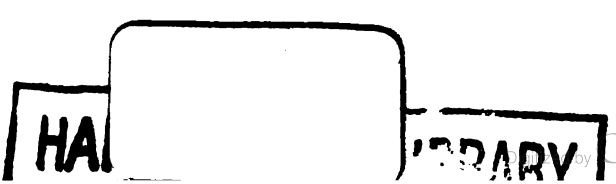

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PENNSYLVANIA

STATE REPORTS.

VOL. LXXIII.

COMPRISING

CASES ADJUDGED

IN THE

Supreme Court of Pennsylvania.

BY

P. FRAZER SMITH,
STATE REPORTER.

VOL. XXIII.

CONTAINING

CASES ARGUED AT JANUARY TERM, 1873.

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1874.

☞ The Reporter will be greatly obliged to the members of the Bar if they will insert the *names* of the cases cited as well as the book and page. This would save him very great labor, and what is much more important, would tend to secure accuracy in the citations.

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JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA

DURING THE PERIOD OF THESE REPORTS.

JOHN M. READ, ...	Chief Justice.
DANIEL AGNEW, ...	Justices.
GEORGE SHARSWOOD, ...	
HENRY W. WILLIAMS, ...	
ULYSSUS MERCUR, ...	

F. CARROLL BREWSTER, Esq., Attorney-General.

JUDGES OF THE COURTS OF COMMON PLEAS. 1873.

DIST.

1st—City of Philadelphia. *President Judge*, Hon. JOSEPH ALLISON; *Associate Judges*, Hon. JAS. R. LUDLOW, Hon. WM. S. PEIRCE, Hon. EDWARD M. PAXSON, and Hon. THOMAS K. FINLETTER.

2d—County of Lancaster. *P. J.*, Hon. JOHN B. LIVINGSTONE; *A. J.*, Hon. ALEXANDER L. HAYES.

3d—Counties of Northampton and Lehigh. *P. J.*, Hon. A. BROWER LONGAKER.

4th—Counties of Tioga, Potter, McKean, Cameron, and Elk. *P. J.*, Hon. HENRY W. WILLIAMS; *A. J.*, Hon. STEPHEN F. WILSON.

5th—County of Allegheny. *P. J.*, Hon. JAMES P. STERRETT; *A. JJ.*, Hon. EDWIN H. STOWE and Hon. FREDERICK H. COLLIER.

6th—Counties of Erie and Warren. *P. J.*, Hon. L. D. WETMORE; *A. J.*, Hon. JOHN P. VINCENT.

7th—Counties of Bucks and Montgomery. *P. J.*, Hon. HENRY P. ROSS; *A. J.*, Hon. RICHARD WATSON.

8th—Counties of Northumberland and Montour. *P. J.*, Hon. W. M. ROCKEFELLER.

9th—Counties of Cumberland, Perry, and Juniata. *P. J.*, Hon. B. F. JUNKIN.

10th—Counties of Westmoreland, Armstrong, and Indiana. *P. J.*, Hon. J. A. LOGAN.

11th—County of Luzerne. *P. J.*, Hon. GARRICK M. HARDING; *A. J.*, Hon. EDMUND L. DANA.

12th—Counties of Lebanon and Dauphin. *P. J.*, Hon. JOHN J. PEARSON.

13th—Counties of Bradford and Susquehanna. *P. J.*, Hon. FERRIS B. STREETER; *A. J.*, Hon. PAUL D. MORROW.

14th—Counties of Fayette and Greene. *P. J.*, Hon. A. S. WILLSON.

15th—Counties of Delaware and Chester. *P. J.*, Hon. WILLIAM BUTLER.

16th—Counties of Franklin, Bedford, Somerset, and Fulton. *P. J.*, Hon. WILLIAM M. HALL; *A. J.*, Hon. D. WATSON ROWE.

17th—Counties of Butler and Lawrence. *P. J.*, Hon. LAWRENCE L. McGUFFIN.

18th—Counties of Clarion, Jefferson, and Forest. *P. J.*, Hon. W. P. JENKS.

19th—Counties of York and Adams. *P. J.*, Hon. ROBERT J. FISHER.

20th—Counties of Mifflin, Union, and Snyder. *P. J.*, Hon. J. C. BUCHER.

21st—County of Schuylkill. *P. J.*, Hon. C. L. PERSHING; *A. J.*, Hon. T. H. WALKER.

22d—Counties of Wayne, Pike, Monroe, and Carbon. *P. J.*, Hon. S. S. DREHER.

23d—County of Berks. *P. J.*, Hon. WARREN J. WOODWARD; *A. J.*, Hon. J. HAGENMAN.

24th—Counties of Huntingdon, Blair, and Cambria. *P. J.*, Hon. JOHN DEAN.

25th—Counties of Centre, Clearfield, and Clinton. *P. J.*, Hon. CHAS. A. MAYER.

26th—Counties of Columbia, Sullivan, and Wyoming. *P. J.*, Hon. WM. ELWELL.

27th—Counties of Washington and Beaver. *P. J.*, Hon. A. W. ACHESON.

28th—Counties of Mercer and Venango. *P. J.*, Hon. JOHN TRUNKEY.

29th—County of Lycoming. *P. J.*, Hon. JAMES GAMBLE.

30th—County of Crawford. *P. J.*, Hon. WALTER H. LOWRIE.

JUDGES OF THE DISTRICT COURTS.

District Court for the City of Philadelphia. *President Judge*, Hon. J. I. CLARK HARE; *Associate Judges*, Hon. M. RUSSELL THAYER, Hon. JAMES LYND, Hon. JAMES T. MITCHELL, and Hon. AMOS BRIGGS.

District Court for the County of Allegheny. *P. J.*, Hon. MOSES HAMPTON; *A. J.*, Hon. JOHN M. KIRKPATRICK.

District Court of Cambria County. *P. J.*, Hon. JAMES POTTS.

First District of Criminal Jurisdiction—Counties of Dauphin, Lebanon and Schuylkill. *P. J.*, Hon. D. B. GREENE.

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REPORTED IN THIS VOLUME.

CASES CITED

IN THE

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ERRATUM.

In Keller v. Stotz, 21 P. F. Smith 356, the syllabus should read, "*Held*, to be a correct answer."

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

NORTHERN DISTRICT—SUNBURY, 1873.

The Imperial Fire Insurance Co. *versus* Murray *et al.*

1. Where a party applying for insurance, without fraud, made an inaccurate representation (not a warranty), which he believed to be true, this would not defeat his action on the policy.
2. An insurance was effected on a coal-breaker, &c., by the lessee of a colliery, being the "working interest;" the lessee having the right to renew his lease, and being bound to return the property in good order at the end of the lease. The slope fell in and afterwards the breaker, &c., were burned. The insured could recover the value of the property although by the falling in of the slope his working interest was of less value than the amount insured.
3. The insurable interest of the lessee was the value of the property which he was bound to replace.

January 27th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Writs of error to the Court of Common Pleas of *Columbia county:* Of September Term 1872, No. 2 and 5.

The cases in which these writs of error were taken, were tried together in the court below, and heard together on error in the Supreme Court.

Both actions were brought to September Term 1870 of the court below, by William Murray, Richard Winlack and Walter Randall, trading as Murray, Winlack & Randall, on two policies of insurance: the first against The Imperial Fire Insurance Company; the second against The North British and Mercantile Insurance Company. They were tried June 13th 1871, before Elwell, P. J.

[Imperial Fire Ins. Co. v. Murray.]

Each policy was dated September 18th 1869, for "$2500 on frame coal-breaker structure, schutes, plane, trestling, engine and boiler-house, and all wood work connected; $2500 on breaker engine, rollers, screens, belts, plates, pulleys, shafting and all connected machinery contained in breaker structure, situate in Locust Mountain, in Conyngham township, Columbia county. This to insure all their working interest. Rate 3 per cent.; premium $150; term one year from September 17th 1869. Also another policy of $5000." The foregoing was written in the blank of the printed policy.

Richard Winlack, one of the plaintiffs, testified: "Mr. Sillyman represented the defendants, and came to me to get the insurances; the office was in Pottsville; E. F. Bodey represented both companies; the fire occurred January 19th 1870, in the night; I didn't know it till the 20th, and on the morning of the 21st I went up to the breaker; on the same day I notified Mr. Bodey; I told him the property was destroyed, and he should notify his companies at once; he said he would; I took the notices to Mr. Bodey, he read them over, and said 'The papers are all right.' This was the date of first paper; I executed the paper in duplicate, one copy to Mr. Bodey, and one to be forwarded to the company. About sixty days after the first, I received a letter from Mr. Bodey. I took the letter to Mr. Kaercher, and he and I went to Mr. Bodey, to see what papers in addition he wanted; he gave a memorandum of what he wanted; the papers were made out, and I took them to Mr. Bodey, and he said he would forward them to the company the same day. Duplicates were mailed to the company the same day. The first notice was a verbal notice; the first written notice was on January 24th 1870; gave no other notice until March; Bodey requested that the notice of March be given; he said the papers were all right; he told me he was agent for both companies to effect insurances. I made my application to Bodey, and got the policies; they were handed to me by Mr. Sillyman; I had nothing direct to do with Bodey in effecting the insurances."

The following letters were given in evidence by the plaintiffs:—

"Pottsville, January 25th 1870.

"Imperial Fire Insurance Company of London; Office No. 40 Pine street, New York.

"E. M. Archibald, Esq.

"Dear Sir:—Please find enclosed a copy of the notice and proof of loss this day served upon the agent of the company, E. F. Bodey, by the insured, Messrs. Murray, Winlack & Randall, with instructions to forward the same to the company. Should any further notice or proof be required the insured will cheerfully

furnish the same if desired by the company. Please acknowledge receipt of this and enclosure and oblige

"Yours respectfully,

"GEO. R. KAERCHER,

"Att'y for Murray, Winlack & Randall."

A letter precisely similar was addressed to the New York agent of the North British and Mercantile Insurance Company.

"Pottsville, Pa., March 15th 1870.

"Messrs. Murray, Winlack & Randall:

"Gentlemen:—Your papers purporting to be proofs of loss under policy No. 36 in the Imperial Fire Insurance Company of London, and No. 506 in the North British and Mercantile Insurance Company, are entirely incorrect and insufficient, and are not in pursuance of your policies, and are not in accordance with the conditions thereof. We call your attention to said policies, and to the printed conditions in relation to loss, &c. Until you comply with such conditions in this respect I can give you no answer as to what our course of action will be. Yours truly,

"E. F. BODEY,

"Agent for N. Bt. Mercantile and Imp. Fire Ins. Cos."

"Pottsville, March 19th 1870.

"Dear Sir:—We have this day furnished Mr. E. F. Bodey, agent of the company at Pottsville, additional information concerning our loss by fire of our working interest insured under policy No. 506, with directions to forward the same to the company. It was only yesterday that we ascertained, through Mr. Bodey's letter to us, that the company desired any further information to determine 'its course of action,' though we signified our willingness to comply with any requirements the company might desire, in our communication of January 25th 1870; besides, the same statement was made to Mr. Bodey, the agent, at the time the proofs were handed to him, when he, after examination of them, replied that they were *sufficient and correct*. Hoping that in justice to all parties concerned the company will speedily determine upon its course of action, we are very respectfully,

MURRAY, WINLACK & RANDALL."

Addressed to each of the New York agents.

Conrad Sillyman testified: "I was canvasser for insurance for Mr. Bodey; he was agent for the companies; I procured Murray, Winlack & Randall necessary papers; they were executed by Bodey; he filled the policies; the applications were filed in his office; kept them as references; were not sent abroad as I know of; Bodey paid the losses when they occurred, but not in this case."

Richard Winlack further testified: "I called with Mr. Kaercher

on Mr. Bodey, before the first notice, and asked for the printed form of the policies, to put it in the notice; he said it was not necessary to put it in only the written portion of the policies, and after they were made out showed them to Bodey. He said they were all right."

The plaintiffs, under objection and exception, gave in evidence the following written notices, being those referred to in the testimony of Richard Winlack.

The notice was addressed to each of the insurance companies.

