.com.cn

Schenley and Wife *versus* The City of Allegheny.

The Acts of Assembly of the 5th April, 1849, 8th April, 1851, and Act of 30th March, 1852, relating to the paving and grading of streets in the city of Allegheny, and the assessment of the expense of the same, upon the owners of lots fronting on such streets, and the manner of collecting said assessments, are a proper and constitutional exercise of the taxing power by the legislature.

ERROR to the Common Pleas of *Allegheny county.*

The parties in this case agreed upon the following facts, to be considered in the nature of a special verdict:—

On the 15th day of May, 1851, the Select and Common Councils of the city of Allegheny passed the following ordinance (which was duly published in one of the public newspapers, published in said city of Allegheny, within fifteen days from and after its passage as aforesaid; the publication thereof, with the time thereof, was duly proved by oath, as required by the charter of said city; and said oath, together with said ordinance, was duly recorded in the office of the recorder of deeds, in and for the county of Allegheny, aforesaid, on the 30th day of May, 1851, in a separate book kept for that purpose, as required by the charter aforesaid), to wit:—

"Sect. 1. Be it ordained and enacted by the Select and Common Councils of the city of Allegheny, and it is hereby enacted by the authority of the same, That the committee on streets be and they are hereby authorized and directed to invite and receive proposals for the grading and paving of Liberty Street, from East Common to East Lane; Liberty Street, from East Lane to Chestnut Street; Federal Street, from the south line of the North Common to Carrol Street; Pitt Alley, from Strawberry Alley to the North Common; Ohio Street, from Webster Street to Duquesne borough—streets within the said city, and to contract therefor, with the lowest and best bidder or bidders, at their discretion.

"Sect. 2. That for the purpose of defraying the costs and expenses of the said improvements, there be and is hereby levied a special tax, to be equally assessed upon the said streets, in proportion to the feet front on them respectively, comprised, and bounding, and abutting as aforesaid.

"Sect. 3. That, as soon as the cost and expenses of the said improvements shall be fully ascertained, it shall be the duty of the street commissioner to assess and apportion the same among the several lot-holders owning property upon the said streets and alleys, according to the rule above indicated, and thereupon to give notice thereof to the owner or owners, or occupants of the said lots, respectively, or to the agent or guardians of such owners, and also to make return of said assessment or appraisement to the mayor of said city.

"Sect. 4. That it shall be the duty of said mayor, upon the

Digitized by Google

www.libtool.com.cn

return so made, to cause a duplicate copy thereof to be placed in the hands of the collectors of the proper ward, or wards, or of any of the constables of said city, together with his, the said mayor's, warrant for the collection of the same; and it shall be the duty of the said collectors or constables, on the receipt of said duplicate and warrant, to collect forthwith the amount of said special tax from the persons charged therewith, and, in case of any default made in the payment thereof, to take such measures for the enforcement of the same as are authorized by law to be employed in regard to any tax or taxes assessed by said city.

"Sect. 5. That so much of any ordinance, or ordinances, as may conflict with, or be supplied by, the provisions of the foregoing, be and they are hereby repealed."

In pursuance of the foregoing ordinance, Ohio Street was graded and paved from Webster Street to Duquesne borough. (Said Ohio Street being within the corporate limits of said city of Allegheny, and being a street, or public highway, laid out by the state on the laying out of the town of Allegheny, to wit, in 1786.) The cost and expenses of grading and paving Ohio Street, were equally assessed on the feet front bounding and abutting on that street; and according to the assessment so made, there was assessed on the piece of property, described in the above writ of *scire facias*, the sum of $135.64. Demand of the amount was made on Charles B. Scully, the agent of the defendants (they, the defendants, not residing in the county of Allegheny), and owners of the property described in said writ of *scire facias*, by S. Tyler, the street commissioner of the city of Allegheny, on the 16th of September, 1852. The amount not being paid, on the 27th of December, 1852, S. Tyler, the street commissioner aforesaid, filed a statement in the office of the prothonotary of the Court of Common Pleas of Allegheny county, to No. 208 of December Term, 1852, headed "Ohio Street," and setting forth, among other things, the names of the owners, viz., the defendants, of the piece of property described in the said writ of *scire facias*, and, firstly, described in said statement, the amount of the costs and expenses for which the piece of property is liable, and a description of the said piece of property sufficient to identify it, the ward in which it is, and the number of feet it fronts and abuts on said Ohio Street, graded and paved as aforesaid, and the date of the demand of the amount the said piece of property is liable, and on whom demand was made—of the truth of which facts the said street commissioner made oath before one of the aldermen of the city of Allegheny, on the 27th of December, 1852, and on the same day filed the statement, with his said affidavit annexed to said statement, in the office of the prothonotary of the Court of Common Pleas of said county. The said *scire facias* issued December 31, 1852. If the Court

Digitized by Google

www.libtool.com.cn

should be of opinion, from this state of facts, that the plaintiffs are entitled to recover, then judgment to be entered in their favour for the sum of $135.64, with interest from September 16, 1852, with costs; otherwise judgment for defendants, with costs. The right to a writ of error reserved to the parties, plaintiffs and defendants.

The Court entered judgment on the case stated in favour of the plaintiffs. Whereupon the defendant removed the record to this Court, and assigned the entry of said judgment for error.

G. P. Hamilton, for plaintiffs in error, cited 2 *Kent's Com.* 332; 9 *Harris* 168; *Const. Penna.* 4 sect. 7 art.; 6 *Whart.* 4; 3 *Watts* 92.

Geyer, for defendants in error, cited 3 *Watts* 296–224; 1 *Harris* 104–117; 3 *Id.* 245; 2 *Barr* 216–224; 9 *Leg. Int.* 102; 1 *John.* 77; 8 *Wend.* 263; *P. L.* 1851, 372; *Id.* 1852, 304.

The opinion of the Court was delivered by

WOODWARD, J.—The proceedings of the city of Allegheny to levy the tax in question appear to have been in accordance with the Act of Assembly of 5th April, 1849, as modified by the 3d section of the Act of 8th April, 1851, *P. L.* 372, and by the 3d section of the Act of 30th March, 1852, *P. L.* 205.

The only question is upon the constitutionality of that legislation; and in view of the course of decision which prevails in this Court, as indicated especially in McMasters *v.* The Commonwealth, 3 *Watts* 292, Kirby *v.* Shaw, 7 *Harris* 258, and Sharpless *v.* The City of Philadelphia, 9 *Harris* 147, it seems strange that such a question should have been thought worth submitting. From the principles recognised in these cases it must be apparent to the most careless reader, that the exercise of the taxing power by the legislature must become wanton and unjust—be so grossly perverted as to lose the character of a legislative function—before the judiciary will feel themselves entitled to interpose on constitutional grounds. To arrest the legislation of a free people, especially in reference to burthens self-imposed for the common good, is to restrain the popular sovereignty, and should have clear warrant in the letter of the fundamental law. The legislation complained of here is of the character of much that has prevailed in Pennsylvania without complaint; which has been often sanctioned by judicial tribunals; and which is made indispensable by the growth and prosperity of towns and cities. It is a fair and legitimate mode of taxation, because it imposes the burthens exactly where the benefits are conferred, and its constitutionality is unquestionable.

The judgment is affirmed.

Digitized by Google

www.libtool.com.cn

Waters *versus* Hixenbaugh's Administrators.

A party having a legal claim upon another for work done, wagered the amount with his debtor on the event of an approaching election, who gave his note for double the amount of his indebtedness, to be paid to his creditor upon the success of the candidate named. The debtor won the bet, and the creditor brought *assumpsit* for his original cause of action. *Held*, that he was entitled to recover.

A bet upon an election, regarded as a contract, is totally void, where there has been no deposit of the thing bet.

ERROR to the Common Pleas of *Greene county*.

This was an action of *assumpsit* brought by plaintiff, who declared, 1st, For work and labour done; 2d, Money paid, laid out, &c.; 3d, Money had and received; and 4th, Account stated. To which defendant pleaded *non assumpsit* and the Statute of Limitations.

The plaintiff and defendant's intestate had some dealings together, the plaintiff having done harvest work for defendant; and upon a settlement, the latter was found indebted to the plaintiff, in the fall of 1851, just before the election, $5.68, and gave his note to plaintiff for double that sum, payable when W. F. Johnston was re-elected governor of Pennsylvania. A verdict was rendered *pro forma* for plaintiff by consent, for $6.80, but judgment to be entered for defendant, notwithstanding the verdict, if the Court should be of opinion that the above note given to the plaintiff under the circumstances, was a bar to the plaintiff's recovery.

June 15. The Court gave judgment for defendant.

Dorney and *Rowe*, for plaintiff in error.—By the Act of March 24, 1817, wagering or betting upon the event of an election is prohibited, and all contracts, &c., founded thereon are declared null and void. Under this Act judgment should have been for plaintiff. The Act should be so construed as to suppress the evil. Money lost and paid over cannot be recovered back—the statute renders the contract void: McCoy *v.* McCoy, 6 *W. & Ser.* 485; and see Muret *v.* Stokes, 4 *T. R.* 661.

But in this case the work was done on a legal contract of hiring; the note could not operate as a release, for there was no consideration; nor as a satisfaction, for it had no legal value. The parties stood as before it was given.

The plaintiff does not require the aid of the illegal transaction to entitle him to recover: Swan *v.* Scott, 11 *Ser. & R.* 164; 10 *Barr* 170; 2 *Harris* 18. His cause of action for work and labour done is complete without it; and nothing short of actual payment should be held to extinguish it.

Digitized by Google

www.libtool.com.cn

Sayers, for defendant in error.—The case comes within the Act of 2d July, 1839. The overseers of the poor can recover *the amount* so bet. A "thing of value" was staked by the defendant on the event of an election, and he won. Could not the whole sum have been recovered of him by the overseers within the two years limited by the Act? Plaintiff brought suit within the two years—when the whole belonged to the overseers, can he recover?

The opinion of the Court was delivered by

LOWRIE, J.—In this case we have nothing to do with the penalties which the parties have incurred by their illegal betting. Let them answer for that in the proper manner. Having settled their accounts, the defendant was found indebted to the plaintiff $5.68, and proposed with him to bet that amount on the approaching general election, which was accepted, and therefore he gave to the other his note for double the amount, payable if the election should result in a specified way. The Common Pleas were of opinion that this betting of the debt barred the right of action for it. But in one event this is enforcing the bet; and in another it is letting the losing better win it. The principle is, that the contract of betting is totally void as a mere contract, where there has been no deposit of the thing bet. Then the parties stand to each other as if no bet had been made. Neither one has any right or interest in the thing bet by the other. The Commonwealth may claim it from him, who, without the bet, had the right to it, but the other party cannot. He can take no benefit under legal sanction by his illegal act.

November 15, 1855. This cause came on for hearing at the present term, on a writ of error to the judgment of the Court of Common Pleas of Greene county, and was argued by counsel, and now it is considered and adjudged that there is error in the said judgment of the Common Pleas, and it is therefore reversed and set aside, and it is now here further considered and adjudged that the plaintiff recover of the defendant six dollars and eighty cents, with interest from the 15th of June, 1855, and costs of suit, and the record is remitted to the Common Pleas, that this judgment may be carried into effect.

Digitized by Google

www.libtool.com.cn

Clark *et al. versus* Freeman.

Proof of the handwriting of the maker of a promissory note, and the testimony of a witness that he had corresponded with "Bradner and Co. of New York," and from his knowledge of their signatures thus acquired, his opinion was that the endorsement was made by "Bradner & Co.," was sufficient to let the note go to the jury.

The execution of the note, possession of it by the plaintiff, evidence of the handwriting of the endorser, in the absence of evidence of any other *firm of the same name*, is *primâ facie* evidence of identity.

ERROR to the Common Pleas of *McKean county*.

This action was brought for the recovery of a promissory note, dated 31st May, 1850, for $728.72, signed by defendant, payable to the order of Bradner & Co., and endorsed, or said to be endorsed, by the payees.

Hamlin (a witness produced by plaintiff) deposed that he knew the parties to the suit, and had had correspondence with Bradner & Co., of New York—had addressed them letters, and had received replies; and, being shown the notes, said, "from the knowledge I have of the signature of Bradner & Co., acquired by the correspondence aforesaid, my opinion is that the endorsement of Bradner & Co., upon the back of the note, was entered thereon by Bradner & Co." The Court admitted the note, and defendant excepted.

Johnson and *Brown*, for plaintiff in error, cited 1 *Greenl. Evidence*, § 577; 2 *Starkie* 373. The identity of the endorsers with Bradner & Co. is not established.

Witmore, for defendant in error, cited 1 *Greenleaf*, 3d ed., § 575.

The opinion of the Court was delivered by

LEWIS, C. J.—This is an action on a promissory note, drawn in favour of "Bradner & Co." or order, and purporting to bear their endorsement. The Court admitted the note in evidence after proof of the handwriting of the makers, and evidence given by B. D. Hamlin that he had corrresponded with Bradner & Co., of New York; and, from his knowledge of their signature, thus acquired, his opinion was that the endorsement was entered by "Bradner & Co." The admission of the note in evidence was the error assigned.

The execution of the note was an admission of the existence of the payees therein named; and the possession of it by the plaintiff, with Mr. Hamlin's testimony to the endorsement by

Digitized by Google

"Bradner & Co.," in the absence of evidence of any other firm of that name, was *primâ facie* evidence that the endorsement was made by the proper parties. This was sufficient to justify the Court in admitting the note to be read to the jury.

Judgment affirmed.

Zimmerly *versus* Road Commissioners.

In a proceeding under the Act of 26th of March, 1846, "to amend the road laws of Erie county," the commissioners are authorized to challenge four jurors for "*interest* or other *cause*." It is error to permit such challenge to be made peremptorily, and without showing such good and sufficient cause as would disqualify the juror.

The clause in the proviso of the 9th section of the said Act, which provides that the commissioners "may substitute others" in the place of the jurors rejected, is satisfied when they cause new jurors to be summoned by the magistrate. The commissioners are not permitted by the Act to name and select the substitutes.

The Act of 1810, which makes the decision of the Common Pleas final on a *certiorari*, does not apply to cases arising under special statutes.

CERTIORARI to the Common Pleas of *Erie county*.

This was a certiorari to remove the proceedings in a case under the Act of 26th March, 1846, "to amend the road laws of Erie county, and for other purposes," which were commenced before a justice of the peace. The complaint set forth that Mary E. Zimmerly was the owner in fee of a certain lot in the town of Erie, Mill Creek township; that the road commissioners of said township had laid out and opened a street, taking 25 feet in width and 40 rods in length off the said lot, to the damage of complainant $100. The justice issued a summons for the road commissioners, and summoned six jurors to appear at the same time, to hear and determine the case. The parties and jurors appeared on the day appointed, and the counsel of the defendants claimed the right to challenge peremptorily, and strike off four of the jurors and substitute others in their place, which the justice decided he had the right to do; and four of them were struck off accordingly and others substituted; to all which the counsel of plaintiff objected, and protested against the proceedings for allowing the same without any cause shown of any kind, on the part of the defendants for the rejection of the said jurors or the substitution of others; and objected to the swearing of the jury thus constituted, four of whom were from the said Mill Creek township.

A majority of the said jury found a verdict of "no damages," upon which judgment for costs was entered against plaintiff, who took a *certiorari* to the Common Pleas, where the judgment of the

Digitized by Google

www.libtool.com.cn

justice was affirmed—whence the case was removed into this Court.

Marshall, for plaintiff in error.—The proviso of the 9th section of the Act of 1846, gives the right to the commissioners to challenge a juror on the ground of "interest or other cause." The right of peremptory challenge is not given, and its exercise in this case is clearly error.

To give one party to a controversy the uncontrolled right to select a majority of the jury is so palpably wrong, that the legislature cannot have intended anything of the kind. The proviso would accord with reason and common sense by substituting the words "*the said justice*" immediately before "substitute."

Lane and *Thompson*, for defendant.—The letter of the law leaves it at the option of the commissioners to reject or not any of the jurors chosen by the justice, up to the number four. The right is absolute, and subject to no condition; no other party is constituted judge of the *cause* of rejection. The right to substitute is connected with the right to reject, and is equally certain.

The argument of the plaintiff in error may be good against the law itself, but not as to the construction given it by the Court.

The opinion of the Court was delivered by

BLACK, J.—This is a case under the peculiar road law of Erie county. The plaintiffs demanded compensation for land taken to make a road, and to that end they commenced a proceeding against the road commissioners before a justice, whose duty it became to call a jury of six persons to try the cause. The commissioners claimed the right to challenge or set aside four of the jurors peremptorily, and without assigning any cause whatever. The justice permitted this to be done; and not this only, but he allowed the commissioners of the township to name the persons who should be substituted in the place of those who were so stricken off.

It is contrary to every principle of right and justice that, in a civil proceeding, the power should be given to one party and withheld from the other, of naming the jury to try the cause. No such rule has ever been established in any country since the trial by jury was first instituted. A person accused of certain high criminal offences may challenge a limited number, while the prosecuting officer has no such privilege; but even the tenderness of law for life and liberty has not yet induced any legislation to permit a party so situated to name the persons who shall fill the place of the jurors challenged. It is doubtful if such a statute as this was construed to be, by the justice and the court below, would not be unconstitutional and void. No man's property can be taken for public use without paying, or providing for the payment of

Digitized by Google

adequate compensation. And who will say that a compensation is provided for by a law which compels the owner to take whatever may be awarded by a jury of his adversaries' choosing?

It is argued that the road commissioners are not in any proper sense parties to this proceeding. Then there are no parties, for there are no other names on the record, and nobody else was summoned. It is true that the damages recovered by the complainant will not have to be paid out of their private pockets. Neither does an administrator pay the debt of his decedent, nor is a bank officer personally responsible for a wrong committed by his corporation. Yet if they were permitted to choose juries in their own cases, no one would suspect them of exercising the privilege with very much impartiality. The road commissioners are chosen by the townships, represent the people of the township, and are charged with the duty of managing the financial affairs of the township. Their relation with the township, to say nothing of their personal interest as tax-payers, is as close as that of attorney and client, and very much of the same nature. Our knowledge of mankind will not permit us to believe that these officers could be engaged in a controversy like this, against a claim which they have decided to be wrong, without having some feeling. Most men would have a great deal. Naturally, and almost necessarily, they would exercise the power claimed for the purpose of rejecting impartial jurors, and substituting in their places others whom they believed to be favourable to themselves. Some proof of this is furnished by the record before us, which shows that though the jurors originally summoned were from other parts of the county, and had at least no interest in the cause, every substituted juror was an inhabitant and tax-payer of Mill Creek township.

These are reasons *a priori* which would make us hesitate about yielding such a power to the defendants, even if the letter of the statute should seem at first view to warrant it. But this Act requires no straining to make it accord with the principles of natural justice. The commissioners are authorized to *reject* (a word which we understand as synonymous with *challenge*) four jurors or any less number; but not peremptorily. The Act expressly says that it can be done only "*for interest or other cause.*" The right to reject depends on the existence of interest or other cause, and therefore the latter must be proved before the former can be exercised. The words "other cause," mean such good ground of challenge as will be sufficient to disqualify the juror. The commissioners may be said to "substitute others" in place of those rejected, when they cause new jurors to be summoned by the magistrate. The Act does not say that the substitutes shall be *selected* and *named* by the commissioners.

We are of opinion that the Act of 1810, which makes the decision of the Common Pleas final in a *certiorari*, does not apply to

Digitized by Google

[Zimmerly v. Road Commissioners.]

www.libtool.com.cn

a case like this, which arises under a special statute giving to justices an extraordinary jurisdiction.

The motion to quash the writ is overruled, and the proceedings before the justice are reversed and set aside, with directions that the justice call the parties before him, and proceed *de novo* according to law.

Clark *versus* Smith.

A parol contract, which, if valid and reduced to writing, might be construed to give a life estate to the grantee, remainder in fee to his wife, being unwritten, is within the Statute of Frauds, and has only the force and effect of a lease at will.

Where no certain term is agreed upon, tenancies at will are now construed to be tenancies from year to year; and by the Act of 1772, the like notice to quit must be given to such tenants, as in estates for years.

A tenancy at will exists in Pennsylvania only in name, and is in effect a tenancy from year to year.

Where a tenant under a parol agreement is in possession of a close, and no certain term is stipulated, the landlord has not such a possession, before entry upon the premises, as will entitle him to maintain an action of trespass *quare clausum fregit*.

ERROR to the Common Pleas of *Warren county*.

This was an action of trespass *quare clausum fregit*.

The plaintiff showed title to the close in himself, and possession till about three years previously to the commencement of this suit, when he told his son-in-law, Donegan, that he might go on the land and live—that he would help him, and would will it to his wife. This was in the winter, and, in the spring, the son-in-law moved upon the land. The plaintiff built the cellar, and assisted in putting up a barn. Donegan paid taxes and remained in possession, but never paid anything for the land.

The defendant, C. Smith, was the road-master in 1852, and, without authority, removed the road through the premises, from two to four rods east of its former site, for a distance of twenty rods, and made a turnpike road through the plaintiff's improvement occupied by his son-in-law; and this, with other matters set out in the declaration, constituted the trespass complained of.

The only question in the case was whether the owner of land, not in actual possession before entry upon his tenant at will, could maintain trespass.

Brown, for plaintiff in error.—The possession of tenant at will may be considered either in the lessor or lessee, and, therefore, either may maintain trespass: *Co. Litt.* 57 a, note.

Donegan is nothing but a tenant at will. A parol gift is re-

Digitized by Google

garded as a purchase, and the donee, like any other purchaser, must prove the contract: 7 *Harris* 461. No contract of sale is pretended. He was in possession by license from plaintiff. It has not the requisites enumerated in Moore *v.* Small, and Wood *v.* Farmare, 10 *Watts* 195. The counsel further cited Wrack *v.* Sorber, 2 *Wh.* 390; Eckert *v.* Mace, 8 *P. R.* 364. If Donegan took possession under an expectation or promise that the land would be devised to his wife, he had no other estate than a tenancy at will, and was liable to be dispossessed by plaintiff; but, with the right of entry to secure the emblements after a lease has expired by its own limitation, the lessee is a mere tenant at will: Overdeer *v.* Lewis, 1 *W. & Ser.* 90.

The opinion of the Court was delivered by

Lewis, C. J.—The rule of this Court requires that, "when an error is assigned to the charge of the Court, the part of the charge referred to must be quoted *totidem verbis* in the specification:" 6 *Harris* 578. An assignment that "the Court erred in the answer" to a particular point, without specifying either the point itself, or the part of the answer complained of, is not a specification of error according to the rule. In this case all the assignments of error, except the first, are of this vague character, and we pass them without further notice, and proceed to consider the only error properly assigned.

This is an action of trespass *quare clausum fregit*, brought by Clark against Smith, for an injury to the freehold. The land, at the time of the injury, was in possession of Donegan, the son-in-law of Clark, under a parol contract, which, if valid, might be construed to give a life estate to Donegan, remainder in fee simple to his wife. It may be conceded that, under the statute of frauds, this contract, being without writing, comes within the provision that such contracts "are to have the effect of a lease at will only." As there was no entry, nor any other act by Clark to terminate the estate of Donegan, his possession and estate continued to the time of the trial in the condition it was in at the time the alleged trespass was committed. There is no doubt that Clark could maintain an action *on the case* for an injury to his freehold; but the question is whether he can maintain the present action of *trespass*. We are aware of the ability with which the affirmative of this proposition has been maintained in Massachusetts, both in regard to estates at will created by the contract of the parties, (Starr *v.* Jackson, 11 *Mass.* 519,) and those created by statute out of a contract which is void because not in writing (Hingham *v.* Sprague, 15 *Pick.* 102.) But we find it laid down in the professional horn-book, without qualification, and without any exception in favour of the lessor of a tenant at will, that the plaintiff must have a property either absolute or temporary in the

Digitized by Google

www.libtool.com.cn

soil, *and actual possession by entry*, to be able to maintain an action of *trespass:* 3 *Bl. Comm.* 210. And Mr. Chitty, in his valuable and carefully prepared work on Pleading, tells us that "there is a material distinction between personal and real property" in this respect, and that "in the first case the general property draws to it the possession sufficiently to enable the owner to support trespass, though he has never been in possession; but, in the case of land and other real property, there is *no such constructive possession*, and, unless the plaintiff had the *actual possession* at the time when the injury was committed, he cannot, before entry, support this action:" 1 *Chitty's Pleading* 177. When there is no actual possession in another, the owner is of course to be deemed in actual possession: 3 *Ser. & R.* 513. But, "before *entry* and *actual* possession," a parson cannot maintain trespass, though he hath the freehold in law, as a parson before induction, or a conusee of a fine, or a purchaser by lease and release, or a bargainee, or an heir, or a devisee, or a lessee for years, or a disseisee, for an injury after the disseisin: Liford's Case, 11 *Coke* 51; Lutwick *v.* Milton, *Cro. Jac.* 604; 1 *Chitty's Pl.* 177, and cases there cited. The principle is stated in general terms, without any exception in favour of a lessor at will. But on the other hand we are told that a tenant at will, as well as a tenant at sufferance, and for years, may himself maintain this action: 2 *Roll. Abr.* 551; *Sid.* 347; 1 *Chitty's Pl.* 176. In Pennsylvania it is stated that there is no *constructive* possession in such a case; 3 *Ser. & R.* 517; and, in terms still more emphatic, it is declared that the owner of land can "*in no case* maintain an action of trespass, for a trespass committed upon it whilst it is in the possession of another:" Greber *v.* Kleckner, 2 *Barr* 291. In New York, the case of Campbell *v.* Arnold, 1 *Johns.* 511, holds the same general language. That case appears to have been that of a possession in the tenant at will, and it was held that the landlord could not maintain the action. Why should a lessor at will be made an exception to the rule? The only reasons assigned are, first, that the possession of the tenant is the possession of the landlord, and second, that the landlord's right to take immediate possession is equal to actual possession. There is nothing substantial in the first reason, because the authorities expressly declare that a *constructive* possession is not sufficient to maintain trespass, and because the argument proves entirely too much. The possession of every tenant, whether for years or at will, is by construction the possession of the lessor; and, therefore, the landlord might, upon this principle, maintain trespass in all cases without regard to the actual possession of his tenant, or the duration of his term. The second reason is equally objectionable, because it would sustain trespass at the suit of a disseisee, and every other person who had a right of entry. Besides, the lessor at

Digitized by Google

will has not the absolute right, which has been supposed, to dispossess his tenant without notice, and without giving him a reasonable time to take the emblements, and remove his other property: 4 *Kent's Com.* 111; 17 *Mass.* 287; 1 *Pick.* 49. A tenant at will, in the strict sense of the term, may, in some cases, still exist in England: 4 *Taunt.* 128; 14 *Mees. & Wels.* 675; but even there it was said by WILMOT, J., that "they have been found so inconvenient that they exist only nominally." Timmins *v.* Rowhson, 3 *Burrow* 1603. A tenant by copyhold is strictly a tenant at will, but we all know that a regard for human rights, and for the interests of agriculture, has raised this tenure into a permanent interest in the soil, which the lord cannot wantonly disregard at his pleasure. The same causes, operating in this country with greater energy, have performed the same services for the tenant at will. Chancellor KENT expressed but a simple historical fact when he stated that "estates at will, in the strict sense, have become almost extinguished by judicial decisions," and that where no certain term is agreed on, they are construed to be tenants *from year to year*, and each party is bound to give the other reasonable notice of an intention to terminate the estate: 4 *Kent's Com.* 111, 112. Our statute of 1772 puts tenants at will on precisely the same footing as tenants for years, in regard to the landlord's duty to give notice to quit: *Dunlop* 111. And our judicial learning is evidently in the same direction. Judge DUNCAN declares that "*it is agreed* that a tenancy at will *exists* only *nominally*, and is *in fact* a tenancy from year to year:" Logan *v.* Herron, 8 *Ser. & R.* 473. Even the tenancy at will, created by the statutes of frauds and perjuries out of a void parol gift or sale, has, in the country from which we derive both the statute itself and its construction, been expressly decided to be a tenancy from year to year: Clayton *v.* Blakey, 8 *T. R.* 3. This construction accords with our usages, and with the spirit of our institutions. It is most conducive to the interests of all parties to the contract, and we hold it to be the law of Pennsylvania. We are therefore of opinion that the plaintiff below had not such a possession of the premises as entitled him before entry to maintain trespass *quare clausum fregit.*

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Clarke *versus* Porter.

By the 4th section of the Bankrupt Act, a discharge and certificate is a full and ample discharge of all debts provable under it. And by the 5th section all debts due at a future day, and all uncertain and contingent demands, are provable.

Where the defendant in a joint obligation had been discharged under the bankrupt law, and pleaded his discharge in bar to the joint claim, which was sustained: and some years afterwards his co-obligor, the plaintiff, paid the joint obligation, and brought suit against defendant for contribution, to which he pleaded his discharge in bankruptcy: *Held*, that the claim of contribution was contingent, and within the Act, and that the plea was good.

Error to the Common Pleas of *Beaver county*.

Clarke, Porter, Jones and others, purchased a lot and gave three bonds to Irvine, the vendor, for the purchase-money for $325.33 each, payable August 14th, 1838, '39, and '40. In 1843, suit was brought against the obligors, and Porter pleaded his discharge under the Bankrupt Act, and a *nolle prosequi* was entered as to him by the plaintiff on the 4th June, 1844. The suit was twice tried, and ultimately compromised on the 16th November, 1847, by confessing judgment for $333.33; and several of the obligors having, in the mean time, become insolvent, Clarke paid, in 1849, $265.64 of the said judgment. And this suit was brought by him to recover contribution from Porter, as co-obligor. To which Porter put in the plea of *non assumpsit*, and discharge under the Bankrupt Act.

Fetterman, for plaintiff.—Clarke had no demand against Porter till he had paid the money, and this was after his discharge in bankruptcy, and therefore he could not come in and prove the debt: see Bankrupt Act, 1841, 5th section. See 2 *Barr* 345; Cake *v.* Lewis, 8 *Barr* 493; Gearhart *v.* Jordan, 1 *Jones* 332; Comfort *v.* Eisenbise, 1 *Jones* 13.

Wilson, for defendant.—The cases cited by plaintiff are overruled in Fulwood *v.* Bushfield, 2 *Harris* 90; Mace *v.* Wells, 7 *How.* 272; Stone *v.* Miller, 4 *Harris* 457.

The opinion of the Court was delivered by

Lewis, C. J.—On the 14th August, 1837, William Irvine held bonds against John Clarke, David Porter and others, the first of which was payable 14th August, 1838, the second 14th August, 1839, and the third 14th August, 1840. In an action brought by Irvine, Porter pleaded his discharge under the bankrupt law, and on the 14th November, 1843, a *nolle prosequi* was entered as to

Digitized by Google

www.libtool.com.cn

Porter, and judgment was afterwards confessed by the other defendants in the suit. In 1849, Clarke paid more than his proportion of the debt, and in 1850 brought this action for contribution. The question is, whether Porter's discharge, under the bankrupt law, is a defence. Notwithstanding the cases of McMillen *v.* Bank of Penn Township, 2 *Barr* 348, and Cake *v.* Lewis, 8 *Barr* 493, there is no room for doubt on the subject. By the 4th section of the Bankrupt Act, a discharge and certificate is a full and complete discharge of all debts provable under it; and, by the 5th section, all debts not due and payable until a future day, and all uncertain or contingent demands, are provable, to be allowed when they become absolute. Clarke had not paid the money at the time of the discharge, but he was liable to pay it, and he had therefore "a contingent demand," which was provable, and from which Porter is therefore discharged. If authority be required for this construction of the Act of Congress, we have it in the case of Mace *v.* Wells, 7 *How.* 273, decided by the Supreme Court of the United States. As this is a question of ultimate federal cognisance, and no conflict of jurisdiction is involved, the decision of that Court is conclusive. Its authority on the point in question has been fully acquiesced in by this Court in the subsequent cases of Fulwood *v.* Bushfield, 2 *Harris* 90, and Stone *v.* Miller, 4 *Harris* 450.

Judgment affirmed.

Shinn *versus* Holmes.

The decree of the register admitting a will to probate, whether expressed in the form of an adjudication, or implied by the granting of letters testamentary, is conclusive as to the personalty, and *prima facie* evidence of its execution as to the real estate.

The probate cannot be invalidated in ejectment by looking into the evidence on which it was founded.

Where a testator introduces a devising clause by words which manifest a purpose to dispose of his entire estate, and there is no devise over, nor any language indicating an intention to give less, the devisee will take a fee simple.

Where the owner's right of entry has been tolled by a descent cast, he may release his right of action by an instrument which contains no words of inheritance; the release in such case operating by way of *mitter le droit*, without any words of limitation.

The Act of 11th April, 1848, makes no change in the mode by which a married woman may convey or release her interest in real estate, but only as to the manner in which her husband may transfer or encumber her property.

Error to the District Court of *Allegheny county*.

This was an amicable action of debt on a bond, in which Thomas Holmes is plaintiff, and William M. Shinn defendant. The parties agreed upon a case stated, with liberty to either party to sue out a writ of error. The case stated, comprising copies of many papers and documents, is too voluminous to reprint entire. The leading facts were as follows: The bond in suit was given by defendant to plaintiff to secure the consideration of a tract of

Digitized by Google

www.libtool.com.cn

land in Ross township, Allegheny county, conveyed by plaintiff and wife to defendant by deed, dated the 1st of April, 1853.

The land was conveyed to Holmes by the administrators of John McVicker, by deed of the 1st of July, 1850, under proceedings in the Orphans' Court. John McVicker claimed the premises under the will of his father, William McVicker, dated the 19th of May, 1827, and registered and proved on the 25th July of the same year. This will contained the following clauses: "And as to such worldly property God has seen meet to bless me with in this life, I give and dispose of in the following manner, viz., first of all it is my will, and I order that all my just debts and funeral expenses be duly paid and settled as soon as convenient after my decease, and as touching all the rest of my estate, real or personal, I do give and dispose in the following manner, viz.," then, after making bequests to his daughters Jane and Eliza, the will proceeds: "I allow to my son John the farm with its appurtenances, also my bed, with the dining-table, and my family Bible, and my gun: also one year's schooling, to be paid out of the movables of the place. I allow, if my children choose to live together on the place, that the log building now raised, near the other house, shall be repaired for them to live in."

In the probate of this will, it was recited that James McVicker and William Hutchman, the two subscribing witnesses, appeared and were sworn, &c.

The persons named in the probate were the executors named in the will, and the subscribing witnesses were William Caskey and David Easdell.

On the 11th July, 1850, Jane McVicker, who was intermarried with ——— Walker, and Elizabeth, intermarried with James Guiten, executed an instrument under seal, which, after reciting the sale of the farm by the administrators of John McVicker to Holmes and others, proceeded as follows: "Now, know all men by these presents, that we Jane Walker, and James Guiten and Elizabeth his wife, in consideration of $5 to us in hand paid, the receipt whereof is hereby acknowledged, do release, convey, and confirm the said lots severally to the said purchasers, and lot No. 9 to such person or persons as the said administrators may designate, by any conveyance or conveyances duly executed under authority of the Orphans' Court of the county aforesaid."

This release was signed by Elizabeth and her husband, and separately acknowledged by her. Jane's husband did not join in the conveyance, and it was acknowledged by her in the common form.

Valuable improvements and buildings had been made on the premises, both before and since the death of John McVicker; the sisters living in the mean time near the premises, and one of them within sight of the place.

The purchaser objected to the payment of the purchase-money, on the ground that the will only gave to John a life estate in the

Digitized by Google

www.libtool.com.cn

land, and that the release was so defective in form and substance as not to cure the defects.

The Court entered a judgment on the case stated for plaintiff.

Shinn, for plaintiff in error.
Craft, for defendant in error.

The opinion of the Court was delivered by

Lewis, J.—The decree of the register admitting a will to probate, whether expressed in the form of an adjudication, or implied by his official act of granting letters testamentary, is *conclusive* in regard to the *personalty*, and is *primâ facie* evidence of its execution in controversies respecting the *real estate*: 7 *Watts* 58–9. In ejectment, the probate cannot be invalidated by looking into the evidence on which the decree was founded. This can only be done by the introduction of testimony tending to show that the will was not executed at all, or that it was signed under circumstances which render the instrument invalid. These principles were affirmed in Holliday *v.* Ward, 7 *Harris* 485. The will in this case was therefore sufficiently established by the decree admitting it to probate, notwithstanding that it was founded on the testimony of the executors.

Where a testator introduces a devising clause, by the declaration that, "touching *all* the rest of my estate, real or personal, I do give and dispose in the following manner," and there is no devise over, nor any language in the will indicating an intention to give less than a fee simple, the devisee takes nothing less. This principle is settled by the cases of Schriver *v.* Myer, 7 *Harris* 87, and Wood *v.* Hill, 7 *Harris* 513. John M'Vicker, therefore, took a fee simple under the will of his father.

Where a man enters upon a tract of land claiming the fee simple, making valuable improvements, and exercising all the usual acts of absolute ownership, and dies in possession, and his administrators make sale of it, under a decree of the Orphans' Court, to one who takes possession under such title, the rightful owner is thereby *disseised*, and his entry *tolled by the descent cast*. In such a case, he may release his right of action without words of inheritance. The release enures by way of *mitter le droit*, and passes all the right of the releasor without words of limitation: 4 *Cruise's Dig.* 99.

Where a married woman unites with her husband in conveying or releasing her claim to real estate, and makes the usual acknowledgment, on a separate examination before a competent officer, the instrument binds her since the Act of 11th April, 1848, as much as it did before. The 6th section of that Act, requiring her *previous* consent, acknowledged before a judge of the Common Pleas, applies only to cases where her husband, by her authority, undertakes to transfer or encumber her estate. It has no application to conveyances made by herself. The 10th section

Digitized by Google

www.libtool.com.cn

of the Act of 9th April, 1849, was unnecessary. It merely affirms a principle of law which existed before its enactment.

The result is that the title which Holmes is to convey to Shinn is good, and that the judgment for the purchase-money is correct.

Judgment affirmed.

Truitt Brothers & Company *versus* Ludwig, Kneedler & Company.

A judgment confessed on an amicable action entered before a justice of the peace for a sum exceeding $100, is good without the *personal* appearance of the plaintiff. It is sufficient if he appear by agent.

An execution is intended, not to secure, but to enforce payment of a debt.

Where an execution-creditor after making a levy on a stock of goods, takes a bond with security for the amount of the debt, conditioned for its payment in several instalments at future periods, and that the goods levied shall not be removed without consent of the sheriff, and then stays proceedings upon his execution, leaving the debtor in possession of the goods, and permitting him to buy, sell, and do business with them as before, the lien of the levy is postponed in favour of a subsequent execution-creditor, who seizes the goods before actual possession taken under the first execution.

An *alias fi. fa.* placed in the sheriff's hands by the first execution-creditor, before the first instalment on his bond becomes due, and after the goods had been seized on a subsequent execution, will not revive the lien of the first execution, or create a new one having priority over the subsequent execution-creditor.

By accepting a bond with security payable in instalments for the debt, and staying execution, the execution-creditor parts with the right of seizing the goods before the maturity of the debt under the new contract.

If an execution-creditor, after levy, leaves the goods in the hands of the debtor, who disposes of them, this is a satisfaction of his execution to the value of the goods disposed of.

Error to the Common Pleas of *Cambria county*.

On the 18th April, 1853, Truitt & Brothers and the defendant, Muikerheide, voluntarily appeared before a justice of the peace in said county, the plaintiffs by their attorney, A. Kopelin, Esq., and the defendant in person; and judgment was entered by the justice on the confession of the defendant on one claim for $270.90, and on another claim for $202.

On the 3d May, transcripts of both judgments were entered in the Common Pleas, Nos. 179 and 180, June Term, 1853. On the 2d May, execution was issued and put into the hands of a constable, who returned them endorsed "Levy made as per schedule annexed, May 3, 1853. May 21, 1853, goods sold by sheriff Durbin."

On the 19th January, Ludwig, Kneedler & Co. obtained judgment in the Common Pleas against Muikerheide for $1499.52, with interest from 20th January, 1853. Upon this judgment a *fi. fa.* issued to No. 27, March Term, 1853; and on the 25th January, four days after the receipt of the first, the sheriff re-

Digitized by Google

www.liptool.com.cn

ceived a second *fi. fa.* against the same defendant, in favour of Kneedler & Feather; and, on the 26th January, 1853, the sheriff went to defendant's store in Johnstown, and by virtue of the said writs "levied on his entire stock of goods," Hutchinson, the attorney in both cases, making an inventory thereof. After this the said defendant and George W. Easly, on the same day, 26th January, 1853, executed a bond to the sheriff in the sum of $1525.69 (interest to be added from January 20, 1853), the condition of which was (after reciting the said writs and payment of $100 on account thereof), that "should the said J. Muikerheide pay one-half of the said sum of $1525.69, on or before the 26th April next, and the balance on or before the 26th June, 1853, with costs, and not remove the said goods without the consent of said Durbin; then this bond to be void, &c. The $100 was paid on the same day on the writs, and on the 7th March, 1853, both writs were stayed by Hutchinson the attorney.

On one of the judgments, No. 156, December Term, 1853, an *alias fi. fa.* was issued to June Term, and placed in the hands of the sheriff, 15th March, 1853, and remained unexecuted till May 4, when discovering the levy of the constable on the day before (the 3d May), Easly, the co-obligor in the bond, procured the sheriff's deputy, but with due notice of the prior levy of the constable, to seize and sell the goods of defendant; and on the 11th of the same month the sheriff returned the writ "money made to the amount of $1110.57."

During the interval between the issuing of the first writ on the 19th January, until the 4th May, 1853, when the deputy sheriff levied under the *alias*, a period of nearly five months, the defendant was permitted to retain the possession of the goods, buying, selling, and doing business as he had done theretofore.

An auditor was appointed to distribute the money arising from the sale—who, on the 7th September, 1853, reported "that the proceeds of the sheriff's sale ought to be applied to the payment of the judgment of Ludwig, Kneedler & Co. *v.* G. H. Muikerheide, which was confirmed by the Court, December 5, 1853.

Kopelin, for Truitt & Co.—The effect of the bond was to discharge the judgment which it secures, and plaintiffs can have recourse to the sheriff and his sureties: 12 *Ser. & R.* 41; 5 *Barr* 517; *Tr. & Haley's Prac.* vol. 1, 778.

The party having the fund in his own hands cannot relinquish it to the injury of a third person. Ludwig & Kneedler may yet sue and recover on the bond.

As respects third persons, a release of a levy on personal property by plaintiff is an extinguishment of the debt. The levy in this case was released by the stay of execution: Duncan *v.* Harris, 17 *Ser. & R.* 466.

Seizing goods in execution to the value of the debt, operates

Digitized by Google

www.hbtool.com.cn

a discharge of the judgment, and this whether sold or not: Hunt *v.* Breading, 12 *Ser. & R.* 87. The object of the bond was *security*, and not the *bonâ fide* one of levy and sale. Ludwig & Kneedler are, therefore, postponed: Commonwealth *v.* Strembach, 3 *Rawle* 341; Weir *v.* Hale, 3 *W. & Ser.* 285; Smith's Appeal, 2 *Barr* 231; 8 *Harris* 46.

If the levy under the first *fi. fa.* was discharged, the *alias* could not avail them; but this issued on the 7th March, 1853, before the first instalment on the bond (26th April) became due, and was therefore void. The object in keeping it passive in the hands of the sheriff, was to keep off other creditors; this the law will not tolerate: Earl's Appeal, 1 *Harris* 46. The object was *lien*, and not sale.

R. L. Johnston, for defendant.—The judgment of Truitt, Brother & Co. was entirely void: Act of Assembly 20th March, 1810; 10 *Watts* 118. The parties *in propria persona* must appear before the justice; an appearance by attorney or agent is insufficient to give jurisdiction: 10 *Watts* 118, Camp *v.* Wood.

The plaintiffs *did not release their levy; nor was there any third person affected*, as the appellees had not obtained their judgment till nearly three months after. The cases cited by the appellants do not aid them; and the issuing of the *alias*, before appellees' judgment was obtained, secured a lien on defendant's goods that could not be shaken. The staying of the original *fi. fa.* injured no one, for no one had acquired rights; and if appellants had gone on to sell on their very suspicious judgment, the *alias* would have taken the money.

The bond did appellants no injury; the sheriff would have sold on the *fi. fa.*, instead of taking the bond, before their rights had accrued.

The opinion of the Court was delivered by

Lewis, C. J.—This is an appeal by Truitt, Brother & Co. from the decree of the Common Pleas awarding the proceeds of sale of personal estate of G. H. Muikerheide to Ludwig, Kneedler & Co. It is objected against the judgments of the appellants that they were confessed before a justice of the peace for sums over $100, without the *personal appearance* of the plaintiffs. The defendant, Muikerheide, appeared voluntarily in person, and plaintiffs appeared by agent. An amicable action was entered by consent. The plaintiffs' demand was on a promissory note, the date and amount of which was stated, and the defendant confessed judgment. In general every person may act in person or by agent, and the Act of Assembly, in regulating proceedings before justices of the peace, recognises this right. It speaks of the parties appearing "either in person or by agent," and in no part of it prohibits an appearance by agent. Indeed such a prohibition might lead to

Digitized by Google

gross injustice. A defendant may be prevented from attending in person either by unavoidable absence on a distant joutney, or by sickness, or other urgent necessity. A plaintiff may be in the same predicament. And in the case of the latter, he so frequently resides at a distance from his debtor, that he is under the necessity of sending his claim to an agent or attorney for collection. To deny him the benefit of his judgment for a just debt, voluntarily confessed by his debtor, would produce extensive mischief, without any compensating advantages. The objection that judgments might be confessed in order to defraud creditors, has nothing substantial in it that does not apply to judgments confessed in the Common Pleas. The 14th section of the Act of 1810, which authorizes judgments by confession before justices of the peace for sums over $100, makes ample provision for investigating them if tainted with fraud. If it shall be made to appear that there is just cause to believe that a judgment was confessed with a view to defraud creditors, it is made the duty of the justice to send a transcript of his proceedings to the Common Pleas for investigation there; so that this method of collecting debts affords no greater facilities for defrauding creditors than any other, while it is attended with the great advantage of being more readily accessible and less expensive to the parties. That it enables a debtor to prefer one creditor over another, in cases where he might be deprived of this right if compelled to travel to a distant seat of justice, is no objection to it. Where an acknowledged right exists, the facilities for exercising it would not be denied. That a person by writing without the service of process and without appearance, cannot confess judgment before a justice of the peace, is manifest from the provisions contained in the 13th section of the Act. That section expressly provides for the issuing of "a summons or *capias*," and for hearing the cause "as in other cases." As the jurisdiction is a limited one, it necessarily followed that a judgment obtained in any other way than in the mode prescribed could not be sustained. Alberti *v.* Dawson, 1 *Binn.* 105, and Camp *v.* Wood, 10 *Watts* 113, were determined on this principle. They relate to judgments confessed by warrants of attorney without appearance, and have no relation to *judgments confessed by a defendant in person*. The observations of the judge, in the case last mentioned, so far as they go beyond the question before him, cannot be received as authority. Nor can we regard in that light the decision of the Philadelphia Common Pleas in the case of Boon *v.* Collins, 10 *Leg. Int.* 106. It would be dangerous in practice, as well as contrary to the manifest intentions of the Act, to permit justices of the peace to enter judgments against a party, unless duly served with process, or voluntarily appearing before him. But we see no such evil in permitting the plaintiff to appear either "in person or by agent," to receive such a judgment. The judgments of the appellants are, therefore, valid. This brings us

Digitized by Google

www.tiptool.com.cn

to the question, whether they have gained a priority over those of the appellees.

Nothing can be better settled than that an execution is intended, *not to secure*, but *to enforce payment* of a debt. It must be used in good faith, for its legitimate purpose, or the plaintiff, in whose favour it issues, gains no advantage from it. Where an execution creditor, after making a levy on a stock of goods in a store, takes a bond, with security, for the amount of the debt, conditioned for its payment in several instalments, at future periods of time, and that the goods levied on shall not be removed without the consent of the sheriff, and afterwards stays proceedings on his execution, leaving the debtor in possession of the goods, and permitting him, for several months, to buy, sell, and do business with them as before, the lien of the levy is postponed in favour of a subsequent execution-creditor who seizes the goods before actual possession taken by the first execution. An *alias fi. fa.* placed in the sheriff's hands by the first execution creditor, before the first instalment of his debt becomes due and payable according to the terms of the bond, without any proceedings under it until nearly two months after it issued, and then only after the goods had been seized by another officer on a subsequent execution, is not sufficient either to revive the lien under the first execution, or to create a new one, so as to gain a priority over the subsequent execution creditor. By accepting the bond with security for the payment of the debt in instalments, and agreeing to the stay of execution thereon, the plaintiffs, in the first execution, deprived themselves of the right to seize and sell the goods before the maturity of the debt under the new contract. Under such circumstances, the issuing of an *alias fi. fa.* cannot be regarded as an intention to violate the agreement by selling the goods before the first instalment was payable. It is plain from the contract, and from the manner in which the *alias fi. fa.* was used, that it, like the first writs, was merely intended for security.

If Ludwig, Kneedler & Co., who have thus lost their priority, should be allowed to regain it, there would be a difficulty in ascertaining the amount. After levy, they permitted their debtors to carry on business and dispose of the goods levied on as before. As between the execution-creditors, this is undoubtedly a satisfaction of the executions of Ludwig, Kneedler & Co., to the value of the goods thus disposed of. This value has not been ascertained. Nor is it necessary in the view we take of the case.

It is ordered and decreed that the decree of distribution be reversed. It is further ordered and decreed that the money in Court be applied to the satisfaction in full of the two executions in favour of Truitt, Brother & Co., and that the residue, after payment of costs, be applied to the payment, *pro tanto*, of the executions in favour of Ludwig, Kneedler & Co.

Digitized by Google

www.libtool.com.cn

Cummings *et al. versus* Colgrove.

Where a suit was brought here, for goods sold and delivered, and on a promissory note, and the defendant pleaded a former recovery, and gave in evidence a record and judgment in New York, where the claim was upon an account for goods sold and delivered, *Held*, that the *onus* lay upon the defendant to show that the note sued for was included in the judgment in New York; and that, failing in this, the Court should have instructed the jury to find for the plaintiff.

ERROR to the Common Pleas of *Erie county*.

Plaintiffs were merchants in New York, and defendant was a retail merchant in Erie, Pa., and had purchased in 1851 and early in 1852 a bill of goods of plaintiffs. In May, 1852, he made an alleged sale to his brother of his whole stock in trade, including notes and accounts due to him, without making any provision for plaintiffs' debt, who, on the 25th June, deeming the sale fraudulent, issued a foreign attachment, and attached the goods sold to the brother of defendant. The plaintiffs declared upon a note for $400, given to him by defendant 24th March, 1852, and for $2000 worth of goods sold and delivered. Defendant pleaded *non assumpsit* and payment with leave, and a former recovery. On the trial, plaintiffs gave in evidence to the jury the note for $400, and two bills for merchandise amounting to $1820, and rested. The defendant gave in evidence the record of a suit commenced in July, 1852, in the Supreme Court of New York, in which the plaintiffs and defendant in this suit were the parties, and in which a judgment was recovered, 18th August, 1852, against the defendant, for $1468.38 and costs. Plaintiffs excepted to the evidence. The plaintiffs then proved by the attorney who brought the suit, that he had had the note of $400 in his possession since the 25th June, 1852, to the time of trial.

The Court charged the jury that they might infer that the recovery in the Supreme Court of New York was for the same cause of action, and that they might infer that the note for $400 was given for a part of the account for which the recovery was had: to which plaintiffs excepted.

Marshall, for plaintiffs.—The record of the judgment in the state of New York is not for the same cause of action on its face as the suit in this Court, and the jury could not find a cause of action outside of the record.

The defendant rested his defence upon the record of the suit and judgment in New York, and relied upon that as a bar; and the Court left this to the jury to determine, which was error.

There is nothing on the face of the record that shows it was for

Digitized by Google

[Cummings *et al. v.* Colgrove.]

www.libtool.com.cn

the same cause of action. If for the same cause of action, defendant should have shown it: Connelly *v.* Arnold, 6 *Watts* 312. The Court should have instructed the jury that the record was no bar: Vincent *v.* Huff, 8 *Ser. & R.* 381; 15 *Ser. & R.* 100; 1 *Watts* 425; 2 *Watts* 351.

There was no evidence whatever to show that the note of $400 was included in the judgment; nor anything to authorize the instruction that it *might* have been.

Lane, for defendant.—The account sued for in New York, compared with the causes of action here, showed that they were of like amounts; and there were no other dealings shown between the parties. This calculation was shown to the jury—the variation being but 13 cents—and the Court properly left it to the jury to say that, if the suit and judgment in New York was for the same cause of action, the same debt, it was a bar to this action.

The opinion of the Court was delivered by

KNOX, J.—There was error in permitting the jury to find that the note of 24th March, A. D. 1854, for $400, was included in the recovery had in the Supreme Court of New York. That action was brought upon an account for goods sold and delivered, and there was no evidence that the note was given upon the same account, or that it was in anywise connected with it.

If the note was given for goods sold and delivered, and the recovery in New York included the goods for which the note was given, the defendant's plea of former recovery might avail him; but the burden of proof is upon him to show these facts, and as he gave no evidence tending to establish the truth of his allegation that the note was included in the New York judgment, the Court should have directed the jury to find for the plaintiffs, to that extent at least. In referring to the jury the question, whether the note in suit was not included in the recovery, the Court erred, and for this the judgment must be reversed.

Judgment reversed and *venire de novo* awarded.

Digitized by Google

www.libtool.com.cn

Elizabeth Shallenberger *versus* Ashworth.

Where land is devised to executors to be sold, and the proceeds divided among legatees, the latter, if all of them consent, may take the land instead of money.

The husband in such case may elect in place of his wife, and she becomes the owner of the fee, subject to his life estate.

The land is substituted for the money, and vests in the person previously entitled to the proceeds.

Where the wife elected to take land instead of money, in presence of her husband and with his assent, his subsequent entry into the possession of the land must be regarded as an entry under the title of the wife, and not adverse to it.

Upon the husband's death in possession in right of his wife, a right of action accrued to the heirs of the wife, and the statute of limitations did not begin to run till that period.

Error to the Common Pleas of *Fayette county*.

Jacob Balsley, by his will, made in 1809, directed his executors to sell his real estate, including the land in dispute, and divide the proceeds among certain devisees and legatees, of whom his daughter Elizabeth was one. After the death of her father, Elizabeth married John Shallenberger, and they lived together upon the land until her death in 1844, and her husband continued to occupy it till 1850, when he died. Both the husband and wife had issue by former marriages, but none by their marriage with each other. The defendant in error claims the land under deeds from the heirs of Elizabeth. The plaintiff below claims under the will of John Shallenberger, the husband, dated November 8, 1833, proved 8th August, 1854.

On the trial it was proved that in the year 1828, at a meeting of the devisees claiming under the will, called for the purpose of arranging the estate, it was there agreed by the heirs that Elizabeth might take the portion of land which she and her husband were then occupying, instead of the money she was entitled to receive under the will of Jacob Balsley. That Elizabeth agreed to take the land, and that the arrangement was, that if the land came to more money than she was entitled to under the will, she was to pay the surplus; and if to less, that she was to be paid the deficiency. A deed was to have been written, but no writing was drawn, or deed ever executed for the land. John Shallenberger was present, and made no objection to the arrangement.

The jury found for the plaintiff below. The Court left it to the jury to say whether John Shallenberger had consented to his wife's taking the land; and instructed them that John Shallenberger, under the statute of limitations, acquired a good title to the land by his possession of thirty years, if there was no agreement or election to take the land, with the consent of the husband.

Digitized by Google

[Shallenberger v. Ashworth.]

www.libtool.com.cn

The plaintiff's counsel excepted to the charge, and further alleged, as ground of exception, that there was no evidence of any agreement that would be binding upon any of the parties, as there was no writing, no possession taken under it, nor no part performance that would make an agreement concerning land good under the statute of frauds.

Fuller, for plaintiff in error.—The husband was the only person who could elect, and there was no evidence of such election. The only evidence was that he was present, and that the heirs agreed that Mrs. Shallenberger should have the portion of the land on which they then lived. No evidence that he gave any positive assent.

There was no deed made; and the husband would have had the right to object before delivering; and in 1833 he made a will and disposed of the property.

The election must be by some unequivocal act: Willing *v.* Peters, 7 *Barr* 290.

There being no writing, the parol arrangement was void under the statute of frauds.

And if the agreement did not bind the husband, his title was good under the statute of limitations.

A. Patterson, for defendant.—The evidence was that Elizabeth elected to take the land; her husband being present, and making no objection. This was sufficient to leave the fact to the jury.

It was competent to show by parol that the husband waived his right to recover his wife's legacy, and agreed that she should receive her portion in land: 3 *W. & Ser.* 223.

And if the husband had refused his assent, never having received a deed, upon his death the title would revert to his wife or her heirs: *Ib.*

The opinion of the Court was delivered by

Lewis, C. J.—Where land is devised to executors to be sold, and the proceeds divided among legatees, the latter, if all of them consent, may take the land instead of the money. The husband, by virtue of his marital power, may exercise the right of election for his wife; and in such case, she becomes the owner of the land in fee simple subject to his life estate. His act enures to her benefit. The land is substituted for the money, and vests in the person previously entitled to the proceeds. The husband, it is true, may reduce the wife's chose in action into possession, and thus make himself the absolute owner of it. And where he discharges it in consideration of a conveyance to himself, from one having a right to make it, he may, perhaps, make himself absolute owner of the land. But this is not properly an election, but

Digitized by Google

www.libtool.com.cn

a purchase; and cannot be done without writing, because the statute of frauds and perjuries prohibits it. Election is where the land is taken by the owner of the proceeds: Beal *v.* Stehly, 9 *Harris* 376. But the election in this case was made by the wife herself, in the presence of her husband and with his assent. His entry into possession under the arrangement thus made must be regarded as an entry under the title of his wife, and not adverse to it. Upon his death, a right of action accrued to the heirs of the wife, and the statute of limitations could not begin to run until that period. The defendants had no show of right whatever, and the charge of the Court was quite as favourable to their claim as they had a right to expect.

Judgment affirmed.

Steele's Administrators *versus* Steele.

After a party has agreed to the arrangement and settlement of a family dispute, if this was made under a mistake, which he had the means of ascertaining at the time, and suffers it to rest uncorrected through his own laches more than six years after his right of action accrued, the statute of limitations will bar his recovery.

The party cannot arrest the running of the statute of limitations by his own negligence, or by any arrangement for his own convenience.

ERROR to the Common Pleas of *Westmoreland county.*

Joseph Steele died in 1837, having devised a farm to each of his sons Joseph, Daniel, and James. And to his sons Eli and Absalom $658 each, payable when David became of age, and charged the legacies on his real estate. David became of age in February, 1843, and there was a meeting of the devisees and legatees in February, 1844, to make a final arrangement "between those who got land and those who got money." After they met a dispute arose whether the devisees were to pay equally or in proportion to the value of the land given to them respectively. James claimed an abatement, asserting that his land was less valuable than the others; and the will not being produced or present, some asserted that it provided that all should pay equally, and others that they should pay according to the value. It was finally agreed as a compromise that James should pay less than the other two, and that each should give his notes to the legatees for such amount as was to be paid by him. And notes under seal were accordingly given by James to Eli and Absalom each for $227 or $414 in all; Joseph to the same legatees for $454, and David for the balance, $448; so that a deduction was made in favour of James of $24.66 from the one-third of the whole charge, which was added to the

Digitized by Google

www.libtool.com.cn

liabilities of Joseph and David. The notes bore interest and are all paid.

Joseph died in 1845, and his tract of land was sold by his administrator for payment of debts to E. Steele for $1640. This action was brought by James, to May Term, 1852, to compel the estate of Joseph to contribute, James alleging that he had paid more than his share according to the quantity, quality, and value of the land devised to him; that at the time he gave his notes he was under a mistake as to the terms of his father's will; and that he was not precluded by the settlement then made.

The defendant insisted that the settlement was conclusive, being the adjustment and compromise of a family difficulty and dispute; that the notes given by James to Eli and Absalom, for their legacies charged on the land, were a payment and extinguishment of the latter; and that even if James was entitled to contribution, he should have brought his action within six years from the time the note was given.

Cowan, for plaintiff in error.—The notes given by James, and the acceptance by his brothers, operated an extinguishment of the legacies: Miltenberger *v.* Schlegel, 7 *Barr* 242; Stewart's Appeal, 8 *W. & Ser.* 476; Dewalt *v.* Eldred, 4 *W. & Ser.* 422. The giving of a note by an administrator for a debt or legacy works a discharge: Geyer *v.* Smith, 1 *Dall.* 347; Commonwealth *v.* Shryock, 15 *Ser. & R.* 69; Durling *v.* Neigh, *Id.* 114.

Plaintiff should have brought his action within six years from the time he paid the legacy; as the note paid the legacy and more than plaintiff's share of it, he should have brought his action within six years from the time he gave it.

Foster, for defendant in error.—The tracts divided were of unequal quantity and of unequal value. James paid one-third of the whole charge, and his brothers are bound to contribute in proportion to the value of their respective tracts; which largely exceeded that of James.

The bonds were no more than a collateral security, and did not discharge the lien of the legacy—they were not payment. The question of discharge is one of intention; it will not be implied in the absence of proof, and the presumption is that the security was taken as collateral or as cumulative.

The notes were given under a mistake that plaintiff's land was equally bound. The will was not produced, and he acted under a misrepresentation of its contents, that each was to pay one-third of the charge.

The statute of limitations did not begin to run till after payment, which was made within six years from suit brought.

Digitized by Google

[Steele's Administrator *v.* Steele.]

www.libtool.com.cn

The opinion of the Court was delivered by

LOWRIE, J.—We think the plaintiff is too late in seeking the correction of this mistake. And he cannot excuse his delay on the ground that he did not discover it till recently; for he might have discovered it the next day after it was made if he had attended to it, and he ought then to have insisted on its correction. Here is nine years' delay. But it is urged that he did not pay his share of the legacy until four or five years ago, and that he could not sue for a contribution until he had paid. Admit this, still the non-payment was his own affair; he might delay payment as long as the legatees would let him, without perpetuating his right to correct the mistake made between him and others. The legacies seem to have fallen due in 1842, when David arrived at age, and then arose the duty of contribution, and the share of each was defined at the settlement in 1843. Either might have paid his share at once, and then he could have sued for a correction in *assumpsit*, and it is admitted that in that case he must have sued within six years.

Possibly the delay of payment might delay the right of action for the correction; but a party cannot stop the running of the statute of limitations by his own negligence, or by any arrangements for his own convenience. The right of action must be taken to have vested when the mistake was made, for then he might have paid; and then, by the will, the legacies ought to have been paid; then the law raised the duty and implied the promise of correction. This implied promise being simultaneous with the mistake, the statute began to run then, unless it was suspended by some matter which the claimant could not control.

Judgment reversed and a new trial awarded.

The Erie and Waterford Plank Road-Company *versus* Pilgrim F. J. Brown.

The plaintiffs were incorporated under the general laws relating to turnpikes and plank-roads. Commissioners were appointed under the provisions of the *general* law, to receive subscriptions to the capital stock, and were required to take from the subscribers at the time of subscription, a payment not less than $1, for each share subscribed. The *special* law provided, that the company, when it should be organized, should have authority to "*enlarge* its capital stock, *by taking new subscriptions in such manner and form" as it should think proper.*"

After the company was organized, the defendant subscribed for four shares of the stock, some time after he paid $3.50 upon it, and refused payment of the balance, on the ground that he had paid nothing at the time he subscribed, and that his subscription was therefore void. *Held*, that the provision of the Act requiring the *commissioners* to demand payment at the time of subscription, did not apply to subscriptions made to the *organized company*,

Digitized by Google

[Erie and Waterford Plank-Road Company v. Brown.]

www.libtool.com.cn

who had authority by the clause of the special Act (cited above), to act at their discretion in the premises, within the provisions of the law.

Where a subscriber to the stock of a corporation failed to pay the hand-money required by the Act, at the time of subscription, and afterwards attended a meeting of stockholders, and voted on the business of the company, he is estopped from denying the validity of his subscription.

If the irregularity in making his subscription be ground for refusing to pay for his stock, it ought to restrain him from acting as a member of the company.

ERROR to the Common Pleas of *Erie county*.

This action was brought to recover from the defendant the balance due upon his subscription of four shares to the capital stock of the company, and 1 per cent. per month interest for non-payment.

The plaintiffs were incorporated by Act of 27th February, 1849, subject to the provisions of the Act regulating Turnpike and Plank-road Companies, approved 26th January, 1849.

Books were opened by the commissioners for subscription to the stock; and when more than twenty persons had subscribed more than ten per cent. of the stock as provided by the Act, the facts were certified to the governor, and a charter was obtained, and the company was legally organized.

After the company was so organized, the defendant came to the office of the company and subscribed for four shares, to enlarge the subscription that had been obtained by the commissioners, under the 2d section of the Act of 26th January, 1849, made a payment on his said subscription, and several weeks after attended a meeting of the stockholders and voted on a question to determine the route of the road, under the 1st section of the Act of incorporation. The route voted for by defendant was adopted.

The subscription by defendant after the charter was issued, and payment by him of $3.50 on his subscription, and his attending the meeting of stockholders and voting as above, were proved.

The defendant gave evidence to prove that no money was paid by him at the time of subscribing.

In the Court below the plaintiffs contended that, upon a subscription of stock by defendant after the charter was obtained, no payment of from one to five dollars was necessary, as provided by the 1st section of the Act; and, 2d, that, by the defendant's attendance at the meeting of stockholders, July 1, 1850, and voting on the subject of route, he was estopped from alleging the non-payment of the hand-money at the time of subscription, in bar of a recovery.

The Court instructed the jury negatively on both points; and this charge was here assigned for error.

Verdict for defendant.

Digitized by Google

[Erie and Waterford Plank-Road Company *v.* Brown.]

www.libtool.com.cn

Babbitt and *Gunnison*, for plaintiff in error.—The Act of incorporation provides that on the opening of the books, a specified amount of hand-money shall be paid, to the commissioners on subscriptions to the stock when made, and the remainder to the treasurer of the corporation as soon as organized.

The commissioners could not enlarge the subscription after certifying the amount and names to the governor to obtain the charter; but after the charter was obtained, and the company organized, as provided in the 2d section of the Act, the company had the power of enlarging the stock by "new subscriptions, in such manner and form as they think proper." And the company, when organized, are nowhere required to exact hand-money, nor are subscribers bound to pay it.

The defendant having acted as a corporator at the meeting of stockholders, and voted, was estopped from denying his liability: Clarke *v.* Monongahela Navigation Company, 10 *Watts* 364.

Marshall, for defendant.—The proviso in the 1st section of the Act requires payment of $1 in hand at subscription; and there is nothing to take the case out of the principle decided in the Hibernia Turnpike Company *v.* Henderson, 8 *Ser. & R.* 219: and see 14 *Ser. & R.* 434.

The opinion of the Court was delivered by

Woodward, J.—The error into which the learned judge fell consisted in not distinguishing between a subscription of stock made on the books of the commissioners before charter granted, and one made on the books of the company after its full organisation. It was alleged, and we are to take it as true, that the defendant's subscription was of the latter sort; but this was ruled to be an unimportant circumstance, for that the payment required to be made at the time of subscribing, by the proviso of the 1st section of the general law of 1849, relating to turnpike and plank-road companies, extended to all the original shares authorised in the special Act incorporating this company. The consequence of this doctrine was, that the subscription, though made to the company and not to the commissioners, was void for the want of a payment down at the time of subscribing.

We cannot concur in the opinion of the learned judge. The commissioners were ministerial officers acting under a special authority, and were bound to pursue it strictly. The proviso of the 1st section of the Act of 1849 required the attending commissioners to receive, from every person offering to subscribe, a payment in hand of not less than one dollar—a plain duty, which a special agent had no power to dispense with—and a subscription made without such payment was consequently void. It conferred no rights on the subscriber, and neither the commissioners nor the

Digitized by Google

[Erie and Waterford Plank-Road Company v. Brown.]

www.libtool.com.cn

future company could enforce payment by action: 8 *Ser. & R.* 219.

But the Act of 1849 provides for chartering the company, where twenty persons or more have subscribed *ten per centum* of the capital stock; and, from the moment of the organization of the company, the duties and powers of the commissioners, in respect to further subscriptions of stock, are at an end. Thenceforth the company have, by virtue of the 2d section of the Act of 1849, the power of enlarging its stock by new subscriptions, in "*such manner and form as they shall think proper.*" This enlargement can take place only where the prior subscriptions amount to less than the authorized capital, and where it is found necessary to fulfil the intent of the special Act of incorporation; but, these conditions concurring, there is no such limitation on the powers of the *company* as the proviso of the 1st section imposes on the *commissioners*. The words of the Act mark a plain distinction between the two kinds of subscription: one being subject to an express statutory rule, the other to the discretion only of the company. To take the rule prescribed for the commissioners, and apply it to the company, as was done by the Court below, would be to repeal the words I have quoted from the 2d section; for if the company, like the commissioners, *must* receive an instalment from each subscriber at the moment of subscription, then they may not enlarge the subscriptions in such manner and form as they shall think proper. The discretion vested by the words of the statute is taken away by other words which have no reference to the corporation, but are expressly confined to the commissioners.

Such a construction is warranted by no sound rules of interpretation. The statute having made the distinction, it is the duty of the Courts to observe it.

And it is not a mere arbitrary distinction, but rests on solid reasons. The precedent payment to the commissioners is required, not only to defray expenses attending the opening of books and obtaining subscriptions, but to exclude mere speculative subscriptions, and to give the public assurance that the objects of the Act of incorporation are to be carried out in good faith; but when the company has been organized upon a solid basis thus secured, and finds further subscriptions necessary, it may, and often does, happen that they can be obtained only on new and peculiar terms. One subscriber must have time given him; another must be permitted to pay in labour or materials; a third must have the road located through his property in a particular manner; and unless these and similar conditions be complied with, the company cannot enlarge its stock, nor fulfil the object of its creation. Hence the legislature have seen fit to invest the company with a discretion in the manner of obtaining subscriptions, which they have withheld from the commissioners.

Digitized by Google

www.libtool.com.cn

We hold, therefore, that the Court should have instructed the jury that, if the defendant's subscription was made, not to the commissioners, but to the company after its organization, his failure to make a payment at the time of subscribing did not invalidate his contract, nor deprive the company of their legal remedy for enforcing it.

Another point was made, which perhaps it is unnecessary to rule, in view of what we have said about the effect of the subscription; and yet, if it should turn out on another trial that the defendant's subscription was made on the books of the commissioners before the organization of the company, the point now alluded to would become important.

It appeared in evidence that the defendant was present at a meeting of the stockholders in June, 1850, and participated in their action by voting on the question of routes; and the Court declined, on request, to say that this estopped him from alleging the non-payment of the hand-money at the time of subscribing. A point extremely analogous was taken in the case of Clark *v.* The Monongahela Navigation Company, 10 *Watts* 363, and ruled by the District Court of Allegheny (GRIER, President) against the subscriber on the ground of estoppel, which was affirmed in the Supreme Court, though the opinion and judgment here were rested mainly on the curative provisions of a special Act of Assembly. The subscriber there had not paid the hand-money, but had voted for managers of the company, and he was denied the defence successfully set up here.

There is no merit in such a defence. However expedient public considerations may make a payment down at the time of subscribing, the subscriber himself is under the highest moral obligation faithfully to perform the promise he has distinctly made; and when he voluntarily acts as a corporator, and exercises privileges which can only belong to him in that capacity, there is great reason that he should be estopped from denying the validity of his subscription. If the irregularity in making his subscription is the ground of his refusing to pay for his stock, it ought to restrain him from acting as a member of the company.

If this point should arise on another trial, we think it ought to have a different ruling from that which it received on the last.

We see nothing else in the record which requires to be discussed.

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

Digitized by Google

www.libtool.com.cn

William Bell *versus* The Ohio and Pennsylvania Railroad Company.

Where the state surveyed and laid out a town into in-lots and out-lots, reserving 100 acres of land without the town for a common pasture, and afterwards sold the lots; *Held*, that the right of common so annexed to the town lots, was a common *appurtenant* as distinguished from a common *appendant*.

If one who has a right to common appurtenant, purchase part of the land subject to the easement, all his right of common is extinguished.

So if he be a disseisor of part of the land subject to the easement.

And the incidents of light, air, prospect, &c., fall with the principal.

The right to take the herbage by the mouths of his cattle gives the commoner no incidental right to keep the common open as an ornament to his dwelling, or as contributing to his own personal pleasure or convenience.

Where a commoner's right has been extinguished, he has no interest in the common, to entitle him to ask for an injunction to restrain a trespasser on the common rights of others.

The annoyances arising from the necessary use of a railroad, is not a nuisance *per se*. The fact of nuisance in such case must be determined by a jury.

ERROR to the District Court of *Allegheny county*.

This was an application to the District Court of Allegheny county for an injunction to restrain the defendants from the use of certain works, and from prosecuting certain improvements specified in the bill, over and through a portion of the South Common of Allegheny City. On the hearing of the case in this Court, one of the judges was absent, and the four judges who heard it, were equally divided—the *decree* of the District Court was therefore affirmed.

The point decided in the opinion of the chief justice was not made below, nor argued in this Court. The report of the case is therefore confined to the opinion of the District Judge, which contains an abstract of the bill and answer, and a clear view of all the facts necessary to the understanding of the grounds upon which the decree was founded.

In the opinion of the District Court the following principles were held:—

That at the time this company (the defendants) was chartered, the right of a commoner in the premises in dispute, was vested in the complainant, the right of sale or title to the commons was vested in the city of Allegheny, and the right of eminent domain in the state.

When the legislature has granted common ground to a city for public purposes, the right of eminent domain, existing in the state, is not thereby exhausted, but may be abridged and devoted to other purposes.

The right of eminent domain is inalienable and inexhaustible, and may be exercised as often as the sovereign power may choose, within the provisions of the constitution as to compensation.

Digitized by Google

[Bell *v.* Ohio and Pennsylvania Railroad Company.]

www.fjbtool.com.cn

Of the occasions proper for the exercise of this power, the legislature is to judge, limited only by the public utility of the object.

If the principle applies to a grant of land, *a fortiori* it will apply to a mere easement issuing out of land.

Where there has been no exercise of the right of common for more than twenty years, *quære* if the doctrine of *nonuser* does not apply.

When a party who sets up a right looks on in silence while another is spending large sums of money in making improvements under his own eye, and has made no claim for a period of two or more years, he will be estopped in equity when he asserts it.

And if such right be of little importance, Chancery will never interfere.

Where the right of way over a common was granted to a railroad company by the authorities of a city, in whom the title vested, the city alone has the right to complain, if the company has exceeded or is about to exceed the powers conferred by the grant.

The Court will interpose to restrain a nuisance *per se*, but if not in itself noxious, the matter complained of must first be tried at law

Opinion of the District Court (HAMPTON, J.):—

"The complainant, Bell, sets forth the laying out of the town of Allegheny, and reservation of one hundred acres as a common of pasture, by authority of an Act of Assembly of 1787; the sale of the lots of said town; that the purchasers thereof became entitled to the right of common upon the land reserved; that by an Act of Assembly of the 13th April, 1840, the right of the Commonwealth to all the lands within the limits of the city of Allegheny, excepting such parts as had theretofore been appropriated by grant and authority of law, was granted and vested in the city of Allegheny, for such public uses as were vested in the Act of 1787, and such *public uses as the Select and Common Councils might from time to time direct and ordain*, provided releases were obtained from the commoners; that, relying upon the right to the undisturbed use and enjoyment of the common, the owners of lots in the town so laid out and sold, have erected dwellings, and made valuable improvements for private residences thereon, and for over twenty-one years have continued in the peaceable, quiet, and undisturbed enjoyment thereof, and of the said common; that complainant owned one of said lots, and as such, was entitled to the right of common; that he resides with his family on said lot, and is entitled to the quiet, peaceable, and undisturbed use and enjoyment of said lot and habitation, and the common aforesaid.

"The bill then sets forth that the defendants, being a corporation, created by authority of an Act of the General Assembly of the State of Ohio, passed the 24th of February, 1848, and by an Act of Assembly of the Commonwealth of Pennsylvania approved the 11th April, 1848, wrongfully and unjustly contriving and intending to appropriate the said common to their own use, located their railroad over, through, and upon the said common, passing long the south side of the South Common to Federal street, by

Digitized by Google

www.libtool.com.cn

authority of an alleged resolution of Councils, but denying that any such resolution was ever passed; that under colour of said resolution, defendants entered upon said common, laid down their track, appropriating fifty feet through along the south side of said common to Federal street to their own use, and have since that time wrongfully and unjustly continued to disturb and destroy the quiet and peaceable use of said common by the owners of lots in said town, and have used the same for their railroad, and for cars, engines, locomotives, horses, carriages, and wagons, and for carrying on the traffic and business of said corporation, to the great nuisance of said complainant; that defendants threaten to erect upon the south side of said common, certain buildings for car-houses, depot, and other structures, for the use of said company.

"That defendants are erecting a platform for the receipt and discharge of freight and passengers on a portion of said common, and building a certain wall thereon; that said platform injures and destroys the common, and deprives the owners of lots of the use of said common, and obstructs and annoys them in the quiet and peaceable enjoyment of their lots and habitations aforesaid; that as soon as complainant knew defendants intended to erect said buildings and superstructures, he remonstrated with the President of said company against the use and appropriation of said common, and served a written notice upon him to that effect; that the construction and use of said platform will injure and destroy the use of the whole or a greater part of the South Common by the commoners, and greatly diminish the value of the lots in said common fronting on the South Common, and cause a great and irremediable damage and nuisance to the complainant; that defendants keep their cars and locomotives standing on the track on said common, and receive and discharge freight and passengers thereon, to the nuisance of complainant and others; that the appropriation of the common as aforesaid, was wrongful and without any lawful authority; that defendants have wrongfully and fraudulently exceeded the powers vested in them by law. These are the principal matters contained in the bill. Complainant prays for a special injunction against the defendants, enjoining them from using or occupying the said common, or any part thereof, with their track, cars, trains, and locomotives, or for the receipt or delivery of freight or passengers, or in any manner, for the business of said corporation, and from digging in and upon said common, and from erecting any wall, platform, buildings, or other structures in and upon said South Common, or placing thereon any stones, gravel, earth, timber, plank, or other materials, and from keeping their engines, cars, trains, or locomotives standing or remaining still upon the track of said company along the said South Common, and that they be enjoined from keeping, and be required to remove all platforms, walls, structures, stones, and other mate-

Digitized by Google

www.lbtool.com.cn
rials that may have been deposited on said common by said company:

"And that on a final hearing, said injunction may be made perpetual; that the uses of said common by complainant, and other lot-owners, may be declared and enforced, and that the rights of complainant in said common may be quieted, or that he may have such other and further relief as equity and good conscience may require.

"A special injunction was awarded, enjoining the defendants from erecting any more buildings on that portion of the common occupied by them, but allowing them to use the road as they had done before the filing of the bill. Subsequently the defendants put in their answer, of which the following is a summary:

"The answer admits the laying out of the town of Allegheny, by authority of the Act of 1787, in the manner and for the purposes alleged in the bill; also the reservation of one hundred acres for a common of pasture, for the owners of town lots; also that by an Act of Assembly of 13th of April, 1840, erecting said borough or town into a city, the right of the Commonwealth, which was the right of soil of all lands within the limits of said city, with certain exceptions, was vested in the city of Allegheny, for such public uses as were vested in the said Act of 1787, and such other public uses as the Select and Common Councils of said city might from time to time direct and ordain—with the proviso that no part of the land allotted by the said Act for a common should be applied to any other purpose, without releases being obtained from the commoners; also that the plaintiff is the owner of one of the town lots, on which he resides and has made valuable improvements, and has lived on the same for many years. But it is emphatically denied that he and other lot-holders have, for and during the period of twenty-one years and upwards, continued in the quiet and undisturbed enjoyment of the said common ground for the purposes to which the same was appropriated, viz.: as a common of pasture; because, as they allege, a portion of the same has been enclosed, and the residue thereof, and particularly that part which is especially referred to in the bill, has been open to, and used by, the public as a common and public highway during all that time. The respondents also admit their existence as a corporation by authority of an Act of the 11th of April, 1848, and allege that under that Act they are authorized to construct a railroad from the city of Pittsburgh westward, in the direction of the state of Ohio, and that they located the said road, as charged in the bill, over, through, and upon the said common ground, at the south side of the South Common, west of Federal street; and that they procured for that purpose a resolution to be passed by the Select and Common Councils of the said city of Allegheny, of the tenor stated in complainant's bill, with

Digitized by Google

[Bell v. Ohio and Pennsylvania Railroad Company.]

www.libtool.com.cn

the exception of restraining them to the south side of the South Common, as the same had been located—and that said grant and privilege was afterwards ratified and confirmed by a subsequent resolution of said Councils.

"The answer further admits, that under said authority and privilege the defendants entered upon said common, and laid down and constructed their railroad tracks over and upon the same, and did appropriate to their own use a part thereof, of the width of fifty feet, and have since occupied the same for the purposes of said road, as they claimed they had a right to do by virtue of the said resolution of Councils, and under the authority of the ninth and eleventh sections of an Act regulating railroad companies, passed by the legislature of Ohio, on the 11th day of February, A. D. 1848, and adopted and re-enacted by the General Assembly of this Commonwealth in the Act to incorporate the respondents, passed the 11th day of April, 1848; that it was necessary for the respondents to occupy the said common, and the said Select and Common Councils owned and had charge thereof, as claimed in complainant's bill, and were therefore competent to agree upon the manner, terms, and conditions upon which the same might be used or occupied by the respondents.

"The answer further admits, that having entered upon the said common ground, by virtue of the authority and privilege so granted to them, they did, on or about the — day of ——, A. D. 1850, proceed to locate their said road, and construct the same, and to purchase ground and erect buildings, with an express view to the said location, and the termination of said road at Federal street; and in so doing, expended a very large sum of money, and that said work was done, and said expenditures made, under the immediate observation, and with the knowledge of the complainant, and without any objection or remonstrance from him; but that, on the contrary, the said complainant, well knowing that the said right of common was of no practical or appreciable value, and believing that the said road would be advantageous to the lot-holders generally, and himself in particular, was content with the said entry and location, and, on more than one occasion, expressed his entire satisfaction therewith.

"The respondents further admit, that it was their intention to erect over and upon their roadway, at the terminus thereof, at and adjoining to Federal street, a passenger station, or building for the protection, convenience, and comfort of travellers in their cars, at their arrival and departure from that point; but deny any intention of erecting the same upon any other portion of the common, than that held and appropriated by them as a roadway, or of erecting any other building or buildings upon any other part of the common ground, or for any other or different use; but say that *the execution of said design has been suspended, and they*

Digitized by Google

www.libtool.com.cn

cannot answer whether or not the same will be resumed. They, however, claim the right to cover and protect their roadway, as an incident to the use, and as essential to the proper enjoyment thereof.

"They further admit the digging upon the line of their road, the erection of a stone wall and platform at the termination of the road, for the reception and delivery of freight and passengers, and have used the same for such purposes; but they deny that the said platform interfered in any way with the said common of pasture, or has injured or destroyed the same; or that the complainant is in any way disturbed in the use or enjoyment of his lot thereby, or has been deprived of the enjoyment of his right of common thereby.

"The respondents further admit the application for information and notice, as charged in the bill, but do not admit that the president, at any time, declared that it was their intention to use the whole common ground for their business and purposes, or that they, at any time, entertained any such purpose; which, on the contrary, they now expressly and distinctly disclaim and disavow.

"And the respondents, in answer to the allegations, that the construction and use of the platform erected by them will destroy the use of the whole or greater part of the South Common by the commoners, and will greatly diminish the use, improvement, and value of the lot and habitation of the complainant, by creating a great and irremediable nuisance to his said property, say, that the said South Common ground, as it is denominated, has not, at any time for the last twenty years and upwards, been used and occupied as a common of pasture; nor is of any value whatever for such purpose, a portion thereof having been before that time appropriated and enclosed by the complainant and other lot-holders within their own lots, and the residue having been, for all that time, without herbage for the sustenance of any beast whatever, and used by the public at large as a common highway.

"They deny that the construction or use of the platform has created any nuisance, or inflicted any damage whatever, or any which is remediable either at law or in equity; or any other or greater inconvenience than is suffered by every proprietor whose residence is within the like distance of a railway terminus, or mart of trade.

"They admit that they have permitted their cars, locomotives, and trains to stand upon the track, at its terminus, at all hours when the state of their business required it, for the purpose of running and discharging freight and passengers, and claim the right to do so, but deny that they have other sufficient room and convenience for that purpose, or that they have used the common ground outside of their railroad as a depository for freight, &c.,

Digitized by Google

[Bell v. Ohio and Pennsylvania Railroad Company.]

www.libtool.com.cn

or that they are responsible for the use that may be made of it by others who do business with said road.

"They further allege that the necessity of obtaining releases from the commoners was entirely done away with, and superseded by the Act of Assembly incorporating the said company, and authorizing them to enter upon all lands which might be required for the purpose of the road, and upon all such as were in charge of municipal corporations, or other public bodies, upon such terms as might be agreed upon by those having charge thereof; and that even if the said grant had been defective, the respondents having acted under colour of right, and expended large sums of money in prosecuting their work upon the faith of such grant, and under the eyes, and acquiescence, and approbation of the complainant, and other commoners, they are now estopped in equity from questioning the respondents' title, or in any other way interfering therewith.

"These are the principal matters alleged in the bill, and admitted or denied, or alleged in the answer.

"Before the hearing of the cause, a motion was made by respondents' counsel, to suppress the testimony of all the witnesses on the part of the complainant (except that of James Marshall), on the ground of interest.

"The complainant claims the interposition of this Court on four grounds:

"1. That his common of pasture is destroyed.

"2. That the acts complained of in his bill, and proved or admitted, are a nuisance.

"3. The violation of a trust by the City Councils, in granting the license in question; and

"4. That the defendants should be restrained within their corporate powers.

"These propositions will be *very briefly* considered in their order.

"1st. As to the plaintiff's common of pasture—Is the injury to the plaintiff's right of common in the ground occupied by the said railroad, of such a nature as to call for the interposition of a chancellor by injunction? Is the injury so great and irremediable at law, as to justify this Court in enjoining the defendants from the use of said common ground in the manner and for the purposes heretofore used and intended to be used by them, as charged in the bill, and admitted in the answer? And is the complainant in a position to ask such interference? He who comes into equity must do equity. He must neither do, nor omit to do, any act whereby his adversary may have been led into error, and induced to do the acts complained of. He must on all occasions act and speak consistently with his alleged rights, and

Digitized by Google

www.libtool.com.cn

if he fail in this respect, he will afterwards be compelled to keep silent when he might wish to speak out.

"Prior to the organization of the railroad company, the complainant's right to pasturage on the common ground surrounding the original town of Allegheny is conceded; indeed, it could not be denied, as the same was secured to him as an *in-lot* holder by Act of Assembly. We must therefore inquire whether that right it still in him, or whether he has lost it, either by operation of law or his own conduct.

"The various Acts of Assembly bearing on this question are referred to either in the bill or answers, and detailed histories of this common ground, and the rights of the commoners, are given in the cases of the Trustees of the Western University of Pennsylvania *v.* Robinson and others, (12 *Ser. & R.* 29; Carr *v.* Wallace, 7 *Watts* 394) and other cases tried in this Court, to which reference is made for the sake of more minute information.

"At the time this company was chartered, the right of common of pasturage was vested in the complainant, the right of sale or title to these commons was vested in the city of Allegheny, while the right of eminent domain of course rested in the state.

"The defendants allege this right is gone, on two grounds. First: By virtue of license from the City Councils, which, as trustees of the legal title, they were empowered by the Act of the legislature to grant; and secondly: By complainant standing by and looking on while respondents entered under colour of title, expended large sums of money, and made valuable improvements.

"First as to the license:

"The eleventh section of an Act passed the 11th of February, 1848, by the legislature of Ohio, adopted by the Act of 11th April, 1848, by the legislature of this state, incorporating the Ohio and Pennsylvania Railroad Company, provides as follows: "If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley or public highway, or ground of any kind, or any part thereof, it shall be competent for the municipal, or other corporation, or public officers, or public authorities, *owning or having charge thereof*, and the railroad company, to agree upon the manner and the terms and conditions upon which the same may be used or occupied: and if said parties shall be unable to agree thereon," then the company may apply to the Court of Common Pleas for the appointment of three disinterested freeholders to view the ground, and determine upon the manner and terms upon which the same shall be used, &c.

"Respondents contend, that, under this section the Select and Common Councils of Allegheny were authorized to agree with them upon the terms upon which they might use and occupy the portion of the South Common ground now in their possession. If

Digitized by Google

www.libtool.com.cn

this construction be correct, it cannot be denied that the Councils, by their resolution of 15th August, 1850, and the supplement of 12th October, 1853, did authorize the company to construct their road over the South Common, as they have done.

"But the complainant denies the power of the legislature, after having vested the title to the common ground in the city for public purposes, to change that disposition so as to authorize the Councils to grant the license in question to the railroad company. In other words, that when the legislature has made a grant for public purposes, the right of eminent domain is exhausted, and she cannot afterwards lend or abridge that right, so as to devote it to other purposes.

"If this were so, the idea of sovereignty would sink to the level of individual right, and the state having once parted with her title either to the public or an individual, could never resume it either for her own use, or that of public improvements by corporations. This doctrine is not only at variance with the very existence of sovereignty, but with the settled practice of every civil government, claiming and exercising sovereign powers. The right of eminent domain is inalienable and inexhaustible, and consequently may be exercised as often as the sovereign power may choose, within the provisions of the constitution as to compensation.

"It rests with the legislature to judge of the cases which require the operation of the right of eminent domain; and it may be applied to the case of roads, turnpikes, railways, canals, ferries, &c., provided there be, in the assumption of the property, evident utility and reasonable accommodation as respects the public: Cotrill *v.* Myrick, 3 *Fairfield* 222; Dyer *v.* The Tuscaloosa Bridge Company, 2 *Porter's Rep.* 296; Harding *v.* Goodlett, 3 *Yerger* 41; Chancellor WALWORTH in 18 *Wend.* 14, 15.

"In the case of Charles River Bridge Company *v.* Warren Bridge, 11 *Peters* 420, Chief Justice TANEY declared 'that public grants were to be construed strictly, and that nothing passed as against the state by implication, in diminution of the legislative powers requisite to accomplish the end of their creation. It was accordingly decided, that the grant, by statute, to the Charles River Bridge Company, of the right founded on a valuable consideration to build a bridge over that river, and to take toll, contained no engagement from the state of Massachusetts, nor any implied contract, that the privilege to erect another bridge contiguous thereto, and on the same line of travel, and which might create competition, and diminish or destroy its income, should not be granted within the period of the operation of the grant; that as no grant of any such exclusive privilege, or any contract of the kind was *expressed*, none was to be intended or inferred. There was no constructive franchise, or privilege

Digitized by Google

admitted, and the decision rested on legislative sovereignty, and its all surpassing powers.'

"The same latitudinarian doctrine was declared, after a very elaborate discussion, in the case of Tuckahoe Canal Company *v.* Tuckahoe Railroad Company, in the Court of Appeals in Virginia, (11 *Leigh* 42.) As there was no *express* provision in the charter against the exercise of legislative power to charter other and rival companies for transportation along the same line, parallel and contiguous, it was held that the legislature might lawfully, and in their discretion, exercise the power; though it might, in effect, impair or annihilate the profits of the prior company. And Greenleaf says, that in the case of the Charles River Bridge Company, Chief Justice MARSHALL, who heard the first argument in the case, concurred with the majority of the Court in the principle of the final decision. And Chancellor KENT says, the Charles River Bridge case is now not merely acknowledged universally, but its doctrine has been carried to an extent far beyond the reasoning of Chief Justice TANEY. It was held in Enfield Toll Bridge Company *v.* Hartford and N. H. R. Co., 17 *Conn. Rep.* 474, that a provision in the charter of the Bridge Company, that no person shall have liberty to erect another bridge within certain defined limits, was not a covenant distinct from the franchise, but identical with it, and subject to the same laws. See also, Thompson *v.* The New York and Harlem R. Co., 3 *Sandford Ch. R.* 625; Oswego Falls Bridge Co. *v.* Fish, 1 *Barb. Ch.* 547.

"If any other authorities were necessary to establish this doctrine, they are to be found in numerous cases in our own state, arising out of Acts of the legislature incorporating companies to improve navigable rivers by locks and dams, previously declared public highways (Coon *v.* The Mon. Nav. Co.), and authorizing turnpike companies to take public highways as the bed of their roads—municipal corporations to take and use landings on public rivers as wharves, and charge wharfage therefor; as well as many other similar cases, which it is deemed unnecessary to notice.

"What right does the complainant claim here, which is deemed too sacred to be touched by the power of the legislature? It is a mere private right—a right to pasture his cattle on the common ground—a mere easement, appurtenant to his town lot—an incorporeal hereditament arising out of his title thereto. But if the legislature has power to authorize the taking of the lot itself, which cannot be denied, *a fortiori* this mere right appurtenant may be taken by making due compensation therefor. If you take away the substance, the shadow follows as a matter of course. The doctrine here contended for by complainant, would put it in the power of any one commoner for ever to prevent the improvement of this common ground, and keep it in its present condition,

Digitized by Google

[Bell v. Ohio and Pennsylvania Railroad Company.]

www.libtool.com.cn

"Let us next consider the second ground of defence taken by respondents, viz.: that complainant, by standing by and looking on while they entered upon this common ground, under colour of title, expended large sums of money, and made valuable improvements, without objection, is estopped in equity.

"The evidence in the case showed that respondents located and constructed their road over the ground in question at great expense, in full view of the complainant, without objection on his part—and that they used and occupied the said ground, for a period of more than two years, without remonstrance or complaint by plaintiff.

"If A. constructs a work with the consent of B., either express or implied, equity will not afterwards restrain him by injunction, at the instance of B., although the work proves injurious to B.; 3 *Gren. Ch.* 116; nor from erecting further buildings necessary for the use of, and connected with the former: *Ib.* And in a note to the 2d vol. of Eden on Injunctions, 372, it is said, "it is here proper to observe, that in the case of a party complaining of injury from the execution of works, such as those of a railroad company, it is even more incumbent on him than in ordinary cases, to apply without delay for relief: and that, as the injury to the defendants in being stayed (if it shall ultimately turn out that they are acting lawfully) is great in proportion to the magnitude of their operations, the Court will in general hold even slight acquiescence on the part of the complainant, a bar to his obtaining an injunction: 1 *Swanston* 245.

"If a party is cognisant of his right, and does not take those steps to assert it which are open to him, before he has allowed his adversary to incur material expenses, or to enter into engagements difficult to be discharged, he will lose his right to the interposition of equity: 1 *Railway Cases* 66.

"But let us see what has been held by our own Courts, in regard to this very right of common now under consideration. In the case of The Trustees of The Western University of Pennsylvania *v.* Robinson and others, 12 *Ser. & R.* 34, Chief Justice TILGHMAN says: 'Now it is understood that the Allegheny lot-holders were of opinion, that the erection of the penitentiary on part of the common ground was for their interest, without further compensation; and on this understanding the building has been erected, at a very great public expense. After this acquiescence, the proprietors of the lots are bound. It amounts to a contract. It is equivalent to a release *pro tanto*.'

"This principle is cited with approbation and reaffirmed by the Supreme Court, in Carr *v.* Wallace, 7 *Watts* 400, and Mr. Justice ROGERS, in delivering the opinion of the Court, says: 'It has also been held, that when leave or license to build a college on a common is given by a commoner, by parol, he can bring no

Digitized by Google

www.libtool.com.cn

action for the encroachment, though no sufficient common be left: 11 *Com. Law R.* 347. With a full knowledge of their rights, the commoners took the various steps which have already been detailed, to induce the General Assembly to locate the Seminary within the limits of the town. It seems no other contract was given; but the question is, whether the conduct of the plaintiffs does not amount to an implied license to erect the buildings and occupy the grounds; and if any case can be imagined when such leave or license can be implied, the case is here presented. After two or three successive public meetings of the commoners, the legislature, at their request, pass an Act vesting the property in trustees, for the use of the seminary. Having obtained the consent of all persons interested, as was supposed, after great pains taken for that purpose, a building is erected, which takes *two or three years* in the erection. The building is in the *full view of the plaintiff*, but during all the time he makes no manner of objection, nor does he whisper a complaint, although he is fully aware that they are spending large sums of money under the belief, not hastily or recklessly formed, that the title was superior to all exception. What right has the plaintiff, under these circumstances, to complain of the disturbance of his right of common? There is no principle better settled, nor one founded on more solid considerations of equity and public utility, than that which declares that if one knowingly, though he does it passively by looking on, suffers another to purchase and spend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and the conscience of the plaintiff is bound by the equitable estoppel. Here, then, would be at least a negative fraud, in imposing on the defendants by his silence; for his silence would be treacherously expressive. In equity, when a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent.'

"And in the case of the Trustees of the General Assembly of the Presbyterian Church *v.* George R. Riddle, tried in this Court in 1844, when the same question arose in regard to this common, HEPBURN, President Judge, in his charge to the jury, speaking of the wife of said Riddle, a commoner, says: 'We are of opinion, therefore, that her rights were protected during her minority. But since she became of full age, twelve years have elapsed; the property during all that time has been most conspicuously in possession of the plaintiffs, and immediately under the eye of Mary Ann, when single, and of herself and husband since their marriage; and valuable improvements have been made thereon almost every year during that time—improvements which, on an ordinary

Digitized by Google

www.libtool.com.cn

property, would be accounted of great value, and sufficient to enforce the application of the rule under consideration, against a party acquiescing therein. The defendants, by their long acquiescence, since the minority of Mary Ann, having encouraged the plaintiffs to proceed with their improvements, are in equity postponed, and are not permitted to assert their legal rights against those whom they have thus encouraged to expend their money under any erroneous opinion of title. To suffer the defendants now, or any others under their cloak, to disturb the plaintiffs in the enjoyment of their property, erected at so great a cost, and after so urgent solicitation to place their buildings at that spot, by one tacitly assenting for so long a time to their title, would be contrary to all equity, and fraught with the greatest injustice.'

"Such are some of the authorities bearing directly on this question. How does it stand on principle? It must be borne in mind that this common ground differs from most public squares or grounds laid out and dedicated to the public by proprietors of towns or cities. It never was dedicated to the public generally.

"In the case of the Western University, before cited, TILGHMAN, C. J., says: 'But that a right of common in one hundred acres of land on the Allegheny river, should be reserved for the use of all the citizens of Pennsylvania, is an absurdity too great to be attributed to the legislature; nor are there any words in the Act from which such an intention can, with any plausibility, be drawn.' And in the case of Carr and Wallace it is decided that the right of common of pasture belonged exclusively to the owners of in-lots; and that the owner of an out-lot had no right of common of pasture there whatever.

"The complainant can assert no other or greater claim to this common than merely the right to depasture his beasts thereon. In every other respect he stands on the same footing with the *outsiders*, or those who live on the *outside* of the commons. The evidence in this case shows what is known to all, that the complainant's right of pasture was a *common right*, of no material or appreciable value or nature; that no grass or herbage worthy of notice has grown thereon for more than twenty years; nor has it been shown that it was *ever* used for such a purpose by the plaintiff, or that he contemplates or desires to use it as a pasture ground. So that perhaps even the doctrine of the loss of plaintiff's right by *nonuser* might possibly be applied here, if it were necessary, to prevent the injustice that would follow an injunction in this case.

"Suppose the defendants, instead of agreeing with the Councils on the terms upon which they might occupy the ground in controversy, had made application to the Court of Common Pleas, under the Act of incorporation, and three disinterested freeholders had been appointed to determine the question betwen them and the commoners, what amount of damage would they have awarded to

Digitized by Google

[Bell *v.* Ohio and Pennsylvania Railroad Company.]

www.libtool.com.cn

the present complainant for his right of pasturing his beasts on this strip of fifty feet wide, on the south side of the South Common, especially when the fact is taken into consideration, that every other owner, or part owner, of an interest in the town of Allegheny, had the same right to put any number of animals he pleased on the same strip of ground. It seems to us, it would require a very thorough knowledge of *decimal fractions* to make an accurate calculation of his damages.

"It is not surprising, then, that, with a claim so utterly valueless, he should have looked on, made no objections, while respondents were building their road, inferring, no doubt, in common with the Councils, who subscribed largely to the construction of this road, that it would be both a public and private benefit and blessing, and that the advantages would be immense in proportion to the contiguity of the depot.

"He saw the operations of the defendants from the time when they commenced grading the ground in question, in 1850, for a period of some two and a half years; for their works were all carried on under his immediate observation, from his residence, which is only a few rods off. He saw them expending large sums of money in these operations, and it was his duty then to assert his right, if he had any, as we have seen by the authority of all the cases cited; and not having done so then, he will be estopped in equity from asserting it now. If this would be the case where the right thus lost by laches might be valuable, how much more should the principle apply here, when, as we have seen, the claim is without any value whatever. Under such circumstances, chancery will never interfere. The Court will not interfere by injunction to protect the enjoyment of an ancient right, of little importance, and seldom used: Wilson *v.* Cohen, *Rice*, ch. 80.

"But have the defendants the right to the use of the stone wall and platform, as the same are now constructed and used by them? in which construction and use the complainant has not acquiesced; and have the defendants the right to erect a car-house or depot over the road, at its terminus on Federal street? It is not necessary to consider whether the license by the City Councils confers this right on defendants or not. That question is not before us. There is no complaint on the part of the city of Allegheny (which alone has the power to make it) that the company has exceeded, or is about to exceed, the powers conferred by the resolutions granting the right of way.

"But conceding that the grant of the right of way did *not* confer the right to erect and use the platform or passenger depot, has the complainant a right to insist upon the removal of the former, or to require that the erection of the latter should be enjoined? His right of common of pasture is already lost, as we have seen, by his own supineness; and it is difficult to presume what further

Digitized by Google

www.libtool.com.cn

injury it can sustain by the erection or continuance of either or both. But in our opinion, the erection of a depot and car-house over the road (*without doors* opening out on the residue of the common, which, under their present license, they would have no right to place there so as to receive or discharge freight or passengers upon or from the common ground), would *diminish*, rather than increase, the annoyance complained of.

"The second ground of claim on part of complainant is, that the said road, cars, engines, cattle, freight, &c., as used, received, and discharged, are both a public and private nuisance, disturbing his quiet and peaceful enjoyment of his habitation, and diminishing the value of his property. This, if true, is a very serious inconvenience indeed. But is it such, under all the circumstances, as to call for the exercise of the extraordinary power of a Court of Chancery by injunction?

"A nuisance is anything which unlawfully and tortiously does hurt, or causes inconvenience or damage: 2 *Bouv. In.* 503. It is difficult, says the same learned author, to define what *degree of annoyance* is necessary to constitute a nuisance. A private nuisance, says Blackstone, is anything unlawfully or tortiously done to the hurt or annoyance of the person, or the lands, tenements, or hereditaments of another: 3 *Bl. Com.* 215.

"What degree of annoyance will constitute a nuisance, must always depend upon the special circumstances of every case. Certain sounds would be considered *nuisances* by some, and *music* by others. As, for instance, the chiming of church bells, the blowing of horns or trumpets, the lowing of cattle, the sound of the forge-hammer, the whistle of the steam-engine, and the sound of the drum and fife. And this depends more or less on the proximity or distance of the different sounds. It is not every annoyance that is 'unlawful and tortious,' indictable or actionable, and more especially is that the case in towns and cities, in these modern times of progress and improvement. But is a Court of Chancery called upon to decide those questions of fact which are so difficult and doubtful, when the Courts of law are open to the party, where they can be determined by the verdict of a jury? An injunction *may* be granted to restrain a public nuisance at the suit of a private person, who suffers a special injury thereby: 6 *Johns. Ch.* 439. But equity will not interfere in case of a nuisance, except to prevent *irreparable* injury: 4 *Hen. & Mun.* 474.

"When the thing sought to be prohibited as a nuisance is in itself a nuisance, the Court will interpose; but if not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the Court will refuse to interpose until the matter has been tried at law: Gwin *v.* Milmoth, 1 *Freem. Ch.* 505. To justify the interference of a Court of equity to restrain a nuisance, the right of a complainant must be clearly established,

Digitized by Google

[Bell *v.* Ohio and Pennsylvania Railroad Company.]

www.libtool.com.cn

and it must appear that there is danger of immediate and irreparable injury: Caldwell *v.* Knott, 10 *Yerger* 209. The Court will not interfere by injunction to restrain an erection not in itself noxious, though it may, according to circumstances, prove so, until a trial of the right at law, except where an action could not be framed to meet the question, when the Court may direct an issue: Mohawk Bridge Co. *v.* The Union and Schenectady Railroad Co., 6 *Paige Ch. R.* 554. An act tending merely to diminish the value of a man's house, or to shut out a pleasant prospect, was recently held in England not to be a nuisance: 9 *English Law and Equity R.* 116, 122. Many other cases might be cited; but these are deemed amply sufficient to justify a refusal to interfere by injunction, on the ground of nuisance, under the circumstances of this case.

"It does not appear here that defendants create any more noise or confusion than is usual or customary under similar circumstances, or than is necessary and unavoidable in carrying on the trade and business of their road. To deny to them, therefore, the use of their road, would, in effect, be to exclude all railroads from our towns and cities, after these corporations have chiefly contributed to their construction—to debar the right to steamboats to land at our wharves, to discharge and receive freight and passengers—to stop the passage through our streets of the hundreds of hacks, omnibuses, drays, and carts, necessary to convey freight and passengers between the *outer* depots, and drive them round the city limits—to stop all machinery of every description, driven or propelled by steam—to stop all public markets which produce noise and disturb the citizens residing adjacent thereto, and restrain the use of coal, as fuel, because of the intolerable annoyance occasioned by its smoke. It should be borne in mind that we live in an age and a country of progress and improvement, in all the business departments of life. New branches of business are constantly springing up on every hand. The inexhaustible resources and capabilities of the country are being rapidly developed, by the ingenuity, energy, and enterprise of our citizens. The unparalleled increase and improvement in agriculture, commerce, and manufactures, demand increased facilities in travel and transportation. These, and many other considerations, require the modification of former rules, and judicious application of the expansive principles of the common law to the altered condition of the country and the necessities of the public. The common law is said, and with great truth, to be the perfection of human reason. It is the embodied justice and wisdom of each successive age, moulded and formed into a system adapted to the habits and wants of the current times.

"These remarks are made for the purpose of showing, that what would at one time have been held to be a nuisance, might not, and

Digitized by Google

www.libtool.com.cn

probably would not, be so considered now. Private interest and comfort must often yield to public necessity or convenience. This, we apprehend, must be the case here. If the company had authority to make their road where it is, with its terminus at Federal street, they are entitled to the ordinary and necessary uses and advantages of their position, and would not be responsible for any unavoidable annoyance or disturbance such uses might cause. To permit and encourage them to construct their road at a heavy expense, and then deny them the privilege of using it for the ordinary and necessary purposes of such a work, would be inconsistent with every principle of justice and common sense.

"The *third* ground of claim on part of complainant is: The violation of a trust by the Councils of the city, in granting the license in question.

"It is difficult to perceive how this question can arise between the present parties to this bill. The complainant is a private citizen of the city of Allegheny—the respondents are strangers to the municipal corporation. The complainant alleges that the corporation of said city is the trustee of this common ground, and that he is a *cestui que trust*. If he claims that his trustee has violated the trust, he should have made the trustee a party to his bill, in order that the trustee might come in and defend against the alleged breach of trust. Otherwise, the trustee might be condemned without a hearing, and without a day in Court. It seems clear to us, therefore, that this ground of claim is not well taken, and cannot, therefore, be sustained.

"The *fourth* and last ground taken by the complainant is, that defendants should be restrained within their corporate powers. This point has been already incidentally noticed. We do not perceive any evidence of their having transcended their corporate powers; but if the fact were otherwise, we are of opinion that the city of Allegheny, being the trustee of this common ground, would be the proper party to complain—and not the present plaintiff, whose only right to this common ground was lost before the filing of this bill, by his own negligence and supineness.

"The perpetual injunction is denied, and the bill of complainant dismissed."

Hepburn, and *C. Shaler & Co.*, for complainants.—The defendants claim to exercise the powers asserted by them: 1st, by the 11th section of the charter of the company, authorizing them to agree with officers and authorities having charge of common grounds; 2d, by resolution of the City Councils granting the right of way over the common; and, 3d, by acquiescence of complainant in permitting the company to locate their road over the common.

1. No right to appropriate a common is conferred by the charter. A common is neither "road," "street," "alley or public

Digitized by Google

[Bell *v.* Ohio and Pennsylvania Railroad Company.]

www.libtool.com.cn

way," or "ground of any kind." It is private property, which enures to the use of lot-holders; nor is the use a public use: Western University *v.* Robinson, 12 *Ser. & R.* 29.

The power granted to the city authorities to agree with the railroad company, by the 11th section of their charter, implies that there shall be no infringement upon private rights.

The state became a trustee for the lot-holders, by laying out and surveying the town; and by the Act of 13th April, 1840, provides, that no part of the common shall be applied to other purposes without releases first obtained from such persons as have the right of common, or such as may by law release the whole or a part thereof.

A grant of a right of way, if good, does not confer the power to construct a *permanent* platform, erect buildings, and use the common as a place of deposit. And if these things were not implied in the laying out of the road over the common, the company have acquired no right by the alleged laches of the complainant. The grant of a right of way does not include the right to remain on the common.

The complainant is entitled to relief in equity: 2 *Story's Eq.* §§ 921, 924; *Eden on Inj.* ch. II., p. 259; 2 *J. C.* 430, 272. Everything that renders the enjoyment of life and property uncomfortable, is a nuisance: *Eden on Inj.* 264; 4 *Dick.* 164; *Eden on Inj.* 264.

Equity will restrain acts in violation of an easement, or right belonging or attached to adjoining premises: Seymour *v.* McDonald, 4 *Sand. Ch. Rep.* 502; 2 *Eden on Inj.* 265.

And will prevent grounds from being built upon, which the complainant has a right to have kept open, though the encroachment be small and the right appear unreasonable: Hills *v.* Miller, 3 *Paige's Ch. Rep.* 258.

The powers of corporations are subject to equity jurisdiction in the protection of individual rights: Agar *v.* The Regent's Canal Company, *Cowper's Rep.* 79.

It is not necessary in all cases to show irreparable injury: River Dun Navigation Company *v.* North Midland Railway Company, 1 *Railway Cas.* 135. As where the company exceeds its powers: *Id.* The supervision of corporations was one of the express chancery powers vested in the Courts of this state by the Act of 1836.

T. Williams and *W. S. Courtney*, for respondents.—No Court of equity has ever awarded an injunction for that which is not a nuisance *per se*, without a previous trial.

The substance of the complaint is the disturbance of a right of common of pasture.

The case shows that there has been no pasture on the ground

Digitized by Google

www.hbtool.com.cn

for more than twenty years, and that it has been used all that period as a common highway.

2d. That the ground has been in possession of defendants for at least two years before this bill was filed.

3d. That they entered under the authority of the Councils, who had the legal title and the control thereof, subject to the easement, and under the eye and acquiescence of the plaintiff.

Is this a proper case for an injunction?

1. If there is a dispute as to the title, equity will only interfere in rare cases with a view to a trial at law: 2 *Eden* 259, note 2; 5 *Met.* 118. And to entitle him to this the plaintiff must show a strong *prima facie* case, and that he has been guilty of no improper delay: 2 *Eden* 259, note 2. Or that the defendant has created the nuisance to the prejudice of a right long enjoyed by plaintiff: 3 *Johns. C. R.* 287. And actual possession is required to dispense with sending a party to law: 2 *Johns. C. R.* 265. At least three years: Brown's Case, 2 *Vesey* 414; 6 *Johns. C. R.* 19. And in the case of an easement, the party complaining must show substantial injury not susceptible of compensation in damages: Moyer *v.* The Commonwealth, 7 *Barr* 365.

2. As to the title of defendant.

The 11th section of the charter provides that the company, when it shall be necessary to occupy any *public way or ground*, may agree with the corporate authorities having charge thereof, upon the terms on which the same may be used or occupied; and the city did grant a license to the company to occupy the premises. It is said the common is not "*public ground*," but an easement (see Commonwealth *v.* Rush, 2 *Harris* 186); and that the city corporation holds it in trust; that it shall be applied to no other purposes without releases from the commoners. But the answer is that, the legislature has made the appropriation in the exercise of its right of eminent domain; and the corporate authorities having charge of it are wisely invested with the power of settling its terms; and there is no violation of the trust in allowing the right of way.

Acquiescence by the plaintiff for two years is a conclusive answer to the whole case: Carr *v.* Wallace, 7 *Watts* 394. The slightest laches will operate as a bar in a case like this: 2 *Eden* 372, note 2; Agar *v.* Regent's Canal, 1 *Swanst.* 245; Attorney-General *v.* Cleaver, 18 *Vesey* 211; 2 *Eden* 274–5.

The company have the right to stop and discharge, or load their cars at any point upon their own track, and this *ex necessitate*, as essential to the enjoyment of the road itself; and, as the road was to terminate at Federal street, a stoppage at that point was unavoidable. And so was it necessary in receiving and discharging freight and passengers; and for this purpose a platform, if in their judgment required, would be altogether proper. The plat-

Digitized by Google

www.libtool.com.cn

form complained of occupies no more ground than that previously appropriated under the eye of complainant. And if an estoppel arose out of the appropriation and acquiescence, it extended to all cases for which the ground might have been lawfully taken.

The opinion of the Court was delivered by

LEWIS, C. J.—This is a bill by one who claims common of pasture in certain land called the South Common in Allegheny City. The prayer is for an injunction to restrain the railroad company from using any part of the common for the purposes of the railroad. By the Act of 11th September, 1787, the purchasers of in-lots in the town became entitled to common of pasture in 100 acres of land reserved for the purpose by the state when the lots were sold by her authority. The right of the state has since been transferred to the City Councils, and the latter, in consideration of the sum of $300 annually, have granted to the railroad company a perpetual lease of the right of way through the common of the width of fifty feet. Under this grant the railroad was located and constructed in the summer of 1851. No objection was made by the plaintiff to this proceeding for about two years, although it took place under his view. The South Common, before the grant to the railroad company, was a strip of land of the width of 144 feet. It has not been enclosed. It has been as open to the public at large as to the commoners themselves. The herbage is about as abundant as that which might be found in a recently disinterred street of Herculaneum. The plaintiff's right to take the herbage by the mouths of his cattle is of no appreciable value. Neither he nor those under whom he claims the lot to which the common is said to be appurtenant, have exercised the right within twenty-one years. But, on the other hand, neither the state nor the City Councils, while owning the soil, have exercised acts of ownership adverse to the plaintiff's claim. The Act of 13th April, 1840, is relied on as containing an acknowledgment of the right of common. We may concede for the present, without, however, deciding the point, that this recognition, together with the absence of any adverse enjoyment or claim, may be sufficient to preserve the right of common of pasture from the influence of *nonuser*. But these circumstances will not preserve it from destruction by the positive acts of the commoner himself. The evidence is sufficient to show that about forty years ago the owner of the lot claimed by the plaintiff gave twenty feet from the rear of his lot, for the purpose of widening a twenty feet alley, called Water Alley, into a street of the width of forty feet, and that at the same time he extended this front line of his lot, so as to enclose twenty feet of the land in which he claims common of pasture. The same thing was done by the other lot-holders, whose lots were situated between the South Common and Water Alley. Water

Digitized by Google

www.libtool.com.cn

Alley, thus widened, has been paved by the City Councils, and used by the public as a street ever since; and the portions of the common thus enclosed by the lot-holders, have been held by them in severalty as their own for the same period of time. The common itself, immediately in front of these enclosures, has been used more as a public thoroughfare than as a pasture ground, and no one can fail to perceive that this is more for the advantage of the adjoining proprietors than any right of pasturage which they could possibly enjoy in the land. After the lapse of forty years, and the positive acts of the City Councils in recognition of the exchange, the law will presume that the transaction was in pursuance of a valid purchase of a portion of the land subject to common of pasture by the parties entitled to the easement. That this presumption stands good, until some one whose interest is disputed thinks proper to dispute it, there can be no doubt whatever. Neither the commoners nor the owners of the fee have disturbed the arrangement. On the contrary, for obvious reasons of mutual advantage, all parties have acquiesced for forty years. What, then, is the effect of this purchase by the commoner of a part of the land in which he claims common of pasture? There is a distinction between common appendant and common appurtenant in this important particular, that, if he who has common appurtenant purchases parcel of the land subject to the easement, all his right of common is extinct; or, if he takes a lease of part of the land, all the common is suspended; because it is the folly of the commoner to intermeddle with the land; his common appurtenant was against common right, and he cannot common in his own land which he has purchased. This principle was expressly decided in Kimpton and Bellamy's Case, 1 *Leonard* 43; in Tyringham's Case, 4 *Coke* 38; in Wyatt Wild's Case, 8 *Id.* 79, and in numerous other cases. It was said in Tyringham's Case, that common appurtenant cannot be extinct in part and be *in esse* for part, by the act of the parties. These principles were fully recognised by this Court in the case of Carr *v.* Wallace, 7 *Watts* 397. It is only necessary to add that the origin and nature of the right claimed in this case show that it is a right of common appurtenant. The result is that the plaintiff's right of common of pasture is extinguished. And the same result follows if the enclosure be regarded as only a disseisin. This renders it unnecessary to consider his claims to the light, air, and prospect, supposed to be incidents of the right of pasture. The incidents fall with the principal. But if this were not so, it would be easy to show that the right to take the herbage by the mouths of his cattle gives the commoner himself no incidental right to keep the common open as an ornament to his dwelling, or as contributing to his own personal pleasure or convenience. He is a trespasser if he sets his foot upon it, except when in the necessary attendance upon his

Digitized by Google

www.libtool.com.cn

depasturing cattle. He may be excluded from all view of the common by hedges, gates, or walls, so that his cattle are not thereby kept out or prevented from enjoying the common as before: 5 *Viner's Abr.* 7; 1 *Burrows* 265; 2 *Mod.* 66; 3 *Cruise's Dig.* 95. It is, for the same reason, unnecessary to discuss the effect of the plaintiff's acquiescence in the construction of the railroad under a grant from his own municipal representatives, upon a consideration beneficial to himself as a tax-payer. By similar acquiescence, the commoners lost their right of common in the ground covered by the Western Penitentiary: Western University *v.* Robinson *et al.*, 12 *Ser. & R.* 34; and again by the same means they lost their right of common in the ground occupied by the Theological Seminary: Carr *v.* Wallace, 7 *Watts* 400. It is true that there is no acquiescence here in the exercise by the railroad company of any right beyond the fifty feet granted by the City Councils. But as the plaintiff's right of common is extinguished entirely, he has no interest sufficient to call for this extraordinary remedy to restrain the railroad company from trespassing upon others.

The annoyance alleged to arise from the necessary uses of the railroad, is not a nuisance *per se.* The learned president of the District Court has shown that, until this be determined by a jury to be a nuisance *in fact*, the Court will not interfere by injunction on that ground.

On the whole, the decree of the District Court, denying the injunction and dismissing the bill, ought to be affirmed.

Mr. Justice WOODWARD concurs in this opinion. Mr. Justice LOWRIE did not sit in the case. The other two judges are in favour of granting the injunction. The Court being equally divided, the result is that the decree of the District Court stands affirmed.

Decree affirmed.

Rogers *versus* Waterman.

A demand of an appraisement under the Act of 1849, by the defendant in an execution, after the property levied has been set up for sale, and the biddings have begun, is made too late.

Where the plaintiff knew that his property was advertised before the time appointed for the sale, he was bound to find the constable and demand his appraisement before the hour of sale, and before it commenced; and, failing in this, his right to the exemption was waived.

ERROR to the Common Pleas of *Warren county.*

This was an action brought to recover of Rogers, the defendant below, for an alleged dereliction of duty as constable in not

Digitized by Google

www.libtool.com.cn

granting to plaintiff below his right to the benefits of the exemption law of 1849.

On the 25th February, 1853, an execution against plaintiff, for $62.49, was placed in the hands of the defendant, who was temporarily resident twenty miles off, engaged in lumbering. On the 17th March, 1853, a levy was made by defendant on plaintiff's boards, and the execution returned "not time to sell." An *al. ex.* issued the same day on which the boards were advertised, and sold the 25th March. When the levy was made and advertised, the plaintiff was absent in the state of New York; but he obtained knowledge of the advertisement before the sale. The sale was advertised to take place at 1 o'clock, on the 25th March, and at 2 o'clock the boards were set up, and after one bid was made, the plaintiff claimed his right of exemption and the appointment of appraisers, to which the defendant replied that he was too late, and went on with the sale. For not allowing the claim of plaintiff, this suit was brought, and plaintiff recovered a verdict for $189 damages.

The Court charged the jury, "that the plaintiff would not be bound, under the circumstances of this case, at the peril of losing his right, to go some twenty miles to seek the constable in order to make his demand. It is a fact for the jury to say from the evidence whether the plaintiff manifested his determination to have an appraisement, and did what he reasonably could, to have it done; and whether he was prevented by haste or design of the officer.

Johnson and *Brown*, for plaintiff in error, cited Miller's Appeal, 4 *Harris* 304; Brant's Appeal, 8 *Harris* 141; Rogers' Appeal, 7 *Harris* 210; all of which decide that the claim is not allowable if the consequence will be to postpone the sale. So Hammer *v.* Freese, 7 *Harris* 255, where the demand was made on the day and before the commencement of the sale, and held too late. The demand in this case was not made till an hour after the time advertised for the sale. And the reason given by the Court below for not adhering to the law was one of convenience to the debtor. It is the duty of the debtor to be vigilant, and avail himself of the benefit conferred upon him by the law without delay.

There is no evidence of design or haste on the part of the officer to prevent the defendant in the execution from making his claim.

Curtis and *Miles*, for defendant in error.—No case decides that a defendant shall be barred of his right to exemption, where no reasonable opportunity has been given him to make it. The constable was resident twenty miles distant from defendant in the execution; and to compel him to make what would be a fruitless search after the officer would be unreasonable; and he did make the demand as soon as he saw the officer after making the levy,

Digitized by Google

which was on the day he came to make the sale. It was therefore a fact proper to be left to the jury to say whether the defendant had manifested his determination to have an appraisement, and done what he reasonably could to have it effected.

The levy was made in the absence of the defendant. No inquiry was made for him by the officer, who kept away till the day of sale. These facts, and the admission of prejudice on his part against the defendant in the execution, furnish some evidence of design to prevent the assertion of his rights.

The opinion of the Court was delivered by

BLACK, J.—This action was against a constable for selling the goods of the plaintiff under an execution, in violation, as the plaintiff alleges, of his rights under the exemption law of 1849. The plaintiff did not demand an appraisement until after the property had been set up for sale and the bidding begun. Nevertheless he was permitted to recover.

A party is not entitled to the exemption provided for by the statute unless he demands it. He waives his right by silently suffering property which would otherwise be exempt from levy to be seized and sold. There must be some period fixed at which this demand should be made, and after which it cannot be made. In Hammer *v.* Freese, 7 *Harris* 255, we said it was clearly too late after the sale had begun. We see nothing in the circumstances of this case to require a departure from that rule. If a constable should fraudulently take advantage of a debtor's absence, and sell without giving him a possible chance to get an appraisement, it might afford a good cause of action. But such fraud should be distinctly proved. There is nothing like it here. The fact that the present plaintiff lived twenty miles away from the place where the property was taken and when it was sold is no excuse. If he could afford to spend time and money in prosecuting this suit to redress the supposed wrong, he might have spent a little to prevent it from being committed. He knew of the intended sale several days before it took place; and he was in the village where the constable was some hours before the sale began. We are quite clear that the written propositions which the defendant's counsel submitted to the Court ought to have been answered in the affirmative.

Judgment reversed and *venire facias de novo* awarded.

Digitized by Google

www.libtool.com.cn

McCormack *versus* Russell.

Where a sale of unseated lands for non-payment of taxes is made in the lifetime of the owner, who dies before the time of redemption has passed, leaving minor heirs, the title of the purchaser is complete after the expiration of the two years without redemption.

The death of the owner subsequent to the sale will not enlarge the time for redemption beyond the two years allowed by the Act of 1815.

ERROR to the Common Pleas of *Warren county*.

This was an application by defendant below to open a judgment entered upon a bond, and be let into a defence. The consideration upon which the bond was given, was the conveyance by plaintiff to the defendant below of a tract of land, with special warranty, on the 22d November, 1853. The plaintiff claimed title through a treasurer's deed to A. H. Ludlow, under a sale of the land for taxes on the 12th June, 1848; on the 3d May, 1852, Ludlow conveyed to the plaintiff, who conveyed to the defendant below, as above stated, for the consideration of $1500, for part of which a judgment-bond was given and judgment entered for $1445.

The title to the land at the time of the treasurer's sale, June 12, 1848, was in John Newton, who died intestate on the 26th September, 1848, leaving several minor children, heirs, that are still living, and under age.

On affidavit of the above facts the judgment was opened, and verdict for plaintiffs. The only question considered in this Court was whether the heirs of Newton had the right to redeem the land.

Johnson and *Brown* cited *Purdon* 825, 4th section Act of 1815, and 30th section Act of 26th April, 1840, and Sidle *v.* Waters, 5 *Watts* 389; Ley *v.* Huber, 3 *Watts* 367. If the owner at the time of sale continues the owner (see authorities cited), and the taxes are merely an encumbrance, he dying three months after the sale, his minor heirs become the owners within the spirit of the Act of 1815, and may redeem for two years after they attain their majority. See further 6 *Watts* 290; Act of 12th April, 1842, § 20.

Schofield and *Wetmore*, for defendant in error.—If the several heirs of Newton have the right to redeem after two years, they derive it from the proviso of the 4th section of the Act of 1815: *Purd.* 825. This provides that if the owner shall at the *time of such sale* be a minor, two years shall be allowed for redemption after removal of the disability. The heirs were not the owners at the time of sale, and therefore not within the Act. The two years given to redeem are in the nature of a statute of limita-

Digitized by Google

www.libtool.com.cn

tions, and cannot be enlarged by construction: 6 *Watts* 388; 7 *Ser. & R.* 209.

The construction that would give the right to redeem beyond the two years, to the *immediate* minor heir, would extend it to his descendants if he should die in his minority; and thus one disability might be added to another indefinitely.