It set out the issuing of the policy in each case to the plaintiffs by the company, "countersigned by their agent at Pottsville; the written body of said policy, with its immediate context, is as below specified, said insurance terminating on the 17th day of September, A. D. 1870, at 12 o'clock, noon." * * *

"By this policy of insurance the North British and Mercantile Insurance Company, in consideration of the receipt of one hundred and fifty dollars, do insure Murray, Winlack & Randall to the amount of five thousand dollars, as follows, viz.: $2500 on frame coal-breaker structure, schutes, plane, trestling, engine and boiler-house, and all wood work connected; $2500 on breaker engine, rollers, screens, belts, plates, pulleys, shafting, and all connected machinery, all contained in breaker structure, situate at the Locust Mountain Colliery, Conyngham township, Columbia county, Penna. This insurance to cover their working interest in the above-insured property. $5000, similar insurance."

"That in addition to the amount covered by the above policy there was other insurance made thereon to the amount of $5000, as specified in the accompanying schedule, showing the name of such company and the written portion of said policy, besides which deponents had no insurance thereon. That on the 19th day of January, A. D. 1870, a fire occurred by which the property insured was injured and destroyed to the amount of ten thousand dollars and upwards, which deponents declare to be a faithful and just and true account of their loss as far as they have been able to ascertain the same.

"That the actual cash value of the property so insured amounted to the sum of ten thousand dollars and upwards at the time immediately preceding the fire. That the character and nature of the property so destroyed is set forth in the above-mentioned part of said policy.

"That the property insured belonged and was leased to said Murray, Winlack & Randall, and that the property above insured, and which was destroyed, was used in the mining and preparation of anthracite coal for market, and for no other purpose whatever.

"That the fire originated from causes unknown to deponents, and, after diligent inquiry, they have been unable to ascertain the cause of said fire.

"That the amount of their claims against The North British and Mercantile Insurance Company is five thousand dollars each, and the said deponents further declare that the said fire did not originate by any act, design or procurement on their part, or in consequence of any fraud, or evil practice, done, or suffered by them, and nothing has been done by or with their privity or consent, to violate the conditions of insurance, or render void the policy aforesaid.

Sworn and subscribed before me, the 24th day of January A. D. 1870. } WILLIAM MURRAY, R. WINLACK."

* * * *

Accompanying the foregoing was the affidavit of a resident "most contiguous" to the property insured, that he was not interested as creditor, &c., and that he believed the loss sustained by the plaintiffs was "$10,000 and upwards." Also, a schedule of the additional insurance by the other company.

The notice of March 18th, referred to in Winlack's testimony, set out the insurance, the fire, &c., and stated that full proofs of the loss and circumstances of the fire had been furnished to Bodey January 19th 1870, and a copy forwarded to the company; that on the 17th of March the plaintiffs received a letter from Bodey requiring further information, and the nature of such information "having been this day made known by the said E. Bodey," the plaintiffs presented additional proofs, viz.:—"That the real estate upon which the property insured was erected, is owned by the Locust Mountain Coal and Iron Company, that a leasehold estate therein was conveyed by the said company to the Mammoth Vein Consolidated Coal Company, and that the said leasehold estate became vested in W. W. Goddard and O. Ditson, that the interest of O. Ditson became vested in J. W. Draper, and that a sub-lease was made by the said Goddard & Draper to Murray, Winlack & Randall; that the value of the breaker, engines, improvements (their working interest in which was insured) was between thirty-five and forty thousand dollars; that the estate of Goddard & Draper was to continue until December 31st 1874; that the sub-lease of Murray, Winlack & Randall was to continue until March 31st 1870, with privilege of renewal for one year from that date, in default of which renewal the said Goddard & Draper were to pay to the said Murray, Winlack & Randall the amount expended by them in and upon said breaker, amounting to $7500; that the said improvements and addition to said breaker had been made at the time of said insurance and are part of the property, the working interest therein of which was insured by said policy; * * * that the whole of the property mentioned in the above policy (worth between $35,000 and $40,000) was destroyed by said fire, and the entire working interest of the said Murray, Winlack & Randall was destroyed; that the actual cash value of the working

interest so insured and destroyed amounted to fifteen thousand dollars and upwards at the time immediately preceding the fire; that the amount of the claim of Murray, Winlack & Randall against the Imperial Fire Insurance Company, of London, is five thousand dollars."

The plaintiffs gave in evidence lease dated in 1864, from the Locust Mountain Coal and Iron Company to the Mammoth Vein Consolidated Coal Company, by which the lessors granted, &c., to the lessees "a certain coal breaker, with its appurtenances, situate at the colliery known as the Big Run Colliery, * * * steam-engine, boilers, pumping and hoisting machinery and apparatus at the slope known as the 'Mammoth Vein,' and the house covering said steam-engine, &c.," and other colliery improvements; the lessors also leased to the lessees "for a term commencing at the date of this lease, and terminating on the 31st of December 1874, the right, &c., to mine and take away coal as their own property," in the manner described in the lease, the lessees to pay 25 cents per ton; the lessees to keep the breaker, including the engine and fixtures, insured for not less than $10,000, and the engine-house and machinery therein insured for not less than $5000, the payment, in case of loss, to be made to the lessors; the breaker and fixtures belonging to lessees to remain on the premises until the end of the term, and be kept in repair by the lessees; at the end of the term to be valued, and if not taken at the valuation by the lessors to be removed by the lessees.

Plaintiffs gave in evidence sheriff's sale November 25th 1867, under an execution against the Mammoth Vein Company of all their leasehold interest, including fixtures, to William W. Goddard and Oliver W. Ditson. Also, lease W. W. Goddard and John W. Draper to Winlack, Murray & Randall, the plaintiffs, dated April 1st 1868, granting and demising the premises held under the foregoing lease, and sold by the sheriff, as above stated, to Goddard & Ditson, the interest of Oliver Ditson in which has since become vested in the said John W. Draper. Also, the right to use the machinery, fixtures, &c., erected at the colliery until March 31st 1870; the plaintiffs to pay the rent reserved by the Locust Mountain Company, and an additional rent of 20 cents per ton on coal mined; to keep the covenants, &c., to be kept by the Mammoth Vein Company; to keep the movable personal property in good condition, and deliver the possession to the lessors at the end of the term in good condition, and if it should "be destroyed by accident, or otherwise, to replace the same with others of equal value," &c., and to keep the improvements, &c., in good order; with right of re-entry by lessors on breach of condition, &c.

The plaintiffs gave in evidence, under objection and exception, an agreement dated December 9th 1868, between J. W. Draper

and plaintiffs, reciting that plaintiffs were working the colliery under an agreement with Goddard & Ditson, and contemplated putting in a steam-pump, and agreeing that plaintiffs should be allowed 15 cents per ton on all coal mined until the pump should be paid for, "from after the first of January 1869, the cost not to exceed $5000;" at the end of the agreement with Goddard & Ditson the plaintiffs to have the privilege of removal for one year, "if not so allowed," then all permanent improvements by the plaintiffs to be paid for by Goddard & Ditson, who were to have the privilege of selling the colliery at any time by paying the plaintiffs for the improvements.

Plaintiffs gave evidence tending to show that after the sheriff's sale Goddard & Draper had the control of the colliery.

Winlack testified that Ditson was never at the colliery, and made no claim on plaintiffs; they had always paid rent either to Draper or to an agent of Draper & Goddard. The plaintiffs shipped coal till December 18th 1869; they were not working the pump when the breaker was burned; the slope had caved in when the machinery was burned.

Plaintiffs gave evidence that the amount expended by them for improvements was $8200.

Under objection and exception Winlack testified: "the market value of our working interest at the time of the fire, with the privilege of removal for one year, was between $20,000 and $30,000;" and that it would have cost not less than $30,000 to restore it as it was before the fire; the breaker at the time of the fire was worth $18,000 or $20,000; plaintiffs did not apply for a renewal of the lease; nor was it renewed; they had possession until the time of the fire; had a watchman there and afterwards, until the 1st of April; plaintiffs were sold out by the sheriff; until then they had houses, &c.

Before the fire the slope had fallen in; it was not opened; it would cost about $5000 to open it; plaintiffs made no effort to open it; it would be useless to open the slope unless they had a breaker; it would not pay to open it for the property in the mines, unless they could get out the coal.

Plaintiffs gave evidence also of the character and extent of the injury by the falling in of the slope, and of the expense and time necessary to open it.

The defendants gave in evidence a judgment against the plaintiffs on January 12th 1870, for $3259, in favor of a trustee for wages, under which their personal property was sold for $2041.75.

They gave in evidence the deposition of Draper, in which he said that the plaintiffs gave up the possession in January 1870; that the permanent improvements belonged to the Locust Mountain Company, having been erected before plaintiffs took possession, including breaker and slope, house and ordinary machinery about

it. Plaintiffs did not remain in possession until the end of their lease; the slope fell in about the last of December 1869, and that destroyed the colliery; deponent gave up the colliery to the Locust Mountain Company; plaintiffs did not ask to renew the lease under its provisions, and gave as reasons for abandoning it, that they could not put in the money necessary to re-open it. "The working interest in the breaker and fixtures after the slope fell in, and before it was re-opened, was worth nothing." The plaintiffs never surrendered the sublease formally, and did not leave possession till the breaker was burned. Winlack said plaintiffs would have to give up the place, if they could not get money to re-open it. The possession plaintiffs had from the time the slope fell in till the fire was a nominal possession, and they had not given up possession, nor had Goddard & Draper given it up.

The defendants gave evidence that it would cost $10,000 or more to repair the slope, and that it would occupy twelve months to open it.

The defendants offered to prove that in the spring of 1870, before the institution of these suits, The Locust Mountain Company took possession of the demised premises; had continued in possession since; had cancelled the lease to Mammoth Vein Company with the consent of Goddard & Draper, and promised to release all the covenants in the lease, and any right of action thereon. On objection by the plaintiffs the offer was rejected and a bill of exceptions sealed for defendents.

The evidence was conflicting as to the cost of repairing the slope and also as to the time that it would take to do the work.

The defendants submitted a number of points, which with their answers follow the charge of the court.

The court charged:— * * *

["By the terms of the policies it was incumbent upon the assured to give immediate notice of the loss.

"Was this condition performed? If not, was it waived by the defendants? Were the particulars of loss and other matters of which the plaintiffs were required to give notice, furnished to the defendants, or was more full notice waived by them? If such notice was not given nor waived the plaintiffs are not entitled to recover.

"If, however, you believe from the evidence that the fire occurred at night on the 19th of January 1870, and that the plaintiffs did not hear of it till some time the next day, and that on the 21st one of the plaintiffs went to ascertain the extent of the loss, and that on the next day he notified the local agent of the companies, E. F. Bodey, whose name appears upon the policies as such agent, and if on the 24th of January written notices were served upon him, which he pronounced right, duplicates whereof were forwarded to the general offices of the companies, and if

proofs of loss were served upon the agent the next day, and if no notice was given to the plaintiffs or their attorney of any defect in the notices until the 15th day of March, at which time it was complained that the notices were insufficient, and that action would not be taken until they were made correct, and if the plaintiffs then applied to know wherein they were deficient and what further was required, to which no reply was made, the jury may consider such facts in determining whether the defendants waived further notice than that received.

"If the agent informed the plaintiffs that the notices were right, and the companies were silent for nearly two months and complained only in general terms, it is some evidence that they did not insist upon an objection that the notice was not in time.

"When the insured is desirous to comply with the contract in regard to notice, fairness towards him required that the companies should not mislead him by declaring that his notices were right, and afterwards be allowed to make defence and refuse to pay because they were wrong or not in time, especially if accompanied with an offer to perfect them at any time on notice of a defect.

"We refer the question of waiver as to time and particulars of loss to your consideration, under the evidence.]

"In order to understand the rights of the parties, it is necessary to ascertain what insurable interest the plaintiffs had in the property insured, at the time of effecting these insurances, and at the time of the fire.