The opinion of the Court was delivered by

KNOX, J.—The only question presented upon this record, is this: Where a sale of unseated land for non-payment of taxes is made in the lifetime of the owner, who dies before the time of redemption has passed, leaving minor heirs, is the title of the purchaser complete after the expiration of the two years from the sale without redemption? The Court below held the affirmative of this question, and so do we. To decide otherwise would be in effect to make a new statute, rather than to follow an old one. Where land is sold for non-payment of taxes, if the owner or owners be at the time of such sale in his or their minority, the proviso to the fourth section of the Act of 1815 allows the redemption at any time within two years after the owner or owners arrive at full age; but if the owner at the time of the sale is of full age, the land sold must be redeemed within two years from the sale, or the title is gone. The death of the owner subsequently to the sale will not extend the time for redemption beyond the two years allowed by the Act of 1815.

Judgment affirmed.

King & Shoenberger *versus* Baker.

As a general rule, trespass *quare clausum fregit* can be sustained only by the person who had the actual possession when the injury was committed: but in case of disseisin, the disseisee, after he has regained possession by re-entry, may maintain trespass against the disseisor, for acts intermediate the disseisin and re-entry.

Where A., the owner of land, sold to B. "*wood-leave*" on the same, and he entered and cut the wood, and it remained upon the land, and afterwards C., under a *habere facias possessionem*, issued upon a judgment in ejectment obtained by default against A., entered upon the land, and took and carried away the wood cut by B., and A. subsequently, in two verdicts and judgments in ejectment, established his title to the land, and regained the possession: it was *held*, that B. could maintain trespass against C. for the wood so taken.

In such action, B. could also recover for the wood carelessly destroyed, in the attempt to appropriate it to C.'s own use, as well as for that actually appropriated.

ERROR to the Common Pleas of *Cambria county*.

Elias Baker, the plaintiff, brought this action of trespass against King & Shoenberger, for taking and carrying away 1500 cords of

Digitized by Google

[King & Shoenberger *v.* Baker.]

www.libpool.com.cn

wood, which he alleged belonged to him. On the 8th March, 1845, King and others brought an action of ejectment against James Eckels and others, to recover a tract of land surveyed in the name of Samuel Stitt. On the 18th August, 1845, a judgment was rendered in their favour, under the rules of Court, for want of a plea; and in January, 1846, a writ of *habere facias* was executed, and the plaintiffs in error put into possession. At this time Elias Baker, the defendant in error, had a contract with James Eckels, for "wood-leave," and after this judgment proceeded and cut a large quantity of wood for coaling purposes, but outside the lines of the Samuel Stitt survey. Afterwards, Eckels commenced an ejectment against King & Shoenberger, and recovered all the land they had in possession outside the Stitt survey, upon which Baker had cut the wood in dispute, and was put in possession by a writ of *hab. fac.* While King & Shoenberger were in possession they coaled a part of the wood cut by Baker, and the remainder was consumed by fire communicated from the coal-pits of plaintiff in error. King & Shoenberger brought another ejectment, to recover back the land from Eckels, and Baker brought against them this action of trespass, which by consent of parties were tried by the same jury.

In the ejectment a verdict was rendered in favour of Eckels, and in the action of trespass a verdict and judgment were rendered in favour of Baker for $1100 damages. This writ of error was sued out to remove this latter judgment.

The errors assigned were,—To the ruling of the Court that the action of trespass could be maintained, and that the plaintiff could recover in this form for the wood consumed by fire.

Foster, for plaintiff in error.—The wood was cut while the defendants were in possession, and they are not liable in trespass: 3 *Ser. & R.* 509; 2 *Watts* 126; 6 *Ser. & R.* 476. The title to the land could not be tried in trespass or replevin against one in the actual possession of the land: 10 *Ser. & R.* 114. By the recovery in ejectment, King & Shoenberger became entitled to the mesne profits: 2 *Barr* 271; *Bull. N. P.* 88; 2 *Johns. Rep.* 369.

Banks and *White*, contrà.—The plaintiff, Baker, did not pretend to have any title, but rested his case on the title of Eckels, from whom he purchased the wood-leave, whose title was conclusively established by two verdicts and judgments in ejectment.

On the question of whether trespass would lie, they referred to 8 *Barr* 212; 10 *Ib.* 198, 254; 2 *W. & Ser.* 116; 4 *Harris* 530.

The opinion of the Court was delivered by

Lewis, C. J.—It is true, as a general proposition, that trespass

Digitized by Google

quare clausum fregit can be sustained only by the person who had the actual possession when the injury was committed; but it is also true that in case of disseisin, the disseisee, after he has regained possession by re-entry, may maintain trespass against the disseisor and *his servants*, for acts intermediate the disseisin and re-entry; for, *as to them*, the law, after the re-entry, supposes the freehold to have continued in the disseisee: Lippend's Case, 11 *Rep.* 51. But the law is otherwise as to strangers, for it is a general rule, with respect to the doctrine of relation, that it shall not do wrong to strangers: Wickham *v.* Freeman, 12 *Johns.* 184; Dewey *v.* Osborn, 4 *Cowen* 338; Case *v.* De Goes *et al.*, 3 *Caines Rep.* 261, 263. It was declared by the late Chief Justice GIBSON, in Powell *v.* Smith, 2 *Watts* 126, that nothing is clearer than that a mere recovery in ejectment, without entry or writ of possession executed, is not equivalent to an entry, even to bar the statute of limitations, and therefore not equivalent to actual possession. On this principle it was held in that case, that the party who recovered the land in ejectment could not maintain replevin for fixtures which had been separated from the freehold by the party in actual possession, after judgment and before the issuing of a *habere facias possessionem*. His remedy for this injury is in an action for mesne profits, by laying the spoliation separately in the declaration. In such an action, the party in possession at the time of the trespass complained of is entitled to an allowance for the value of improvements made in good faith, to the extent of the rents and profits claimed: Jackson *v.* Loomis, 4 *Cowen* 168. It would provoke much useless litigation, and be attended with great practical mischief, if an owner out of possession were suffered to harass the actual occupant with an action for every blade of grass cut, or bushel of grain grown by him, instead of being compelled to resort to the action for mesne profits after a recovery in ejectment, by which compensation for the whole injury may be had at one operation: Powell *v.* Smith, 2 *Watts* 127. From these principles it would seem to follow that, by the severance of the timber from the freehold, while it was in the actual possession of the disseisor, the timber became personal property, and as such belonged to the disseisor, he being answerable over to the owner of the freehold for the whole injury committed by the disseisor, in an action for mesne profits, and not otherwise. If the timber was cut by a stranger, under a purchase by him from the disseisor in actual possession, the case is still stronger against the right of the disseisee to sustain any personal action for its value, founded on the right of property. If this case stood, therefore, upon the first judgment in ejectment in favour of King & Shoenberger *v.* Eckels, and the severance of the timber by Baker while Eckels was in actual possession, although after the judgment, but before possession taken, King & Shoenberger would have no right to the timber. But the right

Digitized by Google

www.libtool.com.cn

of Eckels to the land itself has since been established by two concurring verdicts and judgments in his favour. The present action by Baker against King & Shoenberger was not brought until after Eckels, under whose license Baker cut the cord-wood, had recovered possession in a second ejectment. The third ejectment was tried at the same time with Baker's action for the cord-wood. In the instructions, Baker's right to recover was made to depend on Eckels's title to the land. As Eckels had the actual possession when the wood was cut, and also when the action of trespass was brought and tried, and as the jury have found him to be the owner of the land, the plaintiffs in error have certainly no cause to complain. The action of trespass was well founded. The defendants had neither possession of the land, nor the right of property in it, when the wood was cut. They were answerable, not only for the plaintiff's cord-wood which they made use of, but for that which they carelessly destroyed in the attempt to appropriate it to their own purposes.

Judgment affirmed.

McNeal *versus* Holbrook.

Where three executors filed a joint account, showing a balance in their hands, and one of them was discharged by the Orphans' Court, and directed to pay over "any funds in his hands to the other executors," which was done: *Held*, that the decree of the Orphans' Court, designating the persons to whom the money should be paid, was conclusive, and that a legatee could not maintain an action against the discharged executor, to recover a legacy.

Error to the Common Pleas of *Somerset county*.

On the 28th March, 1837, the will of Robert McClintock was proved before the register of wills of Somerset county, and letters testamentary issued thereon to Rachel McClintock, Alexander McClintock, and H. L. Holbrook; and on the 1st of November, 1841, the executors filed a joint account, showing a balance in their hands of $1792.15¼, which was confirmed. In January, 1842, H. L. Holbrook presented his petition to the Orphans' Court, praying to be discharged from his executorship, upon which the Court made the following order:—"The Court discharge executor, and direct him to pay over any funds in his hands to the other executors."

The defendant showed that he had paid over all the funds in his hands to his co-executors. In May, 1854, the legatees caused the balance due on the account to be certified from the Orphans' Court, and filed it in the Common Pleas, under the provisions of the 29th section of the Act of 29th March, 1832. And the plaintiff brought this action of debt thereon, to recover a legacy of $800, bequeathed to her by the testator.

Digitized by Google

www.libtool.com.cn

The defendant relied on the decree of the Court, and the payment over to his co-executors of the funds in his hands.

The Court directed a verdict in favour of the defendant: and this, *inter alia*, was assigned for error.

Gaither, for plaintiff in error.—The account being joint, the defendant is estopped from denying the liability: McCoy's Appeal, 15 *Ser. & R.* 57. They are concluded by the decree of the Court: 2 *Watts* 161; 17 *Ser. & R.* 336; 2 *Rawle* 287; 7 *Barr* 265.

The discharge of the defendant as executor was not binding on plaintiff, as no notice was given to her of the application: 3 *Rawle* 243; 7 *Watts* 438.

Edie and *Baer*, for defendant in error.—The decree of the Court, confirming the account, was conclusive only as to the amount in their hands, but does not determine to whom it should be paid. The decree of the Court directing the discharge of Holbrook, and to whom the money in his hands should be paid, was equally conclusive on these questions. He complied with that decree, and was discharged from all liability. See 21st section Act of 29th March, 1832.

The opinion of the Court was delivered by

Lewis, C. J.—The filing in the Common Pleas of transcripts or extracts of the amount appearing to be due from, or in the hands of executors, on the settlement of their accounts in the Orphans' Court, does not take away the jurisdiction of the latter tribunal. The transcript is still subject to such modification of the original decree, on appeal, bill of review, or otherwise, as the Orphans' Court has the power to make. With much greater reason may it be held, therefore, that the transcript cannot be used to produce an effect entirely different from the decree as it stood when the transcript was taken, and as it still remains in the Orphans' Court. The decrees of the Orphans' Court are conclusive. They cannot be reversed in any collateral proceeding, if the subject-matter and the parties be within the jurisdiction of that Court. The right to discharge one of several executors, and to direct to whom the assets in his hands shall be paid, exists as a part of the jurisdiction of that Court. The necessity for an occasional decree, dismissing an executor before distribution, must be manifest. If this be done, it is clear that the Court must designate the person to whom the money on hand is to be paid. The Act of 29th March, 1832, sect. 21, expressly directs that an executor, on being dismissed from the duties of his appointment, may surrender the property in his hands to "such person as the Court may direct." In this case the account of the executors was confirmed on the 10th November, 1841; but in January, 1842, the Orphans' Court dis-

Digitized by Google

www.libtool.com.cn

charged H. L. Holbrook, one of three executors, and directed him to pay over any funds in his hands to the other executors. After this decree was made, the transcript was taken to the Common Pleas; and instead of the "other executors" bringing the action on the transcript, according to the statute, a legatee brings his action for his share of the balance found due from the executors. The action is in direct conflict with the decree, and cannot be maintained. The Court was correct in directing a verdict in favour of Holbrook. This being the case, the other matters complained of become immaterial.

Judgment affirmed.

Gibson's Appeal.

Where a testator devised lands to his sons, and as to his daughter M. ordered, that she should, "in case of need, be supported in a comfortable manner of the proceeds of my land," it was *Held*, that the maintenance of M. was a charge upon the land devised to the sons, and that the Orphans' Court had exclusive jurisdiction to fix the amount, and enforce the payment of the sum required for that purpose.

If the decision of disputed facts be referred to the determination of the Orphans' Court, without asking for an issue, to try them, their finding of such facts is as binding on appeal, as the verdict of a jury.

THIS was an appeal by Thomas Gibson from the decree of the Orphans' Court of *Butler county* ordering him to pay the sum of $30.78 presently, and the like sum annually, to Mary Denny, towards her maintenance.

Thomas Denny, the father of Mary, died in 1841, having previously made his last will and testament, in which he devised to his sons John and Thomas respectively 74 acres of land, and to his son James 40 acres. And as to his daughter Mary, ordered that she should, "in case of need, be supported in a comfortable manner of the proceeds of my (his) land, so long as she shall live." The devisees entered upon and took possession of the land severally devised to them, in pursuance of the said devise. The interest of John was sold at sheriff's sale, and became vested in Thomas Gibson, the appellant, who was in possession of the same.

In June, 1854, the petition of Mary Denny was presented to the Orphans' Court, setting forth the devise and the charge in her favour upon the land, that Gibson was the owner of a part of the land charged with her maintenance, and also alleging her need of the support ordered by her father's will. And prayed for a decree that respondent pay to her his proportionate share of such sum as the Court might deem proper and reasonable for her comfortable maintenance.

Digitized by Google

[Gibson's Appeal.]

www.libtool.com.cn

The answer of the respondent admitted that the lands devised were charged with the comfortable maintenance of the said Mary during her life only *in case of need*, and alleged that she was not in such circumstances as to require a resort to this charge upon the land.

The case was heard upon depositions of witnesses taken by the complainant and respondent respectively.

His Honour the President of the Court, after stating the case, and the facts presented by the evidence, delivered the opinion and made the following decree:—

"From the whole evidence, we are convinced that the petitioner has made out a case of need, not absolute pauperism or want, as Mr. Gibson seemed to think when he refused to acknowledge any liability to Mary, but that need of support in a 'comfortable manner' which the testator contemplated. This being the case, the portion of the land devised to John Denny has become liable in the hands of his assignee, and must be subjected to the burthen of the charge upon it: Craven *v.* Blakeney, 9 *Watts* 19.

"Thomas Gibson, Esq., the respondent, became the owner of John Denny's 74 acres, as the assignee of the purchaser at sheriff's sale. By privity of estate he is therefore personally liable to the payment of the charge upon it. This, we think, is abundantly shown in the following cases: Mohler's Appeal, 8 *Barr* 26; Shaffer's Appeal, *Ibid.* 44; Horner *v.* Horner, 5 *Barr* 351; Lobaug's Case, 6 *Watts* 167.

"As the legal title still remains in Gibson, who will be liable to Wilson on his contract to convey, and as the land itself will be liable to the decree also, we conceive no personal liability should be visited upon the latter.

"According to the evidence, it would require $2 a week, or $104 per annum, to support Mary. This is charged on the testator's whole land, 250 acres. The proportion which 74 acres gives of this is $30.78, leaving the other portions to bear their own burden.

"And now, to wit, March 26, 1855, the Court order and decree, that Thomas Gibson, the respondent, pay to Mary Denny, the petitioner, until otherwise ordered by the Court, or until his estate in the premises cease, or if his estate in a part cease then in proportion to the remainder, the sum of $30.78 forthwith, with the cost of this proceeding, and a like sum of $30.78 yearly and every year hereafter, during the life of the said Mary Denny; and in default of such payment, that the premises (that is to say, the tract of 74 acres devised to John Denny by his father Thomas Denny, and now owned by the said Thomas Gibson), be sold at public sale at such time and place, on such terms and by such person as the Court shall hereafter on application specially decree, for the payment of the said annual sum and costs."

Digitized by Google

[Gibson's Appeal.]

www.libtool.com.cn

In this Court the following exceptions were filed:—

1. The Orphans' Court has no jurisdiction.

2. The decree is not in accordance with the spirit and meaning of the testator.

3. The amount to be paid per annum is more than is justified by the testimony.

J. N. Purviance, for appellant.

Graham, for appellee.

The opinion of the Court was delivered by

Black, J.—Testator devised lands to his sons, and as to his daughter Mary, ordered that she should, "*in case of need*, be supported in a comfortable manner of the proceeds of my land." This is a proceeding in the Orphans' Court, commenced by Mary against the present owner of part of the land, who claims under one of the devisees, to compel him to give her that share of her comfortable maintenance which is chargeable upon the land owned by him.

We have no doubt that the land is charged with this burden—directly charged; and we are equally clear that the Orphans' Court not only has jurisdiction, but exclusive jurisdiction of the subject. Indeed the answer does not deny that it is a charge. The ground of defence which the respondent has taken on the record is, that the complainant does not need a maintenance out of this land, having other means of support. This was a question of fact, to try which an issue might have been ordered. But none was demanded. The matter was left to the Court, and being determined by the Court, it is as binding on us as if it had been found in the same way by a jury. We may add, however, that the construction given to the will, the adjudication upon the evidence, and the shape of the decree, have our entire approbation.

Decree affirmed.

Linton *versus* Hart.

The owner of a reversion has a right to sell the whole or a part of it, and the law will apportion the rent; and the right of apportionment attaches the instant the sale is made.

No action of the purchaser, in dispossessing the tenant of the part purchased after such severance, can affect the rent accruing out of the unsold part, and remaining in the undisturbed possession of the tenant.

Nor will the fact that the original reversioner became a party to the trespass, by which the tenant was dispossessed of the part sold, by aiding his vendee to commit it, change the rule, or suspend the rent for that part, which was unsold, and which remained in the possession of the tenant.

Digitized by Google

[Linton *v.* Hart.]

ERROR to the District Court of *Allegheny county*.

This was an action of covenant on a lease, brought by John Linton, the plaintiff below and plaintiff in error, to recover from Joseph Hart, the defendant, the sum of $118.75, one quarter's rent due on the 14th September, 1854. The defendant pleaded entry and eviction by the plaintiff, and the rent estopped, upon which issue was joined. And on the trial of the case, the following facts appeared in evidence. On the 13th day of June, 1853, the plaintiff leased to the defendant a ferry on the Allegheny river, called "the Sharpsburg Ferry," together with the boats, appurtenances, and privileges—a house and the piece of ground attached thereto, for and during the period of five years from the 14th day of June, 1853. For which the defendant covenanted to pay the yearly rent of $475 in quarterly payments. The defendant entered into possession in pursuance of the lease. On the 14th day of August, 1854, Linton sold a part of the land embraced in the lease to the Allegheny Valley Railroad Company, and agreed to release the said company from all damages by reason of the location and construction of their railroad. Under this agreement the railroad company entered into the premises purchased, and constructed their road, and in such manner, as defendant alleged, as to greatly interfere with his use and enjoyment of the ferry, and so as to impede and obstruct the road to and from the same.

The plaintiff submitted in writing the following points to the Court, viz.:

The Court is requested to charge the jury, 1. That an eviction, such as to stay rent, must be made and continued by the party himself, or his agent, and in his name, and not by any person to whom he might sell, and against whom the tenant may have a sufficient remedy.

2. That the plaintiff in releasing the right of way to the Railroad Company, did no more than he had a right to do, as the owner of the fee; and by so doing did not interfere with any remedy his tenant might have, and the plaintiff is entitled to recover.

3. That the plea of eviction being a peculiar one, the defendant will be held to strict proof, more particularly since he has elected a sufficient remedy by action of trespass.

5. That the entry of the Company by virtue of the release from Linton, as regards the reversion, was an entry by authority of law, and as regards the term, could not affect the right of Hart, and did not profess to conclude him.

The Court charged the jury as follows:

"The only question of law which arises in this case, is whether such an authority is given by both or either of these agreements as to render the plaintiff responsible for the entry and the eviction

Digitized by Google

www.libtool.com.cn

of the defendant by the railroad company. The law is well settled, that if the lessor wrongfully enters upon a part of the demised premises, and evicts the tenant, the whole of the ensuing rent is thereby suspended. Is then the plaintiff liable for the consequences of the entry and eviction made by the railroad company, under his agreement of the 19th of September, 1853? Looking to the terms of the agreement, it seems to me that he must be considered as having authorized the entry on the demised premises, and that he is to be visited with all the consequences of the eviction in the same manner as he would be if he had himself entered and evicted the defendant. The only question of fact for the determination of the jury is, when did the railroad company enter and evict the defendant from a portion of the demised premises? Was it during and before the expiration of the quarter ending the 14th of September, 1854? If before that date, the plaintiff is not entitled to recover. If it was after the 14th of September, 1854, when the rent demanded became due, then the plaintiff is entitled to recover.

"The defendant's points are sufficiently answered in the charge, and the Court refuses to charge as requested by plaintiff's counsel, in the points by them submitted."

The plaintiff excepted to the ruling of the Court. The jury found for the defendant: and the plaintiff removed the cause by writ of error into this Court, and assigned the following specification of errors:

1. The Court erred in refusing to charge the jury as requested by the plaintiff's counsel in the points submitted.

2. The Court erred in charging the jury that the entry of the railroad company was the entry of the plaintiff, who should be visited with all the consequences.

G. P. Hamilton and *Arthurs*, for plaintiff in error.—Linton, by his agreement, sold to the railroad company only his fee in the premises. He had a right to sell, and if the defendant is injured by the entry and acts of the company, he could maintain his action against it: 10 *Harris* 144. The acts of Linton were not an eviction, and did not suspend the rent for the whole of the premises, or prevent an apportionment of it. The defendant was still in possession of the ferry. A sale of a portion of demised premises is followed by an apportionment of the rent. Even entry into a part extinguishes the rent but *pro tanto*.

Barton, for defendant in error.—The landlord is liable in this case for the acts of the company in taking possession. This was not an ordinary sale of the reversion, but an immediate transfer of the estate; and when the railroad company entered by virtue

Digitized by Google

of it, the landlord's right to rent was suspended. It was an actual eviction of the defendant. Linton sold to the company an immediate right of entry and possession, and the company acted upon this by evicting the defendant. Linton was a trespasser; for all who order or procure a trespass to be committed are principals: 8 *Barr* 217.

The opinion of the Court was delivered by

Lewis, C. J.—The law will not apportion rent in favour of a wrongdoer, and therefore if the landlord wrongfully dispossesses his tenant of any portion of the demised premises, the rent is suspended for the whole. But the owner of a reversion has a right to sell the whole or any part of it. Such right is incident to the right of property, and necessary to the full enjoyment of it. The exercise of it is not wrongful, and therefore, in the case of a sale of a part of the reversion, the law will apportion the rent; and the right of apportionment attaches the moment the sale is made. No action of the purchaser, or his aiders and abetters, in dispossessing the tenant of the part purchased, after such severance can have any effect upon the rent growing out of the unsold part remaining in his undisturbed possession. It matters not that the original reversioner, after such severance, becomes a party to the trespass by aiding his vendee in committing it. The trespass has relation only to the part sold, and cannot be visited upon the other part of the premises. These principles are fully affirmed in Reed *v.* Ward, 10 *Harris* 144. If this be the law in the case of a sale voluntarily made for the mere convenience of the reversioner, it applies with much greater reason to a sale made under compulsion to a railroad corporation having authority from the Commonwealth to take the property for the purposes of the road without the consent of the owner. In such a case there is no reason for visiting the reversioner with the consequences of a trespass committed by the corporation. It had no right to take the estate of the tenant without compensation given or secured. The sale of the reversioner's interest in the part so taken conferred no such right, and the tenant has an ample remedy for the injury without depriving his landlord of the just portion of rent due for the premises enjoyed under the lease.

So far as the instructions of the Court were in opposition to these principles, there was error.

Judgment reversed and *venire facias de novo* awarded.

Digitized by Google

www.libtool.com.cn

Fisher *versus* Whoollery.

Replevin, in its inception, is a mixed action; being a demand for the thing itself, and also for damages for the taking and detention.

If the property be delivered to the plaintiff, the defendant is answerable in damages for the taking and detention, up to the time of delivery; but if the property be retained, he is answerable in addition for the full value.

The property itself can in no event be recovered at law from the defendant; nor can he tender it afterwards, in discharge of the action, or even in satisfaction *pro tanto* of the damages claimed. A clause in the bond given by the defendant, providing for a return of the property, is a nullity.

Where the property is retained and bond given by the defendant, the plaintiff's right to the property is turned into *a chose in action;* his property in the thing itself is absolutely gone.

In such case, where the defendant, after he had given bond to retain the property in the replevin, caused it to be seised and sold under a judgment against the former owner, and purchased it, he acquired no better right than he had before, the property of the plaintiff having been previously divested.

ERROR to the Common Pleas of *Fayette county.*

This was an action of replevin, in which the jury found the following special verdict:—

And now, to wit, January 9, 1855, a jury being duly empannelled, do find on their oaths that, on the day of the issue and execution of this writ of replevin, to wit, on the 13th of February, A. D. 1852, the property mentioned therein was the proper goods and chattels of the plaintiff, and that he had the right to the possession of the same, but that the defendant there held and debarred them from the possession of the said plaintiff; the jury further find that when the sheriff, under the authority of the said writ of replevin, was about to replevy the said property, the said defendant claimed to hold the same as his own, on an innkeeper's lien, which the jury find did not exist, and gave bond to the sheriff that he would defend and make good his claim, &c. That, afterwards, to wit, on the 24th day of February, 1852, the said defendant, having obtained a judgment against the plaintiff, John Whoollery, before a justice of the peace, caused an execution to be issued, which was accordingly done and placed in the hands of a constable, who, on said 24th of February, levied upon the said horse creatures in the replevin mentioned, as the property of said Fisher, and by due and legal proceedings thereafter had, said property was sold under same execution to the same defendant, Fisher. But whether under these facts the plaintiff or the defendant is entitled to their verdict the jury are ignorant, and pray the judgment of the Court. If the Court should be of opinion that plaintiff is entitled to recover the value of the property and damages for the detention, then judgment to be entered for the plaintiff for the sum of $153 da-

Digitized by Google

www.libtool.com.cn

mages and costs of suit. If the Court should be of the opinion that plaintiff was not entitled to recover the value of the property, but merely damages to the date of the levy, then judgment to be entered for the plaintiff for $2 damages and full costs, or such costs as the Court may be of opinion plaintiff is entitled to recover. And if the Court shall be of opinion that plaintiff is not entitled to recover, then judgment to be entered for defendant, with costs of suit.

The Court entered judgment on the verdict for the plaintiff for $153 and costs.

This was assigned for error.

Deford, for plaintiff in error.—If the giving of the bond in replevin changes the property, the plea of property would be a nullity. The case in *Wallace Jr.* per GRIER, J., must be understood to refer to the effect of a recovery. The plaintiff must show property in himself: 5 *Binn.* 399; 4 *Rawle* 253; 6 *Watts* 303; 3 *Wh.* 398. The plea of property does not even admit the caption: *Gilbert on Rep.* 127–8; but throws the whole burden on the plaintiff: 6 *Har. & John.* 469; *Gilb. on Rep.* 227. If giving the bond changes the property, the contest afterwards would be useless. Where delivered to the plaintiff and he recovers, it is only for the detention and costs; if found for defendant, it is *pro retorno habendo*; if for the value of the property, it would be reversed: 5 *Ser. & R.* 132; 3 *Watts* 277; 3 *Barr* 13; 3 *Watts* 223.

Parshall, for defendant in error, cited 1 *Ch. Pl.* 635; 3 *Barr* 13, 21; *Wallace Jr.* 327; 12 *East* 644; 1 *Saund.* 436; 4 *East* 202.

The opinion of the Court was delivered by

LEWIS, C. J.—Replevin, in its inception, is a mixed action. It is a demand for the thing itself, and also for damages for the taking and detention. The defendant has his election to deliver the property on the writ, when the sheriff calls for it, or to retain it on giving security. If the property be delivered to the plaintiff, the defendant is answerable in damages for the taking and detention up to the time of delivery. If the property be retained, he is answerable, in addition, for the full value. In either case, the action thenceforth proceeds for damages alone. The property itself can in no event be recovered at law from the defendant; nor can he tender it, afterwards, in discharge of the action, or even in satisfaction *pro tanto* of the damages claimed. That part of the bond usually given by the defendant which provides for a return of the property is a nullity: Chaffee *v.* Sangston, 10 *Watts* 265; Moore *v.* Shenk, 3 *Barr* 13.

Digitized by Google

www.libtool.com.cn

Nothing but money can be recovered in an action on the defendant's property-bond. Where the property is retained by the defendant, the plaintiff in replevin must declare that the defendant *yet hath* and *detaineth* the goods, and he shall have judgment to recover *all in damages*, as well the *value* of the goods as damages for the *taking* of them: *Fitz. N. B.* 159-60; Chaffee *v.* Sangston, 10 *Watts* 267. The action for *the value* in *damages* is inconsistent with a claim for the return of the property in specie. Such an action can only be sustained upon the ground that the property has been converted to the use of the defendant. Where there is a right, there is usually a remedy. But, clearly, after the property is retained by the defendant on the claim of ownership, and security given to the sheriff, there is no remedy at law by which the plaintiff in replevin can repossess himself of it. If his right exists, it presents the unusual spectacle of a right without a remedy to enforce it. It is idle to talk of such a right. If not recognised and enforced at law, it is the same as if it had no existence. This is the practical view of the subject. The law deals with the substance and not with the shadow. It is true that if the defendant claims only a special property, the plaintiff may have a new writ when the special property of the defendant is determined. But if he sets up a false claim to a special property, the result is the same as a false claim to the property generally. In either case the plaintiff's right to the property itself is turned into a *chose in action*—a right to the value in damages. It follows necessarily from these principles, that if the defendant refuses to deliver the property, and the plaintiff proceeds for damages, the right of the latter to the property itself is absolutely gone. Even the right of recaption is determined by the election of the remedy by action. This result is produced by the election of the parties themselves: Taylor *v.* The Royal Saxton, 1 *Wallace Jr.* 327.

As Whoollery had no property in the animals at the time Fisher caused them to be levied on by virtue of the execution in his favour, the sale by the officer gave the latter no better right than he had before. Such a defence was no answer to the wrongful acts by which the plaintiff had previously been deprived of his property. Judgment was, therefore, properly entered on the special verdict in favour of the plaintiff for the value of the property and damages for the detention.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Hogg *versus* Charlton.

Independent of special legislation, the District Court has power to adopt a rule requiring affidavits of defence.

When a record is admitted to be filed, and the paper-book gives no exemplification of it, this Court will presume it to be filed according to the rule of court.

It is not necessary to file a copy of the note on which a foreign judgment was founded; the note was extinguished by the judgment. The case of McCleary *v.* Faber does not require that a copy of the original cause of action shall be filed, after it has been extinguished by a judgment.

The plaintiff has a right to pursue his remedy in New York and here at the same time, until he obtains satisfaction.

In taking defence to an action of debt on a foreign judgment, defendant is bound, when required by the rule of court, to file a sufficient affidavit of defence.

ERROR to the District Court of *Allegheny county*.

The questions in this case were, whether the plaintiff below was entitled to judgment in an action of debt, brought upon a foreign judgment, where the defendant had failed to file a sufficient affidavit of defence, and where another suit was pending for the same cause of action in the state of New York.

The plaintiff below filed a transcript of a record from the Supreme Court of the state of New York, in which he had obtained judgment against the defendant and others for $2459.96. The defendant alone was summoned, and the summons returned N. E. I. as to the others. The defendant filed an affidavit of defence, and also a supplemental affidavit, which the District Court held insufficient, and gave judgment for the plaintiff for the amount of the claim and interest.

The defendant below took a writ of error, and assigned the following errors:—

1. The plaintiff is not entitled to judgment for want of an affidavit of defence in an action of debt, on a judgment in another state, upon filing a copy of the record.

2. The copy of the record filed contains no copy of the note, or instrument of writing, and book entries, or statement or specification of the claim on which the action was brought in the state of New York.

3. The plaintiff did not file with his *præcipe* for the summons, in the office of the prothonotary, a copy of the instrument of writing and book entries, or a statement or specification of the claim, as required by the rule of Court to entitle him to judgment for want of an affidavit of defence.

4. There is another suit pending for the same cause of action in the state of New York, that was commenced prior to this action.

Digitized by Google

[Hogg v. Charlton.]

Hepburn and *Sweitzer*, for plaintiff in error.—The action brought in the state of New York was to recover the value of goods sold and delivered, and the amount of a promissory note afterwards given in payment thereof. The record shows no specification of the goods or copy of the note. In McLeary *v.* Faber, 6 *Barr* 476, it is held, that the instrument on which the foreign judgment is founded, when itself within the Act, *a copy of which was then filed*, was within the Act allowing judgment to be entered for want of an affidavit of defence, but not otherwise: see Reed *v.* Reed, *Troubat & Haley* 835, in the District Court of Philadelphia, where it is held that the plaintiff is not entitled to judgment on filing a record without such affidavit. But when the record filed shows *a copy* of such instrument as the foundation of the judgment, which, if filed alone, would entitle plaintiff to judgment without such affidavit, then judgment will be given, if such affidavit be not made: so also Walker *v.* Delaware Insurance Company, Lynch *v.* Boyers, and Carter *v.* Winner, 1 *T. & H. by Wh.* 334–6. The record in this case was therefore not within the Act.

The rule of the District Court requires a copy of the instrument, book entries, record, or claim, &c., on which action has been brought, to be filed with the *præcipe* for the writ. No such copy was filed in this case. It must appear from the record that the instrument on which the judgment was founded comes within the Act. The supplemental affidavit shows that after judgment the plaintiff brought suit in New York to reach a specific fund, applicable, as he says, to the payment of his debt; and the Court restrained the receiver from disposing of it till that issue is determined. This subsequent proceeding locks up money and effects of the defendant many times the amount of the judgment; and the plaintiff, having elected to seek satisfaction by this subsequent proceeding, cannot bring another action here; a plaintiff, suing in equity, and in a foreign court of law, shall be put to his election: *Bac. Abr.* 318; Peiters *v.* Thompson, 1 *Cooper* 294; 1 *Vesey & B.* 331; 3 *Vesey & B.* 9; 19 *Ves.* 277. Plaintiff having determined his election, he shall not bring another action of a different stamp before discontinuance: Pitt's Appeal, 5 *Barr* 500; Harker *v.* Whittaker, 5 *Watts* 476; Share *v.* Anderson, 7 *Ser. & R.* 63. Can I sue a bond in several places? Is not *lis pendens* a good defence? 1 *Cooper* 294.

Shannon, for defendant in error, cited 6 *Barr* 477; Winner *v.* Carter, *Wh. Dig.*, *Practice*, § 20. Judgment may be taken in an action of debt on a foreign judgment for want of an affidavit of defence.

The opinion of the Court was delivered by

Lewis, C. J.—The rule of Court authorizes a judgment for

Digitized by Google

want of an affidavit of defence in "all actions of *debt*, or *scire facias*," "on *judgment*, or other record." The present is an action of debt on a judgment recovered in New York, and is within the rule. Independent of any special legislation on the subject, the District Court had the power to adopt the rule in question. It requires an affidavit of the plaintiff stating the amount verily he believed to be due from the defendant, and a copy of the "record" "on which the action has been brought," to be filed with the *præcipe*. It is admitted, in the statement of the case, presented by the plaintiff in error, that an exemplification of the record of the judgment obtained in New York was filed, and as neither a copy of it, nor a copy of the docket entries in this cause is given in the paper-book, the presumption is that the affidavit and the copy of the record were filed according to the rule of Court. It was not necessary to file a copy of the *note* on which the judgment was obtained in New York. The note was extinguished by the judgment. The present action is brought upon the judgment, not upon the note. Filing a copy of the latter would not be a compliance with the rule.

The remarks of the judge in delivering the opinion in McCleary *v.* Faber, 6 *Barr* 476, must not be understood as requiring a copy of the original cause of action to be filed, after it has been extinguished by a judgment, and when the action is brought upon the judgment.

The supplemental affidavit of the defendant discloses no defence. The plaintiff has a right to seek satisfaction out of the funds in the hands of the receiver in New York, and to pursue his remedy against the defendant in this state at the same time. The bill in equity to obtain an application of so much of the funds in New York as shall be sufficient to satisfy the plaintiff's judgment, is not a bar to proceedings at law in this state. He may pursue both remedies until he obtain satisfaction from one of them. He is not chargeable with attaching the funds. He had no agency in placing them in the hands of the receiver. That was the act of the defendant himself.

This view of the case renders it unnecessary to consider the rule affirming the judgment for defects in the paper-book.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Robinson *versus* Snyder.

Where a person desired to purchase certain lots, which were owned by heirs in undivided parts, and agreed in writing and under seal, with a third person, to pay him a fixed sum for each of the shares, and only a part of the shares were purchased, and conveyed directly to the first party: It was *Held*,

1st. That the plaintiff might recover what the defendant agreed to pay him for those shares, which were actually purchased and conveyed to the defendant, although the agreement contemplated the purchase of other shares which were never obtained.

2d. That the sealed agreement imported a good consideration; and

3d. That the defendant's accepting of conveyances for two shares, and taking possession of them, estopped him from asserting in an action against him for the sum so agreed to be paid, the invalidity of the title thus acquired.

Where testimony has been heard without objection, it is in the discretion of the Court trying the cause, to strike it out, if it should afterwards appear that the witness was incompetent, or the testimony inadmissible; but it will only be done where the fact upon which the exclusion is based was unknown, and could not with ordinary diligence have been known to the party, at the time of its admission.

After the admission of evidence without objection there can be no bill of exceptions to its admission *nunc pro tunc*. The only way in which it can be reviewed in this Court, is, in the shape of a written prayer to the Court, to instruct the jury to exclude it from their consideration, in making up their verdict.

Error to the District Court of *Allegheny county*

The action was debt brought upon the following article of agreement:—

This agreement witnesseth, that whereas, Peter Jennings did, on the 22d day of July, 1835, purchase from the following heirs of John Snyder, Esq., deceased, late of Allegheny county, viz.: Michael Siegfried and Peggy his wife, late Peggy Snyder, Michael Straw and Elizabeth his wife, late Elizabeth Snyder, Adam Snyder, and John Kuhns and Michael Straw, guardians of Jacob Snyder, a lunatic, all their seventh parts, each, of two ten acre lots, situate in the Reserve Tract, opposite Pittsburgh, Nos. 242 and 253; and whereas, said Jennings did, on the 25th of July, assign and declare the same to be for the use of W. Robinson, Jr. Now this agreement witnesseth, that in addition to the sums therein stipulated to be paid by said Jennings, the said Robinson agrees to pay for each of the shares so purchased and assigned by said Jennings, as aforesaid, to Jacob Snyder, of Ross township, the sum of $428.50 each, and also $428.50 for the share purchased by said Robinson from John Snyder, of Ross township; the said payments to be paid on the execution of the proper deeds and conveyances for the said shares.

Witness my hand and seal, this 28th July, 1835.

William Robinson, Jr. [L. S.]

Digitized by Google

[Robinson *v.* Snyder.]

The plaintiff alleged a conveyance of the interest of two of the heirs of John Snyder, deceased, and that the plaintiff went with the person who made the purchase and assisted in the negotiations. The plaintiff read the deposition of Peter Jennings, except the following clauses in the cross-examination:—"The basis of the agreement (written article) was that there should be given a good title to this property by them. Mr. Robinson told me, and so did Mr. Bradford, that the title was bad."

"Mr. Bradford said I ought to have got a warrantee deed mentioned in the agreement, instead of an agreement to sell all the right, title, interest, and claim, and that that would have put an end to the matter."

The defendant in presenting his case proposed to read those omitted parts—the plaintiff's counsel objected, because they were the declarations of defendant, hearsay, and the contents of written agreements, &c. The Court sustained the objections, and defendant's counsel excepted and asked the Court to rule out all of the examination in chief, and particularly so much as refers to the same or either of the written agreements.

This the Court also refused, and the defendant's counsel excepted.

Fifty-second Rule of the District Court of Allegheny county:—"No objection to any deposition shall be allowed on the trial of the cause in which it has been taken, except that the witness is incompetent. All objections shall be made by filing exceptions within ten days after notice of the filing of the depositions, or receiving a copy thereof, which exceptions shall be heard in the usual course of the argument list. But parts rejected on exceptions as evidence in chief may be heard, if proper, as rebutting evidence. Rule 52 so far as hereby altered is repealed." Jan. 3d, 1848.

The following points were submitted by the counsel of the defendant.

1. That the agreement on the part of Robinson is, on its face, a mere *nudum pactum*, no consideration being stated therein as moving from the plaintiff, and no obligation whatever being imposed upon him thereby.

2. That the evidence shows no actual services rendered by the plaintiff upon the basis thereof, and so no claim to a recovery.

3. That to entitle the plaintiff to recover, upon the footing of the deed executed by John, in pursuance of a previous sale to Robinson, the plaintiff must have shown some service as a consideration.

4. That as to the conveyance of Adam, made upwards of eight years afterwards, and after he had previously sold to Patterson, there could be no recovery in the absence of evidence that it was procured by the plaintiff, or through his instrumentality.

5. That if the agreement was abandoned on account of a defect

Digitized by Google

www.libtool.com.cn

in the title, real or supposed, there can be no recovery under it, and the subsequent conveyances to Patterson, connected with the lapse of nearly twenty years, without any claim shown under it, may be taken as evidence of such abandonment.

6. That the agreement is an entirety, and there could be no recovery upon a partial performance, and that the execution of one or two deeds out of the five referred to, without any evidence of the services or agency of the plaintiff therein, would not entitle him to recover *pro tanto*.

7. That the agreement to pay on the execution of the proper deeds and conveyances, imported a good title in each of the heirs enumerated, to one undivided seventh part of the property in question.

8. That the title shown to Ann Seabold, a married woman, to one undivided third part of the whole of the said property, in her own right, is to be considered an outstanding title to that extent in the absence of evidence that she had ever become *discovert*, and is to be regarded as of the period when the contract was to be performed.

The Court charged the jury as follows:—"That the plaintiff, under the agreement of the 28th of July, 1835, was not entitled to recover for any of the shares for which he had not shown conveyances to the defendant:—That having shown conveyances from John and Adam Snyder (two of the parties mentioned in the agreement), the plaintiff was entitled to recover the amount agreed to be paid to him by the defendant for each of said shares; notwithstanding he had failed to show conveyances for the shares of the other parties mentioned in the agreement:—That the agreement being sealed with the seal of the defendant, imported a consideration and was binding on him: Yard *v.* Patton, 1 *Harris* 278. That having accepted conveyances from John and Adam Snyder, and having been shown to be in possession of the property, the defendant could not set up the alleged defect in the title of John Snyder under the deed of Meiley and others, to defeat this action:—That there was no evidence that the agreement, as it respects the shares of John and Adam Snyder, was abandoned by the plaintiff; nor was there any evidence of a conveyance by Adam Snyder of his interests in said lots to Thomas H. Patterson."

The Court refused to charge, as requested by the plaintiff's counsel, in the points submitted by them.

The jury rendered a verdict for the plaintiff for $500.

The first assignment of error was to the rejection of the parts of the cross-examination of the deposition of Peter Jennings, without having set forth the testimony offered in the specification of error.

Digitized by Google

www.libtool.com.cn

The second was to the refusal of the Court to *rule out* the examination in chief of Jennings.

The next eight assignments of error were to the refusal of the Court to answer the defendant's several points as requested; but neither the points nor answers were set forth *in* the specifications of error.

The case was submitted on the paper-books and printed arguments, by

T. Williams, for plaintiff in error.

G. P. Hamilton, for defendant in error.

The opinion of the Court was delivered by

Black, J.—The defendant having a mind to purchase certain lots, which were owned by heirs in undivided parts of one-seventh, agreed in writing and under seal with the plaintiff that he would pay him a fixed sum for each of the shares. Some, but not all, of the shares mentioned in the agreement were purchased by the plaintiff, and the conveyances or agreements showing the purchase were made directly to the defendant.

The Court below charged: 1. That the plaintiff might recover what the defendant agreed to pay him for those shares which were actually purchased and conveyed, although the agreement contemplated the purchase of other shares which were never obtained; 2. That the sealed agreement imported a good consideration; 3. That the defendant's acceptance of conveyances of the two shares which he got, and taking possession of the property, estopped him from asserting in this action the invalidity of the title thus acquired.

We believe this to be very sound law, and the defendant's counsel seems to have been of the same opinion; for, although he made an ingenious argument in opposition to it, he did not think it worth while to make a single regular assignment of error to any part of the charge.

A deposition was offered, and a part of it read. In the history of the case we have two bills of exception which do not contain the deposition, and in the appendix we have this deposition without any exception. We are left to conjecture, as we best can, how the evidence was dealt with on the trial. It is *probable* that so much of the deposition referred to as suited the plaintiff, was read by him without objection; and that, upon defendant offering to read the rest of it, the privilege of doing so was refused. The ground on which this decision of the Court went was very clear and correct. The part of the deposition which was not read by the plaintiff, and which the defendant wanted to read on his side, was in part hearsay, and in part declarations of the defendant

Digitized by Google

www.libtool.com.cn

himself; and what is worse, this hearsay and these declarations were offered for the purpose of proving the contents of written papers, not alleged to be lost. Certainly the rejection of such an offer is no reason why the judgment should be reversed. But after this the defendant demanded that the other part of the deposition, previously read by the plaintiff, should be ruled out. We *suppose* this to mean that the judge was requested to withdraw the whole deposition from the jury, and instruct them to give no attention to anything contained in it. There was no error in refusing this. A judge may, in his discretion, strike out evidence after it has gone to the jury, without opposition. But it is not his duty to do so, except in cases where the ground of objection was unknown to the adverse party at the time he consented to it, and where it is plain that his ignorance was not wilful; for if he could have seen its incompetency by the exertion of due diligence, it is the same as if he did see it. For instance, the testimony of a witness, whose interest in the cause is ascertained after he has been fully heard, may be stricken out, if the party demanding its exclusion can show that the fact which made him incompetent was a secret, which ordinary inquiry would not have discovered. But even in such a case there can be no exception *nunc pro tunc*. If the Court refuses to do what is right and legal, the party endangered by the error can get it on the record in a reviewable shape only by a written prayer for instructions in the charge. In this case, however, the defendant could see the objection when he allowed the evidence to be read, as plainly as when he afterwards requested it to be "*ruled out*." His time for making the objection had passed; and, besides, we are inclined to think it would not have been available if made at any time.

The substance of the whole case is: 1. That the errors complained of in the charge are irregularly assigned, and not well founded in law; 2. That the objection to the rejection of the defendant's evidence is not sustainable, because that evidence was clearly incompetent; 3. That, whether the evidence received on part of the plaintiff be legal or not, it was heard without objection, and the Court was not asked to say anything about it in the charge.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Nesbit *versus* Burry.

Where the parties in a sale of cattle, agreed upon the terms of sale, and the mode of ascertaining the weight, but the stipulated means of weighing failed, and the vendor refused to adopt other means, or to carry out the contract at all; such refusal would not vest the property in the vendee.

Nor does the payment of a part of the price aid in vesting the title in the vendee, where the quantity is to be ascertained, and there is no actual delivery.

Under such circumstances, the contract is essentially executory, and the remedy of the vendee is an action for damages, for the refusal to perform according to its terms.

ERROR to the Common Pleas of *Lawrence county*.

Replevin for a yoke of oxen. Burry agreed with Nesbit to purchase the oxen in dispute at 3 cents per pound, live weight, and that the weight should be ascertained by the scales at "Mt. Jackson." Burry paid $10 as earnest on the bargain. When the cattle were taken to Mt. Jackson, the scales were out of repair, and the weight could not be ascertained by them. Burry offered to have the weight ascertained in some other way, and also to pay the balance of the price; Nesbit refused, and drove the cattle home, and Burry brought replevin.

The principal question in the case was, whether, under the circumstances, there was such a change of property in the oxen as to enable Burry to maintain replevin.

The jury, under the charge of the Court, AGNEW, P., found for the plaintiff; and the instructions of the Court were the subject of the errors assigned.

Plaintiff's 3d point: "That if the jury believe by the terms of the contract the price of the oxen was $3 per cwt., and $10 thereof paid at the time, and they were to be delivered on the —— day of ————, in Mt. Jackson, and were so tendered to Burry's agent, Poak, who agreed to receive them, offered to pay Nesbit the price or balance due, and Nesbit at the time agreed with said agent to take them home again, and feed and keep them at the risk of Burry, and at his expense, it is in law a delivery thereof, and Nesbit became the bailee of Burry; and upon his refusal to deliver, the plaintiff may sustain this action."

Answer: "Answered in the affirmative, if the facts be as stated."

Specification of errors: 1st. The Court erred in that part of their charge which was in these words: "If the jury believe, upon the testimony of John Poak, and other testimony in the cause, that the price of the oxen could not be ascertained, because of the condition of the scales at Mt. Jackson, and in consequence of this that Nesbit agreed to take the cattle home at the risk of Burry,

Digitized by Google

www.libtool.com.cn

and to be paid by Burry for their keeping, it would be a delivery, and entitle the plaintiff to recover."

2d. The Court erred in that part of their charge which was in these words: "But if, after it was found that the weight could not be ascertained, Nesbit, instead of taking steps to await till the contract could be carried out, or until the weight could be ascertained by the proposed means, when the scales should be repaired, or by some other mode consented to by the parties, undertook to rescind the contract, and refused to carry it out, while Burry was insisting on its fulfilment, and offering to perform on his part, *Nesbit having received part payment*, the right of property would vest in law in plaintiff, and the plaintiff be entitled to recover its possession."

3d. The Court erred in their answer to the plaintiff's third point.

Stewart and *Johnston*, for plaintiff in error.—1st error: That the refusal of Nesbit, after the weight could not be ascertained, to keep them for Bury, would not be equivalent to delivery. He should have paid or tendered the full price: 2 *Bl. Com.* 448; *Ch. on Cont.* 442–3; *Id.* 375.

2d. While anything remains to be done to ascertain the price, the property remains in the vendor: 6 *Harris* 93; 7 *Barr* 263; 6 *W. & Ser.* 367. Earnest merely binds the bargain: 2 *Bl. Com.* 447 n.; *Story on Sales*, § 274; 3 *W. & Ser.* 14. Time was of the essence here: 6 *Harris* 93; 3 *W. & Ser.* 14.

3d. There was error in instructing the jury that the action could be maintained without a tender of the price.

McGuffin, contrà.—All the circumstances in the case were equivalent to an actual delivery, and vested the property and right of possession in Burry. If the cattle had died, it would have been his loss: 6 *East* 614; 11 *East* 217; 1 *Taunt.* 457; 4 *Greenleaf*, 317; 3 *John.* 399; 1 *Camp.* 452.

2d error. Nesbit refused to wait till the scales could be repaired or adopt any other mode; his refusal was in law a performance: 3 *W. & Ser.* 14.

3d error. The assignment of error is not according to the rule of Court.

The question was submitted to the jury. Nesbit became bailee for Burry: 3 *Bl. Com.* 447–8–9; *Com. on Con.* 78–9–80; *Ch. on Con.* 737; 1 *Harris* 146; 10 *Harris* 460; 2 *Pick.* 156; *Poth. on Ob.* 47–8; 2 *Pa. Rep.* 454; 2 *Pick.* 488; *Ch. on Con.* 788; Wagonblast *v.* McKean, 1 *East* 203; *Ch. on Con.* 215, 318; 3 *Ser. & R.* 518; 6 *Bac. Ab.* 682, 706; 10 *Harris* 170.

The opinion of the Court was delivered by

Digitized by Google

[Nesbit v. Burry.]

www.libtool.com.cn

LOWRIE, J.—There was error in the instruction that, after the parties had agreed upon the terms of sale, and the mode of ascertaining the weight, and part of the price had been paid, and when the agreed means of weighing had failed, the refusal of the vendor to adopt other means or to carry out the contract at all, vested the property in the vendee. The weighing being necessary to a perfect sale where there is no delivery, is not dispensed with by an unsuccessful attempt to weigh, or by a refusal to try a better mode of doing it. These matters left the parties as they stood before, and the title remained in the vendor. Nor does earnest or part payment aid in vesting the title where the quantity is yet to be ascertained, and there is no delivery. Under such circumstances the contract is essentially executory, and the part payment only shows a concluded and binding agreement. Taking the facts as above stated, the sale remained imperfect and executory, and the vendor might refuse performance subject to the vendee's right to damages for the breach. The other instructions are correct.

Judgment reversed and a new trial awarded.

Brown *versus* Brooks.

In an action upon a guarantee, where a judgment was recovered against the principal debtor, and an execution issued and returned "*nulla bona*," the proceedings are *primâ facie* evidence of the insolvency of such principal.

The question whether due diligence has been used by the creditor against the principal, is a question of fact for the jury; and if it depends upon whether the debtor had any personal estate, the existence of the fact is for the jury, its legal effect is to be determined by the Court.

If the words used in a contract be *technical*, or *local*, or *generic*, or *indefinite*, or *equivocal*, on the face of the instrument, or made so by proof of extrinsic circumstances, parol evidence is admissible to explain their meaning by usage.

This Court will not notice assignments of error, unless they are made in conformity with the rules of Court.

ERROR to the Common Pleas of *Jefferson county*.

On the 4th of August, 1849, Brown, the plaintiff in error, made a contract with Jacob Strader to deliver him certain lumber the next spring. On the 1st of December, 1849, Brown assigned this agreement to Brooks, and guarantied the payment of the same. The lumber was not delivered. Suit was brought against Strader, and judgment recovered against him, and an execution issued upon which his real estate was levied and sold, but the proceeds were absorbed by prior liens. An *alias fi. fa.* was issued before the commencement of this suit, and returned *nulla bona*.

The Court (McCALMONT, P.) instructed the jury that, "if

Digitized by Google

www.libtool.com.cn

there was no personal property from which the money could be made after the rendition of the judgment when the execution was issued, we instruct you that due diligence was used in the prosecution of the claim. If there was personal property when the execution issued which could have been applied to that claim to satisfy it, then it would not have been using due diligence to levy on real estate."

Jenks and *Andrews*, for plaintiff in error.

The opinion of the Court was delivered by

LEWIS, C. J.—Only one of the thirteen assignments of error contains the specification required by the 7th and 8th rules, adopted on the 6th September, 1852, and published in 6 *Harris* 577. "When the error assigned is to the charge of the Court, the part of the charge referred to must be quoted *totidem verbis* in the specification;" and, "when the error assigned is to the admission or rejection of evidence, the specification must quote the full substance of the bill of exception, or copy the bill *in immediate connexion with the specification.*" "Any assignment of error not according to these rules will be held the same as none." Under these rules it has repeatedly been held that when the error assigned is to the answer to a point, the point and the answer complained of must be quoted *in the specification.* An assignment which merely declares that "the Court erred in *not* answering the party's point *as put*," or "erred in answering" it, is not a compliance with the rule. The ten first assignments are defective in the particulars last mentioned, and the 12th and 13th, relating to the admission of evidence, contain neither the copy nor the substance of the bills of exceptions on which they purport to be founded. We have looked in vain over the whole evidence for them, and have not been able to find them. The only specification within the rule is the 11th, and we proceed to notice it.

The action is upon a guaranty of the claim which Brown had against Strader, under an agreement of the 4th of August, 1849, by which the latter was bound to deliver three 17 inch rafts, at the mouth of Mahoning Creek, by the first freshet in the next spring, in good order, considered 1000 feet in each raft. The evidence shows that the spring freshet referred to, occurred about the last of February, or first of March, 1850. An action on the agreement was brought against Strader on the 20th March, 1850, and judgment was obtained on the 20th August, 1850. On the 16th September, 1850, a *fi. fa.* was issued, by virtue of which a levy was made on the real estate, subject to a prior levy in favour of W. & R. McCutcheon *v.* Strader *et al.* This levy was disposed of by a sale on a *venditioni exponas* in favour of W. & R. McCutcheon, on the 10th December, 1850, for a sum insuffi-

Digitized by Google

www.libtool.com.cn
cient to reach the execution in favour of the present plaintiffs. An *alias fi. fa.* issued on the judgment of Brown, for the use of Lewis and Jordan, No. 93, February, 1853, which was returned *nulla bona*. This action was brought on the guaranty, on the 23d July, 1853. In view of these facts, the Court instructed the jury that, "if there was therefore no personal property from which the money could be made, after the rendition of the judgment, when the execution was issued, due diligence was used in the prosecution of the claim. If there was personal property when the execution was issued, which could have been applied to the claim to satisfy it, then it would not have been using due diligence to levy on real estate." We see no error in this. The *fi. fa.* was issued within a reasonable time after the judgment. If the guarantor had received notice of that proceeding, the return of the sheriff would have been conclusive. But as it did not appear that he was notified, the Court very properly treated the proceeding as merely *primâ facia* evidence, and permitted him to impeach it if he could. But the jury have found that there was no personal property which could be resorted to, at the time the law required it to be produced. The levy on the real estate was therefore obviously proper; and, as that produced nothing applicable to the plaintiff's claim, it was not incumbent on him to issue an *alias fi. fa.*, after the real estate was disposed of, for the purpose of making another search for personal property. In many cases the question of diligence is one of fact for the jury; but in this case, where it depended upon the existence of personal estate, the fact was properly submitted to the jury, while its legal effect was, with equal propriety, determined by the Court.

The judgment is, for these reasons, to be affirmed. But some remarks may be added in reference to the questions referred to in the defective assignments of error.

A guaranty is an engagement to pay in default of solvency in the debtor, provided due diligence be used to obtain payment from him: Johnson *v.* Chapman, 3 *Penn. Rep.* 18; Isett *v.* Hoge, 2 *Watts* 128; Rudy *v.* Wolf, 16 *Ser. & R.* 81. The contract of a guarantor differs from that of an endorser. In the latter case the engagement is to pay, if the maker does not, upon demand, after due notice: 8 *Wendell* 421. Something more than demand and notice of non-payment is required to support an action on a guaranty. The contract for due diligence requires that a suit be brought within a reasonable time after the maturity of the claim, and be duly prosecuted to judgment and execution, before an action can be sustained against the guarantor, unless in cases where it is shown that such a proceeding could have produced no beneficial result. Where the principal debtor is insolvent at the maturity of the debt, no such proceeding is necessary as a foundation to an action on the guaranty. Nor is it necessary, in such

Digitized by Google

www.libtool.com.cn

a case, to show even a demand on the principal debtor, and notice of non-payment given to the guarantor. This is all that was decided in Gibbs *v.* Cannon, 9 *Ser. & R.* 202. The remarks of the judge, on questions not arising in the case, must be subject to modification, according to adjudicated cases. Notice of non-payment is not an indispensable foundation of the action against the guarantor. Where this is omitted, and some loss or prejudice to the guarantor has been thereby produced, it will constitute a defence to the extent of such loss: 12 *Peters' U. S. Rep.* 508; 3 *B. & C.* 439; 2 *Howard's U. S. Rep.* 457, 485. These are the general rules, but cases of guaranty may be varied by the terms of the contract, and the particular circumstances of each case. Where the holder of the claim is required to institute proceedings against the principal debtor, such proceedings are *prima facie* evidence against the guarantor of the amount of the debt, and of the truth of the facts returned on the executions. But if he have notice of these proceedings, as they progress, they are conclusive evidence of these facts.

It is a general rule, that, if the words used in a contract be *technical*, or *local*, or *generic*, or *indefinite*, or *equivocal*, on the face of the instrument, or made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in the given case: 6 *Taunt.* 445; 7 *Wend.* 270; 8 *Wend.* 160; 7 *Cowen* 202; 7 *Johns.* 385; 13 *Meeson & Welsby* 511. The evidence admitted to determine whether the "1000 feet in each raft" was intended to be linear measure, or otherwise, was properly received in conformity to this rule.

Judgment affirmed.

Ashford *versus* Ewing.

Since the passage of the Acts of 1832, 1833, 1834, and 1836, the Orphans' Court has *exclusive jurisdiction* to make and enforce distribution of the estates of intestates.

No common law action can be sustained to recover a distributive share of such an estate, against the administrator, although his account exhibiting a specific balance against him, has been settled in, and confirmed by, the Orphans' Court.

Error to the Common Pleas of *Beaver county*.

This was an action of *assumpsit* to recover a distributive share. Samuel Ewing died in 1827, having made a will and appointed executors. The plaintiff, his daughter, was born after his death. In 1834 the executors filed an account showing a balance against them of $468.94, which account was confirmed by the Court, but no decree of distribution made.

Digitized by Google

www.libtool.com.cn

The principal question was, whether the action could be maintained. The Court below (AGNEW, P. J.) was of opinion that the remedy was exclusively in the Orphans' Court, and directed a verdict for the defendants.

Cunningham and *Clark*, for plaintiff in error.—The father of the plaintiff died in 1827, and her rights then vested; her rights should be determined as of that time. As early as 1795, it was decided that *assumpsit* would lie by distributees: 4 *Dall.* 187. Again in 1811: 3 *Binn.* 557. The money received by him as executor, after paying debts, was considered as received by him for the use of the persons entitled. So in Bixler *v.* Kunkel, 17 *Ser. & R.* 298; *Id.* 31; 6 *Watts* 379, affirms the principle in Wilson *v.* Wilson, 3 *Binn.* 557. So of 2 *Rawle* 197; Rittenhouse *v.* Levering, 6 *W. & Ser.* 190. Such being the law when S. Ewing died, the interest of Jane descended to her *in ventre sa mere*. It was not intended to oust the jurisdiction of the Common Pleas by the Act of 1832. 7 *W. & Ser.* 167, decided that a *fi. fa.* from the Orphans' Court reached nothing but personal property. The commissioners who revised the Acts did not so understand this law. See report. 2 *Whar. Rep.* 295, determines that the Orphans' Court has no jurisdiction to determine the validity of the claim of a creditor.

The Act of 1834 relied on, did not go into effect until after this account was confirmed—it made no change in the law: 17 *Ser. & R.* 31; 6 *W. & Ser.* 190; 6 *Watts* 379.

The decisions relied on by defendants in error, were cited and commented on at length, and argued that they did not sustain the position of the Court below.

Roberts and *Fetterman*, contrà.—That the Orphans' Court has exclusive jurisdiction, was cited 9 *Watts* 19; *Id.* 60; 5 *Barr* 240; 9 *Id.* 29; 3 *Id.* 60; 5 *Harris* 193; 9 *Id.* 341; 7 *W. & Ser.* 187.

The opinion of the Court was delivered by

LEWIS, C. J.—This is an action brought by a child who was born about six months after the death of Samuel Ewing, to recover a distributive share of the estate of the decedent. The administrators had settled an account which was confirmed on the 3d of June, 1834, exhibiting a balance of $468.94 in favour of the estate. There was no decree of distribution in the Orphans' Court. The Court of Common Pleas decided that since the Acts of 1832, '33, '34, and '36, taken collectively, exclusive jurisdiction to enforce distribution belongs to the Orphans' Court, and that the plaintiff cannot recover in this action at common law.

It would be a waste of time to attempt to explain or reconcile the decisions on cases supposed to be governed by the law as it

Digitized by Google

existed before the Act of 1832. That Act not only gives jurisdiction to the Orphans' Court, in cases of this kind, but prescribes the manner in which that jurisdiction shall be exercised. The Act of 5th March, 1806, requires that the statutory remedy shall be strictly pursued, and prohibits a resort to the provisions of the common law, further than shall be necessary for carrying the remedy provided by statute into effect. It is therefore plain that if we pay any attention to the positive enactments of the legislature, the present action cannot be sustained. After the statute gave a remedy for a ward against his guardian, by the settlement of his accounts in the Orphans' Court, it was held that the action at common law was taken away: Bowman *v.* Herrs's Executors, 1 *Pa. Rep.* 282. After the Act of 1834 gave a remedy in the Orphans' Court for the collection of legacies charged on real estate, it was determined that the statutory remedy must be pursued: Downer *v.* Downer, 9 *Watts* 60; Craven *v.* Bleakney, 9 *Id.* 19; Strickler *v.* Sheaffer, 5 *Barr* 240; Mohler's Appeal, 8 *Id.* 26. On the same principle it has been decided that a widow cannot maintain an action of dower, where her husband died seised and in possession, so as to oust the Orphans' Court jurisdiction, which jurisdiction was declared to be exclusive: Thomas *v.* Simpson, 3 *Barr* 60. Nor can the heirs maintain ejectment against the widow. Their remedy is exclusively in the Orphans' Court: Seider *v.* Seider, 5 *Whar.* 208. Nor can a vendee resort to the common law action of ejectment to enforce specific execution of a parol contract for the sale of land by a deceased vendor. His remedy is confined to that given by statute in the Orphans' Court: Myers *v.* Black, 5 *Harris* 193.

It was expressly decided in Kittera's Estate, 5 *Harris* 422, that the Orphans' Court is by statute clothed with authority to distribute the estates of decedents in the hands of executors or administrators, "among the persons entitled to the same;" and that by these general terms, as well as by express words, the legislature embraces creditors as well as heirs, next of kin, and legatees: 5 *Harris* 422–3. The same principle had previously been announced in Barklay's Estate, 10 *Barr* 387. In Whiteside *v.* Whiteside, 8 *Harris* 474, it was declared that "if there is anything besides death which is not to be doubted, it is that the Orphans' Court *alone* has authority to ascertain the amount of a decedent's property, and order its distribution among those entitled to it." In Shallenberger's Appeal, it was distinctly affirmed that the Orphans' Court, within its appointed orbit, is a Court of exclusive jurisdiction: 9 *Harris* 341.

The inconveniences and expenses arising from an action at common law by each person entitled to a distributive share, were so great as to induce the legislature to prescribe a remedy in the Orphans' Court, where the whole estate can be distributed in one

Digitized by Google

www.libtool.com.cn

proceeding, and by a single decree. In the present case, where the sum is only $468.94, to put each of the distributees to the expense of a separate action to enforce distribution, would be to expend the fund in the effort to secure it. If the Acts of Assembly, the decisions since their enactment, or the convenience of the parties and the Courts, are to be regarded, this judgment must be affirmed.

Our attention has been particularly called to the cases of Richardson *v.* Richardson, 9 *Barr* 428, and Geddis *v.* Irvine, 5 *Id.* 508, as standing in opposition to this view of the question of jurisdiction. In the case last named, the demand was not against the executors as such, nor for assets of the decedent at all. In the case first named, the decedent settled his account in 1818, long before the jurisdiction was established on the footing of the Act of 1832. In neither of the cases did the parties make the point which has been considered in the present adjudication.

It is time that this question should be considered settled.

Judgment affirmed.

Walker *versus* Eyth.

Where one of two partners, after dissolution, assigned to a third party, for a valuable consideration, a note given him by the other partner and a surety, for his interest in the partnership concern; in an action against the surety on such note, a debt due by the firm could not be set off against a recovery on the note, although the partner who signed the note was dead, and his estate insolvent, and the survivor was also insolvent.

The retiring partner, until deprived of dominion over his individual property, had a right to appropriate it to the payment of his individual debts.

Where there are separate and partnership creditors, and separate and partnership property, the rule in equity is, that each estate shall be applied exclusively, in the first instance, to the payment of its own creditors.

Error to the Common Pleas of *Butler county*.

Thomas W. Wallace and Roman Eyth were partners under the firm of Wallace & Eyth, and as such purchased goods and merchandise from David Walker, to the amount of $450. Afterwards, on the 10th day of May, 1849, the partnership was dissolved. Wallace purchased the interest of Eyth, and gave the note on which this suit is brought, with David Walker as surety, in part payment for his interest in the concern. Some time in the fall of the same year, Eyth assigned this note to Berg & Co., in payment of goods bought of them. On the 27th November, 1849, Wallace made an assignment for the benefit of creditors to David Walker, and shortly afterwards left for California, where he died on the 12th of May, 1852, insolvent. Eyth subsequently also became insolvent.

Digitized by Google

[Walker v. Eyth.]

www.libtool.com.cn

The only question in the cause was, whether the claim of Walker against Wallace & Eyth could be set off against the note in the hands of Berg & Co.

The Court below, AGNEW, P., rejected the evidence of set-off, and this was the error assigned.

Graham and *S. A. Purviance*, for plaintiff in error, cited and relied on 1 *Binn.* 123; *Story on Part.* § 361–2; Act of 6 April, 1830, § 1, *Purd. Dig.* 633; 11 April, 1848, § 5, *Purd.* 634; 5 *Carr.* 399; 5 *W. & Ser.* 367; 4 *Ser. & R.* 174; 8 *W. & Ser.* 311; 14 *Ser. & R.* 300; 9 *Ser. & R.* 68; 7 *Watts* 464; 2 *Barr* 261; 2 *Jones* 347; 11 *Ser. & R.* 377.

Bredin and *McJunkin*, contrà.—The case does not fall within the cases cited by the plaintiff in error. The note belonged to Eyth individually, and he had a right to appropriate it to his own debts. The equity of Berg & Co., is equal to or superior to that of Walker.

The opinion of the Court was delivered by

LEWIS, C. J.—This was an action to recover a debt due to Eyth in his individual right. There was an offer to set-off against it a debt due by Wallace & Eyth as partners. We may concede that the death of Wallace, after plea pleaded, left Walker and Eyth, as survivors, the sole debtors of each other at law: 5 *Ser. & R.* 493; 6 *Ser. & R.* 582; but the claim of Eyth was his separate estate, and he had a right to appropriate it to his separate creditors. He might also, until deprived of dominion over his property, appropriate it to the payment of any one of his separate creditors whom he thought proper to prefer: Worman *v.* Wolfersberger's Executors, 7 *Harris* 59. Such appropriation is in accordance with the rule in equity, that where there are partnership and separate creditors, each estate shall be applied exclusively, in the first instance, to the payment of its own creditors: the joint estate to the joint creditors, and the separate estate to the separate creditors: *Gow* 308. It is true that this equity has, in general, to be worked out through the medium of the partners: *Story's Eq.* § 1253; Baker's Appeal, 9 *Harris* 82. But in the case before us, Berg & Co. stand not only upon their own equity but upon that of Eyth, who had the right to appropriate his separate estate to the payment of his separate creditors, to the exclusion of the partnership creditors. He exercised that right before the death of Wallace had produced the effect of making him the sole debtor as surviving partner, while it left Walker alone liable on the demand on which this action is founded. As this was merely a change of legal liability, we do not see how it could deprive Eyth of his equitable

Digitized by Google

rights in the proper distribution of his separate and partnership assets. But the case does not require an opinion on this point, and we leave it undecided. It is clear, however, that an allowance of the proposed set-off would defeat the undoubted and paramount equities of Berg & Co. It was therefore properly rejected.

Judgment affirmed.

Smith *versus* Hood & Co.

A judgment, entered by mistake, upon a warrant of attorney, for a less amount than the obligation calls for, may be amended by the Court, after execution executed, and an *alias* execution may be awarded for the balance uncollected, if the rights of third persons are not prejudiced by such amendment.

Where there is anything to amend by, a clerical mistake in entering a judgment may be corrected, but not an error of judgment in pronouncing it.

ERROR to the Common Pleas of *Greene county.*

Martin Smith, on the 6th day of May, 1854, gave his single bill to Hood & Co., for the sum of $1390.44, with power of attorney to confess judgment. On the 24th day of May, 1854, this single bill and warrant of attorney was handed to the prothonotary of Greene county, to be entered as a judgment, who by mistake entered it for the sum of *thirteen hundred dollars and forty-four cents.* On the 30th of June, 1854, the plaintiffs' attorney directed a credit of $509.46, to be entered as of the 13th of June, 1854; and on the same day issued a *fieri facias*, which was for $1300.44, endorsing the credit as above stated; and the sheriff endorsed on the writ, "Received of defendant eight hundred and twenty-one dollars and eleven cents, in full of debt, interest, and costs, and returned the same "Money made," and the receipt of plaintiffs' attorney for $801, in full of debt and interest.

On the 25th of September, 1854, on motion of plaintiffs' attorney, the Court granted a rule to show cause why the judgment should not be amended; and it appearing to the Court that a mistake had been committed in entering the judgment, the rule was made absolute, and the judgment directed to be corrected, and judgment to be entered for the whole amount of the note, to wit, $1390.44. An *alias fieri facias* was issued, to collect the balance of $90 and interest.

To reverse this order of the Court, the defendant sued out a writ of error.

Errors assigned: 1. The Court erred in directing judgment to be entered for *thirteen hundred and ninety dollars and forty-four*

Digitized by Google

[Smith v. Hood & Co.]

www.libtool.com.cn

cents after the plaintiffs had *accepted* the former judgment, and *issued execution* thereon, and *levied* on the defendant's property, and *collected and received the debt, interest and costs in full.*

2. The Court erred in rendering the second judgment against the defendant after the plaintiffs had *elected* to *accept* the former judgment, and *executed* it by *execution*, which *exhausted* the *power* of the Court over the warrant authorizing the judgment.

3. The *alias* execution issued to No. 10, December Term, 1854, is erroneous and void as the return of the writ to No. 20, September Term, 1854, *levied* and "*money made, debt, interest, and costs in full,*" and receipt of plaintiffs' attorney for "debt and interest in full," *ipso facto* exhausted the power of the Court over the proceeding.

Purman, for plaintiff in error.—In contemplation of law every judgment is the Act of the Court. *Judiciam quasi juris dictum*, and therefore *judicium semper pro veritate accipitur.* It is immaterial whether it is by cognovit or the verdict of a jury: 4 *Watts* 475. The case of Ullery *v.* Clark, 6 *Harris* 148, is decisive of this case. After execution executed, the judgment could not be reformed. 6 *Watts* 513 only decides that a judgment may be corrected before any proceedings had upon it. After execution executed, the power of the Court was exhausted. A party who has received the fruits of a judgment, cannot reverse it on a writ of error: 1 *Penn. Rep.* 114; 2 *W. & Ser.* 101; 5 *P. L. J.* 416. Accepting the amount was a satisfaction of the judgment, and the payment to the sheriff discharged the judgment: 5 *Barr* 518; 3 *Bl. Com.* 415. One entry exhausts the warrant of attorney: 6 *Ser. & R.* 296; 14 *Ser. & R.* 166.

In this case there was a levy, which was an entire satisfaction: 10 *Watts* 9. Every subsequent writ is based upon the return of the previous one; but this is incongruous with the prior return: 5 *Barr* 519.

T. Burson, for defendants in error.—The Court had power to amend, where there was anything to amend by, and the rights of third persons were not affected. There is a wide distinction between a clerical mistake and an error of judgment in the Court. The case in 6 *Harris* 148 was of the latter description. And so of the cases cited from 6 *Watts* 513, 1 *Pa. Rep.* 114, and 2 *W. & Ser.* 107. Nor did the case fall within the cases in 6 *Ser. & R.* 296, and 14 *Ser. & R.* 166, for here there was no second entry—it was a mere correction of the first. The first entry was for a less amount than the note and warrant called for, and could not exhaust the power of the Court.

An amendment may be made even after error brought, if pur-

Digitized by Google

chasers and third persons are not affected by it: 6 *Wh. Rep.* 340; 5 *Watts* 186; 2 *Rawle* .

The granting this amendment was discretionary with the Court, and not the subject of review upon a writ of error: 1 *Barr* 321; 6 *Ser. & R.* 510; 7 *Ser. & R.* 180; 3 *Pa. Rep.* 65; 2 *Watts* 312.

The plaintiff below had a right to issue a *fi. fa.*, so long as any part of the judgment remained unpaid: 5 *Binn.* 266.

The opinion of the Court was delivered by

Lewis, C. J.—Where there is anything on the record, or filed with it as a part of the proceedings in the cause, to justify an amendment, it may be made, even after error brought. The record, if brought up on error, will be remitted to the Court below for the purpose. A *venditioni exponas* may be amended by the *precipe*, by inserting the name of one of the defendants, even after the writ is executed by a sale of the land of the defendants, and after ejectment brought by the purchaser on the sheriff's deed: Sickler *v.* Overton, 3 *Barr* 325. So the omission of a specified item of property in the *venditioni exponas* may be amended by the levy and the sheriff's deed, even after the lapse of forty years: De Haas *v.* Bunn, 2 *Barr* 338. A judgment entered against a defendant by the wrong Christian name may be amended by the bond and warrant of attorney, as between the parties; but such amendment cannot be made so as to affect the rights of third persons: Zimmerman *v.* Briggans, 5 *Watts* 186. So a judgment may be amended from a less to a greater sum, by the paper on file assessing the damages. This, as between the parties, may be done after bail given for the stay of execution, *ca. sa.* issued and returned, and after an action brought against the bail, a trial had, and writ of error brought; but amendments of this character cannot affect the rights of the bail, or of creditors or purchasers. As between the parties themselves they do no injustice, and are attended with no danger as long as they are confined to cases where there is something to amend by: Crutcher *v.* The Commonwealth, 6 *Whart.* 349. The case of Ullery *v.* Clark, 6 *Harris* 148, was an alteration on the judgment, where there was nothing to amend by; and the object was not to correct a clerical mistake in entering it, but an error of judgment in pronouncing it. This, it was held, could not be allowed after the lapse of two years. It is true that a party who has elected to receive the amount of a judgment in his favour, will not be permitted to reverse it: Laughlin *v.* Laughlin, 1 *Pa. Rep.* 114; Smith *v.* Jack, 2 *W. & Ser.* 101. On the same principle, the plaintiff in the judgment in the case before us would not be allowed to reverse the judgment on error, after he had collected the amount of it on execution. But there is a great difference between reversing a judgment and correcting a clerical mistake in entering it. The judgment, through a mistake,

Digitized by Google

www.libtool.com.cn

was not entered for the sum specified in the bond and warrant of attorney. There was no error in permitting it to be amended so as to correspond with these. Such an amendment, of course, must not be permitted to prejudice the rights of third persons.

Judgment affirmed.

Holmes *versus* The Commonwealth.

An accessory may be indicted, but cannot be tried before conviction or outlawry of the principal.

In such indictment, it is not necessary to set forth a *conviction* of the principal, but his *guilt* must be averred, and the evidence must establish that such guilt was legally ascertained, before the trial of the accessory.

Where the record shows a conviction of the principal before the trial of the indictment against the accessory, this Court will presume that legal proof was given to the jury of that conviction, upon the trial of the accessory.

The Court of Quarter Sessions has jurisdiction to try an indictment for being accessory to a burglary, and for receiving stolen goods, knowing them to have been stolen.

In felonies not capital, it is not necessary that it should appear affirmatively on the record that the prisoner was present when the verdict was rendered; unless the contrary appears, the Court will presume that everything was rightly done.

ERROR to the Court of Quarter Sessions of *Fayette county*.

Samuel A. Fisher and Jacob Clement were separately indicted for burglary, in breaking and entering into the house of Daniel Brubaker, in the town of Brownsville, and on the 9th of March, 1855, were arraigned, tried, and found guilty. Jacob Clement pleaded guilty. Andrew H. Holmes, the plaintiff in error, was indicted as being accessory to the burglary, both before and after the fact, and for receiving the goods stolen by Fisher and Clement from the said dwelling-house. And on the 10th of March, he plead not guilty, and a jury was empannelled, who found him guilty "in manner and form as he stands indicted." The indictment upon which Holmes was convicted set forth, with all the precision and technicality of an indictment, the commission of the burglary by Fisher and Clement, and concluded, "against the form of the Act of Assembly, &c., and against the peace and dignity of the Commonwealth of Pennsylvania."

In the succeeding counts the indictment charged Holmes with being an accessory before the fact, after the fact, and with having received the goods knowing them to have been stolen.

After the conviction Holmes' counsel moved in arrest of judgment, which was overruled, and the defendant sentenced to five years' imprisonment in the Western Penitentiary.

Digitized by Google

[Holmes *v.* The Commonwealth.]

www.libtool.com.cn

Copy of Sessions Docket Entry:—

The Commonwealth *v.* Andrew H. Holmes. } In the Court of Quarter Sessions, Accessory before the fact, for burglary, &c. Felony, Daniel Brubaker, Pros. True bill, George H. Wood, Foreman.

The prisoner being called on to plead to the indictment, the Commonwealth elected to try the case in the Quarter Sessions, which was accordingly done. Defendant, Andrew H. Holmes, pleads *non cul et de hoc*, &c. District-Attorney, *similiter*, &c.; J. N. H. Patrick, District-Attorney, Issue, &c. R. T. Galloway, Clerk of Quarter Sessions. And now, to wit, March 10, 1855, jury sworn, tried, and verdict rendered March 13, 1855, that the defendant, Andrew H. Holmes, is guilty in manner and form as he stands indicted. And now, to wit, March 14, 1855, D. Kaine, Esq., moves the Court to arrest the judgment in this case. Reasons filed, and, after argument, the Court overrule the motion in arrest of judgment; and the same day, March 14, 1855, the prisoner, Andrew H. Holmes, brought into Court, and the Court sentenced him to pay a fine of $1 to the Commonwealth, the costs of prosecution, and undergo an imprisonment in the Penitentiary of the Western District of Pennsylvania, in Allegheny county, for a period of five years, to be computed from this date, and stand committed, &c. July 7, 1855. Writ of error received and filed.

Errors assigned: 1. The record shows that Jacob Clement and Samuel H. Fisher were indicted as principals, and that Andrew H. Holmes, the accessory, was alone tried and convicted.

2. The Court of Quarter Sessions had no jurisdiction to try the crimes set forth in this indictment.

3. It does not appear from the record that any jury was selected and empannelled, or that the prisoner was tried by a jury.

4. It does not appear from the record that the prisoner was present at the rendition of the verdict.

Kaine, for plaintiff in error.

Howell and *Patrick*, for the Commonwealth.

The opinion of the Court was delivered by

Knox, J.—Although the first count in the indictment charges that a burglary was committed by Jacob Clement and Samuel H. Fisher, it is apparent from the whole record that the indictment was against Andrew H. Holmes, as accessory before and after the fact, and for receiving stolen goods, knowing them to have been stolen. The pleader has set forth the commission of the burglary in apt and technical terms, but it is merely as inducement to the

Digitized by Google

www.libtool.com.cn

charge against the prisoner as accessory, and not with the intention of indicting principals and accessory together. The bill is endorsed as against Holmes alone, and so was it docketed. It is a common law principle that an accessory shall not be tried before the conviction or outlawry of the principal; but it does not follow that he may not be indicted before either conviction or outlawry. On the contrary, it is clear that principal and accessory may be indicted at the same time, and that the conviction of the principal may be given in evidence upon the trial of the accessory, without being averred in the indictment. The guilt of the principal must be averred, and the evidence must establish that the guilt was legally ascertained before the trial of the indictment against the accessory. We are satisfied from the paper-book of the defendant in error that the principals were convicted of burglary before this indictment was tried; and as we cannot examine the evidence, we are bound to presume that legal proof was given to the jury of that conviction, upon the trial of the indictment against the accessory.

In Stoops *v.* The Commonwealth, 7 *Ser. & R.* 491, the record shows that principals and accessories were indicted together, and that but four of the seven principals had been tried. The trial and sentence of the accessories was held to be erroneous, because the record showed that they were indicted and convicted as accessories to the whole seven principals, when the guilt of but four of the principals had been established. It will be seen that here, instead of its appearing from the record that the principals had not been convicted, the necessary inference is just the contrary, and therefore the case of Stoops and the Commonwealth is an authority in favour of the legality of this proceeding rather than otherwise.

We will consider, in the next place, the question as to the jurisdiction of the Court of Quarter Sessions. The indictment was against the prisoners as accessory to the crime of burglary, and for receiving stolen goods knowing them to have been stolen. It is alleged by his counsel that the Quarter Sessions had no jurisdiction to try this accusation. The jurisdiction of our criminal courts is regulated by the Act of 16th June, 1836. The 15th section of the Act enumerates the crimes which are exclusively within the jurisdiction of the Oyer and Terminer and General Jail Delivery; and the 16th section provides that "the Quarter Sessions of the peace shall have jurisdiction and power within their respective counties, 1. To inquire by the oaths or affirmations of good and lawful men of the county, of all crimes, misdemeanors, and offences whatever against the laws of this Commonwealth, which shall be triable in the respective county; 2. To inquire of, hear, determine, and punish, in due form of law, all such crimes, misdemeanors, and offences, whereof exclusive

Digitized by Google

www.libtool.com.cn

jurisdiction is not given as aforesaid to the Courts of Oyer and Terminer of such county." The "exclusive jurisdiction" as aforesaid means that given by the 15th section; and as neither of the crimes alleged to have been committed in this indictment by the person indicted are enumerated amongst those of which the Oyer and Terminer has exclusive jurisdiction, it is plain that the Quarter Sessions have jurisdiction to try the indictment and pronounce sentence upon the prisoner.

There is nothing in the third assignment of error. It appears from the record that the prisoner was tried by a jury duly called and sworn, and this is all that is required.

The fourth assignment is that "it does not appear from the record that the prisoner was present at the rendition of the verdict." Had this conviction been for murder, the record would not have supported it, for it does not affirmatively appear that the prisoner was present when the verdict was rendered. In felonies not capital it is allowable to presume that everything was rightly done until the contrary appears: Prine *v.* The Commonwealth, 6 *Harris* 103. Here the record neither avers the presence of the prisoner when the verdict was rendered, nor does it show that he was not present. As the felony was not capital, we may presume that the proceeding was regular and lawful.

Judgment affirmed.

Kennedy *versus* The Erie and Wattsburgh Plank-Road Company.

Where a written instrument gave to a plank-road company the unrestricted right of way over certain premises, for the purposes of the road, parol evidence that the right was to be limited to a certain route over the same lands was inadmissible, as directly contradicting the written instrument.

Error to the Common Pleas of *Erie county*.

This was a proceeding to assess damages under the Act of 26th January, 1849, entitled "An Act regulating Turnpike and Plank-Road Companies," brought into the Court of Common Pleas by appeal, and tried at a special Court before his Honour Judge McCalmont. The facts of the case sufficiently appear in the opinion of the Court.

Lane, for plaintiff in error.

Walker, contrà.

The opinion of the Court was delivered by

Knox, J.—It is undeniably true that the rule which prohibits

Digitized by Google

www.libtool.com.cn

the reception of parol evidence to contradict, alter, add to, or diminish a written instrument, has lost much of its force and certainty, by the numerous exceptions which have been recognised in Pennsylvania. To reconcile the adjudicated cases with each other or with the rule itself, would require great ingenuity, and perhaps be an impossible undertaking. The wisdom of the rule is admitted by all, and yet, if the exceptions continue to be multiplied, it will become of little practical value. Repeatedly has this Court admitted the necessity of limiting rather than enlarging the exceptions to the rule; but, with every disposition to conform to this necessity, we find it extremely difficult to define with precision when this species of evidence should be received, and when rejected. The present case is, however, free from difficulty.

The plaintiff had released to the defendant, the Erie and Wattsburgh Plank-Road Company, the right of passage over his land, for the construction and use of the company's road. This release was in writing and in the usual form; to destroy its effect the plaintiff upon the trial offered to prove, by the agent of the company, who had procured the release, that it was signed by the plaintiff "upon the express condition that it was to be binding upon him only in case the plank-road should be located and built upon the Phillipsville route, and not otherwise; and to be followed by evidence that the said road was not located or built on said route, and that this condition was made known by Mr. Robinson and others to the board of directors afterwards at their meeting."

This offer was properly rejected by the Court of Common Pleas. Had it been received, it would not only have altered, by diminishing the effect of the written instrument, but it would have also contradicted it. The one gave the unrestricted right of way over the lands of the plaintiff for the purposes of the road, while the other limited the right to lands lying along a particular route. The one general and unconditional, the other special and conditional. Upon its face, the release gave to the company the undoubted right to appropriate to its use the lands of the defendant, upon which they entered; the object of the parol evidence was to show that the company had no right of entry whatever, and that it was a trespasser. A clearer case of direct conflict between the written instrument and the proffered testimony, can scarcely be conjectured. It was not alleged that there had been either a fraud perpetrated or a mistake committed in the transaction, unless the fraud could be inferred from the refusal of the company to permit the parol agreement to be used to do away with the release; or the mistake established by a misconception of the plaintiff as to the legal effect of his parol reservation. That to stand upon the rules of law, is no fraud, and that a mistake in the existence of such rules cannot be relieved from, needs neither argument nor authority to prove.

Digitized by Google

[Kennedy *v.* Erie and Wattsburgh Plank-Road Company.]

www.libtool.com.cn

The cases cited by the plaintiff in error, do not establish that there was error in rejecting his offer. That of McConaley *v.* The Centre and Kishacoquillas Turnpike-Road Company, 1 *Pa. Rep.* 426, is the strongest case in his favour, and the one upon which he most relies; there it was held that if one was induced to subscribe to the stock of a company by a promise that his subscription should be received in work, the company could not sue for the money until the work was demanded. It does not appear from the report of the case that the parol evidence was received under objection, and even if it did, the difference between that case and the one now under consideration would be too manifest to rely upon the one as authority for the other. An agreement that a subscription should be paid in a certain specified manner, would not contradict the subscription itself, while a parol agreement that a release of damages should be inoperative, unless a certain location was made, would be entirely inconsistent with a written agreement, releasing all damages which might accrue from any location over the plaintiff's land which the company thought proper to make. The decision of the Court below in rejecting the evidence, is substantially sustained by the following cases: Seitzinger *v.* Ridgway, 4 *W. & Ser.* 472; Sennett *v.* Johnson, 9 *Barr* 385; Bertsch *v.* The Lehigh Coal and Navigation Company, 4 *Rawle* 130; Snyder *v.* Snyder, 6 *Binn.* 483; Beasam *v.* Huchison, 4 *Watts* 442; Stub *v.* Stub, 3 *Barr* 255; Woods *v.* Wallace, 10 *Harris* 171; Brett *v.* Chillas, not yet reported.

Judgment affirmed.

Hamilton *versus* Seitz.

An amendment of its records and proceedings, allowed and made by a Court of competent jurisdiction, cannot be collaterally inquired into or impeached.

One, not a party to the proceedings upon which the amendment was made, cannot, in a different proceeding, deny the regularity and legality of such amendment.

ERROR to the District Court of *Allegheny county*.

This was an action of ejectment by Sarah Hamilton against Leonard Seitz and others, to recover lot No. 4, in a plan of lots laid out by A. H. McClelland, in the 8th Ward, in the city of Pittsburgh. The title was in S. & J. Hamilton, against whom a judgment was recovered, and *fi. fa.* No. 308, of April Term, 1852, was issued, and a levy made on lots Nos. 2 and 3; and, on the 22d April, 1852, extended at the yearly rental of $140. Notices served on defendant, and they not retaining it at the yearly rental, a *venditioni exponas* was issued to No. 312, of July Term, 1852. On the 31st July, 1852, the sheriff sold lot No. 2 to John

Digitized by Google

www.libtool.com.cn

Barton for $110, and lot No. 3 to Samuel Morrow for $200. On the 4th of September, 1852, on motion, the Court granted leave to the sheriff to amend his levy, by striking out Nos. 2 and 3, and inserting Nos. 3 and 4. The sheriff's deed to Samuel Morrow, for lot No. 4, sold on *venditioni exponas*, No. 312, July Term, 1852, offered, for acknowledgment, 11th September, 1852. The acknowledgment was objected to by J. S. Hamilton, Esq., but for whom the objection was made does not appear in the case. On the 25th, the deed was duly acknowledged. The plaintiff claimed the premises, under a subsequent sheriff's sale, as the property of S. & J. Hamilton, and alleged that the levy and sale, under which the defendant claimed, conferred no title to lot No. 4.

The Court (HAMPTON, P. J.) directed a verdict for the plaintiff, subject to the opinion of the Court, "as to the legal effect of the amendment of the 4th September, 1852, and the validity of the defendant's title under his deed."

On a subsequent day, his Honour delivered the following opinion on the point reserved, and entered judgment for the defendant, *non obstante veredicto*.

"The irregularity in the proceedings which form the basis of defendant's title, is so great, that nothing but the binding force of authority could compel me to sustain it.

"It was right enough for the Court to allow the levy to be amended so as to embrace the lot in dispute, but all subsequent proceedings should have been set aside at plaintiff's costs, and the sheriff allowed to proceed '*de novo*' with his amended levy; any other practice might lead to the grossest frauds, and become ruinous to creditors as well as debtors. The judgment-creditors under whose judgment the plaintiff here claims, might have objected to the amendment at the time, but did not do so; the defendants in the execution under which defendant claims, are not here objecting to the regularity of the proceeding: the amendment in the levy, *venditioni exponas* and sheriff's deed were all allowed by a Court of competent jurisdiction, before the deed was acknowledged, and before the levy and sale under which the plaintiff claims. The record of this amendment gave full notice to the plaintiff and all others of its contents, so that no want of notice can be alleged under all the circumstances of this case, and the decisions of the Supreme Court. I feel fully constrained to say that the regularity of this amendment cannot be inquired into in this collateral proceeding, but that the same can only be successfully assailed, if at all, on a writ of error sued out in the case where it was allowed. *I shall be very glad indeed, if the Supreme Court can find sufficient reasons for reversing me*, as I consider the amendment if allowed to stand, forms a dangerous precedent.

("Vide Rhoads *v.* The Commonwealth, 3 *Harris* 277; Vastine

Digitized by Google

www.libtool.com.cn

v. Fury, 2 *Ser. & R.* 432; Foster *v.* Gray, 10 *Harris* 14, 15, and many other authorities to the same point.)

"Let judgment be entered for the defendant on the question reserved, *non obstante veredicto.*"

To which the counsel for the plaintiff did then and there except and pray the Court to seal this exception, which is done accordingly.

This opinion, and ruling on the reserved point, was assigned for error.

T. B. Hamilton and *Woods*, for plaintiff in error.—The amendment relied on by the defendants was not of such a nature as to cure the defect in their title. The Court could not divest the title by substituting in the deed a different property from that in the levy. There was no notice of such amendment. Such a practice renders parties liable to imposition—alike injurious to defendants and creditors. The alleged amendment is not such, but an entire change of the record. If the levy was amended, all the subsequent proceedings should have been set aside, and proceedings *de novo* had. The case of Rhoads *v.* Commonwealth, 3 *Harris* 277, does not sustain the ruling of the Court. No amendment will be allowed affecting the rights of third parties: 14 *Johns. Rep.* 219; 5 *Watts* 186; 1 *Wilson R.* 61.

The Act of 16th June, 1836, expressly requires the holding of an inquisition, and a sale without it is void—none was held on this levy, as amended: 8 *Watts* 422; 4 *Yeates* 108; *Ib.* 212; 2 *Binn.* 80; 3 *Harris* 90.

J. Barton, for defendant in error.—This amendment was made by a Court of competent jurisdiction, before the levy and sale under which the plaintiff claims. This was notice to all. Neither the defendants nor creditors object. The plaintiff is a stranger and cannot do so. The plaintiff is the wife of one of the defendants, and has no equity against the defendant, who was a creditor and *bona fide* purchaser.

Even were the amendment erroneous, it could not be inquired into collaterally; and not being under the Act of 1806, it could not be inquired into even directly upon a writ of error. Rhoads *v.* Commonwealth, 3 *Harris* 277; Foster *v.* Gray, 10 *Id.* 14, 15; 2 *Ser. & R.* 432. The entry of the acknowledgment of the deed is presumed to be made upon notice, and has all the effect of a judicial decree: 1 *Baldwin* 246; and is in the discretion of the Court: 8 *Watts* 194. The amendment of a judgment is matter of discretion: 11 *Ser. & R.* 357. So of a writ of *venditioni exponas:* 3 *Barr* 325; 2 *Id.* 355. See as to the description in the writ: 5 *Barr* 126; 2 *Id.* 165. Whatever defects there were

Digitized by Google

www.libtool.com.cn

in the description, are cured by the acknowledgment of the sheriff's deed: 5 *Barr* 168; 2 *Harris* 80.

The opinion of the Court was delivered by

KNOX, J.—We are fully satisfied with the reasons given by the learned judge of the District Court, in support of the judgment for the defendants, *non obstante veredicto*. We are bound to presume that the amendment permitted in the numbers of the lots sold was founded upon satisfactory evidence that a mistake was made in that part of the description of the levy, and that the true numbers of the lots, really levied upon and sold, were 3 and 4 instead of 2 and 3. Besides which, the objection to the amendment is neither made by the proper person nor in the right place. The regularity of an amendment made by a Court of competent jurisdiction cannot be inquired into collaterally; and, whilst the defendant acquiesces, a subsequent purchaser at sheriff's sale can make no valid objection to it.

Judgment affirmed.

Brown *et al. versus* Powell.

A turnpike or plank-road company, or their contractors or agents, who enter upon the lands of a person, for the purpose of constructing their road, without having the damages previously assessed, tendered, or paid, or secured in the mode provided by the Acts of Assembly regulating such companies, are trespassers, and may be sued as such.

A tenant for years is an owner within the meaning of the Act, and is entitled to compensation according to his interest.

Where the company, their agents or contractors, fail to comply with the provisions of the Acts in regard to damages, the owner or tenant may waive the *tort*, and proceed to have his damages assessed according to the Act, or bring trespass at his election.

A license from the owner of the fee, given after the date of the lease, would afford no justification for invading the possession of the tenant.

ERROR to the Common Pleas of *Erie county*.

The action was trespass *quare clausum fregit*. The plaintiff occupied the *locus in quo* as the tenant of James M. Sterrett.

The defendants justified on the ground that they were the contractors of the "Erie and Wattsburg Plank-Road Company," which was incorporated by the Act of 27th February, 1849; and also set up a license to said company by Sterrett, the owner of the fee.

The defendants contended that the company had the right, and having it might delegate it to its contractors, to enter upon the land for the purpose of constructing the road, previous to the assessment or payment of damages; and that the only remedy of

Digitized by Google

[Brown v. Powell.]

www.libtool.com.cn

the plaintiff was to proceed under the Act for the assessment of damages. The plaintiff insisted that neither the company nor its contractors could enter upon the land until the plaintiff was paid his damages, and having done so, they became trespassers, and this action could be maintained.

The Court instructed the jury, that the defendants, not having paid the plaintiff his damages before entering upon the land, became trespassers, and this suit could be maintained.

Walker, for plaintiff in error.—The plaintiff, for the recovery of damages, must resort to the mode pointed out by the Act. See Acts 26th January, 1849; 7th April, 1849; 14th May, 1850. The Act must be pursued in exclusion of the common law remedy: Act 21st March, 1806; 8 *Harris* 94; 10 *Id.* 29; 2 *Id.* 65; 1 *Barr* 308; 20 *Johns. Rep.* 735; 18 *Wend.* 17.

The plaintiff's land is not taken; he was but a lessee; the company had a release from the owner. His damages are only consequential: 6 *Whart.* 25; 6 *W. & Ser.* 114; 8 *Harris* 93–4; 10 *Id.* 29.

Thompson, for defendant in error, the Court declined to hear.

On the paper-book were referred to: 8 *W. & Ser.* 460; 4 *T. Rep.* 794; 2 *Barn. & Cress.* 703; 5 *Harris* 65; 1 *Barr* 308; 10 *Harris* 29.

The opinion of the Court was delivered by

Lewis, C. J.—The Act of 26th January, 1849, regulating turnpike and plank-road companies, contained no provision for compensating the owners whose lands were taken for the bed of the road; but the supplement of the 7th of April following made provision for the recovery of damages for this injury, to be assessed in the manner prescribed in the 9th section of the original Act. By that section it is made the duty of the corporation to give notice of their intentions, to endeavour to agree with the occupiers upon the damages, or upon men to assess them; or if either party, upon due notice, refuses to join in the choice of men for that purpose, then a justice of the peace of the county where the lands lie, is to choose them. But the property is not to be taken, until the assessed value be tendered or paid, or adequate security be given to the owners for the payment thereof. In the case before us, the land appears to have been taken without any effort to adjust the compensation, and without any tender or payment of or security given for the same. The corporation and all who acted by their authority, in entering upon and taking possession of the plaintiff's land, were therefore trespassers, and liable to the action of trespass at common law. The supplement was not intended to repeal the provision in the original Act, which declared that no

Digitized by Google

www.libtool.com.cn

part of it "shall authorize the taking of any property by the company, unless the same be previously paid for, or adequate security given to the owners for the payment thereof." It gives to the owner a right to have the damages assessed in the manner prescribed in the 9th section of the original Act, either before he is deprived of his property or afterwards (if he chooses to waive the trespass). But if he does not choose to waive the wrong arising from an unauthorized entry upon him, he may bring his action for redress at common law. Notwithstanding a slight ambiguity in the supplementary Act, the fair construction of it, when taken in connexion with the proviso in the original Act, already referred to, is that the owner is not to be deprived of his land until the compensation be adjusted and tendered, paid, or secured. The security may be substituted for payment, or tender of payment, where there is an appeal from the assessment, and the company desires to enter before the final decision. A tenant for years is an owner within the meaning of the Act, and is entitled to compensation according to his interest: Turnpike Road *v.* Brosi, 10 *Harris* 29.

There is no evidence on the paper-book of the plaintiff in error tending to show that the corporation had a license to enter granted by the owner of the fee, before he demised to the tenant his term for years. The testimony given by Samuel Low and Timothy Reed, amounts to no more than proof that the company entered upon the rights of the tenant for years, under a license from the landlord. This was clearly a trespass. It is not necessary, under the evidence stated on the paper-book, to consider what the law would be if the license had been granted before the lease, and the tenant contracted and entered without notice of it.

On a careful consideration of the errors assigned, we see nothing to justify a reversal of the judgment.

Judgment affirmed.

Gibson *versus* Cummings.

Where a party sues out a writ of error, and the judgment is affirmed, and the record is remitted to the Court below, where the costs are taxed, he cannot maintain another writ of error to such taxation.

A party can have but one writ of error to the same judgment.

Error to the Common Pleas of *Fayette county*.

The plaintiff in error brought an action of *assumpsit* against the defendant, upon a parol contract, for the sale of a house and lot. The defendant denied the contract, and also set up the statute of frauds and perjuries. Upon the first trial of the cause, the plaintiff, by leave of the Court, filed an additional count,

Digitized by Google

www.libtool.com.cn

claiming damages for the breach of the contract, and the jury rendered a verdict in his favour for $217.27. This verdict was set aside by the Court, and a new trial granted; and, on the second trial, the plaintiff recovered a verdict for $20. Upon which he sued out a writ of error, and the judgment was affirmed and the record remitted. The plaintiff's costs having been taxed in the case by the prothonotary, the defendant appealed from said taxation to the Court of Common Pleas, and the Court struck out all of plaintiff's costs prior to the term at which the amendment of the *narr.* was made, and allowed him those which accrued subsequent to the time of the amendment filed. To this ruling of the Court the plaintiff excepted, and sued out this writ, and assigned for error the refusal of the Court below to allow him full costs.

Ewing, for plaintiff in error.

Kaine, for defendant in error.

The opinion of the Court was delivered by

Lowrie, J.—Last year the plaintiff brought this case up on a writ of error, and the judgment was affirmed, and the record remitted. After that the costs were taxed, and now we have a writ of error to the taxation. This is claiming a right to two writs of error to the same judgment, or two suits for the same cause of action; and, if this can be, why may we not have another? A case cannot be thus split up. A party must not sue even in error prematurely, if he wants his whole case reviewed. He ought to see that the costs are taxed before error brought, if he fears that the taxation may need correction here.

Judgment affirmed with costs.

Dodson's Appeal.

A debtor who desires to have the benefit of the exemption under the Act of 1849, must claim it, and he waives all right to it by remaining silent.

Where a debtor's land was levied upon, and he claimed the exemption, and an appraisement was made, but no sale effected under that execution, and afterwards another creditor levied upon a part of the same land and sold it, without the debtor having given the notice and made the claim upon the latter execution; *Held*, that he had waived his right, and was not entitled to claim $300 out of the proceeds of the sale.

This is an appeal from the decree of the Court of Common Pleas of *Westmoreland county*, distributing the proceeds of the sheriff's sale of the real estate of Dorsey Dodson.

Robert McDowell had a judgment against Dodson, upon which

Digitized by Google

[Dodson's Appeal.]

he issued a *fi. fa.*, and levied on the real estate of defendant, as well that part of the lot out of which the fund in controversy arose, as also a part of the same lot which Dodson had previously sold to Glover, Kier & Co., but after the entry of McDowell's judgment.

At the time of holding the inquisition, Dodson gave notice that he claimed the benefit of the Exemption Act of 1849. An appraisement was had under that Act, and found that the land would not divide, &c., and the proceedings returned with the writ. A *venditioni exponas* was issued, but, before any sale was made, the judgment was transferred by the plaintiff to James Glover, one of the firm of Glover, Kier & Co., and the execution stayed on the 22d of February, 1854.

On the 13th April, 1854, Glover, Kier & Co. issued a *fieri facias* on a judgment assigned to them by Amos Ogden, by virtue of which that portion of Dodson's real estate only (included in prior levy) which he had not conveyed to Glover, Kier & Co., was levied, condemned and sold without a notice or claim from Dodson of the benefit of the exemption law. When the proceeds were brought into Court for distribution, he claimed to receive $300 by virtue of the proceedings on the former writ. An auditor was appointed to make distribution, who disallowed the claim, and, on exceptions filed to this report in the Court below, the report of the auditor was confirmed, and Dodson removed the proceedings by appeal to this Court, and assigned for error here the refusal of the auditor and the Court to allow him to take $300 out of the fund in Court under the Act of 1849.

Cowan and *McKinney*, for appellant.—The Act of 1849, creating this exemption, requires the debtor in *any* (not every) case, where real estate is levied upon, to give notice of his claim, &c. In this case the notice was given on the first case, and inquisition and appraisement returned. If the sale had been made on that writ, it is admitted he would have been entitled to the exemption. The sheriff is the officer of the law, and represents all the creditors—certainly all judgment-creditors, and such proceedings upon one notice and claim would bind all the judgment-creditors: Bowyer's Appeal, 9 *Harris* 210. The reasoning in that case is answered by the facts in this—that the defendant gave notice, &c., without delay.

The law is never presumed to require a repetition of the same Act for the same purpose—this would create useless trouble and expense.

Turney, for appellees, relied upon the decision of this Court in Bowyer's Appeal, 9 *Harris* 210. That whatever the debtor does not claim is waived. That he must give notice before inqui-

Digitized by Google

sition: Brant's Appeal, 8 *Harris* 141; Miller's Appeal, 4 *Harris* 300; Weaver's Appeal, 6 *Harris* 307. Act of 9th April, 1849, *P. L.* 533; 2 *Parsons*, 279.

The opinion of the Court was delivered by

BLACK, J.—The appellant's property, consisting of a lot in the town of Bolivar, was levied on by the sheriff. He gave notice that he claimed the exemption. An appraisement was made and returned. But there never was a sale under that levy. Afterwards another execution was issued on another judgment, and another levy was made, not on the same property, but on a part of the same. No notice was given in the latter case, and on it the sale was made out of which the fund now in Court arose.

It is the settled construction of the Act of 1849 that a debtor, who desires to have the benefit of that statute, must claim it, and that he waives all right under it if he remains silent. The appellant suffered the proceedings, on which his property was finally sold, to go on from beginning to end without making any demand for an appraisement. Can he now be permitted to say that his demand in another case, where no sale took place, is enough without showing that it was repeated in the present case? We think not. Notice to one person who does not sell is not notice to another who does. Even if the same person were plaintiff in both executions, it would not answer; and for this the difference in the two cases would be a decisive reason. It might very well be supposed that the debtor had motives for claiming the exemption, when the whole of his lot was levied on, which did not exist when only a part of it was seized.

Decree affirmed.

Stewart *versus* Stewart.

Where a devisee goes into the possession of land claiming it under the devise, and keeps it undisturbed for twenty-one years, he has a title to it which nobody can question.

Other devisees or heirs who are dissatisfied with the quantity or location of the land, must make their claim before the statute runs over it, as after such a lapse of time the law will presume that it was designated and marked off to him by the other parties interested.

Even where the possession has not been consistent with the devise, or the description in the will is ambiguous, after twenty-one years' possession, no new apportionment can be demanded.

Nor will the fact that he entered into possession before the death of the devisor, who was his father, in anticipation of a devise to him, or under a gift from the latter, take the case out of the general rule; his keeping possession and claiming it under his father's will, was as distinct an act of hostility against the other devisees, as if he had claimed it under a deed from the devisor.

Digitized by Google

[Stewart v. Stewart.]

www.libtool.com.cn

ERROR to the Common Pleas of *Indiana county*.

Jane, Polly, and Eleanor Stewart brought an action of ejectment against Samuel Stewart for 50 acres of land in Centre township, Indiana county. On the 29th day of April, 1828, Archibald Stewart, Sr., the father of the parties, was the owner of a tract of land of about 400 acres, of which this land in controversy was a part. On that day he made and executed his will, by which he divided the tract among his family. To his son Archibald he devised 100 acres and allowance to be laid off on the south side of the tract. To the defendant he gave 100 acres and allowance to be laid off to him on the north end of the farm, adjoining lands of Johnson and others, to include the buildings then occupied by defendant. The residue of the tract he devised to his wife Eleanor in fee. Archibald Stewart, the testator, died in March, 1831. The widow, by her will, dated 4th July, 1831, devised her portion of the tract to the plaintiffs. In 1827, Samuel Stewart, the defendant, went into possession of the land he now occupies, including the land in dispute, under a gift from, or by permission of, his father, and continued in the actual occupancy of it until the trial of this suit.

About one year after the death of the testator, Archibald Stewart, Jr., one of the executors (the widow and Jane being the others), procured a surveyor, and divided the land into three parts, according to the directions in the will, as they supposed. Samuel was present, and assisted in the survey, and his part contained 107 acres and 8 perches, and allowance. The widow did not assent to this division, and died shortly after it was made.

The plaintiffs, afterwards, made a deed to Archibald for his part. Samuel continued in the exclusive possession of the part surveyed off to him, and the plaintiffs continued likewise after the death of their mother in possession of the part laid off for her, cultivating up to Samuel's lines, and assisting in keeping up the division fences, until the commencement of this action, on the 20th April, 1852.

The plaintiffs claimed that the defendant was in the possession of land, which, by their father's will, had been devised to their mother, and by her will devised to them.

The defendant relied mainly upon the statute of limitations.

The Court instructed the jury, that if the defendant was on the land claiming by and under the devise, his possession was not adverse, and therefore the statute of limitations would not avail him. And that, before his possession could fairly be considered adverse to plaintiffs, there should be shown some acts of hostility; something to show that after his father's death he claimed adverse to, and not under the title derived through the will.

The jury found for the plaintiffs several acres on the east and south ends of defendant's farm, including a meadow and other

Digitized by Google

fields, of which he had been in possession from before his father's death till the time of trial.

The instructions of the Court below were assigned for error in this Court.

Drum, for plaintiff in error.—The defendant could well hold the land under the will and adversely to the other devisees at the same time. He held adversely to all the world, when he claimed to hold it *as his own*. Suppose him to have been in error that the devise covered the disputed part, his possession would be equally good. The fact that he entered by permission of his father in 1827, does not change the application of the rule. His possession at least commenced to be adverse at the father's death in 1831. The Court should at least have submitted the question to the jury. His occupancy, limitation of his boundary by the fences, and the coincident occupancy on the other side, were a constant and continuing assertion of adverse and hostile possession. An express declaration in severalty was not necessary: 1 *W. & Ser.* 191; 6 *Id.* 315; 10 *Ser. & R.* 182. Taking the whole of the profits must be under a claim of exclusive right: 9 *Barr* 227; 2 *W. & Ser.* 307 and 294; 9 *Watts* 363; 10 *Id.* 192; 6 *Barr* 483. Mutual occupation of lands up to a certain fence for twenty-one years, gives a right, whether either party knew of adverse claim or not: 9 *Watts* 566.

Banks and *Taylor*, for defendant in error.—The defendant's right to the land must depend on the statute of limitations; he cannot pretend to claim it under the will, as the will gave him a different part of the land. The survey made was not in accordance with the will. The defendant claimed to hold under the will and not adversely to the other devisees. Until it was designated, they were holding as tenants in common, and then the statute would not begin to run until his possession became hostile and exclusive: Long *v.* Mast, 1 *Jones* 195; 4 *How.* 289. In Lodge *v.* Patterson, 3 *Watts* 76, it is ruled that the possession of one joint tenant or tenant in common is *primâ facie* the possession of his co-tenants, and it would continue so until some hostile demonstration was made by the one in possession: 10 *Watts* 158; and the new entry into the lands of a common ancestor and taking the profits for twenty-one years, would not be a disseisin of the others, unless there were some plain and decisive acts of hostility: Hart *v.* Gregg, 10 *Watts* 185.

The opinion of the Court was delivered by

Black, J.—From the evidence returned with the charge of the Court in this case, it appears that the defendant occupied, had,

Digitized by Google

www.libtool.com.cn

and held, the land in dispute more than twenty-one years before the beginning of the present suit. Why should he not be protected by the statute of limitations? The plaintiffs, who are his brother and sisters, answer that it was part of their father's land, of which their mother was the devisee, and they afterwards got it by her will.

Archibald Stewart, the father of all the parties, owned four hundred acres, which he devised in separate portions to his two sons and his wife. The present defendant was in possession of the one hundred acres, which he now has, at the time of his father's death, and from that time to the present, he has asserted that the one hundred acres given him in his father's will, was this same piece. The plaintiffs insist that the land actually devised to him does not include the part in dispute, but other land of much less value, which he never claimed.

When a devisee goes into the possession of land, claiming it under the devise, and keeps it undisturbed for twenty-one years, he has a title to it which nobody can question. If other devisees or heirs think he has taken too much land, or taken it in the wrong place, they must make their claim before the statute runs over it, or else not make it at all. After such a lapse of time, the law will presume that it was designated and marked off to him by the other parties interested. They cannot demand a new apportionment, even if his possession has been inconsistent with the devise, much less can they do so when the description in the will is merely ambiguous. His possession for twenty-one years is as good as their deed.

But, in the present case, the defendant had taken possession before his father's death, probably under one of those gifts which parents frequently make to their children in anticipation of their testamentary arrangements. The Court seemed to think that this fact would take the case out of the general rule above laid down. We are not of that opinion. His keeping possession of the land in dispute and claiming it under his father's will, was an act of hostility against the other devisees, as distinct as anything he could have done. If he claimed it as devisee, he claimed it as his own, and if he claimed it as his own, that claim was surely adverse to them as well as all the rest of the world. It would not have been more so if he had held it under a deed from his father.

In this view of the case, the instructions upon that part of the evidence which was adduced to show what were the boundaries of the land devised, became unimportant. It does not matter much what they were, if the defendant has been in the adverse possession for twenty-one years.

Judgment reversed and *venire facias de novo* awarded.

Digitized by Google

www.libtool.com.cn

Black's Appeal.

Where several distributees agreed in writing that the administrator of their intestate should settle certain obligations and claims in favour of the estate, against one of the distributees, upon such terms as should seem most desirable to him, and he believing them to have been paid, delivered them up to be cancelled, the administrator could not be afterwards charged with the amount of such obligations in the settlement of his account, at the instance of one who was a party to the agreement.

In settling the dispute, he was not an arbitrator, but acting in the line of his duty as an administrator, and as such is protected by the agreement of the heirs, and not responsible for an error of judgment.

APPEAL by Mrs. Julia Ann Black, from the decree of the Orphans' Court of *Washington county*, confirming the report of an auditor, distributing the amount in the hands of William Workman, administrator of Jacob Schaeffer, deceased.

The deceased left issue, two daughters, the appellant and Louisa Thompson, and a granddaughter named Mary Ringland, issue of Charlotte Ringland, deceased, a daughter of the intestate, and for whom Colin M. Reed was guardian. Shortly after the death of Jacob Schaeffer, difficulties occurred in the administration of his estate, growing out of claims which he held against his daughters, and of demands which they made upon his estate. To enable the administrator to settle, the heirs signed the following agreements:

"For the purpose of closing the estate of Jacob Schaeffer, deceased, as speedily as possible, and preventing further delay, expense, and litigation, we do hereby authorize William Workman, administrator, to settle all disputed claims for and against said estate on such terms as will seem most desirable to him, and on the basis of such adjustment to settle his account, and make distribution of the whole estate in his hands. It is understood that this authority embraces all claims held by the estate against Mrs. Ringland, for notes given by her to her father, or claims against her paid by him, which claims said administrator is to adjust and dispose of as to him may seem just and equitable.

"Witness our hands this 18th of December, 1858.

"C. M. REED,
"Guardian of Mary Ringland.
"JULIA ANN BLACK,
"GEORGE BLACK."

"I hereby assent to the cancellation and extinguishment of the claims in the hands of William Workman, administrator of the estate of Jacob Schaeffer, against Charlotte Ringland in her life-

Digitized by Google

www.libtool.com.cn

time, and that the distribution of the estate of said Jacob Schaeffer shall be made as if such claims had never existed.

"Witness my hand, December 22, 1853.

"Attest: "LOUISA THOMPSON."

"JAS. WATSON."

The administrator at this time held notes and obligations given to the intestate by Charlotte Ringland, and paid by him for her, to the amount of $516.07, and also various claims against Mrs. Thompson and her husband. Mary Ringland's guardian alleged that Jacob Schaeffer, in his lifetime, had been the guardian of Mary, and that in right of her father, who was deceased, she was entitled to $3000 in Natchez, which had been lost through the intestate's neglect. Mrs. Thompson and her husband made a claim, the amount of which did not very distinctly appear, for various services rendered to her father. In pursuance of the agreements above recited, the administrator delivered up to Mr. Reed, the guardian of Mary Ringland, the claims he held against her mother, and also the claims against Mrs. Thompson and her husband; they at the same time relinquishing their claims against the estate. The administrator filed his account, showing a balance in his hands of $8203.38, which was confirmed by the Orphans' Court in February, 1854; and at the May Term following, an auditor was appointed to make distribution. Before the auditor, the appellant contended that Mary Ringland should be charged with the several claims which the intestate had held against her mother, Charlotte Ringland, and which the administrator had delivered up. The appellees relied upon the agreements, and the settlements made by the administrator in pursuance of them.

The auditor sustained the settlements made by the administrator upon these disputed claims, and reported an equal distribution of the balance of the account among the three heirs.

To this report the appellant, Julia Ann Black, filed exceptions. The Orphans' Court overruled these exceptions, and confirmed the report of the auditor; and an appeal was taken to this Court.

Acheson, *Wilson*, *Montgomery*, and *Gibson*, for appellant.

Wm. McKennan, for appellee.

The opinion of the Court was delivered by

BLACK, J.—The appellee was administrator of Jacob Schaeffer, deceased. The appellant, who is one of the distributees, sought to charge him in his account with certain obligations and notes given up by him and cancelled. The Court refused to permit it, and we think rightly, for this most conclusive reason: The obliga-

Digitized by Google

www.libtool.com.cn

tions and claims in question were disputed, and their justice denied by another member of the family. To save a contest unseemly and disagreeable, the appellant, as well as the other distributees, agreed in writing that the administrator should settle them on such terms as should seem most desirable to him. He did so by giving up the claims. It is not doubted that he acted in good faith, or that he cancelled the notes because he thought they had already been paid. But the appellee thinks that she ought to be permitted to charge him notwithstanding, on the ground that his act was wrong, and that he was merely an arbitrator between the heirs, with his authority revoked at the time his award was made. He was not an arbitrator. In settling or compromising the dispute he was in the line of his duty as an administrator, and the paper which the heirs gave him was sufficient to protect him from responsibility for an error of judgment.

Decree affirmed.

Cassidy *versus* Conway.

When a survey has been once made, returned, and accepted, a new one cannot be made without the assent of the officers of the Commonwealth, and not even then, so as to affect intervening rights.

Nor can such survey when so made, returned, and accepted, be changed by the officers of the Commonwealth, without the previous assent or subsequent acquiescence of the owner of the survey.

The assent of a warrant-holder to an original survey is presumed, but not so as to a subsequent one, unless he had asked for it or claimed under it.

Whether a warrant has been shifted, or whether it has been located upon the land it calls for, are questions of fact to be determined by the jury.

ERROR to the Common Pleas of *Cambria county*.

Patrick Conway, the plaintiff, brought ejectment against Lawrence Cassidy and Michael Nagle, to recover from them a tract of land alleged to be in their possession, surveyed in pursuance of a warrant in the name of David Hammond, Sr., dated the 25th October, 1773, for "three hundred acres of land adjoining Joseph Fields, on some of the head waters of Juniata, in the county of Bedford," endorsed "No. 37," and a survey of 301½ acres and allowance, by Thomas Smith, D. S., on the 15th of June, 1776, also endorsed "No. 37." A tax sale of the same land to James C. McGuire, and a regular title from McGuire to himself. The defendants severed in their defence. Nagle showed an adverse possession of the land he claimed for more than 21 years, and a verdict was rendered in his favour. Lawrence Cassidy gave in evidence, and showed title thereto in himself and his brother Lewis a warrant to Jacob Fawns, dated the 10th of April, 1776, for "300 acres of land on the south side of Clearfield Creek, to adjoin

Digitized by Google

www.libtool.com.cn

an old surveyed line about one mile below, where the path crosses said creek from Frankstown to Kittaning, in Westmoreland county." A survey thereon of 332 acres 25 perches, per John Henderson, "deputed for this service," on the 24th June, 1776. For the purpose of invalidating the plaintiff's title under the David Hammond survey, the defendants gave in evidence a survey of 337 acres, made on the 7th November, 1786, by George Woods, D. S., in pursuance of the same warrant, in the name of David Hammond, which latter survey was returned into the surveyor general's office on the 29th March, 1787. This last survey did not cover the land in dispute, but was located at a different place from the first survey made upon the same warrant.

The first survey as located, and the Jacob Fawns survey, under which Cassidy claimed, interfered with each other, and were the subject-matter upon which the questions in this Court were raised.

That portion of his Honour Judge TAYLOR'S charge, which is material, is as follows:—

"Which is the better title, the Hammond or the Jacob Fawns?

"The Hammond is the older warrant, and the prior survey. The survey upon it was made on the 15th, and the survey upon the Jacob Fawns on the 24th of June, in the same year. This, if both were indescriptive, or descriptive and not shifted, warrants, would determine the priority of the Hammond. But the defendant alleges that the Hammond was *shifted;* and that the title under it would date only from the 5th of August, when it was accepted, after the date of the Fawns survey. And such is the law with respect to a *shifted* warrant. Whether a warrant has or has not been shifted, must be determined by the jury, from the evidence fixing the marks or localities called for, and the location of the survey: but it is necessary to inquire and settle in the first place, what is to be considered a *shifting*, such as will postpone the title until notice, or until the acceptance of the survey. [The Court here read to the jury the observations of Judge GIBSON, in 10 *Ser. & R.* 216, and continued:] It will thus be seen that to constitute a *shifting*, the survey must be so separated from the place described in the warrant, as to show that it was removed from the ground which was first intended; so as to show a change of intention. When the warrant is not precisely descriptive, but loose or vague in the terms of description, and the location answers the calls with reasonable certainty, it is not shifted, though *all* the calls may not be precisely met or answered.

"These are both descriptive warrants; both loose or vague, rather than precise, in the terms of description; as we notice in the description contained in one of them, 'on *some* of the head waters of Juniata;' and in the other, 'on the south side of Clearfield Creek, to adjoin *an old surveyed line about one mile below* where the path crosses said creek.' The Hammond warrant calls for

Digitized by Google

www.libtool.com.cn

'300 acres of land adjoining Joseph Fields on some of the head waters of Juniata, in the county of Bedford.' The survey is shown to adjoin Fields; and it is shown that Fields lies on the head waters of the Juniata, which the plaintiff contends locates the survey according to the literal terms and true and natural meaning of the description. But if it adjoins the Fields (the only certain call in the description), and is not over 40 rods, as the witnesses of the defendant prove, from the nearest Juniata waters, we say that the calls, in any construction of the description of the warrant, are sufficiently met and answered by the location; and that it is not shifted.

"The case then, gentlemen, may be committed to you in a few words. You will regard the survey of 301½ acres, made the 16th of June, 1776, and through a tax sale of which the plaintiff claims, as a valid survey, and the only valid survey upon the David Hammond warrant, if another survey was afterwards made upon that warrant; and, finding it to be located where the plaintiff claims it to lie, and not shifted, it entitles him to your verdict against Lawrence Cassidy for all the land in his possession, or included within the Jacob Fawns survey, and for which that defendant has taken defence. The other defendant, Michael Nagle, has made out a complete defence under the statute of limitations, and is entitled to a verdict in his favour."

The defendant excepted to this charge, and the jury found for the plaintiff.

The defendant assigned for error, the ruling of the Court that the survey of the 16th June, 1776, was the proper and legal survey of the Hammond warrant; and also, that the Court had taken the questions of fact from the jury.

J. G. Miles, for plaintiff in error.—There were facts which should have been submitted to the jury, to show an abandonment of the first survey, and a voluntary change of location by legal authority. Every survey will be presumed to be made with the consent of the warrantee, unless the contrary appear: 2 *Yeates* 88, 89; 4 *W. & Ser.* 80. There were facts raising a powerful presumption that the Hammond warrant was relocated by authority. The maxim *omnia præsumuntur rite esse acta* is as applicable to the land office as to Courts: 6 *Harris* 302. A survey unimpeached for 21 years is conclusively presumed to have been regular: *Id.* 299. It should have been left to the jury to say whether the survey had not been changed: 3 *Harris* 143.

Even records, when necessary to the stability of titles evidenced by long possession, may be presumed: *Matthews on Pres. Ev.* 193; *Cowp.* 109, 110; 3 *T. R.* 158; 2 *Ves. Jr.* 583. Or a private Act of Parliament: *Matthews* 195; Farrer's Case, cited

Digitized by Google

www.libtool.com.cn

Skin. 78; 12 *Viner* 58, pl. 11. Or a charter: *Cowp.* 102. Or a grant: 3 *Ser. & R.* 509.

H. D. Foster, for defendant in error.—The Court did not take the facts from the jury, but expressly submitted the question of location to them. The Court reiterated the law as laid down by this Court in 10 *Ser. & R.* 216, as to what would constitute a shifted warrant. Where a survey is made and returned, the authority is exhausted, and no other can be made without an order of resurvey: 2 *Watts* 397; 3 *Watts* 413. On the question of whether there was an abandonment of the first survey, and a relocation on different ground, there were no facts to raise such a presumption, and nothing to leave to the jury. No possession ever taken of the second survey by the owner. The second survey was void; the owner could not abandon it. Even if the second survey had been made with Hammond's consent, it would have made no difference, as it would have been utterly void. We do not deny that after 21 years the law will presume that a survey was regularly made on the ground. It must, however, still be determined as other questions of fact, as to what land was actually embraced in it. There is no authority for saying that where there are two surveys covering the same land, that after 21 years the void survey is to be presumed regular, and the other irregular.

The opinion of the Court was delivered by

KNOX, J.—Ever since the case of Drinker *v.* Halliday, 2 *Yeates* 88, the rule has been established in Pennsylvania that, where a survey has been once made, returned, and accepted, a new one can not be made without the assent of those representing the Commonwealth, and not even then so as to affect intervening rights: 4 *Ser. & R.* 343; 10 *Ser. & R.* 23. It follows, from the above rule, that a survey which has been duly made, returned, and accepted, cannot be changed by the officers of the Commonwealth without the previous or subsequent assent of the owner of the survey. The original survey of the David Hammond warrant clearly included the land in dispute; but it is said that this survey was abandoned, and that a second survey was made upon the same warrant, ten years afterwards, of entirely different lands. It is very probable that the two surveys were made upon the same warrant. In the one, the warrantee is called "David Hammond, Sr.," and the other "David Hammond;" the date and the number, however, is the same in both surveys, and the second has an endorsement which appears to refer to the first. Had the resurvey been made by the direction of the owner of the warrant, or if the owner had adopted it after it was made, claimed, and held the land included in it, the original survey would have been of no validity; but it does not appear from the evidence that the original

Digitized by Google

www.libtool.com.cn

warrantee, or any one whose title was derived from him, applied for the second survey, or ever recognised it in any manner whatever; and, in the absence of evidence of this kind, the Court of Common Pleas was clearly right in instructing the jury that the first survey was the legal one. The assent of a warrant-holder to an original survey is presumed, but not so as to a subsequent one, unless he had asked for it, or claimed under it. This disposes of the three first assignments of error.

The second ground of defence upon the trial was, that, even if the plaintiff's survey, including the land in controversy, was not abandoned, it only gave title from its return, as the warrant had been shifted. A precisely descriptive warrant gives title from its date. Where the warrant is general, or the description loose or vague, the title dates from the survey; and, when the warrant is shifted, from the return and acceptance of the survey. The David Hammond warrant called for "300 acres of land adjoining Joseph Fields, on some of the head waters of Juniata, in the county of Bedford." The survey adjoined "Joseph Fields," but it was alleged to have been shifted because it did not lie on the waters of the Juniata.

It is the province of the jury to say whether a descriptive warrant has been located upon the land it called for or not, and we can see no grounds of complaint against the manner in which the question was submitted to the jury in the case now under consideration. The language of the assignment of error is this: "The Court erred in taking from the jury the question raised by the evidence, whether the survey of 301½ acres, made first on the David Hammond warrant, had not been shifted from the ground described in the warrant; and in their instruction to the jury that it had not been shifted." This assignment appears to be based upon a misapprehension of the charge given in the Court below. The question was not withdrawn from the jury, but, we repeat, was fairly submitted to them; and, as the words of the charge complained of are not given in the assignment, in accordance with the rule of this Court, we do not deem it either proper or necessary to discuss now in detail this branch of the case.

In answer to the 5th specification we have only to say, that the instruction assigned for error is not to be found in the charge.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Harmar *versus* Holton.

A condition annexed to a judgment, by which it is to be released on payment of a sum of money, is in the nature of an injunction to stay proceedings at law.

An uncertainty in the condition does not avoid the judgment, for it may be rendered certain by investigation on the equity side of the Court, or through the medium of a jury.

Where time is given for the payment of purchase-money, the amount should be ascertained, and stated on the record, before the time begins to run.

Until the amount be ascertained it is impossible to perform the condition by tendering it, and until after the amount is liquidated, the Act of 1846 does not operate upon the case.

THIS ejectment was brought in 1847. On the 12th April, 1848, the defendant confessed judgment, "to be released on payment of the amount due on the article, according to a survey to be made by Judge Irwin." The next proceeding in the case was a writ of *hab. fac. pos.*, which issued to August Term, 1853; and July 27, 1853, a rule was taken to show cause why the writ should not be set aside, which was made absolute January 20, 1854.

In February, 1854, the plaintiff by leave of the Court issued a writ of *hab. fac. poss.*, which the sheriff executed by a symbolical delivery of the possession of the premises to one Chase, the alleged agent of the plaintiff, who leased the premises for one year to a member of defendant's family—all of which was done in defendant's absence, and without his consent or acquiescence, and before the return day of the writ. On the opening of the Court, on the first day of the term, and while the writ was yet in the hands of the sheriff, the defendant obtained a rule to show cause why the *hab. fac.* should not be set aside, restitution awarded, judgment opened, and defendant let into a defence. This motion was founded upon affidavits setting forth, that most if not all the purchase-money had been paid before the writ issued, and that no such survey as that provided for in the confession had yet been made. The rule was made absolute, and issue directed, to ascertain the facts.

The Court, in the opinion filed upon granting the rule, stated, "that the doubt at first entertained was, whether there was any power in the Court to set aside a writ after it was executed?" and proceeded to say, that the amount due on the article had not been ascertained, nor the survey made on which the quantity of land was to be ascertained, to liquidate the amount due: that the fair construction was, that it was the duty of the plaintiff to have the survey made—at all events, in the absence of its having been done by defendant. It was a thing to be done before the judgment became an absolute one. The article referred to is not filed, or any copy of it, or statement from it, or any calculation or liquidation of the amount mentioned in the confession of

Digitized by Google

judgment. The defendant now claims that a large amount, if not all, of the purchase-money is paid: that he was put off his guard by the plaintiff never having taken any steps to have the survey made, and the amount ascertained. Had this appeared before awarding the writ, the Court would not have allowed it without hearing the defendant, and giving him an opportunity of showing it; and in this view this application is regarded as a *writ of error coram nobis*, and is regarded as if the application for the writ of *hab. fac.* were made at this time.

"When a *fi. fa.* has been executed, and the money distributed, it is too late to set aside the writ. But is there not some difference between that and a writ which delivers a specific thing, and this when the application is made on the return day of the writ, and while the writ is still in the sheriff's hands?

"Regarding the judgment, on its face, as a mere general judgment, subject to be made absolute by a compliance with its terms, and there appearing a strong equity on the part of defendant, the rule to show cause why the *hab. fac.* should not be set aside is made absolute, and an issue is directed, to ascertain the amount due on the article referred to, if anything."

Plaintiff excepted to this decision.

The jury found "for the plaintiff, to be released on the payment of $297.50, and costs of suit, within 90 days; the plaintiff to file a deed according to the contract," &c.

Farrelly and *Finney*, for plaintiffs in error.—The equity of the defendant consisted in his right to have a title for the land on paying for it. There was no uncertainty in the conditions; and his confession of judgment bound him to comply within a year. By having his own time for payment, time became of the essence of the contract, and by the Act of 21st of April, 1846, a failure to pay at the time was a rescission of the contract. After judgment, &c., *hab. fac.* issued by leave of the Court, and the land delivered to plaintiff, could the Court open the judgment, and let the defendant into a defence, without any offer on his part to comply with the conditions or tender of money due?

The power of Courts to open judgments confessed depends on different principles than when obtained on adversary proceedings: see Colton *v.* Robinson, 2 *Watts* 373, where a judgment rendered for defendant after opening was reversed, and the original judgment affirmed: Gable *v.* Haines, 1 *Pa. Rep.* 264. When time is material, it is as binding in equity as at law, and a title vested by failure to pay in time cannot be divested: 2 *Pa. R.* 454; 7 *Ser. & R.* 297–8, 499.

The agreement of defendant to pay in a year was for his benefit, and was absolute. He had power to ascertain the amount due,

Digitized by Google

and if it depended on a survey by Judge Irwin, to procure it to be made, which he had undertaken to do by his agreement to pay within the year. A party bound by a condition must show that he has done everything in his power to perform it. Four years elapsed after the judgment before plaintiff issued execution. This the defendant moved to set aside, in which he failed, and an *alias* issued by order of the Court, which is executed, and plaintiff put into possession; and he again applies to set this aside, and open the judgment, without an offer to pay the balance, and the Court opens the judgment and directs the jury to allow such further time for payment as may be reasonable. After so great laches it is difficult to understand the equity of defendant's case.

Church and *Pettis*, for defendant in error.—If the judgment taken by plaintiff be considered for land, it is too indefinite. The record nowhere indicates quantity till the verdict is rendered. How, then, could defendant pay? What amount? For what land should he demand a deed? Of what could the sheriff deliver possession? The judgment is not more for land than money, and the whole is so uncertain that no *hab. fac.* could be sustained upon it: *Ad. on Equity*, 23; Act of 1806, *Purd.* 275, s. 1, 287, s. 9; Hawn *v.* Norris, 4 *Bin.* 77; Jordan *v.* Cleaborne, *Cro. Eliz.* 339; Pemble *v.* Stern, 1 *Lev.*; Fenwick *v.* Floyd, 1 *Har. & Gill's Rep.* 172. The amount could not be ascertained without a survey; and, as the plaintiff claimed the money, it was for him to show by the survey the correct amount. He was bound to tender a deed. The uncertainty of the judgment was sufficient to sustain the Court: Moyer *v.* R. R. Co., 3 *W. & Ser.* 90; Reeber *v.* Fisher, 1 *R.* 223.

The judgment was not within the Act of 1846. This must be strictly pursued before its results can be exacted: Brown *v.* Wicker, 6 *Barr* 391. The judgment is definite as to both money and land, and not dependent upon a contingency. More than five years had elapsed from the rendition of the judgment, and the writ directed was a nullity, and the plaintiff was a trespasser with it. Not an ordinary case of *cessat executionem*: *Purd.* 330, s. 3; 3 *Ser. & R.* 139; 12 *Ser. & R.* 210; 35 *Eng. C. L.* 433; 3 *Wils.* 368; 13 *Eng. C. L.* 184.

There is no analogy in the case of Catlin *v.* Robinson, 2 *Watts* 373. The *terre tenants* had no available defence. Their time had not come, and three years had elapsed after sheriff's sale.

The entry of the prothonotary does not express the meaning of the Court. The judgment was not opened for general purposes, but merely to ascertain what had not been fixed by the confession of judgment itself; and hence the issue is directed for a special purpose, and collateral to the judgment.

Digitized by Google

www.libtool.com.cn

All the circumstances in the case show that plaintiff was to procure the survey to be made.

The confession of judgment is not such as comes within the Act of 1846, and not sufficiently definite to produce a forfeiture, it is to be treated as a contract, wherein time is not shown to be of its essence, as sought to be applied here.

The *hab. fac.* was returned by one D. Black, not the sheriff or his deputy. Was this return evidence of any execution? 7 *Watts.*

That Courts have power over writs of *hab. fac. possessionem*, see 3 *Wils.* 49; *Adams* 21; *Tidd* 1091; 7 *T. R.* 118; 2 *Bin.* 93; Shaw *v.* Bayard *et al.* 4 *B.* 257; 7 *Leg. Int.* 202, Green *et al. v.* McClelland; 7 *Watts* 91, Norris *v.* Hamilton.

In this class of cases a *sci. fa.* should first issue, calling on defendant to show cause: Montelius *v.* Montelius, *Brightly's N. P.* 79; Adams *v.* Buck, 5 *Watts* 291.

As to the requisites of a valid judgment, see Helvete *v.* Rapp, 7 *Ser. & R.* 306; 6 *Watts* 213, McCormick *v.* Crall.

The opinion of the Court was delivered by

Lewis, C. J.—This was an ejectment brought in July, 1847. On the 12th April, 1848, when the cause was for trial, the defendant confessed judgment, "to be released on the payment of the amount due on the article, according to survey to be made by Judge Irwin, with interest and costs of suit, within one year from this time." On the 27th March, 1854, the defendant was turned out of possession by virtue of a *habere facias possessionem;* and, on the 3d of April, 1854, an application was made to vacate the writ, restore the premises, and open the judgment, and let the defendant into a defence. On the 15th June, 1854, the opinion of the Court was filed, directing that "the rule to show cause why the *hab. fac. poss.* should not be set aside, be made absolute, and an issue directed, to ascertain the amount due on the article referred to, if any."

There is a want of precision in the prothonotary's entry of this order. But the fair construction of the entry, taken in connexion with the points made on the trial, and the instructions given by the Court, is the same as that expressed in the order of the Judge, and that the judgment was not opened at all, except so far as it was necessary to open it for the purpose of ascertaining the amount due on the article. An issue was directed for that purpose.

Although the Court answered points not relative to the issue, yet the cause was ultimately put to the jury in a manner which confined them to the inquiry (the amount due on the article), and their verdict ascertains the amount. The points raising other questions were irrelevant, and the answers to them have done the plaintiff in error no harm.

Digitized by Google

[Harmar v. Holton.]

www.libtool.com.cn

A condition annexed to a judgment, by which it is to be released on the payment of a sum of money, &c., is in the nature of an injunction to stay proceedings at law. An uncertainty in the *condition* does not necessarily avoid the *judgment*, because the former, being under the control of the equity powers of the Court, may be rendered certain by further investigation before the Court, without the intervention of a jury; or, if the case require it, the Court in the exercise of its discretion may direct an issue, as was done in this case. Where time is given for the payment of purchase-money, the amount should be ascertained and stated on the record before the time begins to run. It is impossible to perform the condition by tendering the amount required by it, until it be ascertained. Until this be done, the Act of 1846 does not operate on the case.

The 8th, 9th, and 10th errors relate to exceptions to evidence, but the bills are not annexed to the assignments as the rule of Court requires. The charge contains no errors injurious to the rights of the plaintiff in error; and the action of the Court, in setting aside the *hab. fac. poss.*, and directing an issue to ascertain the amount due on the article, was perfectly correct. Justice has been done between the parties.

Judgment affirmed.

Haskins *versus* Tate.

Where a devise of land contains a limitation to a class, which may include persons not yet born, the time of the distribution defines the members that are to constitute the class.

A testator devised as follows: "I further will that the plantation I bought of my son Robert, lying near Hill's Mill, shall be equally divided amongst my son Robert's children, he and them enjoying the benefits of it whilst he lives." *Held*,

1st. That Robert took a life estate in the premises so devised.

2d. That the division amongst the children was to be made at Robert's death.

3d. That children born after the death of testator, and living at the death of Robert, participated equally with those born before.

Error to the Common Pleas of *Fayette county*.

The action was ejectment, in which the parties agreed upon the following case stated, with leave for either party to take a writ of error.

John Tate being seised of the land in dispute, by his will dated September 4, 1799, proved December 13, 1799, which will is made a part of this case, among other things devised as follows, viz.: "I will and devise that my son, Robert Tate, shall have that part of the plantation whereon I now live, to contain 170 acres, to live upon and make use of during his life, and at his decease to

Digitized by Google

be equally divided amongst his children; and further, I will that my son John Tate shall have and fully possess and enjoy the residue of the plantation I live upon; to be disposed of by him as he pleaseth. And I further will that he shall have my horse. *I further will that the plantation I bought of my son Robert Tate, lying near Hill's Mill, shall be equally divided amongst my son Robert Tate's children, he and them enjoying the benefits of it whilst he lives.*"

Robert Tate, at the date of the will and the decease of his father, the testator, had two children, John and Edward. He afterwards had eight more, of whom the plaintiff, who was born in August, 1824, is one. The whole ten are still living. The title of John and Edward is vested in the defendants or one of them. Robert Tate died in 1833. If the Court are of opinion that the plaintiff took under the devise last above recited, then judgment to be entered for him, for one-tenth of said land, otherwise judgment to be entered for defendants.

The Court below (GILMORE, P. J.) rendered judgment on the case stated in favour of "the plaintiff, for the one undivided tenth part of the premises."

N. Ewing, *J. B.* and *A. Howell*, for plaintiff in error.—It is admitted that if the children in this latter devise take a vested fee, none can take except those in existence at the death of the testator. In the first devise, he gives Robert a life estate directly, in the latter, he gives it directly to the children, "he and them enjoying it whilst he lives." The children take a present fee, not an expectancy. Robert had a joint usufruct with them during his life. There is no remainder created to open for the benefit of after-born children. It is identical with Calhoun *v.* Jester, 1 *Jones* 474. There A. had the privilege of living on it with his children during his life; here he was to enjoy it with them.

They also cited *Cowp.* 314; 2 *Vern.* 545; 2 *Atk.* 121–2, note 2; *Pr. Ch.* 470; 2 *Ves.* 83; *Amb.* 348; 1 *Bro. Ch. Rep.* 532; 2 *Id.* 658; 3 *Id.* 352, 434, 391; 1 *Atk.* 470; *Id.* 509; 2 *Id.* 329; 1 *Vesey* 111; 1 *Bro. Ch. Rep.* 386; *Id.* 530, 537; *Cowp.* 309; 3 *Bro. Ch. Rep.* 401, 416, 404; 5 *Binn.* 611; 3 *Whart.* 305; 6 *Ves.* 43, 49.

Ewing, for defendant in error.—Robert Tate took a life estate, whether solely or otherwise is immaterial here.

By a devise of the net proceeds of land, the land itself passes: Carlyle *v.* Canon, 3 *Rawle* 489, 492. So also upon a devise of the rents, profits, and income: Anderson *v.* Greble, 1 *Ash.* 138. So too by a devise of the "free use" of the land: 1 *Saund.* 186, Cook *v.* Gerrard. So a devise of the "occupation:" 2 *Plowden*

Digitized by Google

www.libtool.com.cn
524, Weleden *v.* Elkington. So upon a devise of the rents and profits *to be paid to the devisee by the executor:* South *v.* Alliene, 1 *Salk.* 228. A devise of the "income" of real estate passes the land itself: Reed *v.* Reed, 9 *Mass.* 372.

In McCullough's Appeal, 2 *Jones* 197, the testator devised that his wife *and children* shall dwell on his farm, and have the use of it for the education of his children and her own necessary wants. In case she married, she was to move off the premises and deliver the same to his executors. He again mentioned that his wife, "so long as she remained his widow and during her natural life, should have her maintenance and support off the farm." The testator then devised the farm to his son William. This Court held that "the provision for the wife is a devise of the profits, and consequently of the land to her for life, in the first instance."

It is alleged that the devise gave Robert a mere privilege of living on the place with his children. But it will be seen that in the preceding devise the testator had given Robert *the* 170 *acre tract, to live upon and make use of during his life.*

It being plain, therefore, both from the will itself, and upon the authorities cited, that Robert took a life estate, the remainder opens and lets in the after-born children, as they come into being: Wager *v.* Wager, 1 *Ser. & R.* 374, 377–8–9, and cases there cited; Minnig *v.* Batdorf, 5 *Barr* 505; *Cro. Eliz.* 335.

It is evident that the *division* was not to take place, and indeed could not be made *amongst* the children of Robert Tate, until the determination of Robert's interest, that is, until his death: and, therefore, all who came into being before that period participated in the division.

It is admitted that the testator, in the use of the word "children," in the preceding devise of the 170 acres, meant *all* the children. It cannot be doubted, then, that when, in the next sentence, he uses the same word, he meant the same persons.

The opinion of the Court was delivered by

Lowrie, J.—We think this case falls within the rule that, on a limitation to a class, which may include persons not yet born, the time of the distribution defines the members that are to constitute the class. It is very plain that Robert Tate took a life estate by the devise; but whether in the whole or not, we need not determine. The question is, do his children, born after the death of his father, the testator, take any estate? The devise is, that the land shall be equally divided among Robert's children, he and they enjoying the benefits of it while he lives. At that time he had two children, but died leaving ten. If we put the life estate first, the intention may appear in a more orderly form; thus, let Robert and his children enjoy it for life, and then let it be divided. The thought of the testator must have been about a division then,

Digitized by Google

www.libtool.com.cn
and he must have meant the children who should then be living, else he would have said what children. It is unreasonable to suppose that the testator was intending that his son's children should claim to divide with their father in his lifetime; and even if they might do so, that is not the division he was thinking of, but the division among the children only. This view receives further confirmation from our customs and laws, which favour equality among children, and from the presumption that testators recognise the justice of this rule.

Judgment affirmed.

Shaffer *versus* Lowry *et al.*

To constitute a title to land under the statute of limitations, there must be twenty-one years actual, adverse possession, continued without interruption.

Where a man settled upon land, supposing it to be vacant, and died, leaving his widow and children in possession, and the owner of the legal title, before the occupant's title was complete under the statute of limitations, by threatening a resort to legal proceedings, induced the widow to surrender to him the possession; the possession being thus interrupted will arrest the running of the statute in favour of the heirs of the former occupant.

Error to the Common Pleas of *Indiana county*.

In April, 1822, a man by the name of James Hill, supposing the land in dispute to be vacant, went upon it for the purpose of making a settlement. He raised a cabin upon it, which was occupied by his sons and tenants until 1824, when he sold it to Hugh Cameron. Cameron went into possession, claiming as vacant land 330 acres, built a new house and barn upon it, cleared and fenced 25 or 30 acres; and, in 1827 or 1828, had a survey made including 333 acres. In 1832 he sold to William Shelby, who, in February, 1835, sold to Martin Shook. Shook died in January, 1836, leaving a widow and several children residing on the land.

It turned out that the land had been appropriated by warrant and survey, and that the legal title was in the heirs of James C. Fisher, deceased. The agent of these heirs, in 1839, sold a part of the land to a man by the name of Wilson, who, by threatening the widow of Shook, to have her dispossessed by the sheriff, induced her to surrender to him the possession. She purchased from him twenty acres of the land, and went to live there until a short time afterwards, when she married Wilson, with whom she lived upon the land in dispute. In 1843 Wilson's interest was sold at sheriff's sale, and is vested in the defendants. In 1849, or 1850, Shook's heirs attempted to regain possession, but were prevented by threats of those in possession.

Digitized by Google

[Shaffer v. Lowry.]

www.libtool.com.cn

The plaintiff is one of the heirs of Martin Shook, and the other interests were vested in him.

The Court below (BURRELL, P. J.) charged the jury as follows:—

"The plaintiff's claim to the land in dispute, if good at all, is good as a title under the statute of limitations. The defendants have shown warrants and surveys, and that they cover the land in controversy, and the title to these surveys in James C. Fisher, under whom they claim. Has the plaintiff, then, made out a title under the statute? In order to complete such a title, the possession must be for twenty-one years, and must be adverse, and exclusive of the owner, and must be so kept up for that period.

"It may be doubtful if there was such a possession. But supposing there was, commencing in 1822, by Hill's first improvement, yet, in 1838, we find that Wilson buys from Shoemaker, Fisher's agent, and goes into possession.

"Plaintiff alleges that this possession was illegally obtained by threats; that it should be considered as taken under the widow of Shook, and that, like her, Wilson held as a trustee for Shook's children, under whom the plaintiff claims. The facts are not contested. The evidence is that, after Wilson bought from Shoemaker, he threatened the widow that, if she did not give him peaceable possession, he would resort to the law. This was not illegal: and, therefore, when Wilson got possession, he got it for himself. He came in, not under, but hostile to the Shook title. His entry was that of a vendee of Fisher, the owner of the land, and put a stop to the running of the statute. The widow's remaining there does not alter the case, because adverse possession, to make title under the statute, must be exclusive of the owner. The defendants are entitled to a verdict."

Specifications of error: The Court below erred in charging the jury:—

1. That the evidence was that Wilson, after he purchased, "threatened the widow that, if she did not give him peaceable possession, he would resort to the law."

2. That "this was not illegal: and therefore when Wilson got possession, he got it for himself."

3. That Wilson "came in, not under, but hostile to the Shook title; his entry was that of a vendee of Fisher, and put a stop to the running of the statute:" and that "the widow's remaining there does not alter the case."

4. That the "defendants were entitled to a verdict."

Drum, for plaintiff in error.—The question is whether the manner of obtaining the possession would stop the running of the statute. Mrs. Shook was a trustee for her children: 2 *W. & Ser.*

Digitized by Google

www.libtool.com.cn
27; 10 *Watts* 289; 1 *W. & Ser.* 288; 6 *Harris* 471. Where a party is put out by force or fraud, he cannot set up title as a bar to a recovery of the possession: 10 *Ser. & R.* 43; 18 *Johns.* 94; 2 *Ser. & R.* 352; 3 *Ser. & R.* 381; 9 *W. & Ser.* 208; 11 *Johns.* 504; 6 *Id.* 197; 6 *Watts* 388; 4 *W. & Ser.* 189; 4 *Ser. & R.* 467.

Banks and *Stewart*, for defendant in error.—It was not pretended that the Shook family had actual adverse possession for twenty-one years. It commenced only in 1822. Wilson entered in 1838 or 1839; and, if put in possession, they could not hold. Why was Wilson's conduct illegal? There was neither force nor fraud. He was the owner of the land, and demanded the possession, and informed her he would resort to the law to obtain it, if she refused. The owner may enter if he does it peaceably. After this there was no adverse possession: 1 *Jones* 189.

The opinion of the Court was delivered by

Lewis, C. J.—The plaintiff claimed under the statute of limitations against the holder of the legal title in possession, but failed to show the continuance of an adverse possession for the period of twenty-one years. As a substitute for it, he gave evidence to prove that Martin Shook, under whom he claims, died in possession, leaving his widow there. That, in 1839, after James Wilson become the owner of the legal title, he induced the widow of Shook to quit the possession by "threats of being thrown out by the sheriff." At that time the adverse possession under which she claimed did not exceed seventeen years. The heirs of Shook had no title. Wilson had a right to bring ejectment, and, by means of legal proceedings, to expel her from the possession, and to compel her to pay damages and costs besides. The threat was no more than an intimation that, if she did not cease to occupy his land, he would appeal to the law for redress. She chose to leave the premises, and he took possession under his title as owner. Her election to leave the premises was a wise exercise of judgment, because she could not by any possibility have held them against the rightful owner. It was an honest, as well as a wise proceeding on her part, because she did no more than give up to the rightful owner the property which her predecessors had wrongfully deprived him of. She says she was "*scared*." What at? Certainly not at James Wilson, for she purchased twenty acres of land from him, and afterwards married him and returned to the premises. If she was scared at anything, it must have been at the probable expense and fruitless result of contesting the just claim of Wilson. There was nothing in the transaction which entitles the heirs of Shook to claim the possession of Wilson as held under them. The pinch of the case is, that their title depends on

Digitized by Google

www.libtool.com.cn

adverse possession continued for twenty-one years without interruption, and that the person intrusted with the business of keeping up this possession failed to do so, and could not have done so, if she had made the effort. The heirs may hold the widow responsible for unfaithfulness, if she has been guilty of it, but they cannot visit her sins upon others who have been guilty of no wrong: Koons *v.* Steele, 7 *Harris* 207.

There is no error in this record.

Judgment affirmed.

Neely *versus* McCormick.

Where an administrator refuses to set apart for the widow of a decedent the property to which she is entitled under the Act of 1851, she has neither such a general nor special property in the articles to which she is entitled as will enable her to maintain trespass against the administrator.

Her remedy in such circumstances is a special action on the case, or if converted by him into money, she may sue in *assumpsit* for money had and received to her use.

Error to the District Court of *Allegheny county*.

John Neely died in July, 1851, leaving the plaintiff his widow: the defendant is his surviving administrator. On the 31st of July, an appraisement was filed of the personal estate, amounting to $858.59¾.

Before and at the time the inventory was taken, the plaintiff claimed property of the value of $300, under the Act of 14th April, 1851; the administrators refused to allow her the benefit of said Act, but had the property appraised and disposed of in the course of administration; she then brought this action of trespass *vi et armis*, to recover the value of said property.

The Court (Hampton, P. J.,) held that the plaintiff could not recover in this form of action.

This was assigned for error.

Barton, for plaintiff in error, cited 14 *Johns. Rep.* 352; Act 14th April, 1851; 1 *Chitty's Pl.* 171; 14 *Ser. & R.* 499; 6 *Wh.* 490; 7 *Harris* 255.

G. P. Hamilton, contrà, cited Act of 9th April, 1849; 1 *Ser. & R.* 480; 4 *Ser. & R.* 490; 7 *Ser. & R.* 9; 4 *Taunt.* 547; 1 *East* 244; 7 *C. & P.* 74.

The opinion of the Court was delivered by

Knox, J.—Under the Act of 14th April, 1851, upon demand made, it is the duty of the personal representative to have appraised and set apart of the real or personal estate of their decedent, property to the value of $300, to remain with the widow

Digitized by Google

www.libtool.com.cn

for the use of herself and family. So much of the estate as is thus set apart, is withdrawn from the general administration, and becomes the property of the widow for the aforesaid purpose, as soon as it is appraised and set apart, subject, however, to the approval of the Orphans' Court.

Where the administrator refuses or neglects, upon request made, to allow the property claimed to be appraised and set apart for the widow, she may have an action against him at once without waiting for the settlement of the estate, and the general distribution of its effects. Yet she cannot maintain trespass; for the possession of the personalty is in the personal representative, and the widow has neither a general nor special property in any particular goods until after the election and appraisement. Her remedy is a special action on the case, unless the estate has been sold and converted into money by the administrator; when, at her option, she can maintain *assumpsit* for money had and received to her use.

Judgment affirmed.

Kennedy *versus* Ross.

Where a mortgage dated 21st September, 1853, recited, that it was given to secure to R. the payment of a bond of the same date, in the penal "sum of $3000, conditioned for the payment of $1500, in three annual payments, with interest thereon from the 1st of May, 1853, together with other conditions as therein more fully set forth;" and in case of default of payment for *thirty days*, authorizing the mortgagee to sue out a *scire facias*: *Held*,

1st. That the condition of the bond recited in the mortgage could be resorted to in giving a construction to the condition in the mortgage, to ascertain the time when the annual payments matured.

2d. That the first instalment matured on the 1st day of May, 1854, and that *scire facias*, issued on the mortgage on the 3d day of June, 1854, was not prematurely sued out.

3d. That the Court might enter judgment for want of an affidavit of defence, although no copy of the bond or its condition had been filed.

Error to the District Court of *Allegheny county*.

This was a *scire facias sur mortgage*, dated September 21, 1853, brought on the 3d day of June, 1854, by the mortgagee, Ross, against Kennedy and his wife, as mortgagors. No affidavit or statement of claim, or copy of the bond secured by the mortgage, was filed. There was nothing to designate the character and amount of the plaintiffs' claim, except the usual reference to the record of the mortgage, recorded in the Recorder's Office of Allegheny county, in the Mortgage Book, volume 25, page 165. The mortgage, as correctly recited in the writ, purports to have been executed on the 21st day of September, 1853, by Kennedy and his wife to Ross, to secure upon the property of Mrs. Kennedy

Digitized by Google

www.libtool.com.cn

the payment of her husband's bond in Ross's favour of even date therewith, in the penal "sum of $3000 conditioned for the payment of $1500 in three annual payments, with interest thereon from the 1st day of May, 1853, together with other conditions as therein more fully set forth." It is further provided in the mortgage that "in case of default in the payment of the principal sums and interest as aforesaid, or any part thereof, for the space of thirty days from the time they or any of them shall become due, thereupon it shall be lawful for the said mortgagee, or his legal representatives, to sue out forthwith a writ or writs of *scire facias*, upon the present indenture of mortgage, with the same force and effect as if twelve months next ensuing the last days wherein the principal money hereby secured ought to be paid according to the condition of the above recited obligation, had fully run out and expired, any usage or practice to the contrary notwithstanding."

On the 5th of June, 1854, the writ of *scire facias* was returned "served on defendant by a copy left at his residence with his wife." On the 9th of December, judgment was entered in default of an appearance and affidavit of defence, and a *levari facias* issued, upon which the property was advertised. A rule was obtained to show cause why the judgment should not be set aside. The Court granted leave to the sheriff to amend the return of service, but made the rule absolute, and set aside the judgment. The plaintiff afterwards obtained a rule on the defendant to show cause why judgment should not be entered for want of an affidavit of defence. This rule was made absolute on the 3d day of March, 1855, and the amount liquidated at $1485.53. The following was the condition of the bond, to secure the payment of which the mortgage had been given:—

"That if the above bounden Benjamin Kennedy, his heirs, executors, administrators, and assigns, do well and truly pay or cause to be paid unto the said Jonathan P. Ross, his certain attorney, heirs, executors, administrators, or assigns, the sum of $1500, with interest from the 1st day of May last, in three equal annual instalments *from that date, interest payable on the whole sum annually*, without any fraud or further delay, then this obligation to be void; otherwise to remain in full force and virtue."

The defendants sued out this writ, and assigned the following errors:

1. The Court erred in entering judgment in favour of the plaintiff, inasmuch as by his own showing, the first annual payment of the debt, secured by the mortgage, was not due until the 21st of September, 1854, and he therefore had no cause of action on the 3d June, 1854, the date of the impetration of his writ.

2. The mortgage having been given on the 21st September, 1853,

Digitized by Google

www.libtool.com.cn
to secure a bond of same date, "conditioned for the payment of $1500, in three annual payments, with interest from the 1st day of May, 1853," no default had occurred to authorize the issuing of the writ of *sci. fa.* on the 3d of June, 1854, and the Court therefore erred in entering judgment for the plaintiff, for want of an affidavit of defence.

Penney and *Sterrett*, for plaintiff in error.—The plaintiff having filed no affidavit or statement of claim, or copy of the bond secured by the mortgage, there was nothing, except the recital in the writ and mortgage referred to, by which the nature and amount of his claim could be determined; and by reference to these recitals, it is manifest that no payment of either principal or interest was due at the time the writ was issued, and for nearly four months thereafter. By the terms of the bond, recited in the mortgage and writ, the first annual instalment was not due until the 21st September, 1854. If, therefore, the plaintiff, on his own showing, had no cause of action against the defendants when he brought suit, it would certainly have been a work of supererogation on their part to file an affidavit of defence. In the case of Thomas *v.* Shoemaker, 6 *W. & Ser.* 183, suit was brought on a negotiable note, before the last day of grace had expired, and judgment was entered, for want of a sufficient affidavit of defence; and, on error to this Court, where the objection was first raised, it was held that it was error in the Court below to enter judgment in favour of a plaintiff, who, by his own showing, had no cause of action at the time he commenced suit.

Selden, for defendant in error.—The condition of the bond is never fully copied in the mortgage. In this case the filing the deposition of Mr. Robb with the copy of the bond, fully explains any ambiguity that might be conceived in the phraseology of the reference to it in the mortgage. And the simple question is, and should be, was there *actually* a default at the time of issuing the *sci. fa.* A default occurred May 1. In thirty days from that time the mortgagee had a right to issue a *sci. fa.* It was not issued till June 3, 1854, and consequently after the expiration of the thirty days.

The opinion of the Court was delivered by

Woodward, J.—Whether the *scire facias* issued by the plaintiff, on the 3d June, 1854, disclosed any cause of action, depended on the construction to be given to the phraseology in which the conditions of the mortgage were expressed; and this, judged by itself, was very obscure; but the accompanying bond, which may be properly resorted to for purposes of construction, clears up all doubt on the point. It is there provided that the $1500, with interest from

Digitized by Google

www.libtool.com.cn

the 1st day of May last, is to be paid in three equal annual instalments *from that date*, interest payable on the whole sum annually. That date, first of May last, was first of May, 1853; and consequently, on the first May, 1854, an instalment of the principal and all the interest fell due. Thirty days thereafter, by virtue of the conditions in the mortgage, the plaintiff was entitled to his *scire facias*; and hence his writ, sued out June 3, 1854, was not premature, but after cause of action accrued. Construing the terms in the mortgage agreeably to those in the bond, the *sci. fa.* disclosed a good cause of action, and the defendants should have put in an affidavit of defence if they had any to allege.

The judgment is affirmed.

The Mayor, Aldermen, and Citizens of Philadelphia *versus* Riddle.

It is the duty of the counsel of a plaintiff in error who has excepted to deeds and evidence below, and who wishes to have the rulings of the court upon them reviewed, to present the deeds and evidence in his paper-book, in an appendix; and if not presented in some way, the court will dismiss his exceptions without further notice, and assume that the points excepted to have been correctly ruled below.

An old unrecorded, but technical and duly acknowledged deed from husband and wife to a third party as trustee, which deed was laid aside among the husband's or wife's papers, and never handed over nor known to the trustee, and which (the land conveyed by it having been afterwards sold by the husband and wife for the husband's use and benefit), could not operate as a conveyance, was held to be evidence of an intention on the part of the husband to settle his wife's land on her, and worthy of regard as showing a consideration for subsequent conveyances that were made for her benefit.

"Abandonment" may take place with regard to an inchoate right, but is scarcely predicable of a perfect title: and hence payment of taxes in his own name, for even thirty years, by a sheriff's vendee of a void title, who had made an entry on the land twenty-four years ago, and once or more every year since, and had run lines; and who had had a tenant on for nineteen, but not for twenty-one years; does not prove an *abandonment*, there being an absent owner of the lands, by patent. The constructive possession follows the legal title.

ERROR to the Common Pleas of *Erie county*.

Ejectment. The case in the Court below involved an immense amount of every kind of evidence; some of it brought up from a remote date; and very numerous questions as to the effect of deeds through which the plaintiff, in whom the title had been vested to bring suit, as trustee of parties interested under the last will of Mrs. Susan Wallace, claimed. But though bills of exception were taken to much of this evidence, the Court here refused to pass upon it, because the paper-book of the plaintiff in error did not set forth nor state the deeds or evidence in such a way as

Digitized by Google

www.libtool.com.cn

to enable this Court to judge what they really were. Though the case therefore involved below a great deal of other matter which the plaintiff in error meant to bring up, the only matters which this Court would consider, arose from this case.

John B. Wallace, Esq., in April, 1805, married Miss Susan Binney, who was possessed of a considerable patrimony, mostly real estate, and on June 9, 1806, joined with her in a short but regular deed of bargain of sale, to Horace Binney, Esq., which was not acknowledged till June 9, 1807, when it was formally acknowledged by both parties; by this deed Mr. and Mrs. Wallace conveyed all and singular the lands, tenements, and real estate belonging to the said Susan, wheresoever the same may be, together with the appurtenances, to have and to hold the same with the appurtenances to the said Horace, his heirs and assigns, to the use of the said Horace his heirs and assigns for ever. In trust, nevertheless, that the said Horace, his heirs and assigns, shall hold the same upon such trusts and for such uses and purposes as the said Susan, by any instrument of writing in the nature of her last will and testament, being all written with her own handwriting, signed with her name, and sealed with her seal, shall appoint and declare. This deed was never delivered, nor shown to Mr. Binney, nor put upon record, but was put away among other papers of either Mr. or Mrs. Wallace, and its existence for some time apparently forgotten. Mr. Binney never saw it till after Mr. Wallace's death in 1837, when it was shown to him by a son of Mrs. Wallace, who had found it among the papers of his mother's trust. Between the date of this deed and December, 1814, Mr. Wallace and his wife had sold about $53,000 of her estate for his purposes; and in that month, Mr. Wallace gave to Mr. Binney a bond for $50,000, which Mr. Binney accepted, to hold in trust for the use of his sister, Mrs. Wallace; the consideration of this bond being Mrs. Wallace's patrimony which had passed into her husband's hands, and which Mr. Wallace recited that it had always been his intention to settle. In part payment of this bond, the lands in question were conveyed in 1824, by a short deed, never recorded, to the then trustee, an assignee of the obligee; but no endorsement was made on the bond. Soon after this transfer, August 14, 1819, Stephen Girard obtained a judgment, at Philadelphia, against Mr. Wallace, as endorser of certain notes, and on November 25, 1824, levied on these lands, with actual notice that they were the property of Mrs. Wallace, whose agent forbade the sale; Mr. Girard bought them 19th March, 1825, under the sale made on his own levy. He had no lien at the date of Mr. Wallace's conveyance, his *testatum fi. fa.* having been docketed in Erie, October 20, 1824. Immediately after Girard's purchase he had the assessments charged to his own name, and paid taxes on the property for twenty-nine or thirty years, up to the bringing of this

Digitized by Google

www.jbtool.com.cn

suit. Immediately after his purchase, also, he appointed an agent, who, in May, 1830, went upon the land with surveyors. These got assistance from other parties to run lines and subdivide the property into smaller lots. The land was unseated. Girard's party remained upon the land three or four days, and divided the property into lots. After this the agent advertised for proposals to make a road, received proposals, and sent them to Girard. Girard died about that time, making the plaintiffs in error his devisees. The agent then corresponded with these last, who sent him power to make leases, which he did make in 1835, '36, '41, '42, '46, '49, and '50, but none prior to July 7, 1835. Except in one year, the agent went upon the lands once a year, and sometimes oftener, every year; and was at great expenses of every kind in taking care of the property. This suit was brought in 1853. On the trial below, the counsel for the defendant in error asked the Court to charge in effect that the deed of 1807 constituted an equitable agreement and obligation on the part of Mr. Wallace to settle his wife's separate real estate upon her, and that, having had himself the benefit of this property, it was a good consideration for the subsequent bond; which instruction the Court in substance gave. The plaintiff in error asked the Court to charge in effect that the possession of Mr. Girard was such an adverse possession as created a title under the statute of limitations; and also that the omission for twenty-eight years to bring suit, and the acquiescence in Girard's possession all that time, in his payment of taxes, in his care of the property, and the other facts shown, constituted an abandonment by Mrs. Wallace, or her devisees, of her title; which instruction the Court did not give, but gave instructions in substance the reverse.

Walker, for plaintiff in error, cited Strimpfler *v.* Roberts, 6 *Harris* 283; Foster *v.* McDivit, 9 *Watts* 346; Foust *v.* Ross, 1 *W. & Ser.* 504; Read *v.* Goodyear, 17 *Ser. & R.* 350; Kelsey *v.* Murray, 9 *Watts* 111; Kite *v.* Brown, 5 *Barr* 294; Hole *v.* Rittenhouse, 7 *Id.* 305; Naglee *v.* Albright, 4 *Wh.* 300; McCall *v.* Neely.

Thompson and *Marshall*, for defendant in error, cited Naglee *v.* Albright, 4 *Wh.* 300; Bunting *v.* Young, 5 *W. & Ser.* 188; Roland *v.* Long, 1 *Harris* 464; Girard's Heirs *v.* The City of Philadelphia, 2 *Wallace Jr.* 301.

The opinion of the Court was delivered by

WOODWARD, J.—The counsel of the plaintiffs in error could not have expected us to pass on the effect of the deeds mentioned in the bills of exception, for he has not furnished us with a syllable of those documents. The rules of Court require the evidence,

Digitized by Google

when it is to be reviewed, to be printed in an appendix, which is wholly omitted from the plaintiffs' paper-book. The first five assignments of error, therefore, are to be dismissed without further notice, and it is to be assumed that the title papers were adequate transfers of the title of John B. Wallace, Esq., to the defendant in error. The two remaining errors are assigned in total disregard of Rules VI. and VII. (6 *Harris* 578), but as, by searching and sifting, we can find out the instructions complained of, we proceed to consider them.

The deed, Wallace and wife to Binney, dated 9th June, 1807, and the bond, Wallace to Binney, dated 2d December, 1824, both which were given in evidence, without objection, and for a view of which we are indebted to the paper-book of the defendant in error, were unimportant as affecting the transfer of the lands in controversy, for the deed never was delivered, and the bond does not refer to these lands; but were worthy of some regard, as showing an intention on the part of Mr. Wallace to settle his wife's lands on her, and as a consideration for the subsequent conveyances that were made for her benefit. These were the only purposes which that evidence could legitimately accomplish, and the answers of the Court in respect to it, were substantially to this effect. The answers of the Court to the plaintiffs 4th and 5th points, and to the 1st, 4th, 5th, 6th, and 7th points of the defendants (now plaintiffs in error), may be considered together.

The city of Philadelphia claim under Stephen Girard, whose title originated in a judgment recovered by him against John B. Wallace, in the Supreme Court at Philadelphia, on the 14th day of August, 1819, and a *testatum fi. fa.* docketed in Erie county, the 20th of October, 1824, and levied on these lands 25th November, 1824. Under a *testatum venditioni*, the sheriff sold the lands to Stephen Girard on the 19th of March, 1825. Before the lien of Girard's judgment attached, Mr. Wallace, by several deeds, had conveyed away all his estate and interest in the lands in trust for his wife, as we infer from what is said of the deeds in the bills of exception, but none of the trustees, and no one for them, or for the *cestui que trust*, had paid taxes for, or taken actual possession of the lands, and hence it was insisted on the part of the city, that Mr. Wallace's title was derelict and abandoned.

Mr. Girard, from the time he purchased, paid the taxes, had an agent to supervise the lands, surveyed them in 1830, and, after his death in 1831, the city of Philadelphia continued the same agent, who made leases to tenants, the first on the 7th of July, 1835, and paid taxes as before. More than twenty-one years having elapsed after Girard's purchase, before suit was brought, it was maintained that these acts of ownership constituted a title under the statute of limitations. The Court ruled both points against the city. And we think, rightly.

Digitized by Google

[Mayor, &c., of Philadelphia *v.* Riddle.]

The constructive possession of land, not actually occupied, follows the legal title: that is, in contemplation of law, every man is in possession of the land he owns, until *ousted* by an intruder, and abandonment of title is not to be presumed from non-entry, nor from neglect to pay taxes. The law does not limit a man's title to the *possessio pedis*. He may own lands he never saw, and an entry once in every cycle of one-and-twenty years is not necessary to preserve his title, because, in the eye of the law, he is in possession all the time. Inchoate rights may be abandoned, but abandonment is scarcely predicable of perfect titles. And though it is an owner's duty to pay taxes, what if he do not? The law, instead of presuming his title abandoned, seizes and sells it to the highest bidder. If another pays the taxes, it will help to define the extent of any actual possession he may have taken, but an owner's mere neglect to pay taxes, when they are paid by another, will never work a forfeiture of title. Nor does payment of taxes under a colourable title, constitute possession for the purposes of the statute of limitations. There must be an actual entry, and a continued and visible possession, either by cultivation or residence, to give title under the statute, and where this is, payment of taxes proves much every way. It helps to define the extent of the possession, gives it notoriety, is a renewed protest from year to year against the outstanding title, and, by contributing to the public necessities, increases the merit of the disseisor. But alone, or in connexion with such acts as were proved in this case, before the possession of 1835, payment of taxes is neither ground for presuming abandonment of the real title, nor for barring it under the statute. The plaintiffs in error took actual possession in 1835, and from that time the statute ran in their favour, but it had not completed its course when it was arrested by the present action. These principles have been many times asserted and applied in Pennsylvania, and they justify the answers of the Court to the points propounded. The only remaining point is the defendant's 10th, which relates to the effect of a deed which is not exhibited, and, therefore, we cannot pronounce in respect to it. So far as the case is disclosed to us, we see no error, and accordingly affirm the judgment.

Judgment affirmed.(*a*)

(*a*) The Reporter is indebted to J. W. Wallace, Esq., of Philadelphia, for the report of this case.

Digitized by Google

www.libtool.com.cn

William Filby *versus* George Miller *et al.*

An attorney-at-law, as such, has no authority to compromise and discontinue a suit brought for the recovery of land of his client, in consideration of the other party conveying to himself a portion of the land: but if he makes such compromise, and the discontinuance is entered of record, and the client does no act to manifest his dissent for a number of years, he will be held to have acquiesced in the discontinuance, and the terms upon which it was entered.

The other party, having had the benefit of the discontinuance, cannot invalidate his conveyance upon the allegation that the attorney exceeded his authority in making the compromise.

Nor could he repudiate the conveyance upon the ground that the consideration for making it was, in addition to the discontinuance of the suit, that a good title was to be made to him for the balance of the tract, which had not been done: having received a part of the consideration, his remedy was to enforce, not to destroy the contract.

A *bonâ fide* purchaser, for value of the land thus conveyed to the attorney, without notice of the circumstances alleged against the validity of the title, would hold it discharged from equities between the parties.

And a subsequent purchaser *with notice*, could protect himself by the equity of a former one, who purchased *without* any such notice.

ERROR to the Common Pleas of *Greene county*.

The action was ejectment for 100 acres of land in Alleppo township. The title was admitted to be out of the Commonwealth. The land in dispute was part of a larger tract, called "Fox Hill," which the plaintiff alleged was patented on the 4th August, 1785, to John Hughes and Timothy Ryan. In 1841 or 1842, several of the heirs of Timothy Ryan agreed in writing with R. D. Bird, Esq., a practising attorney, to pay him $300 in land, for his services in looking after and recovering their lands in Greene county. Mr. Bird expended considerable money in having surveys made of their lands, procuring copies of papers, and spent much time and labour; and, in 1844, brought an ejectment to recover the "Fox Hill" tract. But, entertaining doubts whether the title of the heirs of Ryan were not barred by the statute of limitations, he compromised the case with the heirs of Jacob Miller, deceased; and they released to him, in his own name, 100 acres of the tract, and he discontinued the ejectment in 1846. On the 16th December, 1851, R. D. Bird and wife conveyed this 100 acres to William Hughes, for the consideration of $300. For a part of this amount he took a judgment against Hughes, and, under this judgment, it was levied and sold by the sheriff, as the property of William Hughes, to Hugh Montgomery, for $182.50, and Montgomery conveyed it to William Filby, the plaintiff in this action.

The defendants claimed under Jacob Miller, who settled on the "Fox Hill" tract, between 1821 and 1824, and also set up that

Digitized by Google

[Filby v. Miller.]

www.libtool.com.cn

the release to R. D. Bird, by Jacob Miller's heirs, was invalid, because he, as the counsel of Ryan's heirs, had no authority to make the compromise, or take a conveyance of the land to himself.

The plaintiff submitted the following points:—

1. That if R. D. Bird, who was the attorney-at-law of Ryan's heirs, discontinued the suit which they had brought against the defendants in this suit; that such discontinuance, being without terms, is binding on the plaintiffs (viz., Ryan's heirs,) and they cannot gainsay it; but are left to their action against him (Bird) —consequently it is good in favour of the defendants (Millers.)

2. That if R. D. Bird made a compromise with defendants by which he got the land in dispute, in consideration of the discontinuance of a suit against them, and did so discontinue it, and that said defendants have had the advantage of that discontinuance for nine years, till their title has become absolute to the residue of said tract by the statute of limitations, that defendants are now estopped from repudiating the validity of said discontinuance.

3. That if the jury believed that R. D. Bird had an agreement in writing with the heirs of Ryan that he was to have an interest in the land for professional service rendered and expenses paid, that it gave him such a power, coupled with an interest in the land, that the discontinuance by him was not void, and the defendant still enjoying all his part of the compromise, that he cannot now repudiate it.

His Honour, GILMORE, P. J., answered these points as follows:—

"1. An attorney at law doubtless has authority to bind his client by confession of judgment or discontinuance; and when he does so without terms, which shows that he exceeded his authority, the client is concluded by it; and is turned round against him for breach of instructions: 9 *Barr* 316. But in this case, if the witnesses are to be believed, there were terms that, in consideration of the conveyance to the attorney of the plaintiff, the ejectment was to be discontinued, and more that he (the attorney) was to make, or cause to be made, a good and sufficient title for the remainder of the tract. Such an agreement, we say, would be beyond the authority of an attorney, and any conveyance made upon such consideration would be invalid.

"2. We answer this in the negative, the discontinuance was invalid, and could and would have been stricken off at any time upon application to the Court.

"There is no evidence that Ryan's heirs ever sanctioned this agreement—so that defendants could gain nothing by this discontinuance.

"3. We charge you that this proposition is not correct.

"The Court then told the jury the case involved an inquiry of notice; if Montgomery had notice of defendants' title at the

Digitized by Google

sheriff's sale, defendants will be entitled to your verdict. If, on the contrary, no notice was given at the time of the sheriff's sale, and neither George Miller or any one in possession under him at the time, plaintiff will be entitled to recover.

"To which charge the plaintiff excepts."

The jury found for the defendants, and the plaintiff sued out this writ.

Errors assigned: The Court erred in their answer to the plaintiff's 1st point.

The Court erred in their answer to the plaintiff's 2d point.

The Court erred in their answer to the plaintiff's 3d point.

The Court erred in their general charge wherein they "told the jury the case involved an inquiry of notice; if Montgomery had notice of the defendants' title at the sheriff's sale, defendants will be entitled to your verdict."

Purman, for plaintiff in error.—Where an attorney is employed, and brings suit and discontinues, it is binding and conclusive upon the client: 5 *Cowen* 385; 6 *Johns.* 296. In Pennsylvania the authority is more extensive than elsewhere: 16 *Ser. & R.* 368; 9 *Barr* 102; 5 *Watts* 235. It is more especially binding where the discontinuance, as here, is of record, and the clients have acquiesced for years. It was, like the contracts of infants, at most voidable: 13 *Mass.* 237; 6 *Ala.* 544; 9 *Missouri* 135; 7 *Watts* 412; 5 *Cowen* 475. He may confirm it: 3 *Barr* 428; 2 *Edw.* 566; 1 *Pick.* 221; 12 *N. H.* 196. A purchaser without notice would not be affected by it, the conveyance being in Bird's own name: 3 *Yeates* 269; 2 *Watts* 78; 4 *W. & Ser.* 152.

2. It would be a fraud on purchasers to allow the defendants to avoid and repudiate their own conveyance: 9 *Cowen* 274; 4 *Met.* 384; 9 *Wend.* 147; 19 *Ad. & El.* 90; 3 *Hill* 219; 15 *Ser. & R.* 18; 1 *Pa. Rep.* 476; 2 *Watts* 379.

After so long an acquiescence, and the rights of third persons have intervened, it cannot be avoided: 1 *Barr* 147; 2 *Watts* 490; 6 *Johns.* 301; 1 *Binn.* 469. There was no notice to any of the purchasers, and it was error to submit it to the jury: 5 *W. & Ser.* 61; 6 *W. & Ser.* 488.

Lindsey, for defendant in error.—The relation of an attorney to his client is one of confidence and trust. He cannot compromise a suit by which his client is to get money for land, or *vice versa*: 14 *Ser. & R.* 307; 1 *Pa. Rep.* 267; 9 *Barr* 315; 1 *Barr* 157; 7 *Barr* 185; 7 *Watts* 63.

There was notice to Filby, and he was not a *bonâ fide* purchaser for value without notice. There is constructive as well as actual notice. The defendants were in possession when Filby bought,

Digitized by Google

and this was sufficient to put him on inquiry as to the title by which they claimed to hold.

The opinion of the Court was delivered by

KNOX, J.—The compromise made by R. D. Bird, with the heirs of Jacob Miller, was not within the scope of his authority, as attorney-at-law for the heirs of Timothy Ryan, nor would his agreement with some of the heirs, that he should be paid in land for his services, give him the right to divide the land in dispute between himself and the defendant. But his arrangement with the heirs of Miller, though unauthorized by his clients, might be ratified by them; and, if so, it would be binding upon all who had consented to it. There was no direct evidence of precedent authority, nor of subsequent assent, but the long acquiescence of the heirs of Ryan in the discontinuance of the ejectment, afforded strong ground for the presumption that they were willing to adopt it as their act. After a period of nine years has passed without any objection to the discontinuance by either party, and without any other effort being made by the heirs of Ryan to disturb the possession of Miller to the residue of the tract, it is to be presumed that the act of the attorney was ratified by his clients; and the other party, after having the benefit of the discontinuance, cannot now invalidate the release by the allegation that Bird exceeded his authority in making the compromise. It is said that part of the consideration, for the release to Bird of the 90 acres, was his promise to make, or cause to be made, a good title to the heirs of Miller for the residue, and that in this he had failed. Granting this to be as alleged, it would not make the deed of release inoperative. Where part of the consideration is paid, and a deed executed, a failure by the vendee or releasee to perform according to the agreement, will not of itself authorize the grantor or releasor to treat his release as a nullity, and retake possession of the land released, and particularly will he not be permitted to do this, whilst he retains the part consideration paid before the execution of the release. His remedy is to enforce the agreement, not to destroy it. It is argued by the defendant in error, that, as there was no evidence that Mr. Bird notified his clients of the compromise, their assent to it could not be presumed from their silence. If the controversy was between the Ryan and the Miller heirs, this argument would not avail the former, for the discontinuance being of record would be sufficient notice to put them on inquiry as to the terms upon which it was entered, and if they neglected to obtain the information, they would be held to the agreement as fully as though express notice had been given to them; and as the client would not now be permitted to deny the validity of the act of his attorney, in entering the discontinuance, it is plain that the defendants in the ejectment cannot do so.

Digitized by Google

[Filby v. Miller.]

www.libtool.com.cn

The learned judge, who presided upon the trial in the Common Pleas, erred in his instruction to the jury, that, as the agreement was beyond the authority of the attorney, the release was invalid. He should have instructed them, that, even if the attorney exceeded his authority in making the compromise, his clients had ratified it by their acquiescence, and it could not be questioned by the heirs of Miller. It is alleged by the defendant in error that the release was obtained by the fraudulent misrepresentations of Bird, and therefore void. The question of actual fraud was not passed upon by either Court or jury: it has not been considered in any remarks that we have made. As the case is sent back for a new trial, it is proper to add, that in our opinion, the Court should not have limited the inquiry as to notice to Montgomery alone. If the first purchaser from Bird (William Hughes) paid a valuable consideration, and purchased without notice, actual or constructive, that the land was claimed by the heirs of Miller, his (Hughes') title was perfect, and a purchaser at sheriff's sale would be protected by it, even with notice of the outstanding claim. So too, if Hughes and Montgomery had notice, and Filby, the present plaintiff, was a *bonâ fide* purchaser for a valuable consideration without notice, his right to recover would be unquestionable. If Filby, however, is not a *bonâ fide* purchaser, but holds the title for Bird, of course he is not in the position to raise the question of notice. It is scarcely necessary to add, that actual possession of the land in dispute by the heirs of Miller, or any of them, or their tenants, was sufficient to put the purchaser upon inquiry.

Judgment reversed and *venire de novo* awarded.

Cummings's Appeal.

A judgment against a firm is a lien on the separate real estate of the partners, and is entitled to priority in the distribution of the proceeds of sale of such separate real estate, over a subsequent judgment of a separate creditor of the partner whose real estate was sold.

APPEAL from the decree of the Common Pleas of *Fayette county*.

Jacob D. Mathiot, James Paul, and George T. Paul were partners engaged in the iron business in Westmoreland county. On the 1st day of September, 1852, three judgments, in favour of Ramsey, Graham, and Robb, respectively, were entered in the Common Pleas of Fayette county against the firm. On the 6th day of March, 1854, Samuel C. Cummings, the appellant, obtained a judgment against Jacob D. Mathiot. An execution was issued on the judgment in favour of Ramsey, and a tract of land, the

Digitized by Google

www.libtool.com.cn

individual property of Jacob D. Mathiot, was levied and sold. The distribution of the proceeds of the sale was referred to an auditor, before whom Mr. Cummings claimed that his judgment should be first paid, being the individual debt of Mathiot, and the property sold his individual property.

The auditor, however, distributed the proceeds to the other judgments, being the first liens, and the Court below confirmed this report, and decreed distribution accordingly; and this appeal was taken.

Patterson, for appellant.—Joint creditors have a right to priority of payment out of the joint property, and the separate creditors a like priority out of the separate estate, as settled by a long train of decisions, both in England and this country: 3 *Vesey* 238, 837; 6 *Id.* 813; 16 *Id.* 183; 9 *Id.* 35; 11 *Id.* 78; 1 *East* 369; 3 *Kent's Com.* 64–5; *Story on Part.* §§ 363, 365; 5 *Johns. Ch. Rep.* 74; 1 *Pa. Rep.* 147; 7 *Barr* 165; 2 *Jones* 222.

Ewing, for appellees.—The rule contended for holds in *bankruptcy* in England and in some of the states, but no authority can be adduced where it has been allowed to interfere with the priority of liens on real estate: 11 *Ves.* 85; 5 *Ser. & R.* 78; 3 *Kent's Com.* 65, note b; *Story on Part.* 530, 541; 2 *Yeates* 192–3; 1 *Pa. Rep.* 204; 1 *Harris* 475; 7 *Barr* 165; 13 *Ser. & R.* 330; 2 *R.* 188; 2 *Watts* 289; 5 *Watts* 229; 4 *Watts* 24; 3 *Pa. Rep.* 200.

The opinion of the Court was delivered by

KNOX, J.—The appellant claims priority for his judgment, not because it was first in order of time, but because it was for the separate debt of the owner of the real estate sold, and the prior judgments were against a firm, of which the owner of the estate was a member. To substantiate his claim the appellant invokes the aid of the principle, that joint creditors have a right to priority of payment out of the joint estate of several partners, and the separate creditors a like right to priority of payment out of the separate estate of the partners. It is unnecessary to point out how and when the principle stated applies, for it is clear that it has no application to the case in hand. A lien attached by law is never interfered with by introducing an equitable rule for marshalling assets. The reason why joint creditors are preferred in distributing the proceeds of partnership real estate is, that the estate is not subject to the liens of judgments for separate debts, as the individual members of the firm have nothing but a resulting interest in the proceeds after payment of the partnership debts: Kramer *v.* Arthur, 7 *Barr* 165. And this is so only as regards real estate held as partnership property, for if it is held by the partners simply as tenants in common, the estate of one of the

Digitized by Google

www.libtool.com.cn
partners may be encumbered by a mortgage given by him for his separate debt: McDermot *v.* Lawrence, 7 *Ser. & R.* 438. And it may be sold on an individual judgment, and the purchaser takes the title discharged from the partnership debts: Hale *v.* Henrie, 2 *Watts* 143.

It has never been questioned in Pennsylvania but that a judgment against two or more is a lien upon all the real estate owned by the defendants at the rendition of the judgment, whether held by a tenancy in common or in severalty; and when the lien has once attached it cannot be divested or postponed by a subsequent judgment.

Decree affirmed.

Weaver *versus* Wible.

When several persons have a joint or common interest in an estate, one cannot purchase an encumbrance or an outstanding title, and set it up against the rest for the purpose of depriving them of their interests.

Where a man was in possession of a lot under a parol contract, and built a house upon it, and died in possession, the law cast the inheritance upon his children; and the widow, who came into possession through him and under his title, could not repudiate the contract, and purchase the title for herself.

ERROR to the Common Pleas of *Westmoreland county.*

This was an ejectment to recover a lot of ground, in which the following facts appeared: Abraham Horbach was the owner in fee of the land in dispute, which he conveyed by deed to Susannah Weaver, on 11th December, 1848, for the consideration of $200. Abraham Weaver, the husband of Susannah, in his lifetime, from 1840 till the time it is alleged he bought from Horbach by parol, had possession of the land in dispute as the tenant of Horbach, and continued that possession till his death in 1846. About 1844 or 1845, he erected on the land a brick house, one story and basement, which was only partially finished. After his death, his administrator, in 1849, applied to the Orphans' Court for an order to sell it for the payment of debts. John Wible, the administrator, sold it to William Wible for the sum of $45, and made him a deed in 1850. Susannah Weaver being in possession, holding under her deed from Horbach, Wible, the purchaser, tendered her $200 and brought this ejectment, alleging that Abraham Weaver was the owner by parol contract with Horbach, made prior to his death in 1846. This was denied by the defendant, who alleged that there was no such contract. The Court below ruled that there was no valid and binding contract proved between Weaver and Horbach, but that the defendant, being the widow of Weaver, could not purchase from Horbach for herself, but must hold as a

Digitized by Google

www.libtool.com.cn

trustee for the creditors of her husband, and directed a verdict for the plaintiff.

The part of the opinion of the Court below, which was excepted to, is set forth in the assignment of errors:—

The Court erred in charging the jury, 1. The judge, after deciding distinctly that there was no contract between Horbach and Weaver proved, charges as follows: "Did not the position of her husband towards this property, and her own relation to it, enable her to buy it at this low sum, about one-fourth its value? If it did, then in equity and good conscience can she take advantage of the relation she held to the estate, and keep it from those entitled to it along with her, or those who claim it as her husband's estate by a superior right, and strip them of three-fourths the profit? We think she cannot, and so instruct the jury."

2. In charging the jury that Mrs. Weaver by her conveyance from Horbach could not hold the property from those entitled to share it with her, because of the relation she sustained towards them.

3. In charging the jury "that if they believed Mrs. Weaver obtained the deed from Horbach while sustaining and, by reason of her relation to the estate, while enjoying a possession she had acquired under her husband, we instruct you that the plaintiff is entitled to recover, notwithstanding the conveyance, which she can only use as a means of reimbursing herself."

Forster, for plaintiff in error.—It is admitted there was no evidence of a contract of sale from Horbach to Weaver. The Court properly ruled this, and yet decided that Mrs. Weaver, because she was the widow, could not purchase a title to which her husband had no claim. Weaver was merely in as tenant at will. Horbach could have entered and ousted her at his pleasure. Could she be a trustee where there was nothing to found a trust upon? She was not buying an outstanding title to her husband's land, but an independent one. If Weaver's estate had any claim, it was against Horbach for improvements. She did not purchase with the funds of the estate, but with her own. If this goes to the creditors they get more than Weaver had in it, for he had no estate in the land whatever. If Horbach gave her this as a charity, can the creditors or children appropriate it to themselves?

Cowan, for defendant in error.—Upon the death of Weaver, the law cast the possession upon his heirs, subject to the payment of his debts: Hull *v.* Mathias, 4 *W. & Ser.* 381. If the widow take the possession in such case, she is to be considered a trustee for those entitled: *Id.*; Cook *v.* Nicholas, 2 *W. & Ser.* 27. As

Digitized by Google

www.libtool.com.cn

such trustee she will not be allowed to raise an interest in herself, opposed to those for whom she acts: 1 *Ves.* 9; 2 *Atk.* 54; 3 *Ves.* 740; 2 *Ves. Jr.*, 317; 5 *Ves.* 679; 6 *Id.* 617, 625, 631. The purchase by Mrs. Weaver from Horbach enured to the benefit of the estate: Myers' Appeal, 2 *Barr* 467, *et supra.*

The defendant has no equity; and as her husband died largely indebted, it ill becomes her to say the sum for which the property sold was too low, as she was the occasion of it by setting up a title in herself. At any rate, however, it was $45 more than she would have had it for from Horbach, because the purchaser pays that sum in addition to the $200 tendered to her.

The opinion of the Court was delivered by

Lewis, C. J.—Community of interest produces community of duty. On this ground a release to one joint tenant shall enure to the benefit of both: *Littleton*, § 307. A conveyance to one of several tenants in common, or a deed to one of two devisees of the same land, shall enure to the benefit of all who came in under the same title, and are holding jointly or in common: Vanhorn *v.* Fonda, 5 *Johns. Ch. R.* 409; Legget *v.* Bechtel, cited in 1 *Pa. Rep.* 440; Smiley *v.* Dixon, 1 *Pa. Rep.* 439; 2 *Barr* 467; 2 *W. & Ser.* 27. Where several persons have a joint or common interest in an estate, it is not to be tolerated that one shall purchase an encumbrance or an outstanding title, and set it up against the rest, for the purpose of depriving them of their interests. Chancellor Kent, with great truth, remarked that such a proceeding would be "repugnant to a sense of refined and accurate justice, and would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties created." "It is the duty of all to deal candidly and benevolently with each other, and to cause no harm to their joint interests: 5 *Johns. Ch. Rep.* 407. All that can be demanded is contribution from each to the expense of any purchase which releases the common interest from embarrassment. There can be no doubt that a widow who comes into possession by and through her husband, who is entitled to dower out of the estate, and who, by reason of her right to administration, has opportunities to suppress or destroy the title papers, is bound by these rules of justice and morality. The law will not permit her to trample upon the rights of her helpless children. The creditors of her husband have an equal claim upon her in this respect. Indeed they stand upon higher ground than the heirs, because they have given value and the heirs have not. In this case, Abraham Weaver was in possession under a contract with Horbach for the lot. He built a brick house upon it, and died in possession. The law casts the inheritance upon the children at the death of their father, and the widow, who came into pos-

Digitized by Google

www.libtool.com.cn

session through him, and remained there under his title, had no right to repudiate the contract and purchase the property for herself. If she succeeds in her object in this case, she gets the improvements without paying for them. The charge of the Court was perfectly correct.

Judgment affirmed.

Hutchinson *versus* Campbell.

Where a defendant in an execution issued upon a judgment for a debt contracted prior to the 4th of July, 1849, consented to a levy on articles exempt by the Act of 1836, it was competent for him to withdraw such consent before the day of sale, and the officer selling such articles after notice of such withdrawal, is liable to an action for so doing.

This Court will not notice an assignment of error to the charge of the Court below, which does not conform to the rules of this Court, by setting out the exact language of the instruction complained of in the specification of error.

Error to the Common Pleas of *Fayette county*.

The facts of the case sufficiently appear in the charge of the Court.

Kaine, for plaintiff in error.

Fuller, contrà.

The opinion of the Court was delivered by

Knox, J.—As the debt for which the execution issued, was contracted prior to the 4th of July, 1849, the case comes under the exemption law of 1836. By the Act of 16th June, 1836, amongst the property exempt from levy and sale, was one cow. This action was brought against a constable, for levying upon and selling the only cow of the defendant in error. To avoid the exemption, the constable alleged that he had levied upon the cow, with the assent of the defendant in the execution, and evidence, from which this assent might have been inferred, was given to the jury. Upon the other hand, it was proved that after the levy, and before the day of sale, the defendant claimed the exemption law, and gave notice to the constable not to sell the cow.

The Court of Common Pleas instructed the jury that, even if the "plaintiff did consent when the constable asked him for a levy that his only cow should be taken, yet, before the day of sale, he gave notice that he claimed the cow under the exemption law, and the constable, notwithstanding the claim, went on and sold the cow, and she was taken away, this action would lie."

Three errors are assigned upon the record, viz.: 1st. The Court erred in charging the jury "that, although they might believe

Digitized by Google

www.libtool.com.cn
from the evidence that the plaintiff did consent to give up the cow, yet he had a right to reclaim her on the day of sale."

2d. The Court erred in charging the jury that, "under the evidence, the plaintiff was entitled to recover."

3d. The Court erred in this part of their charge, viz.: "Yet if before the day of sale he gave notice," &c., when the evidence was, that the notice was given on the day of sale.

In the case of Criswell *v.* Altemus, 8 *Harris* 124, it was said by LEWIS, J., that "a specification of error should state the language of the charge, so far as it is complained of as erroneous. When the plaintiff in error substitutes his own language, he does so at his peril. A substantial misstatement of the instruction is fatal, whether it be the result of accident or design."

Now, the Court below did not charge the jury that the defendant in the execution had the right to reclaim the cow on the day of sale, nor that, under the evidence, the plaintiff was entitled to recover; so that the first and second assignments of error go for nothing. It would be worse than useless to decide points which can have no practical bearing upon the case itself.

3d. It is alleged that the Court erred in saying to the jury that if the plaintiff below gave notice before the day of sale, he might recover, because "the evidence was that the notice was given on the day of sale." The correctness of the legal principle is not denied, but the complaint is that there was no evidence to sustain it. As the evidence is not before us on a bill of exceptions, we presume that no question was submitted to the jury by the Court, unless it was fairly raised by the evidence. Were it necessary, it could easily be shown from the plaintiff in error's own paper-book, that Campbell claimed the benefit of the exemption before the day of sale. As neither of the assignments raised the question whether there was error in the legal view taken by the learned judge upon the trial in the Common Pleas, it is unnecessary for us to say whether the charge was right or wrong. It is sufficient for us that it is free from error upon the points specified.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Walter *versus* Sample.

If a prosecutor has fairly submitted to his counsel all the facts that he knows are capable of proof, and has acted *bonâ fide* on the advice given, he negatives, if not the malice, the want of probable cause, and is not liable to an action for malicious prosecution, even though the facts did not clearly warrant the advice and prosecution.

The application to counsel, and their opinion, to be available in establishing probable cause, must not be resorted to as a mere cover for the prosecution, but must be the result of an honest and fair purpose: and the statement made at the time by the prosecutor to his counsel must be fair and full, and consistent with that purpose.

ERROR to the District Court of *Allegheny county.*

This was an action on the case for malicious prosecution. Upon the trial of the cause, defendant's counsel, called Jacob Whitesell, Esq., a member of the bar, who testified as follows:—

"Mr. Sample stated to me the facts of the case, and I advised him to go before the mayor and make information, and have the parties arrested and examined. He acted under my advice, so far as arresting the boys, and having an investigation of the matter, and the trial in Court."

The Court instructed the jury, *inter alia*, as follows:—

"The opinion of private counsel cannot amount to proof of probable cause, unless the facts clearly warrant it, and were correctly stated."

Assignment of error: The Court erred in instructing the jury that "the opinion of private counsel cannot amount to proof of probable cause, unless the facts clearly warrant it, and were correctly stated."

Marshall and *Brown*, for plaintiff in error.

J. T. Cochran, for defendant in error.

The opinion of the Court was delivered by

WOODWARD, J.—This was an action on the case for malicious prosecution, and the only question presented by the record is, whether the Court were right in instructing the jury that "the opinion of private counsel cannot amount to proof of probable cause, unless the facts clearly warrant it, and were correctly stated." Ever since the case of Farmer *v.* Darling, 4 *Burr.* 1971, it has been held that malice, either express or implied, and the want of probable cause, must both concur to support actions of this

Digitized by Google

www.libtool.com.cn

nature. The presumption of law is, that every public prosecution is founded in probable cause, and the burden is, therefore, in the first instance, on the plaintiff; but when he has submitted evidence of want of probable cause, or of circumstances from which a violent presumption would arise that it was wanting, the burden of proof is shifted on to the defendant, and then it is competent for him to show that he acted under professional advice. To make this defence available, he must show that he submitted all the facts which he knew were capable of proof fairly to his counsel, and that he acted *bona fide* on the advice given. This proved, he negatives, if not the malice, the want of probable cause. I accede to the proposition, said BAYLEY, J., in Ravenge *v.* McIntosh, 2 *B. & C.* 693, that if a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel (however erroneous that opinion may be), he is not liable to an action of this description. See the cases cited 2 *Saunders' Pleading & Evidence* 659–60 (marginal).

In Sumner *v.* Wilt, 4 *Ser. & R.* 24, Judge DUNCAN plainly intimated his opinion that such evidence would be a defence to the action, as negativing the imputation of malice; and in the case of Hall *v.* Smith, reported in 7 *Leg. Intelligencer* 7, the District Court of Philadelphia treated such evidence as an answer to the imputation both of malice and want of probable cause, between which, it was said, there is no difference in the consideration of a matter of this kind.

The opinion of Judge ROGERS at Nisi Prius, in the case of LeMaistre *v.* Hunter, *Brightly's Rep.* 498, which seems to have been the authority followed by the Court below, is not, when taken altogether, in conflict with the current of authorities. The facts are not given in reference to which he charged the jury in this language: "In conformity to a point put by counsel for the plaintiff, I instruct you that the opinion of private counsel of a prosecution cannot amount to proof of probable cause, nor prevent a recovery, unless the facts clearly warrant it, and are correctly stated. Even the application to counsel, and their opinion, in order to be available in the establishment of probable cause, must not be resorted to as a mere cover for the prosecution, but must be the result of an honest and fair purpose; and the statement made at the time, must be fair and full and consistent with that purpose."

This is no more than a statement of the general rule with its necessary qualifications. Nevertheless, the words, "*unless the facts clearly warrant it*," found both in Judge ROGERS'S opinion and that under review, are ill chosen, because liable to misapplication. "Unless the facts clearly warrant" what? the opinion of counsel, or the prosecution? Whichever be the antecedent

Digitized by Google

www.libtool.com.cn
intended, it is apparent that these words would make the defence depend for its value wholly on the soundness of the legal opinion. If the facts must clearly warrant the legal opinion, that, to be a defence, must be the very judgment of the law on the facts; if they must clearly warrant the prosecution, then the defence is complete without the professional opinion; and thus, either way, it goes for nothing. No matter how candidly and faithfully a prosecutor has submitted the facts to his legal adviser and followed his advice, if they turn out insufficient for the support of the prosecution, he is liable in an action for malicious prosecution. On this principle every acquittal of a defendant would be followed by such an action. A qualification of the rule in terms like these, destroys the rule itself.

The law is not so. Professors of the law are the proper advisers of men in doubtful circumstances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not the insurer of his lawyer. Whether the facts amount to probable cause, is the very question submitted to counsel in such cases; and when the client is instructed that they do, he has taken all the precaution demanded of a good citizen.

To manifest the good faith of the party, it is important that he should resort to a professional adviser of competency and integrity. He is not, in the language of Judge ROGERS, to make such a resort "a mere cover for the prosecution;" but when he has done his whole duty in the premises, he is not to be made liable, because the facts did not clearly warrant the advice and prosecution. The testimony here was, that Sample stated the facts of the case, and there is no suggestion on the record that they were not fairly stated. Suppression, evasion, or falsehood, would make him liable; but if fairly submitted, and if the advice obtained was followed in good faith, he had a defence to the action, and the Court should have given him the benefit of it.

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

Digitized by Google

www.libtool.com.cn

Church *versus* Church.

Where husband and wife convey the land of the wife, by a deed absolute on its face, but really in trust for the wife, and the trustee, by the connivance or participation of the husband, conveys the estate to a stranger, who has no notice of the trust, and the husband afterwards purchases the property thus conveyed, he will hold the same as a trustee, for his wife and her heirs.

In such case he cannot protect himself by the equity of his immediate vendor, who was a *bonâ fide* purchaser for value, without notice of the trust.

It is immaterial whether the consideration received by him for violating the trust was equal to that paid by him on the repurchase of the estate, or whether he purchased with the profits arising from the original wrong, or with other funds; in either case, the instant the estate came back into the hands of the wrongdoer, the original equity attached.

Where upon proof of loss of a deed, secondary evidence of its contents has been admitted, it is not error for the Court to instruct the jury that, if they believe the deed was within the power of the party, the presumption of law is, if the deed were produced it would make against him.

ERROR to the Common Pleas of *Greene county*.

This was ejectment for 190 acres of land, part of a tract which had been originally surveyed on a Virginia certificate, for 400 acres, to Robert McClelland, who, by his will proved on the 10th day of July, 1791, demised the same to his two granddaughters, Elizabeth and Jane Archer. Elizabeth was married to Timmans, and Jane, in 1796 or 1797, to Henry Church. Lazarus Timmans and wife sold their part of the land to a man by the name of James Morris, who died shortly after, and before any conveyance was made to him. Morris, and Church in right of his wife, made a partition of the land, by which the part in dispute was allotted to Jane Church in severalty. On the 16th February, 1799, Church and wife, and Timmans and wife, joined in a conveyance to Joseph Archer, who was the uncle of Elizabeth and Jane. This deed was absolute upon its face, but the plaintiffs alleged that it had been made for the more convenient patenting of the land, and that Archer held it but as a trustee. The deed was alleged to be lost, and secondary evidence of its contents was given. The plaintiffs also alleged that Jane Church was a minor at the time she executed the deed, which was a disputed fact in the cause. Joseph Archer, on the 25th of August, 1800, took out a patent for the land which contained the following recital: "The said Lazarus Timmans and Elizabeth his wife, and Henry Church and Jane his wife, by deed dated 16th February, 1799, conveyed the above described tract of land to the said Joseph Archer, to whom a warrant of the acceptance of the said survey issued 28th October, 1799." It was alleged that Joseph Archer had exchanged a tract of land lying below Waynesburg, with Henry Church for this land, which Church afterwards

Digitized by Google

[Church v. Church.]

sold to a man by the name of Porter, but his wife did not join in the conveyance. On the 4th April, 1813, Joseph Archer conveyed the land in dispute to James Hook, who, on the 10th April, 1815, conveyed the same to John Craig; and on the 2d of March, 1826, John Craig and wife conveyed it to Henry Church for the consideration of $1800. Recorded 10th October, 1836. Jane Church had several children, some of whom are the plaintiffs in this suit. She died in 1816. Henry Church was married a second time, and had children by his second wife, to whom he devised the land, and who are defendants in this action. He died in 1851.

The questions raised upon the record will sufficiently appear from the points submitted by the counsel of the parties, and the answers of the Court to the same.

Plaintiff's 1st and 2d points:—

"1. That as the deed alleged to be lost by defendants is shown to have been in their possession some ten years since, at a time when they so much doubted the title derived therefrom, as to have employed counsel to examine the same, and not having been recorded or produced on the trial, is strong evidence that the deed is not such an one as would vest any title in Joseph Archer or Henry Church.

"2. If the jury believe that the alleged lost deed has not been satisfactorily accounted for by defendants, and that the same is still within their power, the presumption of law is that if the deed was produced it would be evidence against them."

Defendants 3d, 5th, and 6th points:—

"3. That if a trust estate, which did not appear on the face of the title to be so, passes through several innocent purchasers, and again comes into possession of one of the *cestui que trusts* for a full consideration; upon such reacquisition of title the trust will not attach.

"5. That if Hook or Craig, or either of them, purchased or held the land in dispute freed from the alleged trust, that the sale by Craig to Church vested the title in said Church as free from the trust as either Hook or Craig held it.

"6. That if Hook, or Craig, or Church, or either of them, held the land in dispute freed from the alleged trust, the will of Henry Church vested a good title in the defendants, and plaintiffs cannot recover."

To these points the Court (GILMORE, P.) answered as follows:—

"The 3d, 5th, and 6th points of defendants will be answered together. We see no good reason why the principle recognised in answer to the previous points should not be extended to Henry Church, who, in case the deed was in trust, was a *co-cestui que trust* with his wife, Jane Church. But we charge you that if he purchased back the original trust property, by means which he

Digitized by Google

www.libtool.com.cn

had derived from a sale or exchange of the trust property, he can by no means be considered an innocent purchaser unaffected by the trust, and this will be the case whether these means were derived mediately or immediately from this source. We mean by this that if this deed was a trust deed, and Henry Church afterwards participated in violation of the trust by receiving in exchange the property east of town for the trust property, and afterwards sold this property, and realized the price of it to an amount sufficient, or nearly so, to pay for the land in dispute, he, Church, must then be considered as holding this property subject to the original trust; and this will be the case, although the jury should believe that money derived from other sources had been used in the repurchase of the land in dispute. It is sufficient if he had sold the exchange land and realized the price, and that to an amount sufficient, or nearly so, to pay for the repurchased property. There is no evidence here what the exchange property was sold to Porter for; but there is evidence that when the property was exchanged, the property in dispute was valued at £50 more than the property east of town.

"If the property was bought back for the purpose of fulfilling the original alleged trust, of which there is some evidence, it would obviate the necessity of giving any answer to these points.

"We answer defendant's 4th point in the affirmative.

"To the plaintiff's points we answer:—

"1 and 2. These are matters for your consideration. If you believe the deed is not destroyed or lost, and is still in the possession of the defendants, the presumption is, that, if produced, it would make against them."

The answers to these points were the errors assigned in this Court.

Downey, *Lindsay*, and *De Ford*, for plaintiff in error.—1st error: The Court erred in submitting to the jury whether the deed was lost, or whether in party's power to produce it. This was a *preliminary* question for the Court: 1 *Green. Ev.* § 558; 1 *Stark. Ev.* 154; 15 *Pick.* 368; 8 *Pick.* 389; 4 *Cowen* 483; 11 *Wend.* 600; 9 *W. & Ser.* 75. 2d error: The deed to Joseph Archer was absolute. Another tract was given in exchange, as the testimony shows. It is destroying written title by parol evidence. It is the lowest kind of evidence. See 1 *Green. Ev.* § 200; *Sug. on Vend.* 174. The proof to raise a trust should be clear and indisputable. If Archer held as trustee, the violation of the trust was by him, and not by Henry Church: 7 *Watts* 107; 10 *Ves.* 505; 7 *W. & Ser.* 288.

If none of the proceeds of Jane Church went into the repurchase of the land, her heirs would have no interest: *Story's Eq. Jur.* § 1259; 10 *Harris* 16. Hook took it discharged of the

Digitized by Google

www.libtool.com.cn

alleged secret trust, and Henry Church is protected by Hook's title: *Amb.* 313; 1 *Ser. & R.* 379; 1 *John. Ch. R.* 213; 4 *W. & Ser.* 102; *Id.* 251; 10 *Watts* 354.

Black, *Phelan*, and *Buchanan*, for defendant in error.—1st error: The sufficiency of the proof to let in secondary evidence of a lost deed was for the Court—the wilful suppression of that deed was quite another. Even if the Court was wrong, it did no injury, as the case turned on other matters.

2d error: The sufficiency of the evidence to raise a trust was for the jury. Church sold nothing more than his life estate to Archer, all he could convey. Equity will follow the money raised from a sale of land: 3 *W. & Ser.* 280; *Id.* 273; *Story's Eq. Jur.* § 1259; 10 *Harris* 16; 3 *W. & Ser.* 520. Henry Church was the trustee of his wife and children. In this case he would be a trustee *ex maleficio:* 3 *Barr* 319. He cannot shelter himself behind Hook or Craig, whose title intervened: 1 *Vern.* 60; 1 *Cruise*, *Title* 13, chap. 4, § 12; 1 *Hill on R. E.* 319; 12 *Vesey* 372; *Hill on Trustees* 159; 2 *Story's Eq.* § 1261.

The opinion of the Court was delivered by

Lewis, C. J.—At common law the husband represents the wife's estate as tenant by the curtesy initiate. He might do homage to the lord without joining his wife. He may appoint an attorney for both in actions brought against them in respect to the land of his wife: 7 *Harris* 410; 2 *Bl. Com.* 127. His interest in the estate, and his power over it, imposes upon him the duty of protecting and defending it. Like joint tenants, tenants in common, and tenants in dower, he is prohibited from doing anything to the injury of those who have a common interest with him in the title. Neither can purchase an outstanding title against the other. With equal, if not greater reason, each is prohibited from doing any act by which the estate of the other may be unjustly defeated. It follows from these principles that if the deed of 16th February, 1799, from Henry Church and Jane his wife to Joseph Archer, was merely a conveyance in trust, to enable Archer to take out a patent for the use of the grantors; and, if Henry Church afterwards, instead of enforcing the due execution of the trust, participated in the breach of it, by which the estate was conveyed to Hook without notice of the trust, for a consideration beneficial to Church himself, it was an act of bad faith which rendered him liable in equity to make restitution. It is true that the estate itself could not be taken from a *bona fide* purchaser without notice of the trust. Nor could it be defeated in the hands of a purchaser with notice from one who had bought without. But if the original violator of a trust repossesses himself of an estate thus conveyed, the original equity will reattach to it in his hands: 1 *Story's Eq.* § 410;

Digitized by Google

1 *Sch. & Lefroy* 379; Bovey *v.* Smith, 1 *Vernon* 60; s. c. *Id.* 84; 1 *Cruise Dig.* tit. 12, ch. 4, § 12. The husband who aids in the violation of a trust for his wife, upon a consideration of profit to himself, stands in the same predicament. Although Henry Church was a *cestui que trust* to the extent of his own interest, his power over his wife, and his interest and power over her estate, placed him in the relation of a trustee for her to the extent of her interest. In a case of this kind, it matters not whether the consideration received for violating the trust was equal to that paid on the repurchase of the estate, or whether the repurchase was made with the profits arising from the original wrong, or with other funds. In either case the moment the estate came back into the hands of the wrongdoer the original equity reattached. In this view of the case, it is plain that the instruction given on the question under consideration did the plaintiffs in error no injury. It was quite as favourable as they had a right to require.

The other assignment of error is neither specified according to the rules of Court, nor sustained by law.

Judgment affirmed.

Spragg *versus* Shriver.

A sheriff's sale of a defendant's real estate upon a judgment and execution against him, without a condemnation, or waiver of inquisition, in that particular case, and a deed acknowledged to the purchaser, without objection, and the proceeds of sale appropriated to the defendant's debts, will divest the title of the defendant to the premises, and a subsequent sheriff's sale of the premises as the property of the defendant will confer no title on the purchaser.

A defendant whose real estate is sold by the sheriff without a regular condemnation or waiver of inquisition, must object in a reasonable time, and such *reasonable time* is before the confirmation of the sale, and the acknowledgment of the sheriff's deed to the purchaser.

A defendant whose property is being sold at sheriff's sale, and who induces another person to purchase the same, cannot, after the payment of the money, the acknowledgment of the deed, and the appropriation of the proceeds to his debts, impeach the regularity of the proceedings under which it was sold, or the validity of the title of the purchaser. His subsequent release to the purchaser, and delivery of possession, would equally estop him, and all claiming under him by title subsequent to such sheriff's sale.

ERROR to the Common Pleas of *Greene county*.

Isaac Shriver, the plaintiff below, brought ejectment to recover from Otho Spragg, and others, 450 acres of land. The title to the premises in dispute, in 1842, was vested in John Shriver, against whom the plaintiff showed a judgment, entered in 1842—revived in 1844—and again in 1849; a levy and sale under that judgment to the plaintiff, and a sheriff's deed to him, acknowledged 18th December, 1851.

Digitized by Google

[Spragg *v.* Shriver.]

The defendant showed several judgments against John Shriver in 1841, 1842, and 1843—executions issued, inquisitions waived, but no sale made on any of those executions. He then further showed a judgment in favour of John Luce against John Shriver and Henry Shriver, entered to No. 40, June Term, 1842, for $1200 —a *fi. fa.* on the same to June Term, 1844, and a levy returned on the land in dispute. On the execution docket, after the entry of the levy, was an entry as follows:—"Inquisition waived. —See No. 26, Ex. Docket, September Term, 1843." The *fi. fa.*, No. 26, September Term, 1843, was levied on the same land, and attached to it was a formal and regular waiver of inquisition, dated 10th July, 1843. A *venditioni exponas*, No. 30, September Term, 1845, was issued upon the Luce judgment, upon which the sheriff sold the premises to R. W. Downey, Mark Gordon, and Godfrey Gordon, for $510.

The defendants then offered in evidence the deed from the sheriff to them, dated 15th, and acknowledged 17th September, 1845, to be followed with proof that John Shriver released all his title to Downey and Gordon, and ratified the sale so made to them by the sheriff; and that the proceeds of said sale were applied to the indebtedness of John Shriver, and that he surrendered the possession of the premises to said Downey and Gordon—to be followed with proof, that he told the person who became the purchaser from Gordon; that the title of Gordon was good, and that he had dispensed with the inquisition, and had waived the same in order to save costs, and that upon this representation the defendant purchased from Gordon.

The plaintiff objected that there was no inquisition or waiver before the sale, and that therefore the sheriff's sale was void and could not be ratified by John Shriver, so as to prejudice the existing judgments created at the time of the sheriff's sale.

"*Per Curiam.*—The Court sustain the objection and overrule the evidence.

"We are of opinion that there was no waiver of the inquisition in this case, but upon a different writ. The sale must therefore be taken as made without an inquisition or waiver of the same. This being the case, we are of opinion that the sheriff's sale, under which defendants hold, is void and incapable of ratification. Defendants except."

Errors assigned: The Court erred in ruling out the sheriff's deed, and the evidence offered in connexion with the same.

1. Because the several waivers of inquisition read in evidence by the defendants, though in other cases, justified the sale in this.

2. Because the facts alleged in the defendant's offer, if proved, would estop John Shriver, or the present plaintiff, who claims title under him, from recovering the land.

Digitized by Google

www.libtool.com.cn

Downey and *Lazear*, for plaintiff in error.—1. The 44th and 45th sections of the Act relating to executions are for the benefit of debtors. The 44th was but a re-enactment of the previous law, and the 45th but declaratory of the previous practice: 1 *Barr* 183. In 8 *Watts* 422, it was decided that a sale, without inquisition, is void; but it does not decide, if there had been an inquisition or waiver in another case, that it would have been so. It would be unjust and inequitable to permit the defendant to set it up. He had notice of the sale, and all the proceedings: 6 *Barr* 239; *Baldwin* 272.

2. Shriver, the defendant, would be estopped: may be estopped in *pais*, 17 *Ser. & R.* 364; 5 *W. & Ser.* 209; 10 *Barr* 527; 6 *Barr* 239. Wray *v.* Miller, 8 *Harris* 111, approaches nearest to this case. The want of inquisition could only be taken advantage of by the defendant, and by him only in a reasonable time: 2 *Harris* 380; 10 *Barr* 309.

The judgment upon which plaintiffs purchased was no lien upon the land.

Lindsay and *Buchanan*, for defendant in error.—The waiver of an inquisition upon one *fi. fa.* does not authorize a sale upon another judgment and *fi. fa.*, and the sale in such case is absolutely void. If other creditors could not claim the benefit of a waiver, when given with the judgment, how could they do so when given upon process? 1 *Barr* 186.

Some of the waivers invoked in this case were several years before the sale. The land had appreciated in value: 1 *Miles* 286.

In 8 *Watts* 422, held that a levy and sale without inquisition is "absolutely void;" affirmed 3 *Harris* 74. The case in 8 *Harris* 380, cited by plaintiff in error, was decided upon the peculiar facts in that case.

Even if the defendant in the execution would be estopped, the defendant in error would not. He was a creditor.

If the sale and deed to plaintiff were void, they were incapable of being ratified: 9 *Barr* 109.

The opinion of the Court was delivered by

Lewis, C. J.—It was held, in Crowell *v.* Meconkey, 5 *Barr* 174, that the want of an appraisement under the Act of 16th of June, 1842, can be taken advantage of by the defendant alone. In Crawford *v.* Boyer, 2 *Harris* 384, the same principle was applied to the want of a valid inquisition for the condemnation of real estate taken in execution; and it was declared, in the case last mentioned, that even the defendant himself must take the objection at the proper season. In conformity with this principle it was held that the consent of the defendant to a sale of fixtures without inquisition, precluded him from defeating the title of the purchaser:

Digitized by Google

www.libtool.com.cn

Mitchell *v.* Freedly, 10 *Barr* 208. And in Wray *v.* Miller, 8 *Harris* 115, where there was essentially a sale of real estate without condemnation or waiver of inquisition in writing, the title of the purchaser was held to be good by reason of the acquiescence of the defendant in the execution. It is true that there had been a condemnation on a different judgment from the one on which the sale took place, but that judgment had been satisfied two years before the sale. As the condemnation fell with the extinguishment of the judgment on which it was founded, the sale was, as already stated, essentially a sale without condemnation at all. It was there conceded that the sale ought to have been set aside, at the instance of the defendant, for want of inquisition and condemnation; yet, after such acts of acquiescence as the facts and circumstances in that case indicated, neither the defendant nor any other person standing in his shoes could make the objection: 8 *Harris* 116. The objection, it was repeated, must be made "in a reasonable time:" *Id.* 117. What is the reasonable time within which it must be made? This question is answered by the Court in Crowell *v.* Meconkey, 5 *Barr* 174. It was there said that the owner had a full opportunity to make the objection "before the deed was acknowledged, but sealed his lips, and permitted the purchaser to pay his money, and the deed to be acknowledged, without warning or notice, and thus waived all objections:" 5 *Barr* 176. Can anything be more reasonable than this? Where one of two persons must suffer a loss, it should fall on the one by whose fault the loss was occasioned. A defendant who has notice that his property is about to be sold by the officer of the law for the payment of debts, and who makes no objection until an innocent purchaser has paid the purchase-money, and received his deed duly acknowledged, is estopped from objecting afterwards. Even if the judgment on which it was sold had been previously paid, the payment cannot be set up against such a purchaser: Dean *v.* Connelly, 6 *Barr* 239. But in this case there were several judgments entered, with a written waiver of inquisition in each. Under the statement on the execution docket of the *fi. fa.* and levy in the suit on which the sale was made, there was an entry, "Inquisition waived, see No. 26, Ex. Docket, September Term, 1843." As the plaintiff and the defendant both treated this as a waiver of inquisition for the purposes of the sale, and as the Court sanctioned the proceedings by issuing a writ commanding the sale, and subsequently confirmed the sale by receiving the acknowledgment of the deed, the purchaser who paid his money in good faith ought not to suffer for treating the entry as the parties themselves, with the approbation of the Court, had treated it. It is true that it was held, in Baird *v.* Lent, that a sale on a *fi. fa.*, without inquisition, was void. But this was in favour of a purchaser from the defendant in the execution *before the sale*, whose rights could not be affected in equity by any acts or

Digitized by Google

www.libtool.com.cn

acquiescence of the defendant after he had parted with his interest: 8 *Watts* 422. The reason why the defendant in the execution is in general estopped from impeaching the title after the deed is acknowledged, is that the proceeding was for his benefit; it was the means of performing a duty which he had neglected. The officers of the law are thus in some sort his agents. The law provides that he shall have notice of the sale, and gives him the exclusive right to object to or waive irregularities. Under such circumstances, if he permits a purchaser to pay his money and receive the deed duly acknowledged, without objection, the money can never be recovered back by the purchaser. It must be appropriated to the benefit of the defendant in the execution. If the objection comes too late for the relief of the purchaser, it certainly is too late for the defendant in the execution. The first is free from fault of any kind. The last is guilty of gross negligence in permitting an innocent person to be injured by proceedings which he had the power to arrest or set aside. The law will not permit him thus to make profit out of his own wrong.

If these views be correct, the case is stronger against the defendant in the execution after he has actually secured the payment of his debts out of the proceeds of sale. It is true that the Court thought otherwise in Menges *v.* Oyster, 4 *W. & Ser.* 20. But that decision was so contrary to equity that the legislature passed an Act expressly confirming the sale: *P. L.* 1843. And the Court, on reconsideration, overruled the former decision: Menges *v.* Wertman, 1 *Barr* 218. The Act was clearly unconstitutional. The legislature possess no judicial power, and it was a most mischievous error to concede to that body the authority to confirm a title on the ground of a moral right to it, arising from the payment of the purchase-money to the benefit of the former owner, with his acquiescence. This error was acknowledged in a subsequent case by the judge, whose casting vote made up a majority in favour of the first decision: Dale *v.* Medcalf, 9 *Barr* 108. The equitable ground for confirming the title of the sheriff's vendee fully justified the Court in sustaining it, independent of legislative interference, on the principles always applied by the Courts, that whatever in equity and good conscience ought to be done by a vendor, shall be considered as done. The last decision was correct in its result, but the reasons assigned for it have not been adhered to by the judges who adopted them. The first is contrary to principle. Neither can be relied on as authority for anything.

In McPherson *v.* Cunliff, 11 *Ser. & R.* 422, it was held that the application of the proceeds of an Orphans' Court sale to the benefit of a minor child estopped him from impeaching the title of the purchaser. In Wilson *v.* Bigger, 7 *W. & Ser.* 111, it was said that this position, taken by Judge DUNCAN, in McPherson *v.* Cunliff, "has never been disputed, and has controlled the cause in

Digitized by Google

www.libtool.com.cn

some pretty strong cases;" and it was held, in conformity with this doctrine, that, where a guardian united with the other heirs in asking a sale by the Orphans' Court, and the ward, after he came of age, received a portion of the proceeds, the latter was thereby estopped from impeaching the title of the purchaser: 7 *W. & Ser.* 111. In Stroble *v.* Smith, 8 *Watts* 280, it was decided that a judgment-creditor, who accepts his share of the purchase-money arising from a sheriff's sale, is estopped from denying the validity of the sale. In Crowell *v.* Meconkey, 5 *Barr* 176, which was the case of a sheriff's sale, and the application of the proceeds to the judgment-creditors, the Court distinctly declare that, "if the sale had been void, the reception of the purchase-money would have made it valid." It was there held that "the receipt of the money by the judgment-creditors has the same effect as if the debtor's trustee received it himself:" *Id.* 171. In Mitchell *v.* Freedly, 10 *Barr* 208, it was held that, where a sheriff's sale was confirmed without objection, the application of the proceeds to the debts of the defendant in the execution "is the same thing as if paid to himself." It is fully settled upon principle and authority that, where a sale is made for the benefit of any one, the receipt of the proceeds by such person validates it. In such a case, the supposed distinction between a void and voidable sale is immaterial: 7 *W. & Ser.* 111; 10 *Barr* 208; 5 *Barr* 176; 8 *Watts* 280; Commonwealth *v.* Shuman's Executors, 6 *Harris* 346; Adlum *v.* Yard, 1 *Rawle* 171; Furness *v.* Ewing, 2 *Barr* 479; Smith and Wife *v.* Warden *et al.*, 7 *Harris* 424.

If the defendant in the execution may estop himself from impeaching a sheriff's sale by previous consent to dispense with an inquisition, or by a subsequent neglect to make objections to the proceedings, he may certainly confirm the sale by surrendering the possession and executing a release. He may also preclude himself from making objections by representations that he had consented to dispense with an inquisition, and that the title was good, if by those representations the person to whom they were made was induced to purchase the property from the sheriff's vendee.

As the dates of the surrender of possession and release are not stated, no question is raised in regard to the regularity of the revival of the judgment under which the plaintiff below derived title.

We are of opinion that the evidence offered, as stated in the bill of exception, ought to have been received.

Judgment reversed and *venire facias de novo* awarded.

Digitized by Google

www.libtool.com.cn

Meighen *versus* The Bank.

The rule in Post *v.* Avery and kindred cases, does not prevent a stockholder from assigning his stock after suit brought, and testifying in favour of the corporation.

The contingent liability of a stockholder to the noteholders of a bank, in case of its insolvency, is too remote an interest to disqualify him from testifying in favour of the bank, unless there is some evidence of the insolvency of the corporation.

Evidence of the customs and usages of a bank are not competent of themselves to establish a fact in favour of the corporation; but as corroborative or explanatory of facts already proved, may be received and submitted to the jury.

Entries in the books of a bank, supported by the oath of the party who made them, are competent evidence for the bank.

ERROR to the Common Pleas of *Greene county*.

The plaintiff brought an action of *assumpsit* against the bank, upon a certificate of deposit for $500, dated 19th March, 1853, signed by Jesse Lazear, cashier. The bank defended the action on the ground that no such deposit had been made by the plaintiff on the 19th March, 1853, but that such a deposit had been made by him on the 19th March, 1852, which had been subsequently paid by the bank upon the plaintiff's checks. To sustain this defence, Jesse Lazear, the cashier, was offered as a witness. He had been a large stockholder in the bank, but had assigned his stock on the day before the trial to his son, and was released by the board of directors from liability to the bank, for any matter growing out of this transaction. He was objected to by the plaintiff on the ground of interest, but admitted by the Court. The witness stated under objection what was the custom of the bank in making up the accounts, and endorsing drafts and papers before they leave the bank—which is sufficiently set forth in the opinion of this Court. The deposition of Henry L. Pennock, in connexion with the books of the bank, was offered and received under objection.

The errors assigned were to the admission of Mr. Lazear as a witness, and to the subject-matter of the testimony.

Lindsay, *Sayers*, and *Wylie*, for plaintiff in error.—The plaintiff produced the certificate. The only possible way the bank could avoid payment was by calling their own officer to negative his own act at a time when he was a party in interest. Was he competent to do this? Did the assignment to his son remove the difficulty? A stockholder on the very eve of the trial assigns to his son $45,000 worth of stock, knowing it would be reassigned the next hour if he desired it, and then appears upon the stand as a witness.

Digitized by Google

[Meighen v. The Bank.]

www.libtool.com.cn

This is a mockery of the rule which excludes persons interested from testifying. He had substantially as much interest after as before the assignment. This is one of those flagrant cases that provoked the rule in Post *v.* Avery, 5 *W. & Ser.* 509; and if that rule does not exclude the witness it can be of little value.

The witness had a direct interest growing out of the individual liability as a stockholder: see 16th sec. Act 4th April, 1849. He would also be liable over to the stockholders, and the directors could not release him: 2 *P. R.* 27.

2d. Was it competent for the bank to give evidence of its own usage to defeat a recovery by a stranger? It was insisted that the deposit could not have been made on the 19th March, 1853, because there would have been a discrepancy in the accounts for that day in making up and balancing the accounts in the evening. The jury were left to infer that the accounts of that day were so balanced in the evening, and no discrepancy appearing, therefore no deposit was made. It was the parties' own acts, and should have been excluded on that ground. Facts cannot be proved by general usage: 2 *Harris* 376.

3d. The reasons on which his belief is founded were not evidence, as that he would have entered it in the receipts, &c., he calls it "his belief." In Carmalt *v.* Post, it is decided that in questions of credibility and personal skill, a witness may testify to belief, but the rule is different as to facts lying in the compass of memory.

4th. Again, when the witness speaks from the books, he says there is no discrepancy in them on the 19th March, 1853. These books themselves are only evidence between members of the corporation, but not as to strangers: *Phil. Ev.* 319; 3 *Ser. & R.* 29. But many of these entries were made by the witness while a large stockholder and interested. Such entry could not be evidence for the bank against a stranger: 2 *Watts* 141 is full to the point.

5th. This relates to the deposition of Mr. Pennock. He has no personal recollection, the question therefore arises whether the books themselves are evidence. The authorities above cited are sufficient. The case in 1 *Rawle* 152, upon which the evidence was admitted, is not in point. That was merely to explain one entry by another. The inference sought to be drawn is, that no deposit was made, because no entry of it appears upon the books, and this omission by a party whose interests accorded with such an omission. It is submitted that this was incompetent.

Watson and *Purman* (with whom were *Black* and *Phelan*), contrà.—That this evidence was admitted on well-established principles we think we can show. What the law allows and justifies can never be flagrant. The abuse corrected by Post *v.* Avery was of a very different character; and permitting a stockholder to assign

Digitized by Google

www.libtool.com.cn

and testify after release, will not lead to the evils complained of in that case.

The interest under the Act of 1849 is too *uncertain*, *remote*, and *contingent*, to exclude. If doubtful, it goes merely to his credit. The incompetency is to be established by him who objects: 1 *Greenleaf's Ev.* § 390; 2 *W. & Ser.* 190.

But the very point is settled in Curcier *v.* Pennock, 14 *Ser. & R.* 50. So in 1 *Greenleaf's Ev.* § 430, a stockholder may be a witness, although he has assigned for the purpose of becoming a witness: 11 *Wend.* 627; 8 *Wend.* 296; 18 *Wend.* 466; 2 *Cowen* 770; 5 *Ser. & R.* 318.

2. The position assumed would exclude the proof of custom or usage, for that is always made up of the acts of parties. In Metz *v.* Detwiler it was allowed to ask, "as to the practice at medical consultations." The answer must necessarily be as to the acts of parties. The usage must be proved from facts: 2 *Greenleaf's Ev.* §§ 5, 252. Thus a printer may prove the custom of the trade to send a paper till express orders to discontinue it: 1 *S. C.* 308; 8 *Wend.* 266; 5 *Barr* 43. This case differs from Schoneman *v.* Fegley, because there the witness only spoke of a general practice without reference to the case trying. Although, perhaps, not evidence of itself, it was corroborative of facts proved in the cause: 2 *Harris* 469.

The competency of the entries made in the books of the bank, supported by the oaths of those who made them. The testimony must be taken together, and then it will be congruous and consistent with the rules of evidence. In 1 *Rawle* 152 the point is ruled in favour of the admission of the evidence.

(This case was reviewed and cited at length.)

This case appears to us decisive of the question. Without its admission there must be a failure of justice. Mr. Lazear does not only swear from the silence of the books, but from his own recollection: See 1 *Greenleaf's Ev.* § 437; 3 *Pick. R.* 96; 3 *Am. Com. Law Cases* 152; 5 *Rand.* 666.

The opinion of the Court was delivered by

KNOX, J.—That the rule in Post *v.* Avery, and kindred cases, does not apply so as to prevent a stockholder from assigning his stock after suit brought, and testifying in behalf of a corporation, was clearly shown by Chief Justice BLACK in Hartman *v.* Keystone Insurance Company, 9 *Harris* 466. The contingent liability of one who has been a stockholder to the noteholders of a bank, in case of its insolvency, is too remote an interest to disqualify him from testifying in favour of the bank, unless there is some evidence of the inability of the institution to meet its engagements: Willing *v.* Consequa, 1 *Peters* 301. Curcier and others *v.* Pennock, 14 *Ser. & R.* 51; Irwin *v.* Lumberman's Bank, 2 *W. & Ser.* 190.

Digitized by Google

[Meighen v. The Bank.]

www.libtool.com.cn

As the directors had relieved the cashier from any liability to the bank, connected with the transaction in suit, he was competent, and there was no error in his admission as a witness.

The action was against the bank, upon a certificate of deposit, purporting to have been given by the cashier to the plaintiff on the 19th of March, 1853; and the defence was that no deposit had been made on that day, but that it was really made on the 19th of March, 1852, and had been paid out on the plaintiff's check, and that the date of the year was a mistake.

After the cashier had sworn positively that the plaintiff had made no deposit in the bank on the 19th of March, 1853; and that he had no doubt the certificate, upon which the suit was brought, was the one he gave to the plaintiff on the 19th of March, 1852, and had given, as a reason, that he stated so from the books; and, from his recollection, he was permitted, under objection, to add as follows, viz., "it is the invariable custom of the bank to balance and settle the books every evening. There was no transaction of the kind in March, 1853. If he (Meighen) had made a deposit on that day, I would have entered the deposit in the daily receipts; and this is one reason for my belief that he made no such deposit. If he had made such a deposit, it would have been such a coincidence as would not have escaped my mind; besides, he owed no note of this kind at the time, and that, if there had been any discrepancy in the books, I would have heard of it. It is our custom to endorse such drafts before sending them away." Upon the reception of his evidence, the 2d, 3d, 4th, and 5th errors are assigned. It is unnecessary to notice the assignments separately and in detail, as they are all involved in the question whether the above stated evidence was properly received or not. The allegation of the plaintiff in error is, that the witness was illegally permitted to prove the custom of the bank in settling its books, and endorsing drafts, and to speak of the contents of the book, and to express his belief with his reasons for it, that no deposit had been made on the 19th March, 1853. It is important to remember that the witness had already stated, without objection, that no deposit was made by Meighen on the 19th of March, 1853, and that the evidence which is alleged to have been improperly received, was given merely as corroborative, or, rather, as explanatory of his previous assertion. Where a witness has stated a fact, or given an opinion, he may be asked, either in chief or on cross-examination, how he knows the fact, or upon what grounds his opinion is founded; and there is no error in permitting him to answer as to his knowledge of facts, or to give his reasons for opinions expressed. If it should appear that either the one or the other were based upon grounds which were legally inadmissible, it would clearly be the duty of the Court to instruct the jury to disregard the testimony. But surely

Digitized by Google

www.libtool.com.cn
there was no error in permitting the witness to give "the reason for the faith that was in him;" and it seems to us that the reasons which he gave entirely justified his statement, that no deposit had been made in March, 1853, but that the certificate was really given in March, 1852.

Had the evidence of the usage and custom of the bank, in settling books and endorsing drafts, been offered of itself to disprove the liability of the corporation, upon the certificate in question, it might have been liable to the objection that it was the act of the party in whose behalf it was offered, and therefore not competent; but, as we have already observed, it was given merely as one of the reasons which induced the conclusion of the cashier that the certificate of deposit was erroneously dated, and for this purpose it was plainly admissible. In Schoneman *v.* Fegley, 2 *Harris* 376, the witness said, "he did not know whether he gave a receipt for a note or not;" and it was held that the question, whether he usually gave receipts for notes, was properly ruled out. This is by no means an authority against the decision of the Court in the case now in hand. If the witness in Schoneman *v.* Fegley had stated that he did give a receipt for the note in question, and had been refused permission to give, as one of the reasons for believing that he had given a receipt, his invariable practice to give such receipts, the case would have been in point here; but it is not now.

We see no objection to the reception of the deposition of Mr. Pennock, the teller, as to the entries in the books of the bank made in his handwriting. The books would not have been evidence, unsupported by the oath of the party making the entries; but, in connexion with the oath of the teller, they were evidence in accordance with the decision of this Court, in the case of The Bank *v.* Boraef, 1 *Rawle* 152.

Judgment affirmed.

Rowan's Appeal.

Where a father made his will, in which he devised certain lands to his son, in fee simple, charged with the payment of a certain sum of money, and the maintenance of testator and his wife during life, and had the land surveyed, put the son in possession, and received, in his lifetime, a portion of the sum charged upon the land: it was *held* to constitute a testamentary provision for the son, and not a contract to devise the land to him in fee simple.

In such case, the father having revoked the first will, and devised the land to the son for life, subject to the same charge, it furnished no ground to entertain a bill against the executors of the father to compel a conveyance in fee simple.

APPEAL from the Common Pleas of *Westmoreland county*.

Digitized by Google

[Rowan's Appeal.]

www.libtool.com.cn

This was a bill in equity to compel a conveyance of land, which the Court below dismissed before answer, and the complainant appealed. The facts of the case sufficiently appear in the opinion of his Honour WOODWARD, J.

Foster and *Marchand*, for appellant.—That the making of the will, the survey of the land, designation of boundaries, putting appellant in possession, and receipt of money on account of the sum charged upon it, constituted such an agreement or contract in writing to devise the land to him in fee simple, as will enable him to demand specific performance. The will exhibits this on its face. The surrender of the possession, the provision for maintenance of testator and his wife, the provision for payment of the money in his lifetime. The principles of the law as to specific performance apply equally to contracts to devise, as to convey: 7 *Barr* 55. An agreement in writing for the sale of land signed by vendor alone is sufficient: 10 *Watts* 387; 1 *Jones* 503; 12 *Vesey* 471; 9 *Vesey* 234; *Ib.* 253.

Armstrong and *Cowan*, for appellees.—The alleged will and receipts taken together do not constitute such a contract as will entitle the appellant to the relief prayed for. That the father indicated his intention by a will, is proof that he was unwilling to be bound. He would not relinquish his control. A promise to devise, being inherently revocable, instead of being evidence of an absolute contract, is the reverse; and any devise in pursuance of it, which compensated the expectant, would discharge it both legally and morally. In such case, it could never be held to extend beyond the actual consideration. The case is not put by appellant on the ground of a parol contract and part performance, but on the will of 1847, and the receipts. The receipts contain no engagement that the land shall be devised to him. In the case in 7 *Barr* 55, it was alleged and proved that the testator actually devised the land in pursuance of a contract, and the will was destroyed by one of the heirs. And that constitutes a distinct difference in the cases.

The opinion of the Court was delivered by

WOODWARD, J.—The Court dismissed the plaintiff's bill without waiting for the answer to come in; and the question is, therefore, whether upon his own showing he is entitled to the relief sought.

The substance of the complaint is, that the complainant's father made a will devising to him in fee simple a tract of land, and charging it with the payment of $1500—any payments made in the lifetime of the father to go on account of said charge; that the complainant agreed to accept the land on the terms contained in the

Digitized by Google

www.libtool.com.cn

will, went into possession, and paid his father $400; but before his death, his father cancelled and destroyed that will and made another, in which he devised to him but a life estate in the land, subject to the same charge. The bill concludes with a prayer for general relief, and for a decree that a conveyance be made to him for the land. A conveyance of a fee simple estate is not asked for in terms, but this is the necessary import of the prayer for relief, for the second will itself is a sufficient conveyance of the life estate. The bill does not allege, and the accompanying depositions do not prove, that the father made any agreement or contract with his son, and herein the case is distinguishable from Brinker *v.* Brinker, 7 *Barr* 53, in which the contract of the father was both alleged and proved. But it is argued by the appellant's counsel that the will of 1847, in connexion with the receipts, makes out such an agreement or contract in writing to devise the land in fee simple, as entitles the appellant to demand a specific execution by a conveyance from the executors. We have not that will before us, but there is no reason suggested for our considering it anything more than a testamentary writing. The bill so treats it, and the witnesses speak of it as such and no more. The receipts too given to Matthew for the moneys paid, speak of "lands devised to him in my *last will and testament.*" It was a will, then, and not a contract which the elder Matthew Rowan executed in 1847. Nor are the receipts in form or substance contracts for the sale of lands. They are acknowledgments of so much money paid by Matthew Rowan, Jr., "which is to be allowed him by my executors by deducting it from the amount with which he stands charged for lands devised to him in my last will and testament." Lands *devised* and *charged* by will are not lands contracted to be sold and conveyed by deed. No diligence in misnaming, and no skill in torturing these papers can convert them into contracts. Doubtless the son expected, and with reason, a full estate in the land devised; but this expectation was based on testamentary provisions which he knew were in their nature revocable at the pleasure of the testator. He paid his money and supported his parents on the faith of such provisions, and if he deemed them insufficient for his security, he should have demanded something more obligatory. But if these writings do not amount to an express contract, do they, in connexion with the circumstances alleged, afford ground for an implied contract? What if they do? Equity does not enforce implied contracts for the conveyance of lands. The man who claims land from another by virtue of a contract of purchase, must show one that was expressed and defined. The statute of frauds and perjuries would very soon be repealed if courts and juries undertook to adjust equities upon implications and presumptions instead of written evidence. The case alleged, however, is not one of implied contract, for it is specifically a testa-

Digitized by Google

mentary arrangement, such as is common in families, and over which it is well for the parent to retain control as long as he remains responsible for the peace and prosperity of the family. He altered his will. He had a right to do so. By no contract, express or implied, had he tied his hands or placed his property beyond his control. His object was to secure a support for himself and wife. The money paid him was intended for the other children, and not for his present wants. It was the same as a payment to the executors. His reliance for life was on the land, and he was careful to keep the staff in his own hands. He considered that when he died would be soon enough to divide his substance among his children, and therefore he made a will in favour of Matthew instead of a contract. And Matthew was content to rely on a will, though he knew it to be a changeable instrument, and without effect till the death of the testator. And in looking through the new will, it seems to me he has small reason to complain of his father. Twelve acres and a half were added to his portion after the date of the first will, making it one hundred and thirty-four acres and a half; and though it is limited to him for life, there is a remainder over to Irwin and Armstrong, in trust for such of the children and grandchildren (*per stirpes*) of the said Matthew as may survive him. Very many reasons might occur to a father why such a qualified interest would be better for the object of his bounty and those most near to him, than an absolute fee simple; and the law has provided no tribunal to rejudge his discretion. Free to alter his will as he was to make it, we are not to destroy that which was the fruit of his observation, experience, and reflection, and to restore that which he destroyed. We are of opinion that the appellant presented no case for equitable relief, and that the decree of the Court was right in dismissing his bill.

The decree is affirmed.

LEWIS, C. J., dissented.

Digitized by Google

www.libtool.com.cn

Chambers *versus* Marks.

Where there have been mutual accounts between the parties within six years, the statute of limitations does not apply to any part of either account. In such case it makes no difference that both accounts were kept by one of the parties; but the credits, to prevent the operation of the statute, must be authenticated and proved to have been intended as a payment on the account.

ERROR to the Common Pleas of *Westmoreland county*.

The plaintiff was a tanner, and furnished leather to the defendant from time to time, from the year 1828 till 1850, amounting to $344.72.

The defendant was a farmer and shoemaker, and furnished the plaintiff with hides, bark, grain, &c., amounting to $260.34½. Chambers kept the account of both parties, and his account, which was given in evidence, showed that there were debits and credits in each year from 1828 to 1850, both inclusive. It was proved on the trial, that some of the credits in 1847, 1848, and 1849, for bark, &c., had been directed by defendant to be credited on his account. This suit was brought in 1852, to recover the balance due plaintiff.

The defendant interposed the plea of the statute of limitations.

His Honour, BURRELL, P. J., charged the jury as follows:—

"The plaintiff has given in evidence a book account, the first item of which is dated 25th February, 1828, and the last the 22d day of April, 1850. His book shows the entry of various credits, the earliest of the 2d August, 1828, and the last of the 20th February, 1850. This suit was brought 26th June, 1852. The defendant pleads, in addition to the ordinary pleas, the statute of limitations. The defendant had no book of accounts, but gave evidence of sundry articles sold and delivered to plaintiff in 1847, 1848, and 1849. Plaintiff contends that the statute does not bar that portion of his accounts older than six years at the institution of this suit, on the ground that it was an open and running account. We are of a different opinion. It is evidently not a mutual account, it is kept on one side only. We think all the plaintiff's items older than six years are barred by the statute, and the jury will, therefore, take into consideration only that portion of the account since 26th June, 1846."

Errors assigned: 1. The Court erred in charging the jury that the accounts were not mutual—that they were not open running accounts.

2. Error, that the statute barred all items of the account that were dated more than six years before suit brought.

3. The Court should have charged the jury, That every payment made by Marks on account, took the case out of the statute of limitations.

Digitized by Google

www.libtool.com.cn

Todd, for plaintiff in error.

Foster, contrà.

The opinion of the Court was delivered by

BLACK, J.—Where there have been mutual accounts between two persons within six years, the statute of limitations does not apply to any part of either account.

It makes no difference that both accounts were kept by one of the parties. It is, perhaps, doubtful whether it is necessary that the accounts should be kept in writing at all.

When one has an account against another, the whole or a part of which is older than six years, he cannot take it all out of the statute by merely entering a credit. The credit, to have that effect, must be authenticated and proved to have been intended as a payment on the account.

This was a suit for a balance on book account. The plaintiff's book showed several credits within six years, and it was proved, moreover, that the items of credit were delivered on account, and credited agreeably to the defendant's request. The parties must settle as if the statute of limitations had never been passed.

Judgment reversed and *venire facias de novo* awarded.

Ihmsen *versus* Negley, Mohan & Co.

Where an individual is a member of two firms, and draws a promissory note to himself, signed with the name of one firm, and endorses it with the name of the other firm, it would not present such a case as would compel the plaintiff, a holder for value before maturity, to prove the assent of the partners to such endorsement, or that the proceeds were applied to the benefit of the firm.

Any suspicious circumstances in the form of drawing and endorsing such note, could only be used to introduce an unusual defence, and would leave the burden of proving such facts as would relieve the defendants upon themselves

ERROR to the District Court of *Allegheny county*.

The action was *assumpsit*, in which a verdict was found for the plaintiff for $694.30, subject to the opinion of the Court upon a reserved point, which, together with the facts upon which it arose, are stated as follows by his Honour Judge HAMPTON:—

"The point reserved by the Court in this case is, whether the plaintiff is entitled to recover under the evidence given by him; the defendants having withdrawn their evidence by leave of the Court.

"The action is *assumpsit* against the defendants as endorsers of a note bearing date the 16th day of November, 1853, made by Negley and Mohan, payable to the order of James S. Negley at

Digitized by Google

www.libtool.com.cn

four months for $665—and endorsed by James S. Negley, and also by Negley, Mohan & Co. The body of the note, the signature, and the endorsement, were all proved to be in the handwriting of James S. Negley. It was also proved that James S. Negley and Patrick Mohan had, sometime previously to the date of the note, been doing business under the name of Negley & Mohan; and that a firm had existed under the name of Negley, Mohan & Co.: consisting of James S. Negley, Patrick Mohan, and William Dawson; it does not appear from the plaintiff's evidence, whether the former firm of Negley and Mohan had been dissolved before the formation of the new firm of Negley, Mohan & Co. or not, nor is it material to the question.

"James S. Negley was a member of both firms while they existed. It was further proved that O'Conner & Co., exchange and bill brokers of this city, became the owners of the note in suit, and sold it to C. Ihmsen, the present plaintiff, before its maturity, for full value, and that the note was duly protested for non-payment at maturity.

"The question now is, whether, on these facts, the plaintiff is entitled to recover."

Judgment was entered for the defendants *non obstante veredicto*, which was assigned for error.

J. T. Cochran, for plaintiff in error.

The opinion of the Court was delivered by

Lowrie, J.—The bill of exchange in Cooper *v.* McClurkan, 22 *State Rep.* 80, was drawn and endorsed with the name of McClurkan & Co. by Fleming; and it appeared to be for his private use, because it was written and endorsed by him in Philadelphia, and he accepted and sold the bill there, where he was himself living and doing business on his own account, while the place of business of McClurkan & Co. was in Pittsburgh. Some of these matters were perhaps improvidently left out of that part of the opinion in which the question is stated.

The note in Tanner *v.* Hall, 1 *State Rep.* 417, was made by Hall, endorsed by Cochran & Co., and then by Hall, with the name of Hall & Eaton, and discounted for Hall. This last element having been treated as immaterial, we do not see how it can be said that the note was ostensibly made and endorsed for the private accommodation of Hall, except from the fact that he alone was the maker.

If this was the ground of the inference, we think it was a mistake. That fact does not show that it was accommodation paper at all. And if it was, it does not show who was the accommodating party. Suppose it accommodation: how can it be said that it was for the accommodation of Hall, rather than of Hall &

Digitized by Google

[Ihmsen v. Negley, Mohan & Co.]

www.libtool.com.cn

Eaton, who were the last endorsers, and for whose use, therefore, it would seem to have been discounted? Indeed it might represent a regular business transaction between Hall and Cochran & Co., and another between Cochran & Co. and Hall & Eaton. The law does not require us to suspect that such paper is got up by one partner in order to defraud his copartners; much less does it infer that such was the fact.

In the present case, that inference was drawn from the fact that Negley drew the note of Negley & Mohan to himself, and then endorsed it with his own name and with that of Negley, Mohan & Co. The decision is, that the very form and handwriting of the note are *primâ facie* evidence that the name of Negley, Mohan & Co. was fraudulently used for the benefit of Negley, or of Negley & Mohan: in other words, that the endorsement by Negley of the partnership name, is void, unless aided by proof of his copartners' assent, or of its being used for their benefit.

A suspicious appearance sometimes opens the way for an unusual defence; but here it decides the cause. But it is difficult to regard this note as suspicious at all, when we consider that Negley had full authority to bind his copartners, in any form of bill or note he should choose, for partnership purposes. The substantial thing was his authority, and if he used a suspicious form in exercising it, then its intention would seem rather to have been to defraud *bona fide* holders than his copartners. Any one discounting this note, with no warning but what itself conveys, would consider himself as discounting it for Negley, Mohan & Co., and on the faith of, at least, their endorsement. Then it would be for them to account for how the prior names came on it.

Judgment reversed, and judgment is now here entered in favour of the plaintiff on the verdict, with interest from the date thereof and costs, and record remitted.

Brownfield *versus* Canon.

Where, in a suit to recover money, the sum was claimed by a third party, and he voluntarily appeared and interpleaded, and the amount was paid to him by the stakeholder, there was no error in directing the jury to be sworn between the plaintiff and the claimant, omitting the original defendant.

A verdict having been rendered for the plaintiff, the judgment was properly entered against such claimant alone.

ERROR to the Common Pleas of *Fayette county*.

The action was *assumpsit* by Daniel Canon, for the use of Boyle & Rankin, against William Searight, commissioner of the Cumberland Road, who succeeded William Hopkins in that office. Canon had been a contractor on the road, and the plaintiffs claimed

Digitized by Google

www.libtool.com.cn

to recover the amount of an order drawn by Canon in their favour on the 7th April, 1848, for $161.90, and notice of it given to the commissioner. Ewing Brownfield claimed the amount due from the commissioner to Canon, under an arrangement alleged to have been made with Canon and the commissioner of the road prior to the order to Rankin and Boyle; and voluntarily appeared and interpleaded in the cause, and the commissioner paid to him the money in dispute. On the trial of the cause, at the suggestion of plaintiff's counsel, the jury were sworn as to Brownfield alone, and a verdict was rendered in favour of the plaintiff and judgment entered on the same against Brownfield, to both of which matters his counsel excepted, and assigned them for error in this Court.

J. B. and *A. Howell*, for plaintiff in error.—Regarded only as a question of practice, the Court was in error. There is no instance in Pennsylvania where the name of the *claimant* has been substituted for that of the stakeholder. 4 *Rawle* 111 expressly says that constitutes the difference between the practice here and in England. This practice is recognised 9 *Barr* 51–52. The same was held by Judge SHARSWOOD in Philadelphia: cited 1 *Troub. & Hal.* 374, in note; 2 *Miles* 24; 9 *Am. L. J.* 135–136.

In this case, Searight, the commissioner, had pleaded, and the issue was made up between him and the plaintiff. If the money had not been paid to Brownfield, he would not only have lost his account, but would have been compelled to pay the plaintiff in addition.

The action could not have been maintained against the superintendent. He was a public officer: 9 *Watts* 27. Of this defence Brownfield was deprived by order of the Court. The effect of this judgment is to recover money from Brownfield, which was voluntarily paid to him under a claim of right, and this could not be done: 6 *W. & Ser.* 485; 9 *Watts* 462; 1 *Barr* 29.