"On the 1st of June 1869, the Locust Mountain Coal Company executed a lease to the Mammoth Vein Consolidated Coal Company of this coal breaker and other improvements mentioned, together with the colliery, for the term of ten years. By the terms of this lease the lessee was bound to keep the demised premises insured to the amount of fifteen thousand dollars, and was also bound to pay a yearly rent upon not less than 40,000 tons of coal, and to keep the improvements, machinery, fixtures, &c., in good repair. On the 25th of November 1867, the title of the lessees passed by sheriff's sale to W. W. Goddard and O. W. Ditson. On the 1st of April 1868, W. W. Goddard and J. W. Draper executed a lease to the plaintiffs of this property, until the 31st of March 1870, the lessees agreeing to pay as rent certain sums per ton for all coal mined, and to perform all the covenants of the original lease. [In this lease it is recited that the interest of O. W. Ditson had become vested in J. W. Draper. If he put the plaintiffs in possession, and received rents, and the other rents were paid to the agent of Goddard & Draper, Ditson having made no claim, the jury may, if they think the facts warrant it, conclude in connection with the testimony of Draper himself, that he had the interest claimed by him.]

"On the 9th of December 1868, J. W. Draper entered into a

further agreement with the plaintiffs giving, as we construe the writing, the right to the plaintiffs to require a renewal for another year. Prior to the date of the policies the plaintiffs had, as they allege, made large improvements about the colliery, in trestling, constructing railroads and putting in screens, rolls, &c., to an amount of nearly $8000. Considerable evidence has been given upon this subject, from which the amount of expenditures, as far as it is material, can be ascertained.

"When the insurances in question were applied for and effected the colliery was in working order, and it would seem the plaintiffs intended to have their lease renewed. But on the 29th of December 1869, the slope fell in and the work was stopped, and remained so until the fire on the 19th of January.

"Much evidence has been given upon the subject of the condition of the mines and the length of time it would take to restore them to working order. The estimates of the witnesses are wide apart—varying from twenty-five days to one year. It is claimed by the defendants that although the contract of insurance was for one year from the 18th of September 1869, that the plaintiffs had in fact but the interest of a tenant for a year, and that such interest expired on the 31st of March 1870.; and further, that this interest, at the time of the fire, was of no value. On the part of the plaintiffs it is claimed that the insurance was upon specific property, in which they had an insurable interest, not only merely as tenants, having the right to use the property during their present term, but that they had a right to have it renewed; that they were bound to keep it insured, and also to maintain and keep the property in good order and condition at their own expense, and also to pay the royalty or rent upon 40,000 tons of coal, and that their interest in the breaker and other property described, was more than equal to the whole amount of insurance in both policies.

["The term 'working interest,' used in these policies, does not appear to be a technical term. What was intended by it? We think the parties intended that it should, and that it does comprehend the entire insurable interest which the plaintiffs had in the property, under the provisions of the lease to them from Goddard & Draper, and the further agreement, signed by Draper, of the 9th of December 1868. They were liable by the terms of their lease, and under the law, to surrender the premises at the end of their lease, having kept and maintained the improvements, machinery and fixtures in good order, and in case of their destruction, to replace them. They were also bound to keep upon it an insurance of $15,000. Their insurable interest in the demised premises was, therefore, to the extent of the value of the property, which they were bound to replace.

"The plaintiffs were bound to pay a yearly rent upon not less

than 40,000 tons of coal, and were also bound to perform and keep all the covenants of the original lease from the Locust Mountain Coal and Iron Company; they, therefore, had an insurable interest in the demised premises to the extent of their liabilities upon their covenants in these respects.

"If, therefore, the jury believe from the evidence that it would have cost the plaintiffs ten thousand dollars, or upwards, to have replaced the insured buildings and property destroyed by fire in as good order and condition as before, at the date of the lease, then the plaintiffs are entitled to recover against each of the defendants the sum of five thousand dollars, with interest from the time the same was payable by the terms of the policies read in your hearing. But if you find their damages would be less than ten thousand dollars, such damage is to be equally divided between the defendants.] You will understand that this is subject to the instructions before given upon the question of notice and the question of fraud hereafter submitted."

The defendants' points and their answers were:—

1. The plaintiffs in these cases held the leasehold premises under and by virtue of their lease from Goddard & Draper, bearing date the 1st day of April 1868, which expired on the 31st of March 1870; their interest in the breaker and machinery belonging thereto, consisted only in the right to occupy and use the same for the purpose of preparing coal, which might be taken from the demised premises.

Answer: "We decline to answer as requested."

2. The policies of insurance effected on the 17th day of September 1869, to run until the 17th day of September 1870, upon the coal breaker, the breaker engines and machinery mentioned and described in the policies, which were, by the terms thereof, to cover the working interest in the property mentioned in the policies, can only apply to the breaker and machinery mentioned in said policies, and the working interest thereby insured embraces nothing more than the right of the plaintiffs to use the breaker during the unexpired term of their lease in preparing coal mined from the demised premises.

Answer: "This point is not affirmed. The term 'working interest,' under the circumstances of the case, covers all the interest which the plaintiffs had in the property, including both its use and their liabilities in regard to it as stated in the general charge."

3. Under the evidence in the case, the plaintiffs had no insurable interest in the property mentioned in the said policies of insurance, after the 31st day of March 1870, and if the jury believe that the slope fell in on the 24th day of December, A. D. 1869, and by reason thereof the plaintiffs had no use for that breaker, from that time until the 31st day of March 1870, the interest in-

sured was of no value to them, and the verdicts must be for the defendants.

4. As the insurances in these cases were effected upon the breaker and the property described in the said policies, which consisted of only a portion of the property leased to the plaintiffs, the insurance cannot be construed to cover any liability which the plaintiffs were subject to by reason of any of the covenants which they had undertaken to perform. And whatever covenants and obligations they might have been under to rebuild the breaker cannot affect the measure of damages, if any, in these cases, and are to be disregarded by the jury in arriving at their verdict.

Both these points were refused.

5. The improvements put upon the breaker and demised premises, claimed by the plaintiffs to have amounted to $7000 and upwards, and made in pursuance of the contract of December 1868, which contract provided that their landlords should pay the actual value thereof, were, under said agreement, the property of said landlords, and the plaintiffs had no other interest in them except their use thereof, until the expiration of their lease, and the cost to the plaintiffs of said improvements cannot be taken into consideration by the jury in arriving at their verdicts.

Answer: "The jury may consider the improvements mentioned in this point in so far as they affect the value of the working interest of plaintiffs, but not as a distinct item, to be compensated for under the policies."

6. Inasmuch as the plaintiffs did not renew their lease for another year after the expiration of the term expiring on the 31st day of March 1870, and made no effort so to do, their term as tenants expired on the 31st day of March 1870, and the jury in estimating the damage to the plaintiffs, if any, are to take into consideration only the working interest of the plaintiffs from the time of the fire until the 31st day of March 1870, and if they find that within that period of time the plaintiffs had no coal to prepare over that breaker, their verdict must be for the defendants.

This point was refused.

7. Where lessees effect an insurance of their working interest in a breaker and the machinery belonging thereto, which are only part of the demised premises, consisting of a colliery and the right to mine coal, held under a lease for a term of years, and the breaker and machinery are destroyed by fire during the term, the measure of damages is not to be ascertained by proof of the value of the unexpired term to the tenant, but by ascertaining what proportion the value of the working interest in the property insured and destroyed bears to the value of the whole premises devised, and the proportion thus ascertained constitutes the true measure of damages.

Answer: "This is correct as a general rule, but is not applica-

ble to this case, where there are duties and liabilities beyond the mere use of the structure insured."

8. The plaintiffs having produced no evidence by which the damages can be so assessed by the jury, they are not entitled to recover.

9. If the jury believe that it would have required several months to rebuild the slope and to remove the water from the mines, and that the expense thereof, together with the rentals at 45 cents per ton for the prepared coal that they might have mined, would have equalled or exceeded the value of the unexpired term of the lease, the verdict of the jury must be for the defendants.

10. If the jury believe, under all the evidence of the case, that there was no value in the plaintiffs' working interest in the property insured from the time when the slope fell in until the expiration of the lease on the 31st of March 1870, the verdict of the jury must be for the defendants.

11. If the jury believe that from the time the slope fell in the plaintiffs did not intend to re-open it and work the colliery, there was no value in the working interest insured, and the plaintiffs are therefore not entitled to recover.

These four points were refused.

12. The policies of insurance cover only the working interest of the plaintiffs in the properties described in said policies, and all evidence relating to expenditures made by plaintiffs in improvements, is to be excluded by the jury in their estimate of the plaintiffs' loss, if any, resulting from the fire.

Answer: "We have already instructed upon the matters here mentioned. The value of the improvements made by the plaintiffs is not to be considered otherwise than as forming part of the property which the plaintiffs were bound to keep in repair, and surrender up at the expiration of the term."

13. The evidence having shown that a portion of the property insured, consisting of the trestling, the iron thereon, the boilers and engine, screens and rollers, were not destroyed, but only partially injured, the plaintiffs, by the terms of the North British insurance policy, were bound to make an inventory, naming the quantity and cost of each article, and appraise the damage done to each article, and having failed to make such appraisement, there can be no recovery against such company, and the verdict of the jury must be for the said defendants.

Answer: "If the North British Insurance Company had notice of the fire, as required by the policy, or if a more particular notice was waived, it was as much the business of the company to move in the matter of an appraisement of the property damaged, but not wholly destroyed, as it was of the plaintiffs.

"The insurance was upon specific property, partaking of the character of realty—a coal breaker and fixtures; the clause in the

policy relating to personal property damaged does not apply, and the plaintiffs were not bound to have an inventory and appraisement and furnished, with the truth of loss. Notice that the property was destroyed by fire, if that was substantially correct, was all that was required."

14. The plaintiffs having represented in their application that their lease had to run one year from the 1st day of March 1870, such representation being material to the value of the property insured and a warranty, and being shown by the evidence in the case to be a misrepresentation, the policies are void, and the verdicts must be for the defendants.

Answer: "The plaintiffs made their agreement on the 9th of December 1869, with Draper, in regard to a renewal of their lease. Did they believe at the time of effecting the insurance that this gave them the right to hold the property for another year? If they so believed and fairly represented, but were mistaken, it would not defeat their action. It was not such a statement of a material fact as amounted to a warranty. If, however, the representation was fraudulent, it would render the contract void, and there could be no recovery."

15. If these policies of insurance cover the liability of the said lessees to repair and renew the property demised, and to mine 40,000 tons of coal during each year of the said term, or to pay therefor, and there being no evidence that said covenants were communicated to the said insurance companies when the said policies were applied for, then, by reason of such non-communication, the plaintiffs cannot recover upon the said policies.

Answer: "The entire interest of the plaintiffs in the insured property is covered by the terms used in the policies. The defendants were informed by the application that the plaintiffs held the property as tenants, under a lease. It does not appear that they required to be informed as to the covenants and conditions contained therein. The policies are, therefore, binding, although the defendants did not know the full extent of the interest of plaintiffs under the lease. Bearing in mind the law as we have given it to you in the general charge, and also in answer to these points, you will ascertain the facts for yourselves, under the testimony. If you find that the plaintiffs have failed to comply with the conditions in regard to notice, and the defendants did not waive them, or, if the plaintiffs were guilty of a fraudulent representation in regard to the time their lease had to run, the defendants are entitled to your verdict. If, however, upon the principles before laid down, you find that the plaintiffs are entitled to recover, you will ascertain their actual damage within the sum of ten thousand dollars, and divide the amount equally between the defendants, rendering separate verdicts in each case.

[Imperial Fire Ins. Co. v. Murray.]

The verdict was for the plaintiffs in each case for $5312.50.

The defendants took out writs of error and assigned twenty-three errors.

1–5. The rulings on the offers of evidence.

6–8. The parts of the charge in brackets.

9–15. The answers to the defendants' points.

James Ryon (with whom were *J. W. Ryon* and *G. DeB. Keim*), for plaintiffs in error.

G. R. Kaercher and *F. W. Hughes* (with whom was *G. E. Farquhar*), for defendants in error.

The opinion of the court was delivered, May 7th 1873, by

MERCUR, J.—These two cases were argued together. The facts and principles of law involved are substantially the same in each. The same property is covered by each policy; each is for one year from the 17th of September 1869. The loss occurred January 19th 1870.

The plaintiffs have filed twenty-three assignments of error. We will not consider them separately. The twenty-second and twenty-third assignments are based upon an alleged false representation in the application. As we are not furnished with a copy of the application, we are unable to determine with certainty how far the facts go towards sustaining the allegation. As we understand the whole evidence bearing upon that branch of the case, we cannot see that the court committed any error in holding, that if the applicants fairly represented what they honestly believed, it would not defeat the action, and that it was not such a statement of a material fact as amounted to a warranty.

All the other assignments, except the first, sixth and seventh, may be considered together. They relate to the value of the interest insured. That the property was of much greater value than the amount of the insurance, does not admit of a question under the evidence; besides, the jury has so found. It is urged, however, by the plaintiffs, that the interest of the lessees therein was of much less value, and that that lesser value only was covered by the insurance. They claim that the value of the lessees' interest therein was measured by the value of the use thereof, from the time of the loss until the expiration of their term. In this view we cannot concur. The use of the property for the remainder of the term, by no means fixed or defined its value as to them. They had not only a right to its use and enjoyment, but had also assumed an obligation to return and redeliver it in good order and condition at the expiration of the term. If they failed so to do, they were liable to their lessors for its full value. If they redeliver according to the requirements of their lease, they

would be discharged from that obligation. They then had a large value in the property superadded to that of its use. Hence the court was correct in charging that the insurable interest of the lessees was to the extent of the value of the property which they were bound to replace.

The right of the insured and the liability of the companies, were fixed at the time of the loss, provided the requisite notices and proofs were furnished. Such being the case, the evidence referred to in the fifth assignment of error is wholly irrelevant. No arrangement made between the Locust Mountain Coal and Iron Company of the one part, and Goddard & Draper of the other part, after the expiration of the term of the defendants in error, relieved them from their obligations to return the leased property to Goddard & Draper, or pay them its value. The coal breaker, engines, boilers, pumping and hoisting machinery, apparatus and improvements, leased to the defendants in error, were the property of Goddard & Draper, and not the property of the Locust Mountain Coal and Iron Company. If the latter took possession of the leased premises, and released the former from all liability, it was for a valuable consideration paid by Goddard & Draper. It in no wise showed the determination of the estate which the assured had in the land at the time of the loss; nor of their release from liability for failing to restore the property upon which they had the insurance.

The language of the policy, after describing the property, avers, "this insurance to cover their working interest in the above-insured property." The court correctly held this was sufficiently comprehensive to cover the entire insurable interest which the assured had in the property.

The first and sixth assignments relate to the notice and proofs of loss.

We have looked in vain through the testimony to find any evidence of the extent of the powers which the companies gave to their agent Bodey. We find, however, that he was in fact exercising extensive powers. The companies were both foreign corporations, with officers and directors abroad. They also had an office in New York, and this agency in Pottsville. Bodey countersigned these policies; he filled them up; the applications were filed in his office; he kept them as references; they were not sent abroad; he paid losses when they occurred.

There is no evidence that the companies ever questioned his rightful exercise of all those powers. So there was sufficient evidence to submit to the jury to find as to the extent of his agency, and whether it was within the general scope of the business intrusted to his care: Union Mutual Life Ins. Co. of Maine v. Wilkinson, Insurance Reporter, 18th April 1872, No. 16. The question of waiver as to time and particulars of loss, was correctly submitted to the

jury: Franklin Fire Ins. Co. *v.* Updegraff, 7 Wright 350; 5 Id 162; 6 Id. 168; 11 Id. 205.

The seventh assignment was not pressed, and has no merit. We discover no error in the bills of exception, nor in the charge of the learned judge.

Judgment affirmed in each case.

AGNEW, J., dissented.

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The Danville, Hazleton and Wilkesbarre Railroad Co. *versus* The Commonwealth.

1. The rights, &c., enjoyed by the Sunbury and Erie and the Pennsylvania Railroad Companies "for settling and obtaining the right of way," do not include the mode of settling differences between township authorities and a railroad company which had taken possession of a public road.
2. Such settlement and acquisition relates to private property, which under the Constitution cannot be taken by a corporation without compensation.
3. An act gave a railroad company power to construct its railroad on a public road, and provided that if in its construction it should be necessary to change a public road, &c., they should "cause the same to be reconstructed in the most favorable location and in as perfect a manner as the original road." This does not require that the *making* of the new road shall precede the occupying of the old road.
4. The legislature may authorize building a railroad on a public road.
5. A railroad company occupying a portion of a public road not exceeding the extent allowed by law, and obstructing public travel on such portion, is not guilty of nuisance.

January 30th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Certiorari to the Court of Quarter Sessions of *Northumberland county*, of September Term 1872.

On the 1st day of November 1869, The Danville, Hazleton and Wilkesbarre Railroad Company were indicted in the Court of Quarter Sessions of Northumberland county, for nuisance.

The indictment contained two counts:—

The first set out that there was a public highway from a point in another highway, in the township of Rush, in Northumberland county, near the southern end of the bridge over the Susquehanna river, at Danville, to and through Elysburg, in the county aforesaid; that the defendants "dug up and subverted" 1200 yards in length, 30 feet in breadth, and 15 feet in depth, of the highway, and kept it so dug up, &c., whereby it "has been and yet is obstructed, stopped up, narrow and dangerous, so that the citizens of the Commonwealth have been and still are hindered and obstructed in passing," &c.

The second count set out that the defendants dug up, &c., 100

feet in length, 50 feet in breadth, and 15 feet in depth, of the same highway, and kept and maintained it so dug up, &c., and thereby obstructed the travel of the citizens of the Commonwealth.

By special verdict the jury found that the Act of 15th of April 1859 authorized the incorporation of the Wilkesbarre and Pittston Railroad Company, "to construct a railroad along and near the Susquehanna river and to be constructed as near to it as practicable on the east side of the Susquehanna river from the Lackawanna and Bloomsburg Railroad, above the borough of Pittston, in Luzerne county, along said Susquehanna river to the town of Danville or Sunbury, with the right to cross and recross the Susquehanna river at any point," &c.

That the act further provided that the company might connect with other railroads, and by section 4, should "have all the rights and privileges enjoyed for the settling and obtaining the right of way as now enjoyed by the Sunbury and Erie and Pennsylvania Central Railroad Companies;" * * * and, by section 5, should have "the rights and privileges and be subject to all the instructions of the act regulating railroad companies passed the 19th day of February, A. D. 1849."

They further found that by Act of April 10th 1867, the name of the Wilkesbarre and Pittston Railroad Company was changed to "The Danville, Hazleton and Wilkesbarre Railroad Company."

The company, by the same act, was "authorized to commence the construction of their railroad at any point on the line thereof, and the said company may locate and construct their railroad by the most practicable route their engineers may select, and may cross any other horse and locomotive railroad, at grade or otherwise, or connect therewith."

They further found that, by Act of May 8th 1854, it was provided "that in all cases of difference arising between the Sunbury and Erie Railroad Company and the supervisors of any township relative to any road, causeway or bridge which has been or may be altered or supplied by the said Sunbury and Erie Railroad, the Court of Quarter Sessions in the county of which the same may lie shall appoint three commissioners, who shall examine the matter in dispute, and their decision or that of a majority of them shall be final and conclusive between the parties," &c.

And that by Act of March 20th 1849, supplementary to the act incorporating the Pennsylvania Railroad Company, it was provided that: "Whereas, the legislature by the 5th section of the act passed the 27th day of March 1848, entitled a further supplement to an act to incorporate The Pennsylvania Railroad Company, did provide that if the said railroad company shall find it necessary to change the site of any portion of any turnpike or public road, they shall cause the same to be reconstructed forthwith at their own proper expense, in the most favorable location

and in as perfect a manner as the original road; but there is no provision made for compelling the said company to comply with this law, therefore,

"Be it enacted, That if by the construction of this road by the Pennsylvania Railroad Company, it shall have been or may hereafter be necessary to change the site of any portion of any turnpike or public road, when the necessary time shall have elapsed to have enabled the said railroad company to comply with the provisions of the 5th section of the Act of the 27th of March 1848, requiring them to reconstruct such turnpike or public road, it shall be the duty of the Court of Quarter Sessions of the county in which such turnpike or public road shall be located, upon the petition of the company owing the said turnpike, or of any twelve or more citizens of the township in which the said public road may be, to appoint three competent persons, * * * to view the place where the said turnpike or public road was, and make report to the said court at their next session, whether the said Pennsylvania Railroad Company have complied with their duty in making said turnpike or public road as they are required by the said law to do, and if the said viewers shall report to the said court that the Pennsylvania Railroad Company has complied with the provisions of the said Act of Assembly, and the said report shall be approved by the court, an order shall be made that the costs and expenses of the said view shall be paid by the petitioners; but if the viewers shall report to the said court that the said company has not complied with the provisions of the said Act of Assembly, and the said report shall be approved by the court, the expense thereof shall be paid by the said railroad company; then it shall be the duty of the said court to order and decree that the said turnpike or public road, as the case may be, shall be made, finished and completed as the said Pennsylvania Railroad Company, by the provisions of the 5th section of the Act of 27th of March 1848, were bound to finish and complete the same."

They further found: "That before the passage of any of the said Acts of Assembly and until and at the time of the committing and doing of the acts and things hereinafter mentioned by the said The Danville, Hazleton and Wilkesbarre Railroad Company, there was and from the committing and doing of the said acts and things hereunto there ought to have been and still of right ought to be a common and public highway leading from a point in another public highway in the township of Rush, in the county of Northumberland, near the southern end of the bridge over the North Branch of the river Susquehanna at Danville, to and through Elysburg in the county aforesaid, for all the citizens of this Commonwealth to go, * * * and that the said The Danville, Hazleton and Wilkesbarre Railroad Company located its railroad upon and along a part of the said first-mentioned common

and public highway in the said township of Rush and county aforesaid, and afterwards, on the 1st day of July, A. D. 1868, in constructing the bed of its said railroad, dug up, &c., that part of the said common and public highway in the said township of Rush, upon which it had located its said railroad for 875 yards in length and in width varying from 1 to 20 feet, and in depth varying from 1 to 15 feet, and constructed its railroad thereupon, and has kept, &c., the same so dug up, &c., whereby the said highway during the time aforesaid has been and yet is obstructed, narrow and dangerous, so that the citizens of this Commonwealth during all that time have been and still are hindered and obstructed in passing, &c., and that the said The Danville, Hazleton and Wilkesbarre Railroad Company did not and have not at any time caused the said part of the said highway so dug up, &c., and occupied by its said railroad as aforesaid to be reconstructed either in the most favorable location or in as perfect a manner as the original road, and that though the said The Danville, Hazleton and Wilkesbarre Railroad Company did cause to be constructed a new road leading around the said part of the said highway so dug up, &c., yet the said new road was not constructed on the most favorable location, or in as perfect a manner as the original road, but on the contrary was very badly located and is steep, narrow and hilly, and in all these respects much inferior to the original road and unfit for public use, and that the said highway continued to be used and is still used by all the citizens of this Commonwealth to go, &c., though a part of the same common and public highway was during all that time greatly narrowed and obstructed by reason of the same having been dug up and occupied by the bed of the said railroad of the defendants. That since the finding of the said inquisition the said The Danville, Hazleton and Wilkesbarre Railroad Company has partially widened the said part of the said highway where the same adjoins the part of the same which was dug up, &c., and that the road so widened is upon the most favorable location for the said road, but was not and is not reconstructed in as perfect a manner as the original road, but on the contrary is in some places narrowed and more dangerous than the original road, and by reason thereof less fit for the public use or travel."

They further found that no proceeding had been had in relation to the highway under the provisions of the aforementioned acts, relating to the Sunbury and Erie and the Pennsylvania Railroads.