Kaine and *Ewing*, contrà.—Mr. Searight died before the cause was tried. The jury were rightly sworn as to Brownfield, who then had the money. Indeed it was the only way, as is ruled in 1 *Vernon* 351. This case is referred to and affirmed in 4 *Rawle* 100. The case in 2 *Miles* 24, cited by the plaintiff in error, was under the provisions of the Act in relation to the District Court of Philadelphia, which is not in force here. The case of Coates *v.* Roberts, 4 *Rawle* 111, does not sustain the position contended for. Brownfield voluntarily put himself upon the record as the real defendant, and had the money: this being the case, there was no error in swearing the jury as to him alone. The authorities show that was the proper course, and he suffered no injury by the ruling of the Court.

Digitized by Google

[Brownfield v. Canon.]

www.libtool.com.cn

The opinion of the Court was delivered by

Lowrie, J.—The old common law process of interpleader is not much used with us, but it is not abolished, for we never consider an old remedy abandoned until we have an adequate substitute for it: 17 *Ser. & R.* 211, 314; 11 *Id.* 274; 9 *Id.* 323; 8 *Id.* 242; 1 *P. A. Browne* 82; 1 *Miles* 46. While, however, we receive the old forms, we modify them according to the analogies of our own general practice, and even enlarge their sphere according to the equitable principles of our common law: 4 *Binn.* 61; 4 *Rawle* 100; 9 *State R.* 51.

The principles of interpleading, and the cases in which it may be applied, are best exemplified in the practice in equity; but the form of the procedure in a common law case is very simple, and requires but little modification. It may be found very fully presented in the abridgments of Fitzherbert, Brooke and Viner, under the titles *Garnishee*, *Enterpleader*, and *Interpleader*, and in 2 *Mod. Ent.* 425, 427. The principle appears in various forms in our law; as where heirs, devisees, or alienees come in on notice by writ, or by the party to defend for their interests, where a warrantee or landlord comes in on notice to defend an action of ejectment, and other cases: see *Brightly's Equity*, 226.

Under our practice, where the middleman or stakeholder is sued, he may take the simple course of giving notice to the other claimant of the money or thing in controversy, to come and defend the action, or be barred of his claim. But this does not conclusively save the middleman from his liability to action by the other claimant; for the latter, not being a party on the record, is not held barred by the judgment until the fact of notice is properly proved. The middleman is not, therefore, conclusively protected by such judgment, for his proof of notice may fail him. Besides, if the middleman fail, he will have to pay the costs himself, and may have no available recourse.

It would therefore seem more prudent for the defendant to pursue the regular common law form of filing his suggestion, admitting the debt or duty, and his willingness to pay or perform, and stating the claims of third persons, and therefore pray for a *scire facias* to bring him in to interplead. Thus the third person, called, from his being warned, the garnishee, or, in other forms of procedure, the intervener, 3 *Adams's Ecc. R.* 37; 1 *L. Ecc. R.* 599; 2 *Domat* 676, is compelled to come in as a party and set up his claim, and is concluded by the record.

By the service of the *scire facias*, the intervener or garnishee actually becomes a party, and if he makes default, the plaintiff will have judgment to recover the money or thing claimed from the defendant, and his damages and costs from the garnishee. If he comes in and disclaims, the plaintiff recovers of course from the defendant. If he defends unsuccessfully, the plaintiff will

Digitized by Google

www.libtool.com.cn

have judgment for the thing claimed against the defendant, and against the garnishee for damages, or interest and costs. If the intervener plead, the issue to the Court or jury is between him and the plaintiff, and the defendant stands aside altogether and has nothing further to do but to pay the money, or deliver the thing sued for according to the judgment of the Court. If the intervener recover he shall have judgment against the defendant for the thing claimed, and against the plaintiff for his damages and costs. If, however, the money be in Court, the judgment of course is that the party recovering shall take it out of Court. If it has been delivered to one of the claimants, the judgment will accord with the fact. Usually, when the suit is for money, the defendant offers to bring it into Court, and does so; and, if it is for some other thing, he keeps it safely to abide the order or judgment of the Court.

If the middleman be sued by two claimants severally, he must sue out his *scire facias* to interplead in the suit first brought, or if they are both brought at once, then in the one in which the declaration shall be first filed, or which the Court shall direct. All these principles are plain, reasonable, and very easy of application.

In the present case they have been substantially, but not very regularly pursued. It was irregular for the defendant to deny the plaintiff's claim, and for the intervener to come in at the same time and set up his claim to the money. These two sets of pleadings are totally incompatible and unallowable, and the plaintiff might elect on which of them he would join issue and go to trial. The intervener voluntarily made himself a party and was accepted as such; and, as was said by Chief Justice TILGHMAN in a similar case, 4 *Binn.* 65, it does not lie in his mouth to say he ought not to have been admitted. Besides, it seems very plain from the record that all the pleadings were put in by the intervener, and were intended to try the title between him and the plaintiff.

It is objected that the judgment ought to have been against the defendant for the money in dispute, and against the intervener for the damages and costs only, and so it usually is when the plaintiff recovers. But the result is properly different here, because in this instance the defendant had paid the money to the intervener, and therefore out of his hands the plaintiff was entitled to have it. The plaintiff might possibly have claimed a judgment against the defendant notwithstanding such payment, but, under such circumstances, the intervener cannot complain that the judgment is against him.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Farmers' and Mechanics' Turnpike Company *versus* McCullough.

An action of covenant against a corporation will lie only on a written instrument sealed with their common seal; and such seal does not prove itself, but must be proved by some person having knowledge of it.

The plea of covenants performed *absque hoc*, admits the execution of the instrument declared on, and only puts in issue the performance on the part of the plaintiff as alleged in the declaration.

Where the Court granted leave during the trial to defendants to add the plea of *non est factum*, and the plea was not entered on the record, the privilege to do so will be considered as having been waived.

ERROR to the District Court of *Allegheny county*.

The defendant in error brought an action of covenant against the Farmers' and Mechanics' Turnpike Road Company, for breach of articles dated 4th January, 1851. Defendants plead "covenants performed, *absque hoc*, with leave, &c." The article of agreement purported to be made "by and between Michael McCullough, of, &c.," and the "Farmers' and Mechanics' Turnpike Road Company;" and was signed by William Eichbaum, as president of the company, to which he affixed an ink seal or scrawl. On the trial, the agreement was offered and objected to, on the ground "that it was not the deed of the company, and is not the paper declared upon." The Court overruled the objection, and admitted the evidence, and sealed a bill of exceptions. After the defendant's counsel had concluded their argument, the plaintiff's counsel asked leave to amend the declaration, which the Court granted, overruling the objection of defendant to the same. The defendant then obtained leave of the Court to add the plea of *non est factum*, but which does not *appear* to have been entered on the record. The principal point upon which the cause turned in this Court, was whether an action of covenant could be maintained on the agreement against the corporation. The jury found for the plaintiff $1445.95.

On the trial, the Court below (WILLIAMS, P. J.) ruled *pro forma*, that the action of covenant could be maintained, reserving the point. Judgment was afterwards entered upon the verdict.

This, *inter alia*, was assigned for error.

T. Williams and *J. Mellon*, for plaintiff in error.—Was the instrument the *deed* of the company? It was signed by the president with an ink seal like the other party. The instrument did not purport to be the deed of the company, and there was no evidence that they had either authorized or adopted it. It stood, *prima facie*, as the private seal of the president. We do not consider the authorities conflicting as suggested by the judge who

Digitized by Google

www.libtool.com.cn

ruled the cause. A corporation can authenticate its deeds only by its seal, and that seal *must be proved:* 7 *Ser. & R.* 318; *Ib.* 156; 11 *Ser. & R.* 129; Directors of the Poor *v.* McFadden (not reported); 1 *Ohio Rep.* 390; 14 *Pet.* 19; 7 *Cranch* 306; 19 *Johns.* 65; 4 *Mass.* 597; 8 *Conn.* 491; 2 *Scam.* 187; 1 *Green.* 231; 4 *Ib.* 388; 4 *Wend.* 285; *Ang. & Am. on Cor.* 237, 151. If their agents sign and affix their private seals, they are only bound by simple contract.

McConnell and *T. Mellon*, contrà.—The plaintiff declared upon the instrument as the deed of the parties. And the defendants pleaded covenants performed, *absque hoc*, thereby admitting it was their deed, and sealed with the proper seal of the company: 1 *Tr. & H.* 277, edit. of 1837; 2 *Yeates* 106; 6 *Barr* 398. This admission of record superseded the necessity for any such proof. The case was ruled by the learned judge below, on the case in 2 *Pick.* 428, which fully sustains the ruling.

It was not necessary that there should be any words indicating that the parties have affixed their seals, if it otherwise appear: Goddard's Case, 2 *Co.* 5.

The opinion of the Court was delivered by

WOODWARD, J.—An action of covenant against a corporation will lie only on a written instrument sealed with their common seal. And their common seal does not prove itself, but must be proved by some person having knowledge of it. Hence it is that the probate of a deed of conveyance by a corporation, to fit it for being recorded or given in evidence, is made by an officer of the corporation swearing that the seal thereto affixed is the common seal of the corporation. If the corporation have no common seal, they may adopt a seal for the occasion; but that must be proved to be their seal. It is said the instrument sued on here is not the deed of the corporation defendant; that the ink seal set opposite the president's name is neither the common nor the adopted seal of the company; but did the pleadings raise that question?

The plaintiff declared in covenant on articles of agreement, and the defendant pleaded "covenants performed *absque hoc*, with leave, &c." The plea of covenants performed, although in substance a denial of the breach alleged, is an affirmative plea, and puts not the execution of the instrument in issue. Nor do the words "*absque hoc*," "without this;" for these only put in issue the performance on the part of the plaintiff, as alleged in his *narr.* The words "with leave, &c.," imply always an equitable defence, such as arises out of special circumstances, which the defendant hereby intimates that he means to offer in evidence.

As this cause went to trial, then, there was no plea on record which negatived the plaintiff's averment that the instrument sued

Digitized by Google

on was the deed of the corporation. And as in pleading what is alleged and not denied is admitted, it was not necessary for the plaintiff to prove, nor perhaps to produce the instrument declared on. Nothing but the plea of *non est factum* could put the execution of the instrument in issue, and this was wanting from the record, and still is.

But we are informed by the paper-books that after the evidence was closed, and the defendant's counsel had concluded their argument, the counsel of the plaintiff, in the course of his concluding argument, asked leave to amend his declaration, which the Court granted, against the objection of defendants' counsel, and sealed a bill. A continuance was then prayed for by defendants' counsel, on the ground of surprise, and refused by the Court. They then asked leave to amend by adding the plea of *non est factum* on the record; and says the paper-book of the plaintiff in error: "By the Court: let the plea be added." On the part of the defendant in error it is alleged that though leave was granted, the plea was not in point of fact added to the record, and so far as the docket entries are furnished us, it does not appear that either amendment moved for and allowed was actually filed. In their answer to the defendant's ten points, however, the Court take notice of the amendment of the plaintiff's *narr.*, but neither in their charge, nor in their subsequent opinion upon the point reserved, is there any notice taken of the plea of *non est factum*. From all this we are at liberty, perhaps bound, to presume, that no such plea was pleaded. The leave granted entitled the defendants to add this plea, but did not compel them to do so. They might waive their privilege. In some judicial districts the rules require this plea to be verified by an affidavit before it can be filed; and it is not always convenient to swear to it. We are not informed whether such a rule obtains in the District Court of Allegheny, but it is enough for us that the record shows no such plea, and that the defendant in error alleges, without contradiction, that it never was placed on record. The defendants' covenant, then, was admitted of record, and required no proof to establish it. This conclusion, thus fairly deduced, is the more satisfactory to our minds, because it relieves us of the necessity of turning parties out of Court on a mere technicality, after they have had a full trial of the merits of their controversy.

This disposes of the most material points urged in argument. As to the rest, we see nothing in the errors assigned which demands our interposition.

The points put to the Court seem to have been well answered, so far as they involved principles of law; and where they touch matters of fact, we have no means of review; for the evidence is not on the record.

The judgment is affirmed.

Digitized by Google

www.libtool.com.cn

McCue *versus* Johnston.

An agreement to devise land to a grandson, in consideration of past services and the payment of an annual sum during the lives of devisor and wife, followed by the execution of a will making such a devise, will not vest the title in the devisee during the life of the devisor, where no provision for the delivery of possession prior to his death is contained in the will or the accompanying agreement.

To take a parol agreement for the sale of land out of the statute of frauds and perjuries, the evidence must be direct, positive, clear, and satisfactory.

Ex parte declarations of the grantor may be admitted as corroborative evidence, but standing alone are not sufficient to establish such a contract.

ERROR to the Common Pleas of *Butler county*.

Ejectment for 60 acres of land. On the 28th of May, 1849, Michael Maloney, Sr., was the owner of the premises, and on that day made and executed a will in writing, in which he devised to Nancy Johnston, Michael C. Maloney, Jeremiah Maloney, and Daniel Maloney each 60 acres of land, parts of the farm which he then occupied. On the same day, these parties entered into the following agreement with him:—

"Whereas Michael Maloney, senior, has this day made a will, in which has divided his tract of land to Nancy Johnston, Michael C. Maloney, Jeremiah Maloney, and Daniel Maloney, in different portions, as laid off by John Smith, surveyor, on the 26th April, 1848: Now know ye, that we, Barnard Johnston, for his wife Nancy, and Michael C. Maloney, Jeremiah Maloney, and Daniel Maloney, do hereby severally promise to pay to Michael Maloney, senior, and his wife, the just sum of twelve dollars and fifty cents each, from this date until the day of the deaths of the said Michael Maloney, senior, and his wife; and if any one of the parties above named neglects or refuses to pay their part, then, in that case, the grant in the will is to be null and void as to them, and the lands remain to be otherwise disposed of. Given under our hands and seals, the 28th day of May, 1849.

"BERNARD JOHNSTON, his X mark, [L. S.]
"MICHAEL C. MALONEY, [L. S.]
"JEREMIAH MALONEY, [L. S.]
"DANIEL MALONEY, [L. S.]

Witness present.

Under the direction of M. Maloney, Sr., the land was divided, and the several parts of these parties designated by marked boundaries. Michael C. Maloney entered into and took possession of his part; and he and Jeremiah farmed their parts (being contiguous) together. He also paid annually the stipulated sum of $12.50 to M. Maloney the elder. Michael C. Maloney died in

Digitized by Google

www.libtool.com.cn

the year 1852, unmarried and without issue, but leaving a mother and sister surviving him, who are the plaintiffs in this action, and on whose behalf, in the years 1853 and 1854, the yearly payments due from Michael C. under the agreement were tendered, but refused on the part of M. Maloney the elder, he refusing to carry out the arrangement with Michael C. This action was then brought to recover the possession of the 69 acres allotted to Michael C. Maloney under the arrangement stated. M. Maloney, Sr., and his wife were still living at the time of trial.

Michael C. Maloney was a grandson of Michael Maloney, Sr., had lived with him until he was 22 years of age, and had then left; and, upon being sent for by the elder, refused to return until the foregoing arrangement in reference to the land was agreed to by his grandfather.

The Court (AGNEW, P. J.) charged the jury as follows:—

"The will of Michael Maloney and written agreement of Michael C. Maloney, bearing even date May 28, 1849, constitute together such a contract in writing, not within the statute of frauds, as can be enforced in equity, if the conditions be complied with: Brinker *v.* Brinker, 7 *Barr* 53. But the construction of the contract is, that it is an agreement to convey by devise at the death of the devisor, on condition of the payment of the annual sum of $12.50 during his and his wife's lifetime. Now the nature of the instrument, by which the estate is to be conveyed (to wit a will), necessarily imports an agreement to vest the title at the death of the testator, and not before; and consequently specific execution cannot be decreed until that time.

"In point of fact, so far as the instrument by which the conveyance is to take place is involved, it is an executed contract, on condition to take effect at the time specified. A devise transfers the legal estate, and not an equity to be perfected by another instrument. It is the same as if a deed had been executed to take effect *in futuro*, only that the common law incident of a feoffment forbids the freehold remaining in abeyance, and a resort must therefore be had to a devise or a conveyance under the statute of uses. The scrivener no doubt knew but little of these things, and therefore adopted the form of a will, which would convey the estate by its own operation at the proper moment, and at the same time leave the testator free to change it, in case of forfeiture by non-payment of the annual reservation.

"There is nothing upon the face of the will and agreement, or in their effect, which carried to Michael C. Maloney either the title or possession during the lifetime of old Michael Maloney, nor, as a *part* of the *original contract*, can we allow of the existence of an agreement for possession, in old Mr. Maloney's lifetime, as *omitted* out of the will and accompanying writing, without evidence either of fraud or mistake. There is not a particle of evidence that, in

Digitized by Google

www.libtool.com.cn
the drawing of the writings, such a portion of the agreement was either fraudulently or mistakingly omitted. The scrivener was not examined for this purpose, though present at the bar. The evidence, as to even the existence of any such agreement, is anything but clear and satisfactory; a matter necessary in proving fraud or mistake to reform a writing. Jeremiah Maloney, the only witness present at the consummation of the contract between old Mr. Maloney and Michael C. Maloney, says not a word about such an agreement on part of the old man; and James Forquer, who gives the most clear and direct evidence of a rehearsal of the bargain by the old man, says expressly, 'he said he had given each 60 acres; each to pay $12.50 a year during his and his wife's lifetime, and *at their death* the land was to be theirs.'

"There is no principle better settled than that all the previous agreements and negotiations are merged in the conveyance or final instrument by which the contract is to be executed. The will, we have seen, was the instrument adopted by the parties to carry their agreement into final execution. This case comes, therefore, directly within the decision in the case of Blakeslee *v.* Blakeslee, 10 *Harris* 237.

"The question is then narrowed to this, whether there is sufficient evidence of an independent parol contract for the possession of the land during the lifetime of old Michael Maloney, or in other words, was there a parol sale or gift of it during his lifetime—an estate *per auter vie*, which is a freehold?

"Michael C. Maloney was the grandson, raised in the family of his grandfather from infancy, and supported by him. The same rules of evidence and principles of construction which apply between father and son govern this case. The evidence of the sale or gift in consideration of service must be direct, positive, clear, and satisfactory: Bash *v.* Bash, 9 *Barr* 260; Candor's Appeal, 5 *W. & Ser.* 515; Sanders *v.* Waggenseller, 7 *Harris* 248; Lantz *v.* Fry, *Id.* 366.

"There is no *direct* evidence of a contract between the parties, except the testimony of Jeremiah Maloney. He is the only witness who was *present* at any interview between Michael and Michael C. Maloney. The testimony of James Forquer and the other witnesses, of *ex parte* declarations, as the law now stands, can be used only as corroborative evidence: opinion of KNOX, J., in an unreported case; also, Rankin *v.* Simpson, 7 *Harris* 475. So far from the testimony of Jeremiah Maloney, corroborated and supported as it may be by that of James Forquer and others, being positive, clear, and satisfactory evidence of an independent and separate parol sale or gift of an estate to Michael C. Maloney during his grandfather's lifetime, it seems clearly to have relation to the arrangement as contained in the will and agreement of 28th May, 1849.

Digitized by Google

www.libtool.com.cn

"What was the consideration of such independent sale or gift? The annual payment of the $12.50 was indubitably the consideration of the written contract evidenced by the will and accompanying agreement. The inducement to the written contract was also the past labour and services of the grandson, his relationship, and the benefits of their arrangement, which secured to the testator himself a living, as testified by James Forquer.

"Was there a contract for present possession in consideration of prospective services, or of partly these and partly past services? Surely there is nothing like a clear and distinct statement of such an agreement by the old man to be found in Jeremiah Maloney's testimony. If it be not there, it is in vain to look for it elsewhere, and find it at the same time directly and positively proved. Perhaps we might *conjecture*, from the loose general expressions of old Michael Maloney to others, that something of this kind may have taken place outside of the written contract. But this would be to reverse the rule of evidence, and give to these *ex parte* declarations a higher place than to the direct evidence.

"Performing, therefore, the duty assigned to us as chancellors, we are bound to declare that the evidence is insufficient to establish a parol gift or sale of the premises to Michael C. Maloney, during his grandfather's lifetime, such as can be enforced in equity, and consequently that the plaintiffs cannot recover.

"To which opinion and instructions of the Court the plaintiffs' counsel excepted before verdict, and requested the Court to seal this bill of exceptions, which is done accordingly."

Errors assigned: 1. The Court erred in refusing to carry into effect the written agreement of the parties.

2. The Court erred in charging that there was no evidence of plaintiffs' right to possession under the written agreement, and in giving to said agreement the construction which they did.

3. The Court erred in saying the evidence was "insufficient to establish a parol gift or sale of the premises to Michael."

Purviance, *Thompson*, and *Sullivan*, for plaintiff in error.—Michael had faithfully served his grandfather until he was 22 years of age, and left, and refused to return unless he got the land. Would he have paid an annual sum if he were not to have possession during the life of the grantor? He took possession with the acquiescence of the old man. This is sufficient to repel such a construction, and our position is fortified by the repeated declarations of defendant that the land belonged to Michael. It made no difference whether the conveyance was to be by deed or will: 7 *Barr* 55.

2. There was sufficient evidence to make it good as a parol contract executed: 10 *Watts* 195.

Digitized by Google

www.libtool.com.cn

Graham, *Tomlin*, and *Mitchell*, contrà, whom the Court declined to hear. In their printed argument they refer, on the subject of parol contract, to 9 *Barr* 266; 7 *Harris* 461; *Id.* 475; 7 *Barr* 91, 160; 8 *Pa. Rep.* 332.

The opinion of the Court was delivered by

BLACK, J.—This case is to be affirmed, for the reasons given by the Court below.

Judgment affirmed.

Corbet *et al. versus* Evans *et al.*

Where in an agreement for the sale of goods, it was stipulated that a part of the purchase-money should be paid in "good obligations," and certain notes were tendered and received and receipted for, "on payment of goods," there is no guarantee of the solvency of the makers of such notes.

In *assumpsit* against two, there can be no recovery against one of the defendants, on an endorsement made by him in his own name.

A recovery in a suit upon a contract for the sale of goods payable in instalments, in which suit the plaintiff counted for an entire sum, is a conclusive bar to another suit brought on the same contract to recover a sum which was included in the former declaration.

ERROR to the Common Pleas of *Jefferson county.*

On the 14th June, 1849, Evans & McCall purchased goods from Corbet and Means, to the amount of about $3000, which they were to pay in instalments at specified periods, partly in money and partly in "good obligations" of third parties. A part of the amount was paid in money, and various notes, not negotiable, of third persons handed over, and these were endorsed by Mr. Evans with his own name. Some of the instalments being unpaid, suit was brought upon the original agreement, and judgment rendered against Evans & McCall by default; and afterwards the amount was liquidated by the prothonotary in the presence of the parties and with their consent at $1397.05, which was paid in full. Some of the notes and obligations paid to plaintiffs proved unavailable, on account of the insolvency of the makers; and it was to recover the amount of these that this action of *assumpsit* was brought. The receipts given for the notes were as follows:—

"Received Brookville, October 18, 1849, of Evans & McCall per hand of J. B. Evans, the above notes to apply on purchase of goods from us."

"Received of J. B. Evans per Evans & McCall $342.41 as above, on payment for goods, as per agreement dated about June 15, 1849. December 15, 1849. $342.41."

The Court (MCCALMONT, P. J.) instructed the jury that the defendants were not liable as endorsers, the endorsement being by

Digitized by Google

www.libtool.com.cn

Evans alone; that, under the facts, there was no guaranty of the solvency of the makers of the obligations by the defendants; and that the former judgment on the original agreement was a bar to a recovery upon that in this suit.

The jury found for the defendants, and the plaintiff sued out this writ of error.

Jenks and *Andrews*, for plaintiff in error.—The promise to pay in "good obligations" is equivalent to such as were drawn by solvent persons. A contract should be viewed as the mass of mankind would regard it: 2 *Whart.* 491; 4 *Ser. & R.* 1; *Story on Prom. Notes*, § 457; 3 *Rawle* 37.

The solvency of the makers of the notes had not been tested when the other suit was brought, and the plaintiff would not then have had a cause of action for their amount. That case is, therefore, no bar: 5 *Barr* 308.

Lucas, contrà.—The notes were received *as payments*, as appears by the receipts. The defendants paid in such notes as the plaintiffs were willing to accept.

The judgment in the other suit was a bar to any suit on the agreement. The case of Hess *v.* Heeble, 6 *Ser. & R.* 57, rules this case.

The opinion of the Court was delivered by

BLACK, J.—The defendants below bought goods from the plaintiffs, valued at nearly $3000, and agreed in writing to pay for them by instalments, partly in cash and partly in "good obligations." Certain obligations were handed over against persons who afterwards turned out to be insolvent; but there was no guaranty, the paper being merely endorsed by one of the defendants with his name. Subsequent to this, the plaintiffs brought a suit against the defendants for the balance due on the agreement, and got a judgment. The present action is to recover the amount which the plaintiffs lost by the insolvency of the persons against whom they took obligations from the defendants.

It is manifestly impossible for the plaintiffs to recover on the contract made with the defendants at the time the obligations were handed over; for there was no contract of guaranty. The endorsement of an instrument, not negotiable by the person to whom it is payable, creates no obligation of that sort. Besides, this endorsement was made by only one of the defendants, and if two persons are sued, where only one is liable, the action is defeated as against both.

But this suit is brought on the original agreement of the defendants to pay in "good obligations." It is alleged that the obligations handed over were not good, and that, therefore, there

Digitized by Google

www.libtool.com.cn

is no payment. But here the plaintiffs encounter the previous judgment on the same agreement, which is a flat bar. The former suit was in *assumpsit;* the statement filed in it recited the contract in question, and claimed the sum of $2171 as being still due to the plaintiffs, and unpaid. Judgment went by default, and the amount due was ascertained regularly and entered of record. Of course this is conclusive of the amount then due on the contract, and if the plaintiffs recovered less than they were entitled to, they cannot retrieve the error by a new suit for the same matter.

The plaintiff's counsel contend that the promise, when the goods were bought, to pay for them in good obligations was equivalent to a guaranty of the paper. We are not of that opinion. When a man parts with his property in consideration of a promise that he shall be paid for it in notes; obligations, or other evidences of debt against third persons, he is not bound to accept the paper of one whom he knows to be insolvent. And this is true, even where he has not expressly bargained for *good* paper. But when he receives notes or obligations in satisfaction and receipts for them, without demanding a guaranty, he takes the risk upon himself, unless he can show that they were fraudulently imposed upon him. When he has no express stipulation for a guaranty in his original contract, and when none was made at the time of the assignment, the assignor is clear, if he acted in good faith. The insertion of the word *good* implied no guaranty, but it gave the plaintiff a right to refuse notes which did not answer the description, though it was not necessary even for that purpose.

There are some details about this case which might require discussion if the errors had been regularly assigned. But they are all waived. We are satisfied that the cause was rightly tried in the Court below.

Judgment affirmed.

Cook *versus* Shrauder.

A case stated is a substitute for a verdict; and when it is lost or destroyed, if the parties cannot agree upon a new one, the cause goes to a jury as if none had ever been made.

If a case stated is defective in setting forth the facts, no judgment can be given upon it.

Where a case stated was lost, it was error for the Court to appoint a commissioner to find and report the contents of it, and no judgment could be entered upon such report.

Error to the Court of Common Pleas of *Allegheny county.*

This was a *scire facias* on a mechanic's lien. The defendant pleaded "no lien," payment with leave, and set-off. On the 13th February, 1854, the counsel of the parties agreed to and signed

Digitized by Google

www.libtool.com.cn

a case stated, in the nature of a special verdict, which was filed in the prothonotary's office, and marked upon the docket, and the cause placed upon the argument list. When the cause was called, the case stated could not be found by the officer, and the counsel not agreeing upon its terms, the Court, on the application of the prothonotary, appointed an auditor "to take testimony, and make report as to the contents or purport of said paper."

The auditor gave notice to the parties, took testimony and reported as follows:—

"The following I judge to have been the substance of the agreement, viz.:—

"'It is hereby agreed by the parties to above suit by their attorneys, that the only question to be considered in the argument of the above case shall be whether a contractor or material-man can file a lien against a house and lot, for the erection of which he had furnished work, labour, and materials, the lot being held by the —— on a perpetual lease, subject to a ground-rent of $33 per annum, and that said lien should be good in law, under the Acts of Assembly, giving contractors and material-men liens. If the Court are of the opinion that a perpetual lease, as above stated, is subject to mechanic's lien for work, labour, and materials furnished in the erection of a building, then judgment for the plaintiff for the amount of his claim in the above number; if not, then judgment for defendants for costs; each party reserving the right of a writ of error.'

"All of which is respectfully submitted."

The above report was filed on the 26th of April, 1854, and on the 26th of June was "confirmed by consent."

"January 20th, 1855.—After argument on case stated, judgment on *scire facias* for the plaintiff, for the sum set forth in the lien, sum due to be liquidated by prothonotary."

Error assigned: The Court erred in entering judgment for the plaintiff on the case stated.

Carnahan, for plaintiff in error.—The case stated is defective in not stating the facts. The Court will not give an opinion on a mere abstract question of law: 9 *Harris* 417.

T. B. Hamilton, contrà.—It is not a mere abstract question, but one raised on the record, as it stood before the Court below, on the single fact in the case stated, and on the lien itself.

The opinion of the Court was delivered by

Black, J.—In this case it appears that the counsel of the parties agreed to make a case stated, in the nature of a special verdict, which was afterwards lost. The Court appointed a com-

Digitized by Google

www.libtool.com.cn

missioner to take testimony of its contents, and upon his report gave judgment.

The like of this has never been heard of before. I do not say that it is necessarily wrong because it is new. But we are of opinion that it violates principle and analogy. A case stated is a substitute for a verdict. When it is lost or destroyed it cannot answer the purpose, and if the parties cannot agree upon a new one, the cause goes to a jury just as if none had ever been made.

In a Court of common law an issue in fact cannot be determined by a commissioner. If such a mode of inquiry were legal, it would hardly follow that his report is conclusive, when he merely finds that on a certain occasion, the parties admitted the facts to be in a particular way.

A statement of the case is, itself, not conclusively binding on the parties. Whenever it can be shown that there is a defect in it, no judgment should be given. We have often referred cases of that sort back again to be tried by a jury, even after judgment below and writ of error.

When the parties put their case on paper, it is of the utmost importance, sometimes, that it should be submitted to the Court in the very form and shape which they chose to give it. It cannot be expected that this can be reproduced from the testimony of witnesses who have seen it months or years before. It seems to us exceedingly probable that the commissioner's report, in this case, is nothing like the original paper. The counsel would hardly call such a thing a case stated. It sets forth merely an abstract question of law. There is not a fact mentioned on which we could tell whether the plaintiff has a claim or not.

Judgment reversed and *venire* awarded.

Clark & Thaw *versus* Wilder.

A verdict for the plaintiff for a specified sum, subject to the opinion of the Court, whether the plaintiffs upon the whole case are entitled to recover, does not present such a *point reserved* as would authorize the Court to enter a judgment for the defendants *non obstante veredicto*.

To authorize such judgment the facts of the case must be admitted of record or found by the jury.

The pendency of a suit against common carriers for the value of the goods destroyed by fire in a warehouse, in the course of transmission to the owners, is not a bar to a recovery from the warehousemen of the amount of insurance received by them on account of said goods.

Error to the District Court of *Allegheny county*.

The action below was *assumpsit* by Wilder & Co. against Clark & Thaw. The defendant's warehouse in the city of Pittsburgh, in which goods of the plaintiffs to the amount of $4323.23 were

Digitized by Google

www.libtool.com.cn

deposited, was consumed by fire on the 26th June, 1853. The defendants had an insurance in the Delaware Mutual Insurance Company to the amount of $5000, and one in the Western Insurance Company in the sum of $10,000, "to protect the whole interest of the assured themselves, in any way derived on said property in the first instance, and any surplus remaining to be applied to cover property in their charge otherwise unprotected." After deducting defendant's own losses, there remained about $10,000 to be applied to other parties, the *pro rata* share of which, to the plaintiffs, amounted to $1432. The defendants, after the institution of this suit, commenced an action against "The Ohio and Pennsylvania Transportation Line," as common carriers, of which company the defendants are members, to recover the value of their goods thus destroyed.

The defendants contended that Wilder & Co., by commencing suit against the Transportation Company, had debarred themselves from recovering their *pro rata* share of the insurance money received by the defendants.

Under the instructions of the Court, the jury returned a verdict as follows:—

"We find for the plaintiffs $1432, subject to the opinion of the Court upon the question, whether the plaintiffs upon the whole case are in law entitled to recover. And if the Court should be of the opinion that the case is with the plaintiffs, then judgment to be entered in their favour against the defendants for the amount of the verdict; but if the Court should be of the opinion that the law is with the defendants, then judgment to be entered in their favour *non obstante veredicto*."

Judgment was rendered by the Court upon the verdict in favour of the plaintiffs below for $1432, to which judgment the defendants below except and assign for error,

1. That the Court erred in rendering judgment for the plaintiffs below upon the reserved point.
2. In not rendering judgment for the defendants below *non obstante veredicto*.

C. Shaler & Co., for plaintiffs in error.

D. Reed, contrà.

The opinion of the Court was delivered by

BLACK, J.—The only exception on which we are expected to reverse this judgment is, that the Court below should have given judgment for defendants instead of the plaintiffs on the point reserved. When we look at the record we find no point reserved. The verdict was given subject to the opinion of the Court *on the*

Digitized by Google

www.libtool.com.cn

whole case, whether the plaintiffs were entitled to recover. It is impossible for the human imagination to conceive of anything more unlike a *point*.

But this judgment was according to the verdict, and we affirm it, because, after an attentive consideration of the evidence, we find nothing in it on which a point could have been reserved that would have entitled the defendants to a judgment *non obstante veredicto*.

Judgment affirmed.

Irwin *versus* Wickersham.

If a point of law be reserved on the trial of a cause, the point and the facts upon which it arises must be stated upon the record in order to authorize the Court to enter judgment *non obstante veredicto*.

ERROR to the District Court of *Allegheny county*.

This was an action of covenant brought to recover ground-rent alleged to be due to plaintiff on a lot in the city of Pittsburgh.

On the trial of the cause, defendant's counsel submitted four points in writing, requesting certain instructions to the jury, all of which the Court answered in the negative, and directed the jury to find for the plaintiff, and *reserved the points*. Neither the points reserved, nor the facts upon which such points were founded, were stated upon the record.

The Court afterwards entered judgment for the defendant *non obstante veredicto*.

This ruling of the Court was assigned for error.

Bigham and *Leslie*, for plaintiff in error.

Shinn, contrà.

The opinion of the Court was delivered by

BLACK, J.—After the evidence in this case had been gone through with on both sides, the Court directed the jury to find a verdict in favour of the plaintiff, which was done of course. Afterwards a judgment was entered for the defendant, *non obstante veredicto*, upon points said to be *reserved*. But how reserved? They are not specified. Nobody can tell what they are from anything that appears on the record. Perhaps it was meant to reserve the written propositions submitted by counsel. In the absence of any facts to apply them to, they are mere abstractions. The truth of the case is in no way ascertained. It is not admitted by the parties; the jury did not pass upon it, and the Court could not.

Digitized by Google

www.libtool.com.cn

What does it matter whether the plaintiff or defendant was right on the law, since there is not a fact found to which it refers? We repeat again, that if a point of law is to be reserved, it must be done by stating on the record the facts on which it arises.

Judgment reversed and *venire facias de novo* awarded.

Wilson *et al. versus* Steamboat Tuscarora.

In every case where a general verdict is given, subject to a point reserved, the question of law thus reserved must be stated, and the facts on which it arises must be either admitted on the record or found by the jury.

The Court cannot withdraw the decision of the facts from the jury by reserving as a point, whether under all the evidence in the cause the plaintiff is entitled to recover.

ERROR to the District Court of *Allegheny county*.

The action against the defendants was as common carriers to recover damages for injury sustained by plaintiffs to their goods, between New Orleans and Pittsburgh.

The goods were shipped at New Orleans on board the steamboat Concordia, stipulating for reshipment on a good steamboat. The goods were damaged on board the Concordia between New Orleans and Louisville, by perils not within the exception contained in the bill of lading.

At Louisville the Concordia reshipped the goods (sugar and molasses) on the "Tuscarora" steamboat, the owners of which are defendants in this suit. On their arrival at Pittsburgh, the plaintiffs at first declined paying the freight until the damages were deducted; but, the defendants refusing to deliver the goods until the whole amount of freight stipulated to be paid from New Orleans to Pittsburgh was paid, the plaintiffs paid the same under protest. No other bill of lading than that of the "Concordia," was ever delivered to the plaintiffs. Considerable testimony was given on both sides, but the foregoing statement of facts will sufficiently illustrate the point decided by this Court.

The jury at the trial, under the instruction of the Court, found a verdict for the plaintiffs for $1245.63, subject to the opinion of the Court upon the point reserved, "Whether, under the whole evidence in the cause, the plaintiffs were entitled to recover from the owners of the steamboat Tuscarora."

On a subsequent day the Court entered judgment for defendants *non obstante veredicto*.

To this, error was assigned.

Ritchie, for plaintiff in error.

Digitized by Google

[Wilson v. Steamboat Tuscarora.]

www.libtool.com.cn

Stanton, contra.

The opinion of the Court was delivered by

BLACK, J.—This was an issue of fact. A jury was called to try it, and each party produced whatever evidence he had to sustain the issue on his part. But the jury, to whom this evidence on both sides was given, were discharged by the Court without giving a verdict, or even hinting an opinion on any part of it, except the amount of the plaintiffs' loss. The Court reserved the question, whether the plaintiff, on all the evidence, was entitled to recover, and afterwards gave judgment for the defendant *non obstante veredicto*.

It is not possible for us to sustain such a mode of proceeding as this. We have said this, or something like it, so often, that it is scarcely necessary to repeat it here. In a common law action, every disputed fact must be determined by a jury, and not by the judge who presides at the trial. This is an inflexible rule of law, which we cannot change until we can overthrow the constitution.

It is in vain to say that the facts of this case are not disputed. The pleadings put them in dispute.

Equally useless is it to argue that they may be *easily* determined from the papers and oral evidence. That is no reason why they should not be determined by the proper tribunal. It would be better reasoning to say that the facts were very difficult to comprehend, and therefore should be referred to a person better trained, and more accustomed to such work, than jurors usually are. Among the children of Israel it was the *hard* causes that were brought to Moses, and not those which were plain.

If the facts of this case were not in dispute, the parties might have agreed upon them, and put their admission in writing on the record; or the defendant might have demurred to the plaintiff's evidence, instead of meeting it with counter evidence of his own. In either of these ways, we would have had something before us fixed, clear, and certain to go by. But, when the whole subject is handed over to the Court with nothing decided, it is in the same condition it was in before the jury were called.

We review here nothing but what appears on the record. This record is a blank. Evidence can be put on the record only by a bill of exceptions taken during the trial. A bill of exceptions to the judgment of the Court on a verdict, cannot put on the record anything, except what is stated in a reserved point.

The jury found a single fact, and on that gave a verdict for the plaintiff. The Court found other facts, and thereupon disregarded the conclusion of the jury, and gave judgment for the defendant. Neither we nor the judge who tried the cause below, have any authority whatever to do such things.

If a Court can reserve all the evidence in a case, and call it a

Digitized by Google

www.libtool.com.cn

point, then there is no use for juries, and very little use for judges of the Common Pleas. The jurors may leave the evidence to the Court, and the Court can hand it over to us without more trouble than it costs to pronounce a judgment *pro forma*, for one party or the other. But our responsibilities must be squarely met, since there is no tribunal beyond us on whom we can shoulder them off. We must try the cause, ascertain the facts, and decide the law on all the evidence, just as if it had never been heard elsewhere. If we must come to this, let us hear the witnesses, or at least have their testimony in the shape of depositions. We can only rely on hasty notes, taken during a trial and reported to us without even the attestation of a bill of exceptions.

But it is unnecessary to discuss so plain a matter. We can easily understand how the practice crept into the District Court of Allegheny. Conscious as we were, from the first, of its mischief and its irregularity, we have ourselves been half tempted by the importunities of counsel to tolerate it. No man in the Commonwealth will see more clearly the dangers it may bring upon our jurisprudence; no one will guard the administration of justice from such errors with more vigilance; no one will be less likely to usurp a power not pertaining to his office, or more likely to discharge with fidelity those duties which do belong to it, than the learned judge who tried this cause below, whenever the subject is brought to his attention. And we think it extremely improbable that the counsel will ever again ask such a strange and unusual indulgence from any Court.

In every case where a general verdict is given, subject to a point reserved, the question of law thus reserved must be stated, and the facts on which it arises must be either admitted on the record or found by the jury.

Judgment reversed and *venire facias de novo* awarded.

Magaw *versus* Garrett *et al.*

A mortgage, other than one given to secure the purchase-money of the mortgaged premises, recorded on the same day that a judgment is entered against the mortgagor, is not "prior to all other liens on the same property," and is divested by a sale of the premises under proceedings upon a subsequent judgment.

Where the record shows a judgment equal in point of time with the mortgage, to be a subsisting lien at the time of the sheriff's sale, and there is no proof of notice of its entire payment to the purchaser, he will take the premises divested of the lien of the mortgage.

ERROR to the Common Pleas of *Mercer county*.

This was a *scire facias* upon a mortgage by William A. V. Magaw against John P. Garrett and J. R. Mills, with notice to John

Digitized by Google

J. Spearman and Benjamin Spearman, terre tenants. The facts of the case, and the points arising on the record, are fully stated in the opinion of his Honour Justice KNOX.

Stephenson and *Griffith*, for plaintiff in error, cited Act of 6th April, 1830, *Purd. Dig.* 231. The learned judge decided that the judgment of Pearson being open on the docket, it continued a lien within the intendment of the Act. A legacy is not on the docket at all, and yet is a lien: 9 *W. & Ser.* 103. A judgment entered for the same debt would not divest the lien of the mortgage: *Purd. Dig.* 232, pl. 91; 1 *Wh. Dig.* 1021, pl. 830. Faber himself, who is the purchaser and defends here, procured a fund to be placed in Judge Pearson's hands to satisfy his judgment; that was a virtual extinguishment of that lien. Faber was the actor in the case, and had full notice of all the facts. The mortgage was not given to secure the creditors, but Magaw himself. The debt of Faber, under which it was sold, was no part of the mortgage debt. The intention of the parties must control, and here the intention is plain—a security to Magaw, and not to the creditors of J. P. Garrett & Co. If the amount of these debts had been paid to Magaw, the mortgage would have been satisfied; or he could have released without the consent of the creditors.

Stewart and *Holstein*, contrà.—The Act of 1830 was an innovation upon the law as it then stood. The policy of the law is to disencumber estates: 10 *Harris* 317. The records are held to contain unerring information as to liens: 10 *Harris* 123, 359. The criterion is the lien docket: 7 *W. & Ser.* 200; 3 *Harris* 177; 3 *W. & Ser.* 233. That it is not only necessary to pay, but to have the satisfaction entered, is clearly sustained by 10 *Barr* 472.

The purpose of the mortgage was twofold: to pay the creditors, and secure Magaw. A payment to the creditors, against Magaw's consent, would have discharged the mortgage. The mortgage was not part of the purchase-money of Magaw's interest sold to Mills, as is shown by him taking a separate judgment for that.

The opinion of the Court was delivered by

KNOX, J.—This was a *scire facias* on a mortgage, and the only question presented by the case is, Whether the lien of the mortgage was divested by a sheriff's sale upon a judgment?

The facts were these:—Garrett and Magaw owned the land in dispute, as tenants in common. On the 8th of March, 1848, Magaw sold his interest in the land to Mills for the sum of $1000, for which a judgment-bond was given by Mills to Magaw, and entered in the Common Pleas upon the same day that the deed was delivered. Garrett and Magaw had erected a furnace upon the property, and carried it on under the name of J. P. Garrett & Co.

Digitized by Google

[Magaw v. Garrett.]

At the time of the sale of the real estate by Magaw to Mills, the latter agreed to take the place of the former in the firm of J. P. Garrett & Co., and to keep Magaw harmless from the firm debts. In accordance with this agreement, Mills and Garrett executed and delivered to Magaw the mortgage in suit in the penal sum of $20,000, conditioned to pay to the creditors of J. P. Garrett & Co. all the debts then owing, and to keep Magaw, the mortgagee, harmless from said debts. This mortgage was recorded on the 8th of March, 1848, and on the same day a judgment for $1000, real debt, was entered in favour of John J. Pearson v. J. P. Garrett. Subsequently, Mills conveyed his interest in the mortgaged premises to Garrett. Thus the fee in the entire estate was in Garrett, encumbered by the judgment from Garrett to Pearson, also the one of Magaw against Mills, and the mortgage Garrett and Mills to Magaw.

Amongst the debts of J. P. Garrett & Co., which Garrett and Mills had agreed to pay, and which formed part of the consideration of the mortgage, was one in favour of E. & F. Faber, upon which judgment was recovered in the Common Pleas of Mercer county, on the 28th day of May, 1849, for the sum of $1433.94. Proceedings were had on this judgment, by which, in April, 1850, other real estate of J. P. Garrett was sold for the sum of $1100, and purchased by Judge Pearson, to whose judgment it seems the purchase-money was applicable, although no formal application of it was made to this judgment, or any other. After the sale of Garrett's individual real estate, the mortgaged premises were sold by the Faber judgment, and purchased by the plaintiffs in that judgment. The terre tenants defend under this sale to Faber.

Upon the trial it was alleged by the defendants that the lien of the mortgage was lost, 1st. Because, at the time of the sheriff's sale, the mortgage was not "prior to all other liens, except other mortgages, ground-rents, and the purchase-money due the Commonwealth," and that therefore the Act of April, 1830, did not prevent the sale from discharging the lien of the mortgage; 2d. That, as the Faber judgment was one of the debts against J. P. Garrett & Co., for the payment of which the mortgage was given to secure, a sale upon an execution issued upon that judgment would discharge the lien of the mortgage, whether it was or not prior to other liens.

The allegation of the plaintiff is, that the mortgage was given for the purchase-money of the real estate, and that therefore it was prior in lien to the judgments entered upon the same day; and that, even if this is not so, the judgment of Pearson v. Garrett was paid before the sale, which left the lien of the mortgage good against the one-half of the estate. It is also contended by the plaintiff that the Faber judgment was not connected with the mortgage in such a manner as to make a sale upon the one divest.

Digitized by Google

www.libtool.com.cn

the lien of the other. The Court of Common Pleas ruled the case in favour of the defendants. Nine errors are assigned to the charge, but it is unnecessary to examine them in detail, as several of the assignments present substantially the same question. Had the mortgage been given for the purchase-money of the real estate, it would have been preferred in its lien to the judgments, as it was recorded within 60 days of the purchase. But there is no evidence upon this record to show that the mortgage was for purchase-money. In the plaintiff's statement of the case, he avers that the mortgage formed part of the consideration for the sale of the realty. This is denied by the counter-statement; and upon looking at the deed, which is printed only in the paper-book of the defendant in error, we find the consideration there stated to be $1000, and for this a judgment-bond was given by Mills to Magaw, as before mentioned. There does not appear to have been any evidence given upon the trial tending to establish the plaintiff's allegation that the mortgage was for purchase-money, and consequently we cannot say that the Court erred in answering his first point in the negative. Treating, then, the mortgage as upon an equality of lien with the judgments, it is clear that, as to the one undivided half, the sale divested its lien, for it is not pretended that the judgment of Magaw *v.* Mills was paid at the time of the sale.

How stands the case as to the Pearson judgment? The record showed this to be a subsisting lien, neither paid nor satisfied. It is said that the money made upon the sale of Garrett's individual real estate, together with the payments of interest which he had made, was sufficient to extinguish this judgment. But had the purchaser of the mortgaged premises notice of its payment? He knew that a fund had been raised by the prior sale of Garrett's property which was in the custody of the law; but, even if appropriated to the Pearson judgment, it was insufficient to satisfy it, and the legal effect of the sale upon the mortgage was the same if any portion of the judgment was unpaid. That a purchaser at sheriff's sale is protected by the recording act was decided in Pennsylvania as early as 1809, in the case Hiester *v.* Fortner, 2 *Binney* 46, and reaffirmed as late as 1853, in Stewart *v.* Freeman, 10 *Harris* 120. The record, in the absence of any notice to the contrary, is for him a safe guide, and he cannot be affected by evidence outside of the record, of which he had no notice. One about to purchase real estate at public or private sale is not bound to make further inquiry as to the existence of encumbrances than what he may learn from the public records. A secret lien will not be enforced against the estate in the hands of a *bona fide* purchaser without notice, and by parity of reasoning, payments of which he had no notice by record or otherwise, ought not to be used to prevent a sheriff's sale from divesting the lien of a mortgage.

Digitized by Google

www.libtool.com.cn

As the record showed the Pearson judgment, at the time of the sheriff's sale, to be an existing lien, equal in point of time with the mortgage, and as there was no evidence tending to prove notice of its entire payment to the purchasers, the Court of Common Pleas properly held that the estate sold passed into the hands of the sheriff's vendees discharged from the mortgage lien.

There is some difference of opinion in this Court as to the other question, and as the case is fully disposed of by the points already discussed, it is unnecessary to add anything further.

Judgment affirmed.

Graham *versus* Smith.

In the Act erecting a new county, it was provided, that in sheriffs' sales of lands situate there, made in the old county, the deeds should be entered in the docket of the Court of Common Pleas of the new county within thirty days after acknowledgment; the object of this provision was to give notice to purchasers, and none but *bonâ fide* purchasers before such entry of the deed could take advantage of an omission to have it so recorded within thirty days.

Where the defendant purchased after the plaintiff's title was regularly recorded, evidence that he was a purchaser for value was rightly rejected as irrelevant.

If a deed is impeached on the ground of being a voluntary conveyance, made to hinder, delay, and defraud creditors, and there are any facts and circumstances in evidence from which the jury could draw such an inference, they are the proper tribunal to pass upon the character of the conveyance.

Nor is it error in such case for the judge below to express an opinion upon the facts, if it be not given in the form of a binding direction to the jury.

Error to the Common Pleas of *Elk* county.

The ejectment in this case was brought by Josiah W. Smith against James Graham, to recover the possession of 100 acres of land, situate in Jay township, being part of tract No. 532. The plaintiff claimed title under a judgment entered in the Court of Common Pleas of Clearfield county, on the 1st June, 1841, against Eusebius Kincade, and which was regularly revived, execution issued, the land in dispute levied as his property, condemned and sold by the sheriff of Clearfield county on a writ of *venditioni exponas*, on the 4th September, 1848, to plaintiff, and a deed duly acknowledged on the 3d May, 1849, in the Common Pleas of Clearfield county. Upon this deed there was a certificate of the prothonotary of Elk county, that the same had been entered on the docket of that county on the 19th May, 1849, in accordance with the provision in the 1st section of the Act of the 27th April, 1844, being a supplement to the Act erecting Elk county.

On the trial, the defendant's counsel objected to the admission of this deed in evidence, because it had not been entered in Elk county within thirty days after the acknowledgment in Clearfield,

Digitized by Google

www.libtool.com.cn

and offered the prothonotary to prove that fact. This was rejected by the Court, the deed admitted, and defendant's counsel excepted to the ruling of the Court.

The title to the land was admitted to have been in Eusebius Kincade on the 17th September, 1840.

The defendant claimed title as follows: Deed from Eusebius Kincade to Zophar D. Pasco, dated the 17th September, 1840. Acknowledged 22d of same month, and recorded in Clearfield county, 26th February, 1841. And also recorded in Elk county after its erection, on the 8th July, 1844. The consideration expressed in the deed was $1000. On the 2d of May, 1851, Zophar D. Pasco conveyed the land to Charles R. Early, for the consideration of $500. And, on the same day, Early and wife conveyed to the defendant.

The plaintiff alleged that the sale made by Kincade to Pasco, who was his father-in-law, was fraudulent and void, and showed the indebtedness of Kincade; and that, after the sale, he continued in possession of it, taking the profits and exercising acts of ownership over it, as he had done before; and that Pasco *appeared* to be a poor man, and whose only ostensible business was teaching school and preaching occasionally.

The defendant showed a lease from Pasco to Kincade, and that some money passed at the acknowledgment of the deed; the witness could not speak of the amount. He also offered to show a mortgage given by him to Early on the 2d May, 1851, for $450, to show the consideration he had paid for the land. This offer was rejected as irrelevant.

The Court below (WHITE, P. J.) submitted the question of, whether the deed from Kincade to Pasco was fraudulent and void, and made to hinder and delay the creditors of the former or not, with an intimation of the opinion of the judge that the facts, if believed, were against the validity of the deed. The counsel of the defendant excepted.

The jury found for the plaintiff.

Errors were assigned: 1st, To the admission of the sheriff's deed. 2d, To the rejection of the mortgage. 3d, To the refusal of the Court to instruct that there was no evidence that the deed from Kincade to Pasco was fraudulent. 4. To the instruction that the absence of proof of payment or ability to pay, and evidence of apparent destitution, ought to be regarded as *prima facie* proof that the consideration had not been paid.

Lucas, for plaintiff in error.

Johnston, for defendant in error.

Digitized by Google

[Graham v. Smith.]

www.libtool.com.cn

The opinion of the Court was delivered by

KNOX, J.—We will dispose of these errors in the order in which they are assigned.

1. The proviso to the Act of Assembly of 27th April, 1844, requires "that, in case of sale of real estate by the sheriff or coroner of the county of Clearfield, which is situate in the county of Elk, the deeds made by the said sheriff or coroner, after they are duly entered of record on the docket of the Court of Common Pleas of the county of Clearfield, shall, in like manner, be entered of record on the docket of the Court of Common Pleas of the county of Elk, within thirty days." The deed offered by the plaintiff below contained, on its back, the certificate of the prothonotary, that it had been duly entered in the Common Pleas of Elk county on the 19th of May, 1849, which was sixteen days after its acknowledgment in Clearfield county. This corresponded with the entry in the appearance docket of the Common Pleas of Elk county. When the deed was offered in evidence, it was offered to be proved by the defendant below and plaintiff in error, by the prothonotary of Elk county, that the entry on the appearance docket was not made on the 19th May, 1849, and not until thirty days had expired, after the acknowledgment of the deed in Clearfield county.

To the rejection of this proposed testimony the 1st error is assigned.

We think it very clear that the Court below was right in rejecting this evidence, alike, because it was incompetent to contradict the record by parol; and because, if received, it would not have authorized the rejection of the sheriff's deed. The object of requiring the deed to be recorded in the county of Elk was to give notice of the sale, and none but *bona fide* purchasers could raise this question of notice. As it was not pretended but that the deed had been entered of record long before the plaintiff in error purchased, it was wholly immaterial whether it had been so entered within thirty days after its acknowledgment in Clearfield county or not. It is a mistake to suppose that the sheriff's deed would pass no title, unless it was entered of record within the thirty days mentioned in the Act.

2. The second assignment of error is based upon the rejection of a mortgage given by the defendant (Graham) to his vendor Early. The bill of exception states that it was offered to show a consideration, paid by Graham to Early, for the conveyance of the land in question. It was objected to by the plaintiff, upon the ground that the consideration of the deed, from Early to Graham, was not impeached.

We can see no injury that the plaintiff in error has sustained by the rejection of this mortgage. It is argued here that it had some bearing upon the question of notice, but how, or in what

Digitized by Google

www.libtool.com.cn
way, it could affect this question, we are at a loss to perceive. No such question was submitted to the jury, and there is no complaint that the learned judge, before whom the cause was tried, erred in saying to the jury that the defendants had record notice of the plaintiff's title before they or either of them purchased.

3. The plaintiff in error complains, because the Court left it to the jury to determine whether the conveyance from Kincade to Pasco was fraudulent or otherwise, alleging that there was no evidence of fraud. We are not satisfied that there was any error committed in permitting the jury to pass upon the character of the conveyance. It appears to us that there was evidence tending to prove that the deed was a voluntary one, and that it was made with the intention of *hindering, delaying, and defrauding creditors*. Upon a careful examination of the charge, we are of opinion that it was not only correct in a legal view, but that it was well calculated to aid the jury in coming to a right conclusion as to matters of fact.

4. We could not reverse upon the fourth assignment, even if the remark of the judge was not well founded in reason, for it was only an expression of opinion as to the weight of certain evidence, and not a binding direction; but it is proper to add that we coincide with the Court below, "that, in the absence of proof going to show that he (Pasco) had property or money, evidence of his destitution, and apparent want of means to pay so large a sum, ought to be regarded as *prima facie* proof, that the sum stated in the deed as the consideration, was not paid, and that he had not the means to pay it."

Judgment affirmed.

Thorndell *versus* Morrison.

In all civil cases, involving merely the right of property, the fact of marriage may be proved by long-continued cohabitation as man and wife.

The separate deed of a married woman, conveying her real estate, is void.

Such deed is equally void though her husband had previously abandoned her.

The Act of 11th April, 1848, confers no power upon a *feme covert* to make a valid conveyance of her real estate, unless her husband joins in the deed.

ERROR to the Common Pleas of *Fayette county*.

This was an ejectment for a house and lot of ground in Uniontown, brought by Noah Morrison and Ann his wife against William Thorndell, Jr., and others, in which a verdict and judgment were rendered for the plaintiff. The facts of the case, and the questions of law arising upon the record, are fully and clearly stated in the opinion of the Court.

Digitized by Google

[Thorndell v. Morrison.]

www.libtool.com.cn

Ewing and *Kaine*, for plaintiff in error.

J. B. Miller, contrà.

The opinion of the Court was delivered by

KNOX, J.—A brief statement of the facts of this case is necessary to a proper understanding of the legal questions raised by the assignments of error.

Ann Morrison (formerly Ann Springer), the plaintiff, intermarried with Noah Morrison in the year 1820, and resided with him at Uniontown, in this state, until the year 1834 or 1835, when Noah, the husband, went to Wisconsin, leaving his wife and children at Uniontown. The husband remained in Wisconsin until his death, which occurred in 1852.

In March, 1847, under proceedings in partition, the Orphans' Court of Fayette county allotted to Ann Morrison the land in dispute, which was of the estate of her deceased father, Noah Springer. On the 16th February, 1848, Ann Morrison by deed conveyed the property to Samuel Bryan, in consideration of the sum of $1500, and for which Bryan gave his bond, which remains unpaid, except a small part of the accrued interest. Soon after Bryan purchased, he took possession and made improvements to the value of $4000 or $5000. On the 4th of December, 1851, the lot of land in controversy was sold by the sheriff of Fayette county as the property of Samuel Bryan, and purchased by the plaintiffs in error, Eleazar Robinson and William Thorndell, Jr.

In April, 1852, this action of ejectment was brought in the name of Noah Morrison and Ann his wife against Robinson and Thorndell. In September, 1852, Noah Morrison died, and the case was tried in the name of the survivor, Ann Morrison, who claimed that her deed to Bryan did not divest her right, because it was executed by her alone during coverture. The defendants alleged, 1. That there was no legal evidence of the plaintiff's marriage with Noah Morrison; 2. That even if she was a feme covert her deed was good, because her husband had abandoned her fourteen years before the conveyance, and had lost all his marital rights, and that in consequence she had the entire control over her estate, real and personal; 3. That by certain acts of hers she was estopped from alleging her incapacity to make the deed. The verdict and judgment were in favour of the plaintiff below.

The first assignment of error is to the reception of evidence of cohabitation and reputation, to establish the marriage between Ann and Noah Morrison. We have no doubt whatever that this evidence was properly received. The rule is, that for civil purposes, reputation and cohabitation are sufficient evidence of marriage: Sensor *v.* Bower and wife, 1 *Penn. Rep.* 450; Covart *et al. v.* Hertzog, 4 *Barr* 145. Even the rule that strict proof of

Digitized by Google

www.libtool.com.cn

solemnization of marriage is necessary in bigamy and in actions for criminal conversation has been so far relaxed in this state as to permit the admissions and acknowledgments of the defendant in a case of crim. con., to be given in evidence to prove marriage: Forney *v.* Hallacher, 8 *Ser. & R.* 158. It matters not in what way the marriage becomes essential to the case, its existence in all civil cases involving merely the right of property, may be shown by evidence of long-continued cohabitation as man and wife. It was for the jury to determine as to the sufficiency of the evidence to establish the marriage, but this does not seem to have been denied after it was received; the only objection was as to its competency, which is clearly unsustained.

The 2d, 3d, 4th, 6th, and 7th assignments of error are based upon the position that a married woman whose husband has abandoned her for a period of fourteen years, residing in another state, may make a valid conveyance of lands to which she acquired title under the intestate laws subsequent to the abandonment. If this position is unsound, the errors assigned, even if sustained, become immaterial. A careful examination of the authorities has brought me to the conclusion that an abandonment by the husband of the wife will not make good her separate deed for her real estate even as against herself, but that such deed is void. I will notice some of the cases cited by the plaintiffs in error, and upon which they rely to sustain the validity of the deed: Starrett *v.* Wynn *et al.* 17 *Ser. & R.* 131, was a case where personal property was acquired by the wife during the desertion of the husband, and it was held that her disposition of it by will was good; Bouslaugh *v.* Bouslaugh, 17 *S. & R.* 361, decides that where a husband by deed of separation without trustees, relinquishes to his wife all his right in her land, reserving the payment of an annual sum, the land cannot be taken in execution by a creditor of the husband's, whose judgment was obtained nine years after the husband and wife had been notoriously separated.

In Rees *v.* Waters, 9 *Watts* 90, it was held that where the husband had taken the possession of the wife's real estate, and made improvements upon it, and afterwards deserted her, the estate was nevertheless subject to his control. In Krupp *v.* Scholl, 10 *Barr* 198, pending proceedings for divorce, a husband who had deserted his wife was not permitted to make a voluntary assignment of her *choses in action* without consideration and for the mere purpose of destroying her right to them. In Rorer *v.* O'Brien, 10 *Barr* 212, where husband and wife were living separate and apart, and proceedings for divorce on behalf of the wife pending, and an action brought in the name of husband and wife by the husband to recover possession of her lands, it was held that evidence of her dissent ought to have been received. And in Tyson's Appeal, *Id.* 220, a husband who had treated his wife with personal indig-

Digitized by Google

www.libtool.com.cn

nity, and then deserted her, was not allowed to receive the interest of a fund belonging to her and set apart for her separate use. It will be observed that these cases (and others might be cited of the same general character) establish a doctrine which is necessary to protect the wife against the attempt of an unworthy husband who has deserted her, to deprive her of what in equity is her own. In vain he invokes the aid of the law to enforce his marital rights, whilst he neglects his marital duties. But it by no means follows that because the law will not permit a defaulting husband to take from a deserted wife property which she has inherited from her ancestors, received from the bounty of her friends, or earned by her own industry, that it will give to her the entire control of her real estate, so that she may sell and convey it during coverture by her separate deed, to the prejudice alike of the heir at law, herself, and her husband. Did the rule which makes the separate deed of the wife void, contemplate the interest of the husband alone, his abandonment of the wife might be a sufficient reason for the non-application of the rule; but, as was remarked by Justice ROGERS in Trimmer *v.* Heagy, 4 *Harris* 484, "the rule is founded on sound principles arising from the relation of husband and wife, and is necessary to avoid family discord, and to protect her interests." Does she need the protection of the law any the less on account of the desertion of her husband? The case in hand is a striking illustration of the danger to be apprehended from a departure from the principle which prevents the alienation of real estate by the separate deed of a *feme covert*. The plaintiff sold and conveyed away the patrimony which she received from her father's estate, and for aught that the evidence shows, all she received without any money being paid to her at the time of the delivery of the deed, and with no security for its payment save the bond of the purchaser. The result was the involving of the purchaser and non-payment of the purchase-money. True, it was her own neglect in parting with the title without making certain the payment of the price agreed upon, but the consequences of that neglect would be visited alike upon her children and herself. To prevent such consequences, the law wisely throws around her a shield in the form of a legal disability.

I am not aware that the precise question here presented has ever been decided in this state. The rule which declares void the separate deed of a married woman purporting to convey her real estate, has often been stated without an intimation that it had no application where a wife was abandoned by her husband.

In West *v.* West, 10 *Ser. & R.* 445, the power to devise her lands was denied to a *feme covert*, although she was living separate from her husband, and although husband and wife by deed had conveyed the estate to a trustee for the separate use of the wife, which deed, however, was not separately acknowledged by her.

Digitized by Google

www.libtool.com.cn

This case was reaffirmed in Wagner v. Ellis, 7 *Barr*, where it was held that a deed of husband and wife, without the separate examination of the wife, was inoperative and void as to her heirs, but that a husband's assent to a disposition by his wife of her lands when he was her sole heir, was binding upon him and his heirs.

In Hunt v. Devling, 8 *Watts* 408, the deed of a *feme covert* who had been deserted by her husband was admitted in evidence, but the grantor had been in possession for more than twenty-one years, and thus had acquired title by the statute of limitations. The deed was admissible, as was said in a *per curiam* opinion, "as inducement;" but there is no intimation in the opinion that the deed was of any validity in conferring title. In Clark v. Clark, 6 *W. & Ser.* 36, it is very clearly shown by Mr. Justice ROGERS that as long as the marriage relation exists, the wife is entitled to dower, and the husband to curtesy: neither right being destroyed by divorce *a mensa et thoro*. The case of Rhea v. Renner, 1 *Peters* 105, is directly to the point. There the husband had deserted the wife for more than five years before the execution of the deed, which was for real estate acquired by the wife after the desertion. It was held that the deed was void, because the husband was not a party to it. The weight of authority is clearly against the position assumed by the plaintiff in error, and assented to by the Common Pleas, that a deserted wife may lawfully sell and convey her real estate by her separate deed. At common law, the only mode in which a feme covert could convey her real estate was by uniting with her husband in levying a fine. Her deed of conveyance, whether separate or joint, was a nullity as to her interest. Our statute of 24th February, 1770, substitutes the separate examination of the wife for the more formal mode of the common law; but neither the formalities and solemnities of the one, nor the simplicity of the other mode, dispensed with the necessity of the husband's concurrence. The separate existence of the wife in reference to property is held by the common law to be merged in that of the husband. Separately, as was said by the Master of the Rolls in Martin v. Mitchell, 2 *Jac. & Walk.* 424, "she has no disposing power, though she may have a disposing mind." Now, as the disability arises from the marriage relation and its incidents, and is intended for the protection of the wife herself, why should it be removed whilst the coverture remains? The law of Pennsylvania upon this subject has been entirely uniform and consistent. For nearly a century no substantial alteration has been made in the mode by which a married woman can convey or assent to the conveyance of her real estate, or her interest in that belonging to her husband. Time has sanctioned the wisdom of the statutory requirements, and it is altogether too late to weaken the statute by establishing exceptions to the rule which it enjoins. Even our Act of 1848, great as was its innovation

Digitized by Google

www.libtool.com.cn

upon the common law theory of unity of person and interest in husband and wife, did in no respect authorize the wife by her separate deed to convey her real estate. Subsequent to, as well as before, the passage of the Act of 1848, every attempt to obtain title to real estate belonging to a married woman by her separate deed, has been an unavailing one; and we do but repeat what has been often said, when we pronounce her separate deed to be inoperative and void, for the purposes of giving title to her real estate. We add, in the present case, the declaration that the husband's desertion leaves the rule in full force.

From what has been said it is apparent that the exceptions to the admission and rejection of evidence, as well as the objections made to the charge touching the question of abandonment, are wholly immaterial; and there remains to be considered only the fifth assignment of error, which is in the following words, viz.: "The Court erred in not answering the defendant's 1st, 2d, and 6th points affirmatively." As this assignment is in direct conflict with more than one rule of this Court, it is noticed only to say that the very able argument made by the counsel for the plaintiff in error has failed to convince us that there was any error committed by the learned judge of the Common Pleas in not answering the points as requested.

Judgment affirmed.

Lewis, C. J.—The *feme covert* who executed the deed in this case in the absence of her husband, and after he had deserted her for many years, never received the consideration. The deed is invalid at law, and there is no equity in enforcing it against her. On this ground I assent to the judgment of this Court. If she had received the consideration, the case might stand upon different grounds, under the peculiar circumstances of her deserted condition, and the necessity which existed for transacting necessary business.

Digitized by Google

www.libtool.com.cn

The City of Allegheny *versus* Nelson and Others.

A judgment will not be reversed unless it is apparent from the record that an error has been committed, and that such error materially injured the rights of the party complaining.

To have a question reviewed in this Court, all the evidence given in the Court below, bearing upon the point, must be furnished in the paper-book.

An act, proved to have been done by a party at a time when it was against his interest to do it, may afterwards be given in evidence in his favour or those claiming under him.

The acts of the officers of the state in appraising, granting a warrant, and surveying an island in a navigable river, are *primâ facie* evidence against a stranger that the island was subject to appropriation in that manner.

A special Act of Assembly for the survey of a particular tract of land, is not such a public statute as the Courts are bound to take notice of and expound, without requiring its production.

ERROR to the District Court of *Allegheny county*.

This was an ejectment brought by William Nelson and others, against the city of Allegheny, to recover an island in the Allegheny river containing nine and three-fourth acres. On the 22d January, 1828, E. G. Nelson, through whom plaintiffs claim, made application to the land office, under the Act of 27th January, 1806, for a warrant for the said island. Appraisers were appointed to value the same, and make return whether such island was susceptible of cultivation in grain or esculent roots, in ordinary seasons. Their return valued the land at $40 per acre, but was silent upon the subject of its susceptibility of cultivation. On the 4th of June, 1829, Nelson paid one-fourth of the purchase-money, and a warrant issued to the deputy surveyor to survey to him the said island—which was done on the 20th of the same month, and the draft duly certified and returned to the land office. Nelson entered into possession, cleared and fenced four or five acres, and cultivated it in 1831; and died during the same summer, having devised it with his other real estate. Since 1831, or 1832, no part of it has been cultivated.

The defendants resisted a recovery, on the grounds that the land, embraced in plaintiff's survey, is not in fact an island, but is connected with the main shore of the river, and forms a part of it; and, as such, is embraced in the survey of the reserved tract, and belonged to the defendants. And also, that even if it be surrounded with water, it is not susceptible of such cultivation as the law requires; and that, therefore, the acts of the officers, in granting the warrant and making the survey, were unauthorised and void.

Various points were presented to the Court by the counsel for the defendants below, and the answers to the same assigned for

Digitized by Google

[City of Allegheny v. Nelson.]

www.libtool.com.cn

error in this Court, but the evidence upon which they were framed, and to which they related, was not put upon the paper-book.

Williams and *Geyer*, for plaintiffs in error.

J. J. Kuhn, contrà.

The opinion of the Court was delivered by

LEWIS, C. J.—This is an application to reverse the judgment of the Court below, without furnishing us with all the evidence pertinent to the questions discussed. If we are not permitted to see the evidence given on the trial, it is impossible to know whether the instructions have injured the plaintiff in error or not. To justify a reversal of a judgment, after a trial, it must be made apparent from the record, not only that an error has been committed, but that it materially injured the rights of the party complaining. To reverse, without being satisfied in regard to the last branch of this proposition, would, in many cases, be to overturn judgments for errors on mere abstract points, not properly involved in the proceedings below. The 3d assignment of error may be taken as an illustration of this. The plaintiffs in error, in their 8th point, requested the Court to say that, "if the land claimed was an island, it was not a legitimate subject of appropriation, under the laws of this state, unless it was susceptible of cultivation in grain or esculent roots, in ordinary seasons." This was refused; "but," the Court added, "the evidence is, that it was cultivated with esculent roots, sweet potatoes, &c." Now, if this was the uncontradicted evidence in the cause, there was nothing to justify the jury in finding against the paper title, on the ground that the island was not susceptible of cultivation; nothing which should have been left to the jury to warrant them in so finding. The answer, if intended to negative the legal proposition presented, was erroneous as an abstract principle. But it did the plaintiff in error no harm. If the evidence had been conflicting on this point; or, if the testimony, tending to show that the island was susceptible of cultivation, had been impeached, or discredited by any means, so as to require a correct statement of the law, in the event that the jury found the island not susceptible of cultivation, we should be obliged to reverse the judgment. In accordance with the decision of Reed & Rogers *v.* The City of Allegheny, as delivered by Mr. Justice WOODWARD, 12 *Harris* 42, an affirmative answer ought to have been given to the defendant's 8th point, if the evidence authorized the counsel to demand an answer at all. But, as this does not appear, we cannot reverse the judgment for an error not shown to be material.

Digitized by Google

[City of Allegheny v. Nelson.]

It is a general principle that a party cannot be permitted to give evidence in his own favour; but there is an exception in favour of acts of a person deceased, shown to have been done at a time when they were against his interest. An instance of this may be found in the endorsement of the payment of interest on a bond, which, from lapse of time, would otherwise be presumed paid. If the endorsement be shown to have been made by the holder, before the presumption of payment had arisen, it may be read in evidence in his favour afterwards, to repel the presumption. Proof that it was in the handwriting of the obligee, and that he died before the presumption had arisen, would render such evidence competent. The case before us seems to fall within this principle. It was against the interest of E. G. Nelson, deceased, to expend his time and money in taking out a title for the land in controversy, as an island, if it was not one. His application, and the proceedings in the land office, were therefore legitimate subjects for the consideration of the jury, in deciding whether the land was an island or not in 1828 and 1829, when it was applied for, appraised and surveyed as such. It is true that the appraisers omitted to certify according to the directions given to them, "whether the land was susceptible of cultivation in grain or esculent roots, in common seasons." They are silent on this point in their return; but they speak therein of having had regard to the "*soil*," &c., in fixing its value; and, as their report was not rejected, but was accepted and acted on by the receipt of a portion of the purchase-money, and the granting of a warrant, and causing a survey to be made, in pursuance of the application, the presumption is that the irregularity was dispensed with on other satisfactory evidence, that the island was susceptible of cultivation. These proceedings, as against a mere stranger, were surely *prima facie* evidence that all was rightly done; and, as the evidence is not given on the paper-book, we are not to intend that the city of Allegheny was anything more than a stranger.

As the Act of Assembly, authorising the survey of the reserved tract, had not been read in evidence, or referred to by the counsel, the Court left it to the jury "to determine whether it was the duty of the surveyor to make an exact survey of the river, and lay down all the islands in that part of the river bounding the reserved tract? In considering the propriety of this direction, it must be remembered that the state, in the sale of her lands, acts as an ordinary individual, and not as a sovereign. A special Act for the survey of a particular tract of land is not, as a general rule, such a public statute as the Courts are bound to take notice of and expound, without requiring its production. But conceding that the usage has been otherwise, in regard to the Act authorising the survey of the reserved tract on which the city of Allegheny stands, that usage has certainly been confined to controversies

Digitized by Google

www.libool.com.cn

respecting titles held under such survey. The river and the islands in it lie outside of the reserved tract. The Court was not bound to presume, in the absence of the Act of Assembly, that it contained authority to survey either the river or the islands in the river bounding the tract. An authority to survey a tract of land, bounded by a river, does not authorize the survey of islands in the river, although they are opposite to the tract surveyed. There was, perhaps, error in submitting it to the jury to decide on the extent of the surveyor's duty in this respect. But the error did the plaintiff in error no injury, as the point ought to have been ruled against him.

It follows, from what has been said on this point, that there was no error in deciding that "the certified copy of the original survey of the reserved tract was conclusive of the situation, size, and number of the lots, and of the streets, but *not of the river and the islands therein.*"

The opinion of the Court that "the dotted line was no part of the original plan or draft, and no part of the copy in evidence as certified, but that the same had been made there since," cannot be regarded as affirming any principle of law. It is merely an opinion on a question of fact, which was afterwards expressly left to the jury to decide for themselves. In this there is no error in law.

It is not necessary to examine the errors assigned further in detail. We see nothing which calls for a reversal of the judgment. But the occasion demands some remarks in regard to a practice which cannot be tolerated. The argument of a writ of error is, for the discussion of questions of law, apparent on the record. A statement of facts not on the record, or made part of it by bill of exceptions, is impertinent and improper. Allegations respecting the charge of the judge, giving a different version of it from that filed of record under the sanction of his oath of office, are highly indecorous. He is not a party to the case, and cannot be heard in his defence. It is, therefore, out of order to make the argument of a writ of error an opportunity for attacking his integrity. A writ of error is not a commission to settle questions of veracity or integrity between the judge and the counsel; and the counsellor who perverts it to such a purpose, abuses his privilege.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Pittsburgh and Steubenville Railroad Company *versus* Hall *et al.*

The assessment of damages occasioned to a tract of land by the building of a railroad, on the petition of several joint owners, is properly made in a gross sum.

It is no objection to the validity of the proceedings, that the viewers did not apportion the damages among the claimants according to their respective interests in the land.

CERTIORARI to the Common Pleas of *Allegheny county*.

On the 27th day of January, 1855, James W. Hall, Margaret Hall his wife (late Margaret Ewing), John Ewing, and Elizabeth Woods, the two former being the children, and the latter the late widow of John Ewing, deceased, now intermarried with Stephen Woods, presented their petition to the Court of Common Pleas of Allegheny county, alleging they were the owners of a tract of land in said county, and that the railroad company had entered upon and appropriated a portion of the said land for the purposes of their road. On the same day the Court appointed viewers, and on the 1st of March following, the report was filed, finding for the petitioners $1500 damages.

To this report the railroad company filed exceptions, one of which was to the effect, that the viewers had made no apportionment of the damages among the petitioners, according to their several interests in the land. These exceptions were overruled, and the report of the viewers confirmed.

The only exception pressed in this Court, was the one above stated.

Todd and *Smith*, for plaintiffs in error.—The claims of the complainants are distinct and distributive, and not collective and aggregate, and the finding of the viewers should correspond: 1 *Harris* 500; 7 *Watts* 33; 5 *Wheat.* 394; 3 *W. & Ser.* 464.

Hall and *Woods*, contrà.—The viewers assess the damages if there is any contest as to the distribution between the parties. A payment of the amount assessed would exonerate the company: 1 *Harris* 500. It is not necessary to set forth the title of the parties. The petitioners were bound to make out their title before the viewers, and in the absence of contrary proof, it will be presumed that they have done so: 7 *W. & Ser.* 236.

The opinion of the Court was delivered by

BLACK, J.—All the exceptions in this case are abandoned ex-

Digitized by Google

[Pittsburgh and Steubenville Railroad Co. *v.* Hall.]

cept one. That one is, that the viewers did not apportion and divide the damages among the different claimants, according to their respective interests in the land taken. This is nothing. If the railroad company pays these damages, it matters not to it how they may be divided among those entitled.

Judgment affirmed.

Carr *versus* Chartiers Coal Company.

The secretary of a private corporation, at a fixed salary, cannot recover extra pay for services in that capacity.

ERROR to the District Court of *Allegheny county*.

The action below was *assumpsit* by the Chartiers Coal Company, an incorporated body, to recover from its secretary, Carr, the defendant below, $200 retained by him beyond his annual salary, for extra services which he claimed to have rendered the company in numbering, filling, and countersigning coupon bonds issued by the company. The cause being submitted to the Court below upon a case stated, judgment was entered for the plaintiff below; to reverse which the defendant sued out this writ.

Mellon and *Stanton*, for plaintiff in error.—The presumption of law and of fact is, that the annual salary compensated no more than the regular and defined duty; and it being shown that this duty was not within the enumeration, and it being admitted to have been worth the full amount of $200, the law implies an undertaking to pay for it. The work being shown to be extra, is therefore entitled to extra compensation; for it is a well established principle of law "that, if work additional to that contemplated in the original contract be done at the request of the party benefited by it, he will be liable therefor, upon an implied promise to pay for it: *Story on Contracts*, § 15, citing Lovelock *v.* King, 1 *Moody & Rob.* 60; Dubois *v.* Canal Co., 12 *Wend.* 334; Damin *v.* Granby, 2 *Pick.* 345; Hoadly *v.* McLean, 4 *Manning & Scott* 340.

The opinion of the Court was delivered by

BLACK, J.—A person employed as the secretary of a private corporation, at a fixed rate of compensation, cannot demand extra pay for services in that capacity, which were not anticipated at the time of his appointment, or which were not enumerated in the charter or by-laws. The fair construction of his contract is, that he will do whatever his employers may have occasion to employ a secretary about.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Clarke & Thaw *versus* Needles.

If goods are received by common carriers, with orders to "ship immediately," and are stored in their warehouse, the navigation being obstructed, and there consumed by fire, they are liable for the value to the owner as common carriers.

If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessary to the carriage, and for the purpose of facilitating it, his liability as a common carrier begins with the receipt of the goods.

ERROR to the District Court of *Allegheny county*.

The action was case by Needles against Clark & Thaw.

The plaintiff, on the 21st June, 1858, caused twenty-five sacks of wool to be delivered to the defendants, at their warehouse in the city of Pittsburgh, (they being warehousemen and common carriers,) to be transported to Philadelphia, with instructions to ship the same immediately to the consignee. Two or three days before the delivery of the wool, the water had been drawn out of the canal, between Freeport and Leechburgh, for the purpose of repairing the Freeport aqueduct, and was not let in again until Saturday, the 25th of June.

In the mean time the navigation of the canal between Pittsburgh and Leechburgh was suspended; but one or more boats cleared daily (excepting on the 24th), at the collector's office in Allegheny, for Johnstown or Columbia, as shown by the clearance register. None of these boats, however, passed through the Freeport aqueduct until the 25th of June. One boat, belonging to the defendants, cleared on the 25th, laden with flour and second class goods for Philadelphia.

The plaintiff's wool was, on its delivery, stored in the defendants' warehouse, at the Canal Basin, where it remained until the night of the 26th of June, when it was destroyed by the accidental burning of the warehouse.

The declaration charged the defendants: 1. As common carriers; 2. Upon a breach of the contract to "ship immediately;" 3. For general negligence.

The jury found for the plaintiff $2190.68, subject to the opinion of the Court on the point reserved, "Whether the plaintiff, on the agreed facts, and all the evidence, is entitled to recover."

The Court (WILLIAMS, J.) afterwards entered judgment on the verdict for the plaintiff; to reverse which, and have judgment entered for defendants, *non obstante veredicto*, this writ of error was sued out by defendants below.

Stanton, for plaintiffs in error.—I. Where the same party acts in the capacity of warehouseman and common carrier, the liability

Digitized by Google

[Clarke v. Needles.]

www.libtool.com.cn

depends on the relation held at the time of loss: *Story on Bail.* § 445; *Gray's Mass. Rep.* 263; *Am. L. Reg.*, Nov. 1854, 59.

II. The instruction to "ship immediately" could only create the relation of forwarding merchants, which is the same as *warehousemen*: *Story on Bail.* §§ 444, 449; 10 *Watts* 385.

III. The Court below predicate their opinion upon the principle that, being delivered to the defendants to be forwarded, they *ipso facto* became liable as common carriers. This is erroneous. The receipt of defendants showed that they held the wool, subject to the instructions of plaintiff. That receiving the goods to "be forwarded" created the relation of common carrier, is a *non sequitur*, and contrary to the well established rules of law.

McCandless and *Bailey*, for defendant in error.—Were the defendants warehousemen or common carriers? When the object is carriage, the contract must be considered to be made in view of that object; the corresponding liability follows: *Ang. on Car.* §§ 129, 304, 131; *Story on Bail.* § 536; 5 *T. R.* 392; 1 *T. R.* 27.

They were liable on the express engagement to "ship immediately." Was it received to await the orders of the owner, or to ship? If the latter, defendants are liable as carriers: 4 *Wh.* 214.

They are liable for negligence in receiving the goods, when they knew they could not "ship immediately:" *Ang. on Car.* § 168.

The opinion of the Court was delivered by

LEWIS, C. J.—It is admitted that the defendants below were warehousemen and common carriers at the time the goods were delivered to them, with directions to ship them immediately to Still, Martin & Co., Philadelphia. If they had also occupied the character of *forwarders*, the directions to "ship immediately" might have applied to their duties in the latter capacity. But they were not forwarders. If the case contained any fact from which it might be inferred that the goods were delivered to be placed in the defendants' warehouse, to await the orders of the owners, or for any purpose of convenience to him, the ordinary liabilities of warehousemen would be all that could attach to them. But there was no direction to store the goods; no delivery to them for that purpose; no necessity or convenience of the owner requiring the goods to be stored. They were not delivered to be detained to await the orders of the owner. The goods, and the order to ship them immediately, were delivered together. The only inference to be drawn from the facts of the cause is, that they were delivered to the defendants as common carriers, and that the storing of them in their warehouse was an act of their own, for their own convenience, and was incident to their business as carriers. Judge Story, in his work on Bailments, § 536, states the law on this subject with precision. "If a common carrier

Digitized by Google

www.libtool.com.cn

receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier begins with the receipt of the goods;" "so if an innkeeper is at the same time a carrier, and goods are sent to his inn, and received by him for transportation, he is liable as a carrier for any loss before they are put upon their transit." "On the other hand, if a person is at the same time a common carrier and a forwarding merchant, and he receives goods into his warehouse, to be forwarded according to the future orders of the owner; if the goods are lost by fire before such future orders are received, or the goods are put in transit, he is not chargeable as a common carrier, but only as a warehouseman:" *Story on Bailments*, § 537. The case of Platt *et al. v.* Hibbard & Webb, 7 *Cowen* 497, was the case of delivery to a warehouseman, to remain there for the purpose of being forwarded, subject to the owner's order. It was there held that the bailee was answerable only to the extent of a warehouseman's liability. The case of Forward *v.* Pittard, 1 *T. R.* 27, was one in which the carrier was held to be liable for goods destroyed in his *booth* before they were put on their transit. It may be of some advantage to a carrier to have a warehouse, instead of a booth, in which to secure the goods until he is ready to put them on their way to their place of destination. But it is no concern of the owner of the goods. It works no change in the carrier's liability for goods delivered to him for transportation. That the goods were delivered in this case for that purpose is too clear for further argument. The defendants below were therefore liable as carriers, and the judgment should be affirmed.

Judgment affirmed.

Cook *versus* Dunkle.

Where the plaintiff's claim before the justice was for $25, in trespass, and referees awarded him $11, the defendant has no right of appeal under the Acts of 1814 or 1845.

ERROR to the Common Pleas of *Clarion county*.

The facts of the case appear in the opinion of the Court.

Myers and *Knox*, for plaintiffs in error.—Since the Act of 1845, the defendant has the right of appeal in all cases where the plaintiff has this privilege. It is regulated by the demand and not by the judgment: 3 *P. R.* 119; 2 *Watts* 304; 4th section Act of 1810. The amount set out on the docket in actions of *tort*, regulates the right of appeal: 12 *Ser. & R.* 385, 388; 3 *P. R.* 174;

Digitized by Google

www.libtool.com.cn

1 *Ser. & R.* 269; 3 *Id.* 461; 9 *Watts* 17; 1 *Jones* 410; 3 *Barr* 211.

Lathy and *Boggs*, for defendant in error.—The defendant could not appeal under the Act of 1810 or 1814, because the judgment against him was for *less than twenty dollars*. Does the Act of 1845 confer the right? Could the plaintiff appeal? If not, neither can the defendant. It only extends his right to the cases in which the plaintiff may appeal. The plaintiff could not, because his claim was *not reduced twenty dollars*. They reviewed the authorities cited by plaintiff in error, and cited 3 *Barr* 454; 1 *Jones* 280; 14 *Ser. & R.* 205.

The opinion of the Court was delivered by

KNOX, J.—John G. Dunkle brought an action of trespass against John Cook and Jeremiah McDonald, before a justice of the peace. The plaintiff's claim, as set forth on the docket of the justice, was for $25, damages for the destruction of his sheep by the defendants' dog; referees were chosen, who awarded in favour of the plaintiff $11, and judgment was entered upon the award. The defendants appealed to the Court of Common Pleas, where their appeal was dismissed for the reason that the case was not appealable. To reinstate the appeal this writ of error was taken.

The 3d section of the Act of 22d March, 1814, gives to either party the right to an appeal, where the judgment given by a justice or an alderman alone exceeds $5.33, or where, entered on an award of referees, it exceeds $20 in an action of trespass or trover.

The literal reading of this section would give to either party the right to appeal where the judgment, entered upon an award of referees, exceeded $20, and not otherwise. Thus, if the plaintiff's demand was for $100, and the judgment was for $1, the letter of the statute would not give him the right of appeal; but if his demand was for $25, and his judgment for $24, standing upon the letter alone, his right to an appeal could not have been questioned. Whilst in no case could the defendant appeal, if the judgment entered upon the award does not exceed $20. The injustice of such a statutory provision was so manifest, and its inconsistency so obvious, that the legislative intent was sought for beyond a literal reading. It was clear that the intention of the legislature was to preserve the right of appeal where the adjudication had been substantially against the party in a sum exceeding $20 by referees, or $5.33 by the justice or alderman alone, and to carry out this intention, it was decided by this Court, soon after the passage of the Act of 1814, that where the plaintiff's claim exceeded $5.33, and the judgment of an alderman was for the defendant, the plaintiff had the right of appeal (Stewart *v.* Keemlé, 4 *Ser. & R.* 72); but where the plaintiff's claim in *trover* was for

Digitized by Google

www.libtool.com.cn

$50 damages, and the referees awarded in his favour $11, it was held that the defendant could not appeal: Ulrich *v.* Larkey, 6 *Ser. & R.* 285. All of the subsequent cases, either under the Act of 1814 or that of 1810, have been in accordance with the principle above stated, that is to say, if the judgment is through the intervention of referees, and the plaintiff's demand, as set forth on the docket, has been reduced more than $20, he is entitled to an appeal, although the judgment may be for less than that sum. If the judgment is for more than $20, the defendant can appeal, but where it is for less, he cannot, except in cases under the Act of 1810, where a *bona fide* set-off has been made, and the amount which is adjudged against the party, including the set-off, is greater than $20: Stoy *v.* Yost, 12 *Ser. & R.* 385; Soop *v.* Coates, *Id.* 388; Klingensmith *v.* Nole, 3 *P. R.* 120; McClosky *v.* McConnel, 9 *Watts* 17; Downey *v.* Ferry, 2 *Watts* 304.

So stood the law until the passage of the Act of 20th March, 1845, which provided "that the right of appeal from judgments of aldermen and justices of the peace, and from their judgments on awards of referees, should be extended to defendants in all cases wherein, by existing laws, the right of appeal is enjoyed by plaintiffs." Under this Act it was held, in Prestly *v.* Ross, 1 *Jones* 410, that where a plaintiff, in an action of trespass, obtained judgment before an alderman for $5 upon a claim of damages of $25, either the plaintiff or defendant was entitled to an appeal. This Act gives to the defendant an appeal where the plaintiff may have one, but it does not extend the plaintiff's right, and there is no case to be found in our reports where the plaintiff has been allowed an appeal from a judgment entered by a justice of the peace or an alderman, upon an award of referees, unless he has lost, taking his demand as the standard of his rights, more than $20. In the case under consideration, as the judgment was for $11, the defendant had no right to appeal, unless they derived their right from the Act of 1845; and as the plaintiff's demand was only reduced $14 he could not have appealed, and consequently the Act of March 20, 1845, has no bearing upon the case.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Crow *versus* Kightlinger.

The estate of a husband in his wife's lands, is barred by an actual adverse possession of it by a stranger for twenty-one years, during the life of the wife.

The death of the wife after the statutory bar has thus intervened, gives him no new right of entry or action.

Nor can he avoid the bar of the statute by bringing the action during his wife's life, in their joint names.

ERROR to the Common Pleas of *Indiana county*.

This was an action of ejectment for three undivided fourth parts of 200 acres of land, brought by Michael Kightlinger and others against Samuel Crow and others, in which the plaintiffs claimed as the heirs of Thomas Wilkins.

The defendants claimed to hold the land under the statute of limitations, and proved that Henry Livingston entered into possession of the premises in 1812 or 1813, and that they afterwards came into possession under his claim, and continued till the trial of the cause.

To avoid the bar of the statute, the plaintiffs proved that Thomas Wilkins died in 1801, leaving eight children, four of whom died without issue prior to the year 1808. The survivors were Mary (not a party to this suit), Elizabeth, married to Jonathan Benn in 1801, and who died in 1845; Ruth, married to Samuel Reed in 1804, and who died in 1815; and Isabella, intermarried with Michael Kightlinger in 1809, and still living; and who, with the husbands and issue of Elizabeth and Ruth, were the plaintiffs in the cause.

On this part of the case, the Court below, BURRELL, P. J., charged the jury as follows:—

"Elizabeth was married to Benn in 1801, and died about 1845; Ruth married Reed in 1804, and died in 1815; and Isabella married Kightlinger about 1809, and is still living. Now, as Elizabeth and Isabella were married in 1812 or 1813, when this alleged adverse possession commenced, the statute did not run against them, and has not commenced to run against Isabella; and has only been running ten years against Benn, the surviving husband of Elizabeth. But as to Samuel Reed it is different. His wife died in 1815, and he could have sued then to recover his wife's estate; and therefore if there was an adverse possession kept up for twenty-one years, he cannot recover."

The jury found for plaintiffs two undivided fourth parts, and against the claim of Reed, whose wife died in 1815.

The defendants sued out this writ of error.

Drum, *White*, and *Coffey*, for plaintiffs in error.

Digitized by Google

[Crow *v.* Kightlinger.]

www.libtool.com.cn

The opinion of the Court was delivered by

Lewis, C. J.—The rule of Court, adopted more than three years ago, requires that "when the error assigned is to the charge of the Court, the part of the charge referred to must be quoted *in totidem verbis* in the specification." It has been repeatedly held that an assignment which merely alleges that the Court erred in their answer to a point, specified by number, without quoting either the point itself, or that part of the answer complained of, is not a specification of error according to the rule. In the seven assignments in this case, there is not a single *specification* of error. But in the exercise of our discretion, we feel inclined to take notice of an error which we think affects the justice of the cause.

The plaintiffs below were permitted under the charge to recover two undivided fourth parts of the land. The right of Samuel Reed was held to be barred, if the adverse possession of the defendants commenced in 1813, and was continued ever since. But in regard to the interests of Jonathan Benn and Michael Kightlinger and wife, it was held that although such continued adverse possession existed, the statute did not begin to run against them in time to bar their action. The right of action accrued to Jonathan Benn and Elizabeth his wife in 1813. Elizabeth died about the year 1845. The present action was brought in 1852. The Court seems to have been of opinion that Benn was not bound to bring suit until his title as tenant by the curtesy was completed by the death of his wife in 1845. In this we think there was error. A person having different rights of entry is, in general, not barred until the statute has run against them all. This would be the case of the remainder-man where the tenant for life loses his estate by non-acceptance or by forfeiture: Wells *v.* Pierce, 9 *Mass.* 508; 9 *Viner's Abr.* 442. In that case the remainder-man may enter for the forfeiture presently, or he may waive it and wait until the life estate expires by limitation; and he is not barred by the statute until twenty-one years after his last right of entry accrues. But the estate which a husband holds in right of his wife, is but one estate, although it be perfected by stages, and the husband has but one right of entry in regard to it. If he chooses to slumber on his rights for twenty-one years after he is deprived of it by an adverse possession, it is barred, so far as he is concerned, as fully as if he had made a release to the disseisor. The death of the wife, after the bar has thus intervened, does not give him a new right of action. Upon his death her heirs may bring their action as remainder-men; but this gives him no right. Nor can he avoid the effect of the statutory bar by bringing the action during his wife's life, in the joint names of husband and wife. A recovery in such an action is substantially a recovery of his own life estate, after it is gone by his own supineness. If she survive him, she may have her action within

Digitized by Google

www.libtool.com.cn

ten years after the disability of coverture is removed. But the right of action thus preserved for her benefit cannot be made available to resuscitate his own dead claim. The Court ought to have instructed the jury that if the defendants held possession adversely from 1813 down to the commencement of this suit, Benn and Kightlinger and wife were barred. It is the spirit of the statute to allow twenty-one years from the time the persons claiming right make an entry or support an action: Hall *v.* Vandegrift, 3 *Binn.* 374. In McDowell *v.* Potter, 8 *Barr* 189, the husband and wife were held to be barred in a personal action brought expressly for the benefit of the wife, although the wife, if surviving, would not have been barred.

As the plaintiffs below claimed under John Wilkins, a devise in the will of the latter to a particular person by name would be *prima facie* evidence against them of the existence of such a person at the date of the will, unless there were some expressions in the instrument to throw a doubt on the question. As the will is not given in the paper-book, we cannot reverse for any supposed error in the construction of it, or in the effect given to its language. And as the errors are not particularly specified, we do not think it necessary to examine the proceedings any further in search of them. When the cause comes back, the plaintiffs in error, if really injured by the decision, will probably take the trouble to specify particularly the errors of which they complain.

Judgment reversed and *venire facias de novo* awarded.

Fullerton *versus* Campbell.

Where additional plaintiffs were added, after an appeal by defendant from an award of arbitrators, and a *scire facias* was sued out on the recognisance reciting a suit, in the names of the plaintiffs, including those added after the appeal, it was *held* fatal to a recovery on the plea of *nul tiel* record.

Error to the Common Pleas of *Armstrong county*.

This was a *scire facias* upon recognisance of bail. Hugh Campbell brought an action of trespass, *vi et armis*, against James Milligan, and the case being referred under the compulsory arbitration law, an award was made in favour of the plaintiff. On the 14th of May, 1853, the defendant appealed from this award, and Fullerton, the defendant in this action, became his bail on the appeal. A plea in abatement was filed, and at the trial the Court permitted the plaintiff to add the names of Philip Templeton and A. Colwell, as plaintiffs, and a verdict and judgment were rendered for the plaintiffs. This *scire facias* was sued out in the names of Campbell, Templeton, and Colwell, to recover from Fullerton, the bail, the costs that accrued subsequent to the appeal.

Digitized by Google

[Fullerton v. Campbell.]

www.libtool.com.cn

The defendant, among other things, interposed the plea of *nul tiel* record. This was overruled, and, under the charge of the Court, the jury rendered a verdict for the plaintiffs for $53.05, the amount of the costs.

Smith and *Fullerton*, for plaintiff in error.—There is no such record as that recited in the *scire facias*. The defendant was bound to Campbell alone, and the plaintiffs could not, by the amendment, vary his responsibility: 6 *Rob. La. R.* 47; 9 *Wheat.* 680; 4 *Barr* 348; 5 *Id.* 316; 7 *Harris* 119.

Golden and *Fulton*, contrà.—The amendment made was properly allowed: Act 4th May, 1852; *Purd. Dig.* 38. The defendant assumed his responsibility subject to every legal change or amendment which might be made in the cause: Act 20th March, 1845; *Purd. Dig.* 48. Bail under this statute assumes a more extensive responsibility than an ordinary surety. Nor is the engagement subject to the same equities.

The opinion of the Court was delivered by

Lewis, C. J.—When Fullerton became the bail for Milligan's appeal, Hugh Campbell alone was the plaintiff. The result shows that he ought to have joined in the action the names of Philip Templeton and A. Colwell, and that the award in favour of Campbell alone was unjust, or at least illegal. The omission to join the proper parties may have deprived the defendant of a fair hearing in questions of payments to the parties not named, or set-offs against the real plaintiffs, and may also have deprived the defendant of the security to which he was entitled in case of a judgment in his favour. These considerations may have influenced Fullerton in becoming security for the appeal. He became bail on an appeal against the unjust claim of Hugh Campbell. His engagement is not to be extended to liabilities for his principal in a suit brought by Hugh Campbell, Philip Templeton, and A. Colwell. The Court had the power to permit the amendment, if it appeared to them that a mistake or omission had been made. But the mistake in this case was that of the plaintiffs, and they have no right to visit the consequences of it upon the bail, who, for all that appears, never would have become bound as bail on appeal if the recovery before the arbitrators had been in favour of the proper parties. The judgment should have been for the defendant on the plea of *nul tiel* record.

Judgment reversed and judgment for the plaintiffs in error on the plea of *nul tiel* record, with costs.

Digitized by Google

www.libtool.com.cn

Shaw *versus* Irwin.

In an action of partition, where a verdict and judgment are rendered for the defendants on the plea of *non tenent insimul*, they cannot recover their costs from the plaintiff.

ERROR to the Common Pleas of *Fayette county*.

This was a *scire facias sur recognisance*. An action of partition was brought by Lewis Mitchell against M. W. Irwin and others—the defendants pleaded *non tenent insimul*. The plaintiff was ruled to enter security for costs, and Shaw, the defendant, entered into recognisance in the sum of one hundred dollars, as security for plaintiff. A verdict and judgment were entered in the partition in favour of the defendants. This suit was brought to recover plaintiff's costs. A verdict was rendered for the plaintiff, subject to the opinion of the Court, whether costs were recoverable in the cause. The Court below (GILMORE, P. J.) entered judgment for the plaintiff on the verdict.

This was assigned for error.

Deford, for plaintiffs in error.

Patterson, for defendant in error.

The opinion of the Court was delivered by

LEWIS, C. J.—After some conflicting decisions, it was settled in equity that the costs of issuing and executing the commission, in partition, and of making out the title to the several parts of the estate, should be borne by the parties in the proportions in which they were respectively entitled to the estate: Calmady *v.* Calmady, 17 *Ves.* 555, note 1; Agar *v.* Fairfax, 17 *Ves.* 533. But no costs were given up to the hearing of the bill: Baring *v.* Nash, 1 *Ves. & Bea.* 554. For it was thought that one party ought not to bear any portion of the charges incurred, in respect to previous collateral questions raised by the other: Whaley *v.* Dawson, 2 *Sch. & Lefr.* 371. In accordance with this rule, it would seem to be clear, that where the bill was dismissed on the ground that the plaintiff had no interest in the estate, or no right to partition, he could have no claim upon the defendant for any portion of the costs. But whatever may be the rule in equity, it was settled in Stewart *v.* Baldwin, 1 *Penn. Rep.* 461, that where a defendant obtains a verdict in a writ of partition *at law*, on the plea of *non tenent insimul*, he cannot recover costs from the plaintiff. That is precisely the case before us now, and the only question is, does the Act of 11th April, 1835, apply to cases of this kind. That Act declares that "the costs in partition shall

Digitized by Google

be paid by all the parties in proportion to their several interests." Where the parties hold together, it is for their benefit to have their shares set out in severalty: 2 *P. Wms.* 377. It is, therefore, reasonable that each should bear a proportion of the expenses of partition. The Act of 1835 was designed to enforce this principle of equity, and to engraft it upon the action at law. But it applies only to cases where the parties have a common interest, and where that interest is set out in severalty by the partition. Where there is no interest in common to be divided, or where there is no partition awarded—where the plaintiff has no interest whatever, and the defendant is entitled to the whole estate in severalty, it would be unjust to compel the parties to pay the costs "in proportion to their interests." Under that rule the party who owned the *whole estate*, and who was unjustly vexed by the false claim of one who had no interest whatever, would be bound to pay *all the costs*. If the Act of Assembly applies to the case at all, it makes him liable not only for his own costs, but for the costs of the party who unjustly annoyed him with a groundless suit. It is plain that the Act does not apply to the case of a verdict for the defendant, on a plea which denies that the parties hold the estate together and undivided. In such a case there is nothing to show the extent to which each is interested in the estate, and the law as it stood before the Act applies. By that law no costs are recoverable. This may seem unreasonable, but the remedy is with the legislature. We cannot alter the law: 1 *Penn. Rep.* 461. If the statute of 4 James 1, ch. 3, was really enacted in the language in which it purports to be copied in the paper-book of the defendant in error, the propriety of the decision in Stewart *v.* Baldwin might be doubted. By omitting the words which expressly confine it to cases wherein the plaintiff or defendant might have costs, in case judgment should be given for him, the counsel represents it as having a general application in favour of defendants in all actions whatsoever, where the defendant nonsuits the plaintiff, or obtains a verdict against him. We do not suppose that any unfair practice was intended in omitting the material part of the statute. But counsel, for their own sakes, should be careful to guard against such unaccountable omissions. Others might not be as charitable in their constructions.

Judgment reversed, and judgment entered here for the plaintiff in error *non obstante veredicto*, on the point reserved.

Digitized by Google

www.libtool.com.cn

Ramage *versus* Peterman.

Where the evidence of the location of a survey is conflicting or doubtful, it must be referred to the jury; but where the evidence is clear and there is no room for doubt as to what land is included, the law of the case as to which of the parties has the better title to the interference is for the Court, and they may give a binding direction upon the same.

Where the jury, directly against the charge of the Court, found a verdict for the plaintiff, the Court had authority to send them out to reconsider their finding, and record their verdict subsequently rendered in favour of the defendant.

ERROR to the District Court of *Allegheny county*.

This was an ejectment brought by Benjamin Ramage to recover from Philip Peterman about three acres of land lying in Jones's district of the depreciation lands. The plaintiff was the owner of tract No. 12; the defendant, of tract No. 18. The land in dispute was included within the lines of both tracts. The title to the depreciation tracts dates from the patent. The defendant's patent for No. 18 was dated 30th August, 1786; the plaintiff's, for No. 12, on the day following.

The Court below (WILLIAMS, J.) instructed the jury to find for the defendant. The jury returned into Court with a verdict in favour of the plaintiff. They were thereupon instructed by the Court to retire and reconsider their finding, and having done so, brought in a verdict for the defendant.

The counsel for the plaintiff objected to sending the jury out a second time, and requested to have the verdict recorded as the jury had returned it; which the Court overruled.

The instruction to find for the defendant, and the refusal of the Court to record the verdict as the jury first brought it into Court, were the errors assigned.

Woods, for plaintiff in error.

Bruce and *Shinn*, for defendant in error.

The opinion of the Court was delivered by

KNOX, J.—Where contradictory evidence is given of the location of a survey, or where from the evidence the true location is doubtful and uncertain, it must be referred to the jury to determine the land included in the survey; but where there is no conflict in the evidence, and no room for doubt or hesitation in regard to the location, there is nothing to leave to the jury, and the questions of law are for the Court. Such was the case in hand. From the evidence given on both sides, it was perfectly clear that, as originally surveyed, the land in controversy was included in

Digitized by Google

both numbers 12 and 18. Not a "single spark of evidence" was offered or received, from which a doubt could arise as to the true location of these surveys, and hence it became simply a question of law, which gave the better title. And this was equally free from difficulty. To the depreciation surveys the title attaches from the date of the patent, and as the defendant's patent was the older by one day, it gave him priority of right. There was nothing in the case to impair the defendant's title, and therefore the District Court rightly charged the jury that the verdict should be for the defendant.

In the face of the charge, the jury returned with a verdict for the plaintiff; but, upon the request of the Court, they reconsidered their verdict, and, in obedience to the instruction, found for the defendant.

We entirely approve of the course pursued by the District Court in recommending a reconsideration of the verdict. Had the first one been received, it would of course have been set aside at once, and a new trial ordered. Where a verdict is returned directly contrary to the charge of the Court, it is but fair to presume that the jury have mistaken their instructions, and it is far better to give them an opportunity to correct the mistake, than to impose upon the parties the delay and expense of another trial.

Judgment affirmed.

Essler *versus* Johnson.

In proceedings under the Act of 3d April, 1830, relative to landlord and tenant, the affidavit of the defendant that the title to land will come in question, will not oust the jurisdiction of the justices; it must be proved like any other fact in the cause.

Where the judgment of the justices is affirmed on *certiorari*, it becomes a judgment of the Court of Common Pleas, from which the writ of *habere facias possessionem* may issue.

Error to the Common Pleas of *Allegheny county*.

This was a proceeding commenced before two justices under the Act of 3d April, 1830, in relation to landlords and tenants.

On the hearing before the justices, Essler appeared and made affidavit that the title to the real estate would come in question, and that he did not hold by lease or otherwise from Johnson, but claimed title in himself.

The justices gave judgment against Essler, and he removed the cause to the Court of Common Pleas by *certiorari*, where the same was affirmed, and a writ of *habere facias possessionem* issued. This writ of error was then taken.

The only questions raised here were, whether the jurisdiction

Digitized by Google

www.libtool.com.cn

of the justices was ousted by the affidavit of the defendant, and whether the Court of Common Pleas had power to issue a writ of *habere facias* in the case.

Howard and *McCandless*, for plaintiff in error.

Shannon, for defendant in error.

The opinion of the Court was delivered by

KNOX, J.—In Clark *v.* Everly, 8 *W. & Ser.* 226, it was held that, in a proceeding by a landlord against a tenant, to recover possession of the demised premises, under the Act of 3d April, 1830, if it appeared from the evidence that the title was in dispute, and that the alleged lessee refused to pay rent because he claimed title in himself, the jurisdiction of the magistrates was at an end, and the remedy to obtain possession must be the common law action of ejectment. But there is no intimation in the case above mentioned that the defendant's affidavit that he claims title to the land, is sufficient to prevent the landlord from obtaining possession by the summary proceeding given by the Act aforesaid. The Act of 20th March, 1774, commonly known as the Landlord and Tenant Act, as well as that of 16th June, 1836, in reference to purchasers at sheriff's sale, authorizes the oath of the party claiming adversely to be taken, so as to prevent the justices from giving final judgment; but there is no such provision in the Act of 3d April, 1830, and the general rule clearly is, that want of jurisdiction cannot be established by the oath of the party alleging it. Under the One Hundred Dollar Act a justice of the peace has no jurisdiction of a cause of action where the title to land may come in question, directly or indirectly; but it was never pretended that the affidavit of the defendant, that the title of land would come in question, could be received in order to oust the jurisdiction of the justice. Unless it appeared affirmatively by the plaintiff's showing, it had to be proved by the defendant, like any other fact in the cause; and when shown, it was the duty of the justice at once to dismiss the suit. If the justice proceeded to give judgment, the want of jurisdiction could be shown upon an appeal to the Common Pleas, and then it was equally fatal to the action. It must always, however, be established by competent evidence.

Where the question of jurisdiction depends upon the evidence given in a case, a court of error can only look to the record; and if the evidence is not upon the record, such Court must presume that the inferior tribunal has decided correctly. The remedy for an incorrect decision by the justices was by appeal to the Common Pleas, and in that Court the evidence could have been put upon the record by a bill of exceptions, and could have been reviewed here.

Digitized by Google

As the case is presented, we have nothing to disprove the jurisdiction of the alderman, but the defendant's own affidavit; and that is of no account whatever. Neither by *certiorari* to the Common Pleas, nor by writ of error to this Court, can the evidence given before justices of the peace, in a proceeding like the one under consideration, be brought up for re-examination. The judgment of the justices upon all questions of fact is conclusive, unless appealed from.

The writ of *habere facias possessionem* properly issued from the Common Pleas, after the judgment was affirmed on *certiorari*. It then became a judgment of that Court, and there it was to be enforced.

Judgment affirmed.

Grier and Warner's Appeal.

Administrators, who have sold property of the decedent to a creditor of the estate, may set off the amount against the *pro rata* dividend of such creditor, upon a distribution of the funds in their hands in the Orphans' Court.

Where the Orphans' Court makes an order, upon matter appearing of record in the Court, it is not fatal to the proceedings, that the facts were not set forth in a petition verified by affidavit.

APPEAL from the decree of the Orphans' Court of *Allegheny county*.

The facts of the case are fully stated in the opinion of the Court.

J. E. Brady, for appellants.

Marshall and *Brown*, contrà.

The opinion of the Court was delivered by

KNOX, J.—David A. Grier and Griswold E. Warner, as administrators of Nathaniel Stout, filed an account with the register of Allegheny county, in which the balance in their hands was stated at $3852.70. After confirmation by the Orphans' Court, an auditor was appointed to distribute the money in the hands of the administrators amongst the creditors. The fund was insufficient to pay the debts, and a *pro rata* distribution was made. The auditor reported to the claim of Valentine Fehl's assignee $200.64, and the report was confirmed, and the administrators were directed to pay the money in accordance with the report—subsequently the Orphans' Court made an order, upon the administrators, to pay the money appropriated to the claim of Fehl's assignee into Court, or show cause why an attachment should not issue.

Digitized by Google

[Grier and Warner's Appeal.]

www.libtool.com.cn

In answer to the rule, the administrators denied their liability to pay the money—1. Because, before Fehl made the assignment to Bell, they had sold to him a span of horses, belonging to the estate, for the sum of $150, which was a part of the balance reported to be in their hands, and of which distribution had been made, although it had never been paid by Fehl.

2. Because the administrators held Fehl's note for $200, for property belonging to the estate which was purchased at public sale by him, and which also formed a part of the fund distributed. The answer was verified by affidavit, and no replication made to it, nor evidence given to disprove it. We must therefore take it as true. It is difficult to perceive upon what ground the Orphans' Court made the rule for attachment absolute. It is by no means an uncommon practice, for those persons having claims against an estate, to purchase from the personal representatives property belonging to the estate, and when it is ascertained how much the purchaser is entitled to receive, either as creditor or distributee, from the estate, an application is made of the property purchased, to the demand of the purchaser against the estate. Neither the confirmation of the account nor the approval of the auditor's report prevented the administrators from claiming that the property, received by the creditor belonging to the estate, should apply upon his dividend. It is true, as against the assignee, the administrators can only claim a credit for the property sold to the creditor, before notice was given to them of the assignment; but such as was sold before they had notice, would, in equity, amount to a payment of the creditor's dividend. It was merely a payment in advance of the time when it could have been legally claimed, but it was valid between the parties to the transaction, and of course bound the assignee. He only took by the assignment the right to demand from the estate what was then due to his assignee, subject to all the equities between the administrators and the assignor.

The case of Carter's Appeal, 10 *Barr* 144, is cited to sustain the order of the Orphans' Court; that case is not in point, for there the claim which the administrator sought to set off against the distributee was due to the administrator in his own right, and it had no connexion with the settlement of the estate. The attachment was erroneously awarded, and must be set aside. If there are any disputed facts, the Court can direct an issue, or, if it is preferred by the parties, send the matter to an auditor to find the facts. As the case is here presented, the assignee is legally entitled to receive the difference between the amount reported by the auditor in his favour, and the price of the horses, for the answer does not allege that the sale of the property, out of which the note originated, was previous to notice of the assignment from Fehl to Bell.

Digitized by Google

[Grier and Warner's Appeal.]

www.libtool.com.cn

The objection to the jurisdiction of the Orphans' Court is not sustained. When an order is made, founded upon facts appearing of record in the Court, it is not fatal to the proceeding that the facts were not set forth in a petition verified by affidavit preceding the order.

The order of the Orphans' Court, making the rule for attachment absolute, is set aside. And the record is remitted to said Court, with directions to proceed and ascertain how much, if anything, is due to the assignee, in accordance with the opinion accompanying this decree; and it is further ordered that the costs of this appeal be paid by the appellee.

Henry *versus* Raiman.

An attorney-at-law who has been employed professionally to sustain a title to land, cannot either before or after the cause is ended, or during the continuance or after the termination of the relation of counsel and client, while the client holds or after he has conveyed his interest, purchase for himself the opposing or any outstanding title, but such a purchase will enure to the benefit of the client or his vendee.

Where the relation of confidence is in regard to the title to lands, the obligation of fidelity upon the counsel follows such title into whosesoever hands it may go, and good faith and public policy require that such obligation should *never* be violated.

A client, or his vendee, may recover the premises from such delinquent counsel, by paying or tendering the amount of the purchase-money with interest; and a purchaser from such counsel with notice of the facts, is in the same situation.

Where a party is entitled to a conveyance on the payment of the purchase-money, which he tenders, and a deed is refused, it is not necessary to aver a tender and pay the money into Court; it is sufficient to bring it in at the trial.

A condition annexed to a verdict, is in the nature of an injunction to stay proceedings at law, and an uncertainty in *it* will not vitiate the verdict: the Court may reduce the condition to a certainty either with or without an issue.

ERROR to the Common Pleas of *Somerset county*.

Ejectment for three hundred acres of land brought by Samuel Raiman against William Henry. Henry Woods and Henry Clymer were the holders of the legal title to the land in controversy; and, on the 5th March, 1825, demised the same to Peter Henry, on an improvement lease for seven years. While Peter Henry was in possession under this lease, he took out a warrant for this same land on the 9th July, 1832, had a survey made and returned; and, on proceedings before the Board of Property, the Reese Meredith warrant, under which Woods & Clymer claimed, was declared void, and a patent issued to Peter Henry upon his warrant and survey, on the 31st January, 1838. Woods & Clymer thereupon brought an ejectment against him. In this cause Joshua F.

Digitized by Google

www.libtool.com.cn

Cox, Esq., was one of the counsel of Peter Henry, and had all the title papers of Henry relating to the land in his possession. The cause was tried in 1837, and a verdict and judgment rendered in favour of the plaintiffs. A writ of *habere facias* was issued, and the plaintiffs put in possession on the 7th February, 1839. Peter Henry, on the 1st of November, 1838, being still in possession, conveyed all his interest in the premises to Samuel Raiman, the plaintiff in this suit. In 1839, to September Term, Samuel Raiman brought an action against Paul Cleavinger and William Henry, to recover these same premises, in which a verdict and judgment were rendered in his favour; but, the cause being removed to this Court, it was reversed on the ground that Raiman could not recover, without paying or tendering the amount Cox paid when he purchased. When the record was remitted, the plaintiff took a nonsuit: (See the case reported by the name of Cleavinger *v.* Reimar, 3 *W. & Ser.* 486.) By agreement with the counsel of Woods & Clymer, J. F. Cox purchased their title, but the paper is without date. On the 15th February, 1839, the executrix of Clymer conveyed to Cox the interest of Clymer, being two undivided third parts; and, on the 29th March following, the executors of Woods conveyed to Cox the remaining one-third of the premises; and, on the 14th December, 1839, Joshua F. Cox and wife conveyed to William Henry, the defendant below, for the consideration of $1600. William Henry was a witness on the trial of the case of Woods & Clymer against Peter Henry, in 1837, and knew of the sale by the latter in 1838, to Raiman, the plaintiff, and also that Cox had been the counsel of Peter Henry in that cause.

On the trial of this cause, Peter Henry was examined as a witness, and proved that his papers, in relation to the land, had been put into the hands of Cox, as counsel in the cause, in 1836, and continued with him until about the time he sold to Raiman in the fall of 1838, and that Mr. Cox had instructed him that his title was superior to that of Woods & Clymer, and advised against a compromise of the cause or purchase of their title.

Before the institution of this suit, the plaintiff tendered to the defendant $1600, and paid into Court, on the first trial of the cause, $1480. The verdict on that trial was for the defendant, which was set aside by the Court; and the money paid in was paid back to the plaintiff's counsel. On the second trial the plaintiff paid into Court the sum of $1600. The jury found a verdict as follows:—"We find for plaintiff, by plaintiff paying back the purchase-money with interest."

The following points were submitted to the Court by defendant's counsel:—

1. That if the jury believe that the relation of attorney and client, between J. F. Cox and Peter Henry, in the suit between him

Digitized by Google

www.libtool.com.cn
and Clymer & Woods, was at an end when the purchase of the land was made by J. F. Cox, then their verdict must be for defendant.

2. If the jury believe that such relation did exist when Mr. Cox made the purchase of the land, clear and explicit proof must be traced home to William Henry of that fact, before the plaintiff can recover.

3. Should the jury believe that William Henry, the defendant, was induced to make the purchase from the repeated declarations of Peter Henry that he would not purchase the Woods & Clymer title in any event, a recovery here upon the part of the plaintiff would be fraud upon the rights of William Henry, which cannot be tolerated in a Court of justice.

4. That more than thirteen years having intervened between the purchase of William Henry from Mr. Cox, and the bringing of the present suit, during which time valuable improvements were made by the defendant, it would now be contrary to the clearest principles of equity to permit the plaintiff to recover. Equities valid and undoubted may be destroyed by time, resulting either from easy carelessness, or cold and calculating cunning.

5. That a tender paid into Court must remain there until a final adjudication of the cause, and that a withdrawal of the money from the custody of the Court, from that moment leaves the tender in the same condition it would have been, had it not been made at all.

6. That the fraudulent conduct of Peter Henry, in attempting, while in possession of the land, as the tenant of Woods & Clymer, to defeat the title of his landlord, was an act of disloyalty that for ever debars him, or those who claim under him, from demanding equity from either J. F. Cox or William Henry, his vendee.

The Court (KIMMELL, P. J.), after stating the facts, instructed the jury as follows:—

"The plaintiff's counsel claim your verdict for the following reasons:—

"1. That as Mr. Cox was counsel for Peter Henry, in relation to this title when he purchased from Clymer & Woods, he became the trustee for his client, Peter Henry, and held the same, either for his use or use of the plaintiff, who, by the deed of 1st November, 1838, became vested with the legal rights of Peter Henry in the land.

"2. That the defendant cannot claim to take the land discharged of this trust as an innocent purchaser without notice, because they aver that the defendant knew at the time he bought from Cox, and previously thereto, the relation that existed between Mr. Cox and Peter Henry, as counsel and client in regard to the title and claim of Peter Henry.

"3. And that having tendered to William Henry, the alienee

Digitized by Google

www.libtool.com.cn
of Mr. Cox, the sum paid by Cox for the title of Clymer & Woods, before suit brought together with interest to the day of the tender, and having brought that sum into Court this day, and deposited the same with the clerk to defendant's order, the verdict must be for the plaintiff.

"If the jury believe that these positions are sustained by the evidence, then they will find for the plaintiff, unless there may be something to prevent it in the instructions the Court are about to give on the points submitted by defendant's counsel, (read.)

"The Court answer the first and second points in the affirmative.

"The Court instruct the jury on the third point, that if they believe that William Henry was induced to purchase the Woods & Clymer title from Mr. Cox, by the declarations of Peter Henry, before his sale to the plaintiff—that he had abandoned all claim to the land, then plaintiff cannot recover. But if Peter Henry refused to purchase the title, because he thought his own the best; and, especially, if this impression was made on his mind by instructions received from Mr. Cox, or if, when he refused to purchase, he declared his intention to hold on to his own, and dispose of it to some one else, then there is nothing in this point to prevent a recovery.

"The Court refuse to instruct the jury on the fourth point, because there are no facts in the case to which the principle can be applied.

"In answer to the fifth point the Court instruct you that the plaintiff was not bound to leave the money in the hands of the clerk, during the intervals of the Court, having produced it on the trial ready for the defendant's order, he has done all that can be required at his hands.

"If the defendant had desired to avail himself of the tender, he could have demanded the money at any time; had it been refused, the advantage gained by making it would have been lost.

"Sixth answered in the negative."

The principal errors assigned were to the answers of the Court to the points of counsel. The reception of the deed from Wood's executor to Cox, in evidence, and that no judgment could be rendered upon the verdict—it being void for uncertainty.

Baer and *Hugus*, for plaintiff in error.

Edie and *Gaither*, contrà.

The opinion of the Court was delivered by

Lewis, C. J.—Samuel Raiman, the plaintiff below, claimed the land in controversy under a purchase from Peter Henry, who had taken out a warrant for it on the 9th July, 1832, and received a patent on 31st January, 1835.

Digitized by Google

[Henry v. Raiman.]

www.libtool.com.cn

William Henry claimed under a warrant to Reese Meredith in 1776, which became vested in Woods & Clymer; an agreement between the attorneys of Woods & Clymer on the one part, and Joshua F. Cox on the other, ratified by conveyances to Mr. Cox on the 15th February, 1839, and 29th March, 1839, together with a conveyance from Joshua F. Cox to William Henry, on the 14th December, 1839.

But it is contended that the purchase by Mr. Cox, of the title of Woods & Clymer, enures to the benefit of Samuel Raiman; and this was the question tried in the Court below. It was in evidence that, in September, 1833, an ejectment was brought by Woods & Clymer against Peter Henry; that the latter employed Joshua F. Cox as his counsel to defend the suit, and placed the title papers in his hands. Mr. Cox received a fee, and attended to the trial of the cause; but Peter Henry was not heard on the merits of his title, on the ground that he stood in the relation of a tenant to Woods & Clymer, and was bound to deliver up possession before he could try his title. The cause was decided against him, on the 6th December, 1837, and he was turned out of possession on the 7th February, 1839.

The agreement for the purchase by Cox is without date, so that it does not clearly appear whether it was made before or after Peter Henry was turned out of possession. Nor does it appear whether it was made before or after Peter Henry conveyed his interest to Samuel Raiman. Clymer's ratification is dated but eight days after Peter Henry was dispossessed; and as Clymer lived in a distant part of the state, and the facilities for travelling were not as great in 1839 as they are now, it is probable that Mr. Cox made the contract for the purchase before his client ceased to occupy the premises. It is clear, however, that his client's rights were not concluded by the decision. One verdict is not conclusive in ejectment, even where the title has been tried; but in this case he had not had the benefit even of one trial on his title, before he found his own counsel arrayed against him, armed with the title of his adversary. If such a purchase can be justified by showing that, before it was made, the relation of counsel and client had terminated, either by the decision of the cause, or by the conveyance of the client's interest to another, the burden of proof is on the party who affirms this to be the case.

But such a transaction is not to be sustained on any such grounds. It is a mistake to suppose that the attorney is at liberty to violate the professional confidence reposed in him by his client, the moment the relation of counsel and client terminates. The necessities of the client compel him to repose unlimited confidence in his counsel. When he is in jeopardy—either of life, liberty, property, or character—he is obliged to repose confidence in his professional adviser, in order that he may be properly defended.

Digitized by Google

www.libtool.com.cn

If he is threatened with a lawsuit about his land, he is compelled to exhibit his title papers to his counsel, and to disclose to him every supposed defect in them, in order that imperfections may be remedied, and preparations made to sustain the title. So, if the life or liberty of the client be in danger from legal proceedings against him, unlimited confidence in his counsel is so necessary, that he cannot safely go to trial without it. As the necessities of litigation compel confidence on the one side, the policy of the law requires fidelity on the other. The policy which enjoins good faith, requires that it should *never* be violated. The reasons for requiring it at all demand that it shall be perpetual. Occasions may arise where an upright counsellor may feel himself bound to withdraw from his client's cause, but no circumstances whatever can justify him in betraying the trust reposed under the highest obligation of professional honour. Where fidelity is required, the law prohibits everything which presents a temptation to betray the trust. The orison which deprecates temptation is the offspring of infinite wisdom, and the rule of law in accordance with it rests upon the most substantial foundations. The purchase by an attorney of an interest in the thing in controversy, in opposition to the title of his client, is forbidden, because it places him under temptation to be unfaithful to his trust. Such a purchase, therefore, enures to the benefit of his client. Where the confidence has relation to the title to land, the fidelity of the counsel must necessarily follow the title of his client wherever it goes. Any other rule would defeat the object of the trust, by destroying the market value of the title. If a trust reposed for the purpose of establishing it, might be made available as the means of defeating it, the moment it passed into other hands, it would be more injurious than beneficial. No prudent man would repose confidence on such terms, and all men would be deterred from purchasing titles which had ever been in the hands of attorneys or counsellors-at-law. If, after the cause is ended, or the relation of counsel and client is terminated by a sale, or by the death of the client, the counsel employed to defend the title should be permitted to make war upon it by means of the purchase of the hostile claim, which he was employed to oppose, no one would be safe in the employment of professional aid. If the client's vendees, and even his orphan children, may be ruined by means of violating the trust reposed by their vendor or ancestor, and such breaches of trust are sanctioned by the Courts, the whole Commonwealth would be overwhelmed in litigation; all land titles in the state would be in jeopardy; the Bar would cease to enjoy the confidence of the people, and the Courts of justice, instead of being the bulwarks of public and private security, would become the most intolerable engines of disturbance and oppression.

In the case of Reid *v.* Stanley, 6 *W. & Ser.* 376, it appeared

Digitized by Google

www.libtool.com.cn

that Reid was employed by one Buck to make some examinations respecting Buck's title to the lot on which he had made valuable improvements. Reid discovered that Buck, instead of making his improvements on his own lot, had made them by mistake on a lot that belonged to Henry Pratt. Reid thereupon, without disclosing the discovery to Buck, purchased the lot of Mr. Pratt. Buck, a few days afterwards, sold and conveyed his title to William G. Birch, who put Stanley in possession as his tenant. After Birch, the vendee of Buck, had been in possession by his tenants more than a year, Reid brought an ejectment against the tenant, Stanley. Reid was not a member of the Bar. He was not employed under the seal of professional confidence. He was merely employed as an agent. Nevertheless, it was held that he could not avail himself of a defect discovered in the course of his agency, and that his purchase of the adverse title enured to the benefit of his principal. It was not supposed for a moment, in that case, that Reid could assert his ill-gotten purchase against the vendee of his principal with any better success than he could against the principal himself. Accordingly, Stanley, the tenant of Birch, who had purchased Buck's title, was allowed to defeat the claim of Reid, on the ground of duties assumed by him while the title was in the hands of Buck. If this rule exists in full force where the agent is not a professional adviser—where he is not an officer of the Court, created and recommended to public confidence by law—and where he is not acting under the sanction of an oath of fidelity to his principal, it applies with much stronger reason to the relation of counsellor and client, where so many circumstances combine to increase the confidence on the one side, and add strength to the obligation on the other. In Galbraith *v.* Elder, 8 *Watts* 81, it was held that the fidelity of the counsel must be *for ever observed*, and that a purchase of the adverse title, "after the relation of counsel and client had ceased, is equally forbidden with a purchase during the existence of such relation." In what has been here said, we do no more than carry out the spirit of that decision.

But had William Henry notice of this equity? Notice at any time before payment of the purchase-money is sufficient. The receipt on the body of the deed, although good evidence of payment against the party who signed it, is not evidence on a question of this kind to affect the rights of third persons: Union Canal Company *v.* Young, 1 *Whar.* 431; Bolton *v.* Johns, 5 *Barr* 151; Snelgrove *v.* Snelgrove, 4 *Des.* 287. We do not see the evidence of payment of the purchase-money by William Henry before notice of the equities arising out of the professional duty of Mr. Cox. But, admitting that he paid the whole purchase-money when he made the purchase, there is evidence that he was in attendance as a witness for Peter Henry in the suit in which Mr.

Digitized by Google

www.libtool.com.cn

Cox was engaged as counsel, and that he knew that the latter was so engaged. But this is not all. He purchased pending the action brought against himself and Paul Cleavinger by Samuel Raiman to September Term, 1839. That action was full notice that the plaintiff claimed the land. There was therefore no injury done to him in submitting the question of notice to the jury.

The objection to the tender, on the ground that the money was not kept in Court from the time it was refused till the time of trial, seems to be founded on an inattention to an established distinction on this branch of the law. Where a debt is due on a contract *executed*, and the creditor is entitled to it without the performance of anything on his part, an actual tender is required, and must be kept good by bringing the money into Court and pleading the tender, at an early stage of the cause, with an averment of "*tout temps prist.*" But this is not necessary where the agreement is *executory*, and the acts of the parties are to be concurrent; as where one is to make a deed and the other to pay the purchase-money. In such case an unconditional tender is not required. It is sufficient for the plaintiff, in order to put the opposite party in default, so that an action may be maintained, to show that he was *ready* and *willing* to pay the money, on receiving the consideration to which he is entitled. An offer to pay, and a demand of performance, is sufficient if performance be refused. In such case it is sufficient to bring the money into Court at the time of the trial. The rule here indicated was recognised by this Court, on full consideration, in McKean *v.* Wagenblast, a case not yet reported. Besides, although an offer to pay the money was necessary to the support of an action brought immediately on the defendant's taking possession, no such offer is necessary where the possession has been of so long a continuance as to require an account of the rents and profits before the amount to be tendered can be ascertained. The law never requires anything unreasonable. It was sufficient under the circumstances of this case to bring the money into Court at the time of trial. This is all that is necessary to be said on this part of the case. We do not decide that even that was indispensable.

But it is alleged that the verdict is void for uncertainty. The verdict is in favour of the plaintiff below for the land described in the writ. This is sufficiently certain. The uncertainty, if any exist, is in the *condition* annexed to the verdict, and not in the *verdict* itself. The condition is in the nature of an injunction to stay proceedings at law upon terms. It is in favour of the defendant below, and it was his business to see that it was expressed with sufficient certainty. An uncertainty in it will not vitiate the judgment at law. In the exercise of its chancery powers, the Court may reduce the condition to certainty either with or without an issue for the purpose: Harmar *v.* Holton, ante, p.

Digitized by Google

www.libtool.com.cn

245. The plaintiff below is required by the condition annexed to the verdict to pay "back the purchase-money with interest." What purchase-money? The law settles this. It can be no other than the purchase-money paid by Joshua F. Cox, under his agreement with Woods & Clymer. That agreement is returned with the evidence, and forms part of the record. By that contract it appears that the purchase-money paid by Cox was $630, with interest from 1st May, 1839, and $150 with interest from 1st May, 1840. This, at the time of the trial, amounted to the sum of $1519.80; and that sum was brought into Court before the verdict. The condition annexed to the verdict is therefore sufficiently certain, because it can be made so by reference to the contract, and to the money paid into Court.

It follows from these views of the questions involved in the cause, that the plaintiff in error has nothing to complain of. The action of the Court was quite as favourable to him as he had any right to require. The judgment must therefore be affirmed.

It is considered that the judgment on the verdict be affirmed.

It is further considered and ordered that William Henry have leave to take out of Court the sum of $1519.80 deposited there for his use, on delivering a conveyance in fee to the said Samuel Raiman of the said William Henry's title to the premises in controversy, as fully as it was derived from Joshua F. Cox, free from all encumbrances done or suffered by said Cox or William Henry.

KNOX, J., dissented from several of the positions taken in the foregoing opinion.

Raiguel & Co. *versus* McConnell.

An attachment execution to be available must make the debtor of the defendant garnishee, and not the person who holds the evidences of the debt.

Where an assignee under an unrecorded deed of assignment for the benefit of creditors, was summoned as garnishee, and admitted that he held book accounts and other evidences of debt, uncollected, most of which he considered worthless, no judgment could be entered against him for the amount of such accounts.

ERROR to the District Court of *Allegheny county*.

This was an attachment execution, issued by Raiguel & Co. upon a judgment for $2611.52, obtained by them against Joseph M. Elliott, in which Francis B. McConnell was made garnishee. The answer of the garnishee to interrogatories filed, and which was the only evidence in the cause, disclosed the following facts:

Digitized by Google

www.libtool.com.cn

That Elliott, on the 2d October, 1854, executed to garnishee a general deed of assignment for the benefit of creditors, which had never been recorded. That under said deed he had taken possession of the property and effects of Elliott, and realized from the sale of property, after deducting expenses, the sum of $585.22. And that he had in his possession and control, book accounts, &c., amounting to the sum of $5158.22, which he held in trust for the creditors of Elliott; and added: "I have collected no part of these claims, and consider them almost entirely worthless."

The plaintiff entered a rule to show cause why judgment should not be entered against the garnishee upon the facts disclosed in the answer; and after hearing, entered judgment as follows:—

"And now, June 12, 1855, the rule to show cause, &c., having come on to be heard, and the case having been argued by counsel, it is therefore upon consideration thereof ordered, that judgment be entered by the prothonotary against F. B. McConnell, garnishee of J. M. Elliott, for the amount of plaintiff's judgment against the said Elliott, with the interest and costs, to be discharged from the moneys admitted to be in the hands of garnishee, to wit, $585.22; and from the moneys received and coming into his hands from the book accounts, judgments, &c., amounting to $5158.22, assigned to him by the said J. M. Elliott."

Thereupon the garnishee sued out this writ.

Penney and *Sterrett*, for plaintiff in error.

The opinion of the Court was delivered by

Lewis, C. J.—Our system of levying executions upon debts due to the defendant, or deposits of money made by him, or of goods or chattels pawned, pledged, or demised, is established by the Act of 16th June, 1836. By that Act it is declared that "the same may be attached and levied in satisfaction of the plaintiff's judgment, in the manner allowed in the case of foreign attachment. Our proceedings in foreign attachment are founded on the custom of London. By that custom "if a plaint be affirmed against any man, and he is returned *nihil*, and the plaintiff will surmise that any other man who is within the city is debtor to the defendant, in any sum, he shall have his garnishment against him, for him to come and answer if he be indebted in the form which the other hath alleged:" *Priv. Lond.* 253. By this custom, and under the Act of Assembly regulating foreign attachments, the rule, in the case of attaching a debt, is to serve the attachment upon "the debtor to the defendant;" the "garnishment" shall be "against him," and not against the person who merely holds the evidences of the debt. In Stewart *v.* McMinn, 5 *W. & Ser.* 100, there has been a seeming departure from this rule. In that case, an assignee for creditors, holding

Digitized by Google

under a defective assignment, was held liable, as well for the money in his hands, as for the debts which remained uncollected. The assignment was made on the 5th June, 1837. The answer of the assignee was filed in March, 1838. There was no allegation that the debts assigned were desperate or otherwise uncollectable. It may therefore be considered a case where the assignee had made himself personally liable for them. In that view of the case he might fairly be regarded as "the debtor to the defendant," and the "garnishment against him" was proper. But where there is nothing to show that the assignee is in any manner liable for the outstanding debts; where he states that he has not collected any part of them, and that he "considers them almost entirely worthless;" and where there is no attempt to impeach the truth of this answer, but the answer is taken to be true, and the judgment is founded altogether on the facts admitted in it, there is no just ground for holding the assignee liable beyond the money admitted to be in his hands. A judgment for "the moneys coming into his hands from the book accounts, judgments, &c., amounting to $5158.22, assigned to him by the said J. M. Elliott," is unjust if the intention be to make him instantly and absolutely liable for debts admitted to be "almost entirely worthless." It is not sufficiently certain, if the object be to make him liable in case he shall hereafter collect them. The attachment proceeds upon the ground that the assignee has no right to collect them. How then can he be made liable for failing to do what he has no right to do? The rule in foreign attachment is that the garnishee is not liable for goods which came to his hands after plea pleaded: *Priv. Lond.* 259; *Sergeant on Attachments* 103. The judgment in the present case is in contravention of that rule, and is liable to the farther objection that instead of putting an end to the cause, it only lays the foundation for further proceedings to ascertain the extent of the garnishee's liability. The proper course for the plaintiff is to serve his attachment upon those who are "debtors to the defendant." His proceeding against the assignee, as to all beyond his own personal liability, is not a proceeding against the defendant's debtor.

The objections to the judgment against the assignee for the sum of money admitted to be in his hands, are not sustained.

It is considered that so much of the judgment of the District Court as directs that the plaintiff's judgments shall be discharged from the moneys coming into the hands of the garnishee from the book accounts, judgments, &c., amounting to $5158.22, assigned to him by the said J. M. Elliott, be reversed and annulled.

It is further considered that the residue of the judgment of said Court be affirmed.

Digitized by Google

www.libtool.com.cn

Woodwell *versus* The Bluff Mining Company.

Under the rules of the District Court of Allegheny county, no judgment can be entered for want of an affidavit of defence, in an action upon an *implied contract* to pay money

ERROR to the District Court of *Allegheny county*.

Woodwell was the owner of 160 shares of stock in "The Bluff Mining Company of Michigan." The company had made various assessments on the stock, the defendant's share amounting, at the bringing of the suit, to $344, to recover which this action was instituted. The defendant filed an affidavit of defence, but the Court, deeming it insufficient, rendered a judgment for the plaintiff.

The defendant sued out this writ, and assigned the action of the Court for error.

Selden, for plaintiff in error.

J. I. Kuhn, for defendant in error.

The opinion of the Court was delivered by

KNOX, J.—It is unnecessary to consider the sufficiency of the affidavit, for this was not a case in which an affidavit of defence was legally required.

The rule of the District Court of Allegheny county, under which the judgment was entered, is in the following words:—

"In all actions hereafter instituted in this Court on bills, notes, bonds, or other instruments of writing for the payment of money, on book account; in all actions on contracts for the loan or advance of money, whether the same be in writing or not; in all actions of *scire facias*, on mortgages and on liens of mechanics and material men, under the Act of 17th March, 1836, and the various supplements thereto; and in all actions of debt or *scire facias*, on recognisance, judgment, or other record, the plaintiff may enter judgment by default, at any time after the return day and ten days' service of the writ," &c.

The defendant was a stockholder in the plaintiff's company, and the action was to recover the amount of the unpaid assessments made on the defendant's stock. This cause of action is not embraced in any of the specifications in the rule. The action was not instituted on a bill, note, bond, or other instrument of writing for the payment of money, nor on a contract for the loan or advance of money, nor was it an action of *scire facias* of any description, and consequently the rule of Court did not apply to it. Had the action been brought upon a subscription to the stock

Digitized by Google

www.libtool.com.cn

of the company, or upon an agreement in writing made by the defendant with the company that his stock should be subject to assessment, it might have been within the rule, but nothing of the kind appears upon the record. The cause of action is set forth in the declaration in these words: "For that whereas heretofore, to wit, on the 1st day of May, 1855, at the county aforesaid, the said defendant was indebted to the said plaintiff in the sum of $350, for moneys payable, due, and owing, by and from the said defendant, to the said Bluff Mining Company of Michigan, for and in respect of divers, to wit, 150 shares of the stock of said mining company, of which said defendant was proprietor, and which he held in said company, by virtue of divers calls before that time, duly made by the secretary and treasurer of said company for the time being, in pursuance and by virtue of resolutions and assessments duly passed and made by the board of directors of said company for the time being, for the said moneys; and being so indebted, he, the said defendant, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, in consideration of the premises undertook, and promised the said plaintiff to pay to it the said sum of money on request." It will be thus seen that the action was *assumpsit*, founded upon an implied contract between the company and the stockholder that the latter should pay the assessments made by the former upon his stock. It is not an action for money paid and advanced by the company for the defendant's use, but it is to recover money which, it is alleged, he is bound to pay for the use of the plaintiff.

Judgment reversed and *procedendo* awarded.

Nimick & Co. *versus* Holmes & Co.

Where a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire, and by tearing up part of the vessel to gain access to the fire, is general average: and it makes no difference how the water is applied, whether by the aid of fire-engines from the land, or in the form of steam, or by scuttling the vessel.

A general average consists in a purpose, a means, and a result: a design to avert a common danger by a sacrifice voluntarily made, and a successful issue.

In an action by a shipper against the owners of a vessel for general average, evidence that the shipper had received from the underwriters the amount for which the goods lost were insured is irrelevant; nor is the amount so received evidence of the value of the goods.

ERROR to the District Court of *Allegheny county*.

This was an action of *assumpsit* brought by William Holmes & Co. against Charles A. Israel and others, owners of the steamboat "Susquehanna," for the loss of ninety-six hogsheads of

Digitized by Google

www.libtool.com.cn

sugar, shipped by Holmes & Co., upon the said steamboat, from Cincinnati to Pittsburgh, upon a bill of lading, exceptiing the unavoidable dangers of the river and fire.

While the boat was lying at the wharf in Cincinnati, on the 4th May, 1852, taking in a cargo for Pittsburgh, which consisted principally of sugar, cotton, bacon and oil, she was discovered to be on fire in the hold. The cause of the fire was unknown. The hatches were closed down, and preparations made for getting up steam and injecting it into the hold, by means of apparatus provided for that purpose, and also water was introduced by means of hose. In about an hour after the discovery of the fire, the steam-pipes were brought into play, and turned into the interior of the boat, where they continued to operate for fourteen hours or more. The fire, however, still making progress, and the officers of the boat believing there was no other possible means of saving the boat and cargo, determined, after consultation among themselves, and with various other persons, upon the expedient of scuttling her. They accordingly ran the boat out into the river, about two miles from the wharf, and there sunk her on a bar. A portion of the deck was torn up, and water introduced from above, and by these means the fire was subdued and extinguished. In a few hours afterwards, the boat was raised and taken back, with the remnant of the cargo, to Cincinnati, where the cargo was sold. The cargo was injured to about seventy-five per cent. of its value, and the boat and cargo, together, to the value of about twenty-five per cent. of their entire value.

The declaration contained four counts. The first count was on the bill of lading against the defendants as common carriers: the second, a special count for contribution on a general average: the third, a general count for general average: and the fourth, for money had and received.

The plaintiffs, on the trial, gave in evidence the bill of lading, and proved the value and non-delivery of the sugar, and rested.

The defendants then introduced the proof of the special facts and circumstances above stated. And, in the course of the trial, called Franklin E. Gordon, and proposed to prove by him that the present plaintiffs had been fully paid by the insurance company, before the bringing of this suit, and the amount which the insurance company paid in discharge of their policies, as evidence of the admission of the parties of the amount of injury sustained. The plaintiff's counsel objected, on the ground of the irrelevancy of the testimony, and it was excluded by the Court—to which defendants' counsel excepted. The evidence given in the case showed that both boat and cargo were in imminent peril, and that the introduction of steam and water into the hold, the scuttling of the boat, and the tearing up of the deck were resorted to,

Digitized by Google

www.libtool.com.cn

for the purpose of preventing the entire destruction of the boat and cargo, and were necessary to accomplish that end.

The defendants' counsel presented eleven points to the Court below, in which they prayed the instruction of the Court to the jury, that the facts and circumstances in evidence did not constitute a case of general average.

The general instructions of the Court below (HAMPTON, P. J.) were summed up as follows:—

"All the means employed for the safety of the boat and cargo, from the time the fire was discovered until its final extinction, though differing in form as circumstances required, yet having the same object in view, are to be taken together and considered as but one act. The principle is the same, whether the same quantity of water had been thrown into the boat by means of machinery, while lying at the wharf, or rushed in of its own accord from the river, through apertures made in the sides for that purpose, and the position of the boat was only changed for the sake of rendering the latter operation more speedy and efficacious. The consequences to the cargo in either case must be the same.

"If, then, you believe from the evidence there was a common danger both to the boat and cargo, which was imminent and apparently inevitable, except by voluntarily causing the loss and injury that were done to the vessel, and a portion of the cargo, in order to save the remainder, and that by these means so employed, the vessel and a portion of the cargo were saved, then the plaintiffs will be entitled to your verdict on the footing of a general average."

The jury found for the plaintiffs $5076.61—$4073.40, part thereof, on the second count for general average, and $1003.21, residue thereof, on the last count for money had and received, and for the defendants on the other counts.

The defendants sued out this writ, and assigned for error the rejection of the testimony proposed to be proved by Franklin E. Gordon, and the instructions of the Court to the jury.

T. Williams and *G. P. Hamilton*, for plaintiffs in error.—The evidence of Gordon was admissible in two aspects: first, as the measure of the plaintiffs' right without regard to value; and, secondly, as evidence of the value itself. The insurance company were the real plaintiffs, and their rights could not exceed what they had paid. The objection cannot be met by the suggestion that the surplus would enure to the benefit of the legal plaintiffs. They were satisfied, and the offer involved the proof of that fact. What evidence of value could be more satisfactory than the declaration of both the real and equitable plaintiffs?

General average can only be claimed where, in case of peril, a

Digitized by Google

[Nimick v. Holmes.]

www.libtool.com.cn

portion of the property is purposely, premeditatedly, and intentionally *sacrificed* for the benefit of the whole. The essence of general average is the voluntary sacrifice of a portion for the benefit of the whole with a successful result. The application of water and steam were remedial acts, and had nothing of devotion in them—intended, not to peril a part, but to relieve the whole.

The owners of the vessel and cargo are not mutual insurers, no more than the owner of a building and the owner of the goods in it are. Here there was no act imperilling any particular portion of the cargo. The application of the water and steam, if it imperilled anything, it was the *whole*. So in regard to the scuttling. It did not transfer the peril from the whole to any part. The water and steam were thrown upon them indiscriminately; in scuttling all went down together. It was alleviation and improvement, and not sacrifice, either actual or intended.

The rule requires that there shall be a sacrifice, and an intentional one; and that there shall be a *jactus* of some *portion* of the cargo, and that it shall be an act of the *mind* and done upon *deliberation*. Does this case come up to the requisitions? Was it a sacrifice of a *part* for the benefit of the *whole?* Was there a transfer of the peril to any particular portion? There was no selection, no severance, no casting away, no transfer of risk; for to speak of a transfer of risk to the whole, would be an absurdity. Each was bound to take its own risk, unless they were mutual insurers, which it is admitted they were not.

The doctrine here contended for is clearly established by the late very distinguished Chief Justice GIBSON, in the case of Walker *v.* The United States Insurance Company, 11 *S. & R.* 65. And in a still later case by the learned Judge KENNEDY, in Meech *v.* Robinson, 4 *Wh. Rep.* 362.

It is no answer to these cases to produce the conflicting case of Sims *v.* Gurney, 4 *Binn.* 513. Judge YEATES, who tried the cause at Nisi Prius, and Chief Justice TILGHMAN, speak doubtingly of it; and Judge KENNEDY says, in Meech *v.* Robinson, its doctrine has been shaken, if not overruled, by the case of Walker *v.* The Insurance Company.

The learned counsel also referred to 1 *Holt's N. P. Cases* 192; (3 *Eng. Com. L. Rep.* 69); 2 *Phillips* 101; 8 *Fairfield's* (*Verm. Rep.*) 190.

A. W. Loomis and *Stanton*, for defendants in error.—We claim that the Court is fully sustained in the rejection of Gordon's testimony, by the case of Gales *v.* Hailman, 1 *Jones* 515.

The only remaining question is, had the plaintiffs a right to recover for general average?

Assumpsit is the proper action: 1 *East Rep.* 220.

The case of Sims *v.* Gurney, 4 *Binn.* 513, was an action of

Digitized by Google

www.libtool.com.cn

assumpsit. Chancellor KENT says: The doctrine of general average is one of those rules of the marine law which is built upon the plainest principles of justice; and it has, accordingly, recommended itself to the notice and adoption of all the commercial nations of the world: 3 *Comm.* 233. The doctrine is as simple as it is just. Judge KENNEDY says, in Meech *v.* Robinson, 4 *Whart.* 363, "When the property of one is deliberately sacrificed for the benefit of the others, so that thereby his loss is made directly to promote their gain, he becomes entitled to claim restitution:" 3 *Kent's Com.* 333–4. It is the deliverance from an immediate pending peril by a common sacrifice, which constitutes the essence of the claim. It is the safety of the property, and not the voyage, which constitutes the foundation of general average: Col. Insurance Company *v.* Stribley *et al.*, 13 *Peters' Rep.* 331; 2 *Arnold on Ins.* 902; 3 *Kent's Com.* 239.

In Sims *v.* Gurney, TILGHMAN, C. J., says: "It is not necessary that the ship should be exposed to greater danger than she otherwise would have been, to make a case of general average. It is sufficient if a certain loss is incurred for the common benefit."

In the case of Caze *v.* Reilly, 3 *Wash. C. C. Rep.* 302, it is said, "if the cargo and ship, or any part of either, be voluntarily sacrificed or exposed to danger for the common safety, the part saved shall contribute to repair the loss sustained, provided the object for which the sacrifice was made was attained." The case of Barnard *et al. v.* Adams *et al.*, 10 *Howard's Rep.* 303, contains a most clear, convincing, and authoritative exposition of the law of general average. To constitute a case of general average, three things must concur: 1st. A common danger, imminent and apparently inevitable. 2d. A voluntary *jactus* of some portion of the joint concern, for the purpose of avoiding this peril. 3d. The attempt to avoid this imminent common peril must be successful.

Applying these doctrines to the case in hand, can there be a doubt that the recovery for general average was proper? The uncontradicted testimony shows that both boat and cargo were in imminent peril. All that was done, was done deliberately and judiciously, for the protection and preservation of all interests from a common peril and a common destruction. It gave to both vessel and cargo, so far as prejudiced by these acts, a just and legitimate claim to compensation.

The charge of the Court below was a most clear and comprehensive summary of the law, as established by the highest authorities in the land, which this Court is asked to reverse, upon the authority of cases that, instead of overthrowing, sustain the law, as expounded by his Honour in the Court below.

The learned gentlemen here reviewed the cases cited on the other side.

Digitized by Google

www.libtool.com.cn

The opinion of the Court was delivered by

Lowrie, J.—Though the Rhodian law *de jactu* provided for contribution only in the case of goods cast overboard in times of peril, yet the spirit of the regulation is in its reason, which is, because the act was done for the benefit of all; and it was this reason, rather than the limited expression of it, that was applied in the Roman jurisprudence: *Dig.* 14, 2. And if the adoption of the Rhodian law by Augustus and Antonine is the only evidence that the Romans derived their law of marine contribution from the Rhodians, then it is fully met by the text (*Dig.* 14, 2, 2, 3), which refers, for the same principle, to the Roman lawyers, Servius, Labea, and Ofilius, who flourished in the time of Julius Cæsar; and the absence of all reference to the Rhodian law, in the cases mentioned in the Digest, seems to show that the regulation was part rather of their common than of their statute law. And, while it may be doubted, perhaps, whether our law of average was in fact derived from the Romans, it is very plain that the Roman law on this subject has had great influence in moulding and defining that of all modern commercial nations. The equity of the rule is so obvious to natural reason, that it may very well be supposed that the practice might grow up spontaneously, wherever naval commerce existed. The name average, given to it in nearly all European languages, would seem to strengthen this supposition, for this is not at all of Roman origin; and a modern Latin word, *avaria*, had to be invented to express it, as the word *contributio* did not express the same idea. Average means ship damage, and not contribution, as is plain when we speak of particular average. The average of common parlance is a secondary sense of the word, derived from the practice of contribution in cases of general average.

But whencesoever the practice may have been derived into the law of modern nations, it may be said that, for America, England, and continental Europe, there is but one law on this subject; and its unity is preserved by the simplicity of the principle embodied in it, and by the fact that all treatises, European and American, on this subject, like those on international law, are regarded as the common property of the commercial world.

In the *Ordinatio Nautica* of the Hanseatic Cities, title 8, which was compiled in 1614 from more ancient customs and ordinances, there is a law on this subject, which is scarcely more comprehensive than the Rhodian law *de jactu;* but Reinold Kuricke, in his commentary upon it, shows that its practical interpretation has been as large as the reason upon which it is founded, and he quotes from Weitsius the rule, that every loss, suffered by ship or cargo for the purpose of averting a common danger, is a subject of general average.

Locconius (*De Jure Maritimo* 2, 8, 7), says that equity and

Digitized by Google

www.libtool.com.cn

expediency require this extensive interpretation, and that it is easy to apply the rule according to its reason to all cases of sacrifice for the common safety as they arise.

The rule is laid down in all its breadth by the commentators on the Digest, 14,2. Pothier merely repeats what he finds there; but Voët generalizes the cases, and declares that, no matter where the act is done, or under what circumstances of danger, if there be a sacrifice of part for the safety of the rest, and without any fault of the master, it is a case of general average. Noodt says that, whatsoever may be the nature of the sacrifice, it is at the common expense, if it is for the common safety. *In pari causa, par jus servatur, etiam cum verba legis deficiunt.* Huber says the same.

Mittermaier (*Grundsätze des deutschen Privatrechts*, § 317) says, to general average belongs every intentional sacrifice made for the purpose of averting or mitigating a danger that is common to both ship and cargo; and he cites very freely the English and American works on this subject, that are familiar to us all.

Vincens (3 *Legislation Commerciale* 186) declares that all the damages deliberately suffered for the common safety, and all the time expended in repairing them, must be taken as general average. To this rule there are no exceptions.

It is unnecessary to repeat the quotations of our own authorities, made by the counsel, for they all declare and illustrate the same principle. In all European and American treatises, we find the same sorts of instances given, and they all tend to enforce the broad rule of general average already expressed in various forms. Thus the following instances of sacrifice have been declared cases of general average: goods cast overboard; masts, rigging, anchors, and boats cut away; the hire of lighters, and the goods lost thereby; the hire of armed convoy; the damage incurred in order to evade a hostile pursuit; damage from an engagement with pirates, including the rewards to the crew, the healing of the wounded, and the burial of the dead; the sinking of a vessel in a crowded port, in order to prevent the fire of an adjoining one from spreading to the others; the cutting of the cable of one in order to save others; the voluntary stranding of the ship; ransom from pirates; compromise with captors; seeking port and refitting after an inevitable accident; and the excess of damage or expense borne by one of several ships, sailing in company, in defending against a common enemy.

In some countries a consultation is required before the sacrifice is made; but that form is resorted to only as a means of deciding upon and proving its necessity, and is not a part of our law, for it may be otherwise proved. An analysis of the cases very plainly reveals three things as the elements of general average: a purpose, a means, and a result; a design to avert a common danger

Digitized by Google

www.libtool.com.cn

by a sacrifice voluntarily made, and a successful issue. The first and the last are perfectly definite in their character, while the means must always remain to be defined by the rule of prudence when the danger arises.

Guided by the light of the rule and its instances, we feel constrained to say that when a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire, and by tearing up part of the vessel in order to get at it, is general average. The danger is a common one, and the cost of the remedy must be common. It makes no difference how the water is applied: by the aid of fire-engines on the land, or in the form of steam, or by scuttling the vessel. All these modes were tried in this case before the success was complete. They are all to be treated together, because they all referred to the same peril. They were the means employed for the purpose of averting the danger in which they were placed. It was a sacrifice for the common safety, for it was intentionally injuring or destroying all that part of the cargo that could be thus affected by water, in order to save the rest. The result was successful if a single article was saved by the means employed. Without attempting to follow the counsel in their minute criticism upon the charge to the jury, we may say that it was entirely correct.

There is an exception to the admission of evidence, but it also is unfounded.

Judgment affirmed.

Wright's Appeal.

Where a sheriff's vendee pays a part of the purchase-money at the time of the sale, but fails to pay the residue, the sheriff may return the land unsold, and the delinquent purchaser will be liable for the loss on a resale.

If the sheriff in his return omit to state the sum received from the bidder at the first sale, he may, with leave of the Court, after the second sale, amend his return so as to state the fact.

Where the loss on the resale is greater than the sum paid by the first purchaser, the Court may distribute the latter sum among the creditors unless some legal objection be shown.

If there are disputed facts, an issue must be applied for before the distribution, and such disputed facts must be particularly stated.

APPEAL from the decree of the Court of Common Pleas of *Westmoreland county*.

The real estate of William Everhart was sold at sheriff's sale, and John F. Wright, the appellant, became the purchaser at the sum of $25,700. Upon this purchase he paid, at the sale to the sheriff, $400, but failed to pay the residue. The sheriff returned

Digitized by Google

www.libtool.com.cn

that, he having failed to comply with the terms of sale, the property remained unsold for want of buyers. At the resale, it was sold to J. K. Moorhead for the sum of $19,800. On application to the Court, an auditor was appointed to distribute the $400 paid by Wright, and the auditor applied it to the judgments against Everhart, which report the Court confirmed. After the deed was acknowledged to the second purchaser, the Court permitted the sheriff to amend his return, by stating the amount which Wright had paid on the first sale, to the allowance of which the counsel for Wright objected.

Errors assigned: 1. The Court erred in confirming the report of the auditor.

2. The Court erred in permitting the sheriff to amend his return.

Foster, for appellant.—The 86th section of the Act of 16th June, 1836, only gives the Court power to distribute money, which arises from *a sale* of real estate.

A purchaser may be liable for the difference between his bid and a resale, but not in this summary way. It can only be in an action by the sheriff. Then he could defend himself on the ground that the first sale was void.

The purchase is a contract—the sheriff returning it unsold was a rescission of the contract. He refused to pay—the sheriff, instead of bringing an action in affirmance, agrees to the rescission. In such case the purchaser is entitled to a return of the money paid: 15 *Ser. & R.* 231; 5 *Barr* 282.

There could be no appropriation till the rights of the parties were fixed in a trial by jury.

Cowen, for appellees.—There was a contract between the sheriff and Wright, upon which he paid this hand-money. This contract was rescinded by Wright's refusal to carry out the contract. Under these facts he had no claim to have it refunded.

It properly belonged to the creditors. If there were any facts in dispute, they could, on application, have been tried in an issue, for which the Act of Assembly provides.

The opinion of the Court was delivered by

Lewis, C. J.—Where the sheriff's vendee pays a part of the purchase-money on the day of sale, according to the terms prescribed, but fails to complete the purchase by the payment of the residue, the sheriff may return the land unsold; and on a resale, the delinquent purchaser is in general liable for the difference, if the land at the second sale brings less than the price at which it was struck off at the first.

Digitized by Google

[Wright's Appeal.]

www.libtool.com.cn

If the sheriff, in returning the land unsold, omits to state the sum received from the bidder at the first sale, he may, with leave of the Court, amend his return so as to state the fact. This amendment may be allowed after the second sale has taken place.

Where the loss on the resale is greater than the sum received on the first, the Court may distribute the latter sum among the lien creditors as money arising from the sale, unless some legal objection be shown. This does not deprive the first purchaser of the trial by jury, because the law provides for an issue in case of disputed facts. But the issue must be applied for at the proper time, and the disputed facts must be particularly stated.

In the case before us, no legal objection to the distribution was shown. Nor was there any application for an issue. The lien creditors are satisfied with the decree. The delinquent purchaser alone objects; and as he appears to be liable for a much greater sum, he has no cause to complain. If he had a right to the money, or to be relieved from liability on his purchase, he has entirely failed to show it.

Decree of distribution affirmed.

Custer and Lantz *versus* The Commonwealth.

In an action on a recognisance, given for the valuation of land taken under proceedings in partition, instituted by an administrator, by virtue of a special Act of Assembly, the defendant could not claim to set off his share as an heir in the valuation: his remedy is to compel a settlement of the administration account, and a distribution in the Orphans' Court.

The Act of Assembly of 4th June, 1839 (*P. L.* 243), so far as it relates to the estate of Joseph Ball, deceased, is not unconstitutional.

Error to the Common Pleas of *Greene county*.

This was a *scire facias* on a recognisance in the Orphans' Court. Joseph Ball, deceased, in his lifetime was possessed of several tracts of land in the county of Greene, and in 1835, upon petition of some of his heirs, a writ of partition and valuation was awarded, and upon an appraisement returned one of the tracts was awarded to Mark Custer, who entered into recognisance with Lot Lantz as his surety in the sum of $2000, to secure to the *heirs* of the said Joseph Ball, deceased, the sum of $932, the price at which the said tract had been valued by the Inquest. On the 4th day of June, 1839, the legislature passed an Act in reference to the real estate of the said Joseph Ball, authorizing the administrator to receive the proceeds and distribute them according to the interests of the several heirs or claimants. The suit was brought in the name of the Commonwealth for the use of Stephen Caldwell, administrator *de bonis non* of Joseph Ball, deceased. Mark Custer claimed to

Digitized by Google

www.libtool.com.cn

be an heir of the decedent, and as such entitled to a portion of the proceeds which it was contended should be deducted from the claim of the plaintiff. The amount of his interest did not appear.

The defendant's counsel requested the Court to charge the jury "that the administrator of Joseph Ball, deceased, cannot recover, the terms of the recognisance being to pay to the heirs;" and "that the defendants may retain and hold from this recognisance the amount of the shares they hold either by descent or purchase."

The Court (GILMORE, P. J.) charged the jury as follows:—

"The Court charge you, the plaintiff is entitled to recover notwithstanding the wording of the recognisance, and that the defendant is not entitled to deduct from the recognisance what might be his purpart. The Act of Assembly of 4th June, 1839, was passed expressly for the purpose of relieving the Court and jury from the difficult and almost impossible duty of ascertaining the heirs to said estate, and to what each was entitled. This duty has been committed by said Act to the administrator, and we feel disposed to leave it to him."

Sayers, for plaintiff in error.

Downey and *Rowe*, contrà.

The opinion of the Court was delivered by

KNOX, J.—In ordinary cases, where land is taken at an appraisal under proceedings in partition by one of several heirs, and a recognisance is entered into to secure to the other heirs their respective purparts, the administrator of the estate has nothing to do with the recognisance. In the present case, however, upon representation to the legislature that the heirs at law of Joseph Ball numbered "many thousands," an Act of Assembly was passed, which, amongst other things, authorized the administrator to receive the purchase-money due on proceedings in partition, and provided the means of distributing the same to the heirs of the decedent. We see no constitutional objection to this Act, and under it the Court of Common Pleas very properly held that the administrator could, in the name of the Commonwealth, maintain the action, and compel payment of the recognisance.

It is alleged that one of the defendants was entitled to a distributive share in the estate of Joseph Ball, and that the other was attorney in fact for several of the heirs; and an effort was made to retain out of the recognisance, such parts as the defendants would be entitled to receive upon distribution. It does not appear from the paper-book that any evidence was either given or offered, from which it could have been determined how much the defendants were entitled to out of the money due on the recognisance;

Digitized by Google

www.libtool.com.cn

and, at all events, as the Act of Assembly points out a specific mode by which the interests of the several heirs shall be ascertained and paid, an action at law was no place for partial distribution. The remedy of the defendants is by a settlement of the administration account, and distribution to be made by an auditor, as provided for in the Act of Assembly.

Judgment affirmed.

Crum *versus* Burke.

A purchaser at treasurer's sale, as against a mere intruder deriving no title from the original owner, need only show title out of the Commonwealth, and a treasurer's deed to himself or some person from whom he derives title.

The payment of taxes by a stranger without title, on a part of a tract of unseated land without defining the location or boundaries of the part for which the taxes are so paid, will not defeat the title of the purchaser of such tract at a sale for taxes.

Whether a tract of land is seated or unseated at the time the taxes for which it was sold were assessed, is a question of fact for the jury: but it is not error for the Court to express their views of the evidence, if the question be not withdrawn from the jury.

Where the defendant resided on an adjoining tract of land, and in 1821 designated his boundaries, including a part of another tract, and in 1836 the owner of the latter tract entered into the actual possession of it, it was not error for the Court to instruct the jury that the lapse of time was far too short to enable the defendant to hold the land under the statute of limitations.

Error to the Common Pleas of *Cambria county*.

This was an ejectment for 80 acres of land. The plaintiff, Burke, claimed under a treasurer's sale of a larger tract, of which this is a part, made in June, 1816, to James Rhey. The original warrant was in the name of George Messersmith, and in 1814 and 1815 the land was assessed with taxes, for the non-payment of which it was sold. The plaintiff showed a list of unseated lands, from the commissioners of Cambria county to the treasurer, containing the following entry: "284 acres 33 perches, Geo. Messersmith, 1814. Co. tax, 71 cents; road, 71;" and a similar entry for 1815. The treasurer's sale book and deed being offered were objected to by defendant, but were admitted by the Court.

The defendant contended that the sale for taxes was void, because there was no sufficient assessment shown; that the land was seated at the time, and that the tax was paid before the sale. He also relied on the statute of limitations.

Several persons of the name of Crum were settlers in the neighbourhood of the Messersmith tract, but there was no residence or cultivation upon it, nor were any boundaries defined, including the premises in dispute, until the year 1821 or 1822, when 100 acres of this tract, including the part in controversy, were run into a

Digitized by Google

www.libtool.com.cn

survey made for the heirs of John Crum. A man by the name of Michael Skelly made sugar in the spring of the year, from 1810 to 1820, on the Messersmith tract, and returned 100 acres of it, and paid the taxes, but without any residence, cultivation, or designation of boundaries to indicate what part he paid the taxes for. In 1836 Rhey entered under his tax title, and put a tenant in possession; and he, and those claiming under him, have continued in possession ever since, except of the part in dispute, upon which the defendant, Abraham Crum, entered about 1843.

The charge of the Court (TAYLOR, P. J.) was, after stating the case, as follows:—

"I. Whether the tax sale is sufficient to connect the plaintiff with the Messersmith title? This is denied, and the sale is alleged to be void for three distinct reasons: 1. That the assessment of a tax is not sufficiently shown; 2. That the land was *seated*, and not liable to sale as *unseated;* and, 3. That the taxes had been paid.

"1. In relation to the first of these objections to the sale, it has not, indeed, been shown that the assessor returned the tract; but, on the contrary, it appears by the assessments that it was *not* so returned. This, however, was not necessary. It might be afterwards inserted in the assessment by the commissioners. *They* might assess it; and any competent evidence which shows that they did do it, is sufficient. And their list, made out for the treasurer, including this tract, with a county and road tax charged upon it, in the handwriting of one of the commissioners, and upon which the treasurer proceeded to make a sale, is, we think, competent evidence of an assessment.

"2. Whether the tract was or was not seated at the time, is, as it seems to us, as free from difficulty. It is true the cultivation of a few acres of a tract at the time of assessment, even though it be a clearing over by the owner of an adjoining tract, changes its character from unseated to seated, and charges the person of the cultivator with the payment of the taxes. But does the evidence here, in any view of it, show cultivation of such portion of this tract in 1814 and 1815? It is not pretended that there was any residence upon it then, or for many years afterwards. One witness states that, 'about 1814 or 1815,' there was a patch cleared and cultivated. This, however, does not prove that it was in 1814; while Nicholas Crum testified that five acres were chopped, and a small part of it put in the same year; but that the part put in that year was *outside* of the Messersmith line. 'The season following,' he says, 'the whole five acres were put in something; that would be in the year 1816, or thereabouts.' And, as to the time, he says, 'I am well persuaded.' According to this testimony, there was no land cleared and cultivated within this Messersmith survey at that point, till 1816. We submit, then, whether

Digitized by Google

www.libtool.com.cn

the weight of evidence, so far from proving this tract seated in this respect in the years mentioned, does not prove the reverse.

"3. The remaining objection to the tax sale is, that the taxes had been paid upon this land by others who bounded upon it, and, as it is alleged, claimed it, or parts of it, and by Michael Skelly. This the defendant has undertaken to show, by showing the assessment of land to these different persons. But it will be remembered that it is not even alleged that any of them had any improvement within this tract prior to 1816; and that none of them, for several years afterwards, had any survey, official or unofficial, including any part of the tract. Whether they (if we except Skelly) paid tax for any part of it, is therefore to be determined alone from the quantities which they respectively returned; and, in the absence of more or other evidence, *we* would have great difficulty, and we presume *you* would also, in concluding that the taxes on George Messersmith were thus paid. It would be easier, perhaps, to arrive at the conclusion, from all the evidence, that not one of them returned and paid tax for the whole of the land he had outside of the Messersmith; while it is pretty clear that some of them, including John Crum, under whom the defendant claims, did not return *half* the quantity claimed without the interference. As to the alleged payment by Michael Skelly, his testimony is, that, from 1810 or '12 to 1820, he made sugar within what he has since ascertained to be the Messersmith tract; returned to the assessor 100 acres, without reference to any boundaries, without marking any boundaries; or even without knowing, then or now, what precise land it was. Such payment of tax, it could not be contended, would avoid the tax sale for the whole tract. The most that could be contended would be, that that 100 acres was exempt from liability to sale. But what 100 acres? How could a jury here undertake to say that it included the whole or a part of the 30 or 40 acres here in dispute? Such return of 50 acres within a 300 acre tract might thus become a defence in the mouths of half a dozen intruders upon that many fractions of the tract, the sale be virtually rendered nugatory as to the whole, and the operation of the tax laws be thwarted. For reasons, then, which are readily perceived, we are of opinion, and so instruct you, that the return of that 100 acres to the assessor by Michael Skelly, and his payment of the taxes, does not affect the validity of the tax sale as to any part of the tract.

"The plaintiff contends, upon the authority of the cases here cited, that the regularity of this tax sale, as between these parties, is not the subject of inquiry; and that the production of the treasurer's deed vests in him *prima facie* the title of the owner of the survey, and is sufficient to enable him to recover against an intruder. This is the law, and applicable here, if the entry of John Crum, through whom the defendant claims, was without right;

Digitized by Google

that is, without title or colour of title; at least so far as it relates to mere irregularity in the assessment of the taxes, and in making the sale. And we instruct you, that if you find the land unseated at the time of the assessment, and the taxes unpaid—questions of fact which appear to us to be free from difficulty upon the evidence, however they may appear to you—the sale by the treasurer, as between these parties, vested the title to the George Messersmith survey in James Rhey.

"We return, then, to other general questions, and the remaining question, in the case.

"II. Is the defendant protected by the statute of limitations?

"The defendant not having his claim defined by any survey, or any fixed boundary or marks upon the ground until the survey made by Mr. Proctor in June, 1822, that is the earliest starting point you can find to reckon time in view of the statute. Starting at that point, you have but fourteen years until the entry of James Rhey upon the Messersmith survey under that title, in 1836, as shown by the evidence; so that between these periods, or between the latter and the commencement of this action, we need scarcely remark, the lapse of time is far short of 21 years; and the case, upon this point, if you find these to be facts, is plainly against the defendant."

The jury found for the plaintiff.

The errors complained of were: the admission of the tax list; the instruction that it was competent evidence of an assessment; that the return of 100 acres by Skelly did not affect the validity of the tax sale; and that, there being no designation of boundaries prior to 1822, there were but 14 years until the entry of Rhey in 1836, which was insufficient to make a title by the statute of limitations.

White and *Coffey*, for plaintiff in error.—As to the sufficiency of the assessments to sustain the sale, they referred to 1 *W. & Ser.* 310; Act of 13th March, 1815, *Purd. Dig.* 822; 1 *W. & Ser.* 313; 7 *Id.* 457; *Ib.* 260.

On the statute of limitations, they cited 1 *Watts* 533; 8 *Barr* 504; 7 *W. & Ser.* 580; 2 *W. & Ser.* 251; 5 *Barr* 300; 9 *Watts* 78; 2 *Harris* 404; 7 *W. & Ser.* 208.

The settlers regarded the tract as seated, and it should not have been transferrred to the unseated list without notice to them: 8 *Barr* 169; 4 *W. & Ser.* 133; 10 *Barr* 511; 7 *Harris* 305.

The opinion of the Court was delivered by

Lewis, C. J.—The objection to the admission of the tax list of the commissioners, as evidence of an assessment of taxes, is not

Digitized by Google

www.libtool.com.cn

accompanied with a "copy of the bill of exceptions" or "the full substance of it," as the rule of Court requires: 6 *Harris* 578. It is therefore to be disregarded. But we have examined through the whole record, as set forth on the paper-book, and find no exception of the kind. The exception is merely to the treasurer's sale and deed, and this exception cannot be sustained, because the defendant was a mere intruder, deriving no title whatever from the original owner. Against him, all that was necessary for the plaintiff, in the first instance, was to show title out of the Commonwealth, and a treasurer's deed to himself, or to some person from whom he derives title: Dikeman *v.* Parrish, 6 *Barr* 210; Foster *v.* McDivitt, 9 *Watts* 344; Foust *v.* Ross, 1 *W. & Ser.* 501.

In Bratton *v.* Mitchell, 1 *W. & Ser.* 310, it was held that a *treasurer's sale book* was not evidence of an assessment of taxes; but, when the same case came up again, it was decided that a loose paper, from the *commissioner's* office, purporting to be an assessment of taxes, was competent evidence: Bratton *v.* Mitchell, 7 *W. & Ser.* 259; 5 *Watts* 287. So that there was no ground of objection to the evidence, or to the charge on this point.

In this case the sale took place in 1816. No ejectment has ever been brought, by the original owner, to contest its validity. Under such circumstances, if the land was unseated when the taxes were assessed, no stranger could defeat the sale, on the ground of irregularity, however gross. Even the payment of taxes, by the owner, before sale, is an equity, which a stranger would seem to have no just right to assert against a *bonâ fide* purchaser without notice of it. But the case does not require a decision on this point. It is sufficient for our present purposes, to say that the payment of taxes on 100 acres of the land, without defining its location or boundaries, by a stranger, without title, will not defeat the title of the purchaser at the sale for taxes. Michael Skelly, who made the payment, made use of a part of the land, for the purpose of making sugar on it; but, if he had occupied permanently and adversely a portion of the land, with boundaries defined, and had paid taxes on that portion, it would not defeat the title for the residue. In this case, as it was impossible to know on what particular part of the tract he paid the taxes, the payment must have no greater effect than a payment of part of the taxes by the owner would have. In that case the treasurer might sell either a part of the tract, or the whole, for the unpaid taxes: 13 *Ser. & R.* 151; 1 *Watts* 533. In the case before us, as the whole tract was sold, the presumption is that a part was insufficient to raise the taxes due upon the whole.

The question, whether the tract was seated or unseated when the taxes were assessed, was submitted to the jury. Although the Court gave their views of the evidence, the question was not withdrawn from the jury, as supposed by the plaintiff in error.

Digitized by Google

[Crum v. Burke.]

www.libtool.com.cn

The defendant below had no land cleared on the tract in dispute, until the entry of Abraham Crum, about ten years ago. As we understand the evidence, he claimed by virtue of a residence, and clearing on an adjoining tract, with a designation of boundaries, including the land in controversy, within the plaintiff's survey. These boundaries do not appear to have been designated before June, 1821. The plaintiff entered in 1836, and put his tenants in actual possession of the tract. In view of these facts, it was not error to say that the lapse of time between 1821 and 1836, was far too short to enable the defendant to hold the land under the statute of limitations. The evidence seems to justify all that the Court said on the subject of the designation of boundaries and the entry.

We are unable to see any error in the proceedings.

Judgment affirmed.

Wade *versus* Haycock.

Where one contracts to do all the millwright work necessary in the construction of a grist-mill, he is bound to do it in a workmanlike manner, so that it will answer the purpose for which it is designed.

A neglect or refusal to complete the work is a bar to a recovery: but for defective execution, the contract price, or the value of the work, deducting the actual damages sustained, may be recovered.

The measure of damages would be the cost of the new work, and the profits of the mill whilst the alterations were being made.

The workman is not responsible, if the defects were occasioned by following the directions of the owner.

If the workman knowingly and purposely makes the work defective, it is such *mala fides* as would prevent a recovery for any of the work done under the contract.

Error to the Common Pleas of *Westmoreland county*.

The action below was debt upon a note under seal. In 1851, James Wade, the defendant, being engaged in erecting a mill, to which he designed to apply both water and steam power, engaged Haycock to perform the millwright work for him, at a stipulated price. Haycock professed to be a practical millwright. Before the work was completed he left, but procured another millwright to proceed with the work and finish it. In the mean time Wade gave Haycock the note in controversy, dated the 16th March, 1852, for the sum of $320, payable 1st April, 1852, that being the amount of the work as stipulated in the contract. When the work was finished it was found to operate imperfectly, and the mill had to be stopped for several weeks, and a portion of the machinery was removed, and others substituted by Wade.

The defendant resisted a recovery on the grounds that the con-

Digitized by Google

www.libtool.com.cn

tract was entire, and that the plaintiff failed in performing it in such manner as to answer the intended purpose. That there was a failure of the consideration. That the failure to perform, as well as professing to be a skilful millwright, were a fraud on the defendant which would bar a recovery.

The plaintiff contended that the plans and specifications of the work were all made and arranged under the direction of Wade himself, and according to his desire and request.

Under the charge of the Court (BURRELL, P. J.), the jury found for the plaintiff $313.87½.

And the defendant sued out this writ, and assigned the instructions of the Court as error.

Cook, for plaintiff in error.—He was bound to construct the work in a skilful manner: 8 *Harris* 132; *Jones on Bail.* 91; 2 *Kent's Com.* 458; *Sto. on Bail.* 281. It was an entire contract, and must be fully completed before he can claim compensation: 5 *W. & Ser.* 382; 2 *Kent's Com.* 667–8; 2 *P. R.* 454; 3 *Harris* 195; *Par. on Con.* 386; 2 *Jones* 236.

If Haycock knew of the imperfections in calculations, &c., and did not communicate it, it was a fraud: 1 *Bouv. Inst.* 301; *Bright. Eq. Jur.* 73; 5 *Harris* 54; 1 *Bouv. Inst.* 228; 12 *Ser. & R.* 432; 2 *Par. on Con.* 267.

On the question of damages were cited 1 *Harris* 246; 2 *Par. on Con.* 456; 18 *Verm. Rep.* 620; 3 *W. & Ser.* 270.

Cowan, for defendant in error.

The opinion of the Court was delivered by

KNOX, J.—After a careful examination of this case, we are of opinion that it is free from error.

The principles of law applicable to the case were clearly and correctly stated to the jury by the learned judge who presided at the trial, and were substantially as follows:—

1. Where one contracts to do all the millwright work necessary in the construction of a grist-mill, he is bound to do it in a workmanlike manner, so that it will answer the purpose for which it is intended.

2. If the millwright, after doing part of the work under the contract, refuses or neglects to complete it, he can recover nothing for part performance; but if the work is all done, but part of it defective in the execution, which defect can be cured by the substitution of other machinery or better work, there may be a recovery of the contract price; or in the absence of an express contract, what the work is reasonably worth, deducting the actual damages sustained on account of the defective performance.

3. The measure of damages would be the expense of the new work, and the profits of the mill for such time as it was necessarily stopped from running whilst the alterations were being made.

Digitized by Google

www.libtool.com.cn

4. Where that part of the work complained of was constructed under directions given by the owner of the mill, the workman is not responsible if the defect was occasioned by following the directions so given.

5. If the employee knowingly and purposely makes the work defective, it is such *mala fides* on his part that he can recover nothing for any of the work done under the contract.

Judgment affirmed.

Marshall *versus* The Franklin Bank of Washington.

A principal debtor in a judgment, although not served with the *scire facias*, is an incompetent witness on the ground of interest to prove payment of the judgment, being liable for the debt and costs to his surety, in the event of a recovery against the latter.

A person who is a party to the suit at the impetration of the writ, but who is not served with process, nor a party to the issue, is nevertheless incompetent as a witness for his co-defendant.

A defendant on the record cannot render himself competent as a witness for his co-defendant, by offering to confess judgment to the plaintiff for the amount claimed.

A plaintiff who holds several judgments against a debtor, and different sureties or endorsers, may, in the absence of any agreement to the contrary, issue execution upon *any* one of them, and the proceeds of personal property realized upon such execution will be applied to the debt upon which it issued.

ERROR to the Common Pleas of *Washington county*.

This was a *scire facias* at the suit of the bank against George A. Creacraft and Thomas Carson, drawers, and John Marshall and Adam Carson, endorsers. In 1846, Creacraft and Thomas Carson were extensively engaged in the bacon and lard business, and the defendant Marshall, with others, had endorsed for them largely in the bank.

In the fall of that year, being unable to meet their liabilities, they, together with their endorsers, confessed five judgments to the bank, amounting to $24,200. The defendant Marshall, being the first endorser on two notes, became a party to two of those judgments, one for $4200, and the other for $5000. At the same time Creacraft & Carson assigned over various consignments of property, for the benefit of the endorsers, and the amount of which was applied to all the judgments.

The defendant alleged that, by a special agreement of the parties, it was agreed to be applied to the judgment of $4200, in which he was defendant. Various payments had been made by the defendants on this and the other judgments.

At the instance of another endorser, who was a defendant in one of the five judgments confessed to the bank, an execution was issued on that judgment, and the personal property of Creacraft

Digitized by Google

[Marshall v. Franklin Bank of Washington.]

www.libtool.com.cn

& Carson levied and sold, the proceeds of which Marshall contended, under the agreement, should be applied equally to all the judgments.

In November, 1850, Marshall applied to the Court, setting forth the facts of the case, and alleging that if the proceeds of the property, which had been assigned by the makers, and a *pro rata* share of the amount raised on the execution by the sale of their personal property, were applied to this judgment according to the agreement, the same would be fully paid. The Court thereupon made an order, staying execution on the said judgment until the bank should issue *scire facias* upon the same, to give Marshall an opportunity of interposing said defence. This *scire facias* was accordingly sued out, and was returned served on all the defendants, except Creacraft, and "*nihil*" as to him. The appearance and plea were by Marshall alone, and the jury were sworn as to him alone. On the trial of the cause, the defendant offered the deposition of George A. Creacraft. It was objected to by plaintiff, on the ground that the witness was a party to the judgment, and liable over to Marshall, for the debt and costs recovered against him. The defendant then showed that Creacraft had offered to confess a judgment to the bank for the amount claimed. The Court sustained the objection, and defendant excepted.

The defendant asked the Court to instruct the jury, "That, inasmuch as the plaintiff had a meeting with Creacraft & Carson, the drawers, and their endorsers, for the purpose of securing the debts due the bank, and judgment-bonds were taken from all the drawers and endorsers, at the same time, for the same purpose, that if the bank afterwards issued execution, as they did, and levied on and sold the personal property of either of the drawers, the proceeds of said sale must be applied to the relief of all the said endorsers, although they were in different judgments—that in equity all the endorsers stood on an equality, so far as any moneys were made out of the personal property of the drawers, under the arrangement testified to."

To which the Court (GILMORE, P. J.) responded as follows:—

"We know of no principle of equity which would require money made, on process of law, to be applied to different judgments. The circumstance that the bank was the creditor of all, and that the judgments were taken at the same time, and that there were securities in all, would not be sufficient in equity to require an equal application of the money made to the several judgments. A debtor has a right to appropriate money as he may think proper; this is the general principle in respect to voluntary payments; but, where money is raised by process of law, or *in invitum*, the right of application does not belong to the debtor—the law then makes the application. Still, there is nothing in this which will prevent an agreement as to the application of money which is

Digitized by Google

www.libtool.com.cn

about to be raised on legal process. All parties concerned may agree about this, as well as any other lawful matter. The parties which are concerned in such an arrangement as is alleged, are the bank, John Marshall, Creacraft & Carson, and the endorsers in the judgment on which the money was made, to wit: Horn and Miller. If they all agreed to this arrangement, it was competent for them so to do; and the bank, in receiving the money, should have appropriated it accordingly."

The jury found for the plaintiffs $1195.13, and judgment was entered on the verdict.

The rejection of the deposition and the answer to the point, were the errors complained of in this Court.

Montgomery and *Watson* (with whom were *Acheson* and *Wilson*), for plaintiffs in error, as to the admissibility of the deposition cited 9 *Barr* 21; 3 *Ser. & R.* 402; 1 *Pick.* 116; 1 *Green. Ev.* § 355.

Gow and *Murdock* (with whom was *McKennan*), for defendant in error, cited 9 *Ser. & R.* 236; 9 *Watts* 144; 3 *W. & Ser.* 557; 1 *Barr* 440; 2 *Id.* 106; 3 *Id.* 361; 4 *Id.* 199; 1 *Green. Ev.* § 329.

The opinion of the Court was delivered by

KNOX, J.—It is conceded that John Marshall, who took defence to the *scire facias*, was a surety, and that George A. Creacraft, the person whose deposition was offered and rejected, was one of the principal debtors. The defence was, substantially, that the judgment had been paid, and it was to prove payment that the principal debtor was offered as a witness. Upon the failure of this defence, the principal was, doubtless, liable to the surety, not only for the principal debt recovered, but also for the costs, and this according to the cases of the Bank of Montgomery *v.* Walker, 9 *Ser. & R.* 229, Smith *v.* Thorne, 9 *Watts* 144, Davenport *v.* Freeman, 3 *W. & Ser.* 557, disqualifies him from testifying, upon the ground of interest. But he was also disqualified, because he was a party to the record. The original judgment was against him, and he was named in the *scire facias* as one of the defendants. True he was not served, and was not a party to the issue; but Parke *v.* Bird *et al.*, 3 *Barr* 360, rules that this makes no difference, as he was a party to the suit at the impetration of the writ, which is also the doctrine of Wolf *v.* Fink, 1 *Barr* 439.

As the exclusion of a defendant, who has not been served, or who has suffered judgment by default, rests upon grounds of public policy, he cannot remove the objection to his competency, by an offer to confess judgment against himself. A judgment against

Digitized by Google

www.tibtool.com.cn
an insolvent principal would be but a sorry compensation to the creditor for the loss of his claim against a solvent surety; nor would the existence of a judgment against one confessedly insolvent before lessen the temptation to perjury, to remove which is one of the principal grounds of the rule. One of several plaintiffs cannot testify to charge a defendant, even though he has no interest in the event, and neither shall one of several defendants be permitted to discharge, by his evidence, his co-defendants, even though he may remain liable himself.

There was no error in the answer of the Court to the defendant's first point. In the absence of any agreement to the contrary, it was clearly the privilege of the bank to issue execution upon any one of its judgments in advance of the others, and the law would apply the money made to the judgment from which the writ issued. This is, doubtless, a hard case for Marshall, the surety, but we can afford him no relief.

Judgment affirmed.

Jennings *versus* McDowell.

Extracts from the general draft of donation lands and the donation land book, in the land office, duly certified, are legitimate evidence to show title out of the Commonwealth.

After the lapse of fifty-six years, a sale of a donation tract of land for non-payment of taxes will be sustained against an intruder, in the absence of all evidence tending to prove, that the donee was living at the time the taxes were assessed, or had ever claimed the land, or exercised acts of ownership over it.

In a contest between a purchaser at treasurer's sale and an intruder, evidence that portions of the tract sold were occupied in sugar-making in the spring of the same year the taxes were assessed, will not invalidate the sale.

ERROR to the Common Pleas of *Venango county*.

This was an ejectment brought by McDowell against Jennings, to recover tract No. 1155, in District No. 6, of "donation land." This tract of land, on the 19th October, 1786, had been allotted to David Jacobs, a private in the Pennsylvania line. In 1842 and 1843, it was assessed with taxes; and sold in 1844, by the treasurer of the county, to McDowell, the plaintiff. The years for which the taxes were assessed, the land was occupied temporarily in the spring, for the purpose of making sugar, and some of the parties who thus occupied paid rent for this privilege. It was not shown, on the trial of the cause, that David Jacobs (the patentee) had ever been in the neighbourhood, or had ever claimed the land, or exercised acts of ownership over it.

For the purpose of showing title out of the Commonwealth, after giving in evidence a certificate of survey, dated 16th November, 1785, the plaintiff offered a certified *extract* from the office of the surveyor-general, of the general draft of the 6th District

Digitized by Google

www.libtool.com.cn

donation lands, showing the location of the land in dispute; and also an extract from "Donation Lands" Book, showing the District —the number of the tract—the name of the soldier to whom granted, and the time when returned for patenting. These were objected to, because they were mere extracts, and not full copies of the papers, &c. The Court overruled the objections, and received the evidence. The defendant showed no title. He contended that plaintiff could not recover, because the tract was donation land, and not subject to assessment for taxes during the life of the soldier, and that plaintiff had not shown that the donee was dead at the time of assessment of the taxes for which it was sold. That the land was seated, and that no title was shown out of the Commonwealth.

The Court below (McCalmont, P. J.) ruled these points against the defendant.

The jury found for the plaintiff.

Church, for plaintiff in error.

The opinion of the Court was delivered by

Knox, J.—The extracts from the general draft of the donation survey, and the copy of the entry from the donation land book, were properly received in evidence to prove that the title to the land in dispute was out of the Commonwealth: De France *v.* Stricker, 4 *Watts* 327; Farr *v.* Swan, 2 *Barr* 245; Oliphant *v.* Ferren, 1 *Watts* 57. This evidence, when received, clearly established that tract No. 1155, in District No. 6 of the donation lands, had been allotted to David Jacobs, a soldier of the revolutionary army, belonging to the Pennsylvania line.

There was no error in admitting the treasurer's deed, under which the plaintiff claimed title. Its validity, however, depended upon two questions—1. Was the land subject to taxation? 2. Could it be assessed and taxed as unseated?

By virtue of the Act of 1st March, 1780, and that of 16th March, 1785, "all lands granted to the officers and soldiers of the line of this state, as a reward for their services, are exempt from taxation for and during the life of such officer and soldier respectively, unless the same shall be transferred or aliened to any other person." As there was no evidence of alienation by the soldier, nor direct evidence of his death before the assessment of the taxes for which the land was sold, the treasurer's deed gave no title to the plaintiff, unless the law would raise a presumption of the soldier's death arising from the lapse of time. The tract was allotted to him in 1786—the assessment was for the years 1842 and 1843, fifty-six years after the title had passed from the Commonwealth to the soldier, and there was no evidence that he had ever exercised any acts of ownership over the land, or paid

Digitized by Google

[Jennings v. McDowell.]

www.libtool.com.cn

any attention to it whatever. Under these circumstances we are of the opinion that the Court below was right in saying, that, as against an intruder, for the purpose of sustaining the legality of the assessment, it was unnecessary to prove the death of the original donee. The great lapse of time, together with the absence of all proof showing any claim on the part of the soldier, raised a sufficient presumption of his death, as against one showing no title whatever to cast the onus upon the defendant to prove that the assessments were made pending the life of the donee.

It remains only to be considered whether the tract was seated or unseated, when the taxes for which it was sold were assessed. It appears, from the testimony given in the case, that, for some years previous to the sale for taxes, the present plaintiff and his brother Thomas claimed the land in dispute; and that, with their permission, or that of one of them, there was a temporary use of portions of the tract in the spring of the year, for the purpose of making sugar; and, for the years 1842 and 1843, a small compensation had been paid to the plaintiff for this permission. We concur with the Common Pleas, that this did not render the tract a seated one, so as to prevent its sale for taxes. There was no residence upon it, nor was there cultivation in any proper sense of the word. The temporary occupation of the tract in the spring, for the mere purpose of sugar-making, would be no notice to the assessor in the fall of the year, when the taxes are usually assessed, that there was any personal liability for the taxes. It will not do to say that, whenever profits are made from land, it becomes seated. Valuable timber, or minerals, may be taken, and yet it can scarcely be doubted, but the land would be liable to taxation as unseated. The profits must be derived from cultivation, or there must be an actual residence to change the character of a tract from unseated to seated land. The legal owner or owners of this land suffered it to be assessed, and sold as unseated—an intruder, who showed not the colour of title, having nothing but the naked possession taken subsequent to the treasurer's sale, objects to the validity of the sale, because portions of the tract were occupied by trespassers, for a mere temporary purpose, in the spring of the year when the assessments were made. We think the Common Pleas was right in ruling the point against the plaintiff in error.

The eleven assignments of error are all answered in deciding—

1. That extracts from the general draft, and the donation book in the land office, were legitimate evidence to show title out of the Commonwealth.

2. That, after the lapse of fifty-six years, a sale of a donation tract of land, for non-payment of taxes, will be sustained against an intruder, in the absence of all evidence tending to prove that

Digitized by Google

www.libtool.com.cn

the donee was living when the taxes were assessed, or that he had ever claimed the land or exercised acts of ownership over it.

3. That, in a contest between a purchaser at treasurer's sale and an intruder, evidence that portions of the tract sold were occupied in sugar-making in the spring of the year that the taxes were assessed, will not invalidate the sale.

Judgment affirmed.

Jordan *versus* Wilson *et al.*

Where the owner or officer of a boat delivers a bill of lading contemporaneously with the delivery of goods, being a declaration accompanying an act, it is part of the transaction, and is evidence of ownership in the person, whose property the goods are stated to be in the bill of lading.

ERROR to the Common Pleas of *Beaver county*.

This was an action of *assumpsit* to recover the value of 12 tons of pig metal. In 1846, the plaintiffs, Wilson, Campbell & Willards shipped from Greenupsburg, in Kentucky, 70 tons of pig metal, on the steamboat Waverley, to be delivered to Michael Allen & Co., Pittsburgh. Owing to the low stage of water in the river, the master of the boat was compelled to discharge a part of his cargo; and among the rest the pig metal in dispute, which was left on the beach at "Dead Man's Ripple," whence it was taken by defendant (as alleged by plaintiffs) and sold, and the money appropriated to his own use. The balance of the metal was delivered by the person in charge of the steamboat Waverley to Michael Allen & Co., at Pittsburgh, with the bill of lading. This bill of lading was offered in evidence with the testimony of the person who received it from the officers of the boat, for the purpose of showing the ownership of the metal. The defendant objected. The Court overruled the objection and admitted the evidence. The jury found for plaintiffs $383.

The admission of the bill of lading was the only error assigned.

Cunningham and *Clark*, for plaintiff in error.—The bill was a mere declaration of the plaintiff himself. The person who signed the bill was not produced: it was not the best evidence of ownership: 4 *Ser. & R.* 536; 4 *Binn.* 150; 2 *Watts* 180; 4 *Watts* 424.

Roberts and *Fetterman*, for defendant in error.—The objection was general; the Court cannot perceive the ground of the objection: 7 *Harris* 339; 8 *Harris* 96. The bill of lading showed possession, and that is sufficient against one who has no right: 2 *Green. Ev.* § 637. It was evidence as part of the *res gestæ*: 2 *Hall* 482; 2 *U. S. Dig.* p. 225, pl. 1163; 4 *Whart.* 130.

Digitized by Google

[Jordan *v.* Wilson.]

www.libtool.com.cn

The opinion of the Court was delivered by

KNOX, J.—We are satisfied that the Court of Common Pleas committed no error in permitting the bill of lading to be read to the jury. It is true that no evidence was given that "E. C. Stout" was the owner, master, or clerk of the steamboat Waverley; but the bill offered in evidence was proved to be genuine by the fact that it was delivered by the officers of the boat to the consignee, as the bill of lading for the iron then delivered to them. It was part of the transaction itself; and, in connexion with the other evidence in the case, established the fact that the 58 tons of metal received by Michael Allen & Co. from the steamboat Waverley in November, 1846, belonged to Wilson, Campbell & Willards. If the evidence had gone no farther, it would of course have been immaterial, as the metal in dispute was no part of the 58 tons; but as we are not furnished with all the evidence, it is our duty to presume that the plaintiffs proved that the metal left by the boat at Dead Man's Ripple was taken by the defendant, and that it was a part of the same lot, the residue of which was delivered to the consignees, November, 1846. The bill of lading delivered by the officers of the boat to the consignees contemporaneously with the metal, was the written declaration of the party so delivering it, that the metal belonged to the plaintiffs; and, being a declaration accompanying an act, was legal evidence of ownership.

Judgment affirmed.

Strawn *versus* Hook.

Where a vendee assumed to pay the amount of a judgment against his vendor, a failure of the title to the land is no defence to an action brought against him, by the plaintiff in the judgment to recover its amount.

The payment of the costs to the prothonotary, within six years before suit brought, by one who had assumed the payment of a judgment, is not such part payment of the debt as will take the case out of the operation of the statute of limitations.

ERROR to the Common Pleas of *Greene county*.

The action in this case was commenced by foreign attachment, and was brought to recover the amount of a judgment which Hook held against a man by the name of Cumpston. Strawn, the defendant, had purchased a house and lot from Cumpston, upon which Hook's judgment was a lien, and Hook alleged that Strawn, in consideration of an extension of time, agreed to pay the amount of it to him. These transactions took place in 1841 or 1842. In 1848, Strawn paid to the prothonotary the amount of the costs due on the judgment of Hook *v.* Cumpston. The title of Cumpston to the property sold to Strawn proved to be worthless, and it was recovered from the latter in ejectment.

Digitized by Google

www.libtool.com.cn

Strawn defended this action on two grounds: That the title proved defective, and that, consequently, there was a failure of consideration; and also interposed the statute of limitations.

The plaintiff contended that, after he had suffered his lien to expire on the faith of the promise, the defect of title could not affect him. And that the payment of the costs within six years was such a part payment as would amount to an acknowledgment of, and promise to pay, the debt.

The Court charged in accordance with the views of the plaintiff, and the jury found a verdict in his favour for the amount of the judgment and interest.

Sayers, for plaintiff in error.

Downey and *Black*, contrà.

The opinion of the Court was delivered by

KNOX, J.—The answer to the defendant's second point is free from error. There was evidence to submit to the jury that Strawn had purchased from Hook the judgment which Hook held against Cumpston, and that it had been used by Strawn in payment of the purchase-money due from him to Cumpston. The failure of Cumpston's title did not release Strawn from his engagement to pay Hook the amount of the judgment against Cumpston. The consideration for his promise was the transfer of the judgment, and not the guaranty of the title.

Did the payment to the prothonotary of the costs within six years from the commencement of the suit, toll the bar of the statute? The Court below ruled that it did, and in this we think there was error. That part payment of a debt, within six years, will take a case out of the statute, is well settled; but the officer's fees formed no part of the debt which Strawn owed to Hook. A sale of the judgment would not pass to the purchaser the right to receive the costs, nor would it make him liable to the plaintiff for the amount thereof, when the plaintiff had not paid them to the officer. Unpaid costs, belonging to the officers of the Court, cannot be transferred to a stranger by a plaintiff. In Ranck *v.* Hill's Executor, 3 *Barr* 423, it was held that the plaintiff could not release the defendant's liability to the officers for their costs, by agreeing to pay them himself.

All that Hook could have demanded from Strawn was the amount of the judgment and interest, as this was all that passed by the sale; and as the payment of the costs was no part of what was due to Hook, leaving his entire claim unsatisfied, it was not an admission of the existence of the debt to him, nor a promise to pay it.

It is proper to add that there was no evidence of any special

Digitized by Google

[Strawn v. Hook.]

www.libtool.com.cn

understanding on the part of Strawn to pay the costs; if there had been, perhaps Hook could have recovered them as a trustee for the officers, and in that event, a payment to the prothonotary, on the foot of the agreement, might keep the whole contract alive, but the case was put to the jury by the Common Pleas solely on the basis of a sale of the judgment from Hook to Strawn.

Judgment reversed and *venire de novo* awarded.

Patton *versus* Minesinger.

Admissions by an agent, when he is about the doing of some act within the scope of his delegated authority, are evidence against the principal, but naked declarations which are not part of any *res gesta* are not admissible.

Error to the Common Pleas of *Beaver county*.

This was an action of debt brought by Christina Minesinger against the executors of Samuel Patton, deceased. Patton had been the administrator of Joseph Minesinger, a son of plaintiff; and settled his account, in which a balance of $1612.16 was ascertained to be in his hands. This suit was brought to recover a balance due, part of the above-stated sum. On the trial the defendants produced several receipts, the last of which was dated on the 11th September, 1847, and was for the sum of $100. They alleged that the entire balance had been paid by Samuel Patton in his lifetime, for which no receipts were taken; or, if taken at the time, that they were lost.

In support of this allegation, the defendants proved that the plaintiff, who was old and infirm, had appointed her son, John Minesinger, her agent, to collect this money and attend to the settlement with Samuel Patton; and then offered to prove that the agent, in conversations with witnesses, prior to the date of the receipt for $100, had said that Samuel Patton had paid the whole amount due except $100. This was objected to by plaintiff's counsel, and rejected by the Court; to which defendant excepted.

The jury found for the plaintiff $175.96.

The rejection of the testimony offered by the defendants was the error assigned.

Fetterman, for plaintiffs in error.—These declarations were made during the continuance of the agency. His receipt would have been evidence, and that was no more than a written declaration: 3 *Barr* 473; 8 *Watts* 393; 9 *Barr* 28; 7 *Watts* 39.

Cunningham, for defendant in error.—The declarations were not made while he was doing any act in relation to the agency.

Digitized by Google

[Patton v. Minesinger.]

www.libtool.com.cn

Declarations of an agent are only admissible as part of the *res gesta*: *Story on Agency*, §§ 134, 135, 137; 2 *Stark. Ev.* 24; 10 *Ves.* 123; 8 *Bing. R.* 451; 3 *Wash. C. C. R.* 500; 4 *Wend.* 382; 24 *Pick.* 39, 242; 8 *Watts* 392; 7 *Ser. & R.* 106. Where not made at the time of the act, are not evidence: 4 *Rawle* 291; 6 *Watts* 487; 3 *Litt.* 127; 7 *Wend.* 446; 13 *Ala.* 641. His subsequent declarations are not received against the principal: 7 *Greenl.* 421; 4 *Cush.* 93; 11 *Humph.* 67; 11 *Ill.* 648; 6 *Cush.* 93.

BLACK, J.—This was an action of debt, in which the plaintiff below claimed and recovered $175. Proof was offered by the defendant, and rejected, to show that the plaintiff's son had been employed as her agent to collect this debt; and that he had declared to a witness that it was all paid but $100.

Words spoken by an agent, when he is about the doing of some act within the scope of his delegated authority, are evidence against the principal, because the words are part of the act, and tend to explain or characterize it. But naked declarations, which are not part of any *res gesta*, are not admissible. They are mere hearsay, like words spoken by a stranger. In this case the declarations of the agent were not made in any sort of connexion with the performance of his duties as agent. The evidence was rightly rejected.

Judgment affirmed.

Zack *versus* The Pennsylvania Railroad Company.

He who claims a special privilege, or the right to be tried before a special tribunal, and in a special form, must submit to a strict construction of his right, and pursue strictly the forms prescribed.

A report of viewers, appointed under the 4th section of the Act of 27th March, 1848, supplementary to the charter of the Pennsylvania Railroad Company, which omits to state the quality and value of the land taken, is fatally defective, and will be set aside.

It is not essential to the validity of the proceedings, that the owner of the land to be taken should have notice of the presentation of the petition, and the appointment of viewers.

ERROR to the Common Pleas of *Indiana county*.

On the 6th of July, 1854, the Pennsylvania Railroad Company presented their petition to the Court of Common Pleas of Indiana county, for the appointment of viewers to assess damages on the land of Daniel Zack; setting forth that they found it necessary to enter upon and appropriate a part of the land of Zack for the construction of the Indiana Branch Railroad, and that said company had been unable to agree with the said Zack, the owner, as

Digitized by Google

www.fbtool.com.cn

to the compensation. On the same day, the Court appointed viewers to meet upon the premises on the 4th August, 1854, on ten days' notice to viewers and Zack. The viewers met at the time and place appointed, and made the following report:—

"We, the subscribers, appointed by the within order of Court, having been first duly sworn and affirmed, met upon the premises owned by Daniel Zack, situate in Burrell township, on the 4th day of August, 1854, as within directed, in presence of counsel for the petitioners and Daniel Zack; having viewed the premises, adjourned to the Court-house in the borough of Indiana, until the 5th day of August, 1854, and heard the testimony adduced by the petitioners; and having a due regard to, and making due allowances for, the advantages which have resulted and seem likely to result to the said Daniel Zack, in consequence of the opening of the Pennsylvania Railroad and the construction of the works connected therewith; and having made a fair and just comparison of the said advantages and disadvantages to the said premises; we do estimate and determine that the said Daniel Zack has sustained damages to the amount of $50, and we do hereby find that the Pennsylvania Railroad Company shall pay the said Daniel Zack the said sum of $50 for his damages aforesaid; and we do further find that the Pennsylvania Railroad Company has taken and occupied for construction and working of said road a strip of feet long and 66 feet wide, a plot or draft whereof is hereto attached, and the value of which is embraced and adjusted in the damages above awarded, and we further find that the said sum of $50 is payable to the said Daniel Zack.

"Witness our hands and seals this fifth day of August, A. D. 1854."

On the 25th December, 1854, the following exceptions were filed to the foregoing by the counsel of Zack:—

1. No notice was given to Daniel Zack of the time and place when and where the viewers were to be chosen, and he could not be heard on that choice.

2. The quantity of land taken is not stated in the award, nor its value, so that the Court cannot confirm the report unless without objections.

3. There is no plot of the other lands of claimant showing how this land is taken thereout and the shape it leaves the residue.

4. That the damages are entirely too low, and are not estimated in accordance with law.

On the 30th December, the Court overruled the exceptions, and entered judgment for the amount awarded. Whereupon Zack removed the proceedings to this Court, and assigned the same for error.

Cowan and *McCabe*, for plaintiff in error.

Stokes, contrà.

Digitized by Google

[Zack v. Pennsylvania Railroad Company.]

www.libtool.com.cn

The opinion of the Court was delivered by

LOWRIE, J.—It is most manifest equity that he who claims a special privilege, must submit to a strict construction of it. He who claims the right to be tried before a special tribunal and in a special form, both of which are out of the general course of the law, must expect that his special mode of trial shall be strictly pursued as to the forms prescribed, and not be allowed to innovate upon the general principles of law further than is indicated by the law that prescribes it.

The Act of 27th March, 1848, § 4, *P. Laws* 274, under which this proceeding was instituted, requires that the viewers shall be sworn "faithfully, justly, and impartially to decide, and true report to make, concerning all the matters to be submitted to them, and in relation to which they are authorized to inquire;" and then directs that, "having viewed the premises, they shall estimate and determine the quantity, quality, and value of the land taken and occupied, or to be taken and occupied; and having a due regard to, and making just allowances for, the advantages resulting to the owner of the land, in consequence of the opening or making of said railroad; and, after having made a fair and just comparison of said advantages or disadvantages, they shall estimate and determine" the damages, "and make report thereof to the Court."

From these last words it is argued that the law does not require the viewers to state anything in their report but the damages; but this is treating their oath altogether too lightly, or overlooking the fact that they are sworn to report all the matters which become a subject of their inquiry, including expressly, and at the least, the quantity, quality, and value of the land taken. It is impossible for us to declare that the special requisition that the general result shall be reported, sets aside any other duties which the viewers have sworn, and were required to swear that they would perform.

The objections made to this report are, that the quality and value of the land taken are not reported, and it seems to us that they are well taken. The report states the length and breadth of the strip of land taken, from which the quantity may be very nearly ascertained, but it states nothing else, except the damages. To the argument that more would be useless, we may say, it is enough that the law requires more. But is it useless? The report is to be reviewed by the Court; and this can be of no value if no facts be set out in it, unless the Court choose to hear the evidence over again. If the facts be not set out, and are not required to be, then a review in this Court is worth nothing. Besides it is important, in reviewing a cause tried out of the general course of the law, to see what matters have been inquired of, that it may be known that the cause has been fully and rightly consi-

Digitized by Google

www.ibtool.com.cn

dered. When cases are referred to auditors, we do not accept from them mere results, but require the material facts to be stated.

Land may be described, as to quality, in many ways, as barren or fertile, town land or farm land, woodland or cultivated, hillside or bottom; but not a word is said about it here.

In such a summary mode of dealing with a man's property, he has a right to expect that it shall appear in the report that his cause has been fully considered, and certainly, in the long run, such mode of reporting is fairest for both parties. It does not at all interfere with the promptness of the remedy, and it saves both parties, in some degree, from the risk of a mere perfunctory report, and perhaps from much future litigation; for then the rights of both are fully defined, and the very things for which damages have been paid are ascertained.

Another objection is that the owner had no notice of the presentation of the petition, and appointment of the viewers. However proper it may be for the Court below to require, as matter of practice, that such notice should be given, and much as it would tend to the satisfaction of suitors, whose property is to be taken against their will, the law does not make it essential. It falls into the same class with sheriffs' inquisitions of damages, where the right is admitted or decided, and the officer of the law chooses the persons who are to settle the amount.

Judgment reversed and a new view awarded.

Tiley *versus* Moyers.

A provision in the lease of a coal-bank that the lessee shall be treated as having abandoned his lease, if he shall suffer the bank, by any fault of his, to lie idle for a year when it would yield coal, does not apply if he be actually taking coal out of the bank by any means of access leading to the coal.

The lease of a coal-bank will carry with it the drifts, platforms, and hoppers used in working it, as appurtenant, but the principal thing granted is the right to mine coal, and not the drift or passage leading to the mine.

Error to the Common Pleas of *Cambria county*.

The action was ejectment to recover a tract of land containing 220 acres. Michael Moyers and Elizabeth Moyers, the plaintiffs below, were the owners of the land for which this action is brought; it was situated on the Allegheny Portage Railroad, was coal land, and had one or more drifts opened upon it, with some of the fixtures necessary for mining and loading coal. On the 29th January, 1852, they leased and demised to William Tiley, "their coal-bank and the appurtenances thereunto belonging, together with a privilege of timber for use of coal-bank, for and during the term and space of ten years, commencing from and after the 1st day of March, 1852, and to continue until fully complete and ended."

Digitized by Google

www.libtool.com.cn

Tiley, the lessee, was "to put the coal-bank in good working order for the rent of the first year, and to pay the second and third years one-quarter of a cent per bushel for each and every bushel of coal taken from the said bank, and for the remaining seven years, one half-cent per bushel for each and every bushel taken." The agreement contained (amongst other things) the following clauses: "It is further agreed that the said Tiley is to have the privilege of right of way for a more direct railway, provided it does not interfere with any of the buildings on the land of the said Moyers, together with the privilege of building one or more houses or shops for use of said bank, and to occupy them for the term of the lease, free of rent, and to leave them in good order; the buildings to be substantial. It is mutually agreed that if the said coal-bank should stand, by the act of the said Tiley, for one year when it would give coal, it is to be taken as an abandonment of the lease, and to be treated accordingly. It is further agreed that the said Tiley is to leave the bank in good working order; the main gangway to be left open, or in such order so as not to interfere with the taking out of coal after the expiration of this lease; and no other person or persons is to have the privilege of taking any coal from said bank without the consent of said Tiley first had and obtained in writing." The tract of land in which the coal was found contained 220 acres. It had two openings or coal-drifts upon the tract proper: one denominated in the testimony the *Russell* drift, and the other the drift above the "*lime-kiln.*" There was a third opening, called the "*O'Neil*" drift, starting on an adjoining tract of land, and connecting with or intersecting the Russell drift on the Moyers' tract.

The tract of land upon which this last drift started was in the occupancy of a tenant by the name of Fox. Tiley having failed in an effort to purchase Fox's lease, purchased the land from the owner, Ross. The Russell drift, through which Moyers' coal-bank had been worked, connected with the old Portage Railroad; and it was alleged that this drift became impracticable, by the altered location and grade of the new railroad, and the removal of the old one. Tiley then abandoned this Russell drift, and opened one on his own land, which communicated with the coal on the Moyers tract, and in this way continued taking coal out of his own and Moyers' land.

The plaintiffs contended that, by the terms of the lease, the "coal-bank" referred to the openings or drifts upon the land at the time of the lease, and the defendant not having used or worked them for a year, from the 1st March, 1853, to the 1st March, 1854, brought this action of ejectment to enforce the clause of forfeiture contained in the lease.

The defendant contended that all that he had done in the changes of working the coal-mines had been with the knowledge,

Digitized by Google

www.libtool.com.cn

acquiescence, and advice of the plaintiffs. And also that the true construction of the lease was, that he might take coal from the land at any point, or by any mode most convenient and accessible.

The Court below (TAYLOR, P. J.) instructed the jury, that if the plaintiffs acquiesced and agreed to the manner in which the defendant had conducted the mining operations, they could not recover; but if they had not done so, the failure to mine coal through the *bank opened* on the premises at the time of the lease for an entire year, would be a forfeiture of the lease.

The jury found for the plaintiffs.

J. G. Miles, for plaintiff in error.

White and *Coffey* (with whom was *Heyer*), contrà.

LOWRIE, J.—The entry or drift to a coal-bank is merely a means by which the bank is to be mined and the coal taken out; and when the bank is leased, the right to use the entry, platform, hoppers, and the private roads leading to it, would seem very naturally to go with it as appurtenances. But the principal thing granted in the lease of a coal-bank is the right to take coal out of it, and not the passage to the coal. The provision, therefore, that the lessee shall be treated as having abandoned his lease, if he shall let the bank, by any fault of his, lie idle for a year, when it would yield coal, does not apply, if he be actually taking coal out of the bank by any entry. The purpose of the provision is to prevent the lessee from using the property so as to produce no profits to the lessor, and it is not broken in letter or spirit by the adoption of new ways of reaching the coal.

This interpretation of the lease sets aside all the other questions raised in the cause. If Tiley has wrongfully opened a new entry, or made use of an old and abandoned one, or did not put the coal-bank or main gangway in proper order, his errors must be corrected by an action for damages, for the parties have not made these matters causes of forfeiture of the lease.

Judgment reversed and new trial awarded.

Kribbs *versus* Downing.

When a person against whom a fraud has been perpetrated lies by for twenty-one years without causing it to be investigated, he will not then be permitted to show it: for after so long an acquiescence the presumption of law is conclusive that no fraud was committed.

Ejectment is a possessory action, and the plaintiff cannot recover in this form land of which he is in the actual possession at the time.

Specific performance of an agreement for the conveyance of land, cannot be enforced by a conditional verdict for any other land than such as is embraced in the agreement.

Digitized by Google

[Kribbs v. Downing.]

www.libtool.com.cn

ERROR to the Common Pleas of *Clarion county*.

This was an ejectment for 350 acres of land, brought by James Downing and others against George Kribbs and others. In 1801, or 1802, a man by the name of Samuel Parker commenced an improvement on the land in dispute. He deadened some trees and commenced the building of a cabin, but had no residence or cultivation on the land. In 1805, Sally Cook, a single woman, entered upon the land, and, with the aid of her brothers, commenced a resident settlement upon the land—built a cabin—cleared land and resided upon the tract. In October of the same year she was forcibly driven off by Parker. He then sold 100 acres, including his own and Sally Cook's improvement, to James Platt, who sowed some grain in the fall, which he harvested the following summer and took it away. Sally Cook instituted a prosecution against Parker for forcible entry and detainer, which was to be tried in September, 1806. On the 16th of September, 1806, the matter was compromised between them, by which she relinquished all claim to the land except 50 acres, and gave up the prosecution, and Parker agreed to procure the title from the Commonwealth, and convey to her 50 acres adjoining Daniel Cook, he to pay the costs, &c.

This agreement was made at Franklin, in Venango county, the premises at that time being within that county. J. W. Hunter was a witness to this agreement, and, it was alleged, was the counsel of Sally Cook, in the prosecution against Parker. John Witherup was at that time the sheriff of Venango county. On the same day, endorsed on the agreement between Parker and Sally Cook, was an acknowledgment by Parker that J. W. Hunter and John Witherup should be equally concerned with him in the land, after deducting the 50 acres for Sally Cook; and, on the 25th of May, 1836, a release of his interest by Hunter to Witherup. On the 13th of June, 1836, Witherup conveyed his interest, being two-thirds, to George Kribbs, one of the defendants in this suit. Parker sold his third of the land to William McCall, it being severed from the rest of the land, and had been surveyed and patented. On the 6th of July, 1836, Kribbs procured a warrant, and had the land surveyed, including the 50 acres which had been allotted to Sally Cook, and took a patent for it. In his application he claims an improvement commenced in 1805, being the one made by Sally Cook, as there was no other resident settlement besides upon it.

In 1807, Sally Cook was married to Jacob Keely, and she and her husband lived upon the land till 1815, when they sold to Peter Downing, who continued to reside on it till his death, in 1834. His family remained there at the time of trial.

Downing, in 1820, had a survey made by the deputy surveyor of the whole tract. He knew of the agreement of 1806, and did

Digitized by Google

www.libtool.com.cn

not appear to claim at that time more than the fifty acres. The balance of the land was assessed in the names of Hunter, Witherup, and Parker.

The land, except the 50 acres in possession of Keely and wife, and afterwards of Downing, appears with some intervals on the unseated land list from 1808 to 1830, and in 1828 was sold at treasurer's sale, and purchased by Witherup.

The plaintiffs contended that the agreement of 1806 was a fraud upon Sally Cook, in which her counsel, Hunter, and Witherup and Parker participated: and that her possession was sufficient notice to the defendants purchasing a title thus situated. They also contended that the warrant, survey, and patent of Kribbs was an ouster of plaintiffs of the fifty acres; and no conveyance having been made according to the agreement, that the plaintiffs would be entitled to a conditional verdict to enforce the execution and delivery of the deed for that part.

The defendants relied upon the compromise made in 1806, and the long acquiescence of the parties. The treasurer's sale to Witherup in 1828, and that neither Sally Cook, Keely nor Downing ever claimed more than the fifty acres, which they had been and still were willing to convey.

That part of the charge of the Court (GALBRAITH, P. J.) which relates to the questions upon which this Court decided the cause, was as follows:—

"It is clear from this statement that the plaintiffs are entitled to a verdict for something. It is said, however, that the defendants are not in possession of the fifty acres, do not claim it, and have expressed a willingness to convey that quantity to the plaintiffs—but that is not a sufficient answer under any circumstances disclosed in the evidence. They have made an entire survey including the residence and possession of the plaintiffs, and without their consent, and without even making a record of their right in the land office, taking out a patent from the Commonwealth covering the whole tract. This is such an ouster as will entitle the plaintiffs to a verdict for the fifty acres at least, or for a verdict to be released on making a good title to the fifty acres within a reasonable time. If the agreements of September, 1806, were obtained from Sally Cook by the fraud of her counsel, and Witherup concerned in it—and she and her husband continued the possession under that delusion; transferred their entire right to Downing, and he continued to act under the same delusion, and under misrepresentations of Witherup, and has made no new agreement of his own, or adopted and recognised none such as his own,—if Witherup obtained the right of Hunter with knowledge of the wrong practised upon Sally Cook and her husband, Keely, and upon Downing afterwards, the possession of Downing, or his heirs on the land was sufficient to put Kribbs upon notice, and he would

Digitized by Google

take the right, subject to all its infirmities, and the plaintiffs would be entitled to a verdict without any conditions, on the principle of Hunter *v.* Howard, in 10 *Ser. & R.* If, however, Downing purchased only fifty acres, and afterwards got a survey stating that Witherup was owner or to be the owner on certain conditions, give it in for assessment, agreeing of himself that Witherup was to take out the title for the whole, and he to be the owner of part, all under one residence, settlement, survey, &c., and this all fair and understood between Witherup and Downing, then the recovery might be confined to the fifty acres by a conditional verdict, as already suggested. If, again, the agreement was fraudulent as regards Hunter particularly, the counsel of Sally Cook, and he induced the agreement, at the same time taking an interest in it himself, Hunter would stand as trustee for his client, Sally Cook, and the interest transferred to him would really belong to her. If this were so did Witherup know it, or was he bound to take notice of it? The plaintiffs say there is evidence of this in the transfer from Hunter to him in the peculiar wording of this instrument. There is some force in this, and you may take it into consideration. If, besides this, Downing acted in mistake of his rights, in his acts and declarations in relation to Witherup's claim; if, added to this, there was unreasonable delay on the part of Witherup in performing the agreement for Parker in paying the purchase-money and perfecting the title, and finally, the defendants (the plaintiffs having no opportunity of ascertaining the true state of the land) took out the title from under the plaintiffs in their own name without consulting them, and without their consent, the jury might find a verdict for the plaintiffs to be released, on making and filing of record within a reasonable time, a deed from the patent not for the fifty acres alone, but for so much more as the interest of Hunter would amount to, if the evidence justify that conclusion upon the principles stated, designating it in such manner as to be certainly ascertained, and on payment of the costs of suit. The plaintiffs were entitled as the settlers to have the legal title in their own name, or to be known in the application of record, or in some way to have the portion they were entitled to, secured before the title-papers were taken out of the office. No deed has yet been given or tendered to them, and their equities can be thus secured by a conditional verdict."

The jury found for the plaintiffs to be released on defendants making the plaintiffs a deed for fifty acres of land, across the western end of the tract, and also for one undivied sixth part of the balance of the land in dispute, within one year from the date of the verdict.

The instructions of the Court, the form of the verdict, and the entry of judgment thereon, constituted the foundation of the errors assigned.

Digitized by Google

[Kribbs v. Downing.]

www.libtool.com.cn

Lathy and *Corbet*, for plaintiffs in error.—If the contract was fraudulent as to Mrs. Keely, she could avoid it; but their vendees, if they got all they purchased, would have no such rights. These plaintiffs are strangers and volunteers, and cannot allege it if it even existed: 6 *Harris* 137.

There was nothing in the case to show that Kribbs had any notice of the alleged fraud. There was nothing in the agreement to indicate it; and nothing in the possession of Keely or Downing to indicate any claim beyond the 50 acres: 4 *Wh.* 259; 2 *Watts* 275; 7 *Watts* 267; 1 *Barr* 474; 4 *Harris* 364; 7 *Watts* 167; 7 *W. & Ser.* 442.

Could the plaintiffs recover the 50 acres of which they were in possession? It is a possessory action. At common law the plaintiff had always to prove the defendant's possession. The Act only makes the service of the writ *prima facie* evidence of defendant's possession; it merely shifts the burden of proof; but if the defendant proves himself out of possession, it is a flat bar: 9 *Ser. & R.* 26; 13 *Ser. & R.* 110; 10 *Ser. & R.* 151; 5 *Watts* 70; 8 *Barr* 365; 7 *Harris* 434.

Myers and *Campbell*, for defendants in error.—Substantial justice could only be done in this case by a conditional verdict. By adding the condition, the verdict operates as a decree in chancery: 8 *Ser. & R.* 491; 4 *Id.* 288; 9 *Id.* 315; 13 *Id.* 171; 4 *Binn.* 41; 3 *Barr* 172.

Was the verdict for Hunter's share right? He paid nothing; the jury found his conduct fraudulent. It was left to the jury whether Keely and wife transferred their *entire* right to Downing, or but the 50 acres. The jury found the former. If there was no fraud on his part, but had been a gift from his client, Sally Cook, he could not have held it: 2 *Harris* 506; 8 *Ser. & R.* 417; 3 *Barr* 172.

Witharup's treasurer's deed, in any aspect, was worthless, as the title was not out of the Commonwealth: 9 *Harris* 480.

The opinion of the Court was delivered by

BLACK, J.—If the law would not take a simpler view of human affairs than the parties and counsel seem to have taken of this case, the administration of justice would soon become an impracticable thing.

About the beginning of the present century a dispute arose concerning a tract of land, between one Sally Cook and Samuel Parker, each claiming to be entitled to it by a settlement right. The dispute grew into a quarrel, which ended in the forcible eviction of one party and a criminal prosecution against the other. Then they compromised, Sally Cook agreeing to take 50 acres and relinquish all claim to the balance, while Parker was to get

Digitized by Google

www.libtool.com.cn

title from the Commonwealth for the whole and make her a conveyance for the 50 acres. Sally Cook and those claiming under her have been in possession of the 50 acres ever since. The present plaintiffs claim under Sally Cook, and the defendants under Parker.

It is not without some surprise that we find these parties going back to the remote transactions of a former generation, and fishing up matter for a lawsuit from the oblivion of nearly fifty years. It is still stranger to see this done in the form of an ejectment for the whole of the original tract of land, when the plaintiffs are themselves in the actual possession of a part of it, and as much in possession of all the rest as they have been at any time since 1806.

It is now alleged that the compromise under which the parties have been holding ever since its date was procured by fraud, and this question of a fraud committed in 1806 was actually left to a jury in 1855. We know not how true or how false this allegation may be. It is wholly impossible for us to rely, with the least confidence, on the very small amount and imperfect character of the evidence which can now be given of it. Death has disarmed the accused parties of the power of self-defence, and closed the lips of the witnesses who might have testified in their favour. After such a lapse of time no owner of land can be called on to answer a charge impugning his title in that way. If he could, where would be the security of property? When a person, against whom a fraud has been perpetrated, lies by for twenty-one years without causing it to be investigated, he will not then be permitted to show it. From so long an acquiescence, the presumption of law is conclusive that all was done rightly. For this reason the judge erred when he instructed the jury that they might find for the plaintiffs on that ground.

It seems that one of the defendants, in 1836, got the whole tract patented to himself, including the 50 acres in possession of the plaintiff. This gave him the legal title in trust (to the extent of the 50 acres) for the plaintiffs. But the Court charged that it was an ouster of the plaintiffs, and entitled them to recover in ejectment, although they were not out of the actual possession. The law is otherwise. Ejectment is a possessory action. It is designed to redress no other wrong than that of holding the true owner out of possession, and it cannot be maintained for land of which the plaintiff is himself in possession.

We have already said enough to lay the question of fraud out of the case, and to show that the recovery of the one-sixth on that ground was all wrong. On all the other evidence the Court below and the jury came rightly enough to the conclusion that the plaintiffs had no title to more than the 50 acres. Yet a conditional verdict was given for the whole. We say that they could not

Digitized by Google

www.libtool.com.cn

recover any part of the tract—not the 50 acres, because that they had already—and not the balance, because to it they had no right.

If I am in possession of a piece of land, which I hold by an equitable title, and my trustee is in possession of another piece, to which he has a title legal and equitable both, I cannot demand his land from him as a penalty for not making a legal conveyance of mine.

How the conveyance of the legal title may be enforced is a question which does not arise now, and perhaps never will; for the long possession of the plaintiffs makes them amply secure in the enjoyment of the 50 acres against any claim that can possibly be made.

This curious case has twenty-three errors assigned; but they do not require any further notice than what they have received.

Judgment reversed and *venire facias de novo* awarded.

Porter *versus* Dougherty.

He who demands specific performance of a parol contract for the sale of land, must present his claim without any unnecessary delay, and while performance may be enforced without injury to others, and must also have done no act which would render it unjust or inequitable to decree specific execution of the contract.

Where the vendee under a parol contract gave up the possession, on receipt of notice from his vendor, who thereupon entered and made valuable improvements on the land, and by his will devised it to another who entered into possession; the vendee also having received a pecuniary legacy under the will of the vendor. *Held*, that these circumstances accompanied with the lapse of eleven years before any suit was brought to enforce the parol agreement, were a bar to a specific performance.

Where the vendor of land by a parol agreement is dead, the Orphans' Court has exclusive jurisdiction to enforce the specific performance of the contract.

Error to the Common Pleas of *Westmoreland county*.

This ejectment was brought by John Porter against Andrew Dougherty to recover the possession of a tract of land containing 100 acres. The title was originally in John Beacam, whose daughter was intermarried with James Porter, the father of the plaintiff. At the instance of Beacam, James Porter and his wife went on to a tract of land belonging to Beacam in Allegheny county. After living there for four years Beacam gave the land to his son Robert, by whom 40 acres of the improved part of it was sold to Porter, who moved upon it, built a cabin, and cleared some additional land. He paid Robert $40 for the land.

Porter lived there about a year, and he and Robert disagreeing, John Beacam came over and proposed to Porter to give up the land to Robert, and he would give him a tract in Washington township,

Digitized by Google

www.libtool.com.cn
Westmoreland county, containing 60 acres. Porter acceded to this proposition, built a cabin on the land, moved upon it and cleared six or eight acres, and lived there about fifteen years, until he was accidentally killed, leaving his wife and six children upon the land. The widow continued to live on the land for two years longer, when she married a man by the name of Baxter, and with her family went to reside with him.

Before she left, her father had given her notice to quit. He then made his will, and devised the land to his daughter, Mrs. Croops, under whom the defendant claims as tenant. Beacam died in 1847. He also bequeathed $100 to plaintiff's mother.

The widow and the other surviving children of James Porter conveyed their interests to John Porter. The widow left the land in 1840 or 1841, since which time it has been in the possession of John Beacam, and Mrs. Croops, who claims as devisee under Beacam's will.

The Court (AGNEW, P. J.,) instructed the jury that the statute of frauds and perjuries was a bar to the plaintiff's recovery, and directed the jury to find a verdict for the defendant.

This instruction was assigned for error.

Cowan and *McKinney*, for plaintiff in error.

Foster and *Woods*, for defendant in error.

The opinion of the Court was delivered by

LOWRIE, J.—This plaintiff claims this land under a grant from his mother, and he fails because she had no equity. One who desires to enforce specific performance of a parol contract for the purchase of land must present his claim without any unnecessary delay, and while affairs remain in such a condition that performance can be enforced without injury to others, and especially he must not himself have done any act that is incompatible with his claim for performance, or that makes such a claim inequitable.

Here eleven years elapsed between the breach of the alleged contract by the plaintiff's grandfather, when he claimed and got back the land from the plaintiff's mother, and the bringing of this suit. In the meantime the grandfather made considerable improvements on the land, and then died, having made his will devising away to his children this and his other land: the devisee of this portion is in possession of it as part of her share of her father's estate, and must lose it if this claim succeeds; and the plaintiff's mother was bequeathed $100, and it was paid to her.

These circumstances very obviously set aside the equity on which the plaintiff relies, if it ever existed, which is very doubtful. Besides this, ejectment is not the proper form of remedy for

Digitized by Google

www.libtool.com.cn

enforcing specific performance of such a contract against the estate of a decedent: 17 *State Rep.* 198; 19 *Id.* 491.

Judgment affirmed.

Wood *versus* Anderson.

An order of the Court sustaining a demurrer to a declaration, is in substance a judgment that the plaintiff take nothing, and the defendant go without day, and have his costs.

An amendment of the declaration, allowed several years after such order, is a nullity, as there was no case pending to which the amendment could apply.

In such cases, an amendment will be allowed at the time of judgment, or during the term, upon proper terms, if the plaintiff shows that he has a good cause of action.

Where the original declaration and the amended counts present both in form and substance totally different and distinct causes of action, it is error in the Court to allow the amendment; more especially is this the rule where the right of the plaintiff is apparently barred by the statute of limitations.

ERROR to District Court of *Allegheny county*.

This was an action of trespass on the case, by John Anderson against James Wood, commenced on the 16th January, 1845. Onthe 7th March, 1845, the plaintiff filed his declaration in *tort*, complaining that he, being a partner in the Globe Cotton Factory, and having contributed $800 to the capital stock, was wrongfully excluded from the partnership and business by Wood, his co-partner, with a loss of his capital stock and wages. This declaration being demurred to, an amended count was filed, to which the defendant also demurred. On the 10th March, 1849, the opinion of the Court was filed, which concluded thus:—"For these reasons the demurrer is sustained, and judgment thereon in favour of the defendant."

On the 12th August, 1852, the plaintiff's counsel, by leave of the Court, filed an amended declaration: in the two counts of which he declares upon a contract for the voluntary dissolution of the partnership, and alleges that by that contract Wood agreed to pay him his $800 of capital and arrears of wages.

The defendant's counsel moved to strike out this declaration, on the grounds:—

1. That the same was irregularly and improperly filed, and that leave to file the same was improvidently and irregularly granted.

2. That the cause of action set forth in said amended declaration, is another and different cause of action from that on which suit was brought, and for which the plaintiff, in his original and first amended declaration counted.

3. That the cause of action in said amended declaration, filed on

Digitized by Google

[Wood *v.* Anderson.]

www.libtool.com.cn

the 12th of August, 1852, is in *assumpsit*, on promises, whereas the action and original declaration sounds *in tort*.

This motion was overruled.

The defendant was ruled to plead, and, on the trial, a verdict was rendered for the plaintiff for $1304. To reverse which, the defendant sued out this writ of error.

Stanton, for plaintiff in error.—At common law no amendment was allowed after final judgment upon demurrer. Under the Act an amendment will be allowed, if asked for during the term. The plaintiff failing to ask it at that time, the judgment became final.

The amended declaration is for a different cause of action. The causes of action are not only different, but contradictory. The one sounded in *tort*, the other in *contract*. The Act of amendment allows only a modification, not a change of the cause of action: 6 *Ser. & R.* 294; 11 *Id.* 102; 8 *Id.* 287; 2 *Rawle* 337; 5 *Barr* 257.

The amendment was not made in time, as it takes from the defendant the right of pleading the statute of limitations: 4 *Yeates* 507.

Cochran, for defendant in error.—Amendments at common law are discretionary with the Court, and not the subject of a writ of error.

No judgment was entered in this case. The opinion was filed sustaining the demurrer, but no judgment was actually entered upon it: 2 *Watts* 311.

In 6 *Ser. & R.* 511, we have an instance of an amendment after judgment—though not on demurrer, *Id.* 385; it was allowed even after error brought: 2 *Ser. & R.* 220. Amendments are not reducible to any certain rule: 7 *T. R.* 699; 1 *Binn.* 369.

The amendment in this case was allowed by the Court under its discretionary power at common law, and not under the Act of 1806. The later cases under the Act are more liberal in allowing amendments: 1 *Penn. Rep.* 65; 3 *Watts* 456; 4 *Id.* 258: 1 *Whart.* 282; 1 *W. & Ser.* 554; 4 *Id.* 550; 4 *Barr* 242; 4 *Harris* 160; 5 *Id.* 518.

Defendant cannot set up this objection now after plea pleaded, and a trial on the merits: 11 *Ser. & R.* 101; 1 *Munf.* 76; 4 *Yeates* 507; 13 *Ser. & R.* 253; 3 *Barr* 223.

The opinion of the Court was delivered by

Lowrie, J.—This action was brought in January, 1845, and there was a general demurrer to the declaration; and in March, 1849, judgment was entered in favour of the defendant that the demurrer was sustained; and in August, 1852, the plaintiff, on motion, was permitted to file a new declaration and proceed with

Digitized by Google

www.libtool.com.cn

the cause. This seems to us to be irregular. The order sustaining the demurrer was in substance a judgment that the plaintiff take nothing and the defendant go without day and have his costs; and that is the meaning of our short entry. The *ideo consideratum est* is regarded as if it were really enrolled. If the plaintiff had shown, at the time of the judgment, or perhaps during the term, that he really had a good cause of action, the Court would, no doubt, have allowed an amendment on proper terms, instead of entering the judgment; but there was nothing of the sort. There was therefore no case pending in 1852, when the Court allowed the new declaration to be filed, and required the defendant to plead to it.

There is another objection. The first declaration was for a tortious exclusion of one partner by another from the possession of the partnership business and effects; and the second was for a breach of contract for the purchase by one partner of the interest of the other. These two counts are totally inconsistent in form and substance, and could not be joined in the same action; and therefore, when the plaintiff is defeated on the one he cannot fall back upon the other by way of amendment.

Again: the two counts, being totally inconsistent, present totally distinct causes of action, and it was error to allow the plaintiff to amend by inserting a new cause of action after the right of the plaintiff had been apparently barred by the statute of limitations: 6 *T. R.* 544; 7 *Id.* 51.

None of these errors were waived by the defendant's putting in a plea, for he could not avoid this. He did endeavour before the trial to get the Court to retrace its steps, but failed.

All the proceedings after the judgment in favour of the defendant below on the demurrer are hereby reversed and set aside.

Rowen *versus* King & Schrack.

No admission of a debt by a party, much less by an agent, can be strong enough to preclude the person from showing that it was made in ignorance of his rights.

A judgment entered by a justice of the peace upon the confession of the party or his agent, is subject to an appeal.

ERROR to the Common Pleas of *Somerset county*.

An action was brought by King & Schrack against Sarah Rowen, before a justice of the peace, to recover a debt which the defendant's son owed the plaintiffs. Mrs. Rowen employed a man by the name of Garrison Smith to attend to the suit as her agent, and he employed counsel to appear before the justice and make

Digitized by Google

www.libtool.com.cn

defence. On the day of appearance Smith, and the counsel of Mrs. Rowen, and the plaintiffs and their counsel, appeared before the justice. After some proceedings and conversation among the parties it was stated that judgment should be entered for the defendant. Her counsel then retired, but ascertained afterwards that Smith had confessed a judgment against the defendant for $93.95. He applied to the justice to open the judgment, which was refused, and the defendant then appealed. The appeal was entered in the Common Pleas on the 20th January, 1855, to February term. On the 27th August, 1855, at the third term after the appeal, a rule was granted to show cause why the appeal should not be quashed; which rule was made absolute on the 18th September following. To reinstate the appeal this writ was sued out by the defendant below.

Gaither, for plaintiff in error.—The agent had no authority to confess the judgment in this case. It would require a special authority for that purpose: 5 *W. & S.* 548; 2 *Harris* 105; 2 *Kent* 793. The motion to quash was made too late: 3 *Barr* 354; 1 *Jones* 280.

Edie, for defendant in error.—It appears from the evidence given on the argument of the motion, that Smith was instructed by defendant to attend to the cause as if it were his own. This, it is submitted, would confer the power to confess a judgment. If he could confess a judgment in his own case, he could do so in this.

No appeal can be taken from a judgment confessed.

The cases cited from 3 *Barr* and 1 *Jones* by plaintiff in error, do not sustain the position assumed in this case. There declarations had been filed, and the causes tried before arbitrators. Here nothing was done after the appeal, and the motion is believed to be in time.

The opinion of the Court was delivered by

Black, J.—The defendant below was sued before a justice and employed an agent, who, instead of making her defence, confessed judgment against her for $93.95. From this judgment she afterwards appealed, but the Court, being of opinion that an appeal would not lie, quashed it.

Every person, against whom a justice of the peace renders a judgment, is entitled, of common right, to an appeal and a trial by jury. It has never yet been decided that it makes any difference whether the judgment was obtained by confession or otherwise. A judgment may be confessed by mistake, or in consequence of imposition, or it may be done fraudulently by a corrupt agent. In such case, what is the remedy, and how shall justice be reached?

Digitized by Google

www.libtool.com.cn

The justice is not bound by the statute to open the judgment, and a *certiorari* would be of no avail. If the wronged party discovers his situation in time to appeal, he ought not to be turned out of Court. When the judgment is confessed by the defendant in person, it is evidence that the debt is just, and may be proved for that purpose. But no admission of a debt can be strong enough to preclude the party from showing that it was made in ignorance of his rights. Much less can the admission of an agent have that effect.

Appeal reinstated and record remitted with a *procedendo*.

Watt & Co. *versus* Hoch.

The custom of the merchants of Pittsburgh to charge interest on goods sold after six months is so universal and notorious, that it necessarily enters into the contract as a part of it; and the Courts are bound to take notice of this custom as a part of the law.

Where a person indebted on several accounts, makes a payment, he may direct how it shall be applied; if he give no such direction, the creditor may apply it, and if he credit it generally on an open account, the law will not afterwards appropriate it to a judgment although older than the account; especially if the creditor have security for the judgment and none for the account.

Error to the Common Pleas of *Jefferson county*.

The plaintiffs, John Watt & Co., were merchants, doing business in the city of Pittsburgh. The defendant resided in Jefferson county, and purchased goods from the plaintiffs. On the 22d of January, 1850, the defendant gave to the plaintiffs a single bill, with J. P. Hoch as surety, with warrant of attorney to confess judgment for the sum of $2219.21, payable one day after date, which was entered in the Court of Common Pleas of Jefferson county, on the 1st February, 1850. The defendant continued, after the single bill was given, to purchase goods from the plaintiffs, and made various payments in cash, lumber, and notes and drafts of third persons.

On the 11th of May, 1852, the defendant applied to the Court to open the judgment and let him into a defence, alleging that the judgment was paid. This rule was made absolute and an issue directed to ascertain the amount due on the judgment.

On the trial the defendant claimed, that certain payments made by him should have been credited upon the judgment and not upon the open and running account. He also resisted the right of the plaintiffs to charge interest upon the several bills of goods purchased after six months.

The plaintiffs contended that the payments having been made by defendants without any direction to apply them to any particular

Digitized by Google

debt, they had a right to apply them to either, and that even if they had not, the law would apply them to a debt for which they had no security, rather than to one for which they had. They also alleged that they had a right to charge interest, under the established custom of merchants of Pittsburgh, and offered evidence to prove that such was the custom, which was rejected by the Court.

The Court below (GALBRAITH, P. J.,) charged the jury as follows:—

"In this case there was a judgment in favour of the plaintiff, which was opened on application of the defendants to let them into defence in order to show how and for what the judgment was obtained, what payments had been made, and the general equities. Evidence has been given of payments by the delivery of timber, lumber, &c., of which the jury must judge, and determine to what extent. The plaintiffs have shown bills of goods furnished in the progress of the dealings between the parties, the amount of which the jury must determine from the evidence. As a general rule, no interest is chargeable on a running account of a merchant who sells goods in the ordinary way, unless settled from time to time, notes taken, or something to indicate a different understanding. It is a general rule, that payments made, without any agreement or understanding as to what debt it is to be applied to, will be appropriated by law to the oldest debt. If there has been no other agreement shown here, the jury will determine by the evidence what payments made by the defendants in this case shall be applied to the judgment, and find their verdict accordingly."

The jury found for the defendants.

The errors assigned were as to the instructions of the Court on the right to charge interest on the accounts; on the application of the payments, and the rejection of evidence of the custom to charge interest after six months.

Barclay, for plaintiffs in error.—Interest is chargeable upon goods sold or delivered as soon as the express or implied term of credit has elapsed: 4 *D.* 289; 3 *W. & S.* 271; 6 *Binn.* 162; 1 *Id.* 488; The plaintiffs' claim in this case was a stated account, and they were entitled to interest from the time of the statement; 1 *Bald.* 536; 4 *W. & S.* 14; 2 *Barr* 323; 7 *Barr* 281; 3 *Harris* 236; 1 *Id.* 313.

Gordon, for defendant in error.—Interest can only be allowed upon an open account, by express agreement, by general usage, or where there has been unreasonable and vexatious delay in paying.

As a general rule, where a payment is made without any agreement or application, it will be applied to the oldest debt. This case is governed by the case of Speck *v.* The Commonwealth, 3 *W. & Ser.* 328, and that fully sustains the charge of the Court.

Digitized by Google

[Watt & Co. *v.* Hoch.]

www.libtool.com.cn

The opinion of the Court was delivered by

KNOX, J.—In Koons *v.* Miller, 3 *W. & Ser.* 271, it was held that the practice of merchants of Philadelphia to charge interest on their accounts, after six months, had existed so long, and was so uniform, that it formed part of the contract of sale, and that its existence was so notorious that courts of justice were bound to notice it as part of the law. There is no reason why the same rule should not be applied to sales of goods made by the merchants of Pittsburgh, as the custom is the same there as in Philadelphia, and equally notorious. The first assignment of error is therefore sustained.

The rule as to the appropriation of payments was not correctly stated. Where a debtor indebted on several accounts makes a payment, he may direct how it shall be applied, but if he makes no appropriation of it to any specific debt, the creditor then has the right of application, and if he credits it generally on an open account, the law will not afterwards apply it to the payment of a judgment, even although older than the account, and more particularly is this so where the creditor has security for the payment of the judgment, and none for that of the open account. In the absence of any agreement, understanding or direction to the contrary, the payment made in this case should have been applied first to extinguish the book account and the residue only to the judgment.

The objection to the depositions of Valentine Hoch is not sustained. It sufficiently appears that they were taken before competent authority.

The fifth and sixth assignments of error have no bills of exceptions upon which to found them.

Judgment reversed, and *venire de novo* awarded.

Abbey *versus* Dewey.

A purchaser at sheriff's sale, who resorts to any trick or device to get the property at an under value, and thereby purchases it for less than it would have sold for at a fair sale, renders the title so acquired utterly void.

A fraudulent intent, or an unsuccessful effort to get the land for less than it is worth, is not enough to avoid the title of the purchaser.

Where the question is whether the purchaser at sheriff's sale committed such a fraud as will vitiate his title, evidence of the value of the property is pertinent and proper.

An instruction to the jury that the fraud could not be found by them "except upon clear and undoubted proof of it" is error.

If the party alleging the fraud produced such evidence of the fact as the jury could reasonably and safely rest their consciences upon, it was sufficient.

ERROR to the Common Pleas of *Warren county*.

This was an ejectment for 106 acres of land in Columbus town-

Digitized by Google

www.libtool.com.cn

ship, Warren county. Both parties claimed under Appollos Terry. The plaintiff, by a conveyance from Terry, dated 22d January, 1847.

The defendant showed a mortgage of the premises executed by Terry to Herman Abbey on the 10th of September, 1840; a *scire facias* upon the same to June Term, 1847; a judgment rendered on the *scire farias* for $712.15; a *levari facias* to June Term, 1848; and on the 6th of June, 1848, a sale by the sheriff to Daniel A. Dewey and E. W. Dewey for $789.

To defeat the title of the defendant under the sheriff's sale, the plaintiff proved that the Deweys had "bought off" George Cady, who attended the sale and was bidding on the property, until the defendant paid him the sum of $10 to cease bidding. The defendant, under exception by plaintiff, introduced evidence that the property sold for its full value.

The plaintiff requested the Court to charge the jury: 1. That if the jury believe that George Cady was a bidder at the sheriff's sale for the purpose of purchasing the property for himself, and that while bidding the defendant proposed or agreed to pay him $10 to withhold further bids, and that said proposition was acceded to, and Cady did cease bidding, and the property was struck down to defendant; that such conduct was fraudulent to the plaintiff, and rendered the sale void.

2. That the plaintiff was entitled to whatever the property would sell for over the amount due on the mortgage in a free, open, fair sale, without regard to the real value of the property sold, and the fact whether it sold for its actual value is not to have any weight in determining the question of fraud.

The defendant also submitted the following points:—1. Actual fraud cannot be presumed or found by a jury except upon clear and undoubted proof of it.

2. That to constitute the actual fraud, which alone can avail the plaintiff here, the jury must be satisfied beyond reasonable doubt that the defendant and Cady actually engaged in that which would amount to a conspiracy to defraud by preventing the property being bid up to as high a price as it otherwise would have been.

3. And that an arrangement was entered into by and between them for such purpose, and in consequence of it a less price was obtained for the property at said sale.

4. That if Cady bid upon the property after the alleged stipulations not to do so, it was an abandonment of the contemplated fraud if there had been any, and the purchase by the defendant would be valid.

5. The testimony of sheriff Morrison affords evidence from which the jury may infer that Cady did bid upon the property afterwards.

6. That casual conversation between the defendant and Cady

Digitized by Google

www.libtool.com.cn

about it by way of banter, or propositions and loose statements made by them, are not of themselves sufficient to defeat the purchase.

7. If there was real *bona fide* bidding made by others after the propositions made as alleged by Cady to defendant, the sale would not be vitiated unless the jury are fully satisfied that more would have been bid for the property if such proposition had not been made.

8. That if the jury believe the testimony of Harriet A. Nolton, the assignment of the deed from Appollos Terry is not sufficiently proved.

The Court below (GALBRAITH, P. J.), charged the jury as follows: —"The first six points answered in the affirmative; 7th also, with this explanation, that if Cady withdrew from bidding in consequence of the offer of $10 to be paid by defendant, and relied upon that as an existing agreement, the sale would be void to the defendant. The 8th point in the negative. The plaintiff's first point answered by the answer to defendant's 7th point, and the 2d point of defendant's answered in the affirmative."

Both parties except to the charge, and at the request of plaintiff's counsel this exception sealed.

The jury found for the defendant.

Errors assigned:—1. The Court erred in receiving evidence of the value of the property as set forth in the first bill of exceptions.

2. The Court erred in answering the defendant's 1st, 2d, and 3d points unqualifiedly in the affirmative, on the same subject.

3. The Court erred in the answer to defendant's 5th point.

Johnson, *Brown*, and *Wetmore*, for plaintiffs in error.—The value of the property was not in issue, and the evidence of that should have been excluded: 1 *Green. Ev.* § 17–52; 4 *Harris* 200; 2 *Phil. Rep.* 372.

In Staines *v.* Shore, 4 *Harris* 200, where a puffer was employed, it was held that it vitiated the sale; and whether the price was more or less than the value of the thing sold, was immaterial; Pennock's Appeal, 2 *Harris* 446. If the action were to recover damages for the fraud, the difference between the price and the value would furnish a means of measuring the damages: 2 *Stark. Ev.* 270; 2 *Watts* 66; 1 *W. & Ser.* 297; 10 *Harris* 179; 5 *W. & Ser.* 60; 5 *Watts* 49.

Church, for defendant in error.—The plaintiff alleges actual fraud. This must be proved. In such questions great latitude must be allowed as well in repelling fraud as in proving it: 6 *Watts* 96; 5 *Barr* 230; 1 *W. & Ser.* 138; 6 *W. & Ser.* 124. The value of the property was therefore of importance in ascertaining whe-

Digitized by Google

www.libtool.com.cn

ther there was or was not a fraud committed: 2 *Watts* 66; 3 *Yes.* 620; 12 *Id.* 477; 9 *Watts* 185.

The opinion of the Court was delivered by

BLACK, J.—This was ejectment for land which was claimed by both parties under one Terry, who was admitted to have been at one time the owner. The plaintiff claimed it under Terry's conveyance, dated in 1847, and the defendant proved that Terry, in 1840, had mortgaged it for $500, and that it had been sold by the sheriff to him in 1848, under a regular proceeding had upon the mortgage. On the face of the two titles that of the defendant is the best. But the plaintiff alleges that the defendant's purchase at the sheriff's sale was void, because he practised a fraud in buying off a bidder.

We have several times lately decided, in obedience to what we are well satisfied is the law of Pennsylvania, that a purchaser at sheriff's sale who practises any deceit or imposture, or who is guilty of any trick or device, the object of which is to get the property at an under value, thereby renders the title so acquired utterly void and worthless in his hands. But it must be shown also that he did actually get it for less than it was worth, or less than what it would have sold for at a fair sale. A mere naked intention fraudulently to get land for less than it is worth, or an unsuccessful effort, which results in no loss to one party and no gain to the other, is not enough to make the title of the purchaser void.

But it is complained that the Court, in this case, adopted the wrong standard to ascertain the price of the property. Evidence was admitted to show its *value*. We do not think there was any error in this. When a man is charged with a fraud like this, it is certainly very important for the jury to know whether he paid an outside price for the land after all. It diminishes very much the probability that any fraud was either committed or intended.

It is true, that a person whose property is to be sold at a judicial sale is legally entitled to all the advantages arising out of the wants and wishes, or even out of the capricious fancies of bidders. If, therefore, there be a bidder on the ground ready to give twice as much for the property as it is really worth, and another bidder buys him off, so that he gets it for no more than its true value, the title is void; because, thereby the defendant in the execution has lost 50 per cent. of what he otherwise would have got. But this is a state of things which no Court or jury ought to suppose without plain evidence to establish it. When the purchaser shows that he has paid the full value, the presumption is that nobody else would have paid any more. The burden of proving that the bidder bought off was so unreasonable, and so regardless of his own interests, that he would have been willing to take it at a

Digitized by Google

www.libtool.com.cn

higher price, is thrown with its full weight on the party alleging it.

But the Court charged, that the fraud could not be found by the jury, except upon "clear and undoubted proof of it;" and, for this alone, we are obliged to reverse the judgment. It is very seldom that perfectly clear proof can be produced of a fraud. In civil cases one party is as much entitled as the other to any doubt which may arise on the evidence. If the plaintiff in this case produced such evidence, of the fact he alleged against the defendant's title, as the jury could reasonably and safely rest their consciences upon, it was enough.

Judgment reversed and *venire facias de novo* awarded.

Hood *versus* Hood.

An entry by the owner, upon land in the adverse possession of another, in order to be effectual in tolling the statute of limitations, must not be accidental, equivocal, or by invitation of him in possession, but to regain a pedal possession of the land inconsistent with the title of the occupier.

Such an entry made by an agent of the owner must be with the *avowed* object of claiming it for his principal, which avowal may be expressed in words or indicated by an act equally significant.

Entering and surveying off a part of the tract for another, would be such an act of notorious dominion as would arrest the running of the statute.

It is not error for the Court below to answer propositions submitted to them in the language employed by the Supreme Court in deciding similar points.

Error to the District Court of *Allegheny county*.

This was an action of ejectment brought by the executors of John M. Hood, deceased, against Mary and others, children and heirs at law of McClelland Hood, deceased, to recover the possession of a tract of land situated in Ohio township, Allegheny county, called "Safe Landing," containing 226 acres.