But whether on the whole matter found, the provisions of the acts relating to the Sunbury and Erie and the Pennsylvania Railroad Company "apply to or affect the Danville, Hazleton and Wilkesbarre Railroad Company or not, and if they do whether either of the said last-mentioned acts supersede the proceedings under this indictment against the said The Danville, Hazleton and Wilkesbarre Railroad Company for occupying a public highway

with their railroad, and whether any proceedings under either of the said mentioned acts are by law necessary before the commencement of such proceedings by indictment, the jurors aforesaid are entirely ignorant, and if * * * it shall appear to the court that the said last two mentioned Acts of the General Assembly apply to the said The Danville, Hazleton and Wilkesbarre Railroad Company, and that they or either of them under the facts found by the jurors as aforesaid supersede these proceedings by indictment, or that proceedings under either of the said last-mentioned acts were by law necessary before the commencement of the proceedings by indictment in this case, or that upon the facts as aforesaid found, the court be of opinion that the defendants are not indictable in manner and form as indicted; then the said jurors say that the defendant is not guilty on the first count of the said indictment." But if the court should be of opinion otherwise, they found the defendants guilty on the first count of the indictment.

The jury further found that the part of the highway narrowed, &c., by having been dug up, &c., by the defendants on the 28th of October 1869, "was in length one hundred feet, and in breadth ten feet, and in depth ten feet, and that the defendants kept, &c., this part of the said public highway thus dug up, &c., for the space of one day, so that the citizens of this Commonwealth during all that time were hindered and obstructed in passing, &c., and that the defendants caused the said part of the said public highway to be dug up and subverted to prevent the passage of citizens and travellers along the same and to compel them to pass along and travel upon the aforesaid new road constructed around the part of the said public road dug up and subverted and occupied by the said railroad as mentioned in the first count of this indictment; but whether upon the whole matter found, &c., the provisions aforesaid relating to the Sunbury and Erie and the Pennsylvania Railroad Companies apply to or affect the defendants, and if they do, whether either of the said last-mentioned Acts of Assembly supersede the proceeding by indictment against the defendants, and if not whether any proceedings under either of the said last-mentioned Acts of Assembly were by law necessary before the commencement of such proceedings by indictment, the jurors are entirely ignorant; and if upon the whole matter aforesaid it should appear to the court that the said Acts of Assembly apply to the defendants, and that they or either of them supersede the proceedings by indictment in this case, or that proceedings under either of the said last-mentioned Acts of Assembly are by law necessary before the commencement of the proceedings by indictment, or that the defendant is not indictable in manner and form as indicted, then the jury say, that the defendant is not guilty on the second count of the said indictment. But if upon the whole matter" the

[Danville, &c., Railroad Co. v. Commonwealth.]

court be of a contrary opinion, the jury find the defendants guilty on the second count.

The questions in the case were:—

1. Whether the supervisors were not bound to pursue the special remedy provided for the settlement of disputes between supervisors of any township and the company relative to any public road, under the provisions of the acts of incorporation and supplements.

2. Could the Danville, Hazleton and Wilkesbarre Railroad Company be convicted under the indictment for obstructing a public highway without charging that the defendant refused or did not reconstruct a new road in place of the one occupied?

The court (Rockefeller, P. J.) were of opinion that the provisions of the Acts of Assembly relative to the Sunbury and Erie and Pennsylvania Railroad Companies, mentioned in the special verdict, did not apply to or affect the defendants nor supersede the proceedings by indictment; and that no proceedings under either of those acts were necessary before the commencement of proceedings by indictment; and that the provisions of the Acts of Assembly above mentioned did not supersede the proceedings by indictment against the defendants for the things committed on the 8th of October 1869, as found by the special verdict, and that the defendants are "indictable in manner and form as indicted."

The court sentenced the defendants to pay a fine of $10 and the costs, and directed them to abate the nuisance.

The defendants removed the record to the Supreme Court by certiorari, and assigned for error that the court erred:—

1. In deciding that, under the findings of the special verdict, the provisions of the Acts of Assembly mentioned in it did not apply to or affect the defendants, and that they did not supersede under the facts found by the jury these proceedings by indictment, and that no proceedings under either of the said acts were by law necessary before the commencement of these proceedings by indictment.

2. In deciding that under the finding the defendants were indictable under the indictment in this case.

3. In deciding that the provisions of the Acts of Assembly mentioned in the finding did not supersede the proceedings by indictment against the defendants for causing the things committed on the 28th of October 1869, as found by the special verdict, and that the defendants were indictable in manner and form as indicted.

4, 5. In sentencing the defendants to pay a fine of $10 and costs, and directing them to abate the nuisance.

S. G. Thompson and *S. P. Wolverton*, for plaintiffs in error.—The company could by law take possession of a public road to

construct their railroad upon it, and therefore this act was not a nuisance: Commonwealth *v.* Erie and N. E. R. R., 3 Casey 339. The legislature is presumed to know that the railroad would be an impediment to travel: King *v.* Pease, 4 B. & Ad. 17; King *v.* Russell, 6 Barn. & Cress. 566; King *v.* Morris, 1 B. & Ad. 441; Queen *v.* Scott, 3 Q. B. 543; Newburyport Turnpike *v.* E. Railroad, 23 Pick. 326; Commonwealth *v.* Wilkinson, 16 Id. 175; Commonwealth *v.* Pittsburg, F. W. & Ch. R. R., Pitts. Leg. I., Jan. 2d 1858, Vol. 5, No. 35. A railroad built by authority of law is not a nuisance: Phila. and Trenton R. R. Case, 6 Whart. 25; Hickman *v.* Patterson, &c., R. R. Co., 2 Green (N. J.) 75; Bordentown and S. Amboy Turnpike *v.* Camden and Amboy Railroad, 2 Harr. 314; Davis *v.* The Mayor of New York, 14 N. Y. R. 506; Fletcher *v.* Auburn and Syracuse Railroad, 25 Wend. 463; Drake *v.* Hudson River Railroad, 7 Barb. 508; Hentz *v.* Long Island Railroad, 43 Id. 646; Harris *v.* Thompson, 9 Id. 356; Milhau *v.* Sharp, 15 Id. 193; Stuyvesant *v.* Pearsall, 15 Id. 244; Williams *v.* N. Y. Central R. R., 18 Id. 222; Harris *v.* Thompson, 9 Id. 350.

The words in the act "to be reconstructed forthwith," do not mean that a new road should be constructed before the company should occupy the old one, but in a reasonable time under the circumstances: Styles Reg. 452, 453. The remedy provided by the act must be pursued: Act of March 31st 1806, sect. 13, 4 Sm. L. 332, 1 Br. Purd. 58, pl. 5; Commonwealth *v.* Capp, 12 Wright 53; Koch *v.* Williamsport Water Co., 15 P. F. Smith 288; Railroad Co. *v.* McLanahan, 9 Id. 23.

The railroad company having occupied the public road in question in pursuance of lawful authority, this prosecution cannot be sustained.

If indictable at all it could only be for not supplying a good road in place of the one occupied, and not in manner and form as indicted.

A specific remedy having been provided, it must be pursued.

J. W. Comly (with whom was *G. W. Ziegler*), for the Commonwealth.—If the powers granted to a corporation cannot be exercised without disregarding the restrictions with which they are coupled, they cannot be executed at all: Commonwealth *v.* Erie & N. E. Railroad, 3 Casey 339; Queen *v.* Scott, 3 Q. B. 543. The special verdict finds that the railroad is a nuisance as to such a road: Harvey *v.* Lackawanna & Bl. Railroad, 11 Wright 428. The new road should have been made before the old one was closed: Queen *v.* Scott, *supra;* Queen *v.* Great North. & E. Railway, 9 Q. B. 315. Reconstruction of a new road was matter of proof by defendants on the trial: Commonwealth *v.* Church, 1 Barr 105; Chitty's Crim. L. 23; 1 Whart. Am. Cr. L., sect. 378.

[Danville, &c., Railroad Co. *v.* Commonwealth.]

The opinion of the court was delivered, July 2d 1873, by

MERCUR, J.—The Wilkesbarre & Pittston Railroad Company (to whose rights the plaintiff succeeded) was incorporated under the Act of 15th April 1859. The fifth section of said act provides, "that this company shall hereby have the rights and privileges and be subject to all the restrictions of the act regulating railroad companies, passed the 19th day of February, A. D. 1849." This language is sufficiently comprehensive to subject it to the general railroad law to which it refers. It is contended, however, by the plaintiff, that inasmuch as the fourth section of said act declares "that said company shall have all the rights and privileges enjoyed, for the settling and obtaining the right of way, as now enjoyed by the Sunbury and Erie and Pennsylvania Central Railroad Companies," that this extends to, and includes, the mode of settling differences between township authorities and a railroad corporation, when the latter has taken possession of a public road. We cannot concur in this construction of the statute. We do not think "settling and obtaining the right of way" was designed to include the rights of the public in a public highway. That language is evidently designed to be restricted to the settlement and acquisition of that private property which, the Constitution says, the legislature shall not invest any corporate body with the privilege of taking for public use, without requiring such corporation to make compensation to the owners thereof, or give adequate security therefor before such property shall be taken. The statutes referred to designate the manner in which the right of way over private property may be acquired by these corporations. The said fourth section of the Act of 15th April 1859 must be held as referring to the right of way over private property only, and not extending to public property. Hence, we discover no error in the first and third assignments. The second assignment presents the important question in the case. The thirteenth section of the Act of 19th February 1849, 2 Br. Purd. Dig. 1221, pl. 39, declares "if any such railroad company shall find it necessary to change the site of any portion of any turnpike or public road, they shall cause the same to be reconstructed forthwith at their own proper expense, on the most favorable location and in as perfect a manner as the original road." The plaintiffs' railroad was located between the east bank of the Susquehanna river and Blue Hill. In the construction thereof, along the base of said hill, it became necessary to occupy so much of the public road, for a distance of 875 yards, as to hinder, obstruct and make dangerous the travel over the same. A change of the site of so much of said public road became necessary. Before occupying this road, the plaintiff constructed a new road, in lieu thereof, over the hill, and opened it for public use. This new road, however, was not constructed on the most favorable location, and in as perfect a manner

as the original road. It so continued for more than a year after the old road was obstructed, and down to the time of finding this indictment—subsequently, and before the trial, the plaintiff partially widened the public highway along the track of said railroad, upon the most favorable location; but did not reconstruct the same in as perfect a manner as the original road. The defendant contends that this omission by the plaintiff to reconstruct a public road, makes the appropriation of the old road illegal and subjects the company to an indictment therefor. The indictment, therefore, does not charge the plaintiff with neglecting or omitting to reconstruct a road in lieu of the one occupied by the railroad, but with obstructing and stopping up the old public road. The effort is to convict the plaintiff for obstructing the old road by reason of its failing to construct a new one. Can this be done? In support of the affirmative, the case of Reg. v. Scott, 3 Q. B. 858 (43 E. C. L. R.), has been cited. It is true an indictment was there sustained against the engineer and other persons, acting on behalf of the Manchester and Leeds Railway Company, for obstructing a road before constructing a new one in lieu thereof; but that is based upon the language of the statute. After authorizing a railroad corporation to make obstructions in public or private roads for the purpose of their undertaking, the statute expressly declares "*before* any such road shall be so cut through, taken or injured as aforesaid," the company shall cause a good and sufficient road to be set out and made instead thereof. The making of the new road was therefore a condition precedent to the right of the corporation to break ground in the old road. In ruling the case, Lord Denman, C. J., said, "the company have not done what the act legalizes only on a condition which they have not performed." So in Reg. v. The Great North of England Railway Company, 8 Q. B. 314 (58 E. C. L. R.), it was held, in an opinion given by the same chief justice, that a corporation aggregate might be indicted for misfeasance or nonfeasance under the same statute, in not conforming to the powers conferred on the company by Act of Parliament. The language of our statute is entirely different. It nowhere declares that the making of a new road shall precede the taking possession of the old one. It gives an unconditional power to a railroad company to construct its railroad upon a public road, but commands what the company shall thereupon do. The legislature authorizes the original highway to be changed to another form of highway. The Act of February 19th 1849 gives to all railroad corporations, subject to its provisions, the right to take possession of such portions of any public road, as come within the line of its track. When the construction corps strikes a public road, it is not obliged to pause and seek for an agent of the Commonwealth to whom payment must be made, or adequate security be tendered before breaking ground. The statute has provided