The plaintiffs showed a regular chain of title from the Commonwealth to their testator, vesting the legal title in him on the 6th of February, 1808. His will gave his executors authority to sell and dispose of his real estate.

The defendants resisted a recovery, on the ground that John had purchased the land for McClelland with the money of the latter, and held the legal title in trust for him. Or, if not purchased with the money of McClelland, that John had made a free and voluntary gift of it to his brother, in pursuance of which McClelland had taken possession in 1808, and had made valuable improvements on it. And also that McClelland entered into the land, claiming it as his own, in 1807, or 1808, and so continued in the actual, exclusive, and adverse possession of it up to the time of his death, and that his title, or that of his heirs, had become perfect under the statute of limitations.

Digitized by Google

www.libtool.com.cn

From the evidence, it appeared that John M. Hood and McClelland Hood were sons of David Hood, who resided in the county Tyrone, Ireland. Their father was possessed of some estate, the value of which did not appear. He died in July, 1801, leaving a widow and ten children, of whom John and Robert had gone to the United States, the former in 1799, the latter in 1801. After the deaths of their father and mother John went to Ireland, sold whatever estate there was, and returned to Philadelphia in 1802 with his brothers and sisters. Shortly afterwards he came to Crawford county with his brothers and sisters, except David and Wallace, where he purchased a piece of land, and, leaving the family in charge of McClelland and Robert, he shortly afterwards returned to Philadelphia, and entered into business as a grocer. In 1807 he was informed by letter from Hugh Davis that the place now in controversy was for sale, and thereupon he wrote to McClelland to go down and look at the place; and, if it pleased him, to buy it, and to tell Davis to write to him at Philadelphia, and he would forward the money to pay for the land.

McClelland Hood went down and looked at the premises, and the purchase was made from Jonathan Richardson, who, with his wife, on the 6th February, 1808, conveyed them to John M. Hood. The deed was recorded on the same day, and the fees paid by Hugh Davis. Shortly after the purchase McClelland Hood moved on to the land, and continued in the occupancy of it till his death in 1846, with the exception of two years, from 1821 to 1823, and his heirs since his death continued the possession to the time of trial.

The plaintiffs alleged that there was no trust; that the evidence given to establish it was too vague and indefinite. Also that McClelland's possession was not adverse and hostile, he having recognised the right and title of John; but, even if it had been adverse, that John by his agents had entered upon the land to survey it, and exercised other acts of ownership over it, before the bar of the statute was completed, and which would toll its operation.

The testimony on these matters was very voluminous and conflicting.

The Court (HAMPTON, P. J.) instructed the jury, that there was not sufficient evidence of either a trust or gift to submit to them. Those parts of the charge which related to the alleged holding under John, and entries upon the land by the agents of John M. Hood, and which was the principal matter reviewed in this Court, was as follows:—

"Did McClelland Hood, the defendants' ancestor, enter upon the land in dispute, claiming the same as his own, adversely to all others; and did he hold notorious and hostile possession thereof

Digitized by Google

www.libtool.com.cn

for a period of twenty-one years, using, enjoying, and occupying the same exclusively as his own, and adversely to the holder of the legal title? Or, if he entered in subserviency to the legal title of John M. Hood, with his permission, or as his tenant at will, did his possession afterwards become adverse thereto, by such open, continued, and notorious acts of a hostile character as to preclude all doubt as to the nature of his possession and holding, or the want of knowledge on the part of John M. Hood, the real owner? If McClelland Hood entered under an adverse claim, or if he entered in subserviency to the title of his brother, and his possession afterwards became adverse by open, notorious, and hostile acts, not rebutted or explained by the recognition or admission of his brother's title, and if he continued to hold such possession for a period of twenty-one years, then the plaintiffs are not entitled to recover, unless you are satisfied from the evidence that John M. Hood in his lifetime, either by himself or his agent, or his executors since his death, made entry on said land within the said period of twenty-one years, of such a character as to suspend the running or operation of the statute. If, however, McClelland Hood, in taking possession of the said land, intended to hold and occupy it, subject to the will of his brother John, and if he did so hold and occupy the same, the statute of limitations will form no bar to the plaintiffs' recovery in this action: Criswell *v.* Altemus, 7 *Watts* 581.

"If you find that McClelland Hood, either by himself, or in connexion with those claiming under him, was in the adverse possession of the land in controversy, at any time between the date of its purchase and the bringing of this action; and if you are satisfied, from the evidence, that he did not recognise or acknowledge the title of his brother John, in the manner required by the rules of law just laid down, for a period of twenty-one years, your next inquiry will be, did John M. Hood, during his lifetime, either by himself, or his agents, make an entry upon the land, within the said period of twenty-one years, of such a character as to suspend the running of the statute, or have the plaintiffs so entered since his death? And this is a question of fact for the determination of the jury under the law, as we shall now lay it down.

"In Altemus *v.* Campbell, 9 *Watts* 30, Chief Justice GIBSON says: 'The office of an entry is not to claim title, but to regain a pedal possession; and it has been said that to make it good, the former possessor and his servants must be removed from the land —an assertion qualified by Lord HOLT in an anonymous case in 1 *Salk.* 246, who says, that an entry without expulsion, makes such a seizure only, that the law will adjudge him in possession who has the right, but that it will not work a disseisin or abatement.' And again he says: 'The effect of an entry, it is agreed, depends on the intent of it, expressed by words, or intimated by an act

Digitized by Google

www.libtool.com.cn

equally significant. I would say, in a few words, that there must be an explicit declaration, or an act of notorious dominion, by which the claimant challenges the right of the occupant: or it cannot perhaps be better defined than by saying that the entry must bear on the face of it an unequivocal intent to resume the actual possession."

"And, in Hoopes *et al. v.* Garver's Administrator, 3 *Harris* 525, Mr. Justice CHAMBERS says: 'In the case of Holtzapple *v.* Phillebaum, 4 *W. C. C. R.* 356, it is ruled that to constitute a legal entry on land to avoid the bar of the statute, the party must enter with intent to claim the possession, and must do some act to prove that such was his intention by acts amounting to a trespass on the land, or he must declare that he enters for the purpose of claiming or taking possession. No particular form of words is prescribed by law, the substantial part is the taking or declaring the intention to take or claim possession.'

"The case of Altemus *v.* Campbell is here referred to with approbation, where the learned judge continues—'So, in the case of Miller *v.* Shaw, 7 *Ser. & R.* 129, it is said, where a person enters *animo clamandi*, as when he enters and surveys the land, it operates as a bar to the act: and where the intent with which the entries are made is doubtful, the question of intention was to be submitted to the jury.'

"In the case of Ingersoll *v.* Lewis, 1 *Jones* 212, it is ruled that when the agent of the owner enters upon land with the avowed object of claiming it, making a survey thereof with the knowledge and assent of the person in possession, these acts operate to bar the running of the statute; and if the proof of these is satisfactory to the jury, the Court should give a binding direction to that effect.

"Keeping these principles of law steadily in view as your guide on this part of the case, you will inquire whether at any time, during the running of the statute, John M. Hood himself, or by his agents, made such an entry upon the land, as would suspend its operation? If he did, then the adverse possession of McClelland Hood would date only from the time of such entry, and would require the full period of twenty-one years from that time to complete his title. But, as we have before instructed you, if his title was completed under the statute, before the entry, or recognition of title, it could not be affected thereby.

"If then you are satisfied from the evidence, that Hugh Davis, acting as the agent of John M. Hood, in 1828—or at any other time, entered upon the land in dispute, with the avowed object of claiming it for his principal, and procured a survey to be made thereof, with the knowledge and assent of McClelland Hood; this was such an entry as would in law stop the running of the statute.

"If you believe from the evidence that John M. Hood or his

Digitized by Google

www.libtool.com.cn

agent in 1830, entered upon the land in controversy, with the avowed object of claiming it for the said John, and surveyed, or marked off on the ground, eight acres, or any other quantity, for the exclusive use and possession of David Hood, with the knowledge and assent of McClelland Hood, and that the same was surveyed to David by John; this was such an entry as would, in law, bar the running of the statute of limitations.

"If the evidence satisfies your minds that, in 1835, Hugh Davis, Nathaniel Patterson, or any other person, acting as the agent of John M. Hood, entered upon this land, with the avowed intention or object of claiming it for his principal, John M. Hood, and made, or procured to be made, a survey thereof with the knowledge and assent of McClelland Hood, this was such an entry as would in law suspend the running of the statute. So, also, of the survey made by Colonel Gibson, at the instance of George R. Riddle, in 1850.

"The whole case, then, is narrowed down to this single proposition, viz.: Whether McClelland Hood himself, or himself and his heirs together, held such adverse possession of this land, as the law requires to give title, for any period of twenty-one years together, before the institution of this suit, without recognising the title of John M. Hood, or without any entry by him or his agents. If you find such to be the fact, then the defendants will be entitled to your verdict; but if not, then the plaintiffs are entitled to recover. You will take into consideration all the evidence submitted to you by the Court, and give to each portion thereof such weight as the importance of the interests involved demand; and after applying the law, as laid down by the Court, to the facts as you find them to be, render such a verdict as is warranted by the evidence."

The jury found for the defendants. The plaintiffs below sued out this writ, and assigned the foregoing instructions, and the manner of submitting the facts, for error.

G. P. Hamilton and *Shaler*, for plaintiffs in error.—The answer, as to the manner of McClelland Hood's occupancy, was vague and obscure. A refusal to give a clear and distinct answer, is error: 1 *Ser. & R.* 449; 2 *Id.* 74; *Id.* 51; 5 *Watts* 30–1; 11 *Ser. & R.* 324; 6 *W. & Ser.* 62. The question submitted was, whether certain acts constituted a hostile, adverse possession. The Court evade the question.

How did McClelland enter? The evidence upon the subject is clear, and there was no change in the nature of the tenure. If he entered under John, it lies upon the other party to show such a change in his possession as would make it adverse: 1 *Wilson* 176; *Russ. Cr. Cas.* 498, 552; 1 *Ser. & R.* 458; 9 *Exch. R.* 643; 7 *Harris* 390; 1 *Jones* 219; 9 *Met.* 418; 8 *Watts* 165; 4 *How.* 289.

Digitized by Google

www.libtool.com.cn

On the subject of the entry by John M. Hood or his agents, which was relied upon to toll the statute, they cited 7 *Ser. & R.* 129; 9 *Watts* 28; 1 *Jones* 220; 3 *Harris* 525.

Knox, for defendants in error, on the subject of the adverse possession, cited 6 *Ser. & R.* 21; 1 *Pa. Rep.* 8; 4 *How.* 289; 3 *Harris* 525; 1 *Ser. & R.* 129; *Co. Litt.* 245 b; 9 *Watts* 30; 1 *Jones* 212; 10 *Watts* 142; 6 *Barr* 227; 6 *W. & Ser.* 318; 10 *Ser. & R.* 188, 806; *Cowp.* 218; 1 *W. & Ser.* 191.

The opinion of the Court was delivered by

WOODWARD, J.—All the material facts in this case were sternly contested, and it was therefore a case peculiarly within the province of the jury. Nor is there any complaint that the Court withdrew the facts from the jury, but the errors assigned were all founded on the manner of their submission. It is especially objected that in answering vital points submitted on the part of the plaintiffs, the Court recited to the jury lengthy extracts of apparently conflicting opinions and dicta of the Supreme Court, leaving it to the jury to extract the rule of law from the authorities cited.

The record shows that there is some ground for this complaint. The numerous quotations from judicial opinions, predicated of a state of facts peculiar to each case, were not the most satisfactory and skilful mode of answering the points. A brief and comprehensive statement of the *result* of the authorities is always better for a jury than the authorities themselves. Judicial opinions are written to guide judges, not juries, and the judge who presides at the trial is expected to deduce the rules of law applicable to the case from all that has been recorded for his instruction, and to deliver them to the jury relieved, as much as possible, from the verbiage in which they are found clothed. The law is often like particles of shining ore mixed in a mass of crude rubbish, from which the intellect of the judge, operating like a magnet, should extract it for the service of the jury. But when, instead of doing this, he hands over the mass itself to the jury, how are we to say they did not find the ore? Told that it was there, and taught how to use it, it was quite possible for them to extract it for themselves, and we are bound to presume that they performed the possible duty which was laid upon them. There is no standard but the discretion of the judge himself to determine how much help he shall render a jury in weighing facts, and applying the law to them. Perhaps the least amount of aid is rendered where the law is delivered in the form of copious extracts from judicial opinions in other cases, but nevertheless we cannot say the Court erred in matter of law, when they answered legal propositions in the very terms in which similar propositions had been answered in this

Digitized by Google

www.libtool.com.cn

Court. Take, for example, the answer most complained of in this record—that which the Court gave to the points relative to the entry of John M. Hood, or his agent, to toll the statute—it cannot when taken altogether (the only fair way of estimating any charge) be said to be erroneous in point of law. After quoting Judge GIBSON'S clear exposition of the law of entry in Altemus *v.* Campbell, 9 *Watts* 30, and the language of this Court in Ingersoll *v.* Lewis, 1 *Jones* 212, the learned judge put it to the jury to say whether the agent of John M. Hood entered upon the land with the "*avowed*" object of claiming it for his principal.

Now counsel suppose the jury were misled by this word avowed —that they understood an entry to survey off 8 acres for David Hood was not sufficient to stop the running of the statute, unless accompanied with some verbal declaration that such was the effect intended. But they had just been instructed, in the language of Judge GIBSON, that the effect of an entry depends on the intent of it expressed in words, or *intimated by an act equally significant* —that there must be an explicit declaration, or *an act* of notorious dominion; and can it be doubted they would understand from all this that the intention could be *avowed* as well by deeds as by words? An entry to toll the statute must not be accidental—nor by invitation of him in possession, nor for any equivocal purpose whatever, but to regain a pedal possession of the land for purposes inconsistent with the title of the occupier. An entry to measure off 8 acres for another would be such a purpose, and how could it be more distinctly avowed than by the act itself? A jury of common intelligence could not fail, we think, to get the very law of entry from all that the Court placed before them. We are not then to reverse the judgment on a mere suggestion that they may have misunderstood the word avowed. If they were satisfied that it was the brother in possession who was parting with the 8 acres to David, or that the survey was intended as an adjustment of boundaries between McClelland and a neighbour, they had good ground for not giving effect to the entry. On this point, as on every other in the cause, the jury were the disposing power, and we cannot perceive any satisfactory evidence in the record that they were misguided by the Court.

We have looked through all the matters assigned for error, and discovering no adequate grounds for reversing the judgment, it is affirmed.

LEWIS, C. J., was absent when this cause was argued.

Digitized by Google

www.libtool.com.cn

Robinson *versus* Bakewell.

Where a vendor gave to his vendee a bond conditioned to indemnify the latter against any claim or encumbrance affecting the premises, and to "pay all costs, charges, or expenses necessary to defend the said premises against any such claims;" the obligee is entitled to recover on the bond the amount paid counsel, and other necessary expenses of defending an unsuccessful ejectment brought against him for the premises.

Where the vendor had notice of the ejectment brought against his vendee, and an appearance was entered in the cause at his instance, and he was requested by the counsel of the vendee not to interfere in the defence, as his connexion with it might be prejudicial, but he and his counsel assisted in the preparation and trial of the cause, the obligee would not be barred from recovering on the bond the amount paid his counsel for defending against such ejectment.

Where a witness is called to prove the value of the services of an attorney in a certain cause, it is not relevant to ask the witness on cross-examination how much he had paid counsel for their services in a suit in which he had been a party.

ERROR to the District Court of *Allegheny county*.

This was a *scire facias* to have execution of a judgment, and to assess the damages sustained by the breach of the condition, issued at the suit of Thomas Bakewell, for the use of the minor children of John P. Bakewell, against Charles S. Bradford, administrator of William Robinson, deceased, with notice to the widow and heirs of said deceased.

This judgment was entered upon a warrant of attorney accompanying a bond, dated the 4th day of January, 1834, from Robinson to Bakewell, in the penal sum of $5000, the condition is as follows:—

"That if the above bounden William Robinson, his heirs, executors, administrators, and assigns, do well and truly assure unto the said Thomas Bakewell, his heirs, executors, administrators, or assigns, a complete and perfect title to the western half of lot No. 202, in the city of Pittsburgh, conveyed to the said Thomas Bakewell, by said Robinson and wife, and shall save harmless and indemnify the said Thomas Bakewell, his heirs and assigns, from any equitable right or trust, or other claim or encumbrance in anywise affecting said premises, and against any person claiming any estate or interest in law and equity to the same, or any part thereof, and shall pay all costs, charges, or expenses necessary to defend the said premises against any such claims, so that the said Thomas Bakewell shall not be injured or damnified thereby, without any fraud or further delay, then this obligation to be void, otherwise to be and remain in full force and virtue."

The deed from Robinson to Bakewell, for the premises, is dated the 3d day of January, 1834, and contains a covenant of general warranty. The consideration named is $2500.

Digitized by Google

[Robinson v. Bakewell.]

In 1845, Eliza Wilkins brought an ejectment to recover the premises from John and William Anderson, who were in possession under Bakewell's heirs. In 1846, the cause was on the trial list, and a verdict taken for defendant by default. This was set aside by the Court, and, in May, 1848, the cause came on again for trial and resulted in a verdict and judgment for the defendant, which was affirmed in the Supreme Court. Robinson had notice of the pendency of the suit, and assisted in preparing and conducting the defence.

This *scire facias* was issued, and the breaches assigned were, that Bakewell had incurred expense in defending the title, and paid large fees, costs, and charges, &c., in the preparation, management, and trial of the cause. The defendants pleaded *non damnificatus*, and payment, with leave.

On the trial the plaintiffs gave in evidence the bond, the entry of judgment upon it, and the several revivals; and the ejectment brought by Eliza Wilkins against their tenants. James S. Craft, Esq., was called and testified, that he was employed by Bakewell to defend the ejectment, and that Bakewell had paid him $1000 for his services. That the value of the property, at the time of trial, was not less than $10,000. On his cross-examination Mr. Craft stated, that Robinson and Tassey had entered their appearance to the ejectment, and when he discovered it he deemed it an incautious movement, as bringing the contest between Eliza Wilkins and Robinson, in which event he thought the defence would have been unavailable; and added, "I told them what seemed to be the difficulty, and begged them not to interfere. I think Robinson then left the case to us." The defendant's counsel then proposed to ask the witness, how much he had paid his counsel in certain ejectments which had been brought against him. The Court overruled the question, on the ground that the witness had previously stated that his counsel, in the cases referred to, had not charged him the usual fees on the ground of professional courtesy. The plaintiff further proved, by Judge Shaler, who was counsel for Eliza Wilkins, in the ejectment referred to, that Mr. Craft's services were, in his opinion, worth $1000.

The defendant called William Tassey, who testified that he had been the law-partner of Robinson at the time the ejectment of Eliza Wilkins was pending, and that they had assisted in the preparation and trials of the cause.

The 1st and 3d propositions of defendant's counsel were as follows:—

1. That the provisions of the bond sued on in this case, executed, as it was, cotemporaneously with the defendant's deed of conveyance, and constituting a part of the same transaction, are to be construed in connexion with the said deed, and import no more than the covenant of general warranty, contained therein,

Digitized by Google

www.libtool.com.cn

with the additional advantage of a lien upon the real estate of the obligor; and that, therefore, a successful defence of the title against a third person, claiming ineffectually to recover the same from the grantee, would authorize no claim on the part of the latter, for fees paid or expenses incurred in the defence of the said suit.

8. That if the defendants appeared to the said suit, upon the advice given to them, by counsel employed by them for that purpose, the retaining by the plaintiff of other counsel, for his own use, would constitute no claim on them, and in connexion with the intimation of those so employed by them, that an appearance at the instance of the obligor would be prejudicial to the defendant's interests, and that their services could, therefore, be dispensed with, would operate as a bar to a recovery for the expenses thus incurred.

The Court below (HAMPTON, P. J.) answered the points as follows:—

"1. Declined.

"8. This point is affirmed, if the jury find the facts to be as therein supposed, and if they find that Mr. Craft, by the authority of his client, Bakewell, said or did anything by which Robinson, or the present defendants, were thrown off their guard, and induced to believe Bakewell intended to release them from their liability under the conditions of the bond, to defend the title which he (Robinson) had conveyed to Bakewell. The conditions being for the benefit of Bakewell, he might, if he saw fit, release the obligor from them. The jury will determine from all the evidence bearing on this point, whether it was his intention to do so, and whether what was said by Mr. Craft threw them off their guard, and prevented them from taking the necessary measures for the defence of the action. If they continued in the cause, and co-operated with Mr. Craft in the general defence, the plaintiff would not be barred."

The jury found for the plaintiffs $291; and the defendant took this writ of error, and assigned that the Court below erred—

1. In overruling the question put to the witness, Craft, as to the amount paid by him to his own counsel, in the several ejectments brought against him for his own property, the same being the subject-matter of defendant's first bill of exceptions.

2. In declining to affirm the first proposition submitted by the counsel for the defendants.

3. In their answer to the third proposition submitted by the defendants' counsel, and particularly in the remark that if they (the counsel employed by defendants) continued in the causes, and co-operated with Mr. Craft in the general defence, the plaintiffs would not be barred.

Digitized by Google

[Robinson v. Bakewell.]

www.libtool.com.cn

Williams, for plaintiff in error.—The 1st error assigned is to the refusal of the Court to permit us to ask the witness what he had paid his counsel in his own suits. The witness had before expressed his opinion as to the value of the services for which suit was brought. The object was to test the value of the opinion, by comparing what he *did* with what he *said*. His opinion when he was to *pay* as well as to *receive*.

The 2d is to the construction put upon the condition of this bond. The bond was not intended to have any operation beyond a clause of general warranty in a deed, except to secure a lien. It is not pretended that the title was not good—that the plaintiff does not stand fully protected; but he claims the costs and charges of defending an unsuccessful attack made on the title. The defendant did not engage to play knight-errant by repelling every assailant. The construction insisted on would keep this bond a perpetual lien on the estate of the grantor: for it would extend to future unsuccessful attacks as well as past ones.

The 3d error is the instruction in regard to notice and employment of counsel. Bakewell gave notice of the ejectment. Robinson responded by appearing to the action. Now, if Bakewell saw proper to employ additional counsel to protect his interest, it is not a matter which he can recover from Robinson's estate.

Bakewell, for defendant in error.—The question proposed to the witness had no tendency to prove the value of the witness's service in the case in dispute, nor was any reasonable inference to be drawn from the evidence if given. It was therefore clearly irrelevant: 1 *Greenleaf's Ev.*, § 52, 448. The amount paid by witness, or any one else in any other case, would furnish no standard in this.

The 2d error assigned embraces two propositions—1. That the condition in the bond has no greater extent than the covenant of general warranty; and 2. That no recovery can be had for fees and expenses, because the ejectment was unsuccessful. The first is to be decided by a comparison of the terms employed, which are entirely different from the warranty, and expressly provides that the obligor "shall pay all costs, charges, or expenses, necessary to defend the said premises against any such claims, so that the said Bakewell shall not be injured or damnified thereby." 2. The covenant of warranty bound the grantor to defend the land and no more: 2 *Harris* 338; 3 *Penn. Rep.* 442; 3 *Ser. & R.* 372; 4 *Mass. Rep.* 350; 4 *Hill* 646; 3 *Ser. & R.* 372; 3 *Watts* 310; 3 *W. & Ser.* 410.

The opinion of the Court was delivered by

KNOX, J.—We cannot agree with the plaintiff in error, that the covenant of indemnity contained in the bond upon which the suit was brought, did not extend to "costs, charges, and expenses,"

Digitized by Google

www.libtool.com.cn

incurred in defending an action commenced by an unsuccessful claimant. On the contrary, it plainly appears from the words used that the vendor not only warranted the title, but that he also covenanted to defend it against any one claiming a better right. The condition in the bond differs from the covenant of warranty in the deed, in that the first binds the vendor to defend the estate conveyed "against any person claiming any estate or interest in law or equity to the same or any part thereof, and to pay all costs, charges, or expenses necessary to defend the said premises against any such claims, so that the said Thomas Bakewell shall not be injured or damnified thereby." Whilst the latter is, "that he, the said grantor and his heirs, all and singular the premises, &c., unto the said grantee, his heirs and assigns, against him the said grantor and his heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, shall and will warrant and for ever defend." The difference between the two is so marked that it would be doing great violence to the natural meaning of words to hold that both meant the same thing.

The defendant's third point was answered fully as favourable as he had any right to expect, and the question proposed to be put to Mr. Craft was clearly inadmissible. The plaintiff in error has no just ground of complaint against the manner in which the cause was tried, nor the result of the trial.

Judgment affirmed.

Himblewright *versus* Armstrong.

There is no rule of policy which prohibits the assignor of a judgment from testifying in favour of the defendant.

Nor is he incompetent on the ground of interest, it being, if he has any, against the party calling him.

If the plaintiff in error fails to put upon the paper-book the evidence, the admission of which he assigns for error, or that which preceded it as the ground for its introduction, this Court will presume that it was rightly admitted.

ERROR to the District Court of *Allegheny county.*

C. H. Armstrong and James Potts were partners, and being indebted to Jeremiah Platt, gave him a note for the amount, with Hugh Himblewright, the brother-in-law of Potts, as security. In 1851, about the time the note matured, Armstrong & Potts dissolved partnership, and Potts agreed to pay this note; Platt consented to the arrangement, and Armstrong's name was to be taken off the note. Armstrong being importunate to have an arrangement made by which he would be released from liability, was assured by Himblewright that he need not concern himself about it—that he, Himblewright, would pay it. Platt transfer-

Digitized by Google

www.libtool.com.cn

red the note to Samuel Crawford, who in 1853 brought suit against Armstrong, Potts, and Himblewright, and recovered a judgment against them. In 1852, Potts confessed a judgment before a justice of the peace to Himblewright for $590, upon which he caused an execution to be issued, and all of Potts's personal property levied, the most of which Himblewright purchased at the constable's sale. In 1854, Himblewright paid the judgment of Crawford, and took an assignment of it from him, and had himself subrogated as plaintiff on the record. Armstrong having discovered this state of facts, applied to the Court to open the judgment, and let him into a defence, which was granted by the Court. And this case arises on the trial of that issue between Himblewright and Armstrong.

On the trial of the cause, the following bills of exceptions to evidence were sealed, at the instance of plaintiff's counsel:—

Defendant's counsel call Samuel Crawford. Plaintiff's counsel object to the competency of the witness, on the ground that he having assigned the judgment to Himblewright, is excluded from being a witness, both from interest and public policy.

The witness states that he is willing to be sworn and give testimony in the cause, and that he has no interest whatever in the present action.

The Court admitted the witness.

Defendant's counsel then offered to read that portion of the examination or answer of James Potts, taken in No. 226, November Term, 1852, before the Hon. H. W. WILLIAMS, assistant judge of the District Court, on a warrant of arrest, issued by him at the instance of John Watt & Co., against the said James Potts, which relates to the Platt or Crawford note being included in the judgment confessed by Potts to Himblewright before Thomas Davidson, Esq.

Defendant's counsel object: 1. That the evidence is irrelevant, being *res inter alios acta*, and not a part of the *res gestæ*.

2. That Potts is not a competent witness, on the ground of interest, and could not be examined as a witness if in Court.

3. That he ought to be examined personally.

That portion offered read; (*prout*) plaintiff's counsel has leave to read any other portion, or the whole of the examination. Plaintiff's counsel reads such other portions of the examination as he thinks fit.

The jury found for the defendant; and the plaintiff brought this writ of error, and assigned for error: 1. The Court below erred in permitting Samuel Crawford to testify.

2. The Court below erred in permitting the counsel for Armstrong to read in evidence the examination of James Potts taken before the Hon. H. W. WILLIAMS on a warrant of arrest issued

Digitized by Google

www.libtool.com.cn

under the Act 12th July, 1842, by John Watt & Co. in No. 226, November Term, 1852.

Mellon and *Black*, for plaintiff in error.

Bruce and *Negley*, for defendant in error.

The opinion of the Court was delivered by

KNOX, J.—We can see no reason why Samuel Crawford was not a competent witness for the defendant, Armstrong. True, he was the equitable party when the judgment was obtained, and he had transferred it to Himblewright; but he was not interested in favour of the defendant, and there is no rule of policy which prohibits the assignor of a judgment from testifying when called by the defendant. His interest, if he had any, was against the party calling him; and as he made no objection to being sworn, his assignee cannot complain of his admission as a witness.

Whether the statement of James Potts before Judge WILLIAMS was or was not legal evidence in this suit, depends much upon the nature and character of the statement, and upon the other evidence which had been previously given by the defendant. As the plaintiff in error has neither given us the evidence, the reception of which forms his bill of exceptions, nor that which preceded it, his allegation of error is not sustained. In the absence of what should be upon the paper-book, the presumption is of the strongest kind against the party who fails to put it there. It is the duty of the plaintiff in error to furnish us with all the evidence in the case which can in any degree elucidate the points raised by the assignments of error; and if he does not do so, his chance for a reversal is a desperate one.

Judgment affirmed.

Grier & Co. *versus* Hood.

One partner has power to confess a judgment against the firm for a partnership debt, but such judgment will not affect the persons or separate estate of the other partners.

If one partner confesses a judgment against the firm for a partnership debt, another creditor of the firm can interpose no objection to the judgment on that account.

A sale of partnership property, on execution issued upon a judgment confessed by one partner alone against the firm for a partnership debt, will vest a good title to the property in the purchaser; and such execution being the first lien will be entitled to the proceeds of sale.

APPEAL from the decree of the Court of Common Pleas of *Armstrong county*.

Digitized by Google

[Grier v. Hood.]

www.libtool.com.cn

The case is fully stated in the opinion of his Honour, Mr. Justice KNOX.

Mellon and *Negley*, for appellant.—The law favours the vigilant, but not on terms that are unfair or inequitable. If a firm creditor can gain all the advantages of a regular and valid judgment against the firm by the unauthorized signature of a single member, neither creditors nor partners have any security. A mere nominal partner of a firm could sweep away all its effects.

Hood & Co. were bound to know that McCain had no authority to bind his partner by an instrument under seal. The paper itself was notice to them that it was the deed of one partner alone.

In the cases cited, whatever is said on the point involved here is only incidental. The rights of third parties were not intended to be affected by the principles here decided. See also 4 *Harris* 58.

Conceding that the sale transferred the entire property in the goods, because the buyers are innocent purchasers under an apparently regular judgment against the firm; it is clear that Hood & Co. have not this equity. They participated in the concoction of the matters by which Grier & Co. are to be deprived of their just claim and preference.

Cantwell, for appellee.—The appellants cannot in this proceeding attack the judgment of Hood & Co. It was not void; and even if irregular no one but Renshaw could question it: 13 *Ser. & R.* 204. It was a *bona fide* transaction, and given for *a debt of the firm*. He had a right to transfer the whole property for such a debt. Why not bind it by a judgment? 5 *Watts* 22. He could not bind the *person* or *separate property* of his partner: 7 *W. & Ser.* 143. No case can be shown where the *partnership property* has been sold on such a judgment, that it has not been sustained. The purchaser takes the property; the creditor the proceeds: Kelly's Appeal, 4 *Harris* 59; 5 *W. & Ser.* 475; 17 *Ser. & R.* 457; 8 *W. & Ser.* 387.

The opinion of the Court was delivered by

KNOX, J.—McCain & Renshaw were partners in the mercantile business, and as such were indebted to Hood & Co. for goods sold and delivered. On the 19th of December, 1854, McCain executed a bond in the name of McCain & Renshaw, for the amount of the firm debt, to Hood & Co., with power of attorney to confess judgment. Upon this bond, judgment was entered against McCain & Renshaw in the Common Pleas of Armstrong county, on the 20th of December, 1854, and execution issued and delivered to the sheriff on the 22d of the same month. Upon this execution, the sheriff returned that he had levied the personal property of James

Digitized by Google

www.libtool.com.cn

R. McCain and Richard Renshaw, partners, and sold the same on the 18th, 19th, and 20th of January, and 9th and 10th February, 1855. Whole proceeds of sale, $1699.59. David A. Grier & Co. obtained judgment in the Common Pleas of Armstrong county against the same defendants on the 3d day of January, and issued an execution to the sheriff on the 5th of January, 1855, which was returned "levied on personal property, as per levy and return on *fi. fa.* of Hood & Co." After the money was made, and whilst it was in the hands of the officer, to wit, on the 5th of March, 1855, Renshaw applied to the Court to have the judgment of Hood & Co. vacated as to him, upon the ground, as stated in his affidavit, that the single bill was given without his knowledge or consent, by his partner McCain, and for a greater amount than the defendants owed Hood & Co.

There does not appear to have been any evidence given to sustain the last allegation, but the judgment was vacated as to Renshaw, doubtless because he had not signed the single bill, nor authorized his partner to sign his name to it.

An auditor was appointed to distribute the proceeds of the sheriff's sale, who awarded priority to Hood & Co.'s execution, and whose report was confirmed by the Court of Common Pleas. From the decree of confirmation Grier & Co. appeal.

That one partner cannot confess a judgment against another partner, even for a partnership debt, is a conceded legal principle, but it by no means follows that an execution upon a judgment so given, levied upon the personal property of the firm, would be postponed at the instance of a subsequent execution-creditor of the same firm.

In Taylor *v.* Henderson, 17 *Ser. & R.* 456, and Harper *v.* Fox, 7 *W. & Ser.* 143, it was decided that a sale of personal property belonging to a firm, upon an execution issued on a judgment obtained against one of the members for a firm debt, in a suit against the firm, passed a perfect title to the purchaser; and in the last case it was said by Chief Justice GIBSON, that it made no difference whether the judgment was obtained adversely or by confession. To follow these cases, is to affirm this decree; for if Hood & Co.'s execution was effectual against the firm of McCain & Renshaw, so as to sell the interest of both partners in the property levied, their right to the money produced by the sale cannot be questioned by an execution-creditor, whose writ was levied after their lien had attached.

It is the equities between the partners, rather than those of the creditors, which are recognised in the distribution of firm assets, and creditors are not even permitted to make an objection to a judgment, because it may have been given by one partner in the name of the firm for a firm debt. It is only the non-assenting partner that can question the validity of the judgment, and this because,

Digitized by Google

[Grier v. Hood.]

as was said in Harper *v.* Fox, the judgment, if permitted to stand, would bind his person and separate estate. So far as the judgment affects only the property of the firm, it is good, if obtained in the firm name, against any representative of the firm, and there is no reason why it should not be, for the individual partner has full power and authority to apply the property directly to the payment of the debt. He may even assign the whole of the partnership effects for a *bonâ fide* partnership purpose (6 *W. & Ser.* 301), and what he can do by his own act, he may cause to be done by operation of law. The principle that one partner cannot bind another partner by deed, has been frequently held not to be applicable, when the deed affected only partnership interests. Thus, in Morse *v.* Bellas, 7 *New Hampshire* 549, it was held that one partner could, by deed, bar his copartner of a joint right, and that he might individually adjust, receive payment of, or release any partnership debts; and, in Wills *v.* Evans, 20 *Wend.* 251, an authority, under seal, given by one partner to a third person to discharge a firm debt, was held to be good. So, in Toply *v.* Butterfield, 1 *Met.* 515, the rule was held not to apply where one partner conveyed, by deed, property of a firm which he might have conveyed without deed; and in Russit *v.* Strong, 5 *Hill* 163, an assignment, under seal, of a chose in action belonging to a firm by one member, was held to be good. These exceptions, and many others of the same general character, which might be adduced, prove that the rule was not intended to prevent the use by an individual member of the firm property, for partnership purposes, but to prohibit partnership effects from being misapplied, and also to protect the persons and separate estates of the partners from being bound by acts not contemplated by the articles of copartnership.

At the time of the levy and sale of the goods, from which the money in controversy was made, the judgment against both of the partners remained of record, and the fact that Renshaw did not apply to have it set aside against himself until after the sale, is evidence of acquiescence by him in the proceedings against the joint effects; and even now he does not appeal from the application of the money to the judgment of Hood & Co. Whether an objection from him would have been valid, we do not say; but, clearly, if he had permitted the judgment to stand against both, the subsequent execution-creditor could not have denied its binding effect, nor will the dismissal of the judgment against Renshaw enure to the benefit of Grier & Co., so as to give them priority over the appellees.

Decree affirmed.

Digitized by Google

www.libtool.com.cn

Michael Weaver's Estate.

Where a creditor held the promissory note of his debtor for a debt contracted prior to 4th July, 1849, which he delivered up, and it was cancelled, he receiving in its stead a single bill with warrant of attorney to confess judgment for the amount due, the judgment entered upon the same was not subject to the exemption of the Act of 9th April, 1849.

On an appeal this Court will only review the points made and adjudicated upon in the Court below.

APPEAL from the decree of the Common Pleas of *Westmoreland county*, distributing the proceeds of the real estate of Michael Weaver.

On the 18th January, 1853, David Milliron obtained a judgment against Michael Weaver, upon which a *fieri facias* was issued, and levied on the real estate of Weaver. After the levy, on the 11th December, 1854, Weaver gave the sheriff notice that he claimed the benefit of the exemption law. The appraisers returned that the property could not be divided. It was afterwards sold on a *venditioni* for $366, the money paid into Court, and an auditor appointed to make distribution.

The judgments were, one in favour of Trout, entered on the 7th of June, 1852, balance $39.49. This judgment was obtained on a contract dated prior to 4th July, 1849, and there is no dispute as to its right to be paid.

The second was a judgment in favour of John Weaver, for $298.80, with interest and costs, entered 30th November, 1852, on a note with warrant of attorney, dated the day previously. The plaintiff in this judgment proved before the auditor that this note was given for the amount of another note, which was destroyed at the time, which was dated prior to 4th July, 1849.

The next was the judgment of Milliron, with debt and costs, amounting to $139.52, and which contained a waiver of the exemption laws.

The last judgment was in favour of Kepple, entered 5th September, 1853, for $35.19, with interest and costs.

This judgment was obtained before a justice of the peace, on a note dated 20th May, 1848.

The other creditors and Michael Weaver denied that the cancelled note upon which John Weaver's judgment-note was founded was dated prior to 4th July, 1849.

It was also alleged before the auditor that Michael Weaver had transferred the amount claimed by him under the exemption laws, to a third party, but the evidence offered by him disproved that allegation.

The auditor distributed the fund—first, to Trout's judgment; secondly, to David Milliron; third, to Kepple's judgment, and

Digitized by Google

www.libtool.com.cn

the balance to the judgment of John Weaver. To this report exceptions were filed, and the Court below, upon the evidence returned by the auditor, distributed the fund, first, to the judgment of Trout, and the balance to that of John Weaver.

Michael Weaver and David Milliron respectively appealed.

Laird, for Michael Weaver.

Clarke and *Markle*, for Milliron.

Foster, for appellees.

The opinion of the Court was delivered by

LEWIS, C. J.—These are appeals by Michael Weaver and David Milliron, respectively, from the decree of the Court of Common Pleas, distributing the money raised by the sale of Michael Weaver's real estate. The sale took place on 30th April, 1855, and the proceeds in Court for distribution amount to $366. The costs and the balances due on the two oldest judgments are sufficient to consume the whole fund. If the two judgments aforesaid are founded on debts contracted prior to the 4th of July, 1849, Michael Weaver's claim under the exemption law cannot avail against them. It is admitted that the judgment of Trout for Laird is of this class; and, it is shown on the evidence that the judgment of John Weaver, although entered upon a single bill of the 29th of November, 1852, was in fact founded on a debt contracted before the 4th of July, 1849. The single bill was taken, with warrant of attorney to enter judgment, in consideration of a promissory note given before the 4th of July, 1849. The single bill and the judgment entered upon it were founded on the promissory note previously held, and although that note was cancelled when the new bill was taken, the judgment was founded upon a debt contracted before the exemption law commenced its operation. Michael Weaver has therefore nothing to complain of, and his appeal cannot be sustained.

But David Milliron, in addition to the matter already disposed of, complains that the Court omitted to direct that the costs of the sale, which took place on his judgment, be paid out of the proceeds. As the sale was for the benefit of the party entitled to the proceeds, it is just that the costs of it should be paid out of the fund. But as this matter was not brought to the notice of the auditor, and does not appear to have been excepted to in the Court below, it is too late to start the point for the first time in the appellate Court. The presumption is that there was some arrangement about them, or that the plaintiff in the execution waived his claim to payment out of the fund at present for distribution. Our business is to review the decision of the Common Pleas, but as the parties did not call for a decision on that point,

Digitized by Google

www.libtool.com.cn

by presenting the claim to the auditor and obtaining his report on it, there is nothing for review in regard to it.

The decree of the Common Pleas is affirmed, the appellants to pay the costs accrued in this Court.

McGuire & Fetzer *versus* Faber *et al.*

Where the vendors of land transferred the amount due on the article of agreement to a firm, in trust, to receive and pay over the instalments to certain creditors of the vendors, named in the transfer, neither the vendors nor their creditors will be affected by any fraudulent contrivance between one of the trustees and the vendees, in which they did not participate.

Where one of the trustees under such transfer, purchased at sheriff's sale the personal property of the vendees, and operated a furnace belonging to them, under an arrangement that the profits should be applied to the debts of the vendees, a purchaser at sheriff's sale of the vendees' interest under the agreement cannot set off such profits, against the purchase-money due on the agreement, without showing an actual appropriation of them to that claim.

A purchaser at sheriff's sale of a vendee's interest in land does not stand in the very shoes of the vendee; for the latter may set off against the vendor independent debts, but the purchaser can only set off what was directly or indirectly given and received as payment.

Letters, written by one who was the clerk of a party, not relating to the general business in which he was employed as clerk, must be taken to contain merely the declarations of a third person, until they are proved to have been written by the directions of the party.

ERROR to the Common Pleas of *Clarion county*.

The action was ejectment, and was instituted to recover the balance of purchase-money due on an article of agreement.

The land in controversy was a tract of 82 acres, situated in Washington township, Clarion county, and on which "Hemlock Furnace" was erected. McGuire & Fetzer were the owners of the land, and operated the furnace; and on the 19th of August, 1848, entered into an article of agreement with John Horner and James Eaton for the sale of the real and personal estate belonging to said furnace, for the consideration of $10,841.37, payable as follows: $500 on the signing of the agreement, $5000 on the 1st of May, 1849, and $1500 annually thereafter until the whole should be paid. The agreement also provided that certain cord-wood, which was cut but not taken up or measured, should be included, in addition, in the last payment. It was afterwards ascertained to amount to $179.20, making the whole purchase-money $11,020.57.

The amount payable presently, and the payment due on the 1st of May, 1849, are receipted on the agreement.

On the 24th of August, 1848, McGuire & Fetzer assigned all their interest in the said article of agreement to Breading, Arnold, & Hogg, in trust for various creditors of McGuire & Fetzer.

Digitized by Google

www.libtool.com.cn

The following is the assignment endorsed upon the agreement:—"For value received we do hereby assign, transfer, and make over to Breading, Arnold & Hogg, all our right, title, interest, and claim, of, in, and to the within article of agreement, in trust for our creditors, viz., Breading, Shipton & Hogg, Breading, Arnold & Hogg, R. Dalzell & Co., Walker & Woodwell, John Walker, R. Tanner & Co., C. H. Kay & Co., George Breed, McCord & Co., and William Henderson, to receive the payments as they become due, and divide the same among the said creditors, *pro rata*. Witness our hands and seals the 24th day of August, 1848."

The article and the assignment on it were recorded on the 1st September, 1848, in the recorder's office of Clarion county. This suit was brought for the use of the creditors named in the assignment, against Horner & Eaton and F. & W. M. Faber, to December Term, 1852.

On the part of the defendants was shown a judgment against Horner & Eaton to May Term, 1851, the premises levied and condemned, and, on the 10th September, 1852, sold to F. & W. M. Faber, for the sum of $50, and a sheriff's deed acknowledged to them. They also showed a receipt of James E. Breading, dated 21st November, 1850, for $1500—the instalment due on the 1st of May, 1850—and a distribution, *pro rata*, among the creditors. They further showed, under exception, a judgment, entered to May Term, 1851, in the Common Pleas of Venango county, in favour of Breading, against John Horner, for $2104. Also a judgment in the Common Pleas of Clarion county, for the sum of $2975.25, entered in June, 1851; and that executions were issued on these judgments, and Horner's personal property in both counties was levied, and that at and before the sale it was agreed that Breading should bid in the property and hold it for Horner's use till the judgments were satisfied. The instalment due on the agreement on 1st May, 1851, was included in these judgments. They also proved that, soon after the assignment of the agreement, the firm of Breading, Arnold & Hogg was dissolved by the decease of Hogg and Arnold's withdrawal, and that Breading settled the affairs of the firm. They also proved, under exception by plaintiffs, that the personal property of Horner & Eaton was sold on the 24th and 25th June, 1851; that the witnesses were prevented from bidding on it, by being told by Horner, and by Douglas, who was the agent of Breading, that the property was to be bid in for the use of Horner, and, as soon as his debts were paid, was to be his; that Breading became the purchaser of the said personal property greatly below its value, and carried on the furnace till January, 1853; and that he realized sufficient out of the proceeds of the property and the

Digitized by Google

www.libtool.com.cn
furnace to pay the debts of Horner, including the purchase-money due on the agreement.

Fabers, the defendants, contended that the circumstances given in evidence were a fraud upon the creditors of Horner & Eaton, committed by Breading & Horner; and that the various amounts received by Breading, through the sheriff's sale and the proceeds of the furnace up to January, 1853, were sufficient to pay all the creditors, and must be so applied.

The plaintiffs denied the existence of any fraud, and contended that, even if there were, the other creditors, for whose use the agreement was assigned, were not cognisant of and did not participate in its perpetration; that, if the moneys received by Breading were received for Horner's use, there had been no application or appropriation of them to the payment of this claim, and they remained in Breading's hands, subject to the attachments of such creditors as had or would pursue them, and did not oust the plaintiffs of their right to enforce the payment of the unpaid purchase-money in this ejectment.

The Court below (GALBRAITH, P. J.) concurred in the views entertained by the defendants, and, under the instructions of the Court, the jury found a verdict for them.

The plaintiffs thereupon took this writ of error.

A. W. Loomis, *Purviance*, and *Campbell*, for plaintiffs in error.—All the creditors, and each of them, had distinct and independent interests. McGuire & Fetzer, after the assignment, could do nothing to impair or destroy these interests. Neither could the trustees, Breading, Hogg & Arnold, or any of them, discharge those interests without having received *actual* payment. No action, or even fraud of one or more of the creditors, could affect or impair the rights of the others. The power and authority of the trustees were limited to receiving and dividing the payments among the designated creditors: 2 *Atk.* 120; 2 *Bro.* 656; 1 *Johns. Ch. R.* 16; 2 *P. Wms.* 453; 8 *Atk.* 441; 1 *Harris* 589; *Lew. on Tr.* 265; *Willes* 136; 19 *Vesey* 463; 8 *W. & Ser.* 405; 9 *W. & Ser.* 56; *Story on Agency* 46–7; 9 *Watts* 466; 6 *Ser. & R.* 170; 8 *Watts* 128; 10 *Barr* 519.

J. E. Brady, *Corbett*, and *Sutton*, for defendants in error.—We think the charge of the Court will sustain itself. The facts were fairly submitted to the jury. Would the property of Horner & Eaton, at a fair sale, have sold for an amount sufficient to satisfy all the executions? This was submitted to the jury, and they have so found. The $1500 due on the agreement was included in these judgments and executions.

Breading had undertaken to collect the amount, and having

Digitized by Google

www.libtool.com.cn

included it in the judgments, if lost through his fault, he was responsible for it. The levy was a satisfaction: 8 *Harris* 46–49. If he colluded with the debtor, whereby the property sold under its value, it was equally a satisfaction: 4 *Harris* 55–58; 4 *Watts* 362.

The opinion of the Court was delivered by

Lowrie, J.—A balance of purchase-money of about $4000 being due by Horner & Eaton to McGuire & Fetzer, on a sale of the Hemlock Furnace, they assigned it to Breading, Arnold & Hogg to collect, and apply to certain specified debts due to themselves and others. Afterwards, on the 10th of September, 1852, F. & W. M. Faber acquired the equitable title of Horner & Eaton at sheriff's sale, and on this ejectment being brought to enforce the payment of the balance of the purchase-money, they attempt to show payment thereof by Horner.

It is a little strange that their effort to show this starts from the assumption that there was a fraudulent conspiracy between Breading & Horner to cheat Horner's creditors, by getting all his personal property transferred to Breading by means of judgments and executions, and that, in this way, Breading got funds enough in his hands to pay this whole claim. Suppose it so, does that pay it?

Be it remembered that all that transaction, being a fraud upon creditors, is good for nothing against them, and therefore they cannot suffer by it. If anybody suffers it must only be the supposed fraudulent conspirators, Breading and Horner. Even the creditors of Horner, who were intended to be favoured by it, if there were any, cannot be injured by it unless they were parties to it. McGuire & Fetzer had no hand in it, and cannot be charged with such a fraud concocted by one of their assignees. They want this money collected so that the debts, to which they have appropriated it, may be paid. If the transaction was fraudulent, then Breading stands as trustee for all the creditors for such amount of Horner's effects as he thus got into his hands, or for such creditors as may pursue it by due course of law.

Certainly when Fabers bought the furnace, they acquired no title to this money in the hands of Breading, and, whatever they may do as creditors, they have no sort of right, as purchasers, to interfere with Breading's disposal of it. The decision that has been made of the case, however, takes the money of the creditors and gives it to an entire stranger, and thus the law is made to turn the fraud on them to his profit, and leaves them in a worse condition than they would have occupied if no cry of fraud had been raised on their behalf.

Suppose, however, as it was assumed below, that McGuire & Fetzer and their creditors are chargeable with the fraud of their

Digitized by Google

www.libtool.com.cn
assignee, Breading, in combining with Horner to cheat his creditors; if, in such a case, we treat the money as being in Breading's hands for the use of McGuire & Fetzer, as was done here, then we give the fraudulent parties the benefit of their fraud, and cast the crumbs to the honest creditors, for the law does not require even defrauders to do more than disgorge, and it will do no more with Breading. These views show plainly enough that there was error in every step of this trial.

We may now say that we discover no evidence in the cause that can at all justify the charge of fraud; and, as the plaintiff did not make it, and the defendants have no longer any interest in insisting on it, we may pass by all else that has been said on that subject, and notice the other questions, which must, so far as relevant, relate to the fact of payment of the balance of the purchase-money.

Fabers do not stand in the very shoes of Horner, for he might set off independent debts, so as to have the effect of payment, whereas they can show no more than what was directly or indirectly given and received with the intention of payment; for, in buying the land, they acquired no title to any debts due to Horner, or Horner & Eaton. On this principle it appears plain to us that, so far as any money was made upon the executions of Breading against Horner, it must be applied *pro rata* to the several interests represented by those judgments, unless there was an agreement to the contrary. If these judgments included an instalment of the purchase-money, then this principle applies to it. Breading having a right to collect the money, could do it in this way provided McGuire & Fetzer should not suffer by the arrangement.

If beyond this there was an arrangement between Breading and Horner, by which Horner was to have the profits of running the furnace, then those profits cannot be applied to the purchase-money, unless there was an agreement for that purpose, and they were actually so applied by Breading or Horner. The law will not apply it to relieve the purchaser at the sheriff's sale, and to the prejudice of creditors. It would be a monstrous result if it should be applied so as to give this furnace property for $50, while most of the creditors remain unpaid. A mere agreement so to apply it would give Horner a right of action to enforce it, or his rights under it might be attached by creditors; but it is merely executory until actual application.

This is a suit of McGuire & Fetzer against Horner and Eaton, and we cannot enforce it so as to settle the account of the speculation entered into by Breading and Horner. Breading, as assignee of McGuire & Fetzer, has no power to draw them and their creditors into his plans for setting up Horner in business, and he did not intend to. And the purchaser of Horner and Eaton's land is not entitled, when sued for the purchase-money,

Digitized by Google

www.libtool.com.cn

to claim an account of what Breading owes Horner, and to turn that over as payment.

These views seem to us to meet all the points insisted on in the argument, except the one relative to the letters written by Douglas in the name of Breading, and that seems to be unimportant now. We may say, however, that they must be considered as containing merely the declarations of a third person, until it is proved that they were written under the direction of Breading.

Judgment reversed and a new trial awarded.

Hendrickson *versus* Evans.

In an action upon a bond, the obligor cannot prove by parol and set up as a defence, that the bond was signed by him under an arrangement with the obligee, for the purpose of inducing the wife of the latter to execute a conveyance to a third person, and with the understanding that it should be delivered up and cancelled, when she should have executed the deed.

Where the fraudulent transaction does not appear on the face of the bond, but is interposed by way of defence by the obligor, *he* becomes the *actor*, and the maxim *in pari delicto melior est conditio defendentis*, applies against him and not in his favour.

ERROR to the District Court of *Allegheny county*.

This was an action of covenant brought by Oliver Evans against James Hendrickson, on the following article of agreement:—

"Article of agreement, made this sixteenth day of July, A. D. one thousand eight hundred and fifty-one, between Michael Dravo, John F. Dravo, James R. Hendrickson, and James Neal, of the one part, and Oliver Evans, of the other part, witnesseth, that whereas the said Evans hath this day bargained and sold to Richard B. Gilpin, at the instance and request of the said parties of the first part, a certain lot of ground situate on the Monongahela river, in the borough of McKeesport, in the county of Allegheny, and state of Pennsylvania, as a site for a rolling-mill, to be erected thereon by the said Gilpin, at and for the sum of five hundred dollars, although he, the said Evans, valued the said lot at the sum of two thousand five hundred dollars, he, the said Evans, remitting and abating from the said value of said lot, the sum of two thousand dollars, and they, the said parties of the first part, agreeing and promising on the execution and delivery to the said Gilpin of the deed for said lot, to deliver to said Evans their agreement under their hands and seals, to pay to him the said sum of two thousand dollars, so remitted and abated from the price of said lot, as aforesaid.

"Now these articles of agreement witness, that, in the fulfilment and in pursuance of the arrangement aforesaid, as well as for and in consideration of the said O. Evans having made the

Digitized by Google

www.libtool.com.cn
said sale of said lot at the request and instance of the said parties of the first part, they, the said parties of the first part, do hereby covenant, grant and agree, jointly and severally, to and with the said O. Evans, that they, the said parties of the first part, will well and truly pay, or cause to be paid, unto the said Oliver Evans, the sum of two thousand dollars in manner following: one thousand within twelve months from the date hereof, and the residue within two years from the date hereof.

"In witness whereof the said parties of the first and second parts have hereunto set their hands and seals the day and year above written."

The defendant pleaded *non est factum*, *non infregit conventionem*, and want of consideration, with leave to add, alter, or amend.

On the trial in the Court below, the plaintiff gave in evidence the foregoing agreement, and the deed to R. B. Gilpin, by which himself and wife conveyed the premises mentioned in the agreement to Gilpin, in consideration of five hundred dollars.

The defendant, to maintain the issue on his part, offered the article of agreement between Evans and Gilpin for the sale of the lot, dated the 15th July, 1851, to show that before the date of the agreement in suit, the plaintiff had agreed to sell and convey the premises to Gilpin for $500, and with proof that the present agreement was concluded at the time the deed, dated 17th July, 1851, to Gilpin, was delivered. This was offered, also to be followed with proof, that the plaintiff procured this defendant, and those who signed the agreement upon which this suit is brought, to sign the same merely for the purpose of inducing Mrs. Evans, the plaintiff's wife, to execute the deed to Gilpin and others. And that, at the time the said agreement was entered into, the plaintiff expressly agreed that he would not hold the defendant responsible on the same, but that he would deliver it up or destroy it as soon as the deed should be signed. And, in connexion with the foregoing, also, are articles of agreement between the plaintiff and R. B. Gilpin and others, dated 16th July, 1851. (This latter agreement recited the sale to Gilpin of the lot in McKeesport at the sum of $500, and also that the inducement to sell at that price, although the lot was valued at $2500, was the engagement of Gilpin and others to erect a rolling-mill on the property. And Gilpin and his sureties therein covenant and agree to erect and put the rolling-mill in operation within two years from the date of the agreement.)

It was admitted on the trial that the rolling-mill had been erected and put into operation.

The counsel for the plaintiff objected to the evidence, because irrelevant; because it is in contradiction of the instrument sued upon; and because it is inadmissible on the ground that the defence

Digitized by Google

www.libtool.com.cn

set up involves a premeditated fraud, to which the defendant was a party, upon a third person, to wit, the wife of the plaintiff.

The Court (WILLIAMS, J.,) sustained the objection, and at the instance of defendant's counsel sealed a bill of exceptions.

The jury found for the plaintiff.

The error assigned was the rejection of the testimony offered by defendant.

C. Shaler & Co., for plaintiffs in error.—What is the legal maxim applicable to the case? *In pari delicto melior est conditio possidentis, aut defendentis*, is a maxim of public policy, equally respected in Courts of law and of equity.

All the cases, except those in our own books, cited to support the alleged rule in equity, which precludes an obligor who connived with the obligee to defraud a third party, from setting it up as a defence, establish the contrary principle. Thus Spurret *v.* Spiller, 1 *Atk. Rep.* 165, decides that a bond given to induce a creditor to sign a composition deed, may be defended against even in equity. In Holman *v.* Johnson, *Cowp.* 343, Lord MANSFIELD lays down the true rule: No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. *Ex dolo malo non oritur actio:* 11 *Wheat.* 304; 6 *D. & E. R.* 408; 2 *Id.* 765. In Miller *v.* Henderson, 10 *Ser. & R.* 290, parol evidence was received from defendant that it was agreed that his signing was mere matter of form, and he should never be called on for payment. "A bond, the consideration of which grows out of an illegal transaction; where the illegal consideration is the sole basis of the bond, there can be no recovery:" Swann *v.* Scott, 11 *Ser. & R.* 164.

These cases appear to us to sustain the principle for which we contend. If the bond was given for a fraudulent object, and that was to enure to the benefit of the obligee, and having used it for the purpose contemplated, he cannot maintain an action upon it any more than the defendant could recover the money back if he had paid it, upon the ground of fraud in the original instrument. The maxim *potior est conditio defendentis* must apply, or it can never be applicable to any case.

The cases cited on the other side were reviewed, and also the opinion of his Honour, WOODWARD, J., in the case of Evans *v.* Dravo, 12 *Harris* 62.

T. Williams, for defendant in error.—The counsel for the defendant in error will content himself with a reference to the very able argument of Mr. Justice WOODWARD, in delivering the opinion of this Court at last term, in the case of Evans *v.* Dravo, 12

Digitized by Google

www.libtool.com.cn
Harris 62, which was an action on the same bond, and involved the same state of facts.

The opinion of the Court was delivered by

WOODWARD, J.—The questions raised upon this record are identical with those ruled last year in Evans *v.* Dravo, 12 *Harris* 62, which was an action on the same bond.

Invited by an able argument to a review of the grounds of decision assumed there, we have given them an attentive consideration, and see nothing in them to alter or qualify, and do accordingly reaffirm them. There is one suggestion of counsel which demands a more particular notice. It is said we violated the maxim *in pari delicto melior est conditio possidentis aut defendentis*. A decision which subverts any maxim of law or equity may well be questioned; for when a principle has been so long practised and so universally acknowledged as to become a *maxim*, it is not only entitled to respect as evidence of the law, but is obligatory as part of the law itself. A little reflection, however, will show that our former decision of this case is not obnoxious to the heavy charge of violating the maxim in question.

The plaintiff was then and is now in possession of a legal and valid cause of action. On the face of the bond there is nothing to show that he has not a right to enforce it. But the defendant alleges an equity which ought to restrain him, and, to make it out, is obliged to show the fraudulent transaction. In respect to that matter, the real substance of the dispute, he is the actor. He alleges and proves the fraud. This the maxim forbids him to do. It applies to *him* in the circumstances of the case, and not to the plaintiff on the record. Had the defendant gone into a Court of equity to restrain the plaintiff from enforcing the articles of agreement, he would have relied on the same matters he sets up in defence here, and everybody must see that the maxim would instantly have applied to him. It applies to him as a defendant in this action at law in the same manner it would have applied to him as a plaintiff in equity. As to the equity relied on by him he is plaintiff in fact, whatever the forum or the position of the parties on the record.

So far then from dishonouring this maxim, we gave it effect against the very party who was subject to its operation.

We think the Court were right in rejecting the evidence offered, and the judgment is affirmed.

Digitized by Google

www.libtool.com.cn

O'Hara & Darlington *versus* The Pennsylvania Railroad Company.
O'Hara *versus* The Same.

Under the Acts of Assembly regulating the manner in which the damages done to the owners of land, taken or appropriated by the Pennsylvania Railroad Company for depots, water stations, and other uses, shall be assessed—before the Court can grant a view on the petition of the company, it must appear:

That the company have located, marked, and surveyed the land they deem necessary, or propose to take.

That they have made an effort to agree with the owner for the compensation.

The statement of these matters in the petition is not sufficient; they must at least be verified by affidavit.

A report of viewers which does not set forth the character of the ground taken, its figure, and the advantages or disadvantages to the owners, and whether the land taken, or any and what part of it, is necessary for the use of the company, is not in accordance with the law and will be set aside.

Where the landowners have no notice of the application for the appointment of viewers, the objection to the preliminary proceedings, and to the petition, are in time, if made after the report of viewers is returned.

CERTIORARI to the Common Pleas of *Allegheny county*.

This was a proceeding at the instance of the Pennsylvania Railroad Company, under the Acts of Assembly incorporating and regulating the same, to ascertain the damages sustained by the plaintiff in error (O'Hara) by reason of the appropriation by the said company of certain lands lying in the 9th ward of the city of Pittsburgh, for the uses of the said company. The petition was presented on the 19th of October, 1850, praying for the appointment of five disinterested persons, under the provisions of the 4th section of a supplement to the Act incorporating the company, approved 27th March, 1848, to estimate and determine whether any, and, if any, what damages may be sustained by James O'Hara by said company taking, entering upon, and occupying for the purposes of said railroad, certain land of which the said James O'Hara is the owner, situate in the 9th ward of the city of Pittsburgh, and particularly described in said petition. The viewers were appointed.

On the 14th November, 1850, the viewers made the following report:—

"The undersigned appointed, by the said Court, viewers, agreeably to the prefixed precept, respectfully report:—That, having been duly sworn or affirmed, agreeably to the Act of Assembly in such cases provided, they proceeded on the 12th day of November, A. D. 1850, to view, and did view the premises indicated in the said precept as the property of James O'Hara; that they find the quantity of land required by the Pennsylvania Railroad Company, for the use of the said road, to be in quantity *one acre and eighty-eight perches;* that they duly estimated the value and

Digitized by Google

[O'Hara v. Pennsylvania Railroad Company.]

quantity of the said land, and having a due regard to, and making just allowances for, the advantages which have resulted, and may result to the said James O'Hara, the owner, in consequence of the opening and making of the said railroad, they compared the advantages and disadvantages of the same to the said owner, and do estimate and determine that the said James O'Hara has sustained, and will sustain damages to the amount of *five thousand dollars*, which they accordingly do report to the said Court, and that the same is payable to the said James O'Hara, this 14th day of November, 1850."

The case, O'Hara & Darlington against the Pennsylvania Railroad Company, arose in the same manner, and involved substantially the same state of facts.

The counsel filed the following exceptions to the confirmation of the reports:—

1. That notice was not given to the defendant of the filing of the petition, and application to Court by said Railroad Company for the appointment of viewers, or notice of the time and place of appointment.

2. That the viewers were selected in a manner contrary to law.

3. No effort was made by said company at any time, to agree with said defendants for compensation for the property entered upon and taken by them.

4. That the ground taken by said company has not been staked off and marked in any way so as to designate its boundaries and lines of separation from the streets and adjoining property.

5. To the gross and manifest injustice done to the defendants by the inadequate compensation allowed, and in valuing and estimating by the acre the property taken, the same having been for more than ten years past laid off in square blocks and lots, in the 9th ward of the city of Pittsburgh, and in such manner of record in the office of the Clerk of the Court of Quarter Sessions of Allegheny county.

6. In not making a full or any report of the evidence and its nature, and of all matters and things submitted to them.

7. To the unnecessary quantity of ground taken by said company for the purposes of a depot.

8. That notice was not given to the defendants of the appropriation of their property for the purposes of the said company prior to their application to Court for the appointment of viewers.

9. That it does not appear on the face of the proceedings or otherwise that the said company have by any action of the same, by resolution duly adopted or otherwise, taken the property of the defendants for the purpose mentioned in their petition, upon which the proceedings are founded.

10. That the whole of the proceedings on the part of the said company are unwarranted by law.

Digitized by Google

www.libtool.com.cn

11. That the petition of the company for the appointment of viewers is not verified by affidavit, nor is the fact of the inability of the parties to agree, which is essential to the jurisdiction of the Court, shown by proper averment and proof thereof.

12. The viewers erred in their computation of the area appropriated by the company, in stating it at least one-half acre less than the amount embraced within the description, and allowing damages on the basis of this false measurement.

13. That in their description of the amount appropriated, the company have omitted and excluded the ground belonging to the exceptants, taken and occupied by them on Ferguson and Lumber streets, the same or a part at least thereof being set forth by them in another proceeding against James O'Hara as the several property of the said James; the streets before mentioned having never been actually opened, but being enclosed with all the ground of the exceptants under a fence at the time of the view.

On the 28th July, 1855, these exceptions were overruled and judgment entered on the reports.

O'Hara & Darlington and O'Hara respectively sued out these writs, and assigned for error the overruling of the exceptions, and entering judgments on the reports of the viewers.

Stanton, for O'Hara.

T. Williams, for Darlington.

Stokes, for the Railroad Company.

The opinion of the Court was delivered by

Lowrie, J.—In the case of Zack against this company, we have decided that such a report as this is not at all a satisfaction of the law, since it does not set forth all the matters submitted to them. It gives no idea of the character of the ground, and scarcely any of its figure; for, while the distances are given in the petition and order, and there discordantly, there are no courses given, except eastwardly, southwardly, &c.; and, if the figure has its opposite sides parallel, as the reference to streets would indicate, then the distances are impossible. It states not one of the advantages or disadvantages which the owners may derive or suffer from the use that is to be made of the ground, and we do not know that they have considered them.

It is not at all our province to judge, at least in the first instance, of the quantity of ground necessary for the purposes of the railroad at this place; and, since the law does not say that the company shall be the judge of this matter, and it is not probable that

Digitized by Google

such a matter would be left to them alone, we must presume that this is one of the matters that ought to be reported upon by the viewers in a proper case. The company must, of course, locate and lay out the ground which they think necessary for their convenient use, as depots, &c., and must present their petition accordingly; but the viewers must decide whether so much is thus necessary. As the claim of the company is not conclusive of their right to the land for any more than the road-bed, but only a presentation of it for the approval of the Court in the proper form, we do not see that it is important to the owner that the resolution of the company to take it should appear to have been made and recorded. Their resolution to take it is sufficiently proved by their petition, if it be there sufficiently described.

It seems to us that there are several matters of fact which are preliminary to the appointment of the viewers, and which ought to be shown to the Court to have been performed, in order to justify the appointment. Thus it must appear, when the company are the petitioners, that they have surveyed, located, marked, and determined the ground which they deem necessary for their purposes, and which they propose to take, and that they have made an effort to agree with the owners for the compensation. These facts, and especially the last, cannot be taken for granted on the mere allegation of the petition; and therefore the very least that can be expected is, that they shall be supported by an affidavit, else they become a mere matter of form, for the viewers do not find them as facts.

In this case the landowners had no day in Court until the report was filed. Then they denied that there had been any effort made to agree, and they deny it here. The record does not show how the fact is, and it is very apparent that the Court did not pass upon it. If it had appeared that the landowners were present at the appointment of the viewers, this fact would have been taken as admitted, unless the objection had then been made. But when the appointment is made *ex parte*, the objection is, of course, in time, if made after the report, and then it must be decided before judgment can be entered on the report. This is saying nothing more than that such summary proceedings must appear on their face to be all regular.

This case is a very peculiar one, and of course requires a very special report, in which, at the least, all the matters of quantity, quality, value, and boundaries of the land, and the title to the streets spoken of, ought to appear. Without this there can be no intelligent review of the proceedings.

The delays in this case cannot enter into our judgment, for both parties had the same rights in bringing it to an issue. The process began in error, and it must start anew.

Digitized by Google

www.libtool.com.cn

O'HARA *v.* PENNSYLVANIA RAILROAD COMPANY.

PER CURIAM.—All the points in this case have been considered in the cases of Darlington and Zack against this same company, and the principles there expressed require a reversal of these proceedings.

Judgment reversed at the costs of the plaintiff below, the railroad company.

Weaver *versus* Lynch.

It is a well settled rule of law that if an obligor induce a person to take an assignment of his bond, by admitting the justice of the debt or declaring that he has no defence, he cannot afterwards deny it to the prejudice of the assignee.

In order to create an equitable estoppel upon the obligor, it is necessary for the assignee to prove, not only that he took the assignment, but that he paid a valuable consideration for it.

The holder must also prove that the admission of the obligor was made *before* the assignee expended his money in purchasing the bond.

If the assignee allege that he held the assignment of the notes *conditionally*, with the right to return them in case the obligor should allege any defence, he must prove it; his assertion of it to the obligor in making inquiry of him is not proof of the fact.

ERROR to the Common Pleas of *Fayette county*.

This suit was brought on three several single bills, signed and sealed by John Weaver, payable to Henry J. Ritenour or order, amounting in all to $557, and assigned by Ritenour to John W. Lynch. These notes were given by Weaver to Ritenour in part payment of a tract of land purchased from Ritenour on the 30th of April, 1849. At the time of the purchase there was a judgment against Ritenour, which was a lien on the land; upon which a *scire facias* was afterwards issued and Weaver summoned as terre tenant, and judgment entered thereon on the 12th of June, 1852, for $614.77, which remained unsatisfied.

The plaintiff then called Daniel Sharpneck, and proved by him as follows:—

"Mr. Lynch got me to attend to an arrangement which he said he had made with Mr. Weaver, at the October election in 1852. I called upon Mr. Weaver, to arrange the matter—to give bail for the money—that he could not pay the money—but would give bail in two weeks. I was to give to the middle of March, if he would satisfy me that the money would come without suit—men that would be prompt—said he was not prepared for it on that day—but would give in a couple of weeks. He said that Lynch had proposed the same thing to him—said they were all right but $105 or $106 which he had paid as a credit on the notes. Never saw him till November 3, after the presidential election. He

Digitized by Google

www.libtool.com.cn

then refused to go into the arrangement, that there was a judgment in favour of Brownfield. I asked why he did not tell Lynch that—said he had forgot it.

"This last fall I went to see Mr. Weaver, at the request of Lynch, and if it was time he wanted to give it to him. Weaver said he could not tell anything about it till he would see his attorneys.

"I asked him then, why he told Lynch that they were all right. He said he had, and whether Lynch had not told him if they were not right he, Lynch, would return them to Ritenour. Weaver said he had. I asked him if he had not said to him, Weaver, that if there was to be any quarrelling about it, he wanted to know it, that he could return them to Ritenour. He said yes, that he had, but that he had forgotten about this judgment, and did not know about the same."

The Court below (GILMORE, P. J.) charged the jury: "That if the evidence of Sharpneck was believed, it precludes any defence which existed prior to the assignment of the note, whether Weaver knew of the defence or not. That it was not necessary to prove that Lynch actually paid valuable consideration for the assignment. There is no evidence that he is an assignee without consideration." Verdict in favour of plaintiff for $614.77.

Errors assigned: The Court erred in charging the jury:—

1. That if the evidence of Sharpneck was believed, it precludes any defence that existed prior to the assignment of the note.

2. That it was not necessary to prove that Lynch actually paid valuable consideration for the assignment.

3. In throwing the burthen of proof on defendant to show that Lynch was an assignee without consideration.

Patterson, for plaintiff in error.—The defendant claims that the liens amount to more than these notes, and that he has a good defence. The grantor cannot recover till the encumbrances are removed: 10 *Barr* 74; 1 *Watts* 248; 13 *Ser. & R.* 165. The assignee is in the same situation, and takes it subject to every equity between the parties: 16 *Ser. & R.* 18; 14 *Id.* 306; 1 *Dall.* 23; 1 *P. R.* 29.

The only exception to the principle of these cases is, where the assignee has been induced to part with his money on the representation of the obligor that there was no objection or defence to their payment. In such case he will be estopped. But the assignee must show that these representations were made before the assignment, that he parted with his money relying upon them; and also, that he paid a valuable consideration for the notes.

The Court erred, therefore, in telling the jury it was not neces-

Digitized by Google

www.libtool.com.cn

sary for Lynch to prove that he paid a consideration for the assignment.

J. B. & A. Howell, for defendants in error.—Surely the Court below committed no error in charging the jury, "that if the evidence of Sharpneck was believed it precluded any defence."

Having induced or encouraged Lynch to purchase the notes, he could make no defence that existed at that time—even though he was ignorant of the matter at the time: 2 *Yeates* 541; 14 *Ser. & R.* 306; 16 *Id.* 21; 1 *P. R.* 24; *Id.* 476; *Addis. Rep.* 155.

Was it necessary for Lynch to prove that he paid a consideration? The plea was payment—the onus was upon the defendant: 3 *Harris* 63; 1 *Barr* 68; 11 *Ser. & R.* 234; 4 *W. & Ser.* 38; 4 *Harris* 497; 5 *Harris* 172.

The opinion of the Court was delivered by

BLACK, J.—This was a suit on several notes given by Weaver to Reitenour for a farm, and assigned by Reitenour to Lynch. The defence was that the farm was encumbered. It is not denied that this would have been an answer to the suit if the notes had remained in the hands of the original holder. But the Court held, on certain facts to be mentioned presently, that the defendant was estopped from setting it up against the assignee.

It is a rule as well settled as it is just, that if an obligor induce a person to take an assignment of his note or bond by admitting the justice of the debt, or declaring that he has no defence, he cannot afterwards deny it to the prejudice of the assignee. But, in order to create this equitable estoppel, it is necessary for the assignee to show not only that he took the assignment, but that he paid a valuable consideration for it. If the law were otherwise, an ignorant obligor might easily be trapped into an admission, and a sham assignment might be made for the very purpose of keeping out an honest defence. The assignee must also be able to show that the admission was made *before* he expended his money in procuring the assignment. Anything said afterwards can do him no harm, because it could not be his motive for making the purchase, and therefore it shall not affect the other party by way of estoppel.

In this case there was no evidence to show what consideration was paid for the notes by the assignee, nor whether any at all was given. This made the plaintiff's evidence on that part of the case fatally defective.

But there was another flaw in it. The assignee does not appear to have called on the defendant, or to have heard anything from him about the notes, until after the date of the assignment. Then, however, he told the defendant that he could return the notes and

Digitized by Google

www.libtool.com.cn

would do so if they were not right, and he received for answer that they *were* right. If he had proved that he had them conditionally, with the privilege of returning or keeping them according to his own pleasure, and that he had decided to keep them after the defendant gave him this answer, that would be a complete estoppel. But his mere averment, in a conversation with the defendant, that such was the condition of things, is not sufficient evidence to prove it.

Judgment reversed and *venire de novo* awarded.

Digitized by Google

www.libtool.com.cn

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

WESTERN DISTRICT—PITTSBURGH 1854.

Clark *versus* Morrison.

Where there are nine devisees and legatees under a will, three of whom are contesting the will in an issue of *devisavit vel non*, they cannot give in evidence, on the trial of such issue, the declarations and admissions of three of the remaining six, to prove fraud or imposition practised by them upon the testator.

The interests of legatees and devisees under a will are not joint, but several; and hence the declarations of one cannot be given in evidence to affect or prejudice the others.

Since the Act of 1833, relating to last wills and testaments, no will in writing concerning real estate can be revoked by parol.

ERROR to the Common Pleas of *Washington county*.

This was a feigned issue directed by the Register's Court of Washington county to the Court of Common Pleas, to try the validity of a certain paper purporting to be the last will and testament of Robert Clark, deceased. Robert Clark, at the time of making the alleged will, was an aged and feeble man; he had three sons and five daughters, all of whom were married except his sons Andrew and David, who resided with their father. The will was drawn by Andrew, one of the sons, and retained, as was alleged, in his custody. The principal part of the property, both real and personal, was devised and bequeathed to David and Andrew, and they were named as executors in the will.

Andrew having declined the executorship, letters testamentary were issued to David, who was also the plaintiff in this issue; and three of the daughters, with their husbands, were the defendants.

On the trial the defendants offered the following:—

Digitized by Google

www.libtool.com.cn

That Grier Campbell, the witness, resided in the immediate vicinity of the deceased, and that on the occasion of one of his visits to his (deceased's) house, Andrew, one of the sons of the deceased and a devisee under, and the person in whose hands the will of deceased was deposited, stated that his father had demanded his will for the purpose of destroying it, and that he had refused to give it to him.

To be followed up by evidence of his statement made on other occasions, that his father had afterwards demanded the will with the intention of destroying it; and that he had promised his father that he would destroy it, and that he had afterward informed his father that he had destroyed it, and that all these statements were made in the lifetime of the deceased.

Objected to on the ground that the declarations of the devisees and executor of the will are not competent to affect the interest of other parties to the will, and consequently cannot be admitted at all.

Objection sustained, and defendants except.

They then offered to prove the admissions of Andrew Clark, David Clark, and Jane Clark, widow of deceased, all devisees in the will, and the only persons residing with deceased, at and for some time before his decease, that the deceased had demanded his will with the intention of destroying it, and that Andrew Clark, the depository of the will, and a principal devisee under it, had promised to destroy it, and had afterwards informed the deceased that he had destroyed it, and that testator declared after he had heard this statement, that the law made the best will. And, by their admissions, that at this time he was an aged and feeble man, and confined to the house by bodily infirmity.

Objected to on the ground that the declarations of the devisees are not competent to affect the interest of the other parties to the will, and consequently not admissible.

Objection sustained, and defendants except.

They then offered to prove the declarations of the deceased shortly before his death, that the law made the best will; and that this declaration was made subsequently to the time that the deceased demanded his will, and Andrew had promised to destroy it, according to his admissions, as stated in the former offer—this offer to be taken and considered in connexion with the other offers rejected by the Court, for the purpose of proving fraud and revocation of the will.

Objected to on the ground that it would only be a parol revocation, and not competent to be proven by such evidence.

Objection sustained.

The errors assigned were to the rejection of the testimony contained in the several offers.

Digitized by Google

www.libtool.com.cn

[Clark *v.* Morrison.]

Acheson, *Wilson*, and *Montgomery*, for plaintiffs in error.—Admissions of a depository and legatee under the will, it is submitted, stand upon a different footing from those declarations which have been ruled in this state to be inadmissible. In New York and Massachusetts the point has been decided in favour of the admission of such testimony: 1 *Pick.* 192; 7 *Wend.* 125; 3 *Cowen* 612.

The rule as laid down by this Court is, that the admissions of one legatee are not evidence, because they may prejudice the interests of others: 6 *W. & Ser.* 431; 8 *Watts* 66; 13 *Ser. & R.* 323. Here the persons whose declarations were offered were the principal; none of the others would have been prejudiced, but all benefited: 8 *W. & Ser.* 275. Where testator tore the will, and threw it into the fire, and another took it out, the will was held revoked: 2 *W. Bl. Rep.* 1043. A case referred to 1 *Laws of Pennsylvania* 41, a will supposed by the testator to be destroyed, but retained by one of the devisees, was avoided.

————————, for defendant in error.—The current of decision in this state, with the exception of Dietrich *v.* Dietrich, 1 *Penn. Rep.* 306, has been constant and uniform against the admission of such evidence. In that case the Court were equally divided, but, when the case came back again, the Court were unanimous for its exclusion: 1 *Yeates* 390; 4 *Ser. & R.* 206; *Id.* 499; 13 *Ser. & R.* 323; 4 *Watts* 167; 8 *Watts* 66; 6 *W. & Ser.* 431. In the last case the distinction as to parties on the record, and those not, was entirely swept away.

As to the parol revocation, it is equally well settled. The point arose in Lewis *v.* Lewis, 2 *W. & Ser.* 455, which was a stronger case than the evidence here offered, but the Court held there was no revocation: *Act of* 1833, § 13; 3 *Lev.* 36; 33 *Eng. Com. Law Rep.* 57; 1 *Jarm. on Wills* 126.

The opinion of the Court was delivered by

WOODWARD, J.—This was an issue to try the validity of the will of Robert Clark, deceased. The executor is plaintiff, and three legatees named in the will are defendants. According to the allegation of the plaintiffs, gross fraud and imposition were practised on the testator by Andrew Clark, the principal devisee, but the question raised by the two bills of exception first sealed, has reference to the medium of proof resorted to by the defendants to establish the fraud. On an issue of *devisavit vel non*, where there are nine devisees and legatees under the will, may the three of them who are contesting the will on the record give evidence of the declarations and admissions of three of the remaining six devisees to impeach the will? This is the precise question raised by the two first errors assigned. There is no doubt the admissions of

Digitized by Google

www.libtool.com.cn

the three devisees would be evidence against themselves, if they were the only parties interested under the will; but Margaret and Jane, daughters of the testator, were each entitled to legacies of $200, and Eliza to a legacy of $5, and they are not parties to this issue. These daughters have a vested interest in their legacies; and although it may be true, as was asserted in the argument, that they would fare better if the will were set aside than if it were sustained, yet this does not appear from the record, and no grounds are furnished us for such a presumption. As the case is presented to us they do not question the will, but claim their legacies under it. Are their rights to be affected by the admissions and declarations of their mother and brothers? The general rule of law consonant with reason is, that one person is not to be prejudiced by the unauthorized declarations of another. The exceptions to the rule are found in those cases where there is a joint interest or privity of design between several. In such cases each is presumed to speak for the whole; but where there is neither joint interest nor combination, where each claims independently of the other, though under a common instrument, the words of one no more than his acts can bind the other. The interests of these devisees and legatees under the will are several and not joint; and hence the three who would impeach it were bound, on principle, to produce evidence that was competent as against all the rest. The evidence was not competent as to the three daughters named as legatees, and therefore was properly rejected. This conclusion is as clear on authority as on reason. The cases cited at bar, especially Bovard and Wife *v.* Walker, 4 *Ser. & R.* 499, Nussear *v.* Arnold, 13 *Ser. & R.* 328, and Hauberger *v.* Root, 6 *W. & Ser.* 434, are decisive against the plaintiffs in error, and divest the ruling below of all suspicion of error. I will not weaken the force of these cases by attempting to add to the reasoning on which they rest.

The offer in the third bill could operate only by way of revocation of the will, and for that purpose was wholly inadequate evidence. Since the enactment of the 13th section of our statute of wills of 1833, no will in writing concerning real estate can be repealed, nor any devise or direction therein altered except by a subsequent will or codicil, or by burning, cancelling, obliterating, or destroying the same by the testator himself, or by some one in his presence, by his express direction. The evidence offered did not come up to this statutory rule, and was therefore properly rejected. It was not aided by offering it in connexion with the evidence mentioned in the first two bills, for that, as we have seen, was forbidden by both reason and authority.

The judgment is affirmed.

Digitized by Google

www.libtool.com.cn

Sample *versus* Barr.

The 34th section of the Act of 24th February, 1834, is a rule of *action*, and not of *lien*, to the creditors of a decedent.

Since the Act of 1834 the debt must be established against the widow, heirs, or devisees before it is levied on the real estate of the decedent, whether the sale be made before or after the expiration of five years from the death of the decedent.

The object of the provision is to enable the widow and heirs, or devisees, to contest the *debt*, and not the *lien*, of the creditor.

The rule is equally obligatory upon the creditor where the estate has been devised subject to the payment of debts; and a sale without a compliance with the Act in this respect, will confer no title on the purchaser.

Quære, Whether a waiver of inquisition on real estate, by an executor or administrator, since the Act of 1834, will authorize a sale?

ERROR to the Common Pleas of *Armstrong county*.

This was an action of ejectment at the suit of James Barr and others, heirs of James Barr, deceased, against James Sample and others, to recover the possession of a tract of land containing 100 acres. The parties agreed upon the following case stated, with liberty to either party to sue out a writ of error.

James Barr, the father of the plaintiffs, died on the 15th day of August, 1833, seised of the land in dispute. He made a will on the 26th of September, 1832, which was proved and registered on the 24th of August, 1833, by which he devised the land in dispute to his sons, James and David Barr, the plaintiffs. That David Barr, one of the executors named in the said will, was the brother of the testator, and not the son, who is the plaintiff in this case.

That part of the real estate of the testator which was devised by the testator to be sold by the executors for the payment of debts, not including the land in dispute, was sold and applied to the payment of debts.

Alexander Colwell obtained a judgment against the executors of James Barr, deceased, before a justice of the peace, on the 19th day of January, 1835, which judgment was entered on the records of the Court of Common Pleas of Armstrong county, on the 28th of January, 1835, to No. 111, December Term, 1834, on which a *scire facias* was issued to No. 40, March Term, 1836, against the executors alone; and on the 15th of February, 1836, the executors confessed a judgment thereon. A *fieri facias* was issued on this judgment to No. 194, March Term, 1836, on which writ the land in dispute was levied on by the sheriff, and inquisition was waived by the executors, by writing filed. A *venditioni exponas*, to No. 8, June Term, 1836, was issued, and the land in dispute was sold thereon to James Sample, the defendant, for the sum of

Digitized by Google

www.libtool.com.cn
$355; and a sheriff's deed was executed, acknowledged, and delivered to him for the same by sheriff Huchinson.

David Barr, one of the executors of James Barr, deceased, filed an account of his administration of said testator on the 15th day of February, 1836, and a supplemental account on the 12th day of May, 1840, both of which were confirmed by the Orphans' Court of Armstrong county; and both of which accounts, with the papers and vouchers connected therewith, and the appraisement and vendue lists of said estate, are made part of this case stated.

The defendant has been in possession of the land in dispute since the sheriff's sale aforesaid.

The will of the testator contained the following clause:—

"When my two sons, James and David, shall arrive at the age of twenty-one years, then my will is, that what part of my land should remain after payment of debts, be equally divided between them, share and share alike, subject to the maintenance of my four remaining daughters until they are of full age or marry," &c.

The Court below entered judgment for the plaintiffs on the case stated, and this was assigned for error in this Court.

Foster, for plaintiffs in error.—We admit that a sale made more than five years after the death of the decedent, without making the widow and heirs parties, would be void. But the Act makes all debts a lien on the estate of the decedent for five years; and his real estate is assets in the hands of his executors for the payment of those debts. The 24th section of the Act of 1834 provides that the debts shall be a *lien* for five years, but no longer, unless suit is brought. It is clear, from the 20th section of the Act, that the legislature did not intend that the creditor, within the five years, should proceed against the heirs or devisees. The administrator can sell within five years without notice to the heirs. Why not sell on the judgment?

The case of Atherton *v.* Atherton, 2 *Barr* 112, is the only case where a contrary doctrine was apparently held; but the point does not appear to have been made in that case. In the case of Warden *v.* Eichbaum, 2 *Harris* 121, the sale took place after the five years had expired.

But, under the devise, James and David, the devisees, held in trust for the creditors, and cannot raise this question.

The land was specially dedicated by the testator for the payment of his debts, and is governed by the principle of Alexander *v.* Murry, 8 *Watts* 55, and Steel *v.* Henry, 9 *Id.* 523.

That the executors could waive the inquisition, is settled by Hunt *v.* Devling, 8 *Watts* 403.

Digitized by Google

www.libtool.com.cn

[Sample v. Barr.]

Lee, for defendant in error.—The recovery of the judgment would have no other effect than to extend the lien to ten years from the death of decedent: 2 *Pa. Rep.* 95; 2 *Watts* 53; 7 *Id.* 225; 2 *Harris* 44. But it creates no lien distinct from the debt; it merely extends that: 1 *Jones* 233. If ten years are permitted to elapse without bringing in the widow and heirs, the lien is gone and the land discharged.

Lands, though chattels for payment of debts, can only be made available in the manner prescribed in the Act: Act 21st March, 1806; 1 *Jones* 232. The 34th section of the Act of 1834 was not intended to point out the mode of continuing the lien, but the process of charging the land. The widow and heirs must have a day in Court, and a judgment *de terris* against them: 2 *Barr* 112; 8 *W. & Ser.* 165; 2 *Harris* 45. In the case in 7 *Harris* 390, it is explicitly declared that a sale on a judgment, in which the widow and heirs were not made parties, does not divest their title.

A purchaser at sheriff's sale takes all risk of the title: 9 *Ser. & R.* 397; 11 *Id.* 104.

The case of Hunt *v.* Devling, 8 *Watts* 403, which decided that a waiver of inquisition by an administrator was good, was before the Act of 1834, and before it was necessary to make the widow and heirs parties. Lands are now assets for payment of debts rather in their hands than of those of the administrator. Under the Act of 16th June, 1836, the waiver must be by the owner: 3 *Harris* 92; 8 *Watts* 422.

The opinion of the Court was delivered by

Woodward, J.—The argument of the plaintiff in error is fully answered by the remark that the 34th section of the Act of 1834, is a rule of action, and not of lien, to creditors of a decedent. There is nothing about lien in it. That is regulated by other provisions. But if a creditor means to enforce his lien, if he intends to charge the lands of the decedent, he shall bring in the widow and heirs, and for what? Not to contest his lien, but his debt; to demonstrate, if they can, that the decedent owed him nothing, and that, for *this* reason, he has no right to pursue the decedent's real estate. Debts, when established, are a lien; but, since the Act of 1834, they must be established against widows and heirs, as well as personal representatives, before they can be levied on real estate, and hence their right to contest the claim on original grounds, whether sued with the personal representatives, or brought in afterward by *scire facias*: 8 *W. & Ser.* 165; 2 *Barr* 112; 9 *W. & Ser.* 16. That a purchaser takes no estate where this rule has been disregarded, has been decided in many cases, and in McCraken *v.* Roberts, 7 *Harris* 395, was a conceded point. The estate in that case, as here, was devised subject to payment of debts. That is generally the case, but to assume the existence

Digitized by Google

www.libtool.com.cn
of the debt, which the statute says shall be proved, and then to argue that the will devised only what remained after the payment of debts, is to sacrifice the statute to a *petitio principii*.

It is not necessary to decide the other question in this case. If it were, I should have grave doubts whether, since the legislation of 1834, executors could waive inquisition and confess condemnation, notwithstanding what was ruled in Hunt *v.* Devling, 8 *Watts* 403.

The judgment is affirmed.

Kelley *versus* Kelley.

A will which contains no intelligible devise or bequest is void for uncertainty: parol evidence is not admissible to explain what the testator meant by such an instrument.

Error to the Common Pleas of *Mercer county*.

This was an action of ejectment brought by Leah Kelly against Samuel Kelly, for a tract of land in Wolf Creek township, Mercer county, containing 150 acres. It was admitted that the title to the land in controversy had been in David Kelly—that the plaintiff, Leah Kelly, was his mother and sole surviving parent, and that David Kelly died without issue, but leaving his mother, Leah Kelly, and brothers and sisters, of whom the defendant, Samuel Kelly, was one. Defendant, to support the issue on his part, gave in evidence the record of the will of David Kelly as follows, to wit:—

"The Last Will and testament of David Kelly of Wolf Creek township Mercer county in the name of God I David Kelly considering the uncertainty of this mortal life and Being of sound mind and memory blessed be almighty God for the same do make and publish this my last will and testament in manner and form following that is to say first I give and bequeath unto my) all my just debts and demands all my funeral and burying cost first Balance to Samuel Kelly Brother my Mother and John Montgomery to have their maintainance and burying charges out of it."

Witness
Samuel anderson
adam Hoffman

David Kelly. [L. S.]

Defendant offered to prove by the scrivener who drew the will, that the testator directed him to draw his will, and directed him to give the whole of his property to his brother, Samuel, after his mother and John Montgomery should have their maintenance out of it during their life. That he expressed his desire that his pro-

Digitized by Google

www.libtool.com.cn

perty (except a support for his mother and Montgomery) should go to his brother Samuel, and so directed him to write his will. That the witness told David Kelly that the will written by him so divided his estate, and that David Kelly, after reading it, said he believed it so expressed his desire and signed the will. That witness never drew a will before, and only consented to do it in this instance at the urgent request of the testator, and because no other person could be got to do it. Witness was confused at the time, and may not have expressed the direction of testator as clearly as under less embarrassing circumstances he might have done. Defendant also offers to prove that the testator in his lifetime often declared his intention to divide all his property to the defendant, thus to aid in showing clearly that the word "balance" in the will refers to testator's estate, also to prove that Samuel Kelly was testator's brother, and the plaintiff, his mother, and John Montgomery, a nephew, in ill health and since dead; which offer was objected to on the part of plaintiff.

By the Court: "It would be admissible to show that there were such persons as were recorded by the testator in the will, their connexion with him, and the property he had to dispose of, in order to make clear an expressed intention. But we think the offer in this case is, in effect, to introduce an important word, such as land, property, or estate, into the will, and that extrinsic evidence of the testator is not admissible for that purpose. Therefore, the offer of defendant is overruled, and, at the request of the defendant's counsel, this bill of exception is noted."

Charge of the Court (McCalmont, P. J.):—

"In this case we are of opinion that the words used in the will are not sufficient to show an intention as to the particular kind of property intended to be devised, whether personal or real, or the quantity of the estate. We have refused to admit extrinsic evidence of the intention of the testator in order to fill the blank, and therefore we instruct you that as to the land in controversy, the will is void because of its uncertainty, and that under the admitted evidence the plaintiff is entitled to the property, and your verdict should be in her favour.

"Under these instructions the points of the plaintiff may be considered as answered severally in the affirmative. To which charge, as then and there delivered, the counsel of the defendant did then and there except, and at their request this bill of exception was noted."

Errors assigned: 1. The Court erred in refusing to admit the evidence offered by the defendant.

2. The Court erred in their charge to the jury.

Stewart and *Maxwell*, for plaintiff in error.—1. The evidence

Digitized by Google

www.libtool.com.cn

offered to explain the ambiguity caused by the wording of the will should have been received. The ambiguity is caused by the words "balance" and "it,"—it is an ambiguity that can only be explained by testimony, and the defendant's offer shows what the character and intention of the testator were. To remove a latent ambiguity the testator's acts and declarations in respect to the thing given are certainly admitted: Brownfield *v.* Brownfield, 2 *Jones* 136; Verner *v.* Henry, 6 *Watts* 139; Smith *v.* Bell, 6 *Peters* 68. The offer is to show what was bequeathed. The words "balance" and "it" mean something, and that something can be explained by evidence which defendant offered to prove—and the will further gives to his mother and John Montgomery their maintenance out of *it*—out of what? This can be explained by evidence, and can only be by the declarations and act of the testator. The scrivener was illiterate, not accustomed to drawing wills, hence it is done in a bungling manner.

2. To the charge of the Court.

The testator meant something, and the will must be sustained, if a reasonable interpretation can be made of it. The bequest gives all the balance of something to his brother Samuel, and his mother and Montgomery to have their maintenance of it. Out of what were they to have their maintenance? certainly out of the estate, both real and personal. The intention of the testator that his mother and Montgomery shall have their maintenance out of his property, and his brother Samuel is to have the balance of it, is perfectly clear; and the devise must not be declared void where a reasonable interpretation can be put on it: Smith *v.* Bell, 6 *Peters* 68; 2 *Dallas* 264; 3 *Binn.* 149; 1 *Yeates* 508.

Stephenson, for defendant in error.—The evidence offered was properly rejected. The ambiguity in the will is not latent, but apparent on the face of the will. Parol evidence is not admissible to give a construction to the words of the will. *Pow. on Dev.* 477–8; 2 *Vern.* 98; Vern. Case, 4 *Rep.* 4, rules that no averment ought to be taken out of a will which could not be collected from the words contained in the will itself: 1 *Salk.* 232; 2 *P. Wms.* 318; 7 *Harris. Dig.* 638; 1 *Yeates* 432. The will is the only legal evidence of the devise: 5 *Barr* 35; 3 *Ser. & R.* 609; 11 *Johns.* 215; 2 *Jones* 136; 1 *Ves. Jr.* 415. A devise disinheriting the heir is more strictly observed here than in England: 5 *Binn.* 20; 7 *W. & Ser.* 284.

The opinion of the Court was delivered by

WOODWARD, J.—The will under which the plaintiff claims contains all the unimportant phrases of the form book, without a single intelligible devise or bequest. Such a will is insensible and void. It is incapable of being interpreted or executed. The

Digitized by Google

www.libtool.com.cn

parol evidence that was offered, and properly rejected, might have made a will for the testator, but could have given no vitality to this senseless and shapeless instrument.

The judgment is affirmed.

Cumberland Township *versus* Jefferson Township.

If an order made by two justices for the removal of a pauper is defective, in omitting to state that the person had or was likely to become chargeable, it is the duty of the Quarter Sessions, on appeal, to amend the same, and proceed to try the case upon its merits; an order quashing such proceedings is erroneous.

Where, prior to the order of removal, there had been an order of relief, it was conclusive evidence of the fact, that the person had become chargeable; and where the justices failed to recite it in the order of removal, the Court were bound to allow it to be so amended after the appeal.

The provisions in the Acts of Assembly, allowing amendments in such cases, is to receive a liberal construction.

CERTIORARI to the Quarter Sessions of *Greene county*.

This was an appeal from the order of two justices of the peace, removing Ann West, an alleged pauper, from the township of Cumberland to the township of Jefferson, in the county of Greene. On the 26th of July, 1853, by an order of relief of two justices of the peace, she became chargeable on the township of Cumberland. Shortly after its receipt the overseers of the poor of the latter township applied to two justices and procured an order of removal to Jefferson township, where it was alleged was her legal settlement. From this order of removal the township of Jefferson appealed. The record in the case returned by the justices was as follows:—

"The Overseers of the Poor of the Township of Cumberland *v.* The Overseers of the Poor of the Township of Jefferson. Notice issued August 13, 1852, by Alexander Stephenson, Esq., to appear at the house of Thomas Curl, in Cumberland township, August 30, 1852. The parties appeared at the above-named place, and proceeded to hear the testimony, and after hearing the parties, their proofs and allegations, we do adjudge that the last legal settlement of Ann West is the township of Jefferson, therefore we grant an order of removal to remove the said Ann West from the township of Cumberland to the township of Jefferson."

On the trial evidence was offered to prove that the alleged pauper was an able-bodied woman, and not chargeable as a pauper. The plaintiffs submitted proof of her inability to earn a livelihood, and contended that both parties were concluded by the order of relief issued by the justices.

The defendants moved to quash the order of removal on the grounds: 1st, that the complaint was not made by the overseers;

Digitized by Google

www.libtool.com.cn

and again, that it does not appear in any part of the proceedings that the pauper had, or was likely to, become chargeable.

The Court below delivered the following opinion: "As to the 1st ground, we think it sufficiently appears that the proceedings were commenced by the overseers. But for the 2d reason the proceedings must be quashed. We were anxious to sustain the order of removal, as we are satisfied from the evidence that the pauper had a settlement in Jefferson; but it is nowhere alleged in the order of removal, although it is in substance in the order of relief that she was a pauper, or likely to become chargeable. The 19th section of the Act of 13th June, 1836, is but a transcript, with slight alterations of phraseology, of the 23d section of the Act of 9th March, 1771, and notwithstanding the power to amend defects of form given in this section, it was ruled in the case of the Overseers of Dromore *v.* Overseers of Hanover, 1 *Yeates* 366, that the adjudication must show that the pauper had or was likely to become a charge. The proceedings are therefore quashed, each party to pay their own costs."

Whereupon the overseers of Cumberland removed the cause to this Court, and assigned for error: That the Court erred in quashing the proceedings, on the ground that it is nowhere alleged in the order of removal that the woman removed was a pauper or likely to become chargeable.

Downey and *Wyly*, for plaintiff in error.—It is submitted that the Court should either have disregarded this objection, or caused the proceedings to be amended. The Act of 1810, § 4, declares that in any appeal from the order of two justices it shall be decided "*on its truth and merits only*," and 5 *Binn.* 81, and 5 *W. & Ser.* 484, decided that this applies to an order of removal. It mattered not whether it was a defect of *form* or *substance;* either was equally amendable under the Act.

The order of relief was before the Court; that was conclusive upon the subject that she was chargeable. It was the decree of a competent tribunal directly on the question: 7 *Harris* 19; 9 *Barr* 49; 2 *Yeates* 164; 1 *Harris* 64; 8 *Barr* 433; 6 *W. & Ser.* 522.

Sayers and *Minor*, for defendant in error.—The order of relief was no part of these proceedings, and was not brought up with the record but given in evidence before the Court. The overseers of Jefferson were not justified in receiving the pauper upon any order, unless it contained affirmatively upon its face an adjudication that she was, or likely to, become chargeable: 1 *Yeates* 366; 1 *Ser. & R.* 387.

Digitized by Google

[Cumberland Township *v.* Jefferson Township.]

www.libtool.com.cn

The opinion of the Court was delivered by

WOODWARD, J.—This was an appeal from an order of two justices for the removal of Anne West to the township of Jefferson, and, on motion, the Court quashed the appeal, "because it does not appear in any part of the proceedings that the pauper had, or was likely to, become chargeable." There is no doubt that in point of fact she was chargeable on Cumberland; for a few days before the order of removal was obtained, two justices of the peace had issued an order of relief to the overseers of Cumberland, whereby she became a charge on their hands; but the order of removal did not recite this fact. Was this an incurable defect in the order of removal? The 19th section of the Act of 13th June, 1836, relating to the poor, provides that on appeal from an order of removal, *if there be any defect of form in such order the Court of Quarter Sessions shall cause the same to be amended without cost to the party; and after such amendment, if the same be necessary, shall proceed to hear and determine the cause upon its truth and merits.* This remedial provision in aid of a jurisdiction of great importance, but which is often unskilfully exercised, is entitled to a liberal construction. It was intended to bring pauper cases to a speedy decision on their very merits, and to save the poor, whom we are always to have with us, from the agonizing suspense of protracted litigation about technicalities and forms.

It is undoubtedly necessary that a pauper before he is removable should have become or be likely to become chargeable to the district which undertakes to remove him, for unless this be the case justices have no jurisdiction, and for want of jurisdiction an order of removal will be quashed; but, when he has been made chargeable by due process of law, may not a defective order be amended so as to exhibit the fact? We have no doubt of it. The two justices, before the appeal, might have amended their order by reciting the order of relief which the overseers before them held, and which was conclusive evidence of the chargeableness of this pauper, and an amendment which they might properly have made before appeal, the Quarter Sessions were bound to allow after appeal.

Obviously the Court could have amended the order of removal by the order of maintenance, and this we think is what they ought to have done, and then gone on and decided the cause on its merits, instead of quashing the appeal.

And now, 17th October, 1854, this cause having been argued by counsel, it is ordered and adjudged that the decree of the Quarter Sessions quashing the appeal be reversed and set aside, and that the record be remanded to be proceeded in according to law.

Digitized by Google

www.libtool.com.cn

Sutter's Heirs *versus* Ling.

A decree of specific performance of a written contract, made by the Orphans' Court, on the application of the administrator of the vendor, without notice to his heirs, and a deed made to the purchaser in pursuance of such decree, are *primâ facie* evidence of title in the vendee, as against the heirs of the vendor.

Where a vendor under articles of agreement dies, the right to receive the purchase-money passes to his personal representatives.

ERROR to the Common Pleas of *Somerset county*.

This was an ejectment by the heirs of Solomon Sutter against Henry Landis, for a tract of land containing 200 acres. The facts of the case are accurately stated in the opinion of his Honour KIMMELL, P. J.:—

"The heirs of Jacob Glessner conveyed the land in dispute, on the 2d May, 1833, to Solomon Sutter and Henry Landis. On the 2d March, 1840, Solomon Sutter sold his interest in the land to Henry Landis by articles of agreement, for the sum of $1200 in payments. On the 31st January, 1844, Redding B. Conover, the administrator of Solomon Sutter, deceased, presented his petition to the Orphans' Court of Somerset county, setting forth the written contract between the said parties, and praying the Court to decree a specific performance thereof. Henry Landis, the purchaser, admitted the fact and joined in the prayer of the petitioner; whereupon the Court the same day decreed a specific performance of the contract—a deed to be executed and delivered to H. Landis on his paying the balance of the purchase-money. A deed was executed and delivered to Henry Landis by R. B. Conover, administrator of Solomon Sutter, for the premises, on the 7th February, 1844.

"On the 4th of April, 1841, the Orphans' Court of the county, appointed Joseph Boyer guardian of the minor children of Solomon Sutter, deceased, the present plaintiffs.

"It does not appear that any notice was served on the guardian or children of the deceased of the proceedings in the Orphans' Court for the decree of specific performance.

"The counsel for the plaintiff contend that as there was no notice given to the heirs of Solomon Sutter, deceased, of the proceedings for specific performance in the Orphans' Court, that they are not bound by the decree, that it did not affect their title to the land.

"The Court are of opinion, that the application having been made by the administrator of the intestate, notice was not required to be given to the guardian or heirs; that the deed to Landis conveyed a good title; and therefore direct the jury to return a verdict for the defendants."

Digitized by Google

www.libtool.com.cn

In addition to the facts above stated it appears in evidence that Landis paid to the administrator the balance of the purchase-money, $325, and that it was accounted for by the administrator in the settlement of his account.

The instructions of the Court were assigned for error.

Coffroth, for plaintiff in error.

Stull, for defendant in error.

The opinion of the Court was delivered by

Lewis, J.—It is well settled that what is legally agreed to be done is, in equity, considered as done: 8 *Wheaton* 564; *Adams' Equity* 136, n. 1. It is upon this principle that, if a binding contract be made for the sale of land, enforceable in equity, such contract, though in fact unexecuted, is considered as performed, so far that the land becomes in equity the property of the vendee, and the purchase-money that of the vendor. On the same principle, if either party die before completion, the equitable right to the land, on the death of the vendee, will pass to his devisee or heir, and the same right to the purchase-money, on the death of the vendor, will pass to his executors or administrators, for whom the heirs or devisees will be trustees: 1 *J. & W.* 499; 12 *Sim.* 263; *Adams' Equity* 140; 2 *Kent* 477, n. a; 2 *Vern.* 212; 1 *Jarm. on Wills* 147; *Sugden V. & P.* 141. It is clear from this principle that, wherever there is a contract for the sale of real estate by a vendor, his executors or administrators may lawfully receive the purchase-money after his death. As the heirs or devisees are but trustees, the moment the money is paid to the personal representatives it is considered "at home" in their hands, as between the vendor and vendee, and the effect of the payment is precisely the same as if the money had been paid to the vendor in his lifetime. What is that effect? A vendor, with payment of the purchase-money, is a trustee for the vendee; and as no reason exists for any longer separation of the legal from the *equitable* estate, the vendee, according to the rule in Pennsylvania, becomes seised of the legal estate. A mortgagee is, in form, the holder of the legal estate, but the estate in equity follows the debt, and therefore the assignee of the administrators of the mortgagee may maintain ejectment: Sampson *v.* Ammons, 1 *Bin.* 177. And, upon the same principle, it is conceived that the personal representatives of the vendor might have the same remedy for the purchase-money. Their right to maintain ejectment for it, at this time, is certainly clear, since it has been expressly affirmed by the Act of 9th April, 1849, section 5.

In the case before us, the vendor entered into a binding con-

Digitized by Google

www.libtool.com.cn
tract, in writing, for the sale of the land, and received the greater part of the purchase-money. The purchaser took possession in 1840, and has remained there ever since. On the 7th February, 1844, after the death of the vendor, the residue of the purchase-money was paid to his administrator. These facts are not disputed. They are established by the proceedings of the vendor's administrator and the purchaser, in obtaining a decree of specific performance. That decree, and the deed made in pursuance of it, are *primâ facie* evidence for the purchaser, although the heirs of the vendor had no notice of them. The want of notice might entitle the heirs to go into evidence for the purpose of showing that no decree ought to have been made. But nothing of the kind was attempted here. The justice of the decree is not in any manner impeached. On the contrary, on the evidence before us, we see that the purchaser is entitled to such a decree, and that the heirs of the vendor have no just ground whatever to resist it. The Court was, therefore, correct in giving a peremptory instruction in favour of the defendants.

Judgment affirmed.

Fulton *versus* Moore.

Where a testator devised as follows: "I will that my son Ephraim have the home place, where I now live, by paying the legatees their respective shares, also the clock as it stands; also a horse valued at $75; a good saddle and bridle; also a good bed and bedding." And in a subsequent part of the will provides "as my son Ephraim has these moneys to make, he shall have a reasonable time allowed him without distressing or incurring costs: and further, it is my will that should any of my heirs die without lawful heirs from their body, their part shall return and be divided equally amongst the surviving heirs:" Ephraim entered and paid the legacies. *Held*, that he took a fee simple, and not a fee tail in the land.

Where a person accepts a legacy bequeathed, it is an election to stand by the provisions of the will.

Where the legacy was received in mistake, it might be refunded, but not after long acquiescence, and to the injury of third persons whose rights have intervened.

Where the party is in possession of land, a release to him will convey a fee simple without words of inheritance.

If a married woman in consideration of a release of real estate to her, joins her husband in conveying to the releasor a different part of her real estate, without a separate acknowledgment, and she and her husband afterwards convey the released estate, by a deed accompanied with a separate acknowledgment, she and her heirs will be estopped in equity from taking advantage of the defect in the first conveyance.

A judicial sale is not within the statute of frauds and perjuries.

Where a man is executor of a will in which real estate is devised, and permits the devisee to remain in possession of it, and attests as a witness a conveyance of it by the devisee, he would be estopped from claiming it as his own.

ERROR to the Common Pleas of *Washington county*.

Digitized by Google

[Fulton v. Moore.]

www.libtool.com.cn

This was an ejectment brought by Thornton L. Moore and Dorcas his wife against Abraham Fulton, to recover the one undivided third part of a tract of land in Carroll township, Washington county, containing one hundred and eighty acres.

The wife of the plaintiff below, Dorcas Cooper, now Moore, was the daughter of one of the legatees under the will of John Cooper, deceased, under whom both parties claim.

The will of John Cooper is dated 15th September, 1821, and registered 24th of December following. In that will he devised the land in dispute to his son Ephraim Cooper, which devise with the legacies were as follows:—

Item 2d. "To his wife Macy Cooper, to hold the third of the movables or the value thereof, to have a horse to ride when she chooses, one cow, the room she chooses in the house, and the two black boys, with the third of the interest of his real estate.

3d. "To his son Jacob $1200, subject to what had been previously paid him, the rest to be made in yearly instalments that can be made without distressing for it.

4th. "To his daughter Susannah (afterwards married to Campbell) he gives a horse valued at $50, saddle and bridle, cow, two good beds and bedding, and $500, to be paid after Jacob's legacy.

5th reads as follows:—"I will that my son Ephraim have the home-place where I now live, by paying the legatees their respective shares, also the clock as it stands, also a horse valued at $75, a good saddle and bridle, also a good bed and bedding.

6th. "To Dorcas he gives a horse valued at $50, saddle and bridle, cow, two good beds and bedding, and $500, to be paid in one year after Susannah's.

7th. "To his son John he gives the McCracken Place and $200, a horse valued at $70, saddle and bridle, bed and bedding.

8th. "To his daughter Eliza (afterwards wife of John J. Lynn) he gives a horse valued at $50, saddle and bridle, cow, and two good beds and bedding; also $500 to be paid when she comes of age."

9th. The testator provides, "as my son Ephraim has these moneys to make, he shall have a reasonable time allowed him without distressing or incurring costs: and further, it is my will that should any of my heirs die without lawful heirs from their body, their part shall return and be divided equally amongst the surviving heirs."

Under this will Ephraim took possession of the property, and paid the legacies charged upon the same.

He died in 1833, unmarried, and without issue, having executed his will, dated August 22, 1833, and registered 17th September, 1833.

By his will he devises the property in dispute to his sister Eliza Lynn, as follows, to wit: "It is my will, and I do hereby devise

Digitized by Google

www.libtool.com.cn

to my sister Eliza Cooper, and my mother Macy Cooper, all my real and personal estate of every kind and description, and all my rights and credits whatsoever (except as above bequeathed), to be by them held and enjoyed in equal shares until the death of my mother; and after the death of my mother it is my will that her share shall also go to Eliza Cooper my sister, absolutely and entirely.

"This devise I consider will embrace the home-place on which I live, as I have paid out of my own earnings and industry the shares devised to the other heirs of my father in his will."

He also bequeaths to his sister Dorcas five dollars, which was paid to her by the executor.

Mrs. Macy Cooper, the widow of John Cooper, survived Ephraim, but died before the institution of this suit.

Eliza Cooper having intermarried with John J. Lynn, she and her mother took possession of this property in pursuance of the will of Ephraim.

Ephraim, during his lifetime, had taken out letters of administration upon the estate of his deceased brother Jacob, who had died seised of a certain house and lot in Williamsport, in said county. Ephraim Cooper, as administrator, presented a petition to the Orphans' Court, and thereupon obtained a decree for the sale of the said property, for the payment of the debts of the intestate. An order of Court was thereupon issued for the sale of the property upon the premises, on the second Monday of August, 1831. There was no return made to the order, but the property was sold, as appears by an entry endorsed upon the terms of sale, to Manasseh Reeves, for $800. Manasseh Reeves died shortly after, and no conveyance is found of the property to Ephraim. Ephraim Cooper, however, was in possession of the property at his death, and devised the same by his will to his sister Eliza.

John J. Lynn, the husband of Eliza, took out letters of administration, *de bonis non*, upon the estate of Jacob, and accounted in his settlement for the sum of $800, as paid by Ephraim, to the estate, which amount went to the creditors of Jacob.

After the intermarriage of John J. Lynn and Eliza Cooper, Dorcas, the plaintiff below, laid claim under the will of her father John Cooper, to a portion of the estate of Ephraim, then in the possession of Macy Cooper the mother, and Eliza, by the will of Ephraim; whereupon an agreement was entered into between the parties, Dorcas Cooper, Macy Cooper, and John J. Lynn and wife, for the settlement of all difficulties and their mutual claims. This agreement, under seal, was dated the 5th day of October, 1837, by which agreement John J. Lynn and Eliza his wife agreed to convey, and did thereby convey to Dorcas Cooper the house and lot before mentioned in Williamsport, then in her possession,

Digitized by Google

[Fulton v. Moore.]

www.libtool.com.cn

in fee simple, and Dorcas, in consideration of the premises, "released, acquitted, discharged, and conveyed to the said John J. Lynn and Eliza his wife, in right of the said Eliza, all right, title, interest, claim, or demand she had to the real and personal estate of Ephraim Cooper, or to the real estate or personal estate of John Cooper, deceased, under his will, and by reason of the said Ephraim having died without issue;" which agreement was entered of record in the recorder's office of the county.

On the 19th of May, 1842, John J. Lynn and wife by deed conveyed the farm in dispute to James Nicholls, which was duly recorded; and on the 26th of July, 1842, James Nicholls and wife conveyed the same by deed to Henry Fulton, the present owner and real defendant in this ejectment, under whom Abraham Fulton, the party in possession, held at the time of the commencement of this action.

The defendant below submitted the following points:—

1. That by the 5th item in the will of John Cooper, Ephraim took a fee simple in the home-place.

2. That the latter clause of the 9th item does not limit the estate of Ephraim, but has reference merely to the former clause of the same item, by which time is given to Ephraim for the payment of the legacies given to the other heirs, and contemplates the contingency of some of the legatees dying before that time should expire, and provides in that event that "their part" shall be divided equally among the other heirs."

3. That Dorcas, the plaintiff, having accepted a legacy under the will of Ephraim, cannot now impeach it and deny the validity of the devise of the land in dispute contained in it.

4. That the indenture tripartite of the 5th of October, 1837, between Macy Cooper, Dorcas Cooper, and John J. Lynn and wife, conveys to Lynn and wife the legal title of Dorcas (if any she had) to the land in dispute, and that the subsequent neglect or omission of Mrs. Lynn to acknowledge that deed does not affect the title conveyed by Dorcas.

5. That if Nicholls, or the defendant, purchased upon the faith of the legal title thus vested in Lynn and wife, without notice of any fraud upon the part of Dorcas, or want of adequate consideration paid her, the defendant cannot be affected by either.

6. That to affect the defendant by fraud or gross inadequacy of price, the plaintiff must bring home notice to both Nicholls and defendant. If either of them purchased without such notice, notice to the other will not affect the defendant.

Upon these points the Court below (GILMORE, P. J.) charged the jury as follows:—

"The will of John Cooper is proved on the 24th of December, 1820. Both parties claim under this will. The testator left six children living at the time of his death, viz.: Jacob, John,

Digitized by Google

www.libtool.com.cn
Ephraim, Susannah, intermarried with Patrick Campbell, Dorcas (the female plaintiff), and Eliza, intermarried with John J. Lynn. The three first died after the testator, unmarried and without issue. The three last mentioned are still living. The 5th item in the will is as follows:—'I will that my son Ephraim have the home-place where I now live, by paying the legatees their respective shares, also the clock as it stands, also a horse valued at seventy dollars, with a good saddle and bridle, likewise also a good bed and bedding.' In the 3d item he gives to his son Jacob $1200, deducting therefrom what he has paid for him. In the 7th item he gives his son John the McCracken Place and two hundred dollars, also a horse, and other articles. To each of his daughters he gives $500, a horse valued at fifty dollars, and some other specified articles, and appoints a time for the payment. The ninth clause in the will is as follows: 'I will that, as my son Ephraim has these moneys to make, he shall have reasonable time allowed him without distressing or incurring costs, and further it is my will that, should any of my heirs die without lawful heirs from their body, their part shall return and be divided equally amongst the surviving heirs.'

"It is contended by the defendant that the limitation in the above recited clause of the will is applicable alone to the personal and not the real estate. But we are of a different opinion, and instruct you that Ephraim took an *estate tail* only in the premises in dispute, and he dying unmarried and without issue, the estate descended in fee to his sisters, the brothers having died unmarried and without issue.

"But it is said that the tripartite indenture, as it is called, of the 5th of October, 1837, between Macy Cooper (the widow), Dorcas Cooper, and John J. Lynn and wife, conveys to Lynn and wife the legal title of Dorcas. We are however of opinion, from a careful consideration of said deed, that the same is inchoate, that something was contemplated in the deed to be done towards the perfection of the consideration, which was not done, but left to be completed at some future time, which made the instrument an unexecuted contract—and this writing being the foundation in part of the title derived from Lynn and wife, all persons were charged with notice of the fact, that it did not purport the consideration to be given to Dorcas. The want then of the acknowledgment of Eliza Lynn, left Dorcas without any other title to the house and lot (which was the consideration of her conveyance of the premises) other than what she possessed by virtue of heirship to her brother Jacob, who, it is admitted, died seised of it. This, then, disposes of the first, second, and fourth points put by defendant.

"In answer to the third point, we say that the acceptance of the five dollars willed to the plaintiff, Dorcas, by the will of

Digitized by Google

[Fulton v. Moore.]

www.libtool.com.cn

Ephraim, will not preclude her from denying the right of those claiming her land under the same will. If the acceptance of this trifle could be construed into what is called a disappointment of the will, she could in equity now be permitted to make restitution: 2 *Mad. Ch.* 42.

"We answer the 5th and 6th points in the affirmative, and say the law is correctly stated therein, if the title of Lynn and wife had been what is called a legal title; but so far as it was derived from Dorcas it was not legal, and the purchasers of it were bound to take notice that the consideration was not perfected in the tripartite deed."

The jury found for the plaintiffs.

Whereupon the defendant sued out this writ, and assigned the following errors:—

1. The Court erred in instructing the jury that, under the will of John Cooper, Ephraim took only an *estate tail*, and that at his death without issue, the premises in dispute descended to his sisters in fee.

2. The Court erred also in charging the jury in the negative upon defendant's second point submitted, to wit: that the 9th item in the will of John Cooper limited the estate of Ephraim, &c.

3. The Court erred in charging that the tripartite indenture between Macy Cooper, Dorcas Cooper, and John J. Lynn and wife, did not fully convey the legal estate of Dorcas (if any she had) in the premises to Lynn and wife.

4. The Court erred in the charge in stating that the want of acknowledgment of the tripartite deed by the wife of John J. Lynn, defeated the conveyance of the premises by Dorcas to Lynn and wife, and that such want of acknowledgment was notice to purchasers of want of consideration and fraud.

5. The Court also erred in charging in the negative upon defendant's third point, to wit, that Dorcas having accepted a legacy under the will of Ephraim, could not afterwards impeach the validity of that will.

6. The Court also erred while affirming defendant's two last points submitted in stating that the conveyance by Dorcas was not a legal conveyance, and that purchasers were by the deed itself notified of want of consideration and fraud.

Ewing, *Gow*, and *Murdoch*, for plaintiff in error.

The opinion of the Court was delivered by

Lowrie, J.—The plaintiffs below cannot succeed in this action, and this judgment must be reversed, if the estate granted to Ephraim Cooper, by his father's will, is a fee simple. There are certainly expressions relating to a dying without issue that are quite sufficient to turn any estate into a fee tail if they apply to

Digitized by Google

www.libtool.com.cn

it, and these seem at first sight to be intended to apply to all the devises and bequests, and to a general dying without issue.

But a more careful examination of the whole will suggests a doubt whether the clause relied on applies to all the shares given in the will. The words "any of my heirs" are large enough for this, and therefore we must look at the devises and bequests, and see whether words of entailment will apply to them.

To Jacob he gives $1200—to Susannah a horse, saddle, bridle, a cow, two beds, and $500—to Dorcas the same; to Eliza the same; to John a farm, $200, horse, saddle, bridle, and bed; and to Ephraim the home-place, a clock, a horse, saddle, bridle, and bed, and charges upon him the payment of the legacies; and it would seem that the horses, &c., were to be purchased by him.

Now, it is plainly impossible to suppose, from a general provision for a dying without issue, that he was thinking of entailing, all alike with the land, these gifts of money and chattels that perish in the using, or of giving a mere life estate in them, with a *quasi* executory devise over; yet such would be the effect of giving the clause in question as general an application as the words would allow. We are obliged, therefore, to presume and seek for an intent to give it a special application.

As words of entailment it seems to be especially applicable to land. Did the testator intend to limit its application to the shares of John and Ephraim, and to give them mere estates tail? Then he was thinking of John and Ephraim, and would naturally have named them, and not said "if any of my heirs." We can derive no aid from the word "heirs," for it is an ordinary inaccuracy, and means here, or may mean, devisees and legatees. We discover no intent to distinguish the titles granted to John and Ephraim from those granted to the others, and it is very difficult to suppose that he was entailing Ephraim's title, for which he was requiring him to pay so heavily. These charges upon it were sufficient to imply a fee simple, without the introductory clause, and without words of inheritance.

We must therefore study this clause in its immediate connexion. The testator treats of nine different subjects in nine distinct paragraphs, providing in the first for his debts, in the second for his wife, and allotting one to each of his children to describe their several shares, and in the ninth is the clause that demands interpretation. It is as follows: "I will that as my son Ephraim has those moneys to raise, he shall have reasonable time allowed him without distressing or incurring costs; and further it is my will that, should any of my heirs die without lawful heirs from their body, their part shall return, and be divided equally amongst the surviving heirs."

On account of the difficulties already suggested, we feel constrained to limit the application of the clause in question by the

Digitized by Google

www.libtool.com.cn

principal thought in the paragraph in which we find it. The testator was thinking of the difficulty Ephraim might have in paying the legacies, and was providing that he should have time to do it, and then it was natural to think that some of the legatees might die during this delay without issue, and he provides for this by giving their shares, or any unpaid balance of them to the survivors. The clause is therefore intended to provide for this special dying without issue, and therefore it relates only to the legacies; and this is the most general application that it can receive. It is a clause selected from a form book, somewhat altered and not well applied, and yet it is no worse than is very commonly found in wills drawn by unprofessional persons.

This conclusion renders it unnecessary to notice any of the other questions raised by the assignments of error.

Judgment reversed, and a new trial awarded.

Lewis, J.—I concur with the majority in the opinion just delivered, and submit some further remarks in support of the judgment to be entered in this Court.

Moore and wife bring this ejectment, in right of the wife, as one of the heirs of John Cooper, deceased, to recover an interest in a tract of land which the latter had devised to his son Ephraim. The allegation of the plaintiff is, that the devise to Ephraim Cooper gave him only an estate tail, and that as he died without issue, the plaintiffs are entitled to recover. If the devise to Ephraim Cooper carried a fee simple, the plaintiffs have no right whatever. The will of John Cooper, deceased, gives to his son Ephraim the place in controversy "*by paying the legatees their respective shares.*" It then proceeds to give one-third of the interest to the widow, $500 to each of the three daughters, and $200 to the other son, making (exclusive of the one-third which goes to the widow) the sum of $1700, which Ephraim is to pay to the other heirs for their "*shares*" of the farm. These were not *mere* legacies of an *ordinary* character. They were intended and designated in the will as "the respective shares" of the other heirs. There can be no doubt whatever that this clause, if not controlled by other parts of the will, gives Ephraim a fee simple: 6 *Watts* 171; 5 *Barr* 355. But a doubt is created by a subsequent clause. After giving the legacies to the other children, the testator says, that, "as my son, Ephraim, has these moneys to make, he shall have reasonable time allowed him, without distressing or incurring costs; and, further, it is my will that, should any of *my heirs* die without lawful heirs from their body, their *part* shall return, and be divided equally amongst the surviving heirs." The provision for the contingency of a death without issue, is introduced immediately after the clause which gives Ephraim "a reasonable time to make the moneys," which he is

Digitized by Google

www.libtool.com.cn

directed to pay to the other children, and may therefore be understood to be confined to a death without issue, before payment of the money by Ephraim. It has relation to the death of the testator's "heirs," and operates solely upon their "*parts*" or "shares" of the estate given by the will. Ephraim, so far as regards the farm in controversy, is rather a *purchaser* than an *heir*. He is certainly so to the extent of *four-fifths* of it, because he is directed to pay to the other four heirs "their respective shares." If this construction be adopted, all the clauses of the will stand together in harmony, and Ephraim takes a fee simple. If the opposite view be taken, two clauses in the will, occurring in different parts of it, and having no necessary connexion, are made to stand in repugnancy to each other—the one giving a fee simple, and the other limiting the gift to an estate tail. I am therefore inclined to the opinion that Ephraim took a fee simple, and that it passed under his will to his sister, Mrs. Linn, under whom the defendants claim title. If this construction be correct, the plaintiffs below had no title.

But there are other objections to the plaintiffs' recovery. Ephraim, in his will, claims the place as his own; alleges that he has "paid out of his own earnings and industry the shares devised to the other heirs of his father in his will," and gives it, with the *residue* of his personal estate, to his mother and sister Eliza Lynn. Among the legacies directed to be paid out of the personal estate, is one to Dorcas, the female plaintiff. Her receipt of that legacy, in 1837, was an election to stand by the provisions of her brother's will. She could not take a benefit under the will, and, at the same time, repudiate its provisions. It matters not that the legacy to Dorcas was small in amount. If so, or if it was received by mistake, a chancellor would, perhaps, permit her, within a reasonable time, to refund it; but after the rights of *bona fide* purchasers for value have vested, and after fourteen years' delay and acquiescence, no such relief could be granted without doing injustice. She is therefore barred by her own election.