the character and extent of the compensation which it shall render to the public, consequent upon taking a public road. Legislative wisdom has not said that payment shall precede the taking. The power of the legislature to authorize the building of a railroad upon a public road is indubitable: Phila. & Trenton Railroad Co., 6 Whart. 25; Green *v.* Borough of Reading, 9 Watts 382; Henry *v.* Pittsburg & Allegheny Bridge Co., 8 W. & S. 85; O'Connor *v.* Pittsburg, 6 Harris 189; Mercer *et al. v.* Pittsburg, Ft. Wayne & Chicago Railroad Co. *et al.*, 12 Casey 99. To the Commonwealth belongs the franchise of every highway within its limits as a trustee of the public. Every public road therein exists by force only of the Commonwealth's authority. So every railroad has its franchise by grant from the state: O'Connor *v.* Pittsburg, *supra*. As the statute then authorized the plaintiff to appropriate so much of the public road as was necessary for its purposes, and the portion taken did not exceed the width fixed by law, it follows that the taking, in pursuance of law, cannot be a public nuisance: Fletcher *v.* Auburn & Syracuse Railroad, 25 Wend. 463; Drake *v.* Hudson River Railroad, 7 Barb. 508; Harris *v.* Thompson, 9 Id. 350. In this case the court well said, "it is a legal solecism to call that a public nuisance which is maintained by public authority." In People *v.* Law *et al.*, 34 Barb. 502, the court said that taking a street or highway for the purpose of a railroad is taking it for public use, is settled by repeated adjudications and can no longer be regarded as an open question. A structure authorized by the legislature cannot be a public nuisance. A public nuisance must be occasioned by acts done in violation of law. A work which is authorized by law cannot be a nuisance: Rex *v.* Pease, 4 Barn. & Ad. 17; Commonwealth *ex rel.* Attorney-General *v.* Pittsburg, Fort Wayne & Chicago Railroad Co., Pittsburg Legal Journal, January 2d 1858, Vol. 5, No. 35. We think, therefore, the learned judge erred in holding the conviction good under the first count of the indictment. The second count was not pressed, besides the act therein charged appears to have been done within the limits which the plaintiff was authorized to appropriate to its use. The second assignment is therefore sustained. This necessarily sustains the fourth and fifth assignments. Whether the plaintiff would have been liable to an indictment, if charged with not reconstructing the road in a reasonable time, does not arise under this indictment, and we therefore do not express any opinion in regard to it. We hold this conviction is contrary to the whole spirit of the statute which authorizes a railroad company to lay its tracks upon a public highway, therefore

Judgment reversed and judgment entered in favor of the defendant below.

Gass and others' Appeal.

1. A German Reformed congregation and a Lutheran congregation built a church together, in which by their articles of association "Divine Service" only was to be held; for many years there were no meetings in it except for public worship: *Held*, under the facts in this case, Sabbath Schools were not included in "Divine Service."
2. The meaning of "Divine Service," like a word of art, is to be determined by the sense in which it was used by the parties.
3. Courts must interpret written instruments, but they follow the meaning attributed to the terms by those whose custom it is to use them.
4. Where a contract may have two interpretations courts will follow that which the parties have put upon it and acted upon.
5. Two congregations built a church for their joint use in Divine Service; against the protest of one and their articles of association, the other introduced a Sabbath School into the church. *Held*, that equity had jurisdiction to restrain the latter congregation.
6. Parties in such case are not governed by the ordinary rules of a tenancy in common.

January 31st 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Appeal from the Court of Common Pleas of *Northumberland county:* In Equity: Of September Term 1872.

This was a bill filed December 5th 1870, by Joseph Gass and Charles Haas, deacons; Joseph Gass and Philip Renn, elders; and George Keefor, trustee, of the German Reformed Church and Congregation of Lower Augusta, against Joseph Emerick, trustee; Rev. L. G. Eggers, pastor; and John Sterner, superintendent of Sabbath School; Abraham Sterner and Alexander Zartman, deacons; and Daniel Zartman and Jacob Beck, elders, of the Evangelical Lutheran Church and Congregation of Lower Augusta.

The object of the bill was to restrain the defendants from using a church building held for both congregations by "transferring to the said church the Sunday school, or using the same for the purpose of holding therein a Sunday school, or for any other purpose not stipulated in the articles of association."

The articles of association were as follows:—

"Pursuant to an agreement, the members of the German Reformed and Evangelical Lutheran churches, in the vicinity of Samuel Lantz's, Lower Augusta township, Northumberland county, Pennsylvania, assembled together in Mr. Samuel Lantz's schoolhouse, on the 5th day of June 1847, for the erection of a German Reformed and Evangelical Lutheran church, on the east side of Mr. Michael Arnold's lot, on the property of Mr. Samuel Lantz, now the property of Mr. John Sterner. It was agreed to erect a brick building, 40 by 35 feet, at one side, with a gallery. The members came together again, and after, on each side, church councils were chosen and were consecrated by the ministers, they

formed themselves into congregations, and on the 8th of April 1848, agreed on the following articles:—

"Art. 1. The church to be erected shall be and remain a German Reformed and Evangelical Lutheran church, under the name of 'Emanuel's Church.'

"Art. 2. No preacher can serve as pastor of this church who is not a member of the German Reformed or Evangelical Lutheran Synod, and a supporter of the so-called old measures.

"Art. 3. It shall be allowed to any member of both congregations, in case of a funeral, to choose the preacher, and it shall be allowed the preacher to deliver the funeral sermon in the church.

"Art. 4. If any one, who is no member of the congregation, desires to have his dead buried in the burying-ground, he shall always ask permission of the trustees, and it shall then be allowed to each minister, of good standing, to deliver the funeral sermon in the church.

"Art. 5. Each congregation shall elect its own preacher, by a majority of the male members who are present.

"Art. 10. No one can be a member of this congregation who does not subscribe to this canon law.

"Art. 11. The preachers of this congregation, if required by the church council, must subscribe to this canon law.

"Art. 12. This canon law shall be read at least once a year, by the minister in charge.

"Art. 13. Each congregation shall have equal right to the property of the church, and each pastor shall so arrange his divine service, as not to interfere with the pastor of the other denomination.

"Art. 15. It shall be allowed to hold divine service in two languages, in English and German; but German divine service shall be held, from time to time, as long as there are four members who desire it."

The bill set out:—

1. The articles of association, and averred that by their stipulations the church "was to be used by each congregation for *Divine Service.*"

2. "Divine Service," at the time of the articles, was and always since had been understood to be "the regular preaching service of the respective congregations."

3. In addition to the articles, it was agreed at the time of building that the church was not to be used by either congregation for Sunday Schools or any purposes, except funeral services and the regular preaching services.

4. The practice, for a long time after the church was erected, proved that only the regular preaching services of the church were intended by the term "Divine Service."

5. Until recently the church had never been opened or used for

other purposes than those above named; the Sunday Schools were held in a school-house near the church, and upon the supposition that only the regular services of preaching were to be held in the church, the citizens built, and afterwards repainted, papered and otherwise improved the interior of the church.

6. John Sterner, a defendant, "in violation of the said usage, understanding and agreement, has transferred his Sabbath School, or the Sabbath School of the Lutheran congregation into the church, and against the consent, and in opposition to the protests of the German Reformed congregation, and the covenants and well-established uses to which the said church had been dedicated and used."

7. Averred damage by the children of the school bringing dirt into the church, defacing and otherwise injuring the church, and making it in a great degree unfit for holding the regular "Divine Service," for which it was intended.

8. The defendants, after notice to cease the use of the church for Sabbath Schools, continued to so use it, "to great annoyance, damage and inconvenience of the plaintiffs, and of the German Reformed Church and congregation."

The prayer was for an injunction to restrain the defendants as above stated, and for further relief.

The defendants answered, that by virtue of the articles of association between the above congregations, the Lutherans have the right to hold this Sabbath School in the said church, providing that they will not interfere with the German Reformed Sabbath Services. That Divine or God's Service, in accordance with the translation from the German into the English, does include Sabbath Schools.

The case was referred to L. W. Kase as examiner and master.

The articles of association were in the German language; the word which was translated "Divine Service" was "Gottesdienst."

For the plaintiffs: J. J. Reimensnyder testified that in his opinion the word "includes all that belongs to the preaching of a sermon, such as singing and prayer, reading of the text, &c., * * * I don't think that the word '*Gottesdienst*' could be translated literally '*Public Worship.*' From the reading of the 13th article I would say the words '*Divine Service*' in it meant *preaching.*"

Philip Renn testified: "The understanding at the time this canon law was signed was nothing very particularly but that the church was to be used by both congregations, so as as not to interfere with the regular times for preaching of each, except one thing; there was nothing else to go on but preaching, and that is what I call 'Divine Service.' Nothing said at the time about Sunday Schools. None in existence in the county at the time to my knowledge. It was talked over, and understood that there

were to be no prayer meetings; no night meetings to be held in the church; nothing to be held in the church but preaching; it was considered catechising was a part of the Divine Service, and it has been held ever since, and this was stipulated at the time to be held in the church in both languages. I think the people put the construction upon the words 'Divine Service' that it was preaching service. This was never disputed until about two years ago, that the preaching service was the only service to be held in the church. An effort was then made to put a Sunday School in the church; both congregations objected because the church was not built for that purpose. The effort was then abandoned, and when this last effort was made the Lutheran congregation put their Sunday School in against the protest of the German Reformed congregation."

There was other evidence on behalf of the plaintiffs corroborating the foregoing as to the understanding of the parties and the practice in the use of the church.

The defendants called Rev. S. J. Milliken, a Presbyterian minister, who testified that he could not read the German language; "In the more extensive use of the term, 'Divine Service' includes the performance of any duty running out of our obligations to God; in the more restricted sense, acts of religious worship. My translation of '*Divine Service*' or '*God Service*' would include Sabbath Schools. I do not think the service of the Sabbath School conducted by any Evangelical Church would be in violation of the words '*Divine* or God Service."

Rev. Mr. Hemperly, a minister of the Lutheran church, testified, that he had some understanding of the German. "I understand by '*Divine or God Service*' all the exercises of a worshipful character practised in the denominations. A Sabbath School would come within the above definition most emphatically."

The defendants gave evidence that there had been no injury done by the scholars to the church since the school went into the building, and that regulations had been made by the authorities of the school to prevent injury.

The master reported: * * *

"The bill and evidence in the case presented substantially the following state of facts:

"1. That in the years 1847 and 1848, the German Reformed and Evangelical Lutheran congregations of Lower Augusta erected a church under the name of Emanuel's Church, each congregation having an equal right of property therein.

"2. That each congregation was to regulate its divine service and church government in accordance with the articles of association between the two congregations, dated April 8th 1848.

"3. That divine service only was to be held in the said church.

[Gass's Appeal.]

Each congregation so to arrange its divine service as not to interfere with that of the other.

"4. That by the common understanding of both congregations no meetings other than those for divine service could be held in said church.

"5. That funerals and funeral services, by members of both congregations, in the said church, were a right reserved to the members of each respectively, and to those who were not members by asking the consent of both congregations.

"6. That for a period of over twenty years no other meetings than those for public worship, or preaching the Gospel, were held in the said church.

"7. That a Union Sabbath School, organized and kept up by both congregations, was for a number of years held in the schoolhouse close by the said church.

"8. That the Lutheran congregation a short time ago withdrew from the said Union Sabbath School, and established a Sabbath School of their own, under Lutheran officers, in the audience-room of the said church.

"9. That the dividing of said Union Sabbath School, and the establishing of a Lutheran Sabbath School in said church, was done in opposition to and without the consent of the German Reformed congregation.

"The difficulty between the two congregations is caused by the respondents holding a Sabbath School in the church, the property of both congregations, in opposition to the protests of the complainants, and as they allege in violation of the article of agreement under which it was built.