But there is still another objection to her recovery. It is her release in the tripartite deed of 5th October, 1837. She was then under no disability. Why should she not be bound by her own deed? It is said that there are no words of inheritance in her release. This is so; but if it were an ordinary *conveyance*, instead of a *release*, it would, nevertheless, bind her for life, without words of inheritance. But it is a release which enures by *passing a mere right of action*, and not as a *conveyance* which *passes an estate*. The releasee was in actual possession, under the will of Ephraim, claiming a fee simple. It is not material whether the person in possession had a fee simple by *right* or by *wrong*, by *disseisin*, by *discontinuance*, or otherwise. It is sufficient that she was in possession, claiming the whole estate, and that the releasor had

Digitized by Google

www.libtool.com.cn

nothing but a mere right of action. In such case the release passes the right without words of inheritance. The instrument before us is in due form of law, and well sustained by the precedents. But it is alleged that the release does not bind her, because, by the same instrument, John J. Lynn and Eliza his wife conveyed to her a house and lot in Williamsport (now Monongahela City), and that, as Mrs. Lynn did not acknowledge that deed, upon a separate examination, it is not binding upon her, and therefore Dorcas may repudiate her release contained in the same instrument. This defect of title, it is contended, is one which *lies in the path of the purchaser under Mrs. Lynn; appears upon the face of the title papers;* and *that he is therefore affected with constructive notice of it.* It is not pretended that he had notice of any other defects in the title to the house and lot conveyed to Dorcas. I therefore throw out of view, for the present, all other alleged defects of title to that property, and proceed to consider the only one which can affect the purchaser under Mrs. Lynn. The release of Dorcas Moore's claim to the land in controversy was the consideration for Mrs. Lynn's conveyance of the house and lot to Dorcas. When Mrs. Lynn, on the 19th May, 1842, conveyed the land in controversy to James Nichols, *by deed duly acknowledged, separate and apart from her husband*, she performed a legal act, in due form of law, which bound her as effectually as if she had not been under coverture. The act being legal, is followed by all legal and equitable incidents of a valid act. Having thus irrevocably parted with the land, she could never reclaim it. Having thus, by a valid act, appropriated to her own benefit the consideration received from Dorcas for the house and lot in Monongahela City, she could never afterwards recover that property from Dorcas. A married woman is to be protected against the duress of her husband, but she is not to be sustained in the perpetration of a fraud. She is bound by the rules of common honesty as firmly as others.

Her conveyance, without separate acknowledgment, is not so absolutely void as to be incapable of confirmation. Wherever she takes the consideration, by an act free from the actual or presumed coercion of her husband, she is barred by her election from impeaching her conveyance. The case of Share *v.* Anderson, 7 *Ser. & R.* 43, is an illustration of the principle. It is true that the claim to the consideration, in that case, was made after the death of her husband; but it is in principle the same as a claim to it made in his lifetime, if made in such form as to exclude the presumption of marital control. An acknowledgment before a magistrate, apart from her husband, is the mode prescribed by law for that purpose. That a married woman cannot dishonestly retain real estate conveyed to her trustee, and, at the same time, avoid her bond and mortgage for it on the ground of coverture,

Digitized by Google

www.libtool.com.cn

is shown by the case of Heacock *v.* Fly, 2 *Harris* 540. The same principle has been decided where she joined her husband in a judgment for the consideration of land conveyed to both jointly. The same principle governs in the case of infants. If an infant takes an estate and agrees to pay rent, he cannot protect himself from the rent, if he enjoys the estate when of full age: 2 *Kent* 240. If an infant husband give his bond for his wife's debts, contracted by her when *sole* by notes, and take up her notes, and afterwards pleads infancy to an action brought on his bond, chancery will compel him to give up the notes, and order him not to plead the statute of limitations against them: Clark *v.* Cobley, 2 *Cox* 178; 1 *Mad. Ch.* 331. And generally, if an infant avoids a contract when he comes of age, he must restore the consideration, if in his power; and his conversion of it to his own use, after he comes of age, is a ratification of the contract: 15 *Mass.* 359; 1 *N. H.* 78; 7 *Cowen* 179; 6 *N. H.* 339; 5 *Humph.* 70. Whether the contract be void or voidable, or whether it be made by an infant or *feme covert*, is immaterial, because its validity depends, not so much upon ratification as upon honesty and conscience, which will not permit any one unjustly to enjoy both the thing itself and its value. The two are so repugnant to each other, that the enjoyment of the one, in any form which the law sanctions, operates as an estoppel against a claim to the other. If the consideration be articles necessary for an infant, or if the money be borrowed and applied to the payment of debts for necessaries, the infant is bound to pay for them: 1 *P. Wms.* 483; *Fonbl. Equity* 78, note *y*. The act of borrowing money was not binding, but the application of it to discharge debts for necessaries, was a valid act, beneficial to the infant, and therefore bound him for the payment of the money so applied to his use: *Id.* So, although the conveyance by Mrs. Lynn to Dorcas Moore was not valid, because not properly acknowledged, the subsequent conveyance of the consideration received for it was properly acknowledged, and therefore bound her. It was a valid conversion to her own use of the consideration, which for ever estops her from impeaching her conveyance to Dorcas Moore. The supposition of the latter, that Mrs. Lynn can hereafter disturb her possession of the Williamsport property, is entirely fallacious; and there is no justice whatever in permitting her, upon this idle pretence, to disturb the purchasers under Mrs. Lynn. If Dorcas Moore had made claim during the five years that her sister occupied the premises after the release, the defect complained of might have been cured at once by those who then had an interest in curing it. But the delay until her sister ceased to have any motive for curing the defect, but became interested in asserting its existence, and the loss must fall upon innocent purchasers, looks more like a desire to perpetrate, than to defend against a fraud. Her acqui-

Digitized by Google

www.libtool.com.cn

escence for fourteen years after her own release, and for nearly ten years after the sale by her sister and her husband to Nichols, serves to strengthen this view of the case.

It is alleged that the tripartite deed of 1837 is executory and not executed. In the view I have taken of the case, this is immaterial, because, in either case, Dorcas Moore is precluded from asserting any claim to the land in dispute. But the conveyance to Dorcas is executed. It is in the present tense, and contains words of inheritance. The release from Dorcas to Mrs. Lynn, is also in words of the present tense; and because it operated as a release to one in possession, and not as a conveyance, words of inheritance were unnecessary, and were therefore omitted. There is no provision for the execution of any other conveyance, as necessary to the complete execution of the contract. There is a mere covenant for further assurance, "*if legally required*," "at any time upon demand." Such a covenant has never been held to convert a conveyance into a mere executory contract.

Thus far we have considered only the defects apparent on the face of the title, because these are all that the purchasers are bound to take notice of. But, if there was evidence of notice of all the defects complained of, the result would be the same, because there was no serious defect of any kind in Dorcas Moore's title to the house and lot in Williamsport. Jacob Cooper (the brother of Dorcas Moore and Ephraim Cooper) died seised of it, and Ephraim sold it as his estate, under an order of the Orphans' Court. It appears, by a written endorsement on the conditions of sale, that it was sold on the 5th of August, 1831, to Manasseh Reeves for $800. It further appears from the settlement of the accounts of the administrator of Jacob Cooper, deceased, that Ephraim accounted for the $800, the proceeds of sale, and applied it to the payment of debts against the estate of Jacob Cooper, deceased. So far as the justice of the case is concerned, this puts an end to all claim of the heirs of Jacob Cooper. The property was sold, under the decree of a Court of competent authority, and the proceeds were applied to the payment of debts. But they allege that the sale has never been confirmed. What of that? They are in equity bound to confirm it. It has never been set aside, and after they have had the benefit of the proceeds, and made no application to set aside the sale, but acquiesced in it for more than twenty-one years, the Orphans' Court would certainly refuse to set it aside. But there is no ground to set it aside, even if the question were not affected by time and acquiescence, and by appropriating the consideration to discharge debts. A judicial sale is good without writing, because it is not within the statute of frauds. In this case there is sufficient evidence of a sale to Reeves to entitle him to a deed, and at any time, on application, the Orphans' Court would order the sale to be confirmed and a

Digitized by Google

www.libtool.com.cn

deed to be made to him. When he stood by and permitted Mrs. Lynn to claim it as the devisee of Ephraim Cooper, and sell it to Dorcas Moore, without giving notice of his claim, he estopped himself, if he knew what the parties were doing, from ever afterwards making any claim to the property. That he did know the nature of the transaction, may be inferred from the circumstances. He was the uncle of Dorcas and Mrs. Lynn, and was also the uncle and executor of the will of Ephraim Cooper. In that will, of which Reeves was the executor, Ephraim had asserted a claim to the house and lot, on the ground that he had accounted for it, and he had therein devised it to Mrs. Lynn. Reeves was also the subscribing witness to the tripartite deed in which Mrs. Lynn had conveyed it to Dorcas Moore. He was also the witness who proved the execution of that conveyance in 1840, in order that it might be recorded. He has not, at any time, made claim to the property. Under these circumstances, if defects of title, not apparent in the chain of conveyances, are to affect Fulton, without proof of actual notice of them, a jury might fairly infer that Reeves had a knowledge of the contents of the tripartite deed; and if he had, and gave no notice of his claim until Dorcas had executed the release of her interest in the land in controversy, he would be estopped from asserting any claim to the property, and would stand as a trustee for her. On proof of these facts, the Orphans' Court would have confirmed the sale, and would have directed a conveyance to her, as the party beneficially entitled to the property. What in equity ought to be done, may, in Pennsylvania, be considered as done. If Dorcas, instead of asserting her title at the proper time, permitted the property to be divided among the heirs of Jacob Cooper, she herself being one of them, it is her own fault. After Mrs. Lynn had sold the farm to Nichols and received the consideration for it, it is easy to perceive the motive which she and Dorcas, as heirs of Jacob Cooper, might have to treat the house and lot as still belonging to his estate, and to divide its value among the heirs, after it had already been sold for his debts. They may perceive no dishonesty in such a transaction; but it appears to me that a chancellor, or a judge, governed by the principles of equity, would take a very different view of the matter.

In conclusion, I think that Dorcas Moore's claim to the land in controversy, on the ground that Ephraim Cooper took only an estate tail, is unfounded; that, if it were originally valid, her receipt for the legacy, under the will of Ephraim, precludes her from disputing the devise of the land to Mrs. Lynn; and that her release to the latter in 1837, under the circumstances in evidence, bars her from recovering, in opposition to her own deed, so as to affect the title of an innocent purchaser.

Judgment reversed and *venire facias de novo* awarded.

Digitized by Google

www.libtool.com.cn

Kiester *versus* Miller.

A written lease of lands, not exceeding three years, may be rescinded by parol.

No express consideration is necessary to support such an agreement to rescind; the agreement of one party is sufficient to make that of the other valid.

Whether any particular part of the evidence is weak or strong, is a matter for the consideration of the jury, and not for instruction by the Court as a matter of law.

The declarations of a landlord that the lessee had given up the premises, coupled with an unsuccessful effort to lease them to another tenant, are not *conclusive* evidence of a rescission of a lease.

The removal of the tenant from the premises, and an unaccepted offer to deliver up the keys, was no evidence of the existence of an agreement for the termination of the lease.

ERROR to the Common Pleas of *Allegheny county*.

This was an action of debt, brought by Jacob Kiester and Harriet his wife, before a justice of the peace, to recover from George and Jacob Miller, one year's rent, alleged to be due on the 1st of October, 1853. On the 14th day of February, 1852, Mrs. Kiester leased the premises to the defendants, by a lease under seal, for the term of three years, at the annual rent of $75, payable on the 1st of October of each year. On the trial of the cause, the plaintiffs gave in evidence the lease, with proof that the premises descended to Mrs. Kiester by the death of her father prior to 1849.

The defendants, to maintain the issue on their part, alleged that the lease was rescinded, and the possession of the premises delivered up to plaintiffs; and proved by a witness, that he went to Mrs. Kiester in October, 1852, and asked if Miller had given up the place, and she told witness he had; he then told her he had come to rent, if Miller had given up the place, and she said he had given it up, and that the witness should have the place in preference to any one else; she asked him $25 more rent, which was more than witness was willing to give. This witness also stated that Miller told him he had a mind to give up the place, and advised the witness to rent it, but refused to transfer his lease to him, lest it might cause dissatisfaction.

Another witness proved that he went to Kiester's in February or March, 1853, to rent the property for another person, but effected no lease.

The plaintiffs proved that, at the instance of defendants, witness brought the keys to Mrs. Kiester, about the last of March or 1st April, 1853, and that she refused to receive them. He left them on the shelf in her house. And also that about the latter part of March, Miller said he had been to see the brother of Mrs. Kiester

Digitized by Google

to pay him some rent, and get him to take the place off of his hands; that he had taken the rent, but refused to receive the surrender of the place.

The plaintiff's counsel requested the Court to charge the jury, 1. That the alleged rescission of the lease in question, the said lease being in writing under seal, if made at all, being by parol and not in writing, is void under the statute of frauds, and is no bar to the plaintiff's recovery in this suit.

3. That even if the jury believe that Harriet Kiester, prior to April 1, 1853, agreed with said defendants to accept and resume the possession of the demised premises on the 1st day of April, 1853, the agreement was gratuitous and void, and the plaintiff might disaffirm such agreement, and refuse to accept the premises; and having so refused, any such alleged agreement not being executed, is void, and the plaintiff is entitled to recover, unless the jury find that the plaintiff executed such alleged agreement by resuming the possession of said premises.

4. That offers to lease the premises to other persons afford but slight evidence that the lease was absolutely rescinded, being equally consistent with the hypothesis that such offers were made with intent to rescind said lease, provided another good tenant could be had; and are rebutted by the fact that the landlord retained the lease in her possession after the alleged rescission thereof.

The defendant's counsel also requested the Court to charge the jury: 1. That if the jury believe, from all the evidence, that Mrs. Kiester said Miller had given up the premises; that she offered to rent the property to other persons, and asked a higher rent upon the premises between October, 1852, and April 1, 1853, and that the defendants went out of possession and gave up the keys on the 1st April, 1853; this terminated the lease at that day, and was inconsistent with her right to receive rent after that time, and the plaintiffs cannot recover.

2. That asking a higher rent for the premises is strong evidence that they had taken back the property.

The Court below (McClure, P. J.) answered these points as follows:—

"1. A lease for three years may be by parol; it is not embraced in the statute of frauds and perjuries; and if a lease for three years be in writing, the parties may rescind it by parol.

"3. If the wife, Mrs. Kiester, and the tenant mutually rescinded the lease by parol, her change of mind afterwards cannot render that rescission void; this is not, like a promise without consideration, void; for if the lease is terminated by mutual consent, she resumes and they relinquish possession, and she may rent to another and sustain no loss. The reversion would be a consideration that would bind her by her agreement or promise.

Digitized by Google

[Kiester v. Miller.]

www.libtool.com.cn

"4. Such offer, if made, is evidence of the weakness or strength, of which the jury will judge."

The Court answered the defendants' points as follows:—

"1. Affirmed.

"2. Affirmed, provided the jury are satisfied she did ask a higher rent; the Court says it is evidence, but the strength or weakness of which the jury will judge."

The jury found for the defendants.

The plaintiff in this Court assigned for error the answers of the Court to the points of plaintiff and defendant.

J. I. Kuhn, for plaintiff in error.

Flannegin and *Hasbrouck*, contrà.

The opinion of the Court was delivered by

KNOX, J.—That an estate in lands for a term not exceeding three years, created by a written lease, may be released by a parol agreement to rescind the lease, is too well settled to admit of further dispute: McKinney *v.* Reeder, 7 *Watts* 123; Greider's Appeal, 5 *Barr* 424; McGaw *v.* Lambert, 3 *Barr* 444. Neither is there any consideration necessary to support such an agreement of rescission other than the contract itself. The agreement of the one party is sufficient to make valid that of the other.

This disposes of the first and second specifications of error. As to the third, the answer to the point was proper. The weight of the evidence was to be determined by the jury, and it was not error in the Court to refuse to say whether it was weak or otherwise. The fifth assignment is of the same character.

The fourth is based upon the answer of the Court to the defendant's first point.

The question at issue between the parties was, whether there had been an agreement made for the termination of the lease at the expiration of the first year?

The defendant requested the Court to instruct the jury, "That if they believed, from all the evidence, that Mrs. Kiester said Millers had given up the premises; that she offered to rent the property to other persons, and asked a higher rent upon the premises between October, 1852, and April 1, 1853; and that the defendants went out of possession and gave up the keys on the 1st April, 1853: this terminated the lease at that day, and was inconsistent with her right to receive rent after that time, and the plaintiffs cannot recover."

This point was affirmed, and for this the judgment must be reversed.

The matters stated were proper subjects for the consideration

Digitized by Google

www.libtool.com.cn
of the jury in ascertaining whether the contract had been rescinded; but the declaration of a landlord that a tenant had given up his lease, even when accompanied by an unsuccessful attempt to lease to another, is not conclusive evidence that the relation of landlord and tenant was at an end. It does not operate as an estoppel, but may be satisfactorily explained. The removal by the tenants from the premises, with the unaccepted offer to deliver the key, was no evidence that the lease had been rescinded. These acts would avail nothing until the alleged agreement was first shown. The case should have been put upon the existence of the agreement rather than upon what the plaintiff said and did. Her acts and declarations were evidence against her, but not to the exclusion of the other evidence in the cause.

Judgment reversed and *venire de novo* awarded.

Holmes *versus* Pattison.

Where a testator in 1791 devised a tract of unimproved land, without the use of words of inheritance, and gave the one-third of the annual profits of the land to another for life, and there is no contrary intention expressed upon the face of the will, the devisee will take an estate in fee simple.

Where one of four devisees under a will died without heirs, and her estate escheated to the Commonwealth, and the remaining devisees and another divided the land among them and occupied it in severalty, the Commonwealth having done no act to ratify the partition, the interest of the state would remain an undivided interest.

The Commonwealth's interest, being unaffected by the statute of limitations, would remain as at the death of the co-devisee, an undivided interest in the whole tract devised, and the same right would pass to her grantees of such escheated estate.

An intruder being in the actual adverse possession of the part allotted to him under the partition for more than twenty-one years, would acquire a title by the statute of limitations to three undivided fourth parts of the portion of the land so occupied by him.

Error to the Common Pleas of *Washington county.*

John Pattison brought this action to recover from James Bell and James Holmes 120 acres of land, part of a larger tract called "Star Fort," containing 400 acres.

James Roney was the patentee and owner, and, in 1791, he devised one-fourth of the tract to Ann Roney, child of his sister Sarah, and to his sisters Mary, Nancy, and Sarah, each a fourth, subject to a reservation of one-third of the annual profits to his mother during life. Ann, the child of Sarah, was illegitimate, and died in the same year, 1791, aged about three years. On the day of the probate of the will of James Roney, Hercules, the brother of James Roney, conveyed to his sisters, Mary, Nancy, and Sarah,

Digitized by Google

www.libtool.com.cn

the interest he was supposed to have in the three-fourths devised to them, by reason of that devise being, as was supposed, but a life estate. Hercules was, very shortly afterwards, put in possession of the tract in dispute; and he and those claiming under him were in possession until a short time before the trial. Each of the sisters was also in possession of a distinct and separate part of the land, and severally assessed with 100 acres. Hercules died in possession of the land in controversy in 1812, having devised it to his daughter Mary, who held it till her death in 1829, intestate, by which it descended to her brother and sister, who, in 1840, conveyed it to the plaintiff in this suit.

On the 28th June, 1831, James Holmes made information to the auditor-general of the escheat of the interest of Ann Roney, she being illegitimate; and Isaac Leet, Esq., was appointed deputy-escheator.

An inquisition finding the escheat was duly taken before him on the 11th of August, 1831, and filed in Court, describing the land as one-fourth of the patented tract called "Star Fort."

On the ground, the division marks of tract between the different parts of the land occupied by Hercules Roney and his sisters, could be distinctly traced and counted back to 1796.

By an Act of Assembly of June 4, 1839 (*P. L.* 241), all the title of the Commonwealth in the undivided one-fourth of this tract of 400 acres was vested in the children of Sarah Roney, the mother of Ann. These persons afterwards conveyed their title to James Holmes, the defendant.

The plaintiff founded his title upon the long-continued possession of James Roney and those claiming, whose titles are vested in him.

The defendants claimed under devise to Ann Roney—the escheat to the Commonwealth, the Act vesting it in the children of Sarah Roney, and their conveyance to him.

The plaintiffs requested the Court to charge the jury as follows:—

1. That the escheat proceeding could vest no greater title in the Commonwealth than was possessed by Ann Roney.

2. That, under the will of James Roney, Ann, illegitimate daughter of Sarah Roney, took only an estate for life, and, at her death, the undivided one-fourth of the land devised to her reverted to the right heirs of James Roney, deceased.

3. That, if the said Ann Roney took a fee under the will of James Roney, deceased, her interest would be the undivided one-fourth part of 400 acres; and if she died without partition, then that undivided interest would vest in the Commonwealth.

4. That, if the Commonwealth acquired anything by the escheat, it was this undivided interest in the 400 acres, and the plaintiff is

Digitized by Google

www.libtool.com.cn

entitled to recover the land in dispute, subject to the claim of the Commonwealth as aforesaid.

5. That, if the defendants have any right whatever in the land in dispute, it is derived from the 12th section of the Act of Assembly, passed June 4, 1839, and by the provisions of that Act an undivided one-fourth part in the 400 acres being vested in the defendant's grantors, the plaintiff is entitled to recover the undivided three-fourths of the land in dispute.

6. That no partition of the 400 acres made between Hercules Roney and his sisters, the devisees named in the will of James Roney, deceased, would enure to the benefit of the Commonwealth, unless it was clearly and satisfactorily shown that said Hercules Roney acted, or claimed to act, as the agent of Ann Roney, the illegitimate child, or of the Commonwealth, in making said partition; and, if the jury believe from the testimony that the said Hercules Roney claimed the land in his own right, and acted for himself in making such partition, the Commonwealth, or her grantees, cannot adopt his act and claim the purpart of land allotted to him.

The Court below (AGNEW, P. J.), after stating the facts, charged the jury as follows:—

"If this be the state of the case, it will be seen that the title of the plaintiff is founded on the title or possession of Hercules Roney, and those claiming under him. This title, or possession, or both, as the case may be, must, therefore, be determined, in order to decide upon the plaintiff's title. If the will of James Roney gave but a life estate to Ann, Mary, Nancy, and Sarah, the reversion fell, at their respective deaths, to the right heirs of James Roney (who, according to the intestate laws in force prior to the Act of 1794, were Hercules and his three sisters, and their issue.) He having conveyed his estate in the three-fourths to them, retaining the part in dispute, the partition and separate possession of Hercules, and those claiming under him, would vest a good title in the plaintiff. But, if the will vested in the devisees a fee simple, Hercules had no title to any part, by reversion or otherwise. If the will gave a fee simple to one, it gave it to all. If Ann, therefore, had a fee simple, nothing was left to be inherited by Hercules, and, at her death, her share escheated to the Commonwealth, and was held by her and the three sisters as tenants in common.

"Thus it is clear, if the fee simple vested in Ann, the plaintiff can only claim (through the partition and several possession of Hercules and those claiming under him) the estate of Mary, Nancy, and Sarah in the undivided three-fourths of the part in dispute, by the statute of limitations, the statute not being available against the Commonwealth, as to the other fourth. But, if there was no partition excluding the three sisters from the land

Digitized by Google

www.libtool.com.cn

in dispute, and no separate possession accordingly, by those under whom the plaintiff claims, the statute of limitations would not avail. Mary, Nancy, and Sarah being tenants in common with the Commonwealth, and being in possession of the whole tract (as they would be if no partition and separate possession), there was no ouster, and the plaintiff could not recover. The question recurs, What estate was vested in Ann, as the devisee? There is evidence showing that, at the death of James Roney, this tract called Star Fort was unseated and unimproved. Indeed it is conceded on both sides that the land was wood-land and unimproved. It must have been in the same condition at the time of the making of the will. This being the undenied state of the fact, it is unnecessary to decide what the construction of this will would be, if the land had been improved and yielding profits. I may say, however, I should have doubted, if the fact had been so, whether more than a life estate was carried by the language of this will, notwithstanding the case of Shriver *v.* Meyer, in 7 *Harris*. That case was decided on the effect of the language of the introduction, carried down to the devising clause, and the learned judge delivering the opinion expressly remarks, that the words 'as to such worldly estate,' if they have nothing to which they can attach, must of course be inoperative, and he makes it of importance that the words 'I devise the same,' or similar expressions, are distinctly attached. In Caldwell *v.* Ferguson, 2 *Yeates* 383, relied on in Shriver *v.* Meyer, Judge YEATES notices the distinction between an introduction declaring an intention *to dispose of all* the testator's estate, and one that *with respect to it*, he devises so and so. In the present case, the language is merely that the testator 'wills and bequeaths in the following manner and form *touching* such worldly estate which it had pleased God to bless him with,' meaning, perhaps, no more than *with respect to it*, he wills and bequeaths, &c.

"But as this land was wood-land and unimproved, as it could be of no benefit to the devisees, without a large expenditure of money or labour to improve it, a heavy charge on the devisees which the uncertainty of life would leave no certainty of being repaid to them; and as the land is subjected to a reservation of one-third of the profits, to be given to the mother of the testator, during life, the testator must have meant to vest a fee simple in the devisees, and it brings the case within the chief ground on which Caldwell and Ferguson was decided. The present is even stronger than that case. Here, the estate devised could not otherwise be beneficial to the mother, as well as the devisees, and here the reservation is for the life of the mother, implying that the testator had supposed he had given the others something more enduring than an estate for their own lives which might not have endured as long as that of the mother. Without profits, it was

Digitized by Google

www.libtool.com.cn
worthless to her, and without a greater estate it was worthless to them; for he could not suppose they would improve it upon the uncertainty of life, and pay a rent to her besides. He gives his mother the reservation for her '*sustenance*,' as he expressly says; and it would be unreasonable to suppose he meant to subject the devisees to a heavy burden for this end, and yet limit their estate so that it might expire before the land had yielded profits to any one; and then, who should take up the forgotten reversion? His will gives no response. We conceive that the subject of the devise, and the whole scope of the language of this will, enable the conclusion to be legally drawn, that a devise in fee was intended.

"We therefore instruct the jury, that if this land, as the evidence shows, was woodland and unimproved, the will of James Roney vested a fee simple in Ann, the daughter of Sarah, in the undivided one-fourth of the tract called Star Fort. That, at her death, being illegitimate and incapable of procreation, her estate vested in the Commonwealth by escheat, who became a tenant in common with Mary, Nancy, and Sarah. That this undivided one-fourth by the Act of 4th June, 1839, became vested in the persons therein named, whose title afterwards vested in James Holmes, the defendant, and consequently, as the statute of limitations does not run against the Commonwealth, the plaintiff cannot recover as to the undivided one-fourth of the land in controversy.

"We further instruct the jury, that the Commonwealth was not bound by the partition between Hercules Roney and his sisters; and in the proceedings relating to the escheat, and in the Act of 1839 not recognising the partition, but on the contrary by this Act of 1839 transferring expressly an undivided interest, the defendant's title was not of the whole land in dispute, but of an undivided one-fourth only. If, therefore, the jury believe that the tract was divided at an early day, and that, since Hercules Roney, and those claiming under him, held the part in dispute in possession in severalty, claiming in their own right for twenty-one years or upwards before they were ousted from the possession, and so held it peaceably and uninterruptedly, and not as tenants in common with Mary, Nancy, and Sarah, and those claiming under them, the plaintiff is entitled to recover the undivided three-fourths of the part in dispute. Mary, Nancy, and Sarah being entitled to three-fourths of the tract, if they made partition with Hercules, a mere intruder without right, and suffered him and those claiming under him to remain in peaceable possession against them for twenty-one years or upwards, they lost their title to that part of the land possessed by him by the statute of limitations; and it became a positive title thereafter in him and his assigns, on which a recovery can be had as to the three-fourths they had owned, leaving the remaining fourth unaffected in the Commom-

Digitized by Google

www.libtool.com.cn

wealth only because the statute does not run against her. If it had, the claimants under Hercules would have held the whole.

"There is no evidence until after the Commonwealth had parted with her title in 1839, which would justify us in submitting any question of ratification of the partition before that Act to the jury. Long before this period, the title of the plaintiff, if perfected at all by the statute of limitations, according to the evidence, had been consummated, and no act therefore by the grantees of the Commonwealth, either by adopting a former partition with Mary, Nancy, and Sarah, or making a new one by the same lines, could affect the plaintiff's title.

"There is not a spark of evidence that the partition was made in the lifetime of Ann, or that Hercules proffered to act in her behalf; but the reverse. The death of Ann in 1791; the state of the land; the deed of Hercules to his sisters; the time he took possession; his conduct in always treating the land as his own; the assessments; the age of the marks on the ground, all tend to show that the partition was not made till several years after Ann's death, perhaps not earlier than 1795, and not later than 1796.

"As to the Commonwealth, the evidence is equally clear. She was not informed of the escheat till June, 1831. In the proceedings thereupon she treated the land as undivided, and by a solemn act or law transferred her title in 1839, as still an undivided interest. There is not a shadow of pretence she ratified or adopted the partition. The defendant admits the partition, made at the age of the marks, which is fifty-nine years ago; the undisputed evidence shows the possession of Hercules commencing in him before the year 1800, and continuing in his daughter Elizabeth down to the time of her death in 1829, a period of more than twenty-one years, to say nothing of its continuation down to 1838, when Holmes leased to Emerick. This being the case, no act of adoption by the grantees of the Commonwealth after 1839, or new partition by the old lines or new ones could affect the title of the plaintiff, which had thus become perfected by the statute before the Commonwealth had parted with her title.

"All the points on both sides have been fully and substantially answered in the foregoing charge. It is therefore unnecessary to give distinct and independent answers to them.

"The case comes to this. If the jury believe on the evidence, that Hercules and his sisters, about 1796, made partition and took possession, and occupied accordingly; and that Hercules, and those claiming under him, held continued, peaceable, uninterrupted possession of the part in dispute under this partition, claiming the land as their own, and not holding as tenants in common with Mary, Nancy, and Sarah, and their successors, for twenty-one years or more, the plaintiff is entitled to your verdict for the undivided

Digitized by Google

www.libtool.com.cn
three-fourths, and the defendant for the undivided one-fourth of the land in controversy."

The jury found for the plaintiff for three undivided fourth parts of the land, and for the defendant for the one undivided fourth part.

The defendants took this writ of error, and assigned the instructions of the Court to the jury for error.

McKennan, *Gow*, and *Murdoch*, for plaintiff in error.

Montgomery, *Acheson*, and *Wilson*, for defendants in error.

The opinion of the Court was delivered by

KNOX, J.—As the errors are all assigned upon the charge, we dispose of them by saying, that we approve of the charge, and affirm the judgment for the reasons given therein.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

NORTHERN DISTRICT—SUNBURY 1855.

Hole *versus* Rittenhouse.

Where a survey of unappropriated land has been made by competent authority, and the lines of an unauthorized junior survey interfere with it, possession of that part of the junior survey outside the lines of the previous one, unaccompanied by entry upon, or actual, visible, notorious, hostile and continued possession of the interfering part for twenty-one years, is not such adverse possession of such interference as will bar the right thereto of the holder of the title under the original survey.

Shroder *v.* Brenneman, 9 *Harris* 228, and Bishops *v.* Lee, 3 *Barr* 217—doubted.

Where there has been an actual possession taken by an intruder of any part of the land of another, under a *bonâ fide* claim accompanied with a survey or other designation of boundaries, and a use of the land within the boundaries so claimed—as farmers generally use their woodland—continued for twenty-one years, the intruder gains a title to all included within its lines. And it makes no difference whether such claim and use be according to the lines of surrounding surveys, or of the survey made for the true owner, or whether the boundaries are first marked by the intruder.

To render a title by adverse possession valid, it is essential that there be an actual entry upon the land of the rightful owner, and an actual visible possession taken of some part of it.

All surveys made, without authority from the owner, whether by the state or an individual, upon lands previously appropriated, are unauthorized and void, and necessarily unofficial.

Kite *v.* Brown, 5 *Barr* 291—explained.

Where several surveys become vested in one owner, from that moment they are to be treated as one tract for all the purposes of disseisin and remedy.

Waggoner *v.* Hastings, 5 *Barr* 300—overruled.

ERROR to the Common Pleas of *Columbia county*.

Digitized by Google

[Hole *v.* Rittenhouse.]

www.libtool.com.cn

This was an ejectment brought by James Rittenhouse and John Thompson against Barney Hole. The plaintiffs claimed under two warrants dated 11th January, 1793, to Aaron Levy and Mary Weed, the surveys on which were made on the 2d August, 1793, and patented to Walter Stewart 24th March, 1794. The title became vested in Jesse Roberts, who, in 1818 or 1819, moved into a house which stood on the division line between these two tracts, and continued to reside there until his death, in 1841. His wife and children remained there until the 25th April, 1850, when they conveyed to the plaintiffs. At the time Roberts went into possession, there was a clearing of about twenty or thirty acres, a part being on each of the tracts. Roberts cleared some twenty-five or thirty acres more.

The defendant below gave no evidence of title in himself, but showed a warrant to John Graeff, dated 10th May, 1785—a survey in pursuance of it on the 17th November of the same year, for 409⅓ acres, and returned for patenting 27th April, 1787. And that he entered in 1847 or 1848, and built a house, &c., within the lines of the John Graeff survey.

The Levy and Weed surveys interfere with, and lie across the survey of John Graeff, and the defendant's house and improvement is within that part of the interference embraced in the lines of the Mary Weed survey.

No part of the clearing or improvement made on the Levy and Weed surveys were within the interference with the Graeff tract.

The plaintiffs claimed to recover so much of the land as is contained within the lines of the Aaron Levy and Mary Weed surveys, by virtue of the statute of limitations; alleging that the actual possession of those under whom they claimed, of any part of those tracts, gave them the possession of all the land within the lines of their surveys; there having been no actual possession of any part of the Graeff survey, by any one claiming under it.

The instruction of the Court below (CONYNGHAM, P. J.) was in accordance with the views of this Court as reported in Waggoner *v.* Hastings, 5 *Barr* 300.

Comly, for plaintiff in error.

Pleasants, contrà.

The opinion of the Court was delivered by

LEWIS, C. J.—If any principle in the law of Pennsylvania can be regarded as settled by argument and authority, it is that which affirms that the legal title to uncultivated lands draws to it the possession, and that this possession is to be deemed actual for all purposes of remedy, until it is interrupted by an actual entry, and adverse possession taken by another: Miller *v.* Shaw, 7 *Ser. & R.*

Digitized by Google

www.libtool.com.cn

134; Barr *v.* Gratz, 4 *Wheat.* 213; Mather *v.* Trinity Church, 3 *Ser. & R.* 513. It was certainly at one time equally well settled that this legal possession by the owner cannot be ousted by any mere constructive possession of a wrongdoer. No single trespass, nor even a succession of trespasses, will produce that effect. Nothing short of an actual possession, permanently continued, will take away from the owner the possession which the law attaches to the legal title. In order to give title under the statute of limitations, the possession of the disseisor must not only be actual, but it must be visible, notorious, distinct, hostile, and continued for the period of twenty-one years: Hawk *v.* Senseman, 6 *Ser. & R.* 21; Adams *v.* Robinson, 6 *Barr* 271. This doctrine has been so constantly repeated by our Courts, and so generally acted upon by the people, that it has become a rule of property which cannot be changed without a manifest disregard of the principle of *stare decisis*, producing in its result an alarming violation of the right of property, and a disastrous disturbance of the quiet of the community. In accordance with this rule, it has been solemnly decided by the highest judicial authority in the state, that the uninterrupted use of a tract of land, as a timber lot for the supply of a saw-mill, or as a wood lot for iron works, even when accompanied with the payment of taxes on it, will not constitute an adverse possession: Wright *v.* Guier, 9 *Watts* 172; Sorber *v.* Willing, 10 *Id.* 141. That the annual use of land as a sugar camp, for twenty-one years, under a junior survey, gives no title under the statute of limitations: Adams *v.* Robinson, 6 *Barr* 271. That payment of taxes alone for twenty-one years gives no title: Nagle *v.* Albright, 4 *Whart.* 291; Sorber *v.* Willing, 10 *Watts* 141. And that payment of taxes and claiming and offering to sell the land do not oust the legal owner of his possession: Urket *v.* Coryell, 5 *W. & Ser.* 60. It has also been held that a roving possession of different parts of a tract, from time to time, in the whole continued for twenty-one years, but no particular spot occupied for that time, will not establish a title by adverse possession: Potts *v.* Gilbert, 3 *W. C. C. R.* 475. In a recent case this Court has even gone so far as to decide that the actual occupancy of a small spot of ground for twenty-one years, a part of the time for a privy, and the residue of the time for a dungheap, was not such a possession as gave title under the statute: Shroder *v.* Brenneman, 9 *Harris* 228. It has likewise been decided that actual cultivation of part of a tract with marked lines, continued for twenty-one years, gives no title without payment of taxes beyond the actual enclosure or cultivated part: Bishop *v.* Lee, 3 *Barr* 214. The two decisions last named may have gone too far in opposition to the statute of limitations. For myself, I confess that I do not perceive the principle upon which either of them can be maintained.

Digitized by Google

In Ringgold's Lessee *v.* Cheney, 4 *Hall's Am. Law Jour.* 128, it was decided by the General Court of Maryland that an actual possession of a portion of plaintiff's land, although under a colour of a younger title derived from the state, and continued for the period required by the statute of limitations, was not a defence beyond the adversary possession by actual enclosures. This decision was cited with approbation by Chief Justice TILGHMAN, in Burns *v.* Swift, 2 *Ser. & R.* 439; and it was there stated that the principle was recognised by Chief Justice MCKEAN and Mr. Justice YEATES at *Nisi Prius*. Chief Justice TILGHMAN declared that he "had always considered the law as very clear:" 2 *Ser. & R.* 439. The case of Ringgold's Lessee *v.* Cheney was again cited by this Court in the case of Miller *v.* Shaw, 7 *Ser. & R.* 137. But in the case last mentioned, it was intimated by the Court that "if a man had colour of title to the plaintiff's land, and *had entered on part of it* in assertion of his claim, neither the plaintiff nor any other person under him being on the land, the case would be very different from a possession without colour of title." In McCall *v.* Neely, 3 *Watts* 70, it was held that a written conveyance was not necessary to give colour of title, and it was thought by Chief Justice GIBSON that "an entry is by colour of title, when it is made under a *bonâ fide* and not a pretended claim to a title existing in another: *Id.* 72. In accordance with these intimations, it seems to have been settled that where there has been an actual possession taken by an intruder *of any part of the land of another*, under a *bona fide* claim, accompanied with a survey or other designation of boundaries, and continued use of the land within the boundaries so claimed, as farmers generally use their woodland, for the period of twenty-one years, the intruder gains a title not only to what he has actually cleared and cultivated, but to all included within his lines: Bell *v.* Hartley, 4 *W. & Ser.* 32; McCall *v.* Coover, 4 *Id.* 151. If the claim and use be according to the lines of surrounding surveys, or according to the lines of the survey made for the true owner, it is as valid after twenty-one years' possession under it, as if the boundaries had been first marked by the intruder: Crisswell *v.* Altemus, 7 *Watts* 580. But in all these cases it is essential to the validity of an adverse possession that there shall be *an actual entry upon the land of the rightful owner*, and an actual visible possession taken of *some part of it*. Without such actual invasion of his right of property, he is not called upon to vindicate it, and loses nothing by any supposed neglect to bring an action for an imaginary injury, of which he has no notice. This principle, with the exception to be noticed hereafter, runs through all the cases. It was distinctly asserted by Chief Justice GIBSON himself, in Wright *v.* Guier, 9 *Watts* 172, decided so late as 1840. It was there held that actual residence and possession *on adjoining land* under a levy and conveyance by

Digitized by Google

the sheriff, duly acknowledged and sanctioned by the Court, with boundaries including the valid title of another, will not give actual possession of the valid survey, and that such a possession on adjoining lands, although accompanied with the use of the valid survey, as woodland, cutting and coaling the wood for extensive iron works, cutting timber for rails, barking the trees and selling the bark to a neighbouring tannery, cutting timber for building purposes, and making shingles on the premises, will not constitute "a case of actual possession." "Happily," says the learned Judge, "we have a standard for the measurement of it." He then quotes, as the standard, that furnished by Mr. Justice DUNCAN in Brown *v.* Caldwell, when he declared that possession means "an actual occupation; not a bare solitary trespass by an intruder, but an actual, visible, notorious occupancy." He even carried the principle to its legitimate result, by showing that there was no difference between a solitary trespass and repeated trespasses. He tells us that "although residence is not a necessary ingredient of adverse possession, there must be enclosure and cultivation; that such an occupancy of a trespasser, who neither cultivates nor encloses, continues no longer than he remains in contact with the soil." He then meets and demolishes at a blow the very pretence of possession, which was afterwards sanctioned by himself, through some unaccountable mistake, in the unfortunate decision in Waggoner *v.* Hastings. "But," continued the learned chief justice, in Wright *v.* Guier, "it is supposed that a resident *on adjoining lands* is in actual possession of all he uses for his ordinary purposes after its kind as a part of his domain; and in this lies the vice of the argument. Where a particular tract of land is occupied by a resident on it, under a colourable title, his possession of it is co-extensive with his survey; but it is not admitted that he gains possession of his neighbour's unoccupied tract, by crossing the intermediate boundary to trespass on it:" 9 *Watts* 176. In support of this pretence of actual possession by construction to the extent of the boundaries claimed, it was undoubtedly necessary to show that such a possession had been taken of the land of the rightful owner as would enable him to maintain ejectment. If he could not maintain ejectment, for want of proof that the intruder had taken actual possession of his land, it would shock the common sense of the community to deprive him of his rights for not bringing his action. The doctrine of disseisin by election may be resorted to for the purpose of showing that a plaintiff may, under certain circumstances, support an ejectment where there has been no actual disseisin. But, if this be the law of Pennsylvania, it is undeniable that in all such cases it rests with the party having the right of election to determine whether he will consider himself disseised or not. On this point Chief Justice GIBSON was equally explicit, when he declared that such a claim by the occupier of

Digitized by Google

adjoining land, "certainly would not constitute a disseisin against the will of the rightful owner:" 9 *Watts* 176. But this is not the only case in which the very point under consideration has been considered, and solemnly decided by this Court adversely to the doctrine of Waggoner *v.* Hastings, and its progeny. So recently as 1848, it was decided that "marking the lines of the intruder's claim, and getting an unofficial survey of it, including a portion of the plaintiff's survey, although accompanied with actual residence and cultivation within the lines thus marked, but outside of the plaintiff's survey, continued for twenty-one years, did not give the disseisor title to any part of the survey on which he had made no enclosure or improvement:" Altemus *v.* Trimble, 9 *Barr* 232. In the case last cited, in addition to the actual possession outside of the lines of the legal title, there had been actual possession by clearing and cultivation within its lines for twenty years; but, as this fell a year short of the period required by law, it was held to amount to nothing. This decision was placed upon the ground that "an alleged possession or claim, which was neither notorious, palpable, nor visible within the plaintiff's lines, never was intended to work a divestiture of title;" that "the seisin or possession of the plaintiff was not ousted or removed by making these marks, unauthorized by law, whether they were few or many, within the plaintiff's lines, unaccompanied with any occupancy by clearing, grubbing, or fencing within those lines, so as to give warning of danger:" 9 *Barr* 233. In opposition to the doctrine of Waggoner *v.* Hastings, Mr. Justice COULTER, a jurist of enlarged experience in the land law of Pennsylvania, remarked, as the organ of the Court, "that before a stone is rolled from its bed, or bush grubbed from its place, or a tree felled to the earth, by the defendant, on the plaintiff's land, so as to give him any notice, the statute is made to run against him! The plaintiff, if he traversed his land occasionally and perceived these marks, whether two or a dozen, may have supposed that they were made by a hunter of deer, or to designate a path. He could see no improvement or actual occupancy within his lines. Upon whom, then, would he make his entry? Or, against whom would he bring his ejectment? The statute of limitations was not made to steal people's land from them, but for the quieting of estates and the greater security of real property. It imposed a forfeiture upon those who permitted an estate to grow up under their eye and knowledge, and become permanent by an actual, notorious, adverse possession for twenty-one years:" 9 *Barr* 233. This decision was pronounced by the unanimous voice of all the judges, who had the year before agreed to the decision in Waggoner *v.* Hastings, 5 *Barr* 300; and, in every essential particular, it is in direct conflict with it, and necessarily overrules it. An attempt has been made to reconcile the two decisions, by drawing a distinction between an official and

Digitized by Google

www.libtool.com.cn

an unofficial survey. But the cases admit of no such distinction. All surveys made upon lands previously appropriated, without authority from the owner, are unauthorized and void, and are necessarily unofficial. The Commonwealth, in the sale of her lands, has no attributes of sovereignty. She acts in business of that kind as a private individual, and is bound by the same rules of law and justice that govern individuals. After selling the land once, she has no more right to enter upon it for the purpose of surveying it to another, than an individual grantor has to commit a trespass upon his grantee.

The surveying of appropriated land, on the contrary, is positively forbidden by statute. The Commonwealth and her agents and vendees are bound to take notice of a valid survey marked upon the ground and returned into the land office. The parties who attempt to violate the right of property, by making a second and illegal survey, deserve no favourable consideration whatever. To call a survey thus made, an official act, because it was made by a deputy-surveyor, is an abuse of terms. There is not the least spark of official authority for the second sale of the land. It is true, that the act is clothed in the garb of official formality. But, after parting with the land, the state has no further right over it, in form or in substance, except that of eminent domain. No man is bound to examine the land office for such unauthorized acts. No one is bound to take notice of them. The owner may, if he thinks proper, punish the entry on his land for such purpose, by bringing an action of trespass against the deputy-surveyor, and all concerned with him in the act. But, if he has no notice of it, or chooses to disregard the temporary trespass as doing him no essential injury, the title to his land is not endangered by his forbearance. Every argument tending to show that an unauthorized survey of land already appropriated, does not disseise the legal owner or give the wrongdoer actual possession, applies with equal force to a survey made without authority by a deputy-surveyor, and to one made by a private individual. Both are alike unauthorized; both are alike trespasses. Neither gives actual, visible, and notorious possession to the wrongdoer. Neither gives the owner notice that his right of property has been invaded. Neither furnishes him with the means of knowing against whom to make his entry or bring his action. Neither enables him to sustain his ejectment, should he bring one, because proof of actual possession by the defendant is necessary to sustain the action: Baily *v.* Fairplay, 6 *Binn.* 454. A principle of law which takes away a man's title to his land for an omission to bring an ejectment for a trespass, in its nature so secret that he could not be presumed to have any knowledge of it, would render all the titles to the uncultivated land of the state of no value. To require an ejectment in a case where the action could not be sustained for want of pos-

Digitized by Google

www.libtool.com.cn

session in the defendant, is preposterous. And even if he might maintain an ejectment by electing to consider himself disseised, where no actual disseisin has taken place, the right of action commences with his election, and cannot exist without it. It is therefore absurd and contrary to all our ideas of the law, that a man should be barred for not making an election to consider himself disseised. Such a doctrine means nothing less than that he has no election at all, but must, under penalty of losing his land, consider himself out of possession, whenever an adjoining occupant chooses to lay claim to it, although such claimant neither enters upon it, nor takes possession of any part of it, nor gives him any notice whatever of his claim.

We have seen that there is no substantial distinction between the cases of Waggoner v. Hastings and Altemus v. Trimble. The latter overruled the former before any serious mischief had arisen from the error. We have also seen that the decision in Waggoner v. Hastings was contrary to the principles running through all the cases on the statute of limitations which had been previously decided, and especially in conflict with the decision in Wright v. Guier, 9 *Watts* 172. The attempt to reconcile Waggoner v. Hastings with Wright v. Guier, on the supposed distinction between an official and unofficial act, is more manifestly futile than was the effort to make it stand in harmony with Altemus v. Trimble. In Wright v. Guier, the occupier of the adjoining lands claimed to hold part of the valid title, by virtue of a levy, sale, and conveyance by a sheriff, under process from a Court of competent jurisdiction, and that conveyance was duly acknowledged in open Court, and sanctioned by its decree. The claimant had all the forms of official authority; but inasmuch as the debtor, as whose land it was sold by the sheriff, did not own the land, the conveyance gave the purchaser no title. It stood like the case of a sale by the state, after she had disposed of all her interest in the land. In both cases the acts were unauthorized by law, and gave neither title nor possession to the purchaser. And no claimant under either of such unauthorised acts could acquire the possession from the rightful owner without an actual entry upon some part of his land.

The rule in Waggoner v. Hastings had its origin in the Supreme Court. It was unheard of previously amongst the legal profession, and had not the slightest existence in the customs of the people. It had never been countenanced by any of the experienced president judges whose habits and practice had made them familiar with the land law of the state. It came suddenly into existence by overthrowing their well considered decisions in different parts of the state: Waggoner v. Hastings, 5 *Barr* 302; Seigle v. Louderbaugh, 5 *Barr* 490. Even the learned judge whose solitary dissent from the opinion we are now delivering, marks his recent

Digitized by Google

www.libtool.com.cn

conversion to the error, had unhesitatingly ruled the point differently in Seigle *v.* Louderbaugh. The counsel had not presumed to start the doctrine in the Court below; but it was pressed into the service in the Supreme Court, and Kite *v.* Brown, 5 *Barr* 291, was cited as ruling "the very point." That case rules no such point. On the contrary, it is an authority in harmony with all the previous decisions. The case is not accurately reported. The plaintiffs claimed fifteen warrants and surveys made in 1794. The surveys were all made at one time in a single block, with the exterior lines of the block marked; but none of the interior lines designating one tract from another had ever been actually marked on the ground. These facts are well remembered by Mr. Justice WOODWARD, who made the decision in the Court below, and whose opinion was affirmed by this Court. Under these circumstances it is evident that the whole fifteen surveys, adjoining each other in a single block, without interior lines, all made at one time, and owned by the same party, were essentially but one tract, which the owner might occupy or subdivide at his pleasure. The defendant claimed under a junior warrant and survey, which interfered with parts of seven or eight of the plaintiff's warrants. There had been an actual entry *within the plaintiff's block or tract*, accompanied with residence and valuable improvements *thereon*, in assertion of the defendant's claim. The Court below held that "*the occupancy of part*" of the plaintiff's land "by residence and cultivation, was an ouster of the owner as to all the land claimed by the intruder." This was in harmony with the uniform current of decisions. It recognised the essential principle which runs through all of them, that to affect the plaintiff in any way, there must be an actual possession taken of *some part of his land*.

It could make no manner of difference that the claim of the defendant extended over several of the plaintiff's surveys. The moment several surveys become vested in one owner, they are to be treated as one tract for all the purposes of disseisin and remedy. An entry upon any part of such tract under colour of title is a disseisin, and the owner may redress the wrong by a single ejectment as for a single tract. When he finds his right of property actually invaded, he is bound to take notice of the intruder's claim, and to resort to the appropriate remedy for it within the period required by the statute. But where there is no entry on any part of his land, he can bring no ejectment, and therefore cannot be barred for not bringing his action. There is nothing whatever in Kite *v.* Brown which gives the slightest support to the doctrine that the owner of a single survey may be deprived of his title by a mere claim, without any entry whatever within his lines. That the learned and able judge who decided both causes in the Court below, understood the distinction between them, is apparent in the cases as reported in the book. He decided one of them in

Digitized by Google

www.libtool.com.cn

favour of the claim under the statute of limitations, and the other against it, and he now fully concurs in this explanation of the difference: Fitch *v.* Mann, 3 *Barr* 503, is also sometimes cited as supporting Waggoner *v.* Hastings, but it gives not the slightest countenance to any such principle.

In support of the doctrine of Waggoner *v.* Hastings, it has been suggested in substance by BLACK, J., in 7 *Harris* 307, that the owner, although in general residing at a great distance from his wild and uncultivated lands, ought to be gifted with powers of vision great enough to see all the lines which wrongdoers think proper to run through the trackless wilderness. The bare statement of such a proposition is a sufficient refutation of it. The law is founded on reason, and requires nothing so unreasonable. It has been supposed also (by BLACK, J., in 7 *Harris* 307), that an ejectment may be maintained against a man without evidence that he ever took possession of any part of the plaintiff's land, or even entered upon it for the purpose. But this is contrary to the decision in Bailey *v.* Fairplay, 6 *Binn.* 455. Even if the supposition were correct, it fails to meet the pinch of the case, because no man is bound to consider himself disseised when no such thing has ever actually occurred. As a drowning man will catch at a straw, so the argument in favour of Waggoner *v.* Hastings is driven to the last extremity of suggesting that it is "no bad rule to make men either improve their lands or give them up to others!" BLACK, J., 7 *Harris* 308. It is not perceived how this suggestion can benefit a claimant who has never made the slightest improvement on the land which he seeks to plunder from the rightful owner. But if such a rule is to be enforced, it ought to have been made a condition of the original grant. To add such a condition afterwards, is consistent neither with the obligation of the contract of purchase, nor with the higher obligations of justice.

Believing that the principle affirmed in Waggoner *v.* Hastings, and in the cases governed by it, was a departure from the settled law, and a dangerous invasion of the right of property, tending to render the titles to uncultivated land insecure and worthless to the owners, we are constrained to overrule it and adhere to the law as it stood before that error was committed. It is not our duty to "impart immortality to error," where we can correct it before it has become an established rule of property. It cannot be said, with any show of reason, that a principle affirmed for the first time in 1847, standing in opposition to all previous authorities, and in conflict with a solemn decision made the year afterward, is an established rule of property. It was against the general sense of the profession, and no injury can result from adhering to the ancient landmarks as they stood before they were disturbed. The Court had no more right to alter the law, as was attempted in Waggoner *v.* Hastings, than an individual has to remove his neigh-

Digitized by Google

[Hole v. Rittenhouse.]

www.libtool.com.cn

bour's landmark. To adhere to the error, after we are convinced of it, and see its destructive tendency, would be to prove ourselves unworthy of the high trust reposed in us. To maintain the right of any Court to overthrow all the established decisions, and to trample down the rights of property which have grown up under them, as was attempted, although inadvertently, in Waggoner *v.* Hastings, would be to expunge the whole doctrine of *stare decisis*, to substitute error for truth, and to place the arbitrary will of a judge above the rules of law and justice.

The survey of 1785 to John Graeff was well made on unappropriated land, and by competent authority. The plaintiffs below claimed to hold part of it by adverse possession, on the ground that the lines of their unauthorized junior survey interfered with it, and that they had actual possession of that part of their survey which did not interfere with it. They never entered within the lines of the Graeff survey, never cleared a foot of land, or cut a stick of wood or timber, or exercised any act of ownership upon it. Even the imaginary lines of their survey do not appear to have been actually marked upon any part of the Graeff tract. We have already seen that payment of taxes alone will not give the junior survey actual possession of the interference. But, conceding that it would, did the plaintiffs below pay the taxes on the Graeff land, or any part of it, for twenty-one years before suit brought? Payment of taxes for a less period than twenty-one years would be as ineffectual as an adverse possession for a less time than that required. The ejectment was brought on the 27th of April, 1850. The payment of taxes, to have any legal effect, must have commenced in 1829. But in that year, and in the two following years, the plaintiffs below were assessed for only 100 acres, including their "log building and saw-mill." Their log building and saw-mill were on their two tracts in the names of Mary Weed and Aaron Levy: the first containing 383 acres, and the other 444 acres. They had, besides, three other adjoining tracts. Their whole claim, under their five surveys, amounted to 2031 acres. The Graeff survey contained 409¾ acres. Deducting that from the amount contained in the plaintiffs' surveys, leaves them 1621 acres, for which they might have paid the taxes without interfering with or paying any part of the taxes on the Graeff survey. But during the years 1829, 1830, and 1831, they only paid taxes on 100 acres. It is plain, therefore, that they did not pay the taxes even on their own land. The presumption is that the 100 acres for which they paid were within their own tract. There is no evidence to show that these 100 acres included any part of the Graeff survey. If they did, the plaintiffs have failed to show it; and they have, therefore, failed to make out the ingredient on which they rely to give validity to their claim under the statute of limitations. It was an error to leave the case to

Digitized by Google

www.libtool.com.cn

the jury on the question whether the plaintiffs below intended by the omission to pay taxes to abandon their possession. They never had any possession of the land in controversy. They had, therefore, nothing of the kind which could be abandoned. Even if payment of taxes for twenty-one years gave them possession, payment for a less period would not do so. The intention not to abandon is immaterial.

It is scarcely necessary to say that the defendants below had a right to defeat the plaintiffs' action by showing a subsisting title in John Graeff. No rule is better settled than this: Kennedy *v.* Spear, 3 *Watts* 97. Under the evidence in the cause, the Graeff survey was a subsisting title. The plaintiffs below had no right to recover any part of it, and the jury should have been so instructed.

Judgment reversed and *venire facias de novo* awarded.

BLACK, J., dissented.

Digitized by Google

www.libtool.com.cn

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

MIDDLE DISTRICT—HARRISBURG 1855.

Barclay *versus* The Commonwealth.

Where a nuisance consists not of a building itself, but in a *wrongful use* of it, the remedy is to stop such *use*, not to remove the structure.

On a conviction for nuisance, it is error in the Court to order the nuisance to be abated by the sheriff in the first instance, that being a part of the judgment given against the defendants; but if they fail to comply with the sentence, the Court may command the sheriff to abate it at their costs.

ERROR to the Quarter Sessions of *Bedford county*.

This was an indictment for erecting and maintaining a nuisance.

The town of Bedford was laid out by the Penns in 1766, and on the 9th January, 1793, they conveyed a number of lots adjoining the town to Hugh Barclay, with the following reservation: "excepting and reserving nevertheless out of the said 7½ acres, 1 acre thereof, including the springs, for the use and benefit of the inhabitants of the town of Bedford, particularly for supplying their general pump with water." The authorities never laid off the acre until 1853 or 1854; but they took possession of the springs, and had the water conveyed by pipes into the town. The barn complained of as a nuisance was built on the land conveyed by the Penns in 1841, by S. M. Barclay, who was then the owner of the land, and adjacent to the springs. He died, and by his will devised this land to S. M. Barclay, one of the defendants in this prosecution, and other children of Dr. F. B. Barclay. Riseling, the other defendant, was a tenant under the devisees.

The indictment charged, that the defendants had erected a barn near to and above these springs, and that, by the storing of hay,

Digitized by Google

straw, and other vegetable matter in the barn, and the feeding of the same to the defendant's cattle, and the keeping cattle there, the water of the springs was rendered impure and corrupted, and unfit for use.

The second laid that the barn had been built by S. M. Barclay in his lifetime, and that by reason of keeping his cattle, &c., there, the waters of the springs had been corrupted and rendered impure, and that the defendants maintained and continued it to the common nuisance, &c.

The defendants pleaded not guilty.

The jury found the defendants guilty on the second count, but not guilty on the first count.

The Court sentenced the defendants to pay a fine of $1—pay the costs of prosecution, and be in custody until the sentence be complied with, and commanded the sheriff of the county to abate the nuisance by removing the barn.

Errors assigned: 1. The Court erred in directing the nuisance to be abated by the sheriff.

2. Also in commanding him to do so by removing the barn.

Russell, for plaintiff in error.—The Court erred in commanding the sheriff to abate the nuisance in the first instance. The defendants should have been sentenced to abate it: Taggart *v.* The Commonwealth, 9 *Harris* 530. If the defendants fail to comply with the sentence, then a *writ* would issue to the sheriff for that purpose: *Id.* 532. The Court in this instance gave the defendants no opportunity to abate it themselves. They had ceased to use it in a manner injurious to the springs since the indictment in this case had been found by the grand jury.

2. Was it the barn itself, or the manner in which it and the barnyard were used, that constituted the nuisance? The grievance complained of is the keeping and feeding of cattle in the barn and barnyard, by which the waters have been rendered impure. If they are not *used* in that way, no injury will result to the water. There is no complaint in the second count against the defendants for maintaining and continuing the barn. There was therefore error in ordering the barn to be removed.

Boyd and *King* (with whom were *Cessna* and *Jordan*), for defendants in error.—In the case of Taggart *v.* The Commonwealth, the question was whether it was not exercising too much severity to impose the duty of abating the nuisance upon the defendant, and at his own expense. It was distinctly stated that the Court had the power to issue a writ commanding the sheriff to abate the nuisance: 9 *Harris* 530. But the defendants here can remove all cause of complaint by removing the barn themselves. The ob-

Digitized by Google

www.libtool.com.cn

jection is merely technical: 6 *Binn.* 403; 3 *Ser. & R.* 199; 2 *Barr* 244.

2. The Court instructed the jury that there could be no conviction on the first count, for the reason that defendants had not *erected* the barn. In the second count the facts are properly laid by charging that the barn had been erected by S. M. Barclay, and maintained by him as a nuisance, and that the defendants had continued the same. The verdict is conclusive of these facts, and the Court was right in ordering the nuisance to be abated.

The opinion of the Court was delivered by

WOODWARD, J.—After much consideration it was settled in Taggart's Case, 9 *Harris* 527, that, on conviction for a continuing nuisance, the defendant, besides being sentenced to fine and imprisonment, should be ordered also to abate the nuisance; and that if he failed to do so, a writ, founded on such a judgment, might issue to the sheriff, requiring *him* to abate the nuisance, at the costs of the defendant.

The Court in this case entered no judgment against the defendant that the nuisance should be abated, but ordered the sheriff to abate it by removing the barn.

This was erroneous, not only because the defendant should have been sentenced, as in Taggart's Case, but because of the order for the removal of the barn. The defendant was acquitted on the first count, which charged the *barn* with being a nuisance, and was convicted only on the second count, wherein the erection of the barn is alleged by way of inducement to the offence, which is described as putting hay, straw, and other products of the farm in said barn, and keeping horses, mules, cattle, and other animals in and about said barn, and in the yard adjacent thereto, and feeding the said cattle, horses, and other animals with the aforesaid hay and straw and other products in said barn, and in the said yard near to the aforesaid springs, &c. The offence laid in this count consisted in the *use* made of the barn and yard in close proximity to the springs, and the nuisance would be effectually abated by discontinuing such use. Where an erection or structure itself constitutes the nuisance, as where it is put up in a public street, its demolition or removal is necessary to the abatement of the nuisance; but where the offence consists in a wrongful use of a building, harmless in itself, the remedy is to stop such use, not to tear down or remove the building itself. The barn may be used for storing hay and grain without annoyance to the public, but for stabling and feeding cattle it cannot be. The public are entitled to pure waters from the springs in question, and must be protected in the enjoyment of this right. The Court should take effectual measures to prevent the barn and yard from being used in the manner complained of, and to compel the defendant to put

Digitized by Google

www.libtool.com.cn

and keep them in such condition as will not corrupt the springs. If he fail to do so after being sentenced, the sheriff should be ordered to do it at his costs; and if necessary, the Court can restrain further wrongdoing on the part of the defendant, by requiring him to find security to be of good behaviour.

When, in the progress of agricultural science, the barnyard shall come to be regarded as among the most valuable of the farmer's possessions, as containing the fertilizing agents he needs on his fields, he will not wait for the criminal law to compel him to stop its leakings into the springs and watercourses below, but, with no other promptings than self-interest, will husband carefully this great source of wealth.

The sentence is reversed, and the record remanded to the Quarter Sessions, with directions to proceed and sentence the defendant according to law.

Amick *versus* Oyler.

One trial and judgment in an ejectment to enforce or rescind a contract for the sale of land, is conclusive of the rights of the parties, whether the judgment was entered on the verdict of a jury, or on an award of arbitrators.

Error to the Common Pleas of *Bedford county*.

This was ejectment brought by the heirs of Michael Amick, deceased, against Jacob Oyler and Michael Reigart, to recover the possession of 7 acres of land, under the following circumstances:—

In 1832, Michael Amick, the father of the plaintiffs, was in possession of the land in dispute under an alleged parol contract with the executors of George Funk, deceased. The executors of Funk instituted an action of ejectment against Amick to enforce the contract, which was referred to arbitrators, who, on the 18th of January, 1837, reported an award in favour of the plaintiffs, "with stay of execution until the 1st of January, 1838, judgment to be released if defendant make, before the said 1st day of January, 1838, a reasonably good wagon-road up the hollow from the house to the top of the pine ridge, agreeable to contract, upon which being done, plaintiffs to make a good conveyance for 7 acres of land, in a reasonable shape around the house."

The parties, on the 6th of February, 1837, entered into an article of agreement, selecting three persons to lay out the road, and agreed that they, or any two of them, should examine the road, and report in writing whether it was finished according to contract.

On the 26th of February, 1837, two of the persons named reported that they had examined the road, and that it was a reasonably good road, &c.

Digitized by Google

[Amick v. Oylet.]

www.libtool.com.cn

Amick continued in possession of the land till his death. In 1852, another ejectment was brought against the heirs of Amick by the surviving executor of George Funk, which was referred to arbitrators, who, on the 6th July, 1852, made an award in favour of the plaintiff. An appeal was taken by the defendants, which was dismissed by the Court for a defect in the recognisance of bail given on the appeal. On the 20th of February, 1854, an *habere facias possessionem* was issued, and the plaintiff by virtue of it put in possession. The heirs of George Funk conveyed the premises to John Cessna, Esq., under whom the defendants in this action were in possession.

The present ejectment was then brought by the heirs of Michael Amick, deceased.

The principal matters contested in the case were, whether the ejectment brought in 1852, the award made in the cause, and judgment upon it, were conclusive of the rights of the parties.

The Court below (KIMMELL, P. J.) charged the jury as follows:—

"If the jury believed that the question tried and determined by the arbitrators was, whether or not the conditions in the sale of the land to Michael Amick had been complied with in the completion of the road, according to the terms of the agreement, then that was conclusive against the plaintiffs, and the defendants are entitled to your verdict."

The jury found for the plaintiffs.

The errors assigned were, to so much of the charge as is above quoted; and, in ruling that under the Act of Assembly relating to equitable actions of ejectment to enforce payment of the purchase-money, an award of arbitrators was equivalent to the verdict of a jury.

King and *Jordan*, for plaintiffs in error.—The Act of 21st April, 1846, relative to ejectments to enforce payment of purchase-money, has no application to this case. The award here, was an unconditional finding for the plaintiff, giving no opportunity to the defendants to redeem.

The Act only applies to such cases where the vendor recovers the land, with a condition that it be released on the defendant complying in a certain time. In no other case can time be of the essence of the finding: 6 *Barr* 391.

The award of the arbitrators was absolute, and not conditional. It had no feature of chancery proceedings, but simply that of a common law Court.

If either of these ejectments was a substitute for a bill in equity, it was the one commenced in 1832. In that case there was a conditional award, which was subsequently complied with,

Digitized by Google

and thus the controversy ended. There can be no pretence that the ejectment in 1852, twenty years after the first, was an action to enforce specific performance of the original agreement.

Is an award equivalent to the verdict of a jury? 2 *Harris* 350. The Act contemplates that the jurisdiction conferred should be exercised only by a jury, under the direction of the Court. No reference is made to an award of arbitrators.

Cessna, for defendants in error.—In both the cases cited, 2 *Harris* 350, and 6 *Barr* 391, the action was brought by the vendee. In this case it is brought by the vendor. The general doctrine is maintained in both cases, that where the action is brought by the vendor against the vendee, and is founded upon the contract, one verdict is conclusive: 9 *Watts* 496; 6 *Harris* 448.

The Act of Assembly, and the decisions of this Court, give an award the effect of a verdict, and in 9 *Watts* 496, the point raised here is directly decided.

The opinion of the Court was delivered by

Lowrie, J.—The framer of the law of 5th May, 1841, *P. L.* 445, perhaps intended to assail the doctrine of Seitzinger *v.* Ridgway, 9 *Watts* 496; but it was substantially vindicated by the legislature by the Act of 21st April, 1846, and fully reinstated by the repeal of the law of 1841, by the Acts of 30th April and 8th of May, 1850, § 13, *P. L.* 716.

The principle of Seitzinger *v.* Ridgway is, that one trial and judgment, in an ejectment to enforce or rescind a contract for the sale of land, is conclusive of the rights of the parties. The efficacy of the proceeding is in the judgment, and not in the mode of arriving at it.

The first award and judgment in this case was before the law of 1841, and of course was conclusive, and no new suit was needed. But the defendant died before execution, and a new ejectment was brought against his heirs, after the final repeal of the law of 1841, and an award was rendered against them on the ground that the consideration of the sale was not yet paid; and, very properly, no time was given for the payment, for they had had their day of grace in the first action.

The second award and judgment, as well as the first, is governed by the doctrine referred to, and the purchaser cannot reopen the controversy in another action.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

EASTERN DISTRICT—PHILADELPHIA 1855.

Clark *versus* Depew *et al.*

A conveyance of property, to be fraudulent as to creditors, should bear such a ratio to the indebtedness, as to tend directly to defeat the claims.

Where the attesting witnesses to a deed proved that no money was paid in their presence, at the time of its execution; the vendor being indebted to an amount equal to one-fourth the value of his property, the bulk of which was included in the deed; and the creditors being in pursuit of their claims, and numerous suits pending against him; and notice having been given to the vendee that he would be required to prove a consideration; it was *Held* that it was incumbent upon the vendee to prove a consideration by other evidence than the vendor's receipt.

A party to a suit cannot read in evidence his own answer to a bill of discovery filed in aid of the action.

A copy of a record from another state, certified to be a copy of the *judgment roll*, is sufficiently certified.

ERROR to the District Court of *Philadelphia.*

The plaintiff in error was defendant below. The action was ejectment, and was brought to recover possession of a lot of ground and five houses in the district of Kensington.

Both parties claimed under Benjamin Wilson. The plaintiffs had commenced an action against Wilson in the District Court in May, 1850, upon a judgment which they had obtained against him in the state of New York. The action was tried in October, 1850, and a verdict rendered for the plaintiffs for $2070. Judgment was entered December 10, 1850. On the same day they issued an execution, under which the sheriff levied upon the premises in

Digitized by Google

www.libtool.com.cn

dispute, and sold them to the plaintiffs. The sheriff's deed to the plaintiffs was dated February 15, 1851. At the sheriff's sale, the defendant, Clark, gave public notice that the property belonged to him, having been conveyed to him by Wilson on the 7th August, 1850. This conveyance the plaintiffs alleged to have been made without consideration, and to be fraudulent and void. On the other hand, the defendant alleged that he had bought the property in good faith at a public auction, at which the same had been sold by Wilson, on the 25th June, 1850, and that he had paid in cash for the same, to Wilson, the sum of $10,200, and taken it subject to a mortgage of $3500. The validity of the deed to Clark was the chief subject of controversy upon the trial.

Upon the trial, the plaintiffs, after proving Wilson's possession, gave in evidence the record of the judgment and execution against Wilson, and the sheriff's deed to themselves, and rested.

The defendant then gave in evidence the deed from Wilson to himself, and the receipt for the purchase-money at the foot of it, and proved the notice given by the defendant at the sheriff's sale. The plaintiffs, to prove the prior indebtedness of Wilson, then offered in evidence exemplifications of the records of several judgments obtained against Wilson in the state of New York, in March, 1850. These were objected to: 1st, Because they were not properly certified; and, 2d, Because they were irrelevant. The certificate attached to the copies of the records was in these words:

"I, Robert Oakley, Clerk of West Chester county, and of the Supreme Court in and for the said county, in the second judicial district, do certify, that I compared the foregoing with the original judgment-roll now on file in my office, and that the same is a correct copy of the original, and of the whole of such original.

"In witness whereof I have hereunto set my hand and the seal of my office, as such clerk, this 31st day of August, 1851.

[L. S.] "Signed, ROBERT R. OAKLEY, Clerk."

To this was annexed the certificate of the presiding justice of the Supreme Court for that district, that Robert R. Oakley was, at the date of the certificate, a clerk of said Supreme Court, and that his attestation was in due form of law. The judge admitted the records, and the defendant excepted.

The plaintiffs also gave in evidence the records of actions upon these judgments in the Courts of Philadelphia, which actions were pending when the deed was made by Wilson to Clark. The plaintiffs then called the subscribing witnesses to the deed from Wilson to Clark, and to the receipt at the foot of it; also the alderman before whom the deed was acknowledged, and the conveyancer who had prepared it, all of whom testified that no consideration was paid in their presence. They then read a notice previously served upon the defendant, informing him that he would be required on the trial to prove what consideration was given by him

Digitized by Google

[Clark v. Depew.]

www.libtool.com.cn

for the deed from Wilson, and called for proof of payment of consideration.

The defendant gave no proof of payment of consideration other than the receipt for the purchase-money, at the foot of his deed. He proved, however, that he had bid for the property at a public auction, advertised in the usual manner, and held by M. Thomas & Sons; that the same had been knocked down to him, and that other property of Wilson had been bid for and knocked down to another person at the same auction. He proved also, by the conveyancer, that the usual searches for liens had been made. The defendant then offered in evidence a bill of discovery filed against him by the plaintiffs, and his answer thereto. These were objected to, ruled out, and the defendant excepted.

Hare, J., then charged the jury as follows:—

"The evidence in this case shows that Wilson was indebted to the plaintiffs, and to other persons, at the time of making the conveyance under which defendant claims; and there are two questions for the jury—the one whether this conveyance is valid against the plaintiffs, if made without a valuable consideration; the other whether there was such a consideration. It is somewhat difficult to give a precise definition of the degree of indebtedness, which will render a valuable consideration necessary to the validity of a deed; but there can be no doubt, that this result will not follow from the existence of small or inconsiderable debts, such as every man may owe to his butcher or his baker, nor that when a man is largely in debt, he is not entitled to make any gift of his property of a nature to hinder and defeat his creditors and prevent them from obtaining payment. The question depends in a great measure on the ratio or proportion of the debts, not so much to the property he parts with, as to that which he retains.

"In the present case, Wilson's debts amounted to $4000 at the date of the deed. We have no evidence of the exact amount of assets, although it appears that he conveyed other property to Bell. If he received the consideration of this conveyance, it would of course be assets in his hands, but if he received it in cash, it might be less within the reach of his creditors than the estate for which it was the equivalent. It will be for you to say upon the evidence whether the conveyance to the defendant bore such a ratio to his property and his debts, as to tend directly to defeat the claims of those to whom he owed them. If it did, then it is invalid, unless founded upon a consideration. And this will bring you to the second question, whether there was such a consideration.

"The defendant alleges that there was; and relies to prove its existence upon the receipt at the foot of the deed. I find it difficult to tell you what weight you should give to this evidence.

Digitized by Google

www.libtool.com.cn
It is certain that the receipt might have been written, although no consideration actually passed. So far as it has weight, it must owe it to the presumption in favour of fairness, and that things are as they appear to be on their face. You must weigh this presumption, and compare it with the probability or improbability that, if the defendant had given value, he could and would have proved it. I leave the question as one of fact to you. If you find under the instructions already given that the deed is without consideration and invalid unless it has one, your verdict will be for the plaintiffs, otherwise for the defendant."

The verdict was for the plaintiffs.

The defendant below assigned for error here the charge of the Court, and the ruling upon the admission and rejection of evidence, designated in the bills of exception above mentioned.

St. George T. Campbell and *H. M. Phillips*, for plaintiff in error.—The records from New York were not properly certified, and ought not to have been admitted. The clerk only certifies that it is a copy of the *judgment-roll*. It is not certified to be a copy of the whole *record*. The clerk certifies that the seal annexed is the seal of his office. He is clerk of the county as well as of the Court, and the seal is not stated to be the seal of the *Court*. The Act of 1790 requires the seal of the *Court* to be annexed. The bill of discovery, and defendant's answer thereto, were evidence. The bill was evidence as to the plaintiff's *admissions*, 1 *Greenleaf's Ev.*, § 212; and the answer was evidence, because, by examining the defendant, the plaintiffs admitted his competency. In Maclay *v.* Work, 10 *Ser. & R.* 194, a letter from a third person to the plaintiff was admitted in evidence, because he had himself given it in evidence on a former trial. If the bill was evidence, the answer was evidence as part of the same record.

The Court erred in leaving it to the jury to say whether or not Clark had paid a consideration. Wilson's receipt was *prima facie* evidence of the payment of consideration, and there was no evidence to rebut it: Wilson *v.* Howser, 2 *Jones* 116. Here was no evidence of fraud on the part of Clark, and no presumption could be raised against him, by reason of his neglect to prove actual payment. Fraud is not to be presumed. It is to be proved, Lutton *v.* Hesson, 6 *Harris* 109; and it is error to refer a fact to the jury of which there is no proof: Evans *v.* Mengel, 6 *Watts* 72. The defendant purchased at a public sale regularly advertised. The presumption is in favour of its fairness, and it was not necessary for him to prove actual payment of the money. Wilson's receipt was sufficient evidence of that fact, in the absence of any proof of fraud on the part of Clark.

Digitized by Google

[Clark v. Depew.]

Thayer (*Gibbons* with him), contrà.—The New York records were well certified. The *judgment-roll* is the whole record. The record is called at one stage of its progress the plea roll, at another the nisi prius roll, and when judgment is signed, the whole record is then called the judgment-roll: *Lil. Ab.* 491; 2 *Tidd Pr.* 931, 942; 1 *Arch. Pr.* 175; *Ib.* 225, 228; *Prac. Cas. K. B.* 153; King *v.* Bolton, 1 *Str.* 140; 6 *Mod.* 191; 3 *Bl. Com.* 24; 1 *Ld. Raym.* 243. See the form of the judgment-roll: 1 *Crompton's Pr.* 506, 508. In Pennsylvania judicial records are not enrolled; but in New York they are, and "judgment-roll" there, as in England, means the whole record: Barrie *v.* Dana, 20 *Johns. Rep.* 307; Croswell *v.* Byrnes, 9 *Johns. Rep.* 287; Lownds *v.* Renser, 7 *Wend.* 35.

The clerk certifies that the seal annexed is the seal of his office, which means, necessarily, that it is the seal of the *Court*. Besides, the presiding justice certifies that it is the seal of the Court.

That the bill of discovery is not evidence is expressly ruled by this Court: Owens *v.* Dawson, 1 *Watts* 149. Neither was the answer evidence. A party cannot give his own declarations in evidence to support his case. Upon that principle every affidavit of defence, and every plea, would be evidence for a defendant.

The charge of the Court was more favourable to the defendant than the law required. The Court left it to the jury to say whether any consideration was paid by Clark. The plaintiffs were entitled, under the circumstances, to a peremptory instruction, that the receipt was no evidence of payment against creditors, and that he was bound to give other proof of payment. Here was strong proof of fraud in Wilson—large previous indebtedness: Hamet *v.* Dundas, 4 *Barr* 182; Thompson *v.* Dougherty, 12 *Ser. & R.* 454; Keepner *v.* Burkhart, 5 *Barr* 479; Chambers *v.* Spencer, 5 *Watts* 404; Sanders *v.* Wagonseller, 7 *Harris* 252; suits pending against him when the deed was made: Twyne's Case, *Dyer* 295; *Rob. on Fr. Conv.* 576; 20 *Johns. R.* 11; 18 *Id.* 425; 2 *Pick.* 411; 2 *Amb.* 595; Babb *v.* Clemson, 10 *Ser. & R.* 424; Streeper *v.* Eckhart, 2 *Wh.* 307; Gans *v.* Renshaw, 2 *Barr* 36. The defendant was, under such circumstances, bound to show that he was a *bona fide* purchaser for value, and by other evidence than the written declaration of the fraudulent grantor: Rogers *v.* Hall, 4 *Watts* 359; Wilson *v.* Howser, 2 *Jones* 116; Zerbe *v.* Miller, 4 *Harris* 497; Union Canal Company *v.* Young, 1 *Wh.* 410; Bolton *v.* Johns, 5 *Barr* 145; Kimball *v.* Fenner, 12 *N. H. R.* 248; Snelgrove *v.* Snelgrove, 4 *Dess.* 287; Wheaton *v.* Sexton, 4 *Wheat.* 506. If Wilson made the deed with intent to defraud his creditors, the statute of Elizabeth avoided it. The words are, "shall be clearly and utterly void, frustrate, and of none effect;" and then a *proviso* in the 6th section excepts the case of a *bona fide* purchaser for value without notice: 2 *Stat. at*

Digitized by Google

www.libtool.com.cn

Large 588; and it is well settled, that a party claiming under a *proviso* in a statute must bring himself within it: Rex *v.* Bryan, *Str.* 1101; Inman *v.* Barnes, 2 *Gall.* 319; Thompson *v.* Smith, 7 *Ser. & R.* 215; Brownfield *v.* Commonwealth, 13 *Ser. & R.* 238. The same principle is applied by the law in other cases: thus, where negotiable paper is put in circulation by fraud, the holder must show himself a *bona fide* holder for value: Holme *v.* Karsper, 5 *Binn.* 469; Beltzhoover *v.* Blackstock, 3 *Watts* 26. It is a canon of evidence, that the *onus* of proof is on the party who has cognisance of the fact: Dickson *v.* Evans, 6 *T. R.* 57. Here the defendant had express notice that he would be required to prove a consideration paid, and showed none.

The opinion of the Court was delivered by

KNOX, J.—Upon the trial of this cause, the plaintiffs below offered in evidence the records of certain judgments, obtained in the Supreme Court of the state of New York, against the defendant's vendor, Benjamin Wilson.

These were objected to: 1. Because they were not properly certified and authenticated. 2. Because irrelevant.

The certificate was in these words—

"I, Robert Oakley, clerk of West Chester county, and of the Supreme Court in and for the said county, in the second judicial district, do certify, that I compared the foregoing with the original judgment-roll, now on file in my office, and that the same is a correct copy of the original, and of the whole of such original.

"In witness whereof I have hereunto set my hand and the seal of my office, as such clerk, this 31st day of August, 1851."

(Signed) "ROBERT R. OAKLEY, clerk."

To this is annexed the certificate of the presiding justice of the Supreme Court for that district, that Robert R. Oakley was, at the date of the certificate, a clerk of said Supreme Court, and that his attestation was in due form of law. The objections to the authentication of these records are: 1. That it does not appear that the whole record is certified. 2. That the certificate is not under the seal of the Supreme Court.

In Pennsylvania, where the history of an action is not enrolled, the record consists of the papers properly filed in the cause, together with the docket; but in New York the practice is the same as in England, to make up a formal record, which is a "history of the most material proceedings in the cause, entered on a parchment roll," and when complete, by the entry of the judgment, is called the "judgment-roll," and no proceeding in a cause is matter of record until enrolled: Croswell *v.* Byrnes, 9 *J. R.* 287. The judgment-roll is the record, and the entire record remaining in the court. In particular stages of the case, records may be made up for certain purposes, such as the "*nisi prius* roll" for

Digitized by Google

www.libtool.com.cn

the trial; but these records, in the end, are all superseded by the judgment-roll, and a correct copy of the whole of such roll is an entire copy of the record.

The clerk certifies that he is the clerk of the county of West Chester, and of the Supreme Court in and for said county, and that the seal attached is the seal of his office, as such clerk. From this it sufficiently appears, that the certificate is under the seal of the Supreme Court, for the second judicial district of New York.

The records were also offered, to prove that Wilson was largely indebted when he conveyed to Clark, and were certainly relevant in the issue then being tried.

The deed from Wilson to Clark was attacked, upon the ground that it was made to hinder, delay, and defraud creditors; and it was shown that, at the date of its execution, judgments had been obtained against Wilson in the state of New York, to the amount of between four and five thousand dollars, upon which several suits were then pending in Pennsylvania. It was also in evidence by the conveyancer who drew the deed, and by the alderman before whom the acknowledgment was taken, and by the witness, to the deed and receipt, that no consideration passed between the parties in their presence. Notice had been given to the defendant some months before the trial, that he would be required to prove what consideration, if any, was paid by him to Wilson for the estate in dispute. No evidence was given to prove consideration, other than the usual receipt at the foot of the deed.

Upon this state of the facts, the judge of the District Court instructed the jury, that if they found that the conveyance from Wilson to Clark bore such a ratio as to tend directly to defeat the claims of his creditors, the deed would be void as to creditors, unless founded upon a consideration; and upon the question of the effect of the receipt, in establishing that a consideration had been paid, the charge was in the following words:—

"The defendant alleges that there was a consideration, and relies, to prove its existence, upon the receipt at the foot of the deed. I find it difficult to tell you what weight you should give to this evidence. It is certain that the receipt might have been written, although no consideration actually passed. So far as it has weight it must owe it to the presumption in favour of fairness, and that things are as they appear to be on their face. You must weigh this presumption, and compare it with the probability or improbability, that if the defendant had given value, he could and would have proved it. I leave the question as one of fact to you. If you find, under the instructions already given, that the deed is without consideration and invalid unless it has one, your verdict will be for the plaintiffs, otherwise for the defendant."

We can see no just cause of complaint which the defendant below can make to the manner in which these questions were sub-

Digitized by Google

www.libtool.com.cn

mitted to the jury. If the deed was a voluntary one, and its effect was to hinder or delay creditors; in other words, if the transfer of this property would have the effect to prevent the collection of Wilson's debts, a vendee without consideration, whether there was fraud upon his part or not, would take no title as against creditors. There were circumstances attending the transfer from Wilson to Clark calculated to create suspicions as to its fairness. Wilson's large indebtedness; the pursuit of his creditors, who were just on the eve of obtaining liens upon his real estate; his anxiety to dispose of it, evidenced by his peremptory instructions to the auctioneer to sell; together with the proof that neither the scrivener, alderman, nor witness saw any money pass, required, at least, that Clark should place himself in the position of a *bonâ fide* purchaser, by showing that he had actually paid an honest price for the property in dispute; and this, too, by evidence other than the mere written declaration of his grantor. It rarely happens that a sum of money exceeding ten thousand dollars is paid by one man to another, in the purchase of real estate, without some one, other than the immediate parties, knowing the facts. In commercial cities, large sums usually pass through banks, or other places of deposit; and in recent transactions, the evidence, in nearly all cases, is within the reach of the parties. Wilson himself, if living (and we have no evidence that he is not), might have been called upon to prove that Clark had actually paid him the money stated in the receipt. Although the defendant was expressly notified that he would be required, upon the trial, to prove payment for his purchase, no evidence upon this subject, however remote, was given or attempted to be given by him. If he could have produced such evidence, and did not, the fault is his own; if he could not have produced it, may it not fairly be inferred, that no such payment was ever made? It was left to the jury, as a matter of fact, and found against him. We have no power to disturb the finding.

The question put to Daniel M. Fox was no part of the cross-examination, and therefore properly rejected. If it was important to show that the defendant had the means to make the purchase, it would have been properly rebutting to the plaintiff's evidence of fraud.

The bill of discovery filed by the plaintiffs, and the defendant's answer thereto, when offered together, were not evidence.

This disposes of the whole case.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Muhlenberg *versus* Brock.
Tyson *versus* Same.

Where an issue is directed, the Court should order who are to be the parties plaintiff and defendant, and the cause should be put in form by the counsel of the parties, by filing a declaration, plea, and joinder in issue.

Where a petition was presented for an issue to try disputed facts in relation to the distribution of the proceeds of a sheriff's sale, and no other pleadings were filed or issue formed between the parties, except the petition and the order for an issue, this Court will send the record back, to have an issue formed, and the facts found in regular and legal form.

In an issue directed for the purpose of trying disputed facts, the Court cannot withdraw the whole case from the jury, and decide the law and facts themselves.

ERROR to the Common Pleas of *Schuylkill county.*

These cases arose upon feigned issues directed by the Court under the following circumstances. Marcus G. Heilner and Percival Heilner confessed a judgment to John Brock for the use of Samuel Heilner, John Brock, Sons & Co., on the 5th of August, 1853, for the sum of $32,700, payable on demand. A *fieri facias* was issued and a levy and sale made of the personal property of the Heilners, consisting principally of property used at the coal-mines on the premises leased by them as hereinafter stated. The defendants in the foregoing judgment and execution were coal operators, and on the 24th of June, 1846, had leased from Anthony F. Miller and Jacob Hoffman, a tract of coal land containing about 500 acres, for the term of 20 years, for the purpose of mining, at the rate of 35 cents per ton, payable monthly. The lessees covenanted to "mine and take out not less than 32,000 tons of coal from the veins of said tract in each and every year during the term of the lease." And in case of failure were to pay for that number of tons, unless the veins should prove faulty, with an option in the lessors to forfeit in case of failure; the lease also contained a right of distress for rent in arrear. The lessees took possession, and on the 10th of February, 1851, a supplemental lease was made, by which the quantity was increased from 32,000 to 50,000 tons, and the rent was reduced from 35 to 27 cents per ton. After the execution of this supplemental lease, Jacob Hoffman conveyed his interest in the land, and assigned his interest in the lease to Benjamin Tyson, A. M. Sallade and H. H. Muhlenberg. And Anthony F. Miller conveyed a portion of his interest in the land and lease to H. A. Muhlenberg, since deceased.

When the proceeds of the sheriff's sale were brought into Court for distribution, the owners of the leases presented their petition

Digitized by Google

www.libtool.com.cn
to the Court, setting forth the lease and claiming a year's rent, suggesting that the facts whether the said rent or any part thereof is due, and also, whether, if due, the said claimants are entitled to receive the same out of the said proceeds of sale, are disputed," and praying the Court to direct issues to try the said facts. The Court directed the issues. No further issues were formed in the cases, and they were tried without any pleadings.

The Court below (HEGINS, P. J.) charged the jury, that upon the whole evidence the plaintiffs in each case, the execution-creditors, were entitled to recover $4980.45, and declined to answer the points submitted by the counsel for the landlords.

Whereupon the defendants below sued out this writ, and assigned the charge for error.

Campbell, *Cummings*, and *Hoffman*, for plaintiffs in error.

F. W. Hughes, *Wells*, and *Hughes*, for defendants in error.

The opinion of the Court was delivered by

WOODWARD, J.—John Brock, for the use of Samuel Heilner and John Brock, entered judgment in the Common Pleas of Schuylkill county against Marcus G. Heilner and Percival Heilner, issued a *fi. fa.* thereon, and sold the personal estate of the defendants for $10,130. This money being brought into Court, the above-named plaintiffs in error appeared and claimed it as landlords of the defendants in the execution on account of a year's rent due to them under certain coal leases, and suggested to the Court, says the record, "*that the facts whether the said rent or any part thereof is due, and also whether, if due, the said claimants are entitled to receive the same out of the proceeds of the sale, are disputed.*" Issues were thereupon awarded to try these facts, but they were never formed.

When an issue is directed, the Court should indicate who are to be the parties. Plaintiff and defendant, and the counsel of the party asking for it, should then draw up a declaration in *assumpsit* as upon a wager, and a special plea in bar and a joinder in that issue, and file it. The form books contain precedents; and a very good one, as settled in the District Court of Philadelphia, under the interpleader Act, and which admits of ready adaptation to other cases, may be found in 1 Wharton's Troubat & Haly's Pennsylvania Practice, edition of 1853, p. 727. The record then shows who the parties litigant are, and the precise facts which have been established.

No such course was pursued here. There were no parties and no pleadings, but the suggestion made by the landlords seems to have been considered substantially an issue between them and the

Digitized by Google

www.libtool.com.cn

plaintiffs in the execution. Two questions were suggested—one of pure fact, whether there was any rent due; and the other a mixed question of law and fact, whether, if there were rent due, the claimants were entitled to recover it out of the proceeds of the sale;—and the Court proceeded to try these questions upon the evidence. But, after admitting the evidence, they declined to charge the jury upon the effect of it, as requested in several points put by the counsel of the landlords, and directed a verdict for the plaintiffs in the execution. The whole case was thus withdrawn from the jury, and no fact whatever was established.

This was a virtual abandonment of the issue, such as it was, and a distribution of the proceeds as if none had been asked for; and now, upon a writ of error, we are expected to review the law of the case.

There is nothing here for review. The law arises upon the facts, and they are not found. Neither in form nor in substance have they been passed on. The whole purpose of an issue was that the jury might find the facts; but this the Court prevented by refusing to submit them. It is obvious, then, that the record is in no condition to receive our judgment of the law. The loose, indeterminate, and unskilful character of these proceedings brings to mind forcibly the condemnatory observations of Chief Justice GIBSON in Shultz's Appeal, 1 *Barr* 254, where it was said, we are "confounded by the rude and undigested mass in which the proceedings are sent to us."

The judgments and all proceedings subsequent to the demand of an issue are set aside and reversed, and the record is remanded to be proceeded in according to law.

TYSON & SALLADA *v.* SAME DEFENDANTS.

Let the same judgment be entered in this as in the former case, and for the same reasons.

Judgment reversed and *procedendo* awarded.

Mertz *versus* Dorney.

The extent of a presumed grant to swell water upon the land of adjoining owner, is measured by the land actually flooded, and not by the height of the dam by which it is occasioned.

If by means of repairs to a dam, the land be flooded to a greater extent than it had been for twenty-one years before, the owner of the dam is liable for the injury, although the height of the dam may not have been increased.

ERROR to the Common Pleas of *Lehigh county.*

This was an action on the case brought by Solomon Dorney

Digitized by Google

www.libtool.com.cn

[Mertz *v.* Dorney.]

against Charles Mertz, for flooding the water back on the plaintiff's land. Dorney is the owner of a tract of land in South Whitehall township, Lehigh county, lying on Cedar Creek; and the defendant owns a tract of 23 acres adjoining the plaintiff below, on which are erected a grist-mill and the dam in question. Both parties traced their titles back for many years. The mill and dam were first built more than seventy-five years ago, and came into the possession of the defendant but a few years ago. In 1853, he tore down the mill and built a new one upon the same site, and repaired the dam. The leakages of the dam had also been repaired by the owner in 1836.

It was alleged by the plaintiff, on the trial in the Court below, that the defendant had raised the dam, by which the water was swelled further back upon his land than formerly.

The defendant contended that the dam was not any higher than it was forty or forty-five years ago, and that the water did not swell further back on the plaintiff's land than formerly. He alleged that he had merely repaired the dam by closing the leakages.

The defendant requested the Court to charge the jury, 1. That if the jury believe that the breastwork of the dam is no higher now than it was for the last twenty-one years and upwards, he is not responsible for any injury done by the water flowing on the plaintiff's land, and therefore he cannot recover.

2. That if the jury believe that the swelling of the water was caused by the defendant's merely tightening the dam, the plaintiff cannot recover.

3. That if the jury believe that the dam has been used with but slight variations in the same way for a period of twenty-one years and upwards, plaintiff cannot recover.

4. That if the dam is substantially the same as it has been for the last twenty-one years and upwards, except the tightening of the same by defendant, plaintiff cannot recover.

5. That if the jury believe that the dam had been at its present height for a period of twenty-one years prior to the last fifteen years, the plaintiff cannot recover.

6. That if the jury believe that the water is not higher now than it was for a period of twenty-one years prior to the last fifteen years, the plaintiff cannot recover.

The Court below (McCartney, P. J.) charged the jury as follows:—"No one has the right to swell water or increase the swell of water on the land of another without permission. The evidence of such a permission is either, first, by grant; or second, by twenty-one years' user; ending within twenty-one years before suit brought. Twenty-one years' peaceable continuous user of a road, or of a flow of water on another's land, gives a right. This right may, after it is acquired, be lost by twenty-one years' interruption or abandonment. An omission of the user for less than twenty-one

Digitized by Google

www.libtool.com.cn

years does not destroy the right. Merely raising or tightening the fabric of the dam, works of itself no damage to plaintiff unless the water is thereby swelled upon his land more than the defendant had permission, by express grant, or by twenty-one years' user. The second point of the defendant is answered in the negative.

"The other points of defendant, and also the points of plaintiff, are sufficiently answered in the general charge."

The jury found for the plaintiff.

The errors assigned were to the charge of the Court, and the answers to the points.

Bridges and *Marx*, for plaintiff in error.

Stiles and *Goepp*, contrà.

The opinion of the Court was delivered by

KNOX, J.—We see no error in the charge. The presumption of grant arising upon the lapse of time applied to the land actually flooded, and not to the height of the dam. If therefore the plaintiff's land was flooded by means of the repairs to the dam to a greater extent than it had been for a period of twenty-one years, the defendant was liable for the injury, although the height of the dam may not have been increased.

The points submitted by the defendant below and plaintiff in error were all substantially answered, and with legal accuracy.

Judgment affirmed.

Gaule *versus* Bilyeau.

Where by the terms of the lease the tenant had a right to take a part of the demised premises in fee, on ground-rent, at a stipulated sum, and before he exercised this right, he erected certain buildings on the premises, it was *Held*, that he had such an equitable estate in the land as rendered the buildings liable to the lien of a material-man.

No words of inheritance are necessary in an executory contract, to entitle the party to a conveyance in fee, if it appear that nothing less was intended.

That a part of the materials for which the claim was filed, were used in building outhouses, will not defeat the lien.

ERROR to the District Court of *Philadelphia*.

This was a *scire facias* on a mechanic's lien.

In February, 1852, the defendant, Henry Gaule, rented from Eli K. Price, a certain lot in the city of Philadelphia, for the term of seven years, from the first day of April next ensuing the date of the lease, for the first three years, at a yearly rent of

Digitized by Google

www.libtool.com.cn

$150 per annum, and $200 per annum for the remainder of the term, payable quarterly, with the right and privilege on the part of the said Gaule to take upon ground-rent, at any time within the first three years, the southernmost portion of the said ground at a yearly rent-charge of $400, payable half-yearly, with the covenants and conditions usual in ground-rent deeds.

On various days, between the 1st of March and the 30th day of May, 1852, Henry Gaule procured from the plaintiff, Aaron P. Bilyeau, various lots of lumber, with which was erected upon the above demised lot, a two story frame building, which was used as a bar-room, also a tenpin alley, and various outbuildings, and a fence around the premises. The whole amount of the bill was $682.22, on which was paid $475.57. This lien was filed for $206.65, the balance due.

On the 10th of August, 1852, Eli K. Price and wife conveyed the southernmost portion of the lot to Gaule, reserving a ground-rent of $400, and on the same day Gaule and wife conveyed it in fee, subject to the ground-rent, to Frederick Stoever, who was permitted to defend in this case.

The defendant contended that the premises described in the lien, being held by the defendant, Gaule, upon a lease for years, at and during the time the lumber charged in the claim was furnished, were not subject to a mechanic's lien. That the tenpin alley, the fence, &c., were outhouses distinct from the principal building mentioned in the claim, and were not within the purview of the lien laws.

The Court instructed the jury that the right reserved to the defendant, Gaule, by the lease, of a deed in fee of the premises at any time within three years, taken in connexion with the subsequent deeds, showing that he had exercised that right, was evidence of an equitable estate, in fee, in the premises, in Gaule, and made them subject to a mechanic's lien; and if the tenpin alley was annexed to and opened out of the house, it was a part of it, and within the claim filed by the plaintiff.

The jury found for the plaintiff $103.

The foregoing instructions to the jury were the errors complained of in this Court.

A. Miller, for plaintiff in error.—Buildings and fixtures erected by a lessee for years are not subject to a lien: 9 *Barr* 117; 10 *Barr* 252; 2 *Harris* 118. The Court below held that, because he had a right to demand a fee within three years, it gave him such an equitable estate as would subject the premises to the lien. The right to purchase land at a stipulated price, does not vest an equitable estate in fee. Until Gaule chose to exercise this right, he had no other tenure than the lease. Suppose he had postponed his election till the very end of the three years, what would

Digitized by Google

www.libtool.com.cn

have become of the lien in the mean time? A mechanic's lien attaches on an equitable estate in the same manner as a judgment: 4 *Barr* 126. It is true a judgment in Pennsylvania is a lien on an equitable interest, but it must be an *estate:* 2 *Rawle* 188.

The case of Ely *v.* Beaumont, 5 *Ser. & R.* 124, upon the authority of which this cause was decided, does not sustain the ruling here.

The outbuildings are not subject to the lien: 1 *Harris* 495.

Frazier, Jr., and *Arundel*, for defendant in error.—A right to take land at a fixed price vests in the lessee an equitable estate in fee. The estate of Henry Gaule was such as, upon a judgment, might have been seized and sold by the sheriff, and which would have descended to his heirs, who might have enforced specific performance: 8 *Ser. & R.* 381; 2 *Barr* 325; 16 *Ser. & R.* 266; 5 *Barr* 122; 8 *W. & Ser.* 68.

These buildings were therefore subject to the lien, as well in regard to the buildings as the estate. Whatever is necessary to the enjoyment of the inheritance is subject to the lien: 2 *Br.* 275–285; 2 *Barr* 77.

The opinion of the Court was delivered by

Lewis, C. J.—A building erected on a chattel is itself a chattel; and, therefore, buildings erected by a tenant for years, on the demised premises, for the accommodation of his business, are not subject to mechanics' liens: 9 *Barr* 117; 10 *Barr* 252; 2 *Harris* 118. But in this case the tenant had a right by the contract to take a certain part of the premises, particularly described, on ground-rent, at an annual sum fixed by the contract. No words of inheritance are necessary in an executory contract. It is sufficient, if it be manifest from the instrument that a fee simple was intended to be conveyed. This was sufficiently indicated in the contract, and the parties subsequently carried it out by a conveyance in fee, subject to the ground-rent agreed on. It is not likely that the tenant would have erected the tavern-house, and outbuildings, if he had had no certainty of enjoyment beyond the term of seven years. It was his right to a conveyance in fee that induced him to cause the erections; and it may well be presumed that it was also that right which the material-men relied on, when they furnished the materials for building on the premises. We are of opinion that, at the commencement of the building, the tenant had an equitable estate in the land which made the buildings subject to a mechanic's lien. The use of a part of the lumber for outbuildings does not defeat the lien.

Judgment affirmed.

Digitized by Google

www.libtool.com.cn

Road in Lower Salford.

Where the *termini* stated in two petitions for a road are identical, the Court have no power to grant a second view before a report has been made and acted on upon the first order; but where one of the points of the road prayed for is different in the second petition, the granting of the order is in the discretion of the Court.

CERTIORARI to the Court of Quarter Sessions of *Montgomery county.*

On the 16th May, 1853, a petition was presented to the Court praying for the appointment of viewers to lay out a road in Lower Salford township, upon which viewers were appointed. A report was made in favour of the road, and, on exceptions filed, the proceedings were set aside. On the 20th of February, 1854, another petition was presented, which described the road as follows:—

"Beginning at a point in the Skippack road, on the dividing line of lands of Abraham Ziegler and Michael Ziegler, Sr., thence by the nearest and best route until it intersects a public road leading from the Springhouse and Sumneytown turnpike-road, from near gate No. 4, on said turnpike, to Alderfer's Mill, upon the dividing line of lands of Isaac O. Alderfer and Abraham Alderfer, in the said township."

The viewers were appointed, and an order to view was issued to them, returnable to the succeeding May Term, but no report was ever made on this order.

On the 14th April, 1854, a new petition, signed by the same persons, was presented, praying for an order to view a road as follows:—

"Beginning at a point in the Skippack road, on the dividing line of lands of Abraham Ziegler and Michael Ziegler, Sr., thence by the newest and best route until it intersects a public road leading from the Springhouse and Sumneytown turnpike-road, from near gate No. 4, on said turnpike, to Alderfer's Mill, upon lands of Isaac O. Alderfer, at a point between Alderfer's School-house and said turnpike-road, in the township of Lower Salford, aforesaid."

The Court, without taking any action on the previous petition and order, appointed viewers upon this latter petition, and an order issued to them, which was also returnable to May Term. On the 15th of May, 1854, the viewers reported in favour of the road as prayed for in the petition. This report was approved by the Court, and the road ordered to be opened thirty-three feet in width.

On the 21st August, 1854, exceptions were filed and a petition for a review also; the exceptions were afterwards overruled, and a review awarded, which also reported in favour of a road, and the

Digitized by Google

www.libtool.com.cn

[Road in Lower Salford.]

original report was finally confirmed by the Court. Isaac O. Alderfer, who resisted the laying out of the road, sued out this *certiorari*.

The principal question made in the Court below and in this Court, was that the proceedings were irregular and illegal, and that the order of the 14th April could not issue to lay out the road while the previous order of the 20th February was pending.

Chain, for plaintiff in error.

Longaker, contrà.

The opinion of the Court was delivered by

KNOX, J.—Had the petition of April 4, 1854, called for the same road as that of February 20, 1854, it would doubtless have been erroneous to appoint a view upon it before the first viewers had reported, or the appointment been vacated. But the two petitions did not call for the same road. They had a common starting point, but the terminus of the one was "the dividing line of lands of Isaac O. Alderfer and Abraham O. Alderfer," whilst that of the other was "upon lands of Isaac O. Alderfer, at a point between Alderfer's School-house and said turnpike-road in the township of Lower Salford aforesaid."

The first petition fixed the termination of the road at a particular point, whilst the last left it optional with the viewers to run the road, at any point they chose upon the lands of Alderfer, between the school-house and the turnpike-road. This alteration was a material one, and disproves the identity of the two roads prayed for. As the roads were different, the Court of Quarter Sessions had a discretionary power to appoint the second set of viewers, and we have no doubt it was properly exercised, but, whether it was or not, we cannot review it.

Decree affirmed at the costs of the appellant.

Weiler *versus* Hoch.

Where a surety in a judgment gave notice to the creditor to proceed and collect his money from the principal, and that he would not be bail any longer, and afterwards by agreement extended the time to a specified day, and the creditor issued no process, but the principal debtor, within six days after the expiration of the extended time, assigned all his property for the benefit of creditors, among which was sufficient personal property to have paid the judgment: it was *Held*, that these circumstances would not discharge the surety.

Where the circumstances in proof show that the creditor could not by process have made the debt out of the principal, the surety will not be exonerated.

ERROR to the Common Pleas of *Lehigh county*.

Digitized by Google

[Weiler *v.* Hoch.]

www.libtool.com.cn

This was a *scire facias* on a judgment. On the 25th day of November, 1847, John H. Romig was indebted to Maria Hoch, the plaintiff, in the sum of $300, and on that day executed to her a judgment-bond for the amount, with James Weiler as his surety. This judgment was entered in the Court of Common Pleas of Lehigh county, to November Term, 1847. And this *scire facias* is sued out against Romig and Weiler to revive that judgment. Before the jury were sworn John H. Romig confessed a judgment to the plaintiff, and the cause proceeded as to Weiler the surety alone. On the trial the plaintiff gave in evidence the bond and judgment.

The defendant, to maintain the issue on his part, proved that before the 29th of December, 1849, he had given notice to the plaintiff to proceed and "collect his money, as he would be bail no longer;" and that by arrangement between the parties, it was afterwards agreed that Hoch should have till the 1st of April, 1850. The debt remained unpaid on the 1st of April, 1850, and on the 6th of that month, Hoch made an assignment of all his property for the benefit of his creditors, the inventory of which amounted to $8280.34, of which $1090.33 was personal property. The *pro rata* dividend received by the plaintiff under the assignment was $67.94.

The Court below (McCartney, P. J.) instructed the jury as follows:—

"Formerly the surety had to get a decree in chancery that the creditor sue (or take out execution against) the principal: 1 *Watts* 146.

"In Pennsylvania we substitute *notice* for the *decree* in chancery: Cope *v.* Smith, 8 *Ser. & R.* 115.

"The *notice* should be as explicit as a *decree* that the creditor sue or execute the principal: Erie Bank *v.* Gibson, 1 *Watts* 147; Greenawalt *v.* Kreider, 3 *Barr* 267, 264.

"In the present case there is not that explicit direction to proceed that the law requires in order to relieve the surety."

The jury found for the plaintiff, and the defendant brought the record up on this writ, and assigned for error:—

1. The Court erred in that part of their charge, in which they say that "the notice should be as explicit as a decree that the creditor sue or execute the principal."

2. The Court also erred in saying that "in the present case there is not that explicit direction to proceed that the law requires, in order to relieve the surety."

Bridges, for plaintiff in error.—The Court erred in holding that a notice to a creditor must be as explicit as a decree in chancery. This would be to deprive most sureties of the benefit of

Digitized by Google

www.libtool.com.cn

the law—for few men could give such a notice. The law does not even require that the word sue should be used.

The cases in 1 *Watts* 147, 3 *Barr* 264, and 8 *Ser. & R.* 110, are not like this case. In those cases the direction to sue was not accompanied with the declaration that he would not be bound as bail. In this the notice is full to "*collect in his money, as he would be bail no longer.*"

If execution had been issued after the 1st of April, and before the 6th, the money would have been made and the bail relieved: 6 *Harris* 460.

King and *Stiles*, for defendant in error.—The cases cited by the learned judge below sustain the ruling in this case. The notice must contain a *positive* direction to sue, accompanied with a declaration that the surety will hold himself discharged if it be not complied with.

To which may be added Gardiner *v.* Ferrel, 15 *Ser. & R.* 2. The case in 6 *Harris* 460, cited by plaintiff in error, does not change or modify the rule.

The opinion of the Court was delivered by

WOODWARD, J.—Granting that the direction which the surety gave to the creditor to "collect his money, as he would be no longer bail," was sufficient, in connexion with the long delay of the creditor, to ground an equitable defence for the surety, his subsequent letter of 21st January, 1850, if it did not altogether destroy the effect of the notice, did, at the least, postpone it to the 1st of the ensuing April. Until that time it cannot be pretended that the creditor was under any necessity to take measures against the debtor.

But it is part of the case that on the 6th of April, 1850, Romig, the debtor, made an assignment of all his estate, real and personal, for the benefit of his creditors, which resulted, on settlement, in a dividend of $67.94 as applicable to this debt. That is applied as a credit, and that is all, it is fair to presume, this creditor would have obtained had he taken process and accumulated costs. The only delay, then, of which the surety can complain, is from the 1st to the 6th of April, 1850, and that was not long enough to give him a defence. And even if it were, he has no reason to complain of it, for, before the judgment could have been revived, the assignment took effect, and a *scire facias* would only have increased the burden which the surety doubtless deems heavy enough now. He gave the creditor a legal obligation of the highest character, and the circumstances in proof afford him no equitable defence against it. The Court were right, therefore, in directing a verdict for the plaintiff.

The judgment is affirmed.

Digitized by Google

www.libtool.com.cn

Wheatley *versus* Baugh.

Where a subterranean flow of water has become so well defined as to constitute a regular and constant stream, the owner of the land above, through which it flows, may not divert or destroy it to the injury of the person below, on whose land it issues in the form of a spring.

But where the spring depends for its supply upon percolations through the land of the owner above, and in the use of the land for mining or other lawful purposes the spring is destroyed, such owner is not liable for the damages thus done, unless the injury was occasioned by malice or negligence.

The prior use of the spring for the purposes of a tannery, conferred no right of servitude over or through the land of the adjacent proprietor.

Nor would the enjoyment of the spring for twenty-one years raise any presumption of a grant; for no presumption would arise against the owner until it was shown that the exercise of the privilege interfered with his rights in such manner as to entitle him to legal redress.

ERROR to the Common Pleas of *Chester county*.

This was an action on the case brought by Jacob Baugh *v.* Charles M. Wheatley, under the following circumstances: The plaintiff was a tanner, and resided in Schuylkill township, Chester county, a short distance from Phœnixville. He occupied, as a lessee for years, a tanyard, with its appurtenances, comprising about an acre of ground, from 1824 or '25 to 1853, and carried on his business during the whole of that time. Upon the property which he thus occupied was a spring of water, which he constantly used for the purposes of his business. A valuable copper-mine having been discovered on the adjacent farm of the late Judge Morris, arrangements were made for working it in the year 1852. A shaft was sunk to some depth, and a small engine set to work to pump out the water, which interfered with the operations of the miners. In September, 1853, a larger and more powerful engine was procured, by which the amount of the water pumped up out of the mine was greatly increased. About two weeks after this new engine began to work, the tanyard spring ceased to flow. The engine continued to work till the 13th of January following; it then stopped. Two weeks afterwards the water of the tanyard spring began to flow with its accustomed volume. About the 1st of February the engine started again, and about the middle of the month the water again left the spring head. In the following June the operations of the mine were suspended, and soon after the water began to flow at the spring as formerly, and continued to do so till the time of the trial.

The shaft is about 550 yards from the spring, in a south-east direction. The surface of the ground, at the shaft, is some fifty feet higher than at the spring, and is the highest in that immediate neighbourhood. Several other mines were in operation at the

Digitized by Google

[Wheatley v. Baugh.]

same time with the Morris Mining Company, within two miles' distance, on lower ground, and with deeper shafts.

The suit was brought against Mr. Wheatley, as agent of the Morris Mining Company, to recover damages for the injury which the plaintiff sustained by the loss of the water of the tanyard spring, in his tanning business.

The defendant insisted,

1st. That no action could, under the circumstances, be maintained against him.

2d. That the owner of land through which water flows in a subterranean course, has no right or interest in it, which will enable him to maintain an action against one who, in carrying on mining operations on his own land, in the usual manner, draws away the water from the land of the first-mentioned owner; and that therefore the plaintiff was not entitled to recover.

The plaintiff submitted the following points:—

1. Streams of water are intended for the use and comfort of man. Every occupier of lands has a right to the use of water which flows in the stream on his lands, without diminution or alteration.

2. Where a stream of water rises on a man's land, and flows off upon the surface, and said spring and stream of water has been occupied and used uninterruptedly for twenty-one years and upwards for domestic, agricultural, or manufacturing purposes, the adjacent proprietor has no right to anything upon his own land which intercepts and cuts off the subterranean streams or trapdykes, which supply the said spring and stream.

3. If a person sinks a shaft upon his own lands for mining purposes, and pumps up large quantities of water out of the shaft, so that an ancient spring and stream of water in the adjoining lands of another proprietor, is wholly dried up by reason of the mining operations intercepting the underground streams, which fed the said spring and stream, it is actionable.

4. It is a principle of the common law that the proprietor of land, unless restrained by covenant or custom, has the entire dominion not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it, with this qualification to his dominion, that he must so use his own as not to injure the property or impair any actual existing rights of another.

5. The plaintiff, and those before him, having used the spring and stream of water therefrom, in the manufacturing of leather, for more than twenty-one years, the law presumes a grant of the privilege, so as to control the adjoining owner of land in the use of his own property, in any manner that shall interfere with or defeat the grant thus supposed to be made.

6. If the jury believe from the evidence that the defendant, by

Digitized by Google

www.libtool.com.cn

his mining operations on the adjoining lands, cut off underground streams, which percolated and ran into and made the spring and stream of water used by plaintiff at and in his tanyard, so that said stream of water was taken away, and plaintiff deprived of its beneficial use, he is entitled to recover damages commensurate with the injury he has sustained.

The defendant's counsel also requested the Court to charge as follows:—

1. No action lies against a manager or agent of a company for damages done by persons working for said company, in sinking a shaft in a mine by which damage is done to a neighbouring landholder, where such damage was not necessarily incident to the work, or where it has been caused by the negligence or unskilfulness of the operatives.

2. The owner of land through which water flows in a subterranean course has no right or interest in it, which will enable him to maintain an action against one who, in carrying on mining operations on his own land in the usual manner, drains away the water from the land of the first-mentioned owner.

3. The plaintiff has shown no cause of action that will entitle him to recover in this case.

The Court below (HAINES, P. J.) affirmed all the plaintiff's points—and affirmed the first point put by defendant's counsel, and negatived the second and third propositions.

The jury found a verdict for the plaintiff for $175 damages, and the defendant removed the record by writ of error to this Court, and assigned for error the foregoing instructions to the jury.

Lewis and *J. M. Read*, for plaintiff in error.

Pennypacker, for defendant in error.

The opinion of the Court was delivered by

LEWIS, C. J.—A mining company, in the course of necessary operations in mining minerals from their own land, interrupted the percolations which supplied a spring on an adjacent tract, and the owner of the spring, under the direction of the Court below, recovered damages for the loss of it. The question is, can this recovery be sustained?

The general principle undoubtedly is, that he who owns the soil has it even to the sky, and to the lowest depths. He may dig as deep and build as high as he pleases. The maxim which embodies the principle is, "*cujus est solum ejus est usque ad cœlum et ad infernos.*" If this general rule be applicable to the case before us, the plaintiff in error is justified in all that he did on the land of his principals by their direction. But there are some re-

Digitized by Google

www.libtool.com.cn

strictions upon this general right of property, which it becomes necessary to notice. The natural streams of water existing by the bounty of Providence, for the benefit of the land through which they flow, are incidents annexed to the land itself: 4 *Mason* 400; 12 *Wend.* 332. They do not begin by consent of parties, nor by prescription, but *ex jure naturæ*, and therefore they are not extinguished by unity; nor can they be obstructed or diverted to the prejudice of adjacent proprietors: Sury *v.* Piggot, *Popham* 170; 3 *Bulst.* 339. It was said by Sir JOHN LEACH, in Wright *v.* Howard, 1 *Sim. & Stuart* 190, that "every proprietor who claims a right either to throw the water back above, or to diminish the quantity which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years:" 1 *Sim. & Stuart* 190. It is true that there is a difference between watercourses on the surface, and those which run under ground: Acton *v.* Blundell, 12 *Mees. & Welsby* 324. But that distinction does not authorize neighbouring proprietors to disregard the necessities of each other's condition in respect to the latter. It is manifest that valuable rights may exist in both; and it is indisputable that wherever they do exist they must be protected by law. In limestone regions streams of great volume and power pursue their subterranean courses for great distances, and then emerge from their caverns, furnishing power for machinery of every description, or supplying towns and settlements with water, for all the purposes of life. To say that these streams might be obstructed or diverted, merely because they run through subterranean channels, is to forget the rights and duties of man in relation to flowing water. But to entitle a stream to the consideration of the law, it is certainly necessary that it be a *watercourse*, in the proper sense of the term. A spring gutter on the surface, is none the less a watercourse, although it is not equal in volume to a river. Small as it may be, if it have a clear and well defined channel, and a regular flow in that channel, it cannot be diverted to the injury of the proprietors below: Jack *v.* Martin, 12 *Wend.* 330. So a subterranean *stream*, which supplies a spring with water, cannot be diverted by the proprietor above, for the mere purpose of appropriating the water to his own use: Smith *v.* Adams, 6 *Paige* 435. As the owner of the land below is bound to permit the stream to flow in its accustomed channel, and cannot erect obstructions so as to throw the water back on his neighbour above, so the latter is bound, as a correlative obligation, to permit it to flow to his neighbour below. Each has a right to a reasonable use of the water on his own premises, but he must so exercise his privilege as not to injure the rights of the other. "*Sic utere tuo ut alienum non lædas*" is the maxim especially applicable to the enjoyment of

Digitized by Google

www.libtool.com.cn
these rights. When the filtrations are gathered into sufficient volume to have an appreciable value, and to flow in a clearly defined channel, it is generally possible to see it, and to avoid diverting it without serious detriment to the owner of the land through which it flows. But percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land. Accordingly the law has never gone so far as to recognise in one man a right to convert another's farm to his own use, for the purposes of a filter.

Such a claim, if sustained, would amount to a total abrogation of the right of property. No man could dig a cellar, or a well, or build a house on his own land, because these operations necessarily interrupt the filtrations through the earth. Nor could he cut down the forest and clear his land for the purposes of husbandry, because the evaporation which would be caused by exposing the soil to the sun and air would inevitably diminish, to some extent, the supply of water which would otherwise filter through it. He could not even turn a furrow for agricultural purposes, because this would, partially, produce the same result. Even if this right were admitted to exist, the difficulty in ascertaining the fact of its violation, as well as the extent of it, would be insurmountable. The Roman law, founded upon an enlightened consideration of the rights of property, declared that "he who, in making a new work upon his own estate uses his right without trespassing either against any law, custom, title, or possession, which may subject him to any service towards his neighbours, is not answerable for the damages which they may chance to sustain thereby, unless it be that he made that change merely with a view to hurt others without any advantage to himself." "He may raise his house as high as he pleases, although, by the elevation, he should darken the lights of his neighbour's house:" *Domat*, § 1047. He may dig for water on his own ground, and if he should thereby drain a well or spring in his neighbour's ground, he would be liable to no action of damages on that score: *Domat*, § 1581; *Pardessus*, *Traité des Servitudes*, § 76; *Dig.* 39, 2, 24, 12; *Dig.* 39, 3, 1, 12; *Dig.* 39, 2, 26; *Dig.* 39, 3, 21. These principles of the civil law are also the recognised doctrines of the common law: Burg *v.* Pope, 1 *Cro. Eliz.* 118; Parker *v.* Foote, 19 *Wend.* 309; Hoy *v.* Sterrett, 2 *Watts* 331; Greenleaf *v.* Francis, 18 *Pick.* 121; Acton *v.* Blundell, 12 *Mees. & Wels.* 324. It is true that several English Nisi Prius decisions introduced a modern doctrine in relation to ancient lights, in opposition to that held in the reign of Queen Elizabeth by all the judges in the Exchequer Chamber: 1 *Cro. Eliz.* 118. But the modern doctrine was never recognised by the King's Bench until the decision in Darwin *v.* Upton, in 1786, 2 *Saund.* 175, n. 2. As that decision was since the American Re-

Digitized by Google

www.libtool.com.cn

volution, after which English Courts ceased to have authority here, and is an anomaly in the law, the modern doctrine founded upon it has not been received as suitable to the condition of this country: 19 *Wend.* 309; 2 *Watts* 331. In Acton *v.* Blundell it was held that the defendant had a right to sink coal pits on his own land, although he thereby drained a well on the plaintiff's land. In Greenleaf *v.* Francis it was decided that the owner of land may dig a well on any part of it, notwithstanding he thereby diminishes the water in his neighbour's well, unless in doing so he is actuated by a mere malicious intent to deprive his neighbour of the water without benefit to himself: 18 *Pick.* 117. Neither the civil law nor the common law permits a man to be deprived of a well or spring or stream of water for the mere gratification of malice. The reason is, that water, like air, is of such a nature that no one can have an exclusive right in it. In the process of evaporation and condensation, it is sent, in refreshing showers, all over the earth. In its descent to the ocean, it necessarily passes from one to the other, and is intended for the benefit of all. The right of each is more or less dependent upon that of his neighbour. In this description of property, it is, therefore, peculiarly necessary that each should be mindful of the necessities and rights of the others. The owner of land on which a spring issues from the earth, has a perfect right to it against all the world, except those through whose land it comes. He has even a right to it, as against them, until it comes in conflict with the enjoyment of their own property. Strangers cannot destroy it, even though it be derived from lands which do not belong to the owner of the spring. Even a railroad corporation, armed by law with the eminent domain, and having power to take private property for the construction of its road, is answerable to the owner of a spring for destroying it, although its destruction be caused by excavations on the land of an adjacent proprietor: Parker *v.* The Boston and Maine Railroad Company, 3 *Cush. Rep.* 107. But, while the Court in that case held that the corporation was liable, on the ground that the destruction of the spring was not required for the purposes of the owner of the land through which the excavation was made, the principle was fully recognised that each proprietor has a right to make a proper use of his own land, and that sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss arises, it is *damnum absque injuria:* Parker *v.* The Boston and Maine Railroad, 3 *Cush. Rep.* 107; *American Railway Cases* 553.

The prior occupancy of the spring for the uses of a tannery, gave no right of servitude over or through the land of the adjacent proprietor. No man, by mere prior enjoyment of the advantages of his own land, can establish a servitude upon the land of another. This is shown in a satisfactory manner by Mr. Justice ROGERS, in

Digitized by Google

www.libtool.com.cn

Hoy *v.* Sterrett, 2 *Watts* 330. But it seems to be thought that the enjoyment of the spring by the plaintiff below and those under whom he claims, for the period of twenty-one years, gives him a right to its continued existence, although the neighbouring proprietor may thereby be deprived of the chief value of his own land. This depends upon the question whether the enjoyment of the spring was of such a character as to have invaded his neighbour's rights, so as to enable the latter to maintain an action for the injury. No man can be barred by a statute of limitation for not bringing his action with the prescribed period, until it is first shown that he had a cause of action which he could have maintained. In analogy to the statute, no presumption can arise against a party on the ground of long enjoyment of a privilege by another, until it is shown that the privilege, in some measure, interfered with the rights of the party whose grant is proposed to be presumed, and that he had a legal right to prevent such enjoyment by proceedings at law. Presumption is when the conduct of the party out of possession cannot be accounted for without presuming a conveyance: Kingston *v.* Lesley, 10 *Ser. & R.* 390; Butz *v.* Ihrie, 1 *Rawle* 218. The Frederician Code of Prussia provides that no presumption can take place where no negligence can be imputed, and accordingly by that code a man may raise his house after any lapse of time, although it darkens his neighbour's house: *Frederician Code of Prussia* 48, 55. The same principle is to be found in the law of Scotland: *Erskine's Prin. Law of Scot.* 350. The owner of the mine had no right to complain of his neighbour below for making use of the spring on his own lands. As long as it flowed there, he had a right to make use of it, and the owner of the land through which the supply of water came, was not in any manner injured by such use of the water. Silence or acquiescence, where one is not injured and has no cause of complaint, can never deprive him of his rights on the ground of presumption of a grant. No man can be said to have granted a right about which it would have been an impertinent interference to utter a complaint: Hoy *v.* Sterrett, 2 *Watts* 331; *Merlin's Repertoire de Jurisp. verb.* "*Cours d'Eau.*" Besides, it was impossible for him to know from whence the supply of water came. He had no knowledge that it was derived from percolations through his own land. In this respect there is a material difference between hidden veins of water under the ground and watercourses flowing on the surface. The latter are apparent, and, if appropriated in such a way as to injure the rights of the owner through whose land they flow, he can take cognisance of the wrong, and is bound to redress it by action within the period prescribed by law. But the former are not apparent; and the owner of the land is not bound to resort to an action to redress a wrong of which he cannot by any possibility have notice. By the civil code of Louisiana, *non-appa-*

Digitized by Google

www.libtool.com.cn

rent servitudes can be established only by *title*. Immemorial possession alone is not sufficient to acquire them: *Civil Code Louis. tit. Servitudes*, p. 240; *Pardessus Traité des Servitudes*, § 95. In a case like the present, therefore, there is no reason whatever for depriving the plaintiff in error of the enjoyment of his rights of property on his own land, on the ground of any servitude established by time, or acquiescence for the benefit of the tannery on the adjacent tract. We have treated the spring as depending upon percolations alone, at the point where the mining operations were carried on; because the evidence does not show that any distinct watercourse leading to it has been cut off or diverted. If this should be shown, and it should also appear that it could have been preserved without material detriment to the owner of the land through which it flowed, the destruction of it might be attributed to malice or negligence. In that case the law would furnish redress, because the injury would be unjustifiable. The beneficent Being who created the earth, and gave man dominion over it, imposed on him the duty of doing to others as he would that they should do to him. Upon this high moral obligation rests the legal one which requires every one so to use his own privileges as not to injure the rights of others. In all the relations of social life, it is the interest and duty of each to respect the privileges of others. The law which requires this "acts with a reasonable reference to the public convenience and general good; and it is not betrayed into narrow strictures subversive of common sense, nor into extravagant looseness, which would destroy private rights:" Tyler *v.* Wilkinson, 4 *Mason's U. S. Rep.* 397. In determining what is reasonable, the circumstances of each case must be carefully considered, and the jury, under the instructions of the Court, must, in general, decide the question: Hetrich *v.* Deachler, 6 *Barr* 32; Miller *v.* Miller, 9 *Barr* 74. The owner of a spring, although his right is imperfect where the supply is derived through his neighbour's land, has nevertheless a privilege subordinate only to the paramount rights of such neighbour; and it is only when the fair enjoyment of those paramount rights requires its destruction that he is bound to submit to the deprivation. In conducting extensive mining operations, it is in general impossible to preserve the flow of the subterranean waters through the interstices in which they have usually passed, and many springs must be necessarily destroyed in order that the proprietors of valuable minerals may enjoy their own. The public interest is greatly promoted by protecting this right, and it is just that the imperfect rights and lesser advantage should give place to that which is perfect, and infinitely the most beneficial to individuals and to the community in general.