"The case seems in some measure to rest upon the construction given the words, 'Divine Service.' * * * Divine Service, from information derived from the testimony, and as understood by the master, signifies a special service purely of a religious character, dedicated to God, such as singing and prayer, preaching the gospel, praise and adoration, thanksgiving and the like, and would also, in the master's opinion, include Sabbath Schools, properly conducted, singing and prayer, praise and adoration, thanksgiving, &c., are a part of the services in these schools. The young are taught the Scriptures and other religious instruction, and in this way early in life, lead to praise, adore and worship God. Any service of a religious character having for its object the promotion of God's Holy cause, would be divine service, and the term in its broad and most comprehensive sense would certainly include the Sabbath Schools of the present day.

"But in what sense did members of these two congregations, upwards of twenty years ago, at the time the articles of association were entered into, hold divine service to be? Sabbath Schools, as it appears from the testimony, were not in existence in that neigh-

borhood, nor even thought of at that time. Surely the strong inference is, that the only service contemplated, talked over and agreed upon by them, was 'a 'preaching service;' and this inference is made doubly strong from the fact, that from that time up to within a year or two of the present, both congregations have rigidly adhered to this view of the case, always maintaining that preaching the gospel only could be allowed in the church. Singing schools, prayer meetings and the like, were forbidden the use of the church. Only two years ago an attempt to hold a Sabbath School in this church failed upon the ground that it was unauthorized by the articles of association, a position taken at that time by members of both congregations. I am satisfied from the articles of association and the testimony in the cause, that preaching the gospel only, was what was understood by the members of both congregations, to be the divine service, mentioned in the articles of association at the time they were written; and it seems to me, therefore, that they must be binding upon the parties now, in the sense they were then understood, they were adopted as their 'canon law,' and the pastors in charge enjoined to read them at least once a year to their respective congregations. Trustees, one from each of the said congregations, were to be elected annually, in whose care the church property was intrusted. The choosing of their respective pastors, deacons, elders, terms of preaching, stipulating especially for the holding of *divine service in both the English and German language*, are all regulated by these articles of association, or 'canon law.'

"The master therefore, after a careful consideration of all the testimony in the cause, is of the opinion that the defendants (the Lutheran congregation) can claim no right under the articles of association, nor from the established uses of the church, to hold a Sabbath School within the body of said church, and therefore recommends an order or decree restraining the respondents from using the said church for the purpose of holding a Sabbath School therein."

Exceptions were filed to the report of the master: the court (Rockefeller, P. J.) sustained the exceptions and decreed that the bill be dismissed with costs.

The plaintiffs appealed to the Supreme Court and assigned the decree of the court for error.

S. P. Wolverton (with whom was *T. H. Purdy*), for appellants.

G. W. Ziegler, for appellees.

The opinion of the court was delivered, March 27th 1873, by

AGNEW, J.—This bill on behalf of a German Reformed congregation, was to enjoin an Evangelical Lutheran congregation

[Gass's Appeal.]

from holding Sunday schools in the church building. These congregations built a church for common use, and on the 8th of April 1848, adopted a "canon law," as they called it, for the government of its use by the two bodies. By the first article of this canon, the church was to be and remain a German Reformed and Evangelical Lutheran church, under the name of "Emanuel's Church." The third and fourth articles provide for funerals and burials in the burial-ground, from which it appears a graveyard was to be used in connection with the church. The thirteenth declares, that each congregation shall have equal right to the church property, and each pastor shall so arrange his *divine service*, as not to interfere with the pastor of the other denomination. The fifteenth article provides that it shall be allowed to hold *divine service* in two languages, in English and German.

The master finds, that *divine service* only was to be held in the church, and that by common understanding of both congregations, no meetings other than those for divine service could be held in it, and that, for a period of over twenty years, no other than meetings for public worship or preaching the Gospel were held there; that a Union Sunday school, organized and kept up by the congregations, was held for many years in a school-house close by the church. A short time ago, the Lutheran congregation withdrew from the Union Sunday school, and established one of their own in the audience-room of the church, in opposition to, and without the consent of the German Reformed congregation.

This bill is to prevent this unauthorized and continued use of the audience-room for the Sunday school. The master finds, that Sunday schools were not in existence or thought of in this neighborhood at the time of the union of these congregations, and adoption of their rules; that both congregations understood, and rigidly adhered to the understanding, that a "preaching service" only was to be maintained in the church, and that singing schools, prayer meetings, and the like, were forbidden to be held there. He concludes by saying, he is satisfied, from the articles of association, and the testimony in the cause, the preaching of the gospel only was understood by the members of both congregations to be the "divine service" mentioned in the articles. In the court below, the controversy was not upon the facts reported, but upon the meaning of the terms "divine service;" the defendants holding that they embraced Sabbath schools. The witnesses agree, that the German word *Gottesdienst*, used in the articles of union, means in English, *divine service;* and the court below decided that this included Sunday-school service. That prayer and praise, and, indeed, oral as well as written instruction in religious matters, by laymen, are used in Sunday-school service, is true, and in a general sense it may be said to be divine service. Indeed, the Reverend Samuel J. Milliken did say, in his testimony, that the

more extensive use of the term divine service, includes the performance of any duty arising out of our obligations to God; but in the more restricted sense it is used to signify acts of religious worship. This would give two significations to these words. Like words of art, the sense in which they have been used by the parties must, therefore, be sought for. It is the duty of courts to interpret the language of written instruments; but in doing this they always follow the meaning attributed to the terms by those whose custom it is to use them. Therefore, when a contract is capable of two different interpretations, that which the parties themselves have always put upon it, and acted upon, especially as here for a long series of years, a court will follow, because it is the true intent and meaning of the parties which are to be sought for in the language they use. However right it may be to view, as the court did, the Sunday school as a most useful institution in instructing youth in the knowledge and worship of God, and their duties to mankind, this praiseworthy view cannot change a written contract. We cannot engraft on a contract for one thing an agreement for a different thing, though the fruit of the scion be even better than that of the natural stock.

These congregations never so understood or acted upon their agreement of union. They built their church for divine worship, by prayer, praise, and the preaching of God's word. Its use was to be *congregational worship*, not *school instruction*. Their worship was to be led by *pastors*, who should regulate their appointments in due regard to mutual harmony, and was not to be the instruction of youth, even though part of it were in divine things, led by *individual laymen*. There are reasons, also, why a chamber or audience-room, dedicated to public congregational worship, should not be thrown open to thoughtless, giddy, sometimes vicious youths, to deface and soil it. We think the court erred in deciding the case according to the general meaning of the words "divine service," as testified to by some of the witnesses, instead of confining their signification to the sense in which the congregations understood it when they entered into the agreement, and afterwards practised upon it.

A doubt has been suggested as to the jurisdiction of the court in such a case, but, we think, without a solid ground. As unincorporated associations, the parties fall directly within the fifth equity head of the Act of 16th June 1836, conferring on the Supreme and Common Pleas Courts jurisdiction in the supervision and control of unincorporated societies or associations and partnerships: Foley *v.* Tovey, 4 P. F. Smith 130, is in point, opinion by the present Chief Justice. The number and relations of these parties, and the subject and nature of the injury, also, make the case one for the peculiar jurisdiction of equity. The number of the members of each congregation, and the uncertainty in their

identity and connection with the congregation, make a remedy at law neither convenient nor certain. There would be some difficulty in moulding a common-law action to remedy the perverted use. The subject of the use is also peculiar. Such congregations are not governed by the ordinary rules of tenancy in common. It has been decided there can be no partition of a church or a graveyard held by two congregations, precisely as these two hold their property: Brown *v.* The Lutheran Church, 11 Harris 495. The language of Woodward, J., is forcible and just, in which he shows the sacrilegious character of a proceeding that would sell the altar and the graves; that a church cannot be divided; and that the policy of the state has always been to protect the resting-places of the dead. A sale is the only mode of partition in such a case; and what, he asks, would these graves, of inestimable value to surviving relatives, fetch in the market? This case, therefore, does not, on this ground, fall within the principle of North Pennsylvania Coal Company *v.* Snowden, 6 Wright 488.

The nature of the injury, too, is to be noticed. It is not an act of wrong or injury to the property itself, nor is it an ouster from possession, or wrongful withholding of the possession by one congregation from the other, but a mere perversion of its use; and here again it differs from The North Pennsylvania Coal Company *v.* Snowden, and from Tillmes *v.* Marsh, 17 P. F. Smith 507. In those cases the bills were what is termed an ejectment bill—a bill to obtain possession and enforce rights under a legal title. Here the injury consists in a perversion of the right of the congregation, a misuse of its privileges under the articles of union, and it is continuing in its nature. It involves a series of injurious acts of misuse, and therefore can have no adequate remedy at law, if an action for damages could be conveniently sustained. This brings the case directly within the letter and spirit of the fifth head of equity, in the second branch of powers contained in the Act of 1836, to wit: "The prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community, or the rights of individuals." The congregation defendant is not only an unincorporated association, and thus within the control of the court, but the congregation plaintiff is composed of individuals, whose rights are prejudiced by the defendants, and therefore entitled to the exercise of the restraining power of the court. In either way jurisdiction attaches. The right of the plaintiffs is not disputed, which takes the case out of the rule that the court will not enjoin upon a disputed title till it is settled at law. It is only the illegal acts of the defendants that are the subject of dispute, and they are clearly contrary to law, as we interpret the agreement of union. The disposition of this court has been not to deal with these equity

powers in a narrow spirit, but to make them serve all the purposes of justice to which they can be made applicable. In Wesley Church *v.* Moore, 10 Barr 280, Chief Justice Gibson remarked, that "the equitable jurisdiction conferred by these statutes is a valuable, indeed indispensable one, and ought to be extended by every interpretation of which the words are susceptible." The same opinion has found utterance in subsequent cases: Kirkpatrick *v.* McDonald, 1 Jones 393; Yard *v.* Patton, 1 Harris 282.

The actual exercise of this valuable power of restraint has been sustained in numerous and analogous cases, which may be briefly noticed, premising that in the same clause is found the supervision and control of partnerships following directly after the supervision and control of unincorporated societies and associations, subjects analogous in the unincorporated membership, and the close and confidential relations of the members in each class. Thus in Stockdale *v.* Ullery, 1 Wright 486, a partner was restrained from pawning or pledging the notes of the firm for his own debts. So a partner may be restrained from doing acts prejudicial to the estate of a deceased partner: Holden's Admin'r *v.* McMakin, 1 Pars. 284. And a person may be restrained from doing business contrary to a lawful agreement not to do so: Palmer *v.* Graham, 1 Pars. 476. So to restrain the use of a party-wall before payment of a moiety of the cost: Sutcliff *v.* Isaacs, 1 Pars. 494. To prevent the holder of a legal title from conveying it away contrary to equity: O'Neil *v.* Hamilton, 8 Wright 18. To restrain associates from denying the right of one chosen by a publishing company as the editor of a paper, and preventing his publication of it: Peacock *v.* Cummings, 10 Wright 434. To prevent a usurpation of power by a portion of a body which should be a unit, as the Common Council of Philadelphia: Kerr *v.* Trego, 11 Wright 292. To restrain an unlawful sale under execution of the property of the wife for the debt of the husband: Lyon's Appeal, 11 P. F. Smith 15. Without further citation, Kisor's Appeal, 12 P. F. Smith 428, may be instanced as a case in point. There a deed was made of a church property to trustees, for the use of two congregations, with a provision for division in a certain manner, if conducive to the interests of the parties. One congregation took exclusive possession. Held to be a dispute between members of an unincorporated society in relation to their rights and privileges, and not merely as tenants in common of real estate, and equity had jurisdiction to restore the excluded party to their rights. Sutter *v.* Trustees of First Reformed Dutch Church, 6 Wright 503, is also an authority on this point. The decree of the court below, dismissing the bill, is therefore reversed, and the bill restored, and report of the master confirmed, and it is hereby ordered and decreed, that the defendants named in the bill of the plaintiffs, be enjoined and restrained perpetually from using the

said church described in the bill, for the purpose of holding Sunday or Sabbath schools therein, and that the defendants pay the costs.