There was no evidence to justify the jury in presuming a grant of a servitude; nor was there any testimony tending to show

Digitized by Google

www.libtool.com.cn

either malice or negligence in conducting the mining operations. There was nothing to show that the mining company had been guilty of anything beyond the proper use of their own property. The plaintiff below had therefore no cause of action, and the jury ought to have been so instructed.

Judgment reversed and *venire facias de novo* awarded.

Digitized by Google

www.libtool.com.cn

INDEX.

ABANDONMENT.

LANDS, 1, 5, 6, 14, 15, 17.

Abandonment may take place with regard to an inchoate right, but is scarcely predicable of a perfect title: and hence payment of taxes in his own name, for even thirty years, by a sheriff's vendee of a void title, who had made an entry on the land twenty-four years ago, and once or more every year since, and had run lines; and who had had a tenant on for nineteen, but not for twenty-one years; does not prove an *abandonment*, there being an absent owner of the lands, by patent. The constructive possession follows the legal title. *Philadelphia* v. *Riddle*, 259.

ACCESSORY.

CRIMINAL LAW, 4–7.

ADJUTANT-GENERAL.

OFFICER, 1–4.

See *Commonwealth* v. *Slifer*, 21.

AFFIDAVIT OF DEFENCE.

MORTGAGE, 1.

1. Independent of special legislation, the District Court has power to adopt a rule requiring affidavits of defence. *Hogg* v. *Charlton*, 200.

2. When a record is admitted to be filed, and the paper-book gives no exemplification of it, this Court will presume it to be filed according to the rule of court. *Id.*

3. It is not necessary to file a copy of the note on which a foreign judgment was founded; the note was extinguished by the judgment. The case of McCleary v. Faber does not require that a copy of the original cause of action shall be filed, after it has been extinguished by a judgment. *Id.*

4. In taking defence to an action of debt on a foreign judgment, defendant is bound, when required by the rule of court, to file a sufficient affidavit of defence. *Id.*

5. Under the rules of the District Court of Allegheny county, no judgment can be entered for want of an affidavit of defence, in an action upon an *implied contract* to pay money. *Woodwell* v. *Bluff Mining Company*, 365.

AGREEMENT.

CONTRACT.

TENANTS IN COMMON.

Where a vendee assumed to pay the amount of a judgment against his vendor, a failure of the title to the land is no defence to an action brought

Digitized by Google

www.tibtool.com.cn

AGREEMENT.
against him, by the plaintiff in the judgment, to recover its amount. *Strawn* v. *Hook*, 391.

AMENDMENT.
Poor, 3.
1. Where the vendee of goods was sued on an accommodation note made for his credit, and endorsed by him over to the vendor, and the case was arbitrated, appealed from, tried in court and reversed on error; on the second trial below the plaintiff amended his declaration by joining a new count for goods sold and delivered, no exception being taken, or anything appearing in the record to show objection on the part of the defendant. *Held*, that after a defendant goes to trial and takes the chance of a verdict on a declaration thus amended, it is too late to object. *Shriner* v. *Keller*, 61.
2. A judgment, entered by mistake, upon a warrant of attorney, for a less amount than the obligation calls for, may be amended by the Court, after execution executed, and an *alias* execution may be awarded for the balance uncollected, if the rights of third persons are not prejudiced by such amendment. *Smith* v. *Hood*, 218.
3. Where there is anything to amend by, a clerical mistake in entering a judgment may be corrected, but not an error of judgment in pronouncing it. *Id.*
4. An amendment of its records and proceedings, allowed and made by a Court of competent jurisdiction, cannot be collaterally inquired into or impeached. *Hamilton* v. *Seitz*, 226.
5. One, not a party to the proceedings upon which the amendment was made, cannot, in a different proceeding, deny the regularity and legality of such amendment. *Id.*
6. Where additional plaintiffs were added, after an appeal by defendant from an award of arbitrators, and a *scire facias* was sued out on the recognisance, reciting a suit, in the names of the plaintiffs, including those added after the appeal, it was *held* fatal to a recovery on the plea of *nul tiel* record. *Fullerton* v. *Campbell*, 345.
7. An amendment of the declaration, allowed several years after an order sustaining a demurrer, is a nullity, as there was no case pending to which the amendment could apply. *Wood* v. *Anderson*, 407.
8. In such cases, an amendment will be allowed at the time of judgment, or during the term, upon proper terms, if the plaintiff shows that he has a good cause of action. *Id.*
9. Where the original declaration and the amended counts present both in form and substance totally different and distinct causes of action, it is error in the Court to allow the amendment; more especially is this the rule where the right of the plaintiff is apparently barred by the statute of limitations. *Id.*

APPOINTMENT.
Officer, 1, 3.

APPORTIONMENT.
Damages, 1, 2.
Rent, 1–3.

APPROPRIATION OF PAYMENTS.
1. Where a person indebted on several accounts, makes a payment, he may direct how it shall be applied; if he give no such direction, the creditor may apply it, and if he credit it generally on an open account, the law will not afterwards appropriate it to a judgment although older than the account; especially if the creditor have security for the judgment and none for the account. *Watt* v. *Hoch*, 411.

Digitized by Google

APPROPRIATION OF PAYMENTS.

2. Where the vendors of land transferred the amount due on the article of agreement to a firm, in trust, to receive and pay over the instalments to certain creditors of the vendors, named in the transfer, and one of the trustees under such transfer, purchased at sheriff's sale the personal property of the vendees, and operated a furnace belonging to them, under an arrangement that the profits should be applied to the debts of the vendees, a purchaser at sheriff's sale of the vendees' interest under the agreement cannot set off such profits, against the purchase-money due on the agreement, without showing an actual appropriation of them to that claim. *McGuire* v. *Faber*, 436.

ARBITRATION.

1. An action upon a recognisance of bail for stay of execution may be referred to arbitrators under the compulsory rule. *Pettit* v. *Wingate*, 74.

2. If a party enter a rule of reference under the Act of 16th June, 1836, entitled "An Act relating to reference and arbitration," and fail to serve a copy of the rule on each of the arbitrators, and on the opposite party, his agent or attorney, as required by the said Act, he is liable to the penalty prescribed therein. *Dunlap* v. *McKee*, 84.

3. It is not necessary to sustain a suit for the penalty, that the party suing shall show an injury sustained by him; the penalty is inflicted as a punishment for the default. *Id.*

4. Where additional plaintiffs were added, after an appeal by defendant from an award of arbitrators, and a *scire facias* was sued out on the recognisance, reciting a suit, in the names of the plaintiffs, including those added after the appeal, it was *held* fatal to a recovery on the plea of *nul tiel* record. *Fullerton* v. *Campbell*, 345.

ASSIGNMENT.

BOND, 1–4.

Payment of a judgment to the nominal plaintiff after actual notice that it has been assigned to another, is not a payment to the proper person. It is not necessary that direct notice of the assignment be given by the assignee or his agent—it is sufficient if the information be given under circumstances and in terms calculated to arrest the attention of the debtor. *Guthrie* v. *Bashline*, 80.

ASSUMPSIT.

PLEADING, 2.

ATTACHMENT.

1. An attachment execution to be available must make the debtor of the defendant garnishee, and not the person who holds the evidences of the debt. *Raiguel* v. *McConnell*, 362.

2. Where an assignee under an unrecorded deed of assignment for the benefit of creditors, was summoned as garnishee, and admitted that he held book accounts and other evidences of debt, uncollected, most of which he considered worthless, no judgment could be entered against him for the amount of such accounts. *Id.*

ATTORNEY-AT-LAW.

MALICIOUS PROSECUTION, 1, 2.

1. An attorney-at-law, as such, has no authority to compromise and discontinue a suit brought for the recovery of land of his client, in consideration of the other party conveying to himself a portion of the land: but if he makes such compromise, and the discontinuance is entered of record, and the client does no act to manifest his dissent for a number of years, he will be held to have acquiesced in the discontinuance, and the terms upon which it was entered. *Filby* v. *Miller*, 264.

2. The other party, having had the benefit of the discontinuance, cannot

Digitized by Google

ATTORNEY-AT-LAW.
invalidate his conveyance upon the allegation that the attorney exceeded his authority in making the compromise. *Filby* v. *Miller*, 264.

3. Nor could he repudiate the conveyance upon the ground that the consideration for making it was, in addition to the discontinuance of the suit, that a good title was to be made to him for the balance of the tract, which had not been done: having received a part of the consideration, his remedy was to enforce, not to destroy the contract. *Id.*

4. A *bona fide* purchaser, for value, of the land thus conveyed to the attorney, without notice of the circumstances alleged against the validity of the title, would hold it discharged from equities between the parties. *Id.*

5. And a subsequent purchaser *with notice*, could protect himself by the equity of a former one, who purchased *without* any such notice. *Id.*

6. An attorney-at-law who has been employed professionally to sustain a title to land, cannot either before or after the cause is ended, or during the continuance or after the termination of the relation of counsel and client, while the client holds or after he has conveyed his interest, purchase for himself the opposing or any outstanding title, but such a purchase will enure to the benefit of the client or his vendee. *Henry* v. *Raiman*, 354.

7. Where the relation of confidence is in regard to the title to lands, the obligation of fidelity upon the counsel follows such title into whosesoever hands it may go, and good faith and public policy require that such obligation should *never* be violated. *Id.*

8. A client, or his vendee, may recover the premises from such delinquent counsel, by paying or tendering the amount of the purchase-money with interest; and a purchaser from such counsel with notice of the facts, is in the same situation. *Id.*

AVERAGE.

1. Where a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire and by tearing up part of the vessel to gain access to the fire, is general average: and it makes no difference how the water is applied, whether by the aid of fire-engines from the land, or in the form of steam, or by scuttling the vessel. *Nimick* v. *Holmes*, 366.

2. A general average consists in a purpose, a means, and a result: a design to avert a common danger by a sacrifice voluntarily made, and a successful issue. *Id.*

3. In an action by a shipper against the owners of a vessel for general average, evidence that the shipper had received from the underwriters the amount for which the goods lost were insured is irrelevant; nor is the amount so received evidence of the value of the goods. *Id.*

BANKRUPTCY.

1. By the 4th section of the Bankrupt Act, a discharge and certificate is a full and ample discharge of all debts provable under it. And by the 5th section all debts due at a future day, and all uncertain and contingent demands, are provable. *Clark* v. *Porter*, 141.

2. Where the defendant in a joint obligation had been discharged under the bankrupt law, and pleaded his discharge in bar to the joint claim, which was sustained: and some years afterwards his co-obligor, the plaintiff, paid the joint obligation, and brought suit against defendant for contribution, to which he pleaded his discharge in bankruptcy: *Held*, that the claim of contribution was contingent, and within the Act, and that the plea was good. *Id.*

BILL OF DISCOVERY.

A party to a suit cannot read in evidence his own answer to a bill of discovery filed in aid of the action. *Clark* v. *Depew*, 509.

Digitized by Google

www.tbtool.com.cn

BILL OF EXCEPTIONS.
PRACTICE, 2.

BILL OF LADING.
EVIDENCE, 16.

BOARD OF PROPERTY.
LANDS, 7.

BOND.
MISTAKE, 1.
OFFICER, 3, 4.
TOWNSHIP, 1.

1. It is a well settled rule of law that if an obligor induce a person to take an assignment of his bond, by admitting the justice of the debt or declaring that he has no defence, he cannot afterwards deny it to the prejudice of the assignee. *Weaver* v. *Lynch*, 449.

2. In order to create an equitable estoppel upon the obligor, it is necessary for the assignee to prove, not only that he took the assignment, but that he paid a valuable consideration for it. *Id.*

3. The holder must also prove that the admission of the obligor was made *before* the assignee expended his money in purchasing the bond. *Id.*

4. If the assignee allege that he held the assignment of the notes *conditionally*, with the right to return them in case the obligor should allege any defence, he must prove it; his assertion of it to the obligor in making inquiry of him is not proof of the fact. *Id.*

BOOKS.
EVIDENCE, 11.

CARRIER.
PLEADING, 3.

1. One who holds himself forth to the public to carry for hire, is a common carrier as much in his first trip as in any subsequent one, and has a lien on the cargo for freight. *Fuller* v. *Bradley*, 120.

2. One not a common carrier, but who specially undertakes to carry a particular load for hire, has no lien for freight unless he reserve it by agreement. *Id.*

3. It is a question for the jury from all the evidence to decide whether the contract is one of affreightment as a common carrier, or a mere hiring for the job. *Id.*

4. Where the defendant was the carrier of freight for a round trip, to a given place and back, taking in and putting out freight, at different places on the route, as plaintiff might direct, for a stipulated sum per day, the defendant has a lien on the freight remaining on board on the return of the boat, for the whole amount unpaid at the stipulated rate. *Id.*

5. If goods are received by common carriers, with orders to "ship immediately," and are stored in their warehouse, the navigation being obstructed, and there consumed by fire, they are liable for the value to the owner as common carriers. *Clark* v. *Needles*, 393.

6. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessary to the carriage, and for the purpose of facilitating it, his liability as a common carrier begins with the receipt of the goods. *Id.*

CASE STATED.

1. A case stated is a substitute for a verdict; and when it is lost or destroyed, if the parties cannot agree upon a new one, the cause goes to a jury as if none had ever been made. *Cook* v. *Shrauder*, 312.

Digitized by Google

CASE STATED.

2. If a case stated is defective in setting forth the facts, no judgment can be given upon it. *Cook* v. *Shrauder*, 312.

3. Where a case stated was lost, it was error for the Court to appoint a commissioner to find and report the contents of it, and no judgment could be entered upon such report. *Id.*

CASES OVERRULED OR DOUBTED.

1. Waggoner *v.* Hastings, 5 *Barr* 300, overruled. *Hole* v. *Rittenhouse*, 491.

2. Shroder *v.* Brenneman, 9 *Harris* 228, doubted. *Id.*

3. Bishops *v.* Lee, 3 *Barr* 217, doubted. *Id.*

4. Kite *v.* Brown, 5 *Barr* 291, explained. *Id.*

CERTIORARI.

LANDLORD AND TENANT, 2.

The Act of 1810, which makes the decision of the Common Pleas final on a *certiorari*, does not apply to cases arising under special statutes. *Zimmerly* v. *Road Commissioners*, 134.

COMMISSION.

OFFICER, 3.

COMMON.

1. Where the state surveyed and laid out a town into in-lots and out-lots, reserving 100 acres of land without the town for a common pasture, and afterwards sold the lots; *Held*, that the right of common so annexed to the town lots, was a common *appurtenant* as distinguished from a common *appendant*. *Bell* v. *Ohio and Pennsylvania Railroad Company*, 161.

2. If one who has a right to common appurtenant, purchase part of the land subject to the easement, all his right of common is extinguished. *Id.*

3. So if he be a disseisor of part of the land subject to the easement. *Id.*

4. And the incidents of light, air, prospect, &c., fall with the principal. *Id.*

5. The right to take the herbage by the mouths of his cattle gives the commoner no incidental right to keep the common open as an ornament to his dwelling, or as contributing to his own personal pleasure or convenience. *Id.*

6. Where a commoner's right has been extinguished, he has no interest in the common, to entitle him to ask for an injunction to restrain a trespasser on the common rights of others. *Id.*

COMPOSITION DEED.

1. The defendant, who was a country merchant, proposed to compound with his creditors in Philadelphia, upon terms stipulated in a written instrument, which contained the condition that it was to be void if not signed by *all his Philadelphia* creditors. The plaintiffs and several others signed the agreement, and afterwards the plaintiffs brought suit on the original indebtedness; to which defendant set up the compromise as a defence, but gave no evidence that the instrument had been signed by *all the Philadelphia creditors*. *Held*, that to defeat a clear legal liability under such an instrument, the defendant was bound to prove performance of every condition necessary to give it effect. *Lower* v. *Clement*, 63.

2. Where such instrument proposed new sureties to the creditors, it was for the defendant to show that they had been proposed and tendered, as well as that all the designated creditors had assented to it. *Id.*

3. Where an instrument of release stipulates that it shall be void if not agreed to by *all* creditors in a given place, and it was signed by several, the party setting it up must show that those who assented comprised *all* the creditors designated. *Id.*

Digitized by Google

COMPOSITION DEED.
4. Where the party makes *one* objection to the compliance with the terms of a compromise, where there are several, this is not a waiver of all others, but they remain open and may be asserted at the proper time. *Lower* v. *Clement*, 63.

CONDITION.
JUDGMENT, 4–7.
VERDICT, 3.

CONSIDERATION.
ROADS, 1.
Where one party volunteers to pay a debt for another, the latter is under no obligation to reimburse him. *Wheatfield Township* v. *Brush Valley Township*, 112.

CONSTITUTIONAL LAW.
1. The Acts of Assembly of the 5th April, 1849, 8th April, 1851, and Act of 30th March, 1852, relating to the paving and grading of streets in the city of Allegheny, and the assessment of the expense of the same, upon the owners of lots fronting on such streets, and the manner of collecting said assessments, are a proper and constitutional exercise of the taxing power by the legislature. *Schenley* v. *Allegheny City*, 128.
2. The Act of Assembly of 4th June, 1839 (*P. L.* 243), so far as it relates to the estate of Joseph Ball, deceased, is not unconstitutional. *Custer* v. *Commonwealth*, 375.

CONTRACT.
AGREEMENT.
WEIGHTS AND MEASURES.
1. Where a person desired to purchase certain lots, which were owned by heirs in undivided parts, and agreed in writing and under seal, with a third person, to pay him a fixed sum for each of the shares, and only a part of the shares were purchased, and conveyed directly to the first party: It was *Held*,
I. That the plaintiff might recover what the defendant agreed to pay him for those shares, which were actually purchased and conveyed to the defendant, although the agreement contemplated the purchase of other shares which were never obtained.
II. That the sealed agreement imported a good consideration; and
III. That the defendant's accepting of conveyances for two shares, and taking possession of them, estopped him from asserting in an action against him for the sum so agreed to be paid, the invalidity of the title thus acquired. *Robinson* v. *Snyder*, 203.
2. Where the parties in a sale of cattle, agreed upon the terms of sale, and the mode of ascertaining the weight, but the stipulated means of weighing failed, and the vendor refused to adopt other means, or to carry out the contract at all; such refusal would not vest the property in the vendee. *Nesbit* v. *Burry*, 208.
3. Nor does the payment of a part of the price aid in vesting the title in the vendee, where the quantity is to be ascertained, and there is no actual delivery. *Id.*
4. Under such circumstances, the contract is essentially executory, and the remedy of the vendee is an action for damages, for the refusal to perform according to its terms. *Id.*
5. If the words used in a contract be *technical*, or *local*, or *generic*, or *indefinite*, or *equivocal*, on the face of the instrument, or made so by proof of extrinsic circumstances, parol evidence is admissible to explain their meaning by usage. *Brown* v. *Brooks*, 210.

Digitized by Google

CONTRACT.

6. The secretary of a private corporation, at a fixed salary, cannot recover extra pay for services in that capacity. *Commonwealth* v. *Chartiers Coal Company*, 337.

7. Where one contracts to do all the millwright work necessary in the construction of a grist-mill, he is bound to do it in a workmanlike manner, so that it will answer the purpose for which it is designed. *Wade* v. *Haycock*, 382.

8. A neglect or refusal to complete the work is a bar to a recovery: but for defective execution, the contract price, or the value of the work, deducting the actual damages sustained, may be recovered. *Id.*

9. The measure of damages would be the cost of the new work, and the profits of the mill whilst the alterations were being made. *Id.*

10. The workman is not responsible, if the defects were occasioned by following the directions of the owner. *Id.*

11. If the workman knowingly and purposely makes the work defective, it is such *mala fides* as would prevent a recovery for any of the work done under the contract. *Id.*

12. The custom of the merchants of Pittsburgh to charge interest on goods sold after six months is so universal and notorious, that it necessarily enters into the contract as a part of it; and the Courts are bound to take notice of this custom as a part of the law. *Watt* v. *Hoch*, 411.

13. No words of inheritance are necessary in an executory contract, to entitle the party to a conveyance in fee, if it appear that nothing less was intended. *Gaule* v. *Bilyeau*, 521.

CONTRIBUTION.

Where a debt is due from several parties, and one of them pays it after it is barred by the Statute of Limitations, he cannot maintain an action for contribution against the other debtors. *Wheatfield Township* v. *Brush Valley Township*, 112.

CORPORATION.

CONTRACT, 6.

PLANK-ROADS.

An action of covenant against a corporation will lie only on a written instrument sealed with their common seal; and such seal does not prove itself, but must be proved by some person having knowledge of it. *Turnpike Company* v. *McCullough*, 303.

COSTS.

ERRORS AND APPEALS, 6.

LIMITATION OF ACTIONS, 15.

In an action of partition, where a verdict and judgment are rendered for the defendants on the plea of *non tenent insimul*, they cannot recover their costs from the plaintiff. *Shaw* v. *Irwin*, 347.

COVENANT.

1. An action of covenant against a corporation will lie only on a written instrument sealed with their common seal; and such seal does not prove itself, but must be proved by some person having knowledge of it. *Turnpike Company* v. *McCullough*, 303.

2. The plea of covenants performed *absque hoc*, admits the execution of the instrument declared on, and only puts in issue the performance on the part of the plaintiff as alleged in the declaration. *Id.*

CREDITORS.

TRUST, 1-2.

Digitized by Google

www.libtool.com.cn

CRIMINAL LAW.
NUISANCE, 2, 3.
RAPE.
1. The law does not require that the oath administered to jurors in criminal cases shall be set forth on the record. *Beale* v. *Commonwealth*, 11.
2. When the record in a conviction for rape stated that "the jurors were duly impannelled, sworn, or affirmed, respectively, to try the guilt or innocence of the defendant, of the charge whereof he stands indicted," *Held*, that there was nothing on the record that authorized the inference that an illegal oath was administered, and that the presumption was, that it was administered in legal form. *Id.*
3. The Supreme Court, on reversal of a judgment in a criminal case for error in the sentence, has power to pass such sentence as the Court below ought to have passed, and to remit the record for further proceedings in conformity to the judgment. *Id.*
4. An accessory may be indicted, but cannot be tried before conviction or outlawry of the principal. *Holmes* v. *The Commonwealth*, 221.
5. In such indictment, it is not necessary to set forth a *conviction* of the principal, but his *guilt* must be averred, and the evidence must establish that such guilt was legally ascertained, before the trial of the accessory. *Id.*
6. Where the record shows a conviction of the principal before the trial of the indictment against the accessory, this Court will presume that legal proof was given to the jury of that conviction, upon the trial of the accessory. *Id.*
7. The Court of Quarter Sessions has jurisdiction to try an indictment for being accessory to a burglary, and for receiving stolen goods, knowing them to have been stolen. *Id.*
8. In felonies not capital, it is not necessary that it should appear affirmatively, on the record, that the prisoner was present when the verdict was rendered: unless the contrary appears, the Court will presume that everything was rightly done. *Id.*

CUSTOM.
The custom of the merchants of Pittsburgh to charge interest on goods sold after six months is so universal and notorious, that it necessarily enters into the contract as a part of it; and the Courts are bound to take notice of this custom as a part of the law. *Watt* v. *Hoch*, 411.

DAMAGES.
CONTRACT, 8, 9.
REPLEVIN, 2.
1. The assessment of damages occasioned to a tract of land by the building of a railroad, on the petition of several joint owners, is properly made in a gross sum. *Railroad Company* v. *Hall*, 336.
2. It is no objection to the validity of the proceedings, that the viewers did not apportion the damages among the claimants according to their respective interests in the land. *Id.*
3. Where a vendor gave to his vendee a bond conditioned to indemnify the latter against any claim or encumbrance affecting the premises, and to "pay all costs, charges, or expenses necessary to defend the said premises against any such claims;" the obligee is entitled to recover on the bond the amount paid counsel, and other necessary expenses of defending an unsuccessful ejectment brought against him for the premises. *Robinson* v. *Bakewell*, 424.
4. Where the vendor had notice of the ejectment brought against his vendee, and an appearance was entered in the cause at his instance, and he was requested by the counsel of the vendee not to interfere in the defence, as his connexion with it might be prejudicial, but he and his counsel assisted in the preparation and trial of the cause, the obligee

Digitized by Google

DAMAGES.
would not be barred from recovering on the bond the amount paid his counsel for defending against such ejectment. *Robinson* v. *Bakewell*, 336.

DECEDENT.
WIDOW, 1, 2.
1. The widow has a right to retain real or personal property to the amount of $300, from the estate of her deceased husband under the Act of 1851, whether he died testate or intestate, solvent or insolvent. *Compher* v. *Compher*, 29.
2. It is the duty of the personal representative to set aside this amount to the widow upon request made—to be approved as prescribed by the Act of 1849. *Id.*
3. Acceptance by the widow of a provision under the will of her husband does not deprive her of this right. So much of the estate is withdrawn from the general course of administration, and appropriated by law to the use of the "widow and family." *Id.*
4. When the executors refuse to allow the property to be appraised and remain with the widow, she may sue in the Common Pleas for damages for the injury. *Id.*
5. Lands descend to heirs, and not to administrators; and the heirs, as owners, have the right to the rents. *Haslage* v. *Krugh*, 97.
6. Where a party was in possession under a decedent, and took a lease, after his death, from the administrator, whether through ignorance of the law or otherwise, the lease was void, and the tenant remained under his old lease as tenant from year to year, by holding over. *Id.*
7. A tenant in paying debts of the estate out of the rents is a mere volunteer; and if at the request of the administrator, his recourse must be to the latter, and he has no defence to an action brought by the guardian of the minor heirs for recovery of the rent. *Id.*
8. The 34th section of the Act of 24th February, 1834, is a rule of *action*, and not of *lien*, to the creditors of a decedent. *Sample* v. *Barr*, 457.
9. Since the Act of 1834, the debt must be established against the widow, heirs, or devisees, before it is levied on the real estate of the decedent, whether the sale be made before or after the expiration of five years from the death of the decedent. *Id.*
10. The object of the provision is to enable the widow and heirs, or devisees, to contest the *debt*, and not the *lien*, of the creditor. *Id.*
11. The rule is equally obligatory upon the creditor where the estate has been devised subject to the payment of debts; and a sale without a compliance with the Act in this respect, will confer no title on the purchaser. *Id.*

DEED.
EVIDENCE, 8.
1. The plaintiff contracted for the purchase of real estate, paid for it, and afterwards assented by parol, that the deed contracted for should be made by the vendor to the defendant in consideration of the latter assuming certain liabilities for plaintiff. The deed was made accordingly: *Held*, that the deed so made is to be regarded as the deed of the plaintiff himself, and that the legal title passed by it to the defendant. *Myers* v. *Myers*, 100.
2. In such case the defendant is not in possession under a mere parol title. He has the legal estate; and may rebut any supposed equity of the plaintiff without violating the statute of frauds. *Id.*
3. If defendant fail to perform his agreement, an action will lie for damages. But a party who delivers a deed without taking a mortgage, or otherwise securing a lien for the purchase-money, by written evidence of it, cannot enforce the performance of the contract by ejectment. *Id.*
4. The separate deed of a married woman, conveying her real estate is void. *Thorndell* v. *Morrison*, 326.

Digitized by Google

www.libtool.com.cn

DEED.

5. Such deed is equally void though her husband had previously abandoned her. *Thorndell* v. *Morrison*, 326.

6. The Act of 11th April, 1848, confers no power upon a *feme covert* to make a valid conveyance of her real estate, unless her husband joins in the deed. *Id.*

DEMURRER.

An order of the Court sustaining a demurrer to a declaration, is in substance a judgment that the plaintiff take nothing, and the defendant go without day, and have his costs. *Wood* v. *Anderson*, 407.

DEVISE.

ELECTION.
ORPHANS' COURT, 2.
SPECIFIC PERFORMANCE, 1, 2.
WILL, 1, 4, 5, 6, 8, 9, 10.

An agreement to devise land to a grandson, in consideration of past services and the payment of an annual sum during the lives of devisor and wife, followed by the execution of a will making such a devise, will not vest the title in the devisee during the life of the devisor, where no provision for the delivery of possession prior to his death is contained in the will or the accompanying agreement. *McCue* v. *Johnston*, 306.

DONATION LANDS.

1. Extracts from the general draft of donation lands and the donation land book, in the land office, duly certified, are legitimate evidence to show title out of the Commonwealth. *Jennings* v. *McDowell*, 387.

2. After the lapse of fifty-six years, a sale of a donation tract of land for non-payment of taxes will be sustained against an intruder, in the absence of all evidence tending to prove that the donee was living at the time the taxes were assessed, or had ever claimed the land, or exercised acts of ownership over it. *Id.*

3. In a contest between a purchaser at treasurer's sale and an intruder, evidence that portions of the tract sold were occupied in sugar-making in the spring of the same year the taxes were assessed, will not invalidate the sale. *Id.*

EJECTMENT.

1. A party who delivers a deed without taking a mortgage, or otherwise securing a lien for the purchase-money, by written evidence of it, cannot enforce the performance of the contract by ejectment. *Myers* v. *Myers*, 100.

2. Ejectment is a possessory action, and the plaintiff cannot recover, in this form, land of which he is in the actual possession at the time. *Kribbs* v. *Downing*, 399.

3. One trial and judgment in an ejectment to enforce or rescind a contract for the sale of land, is conclusive of the rights of the parties, whether the judgment was entered on the verdict of a jury, or on an award of arbitrators. *Amick* v. *Oyler*, 506.

ELECTION.

1. Where land is devised to executors to be sold, and the proceeds divided among legatees, the latter, if all of them consent, may take the land instead of money. *Shallenberger* v. *Ashworth*, 152.

2. The husband in such case may elect in place of his wife, and she becomes the owner of the fee, subject to his life estate. *Id.*

3. The land is substituted for the money, and vests in the person previously entitled to the proceeds. *Id.*

4. Where the wife elected to take land instead of money, in presence

Digitized by Google

www.libtool.com.cn

ELECTION.
of her husband and with his assent, his subsequent entry into the possession of the land must be regarded as an entry under the title of the wife, and not adverse to it. *Shallenberger* v. *Ashworth*, 152.

5. Upon the husband's death in possession in right of his wife, a right of action accrued to the heirs of the wife, and the statute of limitations did not begin to run till that period. *Id.*

6. Where a person accepts a legacy bequeathed, it is an election to stand by the provisions of the will. *Fulton* v. *Moore*, 468.

ENTRY.
ELECTION, 4.

1. An entry by the owner, upon land in the adverse possession of another, in order to be effectual in tolling the statute of limitations, must not be accidental, equivocal, or by invitation of him in possession, but to regain a pedal possession of the land inconsistent with the title of the occupier. *Hood* v. *Hood*, 417.

2. Such an entry made by an agent of the owner must be with the *avowed* object of claiming it for his principal, which avowal may be expressed in words or indicated by an act equally significant. *Id.*

3. Entering and surveying off a part of the tract for another, would be such an act of notorious dominion as would arrest the running of the statute. *Id.*

EQUITABLE TITLE.
TENANTS IN COMMON, 1.

EQUITY.
JUDGMENT, 5.
SPECIFIC PERFORMANCE.

1. When several persons have a joint or common interest in an estate, one cannot purchase an encumbrance or an outstanding title, and set it up against the rest for the purpose of depriving them of their interests. *Weaver* v. *Wible*, 270.

2. Where a man was in possession of a lot under a parol contract, and built a house upon it, and died in possession, the law cast the inheritance upon his children; and the widow, who came into possession through him and under his title, could not repudiate the contract, and purchase the title for herself. *Id.*

ERRORS AND APPEALS.
CERTIORARI, 1.
FRAUDULENT CONVEYANCE, 2.
REVERSAL, 1.

1. To submit a fact set up by the defence to the jury, of which there was no evidence, and which the plaintiff disproved, was error. *Lower* v. *Clement*, 63.

2. The decision of the District Court of Allegheny county, on an application to open a judgment by confession, is not the subject of revision in this Court. *McKee* v. *Sanford*, 105.

3. Consent of parties cannot give this Court a jurisdiction which the law has placed in the discretion of Courts of original jurisdiction. *Id.*

4. This Court will not reverse a judgment for error in an immaterial matter, and the party complaining must show, not only that an error has been committed, but that he has been injured by it. *Morgan* v. *Weir*, 119.

5. This Court will not notice assignments of error, unless they are made in conformity with the rules of Court. *Brown* v. *Brooks*, 210.

6. Where a party sues out a writ of error, and the judgment is affirmed, and the record is remitted to the Court below, where the costs are taxed, he cannot maintain another writ of error to such taxation. *Gibson* v. *Cummings*, 231.

Digitized by Google

www.hanhan.com.cn

ERRORS AND APPEALS.

7. A party can have but one writ of error to the same judgment. *Gibson* v. *Cummings*, 231.

8. It is the duty of the counsel of a plaintiff in error who has excepted to deeds and evidence below, and who wishes to have the rulings of the court upon them reviewed, to present the deeds and evidence in his paper-book, in an appendix; and if not presented in some way, the court will dismiss his exceptions without further notice, and assume that the points excepted to have been correctly ruled below. *Philadelphia* v. *Riddle*, 259.

9. This Court will not notice an assignment of error to the charge of the Court below, which does not conform to the rules of this Court, by setting out the exact language of the instruction complained of in the specification of error. *Hutchinson* v. *Campbell*, 273.

10. A judgment will not be reversed unless it is apparent from the record that an error has been committed, and that such error materially injured the rights of the party complaining. *Allegheny City* v. *Nelson*, 332.

11. To have a question reviewed in this Court, all the evidence given in the Court below, bearing upon the point, must be furnished in the paper-book. *Id.*

12. An instruction to the jury that fraud could not be found by them "except upon clear and undoubted proof of it," is error. *Abbey* v. *Dewey*, 413.

13. If the party alleging fraud produced such evidence of the fact as the jury could reasonably and safely rest their consciences upon, it was sufficient. *Id.*

14. It is not error for the Court below to answer propositions submitted to them in the language employed by the Supreme Court in deciding similar points. *Hood* v. *Hood*, 417.

15. If the plaintiff in error fails to put upon the paper-book the evidence, the admission of which he assigns for error, or that which preceded it as the ground for its introduction, this Court will presume that it was rightly admitted. *Himblewright* v. *Armstrong*, 428.

16. On an appeal, this Court will only review the points made and adjudicated upon in the Court below. *Weaver's Estate*, 434.

ESCHEAT.

1. Where one of four devisees under a will died without heirs, and her estate escheated to the Commonwealth, and the remaining devisees and another divided the land among them and occupied it in severalty, the Commonwealth having done no act to ratify the partition, the interest of the state would remain an undivided interest. *Holmes* v. *Pattison*, 484.

2. The Commonwealth's interest, being unaffected by the statute of limitations, would remain, as at the death of the co-devisee, an undivided interest in the whole tract devised, and the same right would pass to her grantees of such escheated estate. *Id.*

3. An intruder being in the actual adverse possession of the part allotted to him under the partition for more than twenty-one years, would acquire a title by the statute of limitations to three undivided fourth parts of the portion of the land so occupied by him. *Id.*

ESTOPPEL.

Bond, 2.

Decedent, 3.

1. No admission of a debt by a party, much less by an agent, can be strong enough to preclude the person from showing that it was made in ignorance of his rights. *Rowen* v. *King*, 409.

2. If a married woman in consideration of a release of real estate to her, joins her husband in conveying to the releasor a different part of her real estate, without a separate acknowledgment, and she and her

Digitized by Google

www.libtool.com.cn

ESTOPPEL.
husband afterwards convey the released estate, by a deed accompanied with a separate acknowledgment, she and her heirs will be estopped in equity from taking advantage of the defect in the first conveyance. *Fulton* v. *Moore*, 468.

3. Where a man is executor of a will in which real estate is devised, and permits the devisee to remain in possession of it, and attests as a witness a conveyance of it by the devisee, he would be estopped from claiming it as his own. *Id.*

EVIDENCE.
CORPORATION, 1.
DONATION LANDS, 1, 3.
LIMITATION OF ACTIONS, 10.
PAROL EVIDENCE, 1–3.
WITNESS.

1. If the relevancy of facts offered in evidence depends upon special scientific principles, they must be offered in connexion with, or after evidence is given of, the principles that reveal their importance, or their relevancy cannot appear. *McCandless* v. *McWha*, 95.

2. Where scientific evidence had been admitted to show that the broken limb of a man of intemperate habits is more difficult of cure than one of temperate habits, and testimony was given as to the plaintiff's habits for a period of seven years, and further testimony was offered to show the continuance of like habits for a longer period: *Held*, that the Court properly refused to allow the patient's habits and character to be put in issue for an indefinite period, and it was enough, if not too much, to lay it open for some years. *Id.*

3. Proof of the handwriting of the maker of a promissory note, and the testimony of a witness that he had corresponded with "Bradner and Co. of New York," and from his knowledge of their signatures thus acquired, his opinion was that the endorsement was made by "Bradner & Co.," was sufficient to let the note go to the jury. *Clark* v. *Freeman*, 133.

4. The execution of the note, possession of it by the plaintiff, evidence of the handwriting of the endorser, in the absence of evidence of any other *firm of the same name*, is *prima facie* evidence of identity. *Id.*

5. Where a suit was brought here, for goods sold and delivered, and on a promissory note, and the defendant pleaded a former recovery, and gave in evidence a record and judgment in New York, where the claim was upon an account for goods sold and delivered: *Held*, that the *onus* lay upon the defendant to show that the note sued for was included in the judgment in New York; and that, failing in this, the Court should have instructed the jury to find for the plaintiff. *Cummings* v. *Colgrove*, 150.

6. Where testimony has been heard without objection, it is in the discretion of the Court trying the cause, to strike it out, if it should afterwards appear that the witness was incompetent, or the testimony inadmissible; but it will only be done where the fact upon which the exclusion is based was unknown, and could not with ordinary diligence have been known to the party, at the time of its admission. *Robinson* v. *Snyder*, 203.

7. After the admission of evidence without objection, there can be no bill of exceptions to its admission, *nunc pro tunc*. The only way in which it can be reviewed in this Court, is, in the shape of a written prayer to the Court, to instruct the jury to exclude it from their consideration, in making up their verdict. *Id.*

8. An old unrecorded, but technical and duly acknowledged deed from husband and wife to a third party as trustee, which deed was laid aside among the husband's or wife's papers, and never handed over nor known to the trustee, and which (the land conveyed by it having been afterwards

Digitized by Google

sold by the husband and wife for the husband's use and benefit) could not operate as a conveyance, was held to be evidence of an intention on the part of the husband to settle his wife's land on her, and worthy of regard as showing a consideration for subsequent conveyances that were made for her benefit. *Philadelphia* v. *Riddle*, 259.

9. Where, upon proof of loss of a deed, secondary evidence of its contents has been admitted, it is not error for the Court to instruct the jury that, if they believe the deed was within the power of the party, the presumption of law is, if the deed were produced it would make against him. *Church* v. *Church*, 278.

10. Evidence of the customs and usages of a bank are not competent of themselves to establish a fact in favour of the corporation; but as corroborative or explanatory of facts already proved, may be received and submitted to the jury. *Meighen* v. *The Bank*, 288.

11. Entries in the books of a bank, supported by the oath of the party who made them, are competent evidence for the bank. *Id.*

12. In all civil cases, involving merely the right of property, the fact of marriage may be proved by long-continued cohabitation as man and wife. *Thorndell* v. *Morrison*, 326.

13. An act, proved to have been done by a party at a time when it was against his interest to do it, may afterwards be given in evidence in his favour or those claiming under him. *Allegheny City* v. *Nelson*, 332.

14. The acts of the officers of the state in appraising, granting a warrant, and surveying an island in a navigable river, are *prima facie* evidence against a stranger that the island was subject to appropriation in that manner. *Id.*

15. A special Act of Assembly for the survey of a particular tract of land, is not such a public statute as the Courts are bound to take notice of and expound, without requiring its production. *Id.*

16. Where the owner or officer of a boat delivers a bill of lading contemporaneously with the delivery of goods, being a declaration accompanying an act, it is part of the transaction, and is evidence of ownership in the person, whose property the goods are stated to be in the bill of lading. *Jordan* v. *Wilson*, 390.

17. Admissions by an agent, when he is about the doing of some act within the scope of his delegated authority, are evidence against the principal, but naked declarations which are not part of any *res gesta* are not admissible. *Patton* v. *Minesinger*, 393.

18. Letters, written by one who was the clerk of a party, not relating to the general business in which he was employed as clerk, must be taken to contain merely the declarations of a third person, until they are proved to have been written by the directions of the party. *McGuire* v. *Faber*, 436.

19. Where there are nine devisees and legatees under a will, three of whom are contesting the will in an issue of *devisavit vel non*, they cannot give in evidence, on the trial of such issue, the declarations and admissions of three of the remaining six, to prove fraud or imposition practised by them upon the testator. *Clark* v. *Morrison*, 453.

20. The interests of legatees and devisees under a will are not joint, but several; and hence the declarations of one cannot be given in evidence to affect or prejudice the others. *Id.*

21. Whether any particular part of the evidence is weak or strong, is a matter for the consideration of the jury, and not for instruction by the Court as a matter of law. *Kiester* v. *Miller*, 481.

22. A party to a suit cannot read in evidence his own answer to a bill of discovery filed in aid of the action. *Clark* v. *Depew*, 509.

23. A copy of a record from another state, certified to be a copy of the *judgment roll*, is sufficiently certified. *Id.*

Digitized by Google

EXECUTION.
ATTACHMENT, 1, 2.
EXEMPTION, 1–3.
JUDGMENT, 1–3.
SHERIFF'S SALE, 2, 3, 5, 6, 7, 8.
WAIVER, 1.

1. An execution is intended, not to secure, but to enforce payment of a debt. *Truitt* v. *Ludwig*, 145.

2. Where an execution-creditor after making a levy on a stock of goods, takes a bond with security for the amount of the debt, conditioned for its payment in several instalments at future periods, and that the goods levied shall not be removed without consent of the sheriff, and then stays proceedings upon his execution, leaving the debtor in possession of the goods, and permitting him to buy, sell, and do business with them as before, the lien of the levy is postponed in favour of a subsequent execution-creditor, who seizes the goods before actual possession taken under the first execution. *Id.*

3. An *alias fi. fa.* placed in the sheriff's hands by the first execution-creditor, before the first instalment on his bond becomes due, and after the goods had been seized on a subsequent execution, will not revive the lien of the first execution, or create a new one having priority over the subsequent execution-creditor. *Id.*

4. By accepting a bond with security payable in instalments for the debt, and staying execution, the execution-creditor parts with the right of seizing the goods before the maturity of the debt under the new contract. *Id.*

5. If an execution-creditor, after levy, leaves the goods in the hands of the debtor, who disposes of them, this is a satisfaction of his execution to the value of the goods disposed of. *Id.*

6. Where a defendant in an execution issued upon a judgment for a debt contracted prior to the 4th of July, 1849, consented to a levy on articles exempt by the Act of 1836, it was competent for him to withdraw such consent before the day of sale; and the officer selling such articles after notice of such withdrawal, is liable to an action for so doing. *Hutchinson* v. *Campbell*, 273.

7. A plaintiff who holds several judgments against a debtor, and different sureties or endorsers, may, in the absence of any agreement to the contrary, issue execution upon *any* one of them, and the proceeds of personal property realized upon such execution will be applied to the debt upon which it issued. *Marshall* v. *Franklin Bank*, 382.

8. A sale of partnership property, on execution issued upon a judgment confessed by one partner alone against the firm for a partnership debt, will vest a good title to the property in the purchaser; and such execution being the first lien will be entitled to the proceeds of sale. *Grier* v. *Hood*, 430.

EXECUTORS AND ADMINISTRATORS.
DECEDENT, 1, 4.
ORPHANS' COURT, 1, 5.
WIDOW, 1, 2.

1. If an executor includes in the inventory his own note to the testator, it does not preclude him from making defence to it; nor is this such an acknowledgment of the debt as takes it out of the statute of limitations. *Bell's Estate*, 92.

2. Where several distributees agreed in writing that the administrator of their intestate should settle certain obligations and claims in favour of the estate, against one of the distributees, upon such terms as should seem most desirable to him, and he believing them to have been paid, delivered them up to be cancelled, the administrator could not be afterwards charged with the amount of such obligations in the settlement of

Digitized by Google

www.libool.com.cn

EXECUTORS AND ADMINISTRATORS.
his account, at the instance of one who was a party to the agreement. *Black's Appeal*, 238.

3. In settling the dispute, he was not an arbitrator, but acting in the line of his duty as an administrator, and as such is protected by the agreement of the heirs, and not responsible for an error of judgment. *Id.*

4. Administrators, who have sold property of the decedent to a creditor of the estate, may set off the amount against the *pro rata* dividend of such creditor, upon a distribution of the funds in their hands in the Orphans' Court. *Grier and Warner's Appeal*, 351.

5. Where a vendor under articles of agreement dies, the right to receive the purchase-money passes to his personal representatives. *Sutter's Heirs* v. *Ling*, 466.

EXEMPTION.
DECEDENT, 1–4.
EXECUTION, 6.
WIDOW, 1, 2.

1. The defendant in an execution had waived his right to the benefits of the Exemption Act of 1849, and afterwards gave notice in due time to the sheriff that he claimed the exemption. There were several other judgment creditors of the defendant who claimed distributive shares. The auditor to whom the case was referred, reported 1st, in favour of a creditor whose claim originated anterior to 1849, $28.44. 2d, in favour of the creditor in whose claim the waiver had been made, $43.35, and awarded the balance of the fund, $40.50, to the defendant on his claim of exemption; and that all other lien creditors were barred by the claim of exemption. The fund arose from the sale of defendant's real estate: *Ordered*, that the decree of the Court be reversed, and that the fund be distributed according to the report of the auditor. *Johnston's and Sutton's Appeal*, 116.

2. A demand of an appraisement under the Act of 1849, by the defendant in an execution, after the property levied has been set up for sale, and the biddings have begun, is made too late. *Rogers* v. *Waterman*, 182.

5. Where the plaintiff knew that his property was advertised before the time appointed for the sale, he was bound to find the constable and demand his appraisement before the hour of sale, and before it commenced; and, failing in this, his right to the exemption was waived. *Id.*

4. A debtor who desires to have the benefit of the exemption under the Act of 1849, must claim it, and he waives all right to it by remaining silent. *Dodson's Appeal*, 232.

5. Where a debtor's land was levied upon, and he claimed the exemption, and an appraisement was made, but no sale effected under that execution, and afterwards another creditor levied upon a part of the same land and sold it, without the debtor having given the notice and made the claim upon the latter execution; *Held*, that he had waived his right, and was not entitled to claim $300 out of the proceeds of the sale. *Id.*

6. Where a creditor held the promissory note of his debtor for a debt contracted prior to 4th July, 1849, which he delivered up, and it was cancelled, he receiving in its stead a single bill with warrant of attorney to confess judgment for the amount due, the judgment entered upon the same was not subject to the exemption of the Act of 9th April, 1849. *Weaver's Estate*, 434.

FEIGNED ISSUE.

1. Where an issue is directed, the Court should order who are to be the parties plaintiff and defendant, and the cause should be put in form by the counsel of the parties, by filing a declaration, plea, and joinder in issue. *Muhlenberg* v. *Brock*, 517.

2. Where a petition was presented for an issue to try disputed facts in

Digitized by Google

FEIGNED ISSUE.
relation to the distribution of the proceeds of a sheriff's sale, and no other pleadings were filed or issue formed between the parties, except the petition and the order for an issue, this Court will send the record back, to have an issue formed, and the facts found in regular and legal form. *Muhlenberg* v. *Brock*, 517.
3. In an issue directed for the purpose of trying disputed facts, the Court cannot withdraw the whole case from the jury, and decide the law and facts themselves. *Id.*

FENCES.
1. Where there is in fact a partition fence, the duty of contribution to maintain it exists—and neither party can excuse himself from this duty by alleging that the line is in dispute. *Stephens* v. *Shriver*, 78.
2. The jurisdiction of a justice of the peace under the fence law to enforce contribution is not ousted by raising a question of title to the land. *Id.*

FOREIGN JUDGMENT.
1. The plaintiff in a foreign judgment has a right to pursue his remedy there and here, at the same time, until he obtains satisfaction. *Hogg* v. *Charlton*, 200.
2. In taking defence to an action of debt on a foreign judgment, defendant is bound, when required by the rule of court, to file a sufficient affidavit of defence. *Id.*

FORMER RECOVERY.
1. Where a suit was brought here, for goods sold and delivered, and on a promissory note, and the defendant pleaded a former recovery, and gave in evidence a record and judgment in New York, where the claim was upon an account for goods sold and delivered: *Held*, that the *onus* lay upon the defendant to show that the note sued for was included in the judgment in New York; and that, failing in this, the Court should have instructed the jury to find for the plaintiff. *Cumings* v. *Colgrove*, 50.
2. A recovery in a suit upon a contract for the sale of goods payable in instalments, in which suit the plaintiff counted for an entire sum, is a conclusive bar to another suit brought on the same contract to recover a sum which was included in the former declaration. *Corbet* v. *Evans*, 310.

FRAUD.
1. When a person against whom a fraud has been perpetrated lies by for twenty-one years without causing it to be investigated, he will not then be permitted to show it: for after so long an acquiescence the presumption of law is conclusive that no fraud was committed. *Kribbs* v. *Downing*, 399.
2. A purchaser at sheriff's sale, who resorts to any trick or device to get the property at an under value, and thereby purchases it for less than it would have sold for at a fair sale, renders the title so acquired utterly void. *Abbey* v. *Dewey*, 413.
3. A fraudulent intent, or an unsuccessful effort to get the land for less than it is worth, is not enough to avoid the title of the purchaser. *Id.*
4. Where the question is whether the purchaser at sheriff's sale committed such a fraud as will vitiate his title, evidence of the value of the property is pertinent and proper. *Id.*
5. An instruction to the jury that the fraud could not be found by them "except upon clear and undoubted proof of it," is error. *Id.*
6. If the party alleging the fraud produced such evidence of the fact as the jury could reasonably and safely rest their consciences upon, it was sufficient. *Id.*
7. Where the vendors of land transferred the amount due on the article

Digitized by Google

www.libtool.com.cn

FRAUD.
of agreement to a firm, in trust, to receive and pay over the instalments to certain creditors of the vendors, named in the transfer, neither the vendors nor their creditors will be affected by any fraudulent contrivance between one of the trustees and the vendees, in which they did not participate. *McGuire* v. *Faber*, 436.

8. In an action upon a bond, the obligor cannot prove by parol and set up as a defence, that the bond was signed by him under an arrangement with the obligee, for the purpose of inducing the wife of the latter to execute a conveyance to a third person, and with the understanding that it should be delivered up and cancelled, when she should have executed the deed. *Hendrickson* v. *Evans*, 441.

9. Where the fraudulent transaction does not appear on the face of the bond, but is interposed by way of defence by the obligor, *he* becomes the *actor*, and the maxim *in pari delicto melior est conditio defendentis*, applies against him and not in his favour. *Id.*

FRAUDS, STATUTE OF.
PAROL EVIDENCE, 1.

FRAUDULENT CONVEYANCE.
TRUST, 1–2.

1. If a deed is impeached on the ground of being a voluntary conveyance, made to hinder, delay, and defraud creditors, and there are any facts and circumstances in evidence from which the jury could draw such an inference, they are the proper tribunal to pass upon the character of the conveyance. *Graham* v. *Smith*, 323.

2. Nor is it error in such case for the judge below to express an opinion upon the facts, if it be not given in the form of a binding direction to the jury. *Id.*

3. A conveyance of property, to be fraudulent as to creditors, should bear such a ratio to the indebtedness, as to tend directly to defeat the claims. *Clark* v. *Depew*, 509.

4. Where the attesting witnesses to a deed proved that no money was paid in their presence, at the time of its execution; the vendor being indebted to an amount equal to one-fourth the value of his property, the bulk of which was included in the deed; and the creditors being in pursuit of their claims, and numerous suits pending against him; and notice having been given to the vendee that he would be required to prove a consideration; it was *Held*, that it was incumbent upon the vendee to prove a consideration by other evidence than the vendor's receipt. *Id.*

GRANT.
RIPARIAN OWNERS, 1.

GUARANTEE.

1. Where a note is transferred by a debtor to a creditor in payment of a debt, with a guarantee that it is good as gold, and will be paid when due, and it proves worthless, the contract is broken as soon as made, and the creditor is under no obligation to pursue the note. *Koch* v. *Melhorn*, 89.

2. To warrant a debt as good as gold and silver, is to warrant that it is founded on a legal consideration, that the debtor is of competent ability, and that the debt will be paid on demand. *Id.*

3. Where a debtor had transferred a note to his creditor, which he guarantied to be good, payment of which was refused by the maker at maturity, and the creditor demanded payment of the guarantor, who asked him to wait the event of a suit then pending, and he would be sure to be paid, and he waited accordingly: *Held*, that the creditor could recover against the debtor on the guarantee without previous resort to the maker of the note. *Id.*

Digitized by Google

GUARANTEE.
4. In an action upon a guarantee, where a judgment was recovered against the principal debtor, and an execution issued and returned "*nulla bona*," the proceedings are *prima facie* evidence of the insolvency of such principal. *Brown* v. *Brooks*, 210.
5. The question whether due diligence has been used by the creditor against the principal, is a question of fact for the jury; and if it depends upon whether the debtor had any personal estate, the existence of the fact is for the jury, its legal effect is to be determined by the Court. *Id.*
6. Where in an agreement for the sale of goods, it was stipulated that a part of the purchase-money should be paid in "good obligations," and certain notes were tendered and received and receipted for, "on payment of goods," there is no guarantee of the solvency of the makers of such notes. *Corbet* v. *Evans*, 310.

HUSBAND AND WIFE.
ELECTION, 1, 2.
MARRIAGE, 1.
MARRIED WOMAN.
TRUST, 6, 8.
1. The estate of a husband in his wife's lands, is barred by an actual adverse possession of it by a stranger for twenty-one years, during the life of the wife. *Crow* v. *Kightlinger*, 343.
2. The death of the wife after the statutory bar has thus intervened, gives him no new right of entry or action. *Id.*
3. Nor can he avoid the bar of the statute by bringing the action during his wife's life, in their joint names. *Id.*

IDENTITY.
EVIDENCE, 4.

INDEMNITY.
DAMAGES, 3, 4.

INJUNCTION.
COMMON, 6.
NUISANCE, 1.

INTERFERENCE.
LANDS, 8.
LIMITATION OF ACTIONS, 17, 19.
SURVEY, 5.

INTERPLEADER.
1. Where, in a suit to recover money, the sum was claimed by a third party, and he voluntarily appeared and interpleaded, and the amount was paid to him by the stakeholder, there was no error in directing the jury to be sworn between the plaintiff and the claimant, omitting the original defendant. *Brownfield* v. *Canon*, 299.
2. A verdict having been rendered for the plaintiff, the judgment was properly entered against such claimant alone. *Id.*

INVENTORY.
EXECUTORS AND ADMINISTRATORS, 1.

ISLANDS.
1. The acts of the officers of the state in appraising, granting a warrant, and surveying an island in a navigable river, are *prima facie* evidence against a stranger that the island was subject to appropriation in that manner. *Allegheny City* v. *Nelson*, 332.

Digitized by Google

www.libtool.com.cn

ISSUE.
FEIGNED ISSUE.

JUDGMENT.
AGREEMENT, 1.
AMENDMENT, 2, 3.
DEMURRER, 1.
FOREIGN JUDGMENT.
LIEN, 1, 2.
MARRIED WOMAN, 1–2.
PARTNERSHIP, 5, 6.

1. A judgment in an action of covenant, for the unpaid purchase-money, against one of the vendees, by articles of agreement, and a levy and sale of the land upon proceedings on that judgment, would not divest the estate of the other vendee in the land. *Arnold* v. *Cessna*, 32.

2. Such judgment would not be a lien on the interest of the vendee, who was not a party to the suit. *Id.*

3. Where the defendant in an execution had no title to the land in question when the plaintiff's judgment was entered, nor when the sheriff's sale was made, it was error in the Court not to instruct the jury peremptorily that plaintiff could not recover. *Phillips* v. *Zerbe Run and Shamokin Improvement Company*, 56.

4. A condition annexed to a judgment, by which it is to be released on payment of a sum of money, is in the nature of an injunction to stay proceedings at law. *Harmar* v. *Holton*, 245.

5. An uncertainty in the condition does not avoid the judgment, for it may be rendered certain by investigation on the equity side of the Court, or through the medium of a jury. *Id.*

6. Where time is given for the payment of purchase-money, the amount should be ascertained, and stated on the record, before the time begins to run. *Id.*

7. Until the amount be ascertained it is impossible to perform the condition by tendering it, and until after the amount is liquidated, the Act of 1846 does not operate upon the case. *Id.*

8. A judgment against a firm is a lien on the separate real estate of the partners, and is entitled to priority in the distribution of the proceeds of sale of such separate real estate, over a subsequent judgment of a separate creditor of the partner whose real estate was sold. *Cumming's Appeal*, 268.

JURISDICTION.
ERRORS AND APPEALS, 3.

JURY.
ROADS, 3, 4.
TRIAL, 1–2.

JUSTICE OF THE PEACE.

1. In a suit pending before a justice, where the parties appear and submit their proofs and allegations, the plaintiff may become nonsuit at his own motion, or may if he please discontinue or withdraw his action; and such proceeding will be no bar to another suit for the same cause of action. *Blair* v. *McLean*, 77.

2. The jurisdiction of a justice of the peace under the fence law to enforce contribution is not ousted by raising a question of title to the land. *Stephens* v. *Shriver*, 78.

3. A judgment confessed on an amicable action entered before a justice of the peace for a sum exceeding $100, is good without the *personal* appearance of the plaintiff. It is sufficient if he appear by agent. *Truitt* v. *Ludwig*, 145.

Digitized by Google

JUSTICE OF THE PEACE.

4. Where the plaintiff's claim before the justice was for $25, in trespass, and referees awarded him $11, the defendant has no right of appeal under the Acts of 1814 or 1845. *Cook* v. *Dunkle*, 340.

5. In proceedings under the Act of 3d April, 1830, relative to landlord and tenant, the affidavit of the defendant that the title to land will come in question, will not oust the jurisdiction of the justices; it must be proved like any other fact in the cause. *Essler* v. *Johnson*, 350.

6. Where the judgment of the justices is affirmed on *certiorari*, it becomes a judgment of the Court of Common Pleas, from which the writ of *habere facias possessionem* may issue. *Id.*

7. A judgment entered by a justice of the peace upon the confession of the party or his agent, is subject to an appeal. *Rowen* v. *King*, 409.

LANDLORD AND TENANT.

Lease.

1. In proceedings under the Act 3d April, 1830, relative to landlord and tenant, the affidavit of the defendant that the title to land will come in question, will not oust the jurisdiction of the justices; it must be proved like any other fact in the cause. *Essler* v. *Johnson*, 350.

2. Where the judgment of the justices is affirmed on *certiorari*, it becomes a judgment of the Court of Common Pleas, from which the writ of *habere facias possessionem* may issue. *Id.*

LANDS.

Donation Lands.

Islands.

Survey.

1. Under the Act of the 30th December, 1786, continuity of actual residence and possession is the vital principle of a pre-emption right, and a part of its legal definition. *Jacobs* v. *Figard*, 45.

2. If the settler should be compelled to quit his residence on the land by any extraordinary or occasional occurrence, he must return as early as convenient, or it will be deemed an abandonment: he cannot substitute *claim* for *residence*, and *convenience* for prosecution of the title. *Id.*

3. By returning "as early as convenient," the law means, as early as he reasonably can. *Id.*

4. To keep possession without a residence, for the purpose of preventing others from making a settlement on the land, is not a compliance with, but a fraud upon the law. *Id.*

5. Where the question of abandonment depends upon mere lapse of time, and there is no dispute as to the length of it, it is a question of law to be decided by the Court, without regard to the intention of the party. *Id.*

6. Relinquishment of actual residence for five years and nine months, without any circumstance to bring the case within the equity of the statutory excuses, would be an abandonment irrespective of the intention of the claimant. *Id.*

7. A holder of land by warrant and survey, may, with the sanction of the Board of Property, contract the lines of his survey and throw out part of his land, so that he do not prejudice other interests; and the part excluded relapses into the general mass of public lands, and may again be appropriated by warrant and survey, as vacant land. *Carbon Run Improvement Company* v. *Rockafeller*, 49.

8. Where the part thrown out lies within the lines of another survey, it does not become vacant land, but relieves that survey from the consequences of an interference. *Id.*

9. An older survey cannot be changed, contracted, or enlarged by the adjustment of the lines of a junior survey. *Id.*

10. Whether a line was actually run upon the ground, or left by the

Digitized by Google

www.libtool.com.cn

LANDS.
surveyor as an open line, was a question of fact for the jury, and their finding will not be reviewed in this Court. *Carbon Run Improvement Company* v. *Rockafeller*, 49.

11. Actual residence is absolutely indispensable to the validity of a title by settlement, and this must be continued until the title is taken out of the land office. *Smith* v. *Beck*, 106.

12. Improvements on the land, and the erection of a dwelling-house, though by mistake, on an adjoining tract, will not dispense with the imperative requisition of actual residence. *Id.*

13. Residence by tenants will continue the pre-emption right. *Id.*

14. If actual residence be discontinued for five years, and not accounted for, it is an abandonment, and should be so pronounced by the Court as matter of law. *Id.*

15. *Quære*, if a shorter period will produce the same effect. *Id.*

16. If a settler entitled to 400 acres, sell a part of his claim, including his residence, and separate it by survey and possession from the residue, the latter is abandoned, unless a separate residence be commenced and continued thereon within a reasonable time. *Id.*

17. If a settler divide and sell portions of his right to several persons, one of whom keeps up an actual residence on his part, and the purchaser of another part does not reside thereon, a presumption of abandonment may arise against the latter in consequence of his non-residence, and the Court erred in affirming the contrary doctrine. *Id.*

LEASE.
DECEDENT, 6, 7.

1. A provision in the lease of a coal-bank that the lessee shall be treated as having abandoned his lease, if he shall suffer the bank, by any fault of his, to lie idle for a year when it would yield coal, does not apply if he be actually taking coal out of the bank by any means of access leading to the coal. *Tiley* v. *Moyers*, 397.

2. The lease of a coal-bank will carry with it the drifts, platforms, and hoppers used in working it, as appurtenant, but the principal thing granted is the right to mine coal, and not the drift or passage leading to the mine. *Id.*

3. A written lease of lands, not exceeding three years, may be rescinded by parol. *Kiester* v. *Miller*, 481.

4. No express consideration is necessary to support such an agreement to rescind; the agreement of one party is sufficient to make that of the other valid. *Id.*

5. The declarations of a landlord that the lessee had given up the premises, coupled with an unsuccessful effort to lease them to another tenant, are not *conclusive* evidence of a rescission of a lease. *Id.*

6. The removal of the tenant from the premises, and an unaccepted offer to deliver up the keys, was no evidence of the existence of an agreement for the termination of the lease. *Id.*

LEGATEE.
ELECTION, 1.

1. Where a person accepts a legacy bequeathed, it is an election to stand by the provisions of the will. *Fulton* v. *Moore*, 468.

2. Where the legacy was received in mistake, it might be refunded, but not after long acquiescence, and to the injury of third persons whose rights have intervened. *Id.*

LEVY.
EXECUTION, 1–5.
PAROL EVIDENCE, 3.

LICENSE.
PLANK-ROADS, 8.

Digitized by Google

LIEN.
CARRIER, 1.
DECEDENT, 8–11.
JUDGMENT, 1–3, 8.
SHERIFF'S SALE, 2.

www.libtool.com.cn

1. A mortgage, other than one given to secure the purchase-money of the mortgaged premises, recorded on the same day that a judgment is entered against the mortgagor, is not "prior to all other liens on the same property," and is divested by a sale of the premises under proceedings upon a subsequent judgment. *Magaw* v. *Garrett*, 319.

2. Where the record shows a judgment equal in point of time with the mortgage, to be a subsisting lien at the time of the sheriff's sale, and there is no proof of notice of its entire payment to the purchaser, he will take the premises divested of the lien of the mortgage. *Id.*

LIMITATION OF ACTIONS.
CONTRIBUTION, 1.
ELECTION, 5.
ENTRY.
RIPARIAN OWNERS, 2.

1. If an executor includes in the inventory his own note to the testator, it does not preclude him from making defence to it; nor is this such an acknowledgment of the debt as takes it out of the statute of limitations. *Bell's Estate*, 92.

2. Where the defendant refused to allow the plaintiff's claim to be deducted out of the purchase-money due to him by a third person, when requested so to do at the instance of the plaintiff, saying that the money received by him from the plaintiff was a *present*; that what he owed the plaintiff he would pay to the plaintiff himself, when he needed it, or when his necessities required: *Held*, that this was not an admission that he owed the plaintiff anything, nor such a promise as would take the case out of the statute of limitations. *Beck* v. *Beck*, 124.

3. Where a devisee goes into the possession of land claiming it under the devise, and keeps it undisturbed for twenty-one years, he has a title to it which nobody can question. *Stewart* v. *Stewart*, 234.

4. Other devisees or heirs who are dissatisfied with the quantity or location of the land, must make their claim before the statute runs over it, as after such a lapse of time the law will presume that it was designated and marked off to him by the other parties interested. *Id.*

5. Even where the possession has not been consistent with the devise, or the description in the will is ambiguous, after twenty-one years' possession, no new apportionment can be demanded. *Id.*

6. Nor will the fact that he entered into possession before the death of the devisor, who was his father, in anticipation of a devise to him, or under a gift from the latter, take the case out of the general rule; his keeping possession and claiming it under his father's will, was as distinct an act of hostility against the other devisees, as if he had claimed it under a deed from the devisor. *Id.*

7. To constitute a title to land under the statute of limitations, there must be twenty-one years' actual, adverse possession, continued without interruption. *Shaffer* v. *Lowry*, 252.

8. Where a man settled upon land, supposing it to be vacant, and died, leaving his widow and children in possession, and the owner of the legal title, before the occupant's title was complete under the statute of limitations, by threatening a resort to legal proceedings, induced the widow to surrender to him the possession; the possession being thus interrupted will arrest the running of the statute in favour of the heirs of the former occupant. *Id.*

9. Where there have been mutual accounts between the parties within

Digitized by Google

LIMITATION OF ACTIONS.
six years, the statute of limitations does not apply to any part of either account. *Chambers* v. *Marks*, 296.
10. In such case it makes no difference that both accounts were kept by one of the parties; but the credits, to prevent the operation of the statute, must be authenticated and proved to have been intended as a payment on the account. *Id.*
11. The estate of a husband in his wife's lands, is barred by an actual adverse possession of it by a stranger for twenty-one years, during the life of the wife. *Crow* v. *Kightlinger*, 343.
12. The death of the wife after the statutory bar has thus intervened, gives him no new right of entry or action. *Id.*
13. Nor can he avoid the bar of the statute by bringing the action during his wife's life, in their joint names. *Id.*
14. Where the defendant resided on an adjoining tract of land, and in 1821 designated his boundaries, including a part of another tract, and in 1836 the owner of the latter tract entered into the actual possession of it, it was not error for the Court to instruct the jury that the lapse of time was far too short to enable the defendant to hold the land under the statute of limitations. *Crum* v. *Burke*, 377.
15. The payment of the costs to the prothonotary, within six years before suit brought, by one who had assumed the payment of a judgment, is not such part payment of the debt as will take the case out of the operation of the statute of limitations. *Strawn* v. *Hook*, 391.
16. An intruder on land, one undivided fourth part whereof had escheated to the Commonwealth, having made a partition with the owners of the other three undivided fourth parts, and occupied the portion allotted to him in severalty for more than twenty-one years; acquired a title by the statute of limitations to three undivided fourth parts of the land so occupied; the Commonwealth's interest in the remaining undivided fourth part being unaffected by the statute. *Holmes* v. *Pattison*, 484.
17. Where a survey of unappropriated land has been made by competent authority, and the lines of an unauthorized junior survey interfere with it, possession of that part of the junior survey outside the lines of the previous one, unaccompanied by entry upon, or actual, visible, notorious, hostile and continued possession of the interfering part for twenty-one years, is not such adverse possession of such interference as will bar the right thereto of the holder of the title under the original survey. *Hole* v. *Rittenhouse*, 491.
18. Where there has been an actual possession taken by an intruder of any part of the land of another, under a *bona fide* claim accompanied with a survey or other designation of boundaries, and a use of the land within the boundaries so claimed—as farmers generally use their woodland—continued for twenty-one years, the intruder gains a title to all included within its lines. And it makes no difference whether such claim and use be according to the lines of surrounding surveys, or of the survey made for the true owner, or whether the boundaries are first marked by the intruder. *Id.*
19. To render a title by adverse possession valid, it is essential that there be an actual entry upon the land of the rightful owner, and an actual visible possession taken of some part of it. *Id.*
20. All surveys made, without authority from the owner, whether by the state or an individual, upon lands previously appropriated, are unauthorized and void, and necessarily unofficial. *Id.*
21. Where several surveys become vested in one owner, from that moment they are to be treated as one tract for all the purposes of disseisin and remedy. *Id.*

MALICIOUS PROSECUTION.
1. If a prosecutor has fairly submitted to his counsel all the facts that he

Digitized by Google

MALICIOUS PROSECUTION.
knows are capable of proof, and has acted *bona fide* on the advice given, he negatives, if not the malice, the want of probable cause, and is not liable to an action for malicious prosecution, even though the facts did not clearly warrant the advice and prosecution. *Walter* v. *Sample*, 275.
2. The application to counsel, and their opinion, to be available in establishing probable cause, must not be resorted to as a mere cover for the prosecution, but must be the result of an honest and fair purpose: and the statement made at the time by the prosecutor to his counsel must be fair and full, and consistent with that purpose. *Id.*

MARRIAGE.
In all civil cases, involving merely the right of property, the fact of marriage may be proved by long-continued cohabitation as man and wife. *Thorndell* v. *Morrison*, 326.

MARRIED WOMAN.
ESTOPPEL, 2.
1. A married woman may purchase real estate and give her judgment for the purchase-money; and when such judgment is charged on the land purchased, by the terms of the conveyance, the payment of the money is the condition upon which she accepts the property. *Patterson* v. *Robinson*, 81.
2. Such judgment is not void on the ground of coverture. *Id.*
3. The Act of 11th April, 1848, makes no change in the mode by which a married woman may convey or release her interest in real estate, but only as to the manner in which her husband may transfer or encumber her property. *Shinn* v. *Holmes*, 142.
4. The separate deed of a married woman, conveying her real estate, is void. *Thorndell* v. *Morrison*, 326.
5. Such deed is equally void though her husband had previously abandoned her. *Id.*
6. The Act of 11th April, 1848, confers no power upon a *feme covert* to make a valid conveyance of her real estate, unless her husband joins in the deed. *Id.*

MECHANIC'S LIEN.
1. Where by the terms of the lease the tenant had a right to take a part of the demised premises in fee, on ground-rent, at a stipulated sum, and before he exercised this right, he erected certain buildings on the premises; it was *Held*, that he had such an equitable estate in the land as rendered the buildings liable to the lien of a material-man. *Gaule* v. *Bilyeau*, 521.
2. That a part of the materials for which the claim was filed, were used in building outhouses, will not defeat the lien. *Id.*

MINES.
1. A provision in the lease of a coal-bank that the lessee shall be treated as having abandoned his lease, if he shall suffer the bank, by any fault of his, to lie idle for a year when it would yield coal, does not apply if he be actually taking coal out of the bank by any means of access leading to the coal. *Tiley* v. *Moyers*, 397.
2. The lease of a coal-bank will carry with it the drifts, platforms, and hoppers used in working it, as appurtenant, but the principal thing granted is the right to mine coal, and not the drift or passage leading to the mine. *Id.*

MISTAKE.
AMENDMENT, 2.
LEGATEE, 2.
An erroneous publication by the commissioners of a county, mistaking

Digitized by Google

www.libtool.com.cn

MISTAKE.
the condition of the accounts of a collector of taxes, for one year, is no ground for the discharge of the sureties in the bond of the same collector for the following year. *Bower* v. *Washington County*, 69.

MORTGAGE.
1. Where a mortgage dated 21st September, 1853, recited, that it was given to secure to R. the payment of a bond of the same date, in the penal "sum of $3000, conditioned for the payment of $1500, in three annual payments, with interest thereon from the 1st of May, 1853, together with other conditions as therein more fully set forth;" and in case of default of payment for *thirty days*, authorizing the mortgagee to sue out a *scire facias*: *Held*,
I. That the condition of the bond recited in the mortgage could be resorted to in giving a construction to the condition in the mortgage, to ascertain the time when the annual payments matured.
II. That the first instalment matured on the 1st day of May, 1854, and that *scire facias*, issued on the mortgage on the 3d day of June, 1854, was not prematurely sued out.
III. That the Court might enter judgment for want of an affidavit of defence, although no copy of the bond or its condition had been filed. *Kennedy* v. *Ross*, 256.
2. A mortgage, other than one given to secure the purchase-money of the mortgaged premises, recorded on the same day that a judgment is entered against the mortgagor, is not "prior to all other liens on the same property," and is divested by a sale of the premises under proceedings upon a subsequent judgment. *Magaw* v. *Garrett*, 319.
3. Where the record shows a judgment equal in point of time with the mortgage, to be a subsisting lien at the time of the sheriff's sale, and there is no proof of notice of its entire payment to the purchaser, he will take the premises divested of the lien of the mortgage. *Id.*

NONSUIT.
JUSTICE OF THE PEACE, 1.

NOTICE.
ATTORNEY-AT-LAW, 4; 5, 8.
PENNSYLVANIA RAILROAD COMPANY, 4.
RAILROAD, 5.
TRUST, 7.
Payment of a judgment to the nominal plaintiff after actual notice that it has been assigned to another, is not a payment to the proper person. It is not necessary that direct notice of the assignment be given by the assignee or his agent—it is sufficient if the information be given under circumstances and in terms calculated to arrest the attention of the debtor. *Guthrie* v. *Bashline*, 80.

NON OBSTANTE VEREDICTO.
POINTS RESERVED, 1–5.

NUISANCE.
1. The annoyance arising from the necessary use of a railroad, is not a nuisance *per se*. The fact of nuisance in such case must be determined by a jury. *Bell* v. *Ohio and Pennsylvania Railroad Company*, 161.
2. Where a nuisance consists not of a building itself, but in a *wrongful use* of it, the remedy is to stop such *use*, not to remove the structure. *Barclay* v. *The Commonwealth*, 503.
3. On a conviction for nuisance, it is error in the Court to order the nuisance to be abated by the sheriff in the first instance, that being a part of the judgment given against the defendants; but if they fail to

Digitized by Google

NUISANCE.
comply with the sentence, the Court may command the sheriff to abate it at their costs. *Barclay* v. *The Commonwealth*, 503.

OATH.
TRIAL, 1–2.

OFFICER.
1. An officer has authority to act until notice of the revocation of his commission, and this whether the revocation be express or implied by the appointment of another person to the same office. *Commonwealth* v. *Slifer*, 23.
2. But when an officer holds for a special term, "*if he shall so long behave himself well*," there is no implied misbehaviour, nor implied removal, arising from that cause, by the appointment of another to fill the same office. *Id.*
3. When by the fair construction of the commission of an officer it is clear that it was intended to give him the right to the office for three years, if he so long behaved himself well, the failure to give the bond and security required by law for the faithful performance of his duties, previous to his entering upon their discharge, and he enters upon, and otherwise discharges the duties without objection; there is nothing in the omission to give the bond to deprive him of the office; and he may file a bond when objection is made to the omission. *Id.*
4. But such officer before giving the security required by law, is not the officer *de jure*—but merely *de facto*—and when the law prohibits the performance of the duties, before the security is given, it will not aid him in compelling payment for services thus rendered against its direction. *Id.*
5. The acts of the officers of the state in appraising, granting a warrant, and surveying an island in a navigable river, are *prima facie* evidence against a stranger that the island was subject to appropriation in that manner. *Allegheny City* v. *Nelson*, 332.

ORPHANS' COURT.
RECOGNISANCE, 1.
1. Where three executors filed a joint account, showing a balance in their hands, and one of them was discharged by the Orphans' Court, and directed to pay over "any funds in his hands to the other executors," which was done: *Held*, that the decree of the Orphans' Court, designating the persons to whom the money should be paid, was conclusive, and that a legatee could not maintain an action against the discharged executor, to recover a legacy. *McNeal* v. *Holbrook*, 189.
2. Where a testator devised lands to his sons, and as to his daughter M. ordered, that she should, "in case of need, be supported in a comfortable manner of the proceeds of my land;" it was *Held*, that the maintenance of M. was a charge upon the land devised to the sons, and that the Orphans' Court had exclusive jurisdiction to fix the amount, and enforce the payment of the sum required for that purpose. *Gibson's Appeal*, 191.
3. If the decision of disputed facts be referred to the determination of the Orphans' Court, without asking for an issue to try them, their finding of such facts is as binding on appeal, as the verdict of a jury. *Id.*
4. Since the passage of the Acts of 1832, 1833, 1834, and 1836, the Orphans' Court has *exclusive jurisdiction* to make and enforce distribution of the estates of intestates. *Ashford* v. *Ewing*, 213.
5. No common law action can be sustained to recover a distributive share of such an estate, against the administrator, although his account exhibiting a specific balance against him, has been settled in, and confirmed by, the Orphans' Court. *Id.*
6. Where the Orphans' Court makes an order, upon matter appearing

Digitized by Google

www.antool.com.cn

ORPHANS' COURT.
of record in the Court, it is not fatal to the proceedings, that the facts were not set forth in a petition verified by affidavit. *Grier and Warner's Appeal*, 351.
7. Where the vendor of land by a parol agreement is dead, the Orphans' Court has exclusive jurisdiction to enforce the specific performance of the contract. *Porter* v. *Dougherty*, 405.

PAROL EVIDENCE.
STATUTE OF FRAUDS, 3.
1. Where two persons purchase land, by articles of agreement, parol evidence is not admissible to show that one of the parties signed the agreement as surety for the other; because, 1st. It would contradict the written instrument. 2d. It would be a violation of the statute of frauds and perjuries. *Arnold* v. *Cessna*, 34.
2. A levy of real estate, free from ambiguity, fraud, or misrepresentation, cannot be impeached or contradicted by parol evidence. *McClenahan* v. *Humes*, 85.
3. Where an offer does not specify the kind and manner of proof to be given, to impeach or contradict a record, the Court will presume it to be by something *dehors* the record, and therefore irrelevant and incompetent. *Id.*
4. If the words used in a contract be *technical*, or *local*, or *generic*, or *indefinite*, or *equivocal*, on the face of the instrument, or made so by proof of extrinsic circumstances, parol evidence is admissible to explain their meaning by usage. *Brown* v. *Brooks*, 210.
5. Where a written instrument gave to a plank-road company the unrestricted right of way over certain premises, for the purposes of the road, parol evidence that the right was to be limited to a certain route over the same lands was inadmissible, as directly contradicting the written instrument. *Kennedy* v. *Erie and Wattsburgh Plank-Road Company*, 224.
6. A will which contains no intelligible devise or bequest is void for uncertainty: parol evidence is not admissible to explain what the testator meant by such an instrument. *Kelley* v. *Kelley*, 460.

PARTITION.
1. In an action of partition, where a verdict and judgment are rendered for the defendants on the plea of *non tenent insimul*, they cannot recover their costs from the plaintiff. *Shaw* v. *Irwin*, 347.
2. Where one of four devisees under a will died without heirs, and her estate escheated to the Commonwealth, and the remaining devisees and another divided the land among them and occupied it in severalty, the Commonwealth having done no act to ratify the partition, the interest of the state would remain an undivided interest. *Holmes* v. *Pattison*, 484.
3. The Commonwealth's interest, being unaffected by the statute of limitations, would remain, as at the death of the co-devisee, an undivided interest in the whole tract devised, and the same right would pass to her grantees of such escheated estate. *Id.*

PARTNERSHIP.
PROMISSORY NOTES, 3.
1. Where one of two partners, after dissolution, assigned to a third party, for a valuable consideration, a note given him by the other partner and a surety, for his interest in the partnership concern; in an action against the surety on such note, a debt due by the firm could not be set off against a recovery on the note, although the partner who signed the note was dead, and his estate insolvent, and the survivor was also insolvent. *Walker* v. *Eyth*, 216.
2. The retiring partner, until deprived of dominion over his individual

Digitized by Google

PARTNERSHIP.
property, had a right to appropriate it to the payment of his individual debts. *Walker* v. *Eyth*, 216.
3. Where there are separate and partnership creditors, and separate and partnership property, the rule in equity is, that each estate shall be applied exclusively, in the first instance, to the payment of its own creditors. *Id.*
4. A judgment against a firm is a lien on the separate real estate of the partners, and is entitled to priority in the distribution of the proceeds of sale of such separate real estate, over a subsequent judgment of a separate creditor of the partner whose real estate was sold. *Cummings' Appeal*, 268.
5. One partner has power to confess a judgment against the firm for a partnership debt, but such judgment will not affect the persons or separate estate of the other partners. *Grier* v. *Hood*, 430.
6. If one partner confesses a judgment against the firm for a partnership debt, another creditor of the firm can interpose no objection to the judgment on that account. *Id.*
7. A sale of partnership property, on execution issued upon a judgment confessed by one partner alone against the firm for a partnership debt, will vest a good title to the property in the purchaser; and such execution being the first lien will be entitled to the proceeds of sale. *Id.*

PAYMENT.
APPROPRIATION OF PAYMENTS.
Payment of a judgment to the nominal plaintiff after actual notice that it has been assigned to another, is not a payment to the proper person. It is not necessary that direct notice of the assignment be given by the assignee or his agent—it is sufficient if the information be under circumstances and in terms calculated to arrest the attention of the debtor. *Guthrie* v. *Bashline*, 80.

PENNSYLVANIA RAILROAD COMPANY.
1. Under the Acts of Assembly regulating the manner in which the damages done to the owners of land, taken or appropriated by the Pennsylvania Railroad Company for depots, water stations, and other uses, shall be assessed—before the Court can grant a view on the petition of the company, it must appear:
I. That the company have located, marked, and surveyed the land they deem necessary, or propose to take.
II. That they have made an effort to agree with the owner for the compensation. *O'Hara* v. *Pennsylvania Railroad Company*, 445.
2. The statement of these matters in the petition is not sufficient; they must at least be verified by affidavit. *Id.*
3. A report of viewers which does not set forth the character of the ground taken, its figure, and the advantages or disadvantages to the owners, and whether the land taken, or any and what part of it, is necessary for the use of the company, is not in accordance with the law, and will be set aside. *Id.*
4. Where the landowners have no notice of the application for the appointment of viewers, the objection to the preliminary proceedings, and to the petition, are in time, if made after the report of viewers is returned. *Id.*

PERFORMANCE.
COMPOSITION DEED, 1.
EJECTMENT, 1.
PLEADING, 1.
SPECIFIC PERFORMANCE, 1, 2.

Digitized by Google

www.libtool.com.cn

PLANK-ROADS.

PAROL EVIDENCE, 5.

1. The plaintiffs were incorporated under the general laws relating to turnpikes and plank-roads. Commissioners were appointed under the provisions of the *general* law, to receive subscriptions to the capital stock, and were required to take from the subscribers at the time of subscription, a payment not less than $1, for each share subscribed. The *special* law provided, that the company, when it should be organized, should have authority to "*enlarge* its capital stock, *by taking new subscriptions in such manner and form" as it should think proper. Erie and Waterford Plank-Road Company* v. *Brown*, 156.

2. After the company was organized, the defendant subscribed for four shares of the stock, some time after he paid $3.50 upon it, and refused payment of the balance, on the ground that he had paid nothing at the time he subscribed, and that his subscription was therefore void. *Held*, that the provision of the Act requiring the *commissioners* to demand payment at the time of subscription, did not apply to subscriptions made to the *organized company*, who had authority by the clause of the special Act (cited above), to act at their discretion in the premises, within the provisions of the law. *Id.*

3. Where a subscriber to the stock of a corporation failed to pay the hand-money required by the Act, at the time of subscription, and afterwards attended a meeting of stockholders, and voted on the business of the company, he is estopped from denying the validity of his subscription. *Id.*

4. If the irregularity in making his subscription be ground for refusing to pay for his stock, it ought to restrain him from acting as a member of the company. *Id.*

5. A turnpike or plank-road company, or their contractors or agents, who enter upon the lands of a person, for the purpose of constructing their road without having the damages previously assessed, tendered, or paid, or secured in the mode provided by the Acts of Assembly regulating such companies, are trespassers, and may be sued as such. *Brown* v. *Powell*, 229.

6. A tenant for years is an owner within the meaning of the Act, and is entitled to compensation according to his interest. *Id.*

7. Where the company, their agents or contractors, fail to comply with the provisions of the Acts in regard to damages, the owner or tenant may waive the *tort*, and proceed to have his damages assessed according to the Act, or bring trespass at his election. *Id.*

8. A license from the owner of the fee, given after the date of the lease, would afford no justification for invading the possession of the tenant. *Id.*

PLEADING.

FORMER RECOVERY.

1. The plea of covenants performed *absque hoc*, admits the execution of the instrument declared on, and only puts in issue the performance on the part of the plaintiff as alleged in the declaration. *Turnpike Company* v. *McCullough*, 303.

2. In *assumpsit* against two, there can be no recovery against one of the defendants, on an endorsement made by him in his own name. *Corbet* v. *Evans*, 310.

3. The pendency of a suit against common carriers for the value of the goods destroyed by fire in a warehouse, in the course of transmission to the owners, is not a bar to a recovery from the warehousemen of the amount of insurance received by them on account of said goods. *Clark* v. *Wilder*, 314.

POINTS RESERVED.

1. A verdict for the plaintiff for a specified sum, subject to the opinion

Digitized by Google

POINTS RESERVED.

of the Court, whether the plaintiffs upon the whole case are entitled to recover, does not present such a *point reserved* as would authorize the Court to enter a judgment for the defendants *non obstante veredicto*. *Clark* v. *Wilder*, 314.

2. To authorize such judgment the facts of the case must be admitted of record or found by the jury. *Id.*

3. If a point of law be reserved on the trial of a cause, the point and the facts upon which it arises must be stated upon the record in order to authorize the Court to enter judgment *non obstante veredicto*. *Irwin* v. *Wickersham*, 310.

4. In every case where a general verdict is given, subject to a point reserved, the question of law thus reserved must be stated, and the facts on which it arises must be either admitted on the record or found by the jury. *Wilson* v. *Tuscarora*, 317.

5. The Court cannot withdraw the decision of the facts from the jury by reserving as a point, whether under all the evidence in the cause the plaintiff is entitled to recover. *Id.*

POOR.

1. If an order made by two justices for the removal of a pauper is defective, in omitting to state that the person had or was likely to become chargeable, it is the duty of the Quarter Sessions, on appeal, to amend the same, and proceed to try the case upon its merits; an order quashing such proceedings is erroneous. *Cumberland Township* v. *Jefferson Township*, 463.

2. Where, prior to the order of removal, there had been an order of relief, it was conclusive evidence of the fact, that the person had become chargeable; and where the justices failed to recite it in the order of removal, the Court were bound to allow it to be so amended after the appeal. *Id.*

3. The provisions in the Acts of Assembly, allowing amendments in such cases, is to receive a liberal construction. *Id.*

POWER.

TRUST, 1–2.

PRACTICE.

AFFIDAVIT OF DEFENCE.
CASE STATED.
FEIGNED ISSUE.
FORMER RECOVERY.
INTERPLEADER.
POINTS RESERVED.
VERDICT.

1. Where testimony has been heard without objection, it is in the discretion of the Court trying the cause, to strike it out, if it should afterwards appear that the witness was incompetent, or the testimony inadmissible; but it will only be done where the fact upon which the exclusion is based was unknown, and could not with ordinary diligence have been known to the party, at the time of its admission. *Robinson* v. *Snyder*, 203.

2. After the admission of evidence without objection, there can be no bill of exceptions to its admission, *nunc pro tunc*. The only way in which it can be reviewed in this Court, is, in the shape of a written prayer to the Court, to instruct the jury to exclude it from their consideration, in making up their verdict. *Id.*

3. Where the Court granted leave during the trial to defendants to add the plea of *non est factum*, and the plea was not entered on the record, the privilege to do so will be considered as having been waived. *Turnpike Company* v. *McCullough*, 308.

Digitized by Google

www.libtool.com.cn

PRE-EMPTION RIGHT.
LANDS, 1–6, 11–13.

PRESUMPTION.
RIPARIAN OWNERS, 1.
SERVITUDES, 4.
TRIAL, 2.

PRINCIPAL AND AGENT.
Admissions by an agent, when he is about the doing of some act within the scope of his delegated authority, are evidence against the principal, but naked declarations which are not part of any *res gesta* are not admissible. *Patton* v. *Minesinger*, 393.

PRINCIPAL AND SURETY.
SURETY.

PROMISSORY NOTES.
GUARANTEE, 1, 2, 3, 6.
MARRIED WOMAN, 3.
1. Where the purchaser of goods pays for them with the note of a third person, given to him for a real consideration, and passes the note to the vendor by endorsement, the vendor can only recover on the note; and to enable him to recover against the endorser he must show that the note was regularly dishonoured. *Shriner* v. *Keller*, 61.
2. But where the note was made for the mere accommodation of the purchaser, and to get him a credit, and he endorses it to the vendor of goods, the maker of the note stands in the relation of surety for the endorser; and the latter, in an action against him on the endorsement, cannot set up by way of defence that the vendor held the note and never demanded payment of the maker. *Id.*
3. Where an individual is a member of two firms, and draws a promissory note to himself, signed with the name of one firm, and endorses it with the name of the other firm, it would not present such a case as would compel the plaintiff, a holder for value before maturity, to prove the assent of the partners to such endorsement, or that the proceeds were applied to the benefit of the firm. *Ihmsen* v. *Negley*, 297.
4. Any suspicious circumstances in the form of drawing and endorsing such note, could only be used to introduce an unusual defence, and would leave the burden of proving such facts as would relieve the defendants upon themselves. *Id.*

QUARTER SESSIONS.
The Court of Quarter Sessions has jurisdiction to try an indictment for being accessory to a burglary, and for receiving stolen goods, knowing them to have been stolen. *Holmes* v. *The Commonwealth*, 221.

RAILROAD.
PENNSYLVANIA RAILROAD COMPANY.
1. The assessment of damages occasioned to a tract of land by the building of a railroad, on the petition of several joint owners, is properly made in a gross sum. *Railroad Company* v. *Hall*, 336.
2. It is no objection to the validity of the proceedings, that the viewers did not apportion the damages among the claimants according to their respective interests in the land. *Id.*
3. He who claims a special privilege, or the right to be tried before a special tribunal, and in a special form, must submit to a strict construction of his right, and pursue strictly the forms prescribed. *Zack* v. *Pennsylvania Railroad Company*, 394.
4. A report of viewers, appointed under the 4th section of the Act

Digitized by Google

RAILROAD.
of 27th March, 1848, supplementary to the charter of the Pennsylvania Railroad Company, which omits to state the quality and value of the land taken, is fatally defective, and will be set aside. *Zack* v. *Pennsylvania Railroad Company*, 394.
5. It is not essential to the validity of the proceedings, that the owner of the land to be taken should have notice of the presentation of the petition, and the appointment of viewers. *Id.*

RAPE.
CRIMINAL LAW, 1–3.
On a conviction for rape the prisoner was sentenced to imprisonment at *hard* labour: *Held*, that this sentence was erroneous, and the record was ordered to be remitted, that the Court below may substitute for "imprisonment at hard labour," "*separate* or *solitary* confinement at labour," as the law requires. *Beale* v. *The Commonwealth*, 11.

RECOGNISANCE.
ARBITRATION, 1.
In an action on a recognisance, given for the valuation of land taken under proceedings in partition, instituted by an administrator, by virtue of a special Act of Assembly, the defendant could not claim to set off his share as an heir in the valuation: his remedy is to compel a settlement of the administration account, and a distribution in the Orphans' Court. *Custer* v. *The Commonwealth*, 375.

RECORD.
TRIAL, 1–2
A copy of a record from another state, certified to be a copy of the *judgment roll*, is sufficiently certified. *Clark* v. *Depeu*, 509.

RELEASE.
COMPOSITION DEED, 3.
1. Where the owner's right of entry has been tolled by a descent cast, he may release his right of action by an instrument which contains no words of inheritance; the release in such case operating by way of *mitter le droit*, without any words of limitation. *Shinn* v. *Holmes*, 142.
2. Where the party is in possession of land, a release to him will convey a fee simple without words of inheritance. *Fulton* v. *Moore*, 468.
3. If a married woman in consideration of a release of real estate to her, joins her husband in conveying to the releasor a different part of her real estate, without a separate acknowledgment, and she and her husband afterwards convey the released estate, by a deed accompanied with a separate acknowledgment, she and her heirs will be estopped in equity from taking advantage of the defect in the first conveyance. *Id.*

REMOVAL.
OFFICER, 1–3.

RENT.
DECEDENT, 6; 7.
1. The owner of a reversion has a right to sell the whole or a part of it, and the law will apportion the rent; and the right of apportionment attaches the instant the sale is made. *Linton* v. *Hart*, 193.
2. No action of the purchaser, in dispossessing the tenant of the part purchased after such severance, can affect the rent accruing out of the unsold part, and remaining in the undisturbed possession of the tenant. *Id.*
3. Nor will the fact that the original reversioner became a party to the trespass, by which the tenant was dispossessed of the part sold, by aiding

Digitized by Google

www.libtool.com.cn

RENT.
his vendee to commit it, change the rule, or suspend the rent for that part, which was unsold, and which remained in the possession of the tenant. *Linton* v. *Hart*, 193.

REPEAL.
STATUTES.

REPLEVIN.
1. Replevin, in its inception, is a mixed action; being a demand for the thing itself, and also for damages for the taking and detention. *Fisher* v. *Whoollery*, 197.
2. If the property be delivered to the plaintiff, the defendant is answerable in damages for the taking and detention, up to the time of delivery; but if the property be retained, he is answerable in addition for the full value. *Id.*
3. The property itself can in no event be recovered at law from the defendant; nor can he tender it afterwards, in discharge of the action, or even in satisfaction *pro tanto* of the damages claimed. A clause in the bond given by the defendant, providing for a return of the property, is a nullity. *Id.*
4. Where the property is retained and bond given by the defendant, the plaintiff's right to the property is turned into *a chose in action;* his property in the thing itself is absolutely gone. *Id.*
5. In such case, where the defendant, after he had given bond to retain the property in the replevin, caused it to be seized and sold under a judgment against the former owner, and purchased it, he acquired no better right than he had before, the property of the plaintiff having been previously divested. *Id.*

RESCISSION.
LEASE, 3–5.

REVERSAL.
The Supreme Court, on reversal of a judgment in a criminal case for error in the sentence, has power to pass such sentence as the Court below ought to have passed, and to remit the record for further proceedings in conformity to the judgment. *Beale* v. *The Commonwealth*, 11.

REVOCATION.
OFFICER, 1.

RIPARIAN OWNERS.
1. The extent of a presumed grant to swell water upon the land of adjoining owner, is measured by the land actually flooded, and not by the height of the dam by which it is occasioned. *Mertz* v. *Dorney*, 519.
2. If by means of repairs to a dam, the land be flooded to a greater extent than it had been for twenty-one years before, the owner of the dam is liable for the injury, although the height of the dam may not have been increased. *Id.*

ROADS.
1. Work done by a private citizen on a public road without authority or request of the authorities, although beneficial, affords no legal cause of action for compensation. That the work was necessary does not alter the case. *Anderson* v. *Hamilton Township*, 75.
2. In a proceeding under the Act of 26th of March, 1846, "to amend the road laws of Erie county," the commissioners are authorized to challenge four jurors for "*interest* or other *cause*." It is error to permit such challenge to be made peremptorily, and without showing such good and

Digitized by Google

www.libtool.com.cn

ROADS.
sufficient cause as would disqualify the juror. *Zimmerly* v. *Road Commissioners*, 134.

3. The clause in the proviso of the 9th section of the said Act, which provides that the commissioners "may substitute others" in the place of the jurors rejected, is satisfied when they cause new jurors to be summoned by the magistrate. The commissioners are not permitted by the Act to name and select the substitutes. *Id.*

4. Where the *termini* stated in two petitions for a road are identical, the Court have no power to grant a second view before a report has been made and acted on upon the first order; but where one of the points of the road prayed for is different in the second petition, the granting of the order is in the discretion of the Court. *Road in Lower Salford*, 524.

SALE.
CONTRACT, 2, 3.
PROMISSORY NOTES, 1–2.

SENTENCE.
On a conviction for rape the prisoner was sentenced to imprisonment at *hard* labour: *Held*, that this sentence was erroneous, and the record was ordered to be remitted, that the Court below may substitute for "imprisonment at hard labour," "*separate* or *solitary* confinement at labour," as the law requires. *Beale* v. *Commonwealth*, 11.

SERVITUDES.
1. Where a subterranean flow of water has become so well defined as to constitute a regular and constant stream, the owner of the land above, through which it flows, may not divert or destroy it to the injury of the person below, on whose land it issues in the form of a spring. *Wheatley* v. *Baugh*, 528.

2. But where the spring depends for its supply upon percolations through the land of the owner above, and in the use of the land for mining or other lawful purposes the spring is destroyed, such owner is not liable for the damages thus done, unless the injury was occasioned by malice or negligence. *Id.*

3. The prior use of the spring for the purposes of a tannery, conferred no right of servitude over or through the land of the adjacent proprietor. *Id.*

4. Nor would the enjoyment of the spring for twenty-one years raise any presumption of a grant; for no presumption would arise against the owner until it was shown that the exercise of the privilege interfered with his rights in such manner as to entitle him to legal redress. *Id.*

SET-OFF.
RECOGNISANCE, 1.

1. Where one of two partners, after dissolution, assigned to a third party, for a valuable consideration, a note given him by the other partner and a surety, for his interest in the partnership concern; in an action against the surety on such note, a debt due by the firm could not be set off against a recovery on the note, although the partner who signed the note was dead, and his estate insolvent, and the survivor was also insolvent. *Walker* v. *Eyth*, 216.

2. Administrators, who have sold property of the decedent to a creditor of the estate, may set off the amount against the *pro rata* dividend of such creditor, upon a distribution of the funds in their hands in the Orphans' Court. *Grier and Warner's Appeal*, 351.

3. A purchaser at sheriff's sale of a vendee's interest in land does not stand in the very shoes of the vendee; for the latter may set off against the vendor independent debts, but the purchaser can only set off what

Digitized by Google

www.libtool.com.cn

SET-OFF.
was directly or indirectly given and received as payment. *McGuire* v. *Faber*, 436.

SETTLEMENT.
LANDS, 1–6, 11–15.

SHERIFF'S SALE.
FRAUD, 2–6.
JUDGMENT, 1, 3.
MORTGAGE, 2, 3.

1. A sale by the sheriff on a judgment obtained against a vendor of land, after sale of the land by articles of agreement, passes only the estate left in the debtor after the contract of sale, and conveys to the vendee a right to the unpaid purchase-money—but he takes the estate subject to the payment of liens against the vendor prior to the contract of sale. *Patterson's Estate*, 71.

2. A sale on such subsequent judgment cannot discharge the lien of those prior to the contract of sale. *Id.*

3. Under the law prior to 1836, a sheriff's sale made at the succeeding Term after the return day of the *venditioni exponas*, conferred a good title on the purchaser. *McClenahan* v. *Humes*, 85.

4. After acknowledgment of a sheriff's deed in open Court, the title of the sheriff's vendee cannot be affected by mere irregularities however gross. *McFee* v. *Harris*, 102.

5. When both parties claim by sheriff's sale, made under several executions against the same party, the oldest sale passes the title when there is no evidence of fraud in the case. *Id.*

6. A sheriff's sale of a defendant's real estate upon a judgment and execution against him, without a condemnation, or waiver of inquisition, in that particular case, and a deed acknowledged to the purchaser, without objection, and the proceeds of sale appropriated to the defendant's debts, will divest the title of the defendant to the premises, and a subsequent sheriff's sale of the premises as the property of the defendant will confer no title on the purchaser. *Spragg* v. *Shriver*, 282.

7. A defendant whose real estate is sold by the sheriff without a regular condemnation or waiver of inquisition, must object in a reasonable time, and such *reasonable time* is before the confirmation of the sale, and the acknowledgment of the sheriff's deed to the purchaser. *Id.*

8. A defendant whose property is being sold at sheriff's sale, and who induces another person to purchase the same, cannot, after the payment of the money, the acknowledgment of the deed, and the appropriation of the proceeds to his debts, impeach the regularity of the proceedings under which it was sold, or the validity of the title of the purchaser. His subsequent release to the purchaser, and delivery of possession, would equally estop him, and all claiming under him by title subsequent to such sheriff's sale. *Id.*

9. In the Act erecting a new county, it was provided, that in sheriffs' sales of lands situate there, made in the old county, the deeds should be entered in the docket of the Court of Common Pleas of the new county within thirty days after acknowledgment; the object of this provision was to give notice to purchasers, and none but *bona fide* purchasers before such entry of the deed could take advantage of an omission to have it so recorded within thirty days. *Graham* v. *Smith*, 323.

10. Where the defendant purchased after the plaintiff's title was regularly recorded, evidence that he was a purchaser for value was rightly rejected as irrelevant. *Id.*

11. Where a sheriff's vendee pays a part of the purchase-money at the time of the sale, but fails to pay the residue, the sheriff may return the

Digitized by Google

www.libool.com.cn

SHERIFF'S SALE.
land unsold, and the delinquent purchaser will be liable for the loss on a resale. *Wright's Appeal*, 373.
12. If the sheriff in his return omit to state the sum received from the bidder at the first sale, he may, with leave of the Court, after the second sale, amend his return so as to state the fact. *Id.*
13. Where the loss on the resale is greater than the sum paid by the first purchaser, the Court may distribute the latter sum among the creditors unless some legal objection be shown. *Id.*
14. If there are disputed facts, an issue must be applied for before the distribution, and such disputed facts must be particularly stated. *Id.*

SPECIFIC PERFORMANCE.
1. Where a father made his will, in which he devised certain lands to his son in fee simple, charged with the payment of a certain sum of money, and the maintenance of testator and his wife during life, and had the land surveyed, put the son in possession, and received, in his lifetime, a portion of the sum charged upon the land: it was *held* to constitute a testamentary provision for the son, and not a contract to devise the land to him in fee simple. *Rowan's Appeal*, 292.
2. In such case, the father having revoked the first will, and devised the land to the son for life, subject to the same charge, it furnished no ground to entertain a bill against the executors of the father to compel a conveyance in fee simple. *Id.*
3. Specific performance of an agreement for the conveyance of land, cannot be enforced by a conditional verdict for any other land than such as is embraced in the agreement. *Kribbs* v. *Downing*, 399.
4. He who demands specific performance of a parol contract for the sale of land, must present his claim without any unnecessary delay, and while performance may be enforced without injury to others, and must also have done no act which would render it unjust or inequitable to decree specific execution of the contract. *Porter* v. *Dougherty*, 405.
5. Where the vendee under a parol contract gave up the possession, on receipt of notice from his vendor, who thereupon entered and made valuable improvements on the land, and by his will devised it to another who entered into possession; the vendee also having received a pecuniary legacy under the will of the vendor. *Held*, that these circumstances, accompanied with the lapse of eleven years before any suit was brought to enforce the parol agreement, were a bar to a specific performance. *Id.*
6. Where the vendor of land by a parol agreement is dead, the Orphans' Court has exclusive jurisdiction to enforce the specific performance of the contract. *Id.*
7. A decree of specific performance of a written contract, made by the Orphans' Court, on the application of the administrator of the vendor, without notice to his heirs, and a deed made to the purchaser in pursuance of such decree, are *prima facie* evidence of title in the vendee, as against the heirs of the vendor. *Sutter's Heirs* v. *Ling*, 466.

STATUTE OF FRAUDS.
DEED, 2.
PAROL EVIDENCE, 1.
1. A parol contract, which, if valid and reduced to writing, might be construed to give a life estate to the grantee, remainder in fee to his wife, being unwritten, is within the statute of frauds, and has only the force and effect of a lease at will. *Clark* v. *Smith*, 137.
2. To take a parol agreement for the sale of land out of the statute of frauds and perjuries, the evidence must be direct, positive, clear, and satisfactory. *McCue* v. *Johnston*, 306.
3. *Ex parte* declarations of the grantor may be admitted as corrobora-

Digitized by Google

STATUTE OF FRAUDS.
tive evidence, but standing alone are not sufficient to establish such a contract. *McCue* v. *Johnston*, 306.
4. A judicial sale is not within the statute of frauds and perjuries. *Fulton* v. *Moore*, 468.

STATUTE OF LIMITATIONS.
LIMITATION OF ACTIONS.

STATUTES.
1. The Act of 14th April, 1851, imposes a fine of $50 for selling liquors on the Sabbath-day within the county of Allegheny, and authorizes a summary conviction before a single justice of the peace. The Act of 25th February, 1855, imposes the same penalty for the same offence committed anywhere within the state, and prescribes the mode of proceeding for the recovery thereof: and further authorizes the offence to be punished by indictment, fine, and imprisonment. The latter Act repeals the former. *Nusser* v. *The Commonwealth*, 126.
2. A general Act prescribing the mode of punishment of a specific offence throughout the state, operates the repeal of an Act, limited to a single county, prescribing the mode of punishment of the same offence within the designated county. *Id.*
3. A special Act of Assembly for the survey of a particular tract of land, is not such a public statute as the Courts are bound to take notice of and expound, without requiring its production. *Allegheny City* v. *Nelson*, 332.

STATUTES CITED AND COMMENTED ON.

ACTS OF CONGRESS.
1841. August 19. *Clark* v. *Porter*, 141.

ACTS OF ASSEMBLY.
1772. March 21. *Clark* v. *Smith*, 137.
1786. December 30. *Jacobs* v. *Figard*, 45.
1787. September 11. *Bell* v. *Ohio and Pennsylvania Railroad Company*, 180.
1810. March 20. *Zimmerly* v. *Road Commissioners*, 134.
1814. March 22. *Cook* v. *Dunkle*, 341.
1815. March 13. *McCormack* v. *Russell*, 185.
1822. April 2. *Commonwealth* v. *Slifer*, 26.
1830. April 3. *Essler* v. *Johnson*, 350.
1833. April 8. *Clark* v. *Morrison*, 453.
1834. February 24. *Sample* v. *Barr*, 457.
1834. April 15. *Evans* v. *Myers*, 114.
1836. June 16. *Beale* v. *The Commonwealth*, 20; *Dunlap* v. *McKee*, 84; *Holmes* v. *The Commonwealth*, 223; *Raiguel* v. *McConnell*, 363.
1839. April 9. *Compher* v. *Compher*, 32.
1839. June 4. *Custer* v. *The Commonwealth*, 375
1840. April 13. *Bell* v. *Ohio and Pennsylvania Railroad Co.*, 180.
1841. May 15. *Amick* v. *Oyler*, 508.
1842. April 8. *Beale* v. *The Commonwealth*, 18.
1842. June 16. *Spragg* v. *Shriver*, 284.
1845. March 20. *Cook* v. *Dunkle*, 342.
1846. March 26. *Zimmerly* v. *Road Commissioners*, 134.
1846. April 21. *Harmar* v. *Holton*, 245; *Amick* v. *Oyler*, 508.
1848. March 27. *Zack* v. *Pennsylvania Railroad Company*, 394; *O'Hara* v. *Pennsylvania Railroad Company*, 445.
1848. April 11. *Patterson* v. *Robinson*, 81; *Thorndell* v. *Morrison*, 326.
1849. January 26. *Brown* v. *Powell*, 229.

Digitized by Google

STATUTES CITED AND COMMENTED ON.
1849. April 5. *Shenley* v. *Allegheny City*, 128.
1849. April 9. *Johnston and Sutton's Appeal*, 116; *Rogers* v. *Waterman*, 182; *Dodson's Appeal*, 232; *Weaver's Estate*, 434.
1850. April 30. *Amick* v. *Oyler*, 508.
1850. May 8. *Id.*
1851. March 14. *Compher* v. *Compher*, 31; *Neely* v. *McCormick*, 255.
1851. April 8. *Shenley* v. *Allegheny City*, 128.
1851. April 14. *Nusser* v. *The Commonwealth*, 126.
1852. March 30. *Shenley* v. *Allegheny City*, 128.
1855. February 25. *Nusser* v. *The Commonwealth*, 126.

SUBTERRANEAN STREAMS.
WATER COURSES.

SURETY.
MISTAKE, 1.
1. Where a surety in a judgment gave notice to the creditor to proceed and collect his money from the principal, and that he would not be bail any longer, and afterwards by agreement extended the time to a specified day, and the creditor issued no process, but the principal debtor, within six days after the expiration of the extended time, assigned all his property for the benefit of creditors, among which was sufficient personal property to have paid the judgment: it was *Held*, that these circumstances would not discharge the surety. *Weiler* v. *Hoch*, 525.
2. Where the circumstances in proof show that the creditor could not by process have made the debt out of the principal, the surety will not be exonerated. *Id.*

SURVEY.
LANDS, 7–10.
LIMITATION OF ACTIONS, 17.
1. When a survey has been once made, returned, and accepted, a new one cannot be made without the assent of the officers of the Commonwealth, and not even then, so as to affect intervening rights. *Cassidy* v. *Conway*, 240.
2. Nor can such survey when so made, returned, and accepted, be changed by the officers of the Commonwealth, without the previous assent or subsequent acquiescence of the owner of the survey. *Id.*
3. The assent of a warrant-holder to an original survey is presumed, but not so as to a subsequent one, unless he had asked for it or claimed under it. *Id.*
4. Whether a warrant has been shifted, or whether it has been located upon the land it calls for, are questions of fact to be determined by the jury. *Id.*
5. Where the evidence of the location of a survey is conflicting or doubtful, it must be referred to the jury; but where the evidence is clear and there is no room for doubt as to what land is included, the law of the case as to which of the parties has the better title to the interference is for the Court, and they may give a binding direction upon the same. *Ramage* v. *Peterman*, 349.
6. All surveys made, without authority from the owner, whether by the state or an individual, upon lands previously appropriated, are unauthorized and void, and necessarily unofficial. *Hole* v. *Rittenhouse*, 491.
7. Where several surveys become vested in one owner, from that moment they are to be treated as one tract for all the purposes of disseisin and remedy. *Id.*

Digitized by Google

www.libtool.com.cn

TAX SALES.
TRUST, 3.
UNSEATED LANDS, 1, 2.
1. A purchaser at treasurer's sale, as against a mere intruder deriving no title from the original owner, need only show title out of the Commonwealth, and a treasurer's deed to himself or some person from whom he derives title. *Commonwealth* v. *Burke*, 377.
2. The payment of taxes by a stranger without title, on a part of a tract of unseated land without defining the location or boundaries of the part for which the taxes are so paid, will not defeat the title of the purchaser of such tract at a sale for taxes. *Id.*

TENANTS AT WILL.
1. Where no certain term is agreed upon, tenancies at will are now construed to be tenancies from year to year; and by the Act of 1772, the like notice to quit must be given to such tenants, as in estates for years. *Clark* v. *Smith*, 137.
2. A tenancy at will exists in Pennsylvania only in name, and is in effect a tenancy from year to year. *Id.*

TENANTS FOR YEARS.
LANDLORD AND TENANT.
PLANK-ROADS, 6.

TENANTS IN COMMON.
A joint purchase of land by two persons, by articles of agreement, vests in them an equitable title to the land, as tenants in common, with a right to demand a conveyance of the legal title, upon payment of the purchase-money. *Arnold* v. *Cessna*, 32.

TENDER.
Where a party is entitled to a conveyance on the payment of the purchase-money, which he tenders, and a deed is refused, it is not necessary to aver a tender and pay the money into Court; it is sufficient to bring it in at the trial. *Henry* v. *Raiman*, 354.

TOWNSHIP.
1. Where a suit was brought in the name of H. township upon a bond given to the road commissioners of the township, who were individually named in the bond, to secure funds advanced by the township; *Held*, that the suit was well brought. *Anderson* v. *Hamilton Township*, 75.
2. Work done by a private citizen on a public road without authority or request of the authorities, although beneficial, affords no legal cause of action for compensation. That the work was necessary does not alter the case. *Id.*

TRESPASS.
PLANK-ROADS, 5.
RENT, 2, 3.
WIDOW, 1, 2.
1. Where a tenant under a parol agreement is in possession of a close, and no certain term is stipulated, the landlord has not such a possession, before entry upon the premises, as will entitle him to maintain an action of trespass *quare clausum fregit*. *Clark* v. *Smith*, 137.
2. As a general rule, trespass *quare clausum fregit* can be sustained only by the person who had the actual possession when the injury was committed: but in case of disseisin, the disseisee, after he has regained possession by re-entry, may maintain trespass against the disseisor, for acts intermediate the disseisin and re-entry. *King* v. *Baker*, 186.
3. Where A., the owner of land, sold to B. "*wood-leave*" on the same,

Digitized by Google

TRESPASS.
and he entered and cut the wood, and it remained upon the land, and afterwards C., under a *habere facias possessionem*, issued upon a judgment in ejectment obtained by default against A., entered upon the land, and took and carried away the wood cut by B., and A. subsequently, in two verdicts and judgments in ejectment, established his title to the land, and regained the possession: it was *held*, that B. could maintain trespass against C. for the wood so taken. *King* v. *Baker*, 186.
4. In such action, B. could also recover for the wood carelessly destroyed, in the attempt to appropriate it to C.'s own use, as well as for that actually appropriated. *Id.*

TRIAL.
PRACTICE, 1–2.
1. The law does not require that the oath administered to jurors in criminal cases shall be set forth on the record. *Beale* v. *Commonwealth*, 11.
2. When the record in a conviction for rape stated that "the jurors were duly impannelled, sworn, or affirmed, respectively, to try the guilt or innocence of the defendant, of the charge whereof he stands indicted," *Held*, that there was nothing on the record that authorized the inference that an illegal oath was administered, and that the presumption was, that it was administered in legal form. *Id.*
3. In felonies not capital, it is not necessary that it should appear affirmatively, on the record, that the prisoner was present when the verdict was rendered: unless the contrary appears, the Court will presume that everything was rightly done. *Holmes* v. *The Commonwealth*, 221.

TRUST.
ATTORNEY-AT-LAW, 6.
1. A conveyance of land to a trustee, in trust, with power to sell in two years for payment of a creditor named in the deed, "and if any balance remain after payment of said creditor, then to pay over the same to the grantor," is not void as regards subsequent creditors. *Phillips* v. *Zerbe Run and Shamokin Improvement Company*, 56.
2. If the power to sell in such deed is not executed within the time limited, the trust is not thereby ended, nor is the land subject to levy and sale by the subsequent creditors of the grantor. *Id.*
3. Where land conveyed in trust had been sold for taxes, the legal effect of payment of the purchase-money to the purchaser, by the grantor in the deed, or his *cestui que trust*, was simply to discharge the tax sale. *Id.*
4. When several persons have a joint or common interest in an estate, one cannot purchase an encumbrance or an outstanding title, and set it up against the rest for the purpose of depriving them of their interests. *Weaver* v. *Wible*, 270.
5. Where a man was in possession of a lot under a parol contract, and built a house upon it, and died in possession, the law cast the inheritance upon his children; and the widow, who came into possession through him and under his title, could not repudiate the contract, and purchase the title for herself. *Id.*
6. Where husband and wife convey the land of the wife, by a deed absolute on its face, but really in trust for the wife, and the trustee, by the connivance or participation of the husband, conveys the estate to a stranger, who has no notice of the trust, and the husband afterwards purchases the property thus conveyed, he will hold the same as a trustee, for his wife and her heirs. *Church* v. *Church*, 278.
7. In such case he cannot protect himself by the equity of his immediate vendor, who was a *bona fide* purchaser for value, without notice of the trust. *Id.*
8. It is immaterial whether the consideration received by him for

Digitized by Google

www.libtool.com.cn

TRUST.
violating the trust was equal to that paid by him on the repurchase of the estate, or whether he purchased with the profits arising from the original wrong, or with other funds; in either case, the instant the estate came back into the hands of the wrongdoer, the original equity attached. *Church* v. *Church*, 278.

UNSEATED LANDS.
1. Where a sale of unseated lands for non-payment of taxes is made in the lifetime of the owner, who dies before the time of redemption has passed, leaving minor heirs, the title of the purchaser is complete after the expiration of the two years without redemption. *McCormack* v. *Russell*, 185.
2. The death of the owner subsequent to the sale will not enlarge the time for redemption beyond the two years allowed by the Act of 1815. *Id.*
3. A purchaser at treasurer's sale, as against a mere intruder deriving no title from the original owner, need only show title out of the Commonwealth, and a treasurer's deed to himself or some person from whom he derives title. *Crum* v. *Burke*, 377.
4. The payment of taxes by a stranger without title, on a part of a tract of unseated land without defining the location or boundaries of the part for which the taxes are so paid, will not defeat the title of the purchaser of such tract at a sale for taxes. *Id.*
5. Whether a tract of land is seated or unseated at the time the taxes for which it was sold were assessed, is a question of fact for the jury: but it is not error for the Court to express their views of the evidence, if the question be not withdrawn from the jury. *Id.*

USAGE.
CUSTOM.
EVIDENCE. 10.

VENDEE.
ATTORNEY-AT-LAW, 4, 5.
JUDGMENT, 1–2.

VERDICT.
POINTS RESERVED, 1–5.
1. Where the vendee of goods was sued on an accommodation note made for his credit, and endorsed by him over to the vendor, and the case was arbitrated, appealed from, tried in court and reversed on error; on the second trial below the plaintiff amended his declaration by joining a new count for goods sold and delivered, no exception being taken, or anything appearing in the record to show objection on the part of the defendant. *Held*, that after a defendant goes to trial and takes the chance of a verdict on a declaration thus amended, it is too late to object. *Shriner* v. *Keller*, 61.
2. Where the jury, directly against the charge of the Court, found a verdict for the plaintiff, the Court had authority to send them out to reconsider their finding, and record their verdict subsequently rendered in favour of the defendant. *Ramage* v. *Peterman*, 349.
3. A condition annexed to a verdict, is in the nature of an injunction to stay proceedings at law, and an uncertainty in it will not vitiate the verdict: the Court may reduce the condition to a certainty either with or without an issue. *Henry* v. *Raiman*, 354.
4. Specific performance of an agreement for the conveyance of land, cannot be enforced by a conditional verdict for any other land than such as is embraced in the agreement. *Kribbs* v. *Downing*, 399.

WAGER.
1. A party having a legal claim upon another for work done, wagered

Digitized by Google

www.libtool.com.cn

WAGER.
the amount with his debtor on the event of an approaching election, who gave his note for double the amount of his indebtedness, to be paid to his creditor upon the success of the candidate named. The debtor won the bet, and the creditor brought *assumpsit* for his original cause of action. *Held*, that he was entitled to recover. *Waters* v. *Hixenbaugh's Administrators*, 131.

2. A bet upon an election, regarded as a contract, is totally void, where there has been no deposit of the thing bet. *Id.*

WAIVER.
COMPOSITION DEED, 4.
PRACTICE, 3.
SHERIFF'S SALE, 7.
Quære, Whether a waiver of inquisition on real estate by an executor or administrator, since the Act of 1834, will authorize a sale? *Sample* v. *Barr*, 457.

WARRANT.
SURVEY, 3–4.

WATERCOURSES.
1. Where a subterranean flow of water has become so well defined as to constitute a regular and constant stream, the owner of the land above, through which it flows, may not divert or destroy it to the injury of the person below, on whose land it issues in the form of a spring. *Wheatley* v. *Baugh*, 528.

2. But where the spring depends for its supply upon percolations through the land of the owner above, and in the use of the land for mining or other lawful purposes the spring is destroyed, such owner is not liable for the damages thus done, unless the injury was occasioned by malice or negligence. *Id.*

3. The prior use of the spring for the purposes of a tannery, conferred no right of servitude over or through the land of the adjacent proprietor. *Id.*

4. Nor would the enjoyment of the spring for twenty-one years raise any presumption of a grant; for no presumption would arise against the owner until it was shown that the exercise of the privilege interfered with his rights in such manner as to entitle him to legal redress. *Id.*

WEIGHTS AND MEASURES.
Where a contract was made for a given number of tons of iron, since the Act of 15th April, 1834, which declares that "2000 pounds shall make one ton," the contract must be taken to have been made in reference to it, and it was error to admit evidence of a local custom to control the statute. *Evans* v. *Myers*, 114.

WIDOW.
DECEDENT, 1–4.
1. Where an administrator refuses to set apart for the widow of a decedent the property to which she is entitled under the Act of 1851, she has neither such a general nor special property in the articles to which she is entitled as will enable her to maintain trespass against the administrator. *Neely* v. *McCormick*, 255.

2. Her remedy in such circumstances is a special action on the case, or if converted by him into money, she may sue in *assumpsit* for money had and received to her use. *Id.*

WILL.
DECEDENT, 3.
DEVISE, 1.

Digitized by Google

www.libtool.com.cn

WILL.

1. The devise to testator's wife was as follows: "This is to be understood, that my wife is to have all the benefit of the farm during her life, and the disposal of one-half at her pleasure, and the proceeds of the other half to be divided among my living children: but should my wife choose, she may have the farm sold, and the products used as before mentioned." *Held*, that by this devise the widow took a fee in one-half of the farm, together with a power over the whole farm to sell it, and appropriate one-half of the proceeds to herself absolutely, the other half to herself for life, and after her death to her children. *Smith* v. *Fulkinson*, 109.

2. The decree of the register admitting a will to probate, whether expressed in the form of an adjudication, or implied by the granting of letters testamentary, is conclusive as to the personalty, and *prima facie* evidence of its execution as to the real estate. *Shinn* v. *Holmes*, 142.

3. The probate cannot be invalidated in ejectment by looking into the evidence on which it was founded. *Id.*

4. Where a testator introduces a devising clause by words which manifest a purpose to dispose of his entire estate, and there is no devise over, nor any language indicating an intention to give less, the devisee will take a fee simple. *Id.*

5. Where a devise of land contains a limitation to a class, which may include persons not yet born, the time of the distribution defines the members that are to constitute the class. *Haskins* v. *Tate*, 249.

6. A testator devised as follows: "I further will that the plantation I bought of my son Robert, lying near Hill's Mill, shall be equally divided amongst my son Robert's children, he and them enjoying the benefits of it whilst he lives." *Held*, 1st. That Robert took a life estate in the premises so devised. 2d. That the division amongst the children was to be made at Robert's death. 3d. That children born after the death of testator, and living at the death of Robert, participated equally with those born before. *Id.*

7. Since the Act of 1833, relating to last wills and testaments, no will in writing concerning real estate can be revoked by parol. *Clark* v. *Morrison*, 453.

8. A will which contains no intelligible devise or bequest is void for uncertainty: parol evidence is not admissible to explain what the testator meant by such an instrument. *Kelley* v. *Kelley*, 460.

9. Where a testator devised as follows: "I will that my son Ephraim have the home place, where I now live, by paying the legatees their respective shares, also the clock as it stands; also a horse valued at $75; a good saddle and bridle; also a good bed and bedding." And in a subsequent part of the will provides "as my son Ephraim has these moneys to make, he shall have a reasonable time allowed him without distressing or incurring costs: and further, it is my will that should any of my heirs die without lawful heirs from their body, their part shall return and be divided equally amongst the surviving heirs:" Ephraim entered and paid the legacies. *Held*, that he took a fee simple, and not a fee tail in the land. *Fulton* v. *Moore*, 468.

10. Where a testator in 1791 devised a tract of unimproved land, without the use of words of inheritance, and gave the one-third of the annual profits of the land to another for life, and there is no contrary intention expressed upon the face of the will, the devisee will take an estate in fee simple. *Holmes* v. *Pattison*, 484.

WITNESS.

1. The rule in Post *v.* Avery and kindred cases, does not prevent a stockholder from assigning his stock after suit brought, and testifying in favour of the corporation. *Meighen* v. *The Bank*, 288.

2. The contingent liability of a stockholder to the noteholders of a bank, in case of its insolvency, is too remote an interest to disqualify him

Digitized by Google

WITNESS.
from testifying in favour of the bank, unless there is some evidence of the insolvency of the corporation. *Meighen* v. *The Bank*, 288.
3. A principal debtor in a judgment, although not served with the *scire facias*, is an incompetent witness on the ground of interest to prove payment of the judgment, being liable for the debt and costs to his surety, in the event of a recovery against the latter. *Marshall* v. *Franklin Bank*, 384.
4. A person who is a party to the suit at the impetration of the writ, but who is not served with process, nor a party to the issue, is nevertheless incompetent as a witness for his co-defendant. *Id.*
5. A defendant on the record cannot render himself competent as a witness for his co-defendant, by offering to confess judgment to the plaintiff for the amount claimed. *Id.*
6. Where a witness is called to prove the value of the services of an attorney in a certain cause, it is not relevant to ask the witness on cross-examination how much he had paid counsel for their services in a suit in which he had been a party. *Robinson* v. *Bakewell*, 424.
7. There is no rule of policy which prohibits the assignor of a judgment from testifying in favour of the defendant. *Himblewright* v. *Armstrong*, 428.
8. Nor is he incompetent on the ground of interest, it being, if he has any, against the party calling him. *Id.*

END OF VOL. I.

Digitized by Google

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

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

www.libtool.com.cn

HARVAR ARY

Digitized by Google

www.libtool.com.cn

Digitized by Google