WILLIAMS, J., dissenting.—I concur in the construction given to the articles or canons in this case, but I dissent from the decree on the ground that the evidence does not show that any such injury has arisen, or is likely to arise from the act complained of, as warrants the interposition of a court of equity to restrain it by injunction.

Vought *versus* Sober.

1. Vought sued Sober before a justice on a note; both parties appeared on the return-day and the case was continued on the application of defendant: parties again appeared and by "common consent" continued until May 7th, when, plaintiff not appearing, the justice entered "judgment in favor of the defendant by nonsuit." *Held* not to be a judgment on the merits nor a bar to another action.
2. The failure of plaintiff to appear on the day of continuance was the same as if he had failed to appear at the return.
3. Act of March 20th 1810, sect. 6, authorizes a justice to nonsuit a plaintiff for failure to appear on a continuance.

January 31st 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Error to the Court of Common Pleas of *Northumberland county:* Of September Term, No 23.

This was an action of debt, commenced October 29th 1868, by John Vought against Isaac J. Sober. The cause of action was this note:—

"100

Six months after date, for value received, I promise to pay to the order of Wm. M. Ellis one hundred dollars, without defalcation or stay of execution.

Dated, Paxinos, June 8th 1867.

ISAAC J. SOBER.

Endorsed—WM. M. ELLIS."

A suit on the same note had been previously instituted before a justice of the peace; the following are the docket entries in the case:—

"John Vought *v.* Isaac J. Sober. Summons issued April 7th 1868, returnable April 16th 1868, at 4 o'clock P. M. And now, April 16th, 4 P. M., plaintiff appears by his attorney, Geo. D. Haughawout. Defendant present. Plaintiff claims, by his attorney, on note given by defendant to Wm. M. Ellis, and by him transferred to John Vought, for $100. Defendant denies signa-

ture and asks continuance. Plaintiff grants it. Continued until Saturday, April 21st, at 1 o'clock P. M. And now, April 25th, parties appear. Plaintiff's witness not present. By common consent agreed that suit be continued until May 7th, at 7 P. M. And now, May 7th, 7 P. M., defendant appears. Plaintiff not appearing, defendant asks and justice grants nonsuit; judgment in favor of defendant by nonsuit, plaintiff for costs of suit, and $1 for defendant's reasonable costs and trouble in attending the suit. Plaintiff appeals. Transcript given May 22d 1868."

The case was tried March 28th 1872, before Rockefeller, P. J.

The plaintiff gave the note in evidence with some testimony to support it, and rested.

The defendant then gave in evidence the foregoing docket entries of the justice and proved that the suit was on the same note.

The justice also testified that the defendant was called by the plaintiff before him and examined as a witness "in reference to this suit. He was examined pretty fully about the merits of this note. This was after the case was opened on the first appearance of the parties. The examination was with reference to the signature; the defendant said he never signed the note. The amount claimed was $100."

The court charged the jury that if they believed from the evidence that former suit before Joseph Ramsey, Esq., a justice of the peace, was for the same cause of action, that is to say, on the same note given in evidence by the plaintiff in this case; that the parties, both plaintiff and defendant, having once appeared, as appears from the transcript of the justice and the other evidence in the case, and the plaintiff having made his claim for one hundred dollars, the amount of the face or principal of the note only, before the said justice, which was denied by the defendant, the justice of the peace afterwards had no right to enter a judgment of nonsuit against the plaintiff, and that he having done so, the effect of it was a judgment in favor of the defendant, from which the plaintiff's only remedy was by an appeal, and their verdict should be for the defendant.

The verdict was for the defendant. The plaintiff took a writ of error and assigned the charge of the court for error.

L. H. Kase (with whom was *S. P. Wolverton*), for plaintiff in error, cited Act of March 20th 1810, sect. 6, 1 Br. Purd. 852, pl. 51; Haws *v.* Tiernan, 3 P. F. Smith 193; Carmony *v.* Hoober, 5 Barr 307; Fisher *v.* Longecker, 8 Id. 410.

W. A. Sober, for defendant in error, cited Gould *v.* Crawford, 2 Barr 89; Lawver *v.* Walls, 5 Harris 75; Haws *v.* Tiernan, 3 P. F. Smith 193.

The opinion of the court was delivered, May 17th 1873, by

Williams, J.—The judgment of nonsuit rendered by the justice in the previous suit, brought on the same note, is no bar to the action in this case. It was not a judgment on the merits, after hearing the proofs and allegations of the parties, but a judgment of nonsuit in default of the plaintiff's appearance on the day to which the hearing of the case had been continued. It is immaterial that the plaintiff appeared by attorney on the return-day of the summons, if he was guilty of such subsequent neglect as authorized the judgment. It was as much his duty to appear on the day to which the hearing of the case was adjourned, as to appear on the return-day of the writ; and for his default in not appearing, no judgment except that of nonsuit could be properly rendered against him. Why then should it be regarded as final and conclusive of the rights of the parties? It was not rendered after hearing their proofs and allegations, as was the judgment of nonsuit in Crawford *v.* Gould, 2 Barr 89, which was consequently held to be final, regardless of its form; nor was it entered after the appearance of the parties on hearing, as in Lawver *v.* Walls, 5 Harris 75, because the plaintiff was not able to substantiate his claim. If it had been, then it might be regarded as equivalent to a judgment that the plaintiff had no cause of action. But it was, as the docket entries show, a judgment of nonsuit in default of the plaintiff's appearance; and in his absence no other judgment could be rightfully entered against him. It is conceded that if the judgment had been rendered in default of the plaintiff's appearance on the return-day of the writ, it would not be conclusive of the rights of the parties. Why then should it be when entered in default of his appearance on the day to which the hearing was continued? The default in the one case is the same as in the other; why then should not the judgment be the same? It would be a narrow construction of the act to hold, if the plaintiff appears on the return of the writ and the hearing of the case is continued to a subsequent day, that the justice has no power to enter a judgment of nonsuit against him under its provisions, if he fails to appear at the time appointed for the hearing; and it would be a harsh construction to hold that a judgment of nonsuit against the plaintiff, that such default is conclusive of the rights of the parties and a bar to any subsequent suit for the same cause of action.

The act is susceptible of a more reasonable construction. It undoubtedly authorizes the justice to give judgment against the plaintiff by nonsuit in default of his appearance either on the day appointed by the summons, or on any subsequent day to which the hearing may be continued. The justice, therefore, had power to enter the judgment of nonsuit, and its only effect was to put an end to the action without concluding the rights of the parties. It follows that the court below erred in charging the jury that the

parties having once appeared, the justice of the peace afterwards had no right to enter a judgment of nonsuit against the plaintiff, and that, having done so, the effect of it was a judgment in favor of the defendant, from which the plaintiff's only remedy was by an appeal, and their verdict should be for the defendant.

Judgment reversed, and a *venire de novo* awarded.

73 52
160 178

McNinch and Wife *versus* Trego.

1. J. and E., partners, purchased two lots which were paid for by firm goods. The deed was made to I. He, his widow and a minor child, continued in possession for more than seven years: and the widow made improvements with the knowledge of E., who afterwards recovered in ejectment against a tenant of the child. The child brought ejectment against E. *Held*, that without an acknowledgment in writing of a trust in E., or notice of his claim, the limitation in the Act of April 22d 1856, sect. 6, barred E., although in possession at the issuing of the writ.

2. When the cestui que trust is in possession *during* the running of the statute, the limitation does not apply, the possession being a continued claim of the trust.

3. Clarke *v.* Trindle, 2 P. F. Smith 492, recognised.

January 31st 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Error to the Court of Common Pleas of *Northumberland county:* No. 19, of September Term 1872.

This was an action of ejectment, brought October 23d 1865, by Marian Trego, by her next friend, &c., against E. Skiles Trego for a house and lot in Milton, Northumberland county, being the westermost of the two lots hereafter mentioned. During the pendency of the case the plaintiff having attained age, and intermarried with William McNinch, the record was amended by inserting the names of William McNinch and Marian his wife as plaintiffs.

The case had been before tried, and resulted in a verdict for the plaintiffs; the judgment having been reversed by the Supreme Court it was tried the second time, March 18th 1872, before Rockefeller, P. J.

The title to the premises in dispute in 1845 was in Dr. William McCleery.

The plaintiffs gave in evidence deed dated February 1st 1850, from McCleery to Jacob K. Trego for two lots of ground, Nos. 4 and 5 in McCleery's addition to Milton, for the consideration of $500, recorded June 22d 1853. Deed for the same lots dated March 25th 1850, from Jacob K. Trego to Eli Trego, his father, for the consideration of $1500, recorded June 22d 1853. Deed for same lots dated April 9th 1850, Eli Trego to Elizabeth Trego,

wife of Jacob K. Trego, consideration "natural love and affection," recorded June 22d 1853. Will of Elizabeth Trego, dated March 1st, and codicil dated March 20th 1858, proved June 29th 1858, devising to her daughter Marian (plaintiff) the interest of all testatrix's real estate till she arrived at twenty-one years, and then the whole of her real estate in fee

The plaintiffs here rested.

The defendant gave evidence by A. J. Chapin that Jacob Trego and the defendant were in partnership as foundrymen in 1845 under the firm name of E. S. Trego & Co.; that about that time Jacob Trego told witness he had purchased the two lots of Dr. McCleery; he intended to build on one, and the other he intended for the defendant; Jacob built on the one lot; he was then in feeble health; defendant had lived on the western lot about ten years.

There was evidence by a number of other witnesses of a similar character.

There was evidence also that Jacob principally kept the books of the firm, the defendant having access to them; Jacob said the houses were to be built principally out of the foundry; McCleery got castings from the foundry in payment of the purchase-money of the lots; the lots were paid for by castings.

Defendant gave evidence for the purpose of showing that the conveyance to Eli Trego, the father, was not bonâ fide, but for the purpose of defrauding the defendant and the creditors of Jacob. Jacob died in June 1853.

He gave evidence that Rebecca Caldwell rented the property from Elizabeth Trego, the widow of Jacob Trego, and occupied it under her in 1858 and 1859. In 1859 the defendant brought an ejectment for the lot against Mrs. Caldwell, in which she alone defended; the attorneys who appeared for her by leave of the court withdrew their appearance, and on "an agreement filed April 3d 1860," judgment was entered for the plaintiff in that suit; from that time the defendant had been in possession.

He gave in evidence the account of McCleery with the firm of E. S. Trego & Co; the charges amounted to $1105.10; the credits were to the same amount; one of them was "by J. K. Trego, $500."

The defendant, who was examined as a witness, testified that "Dr. McCleery paid these two lots on that account."

In rebuttal the plaintiffs gave evidence by Mrs. Caldwell that she had rented the house whilst she lived in it from Mrs. Trego, the widow.

Mary Critzer testified that she lived with Jacob for eighteen months from the fall of 1851; there was no partition fence between the lots; Jacob used the western lot the same as he did the other; the defendant had not used the lot during that time.

Peter O. Campell testified that he built a house for Mrs. Trego

on the premises in 1853, and completed it in 1854; the defendant lived near the lot during the time; it was built against the house of Jacob; on the west end of it; the building was paid for by Mrs. Trego; the lintels for the house were of iron, and were cast by the defendant, he knowing that they were for the house; witness told defendant he was going to build an addition to Mrs. Trego's house; defendant was there frequently whilst witness was building the house; defendant could not come out of his house without seeing the building going up; Mrs. Trego moved into the house in the fall of 1854.

There was additional evidence from a number of witnesses that the defendant knew of the building going up; that when he was told that he should have given notice to Mrs. Trego, he replied that he did not know then that he had title. Also, that Mrs. Trego had occupied the house by herself and tenants up to her death; and Mrs. McNinch by tenants under her guardian until the recovery against Mrs. Caldwell in 1860.

They gave in evidence the accounts of the defendant and Jacob Trego from the firm books.

The balance against the defendant was $3850.61. The balance against Jacob was $3352.63. In his account under date of June 13th 1851, was this charge: "To William McCleery, $500."

The plaintiffs' first point was:—

The plaintiffs have shown a perfect legal title to the lot in dispute, that the deed from Dr. William McCleery to Jacob K. Trego, that from Jacob K. Trego and wife to Eli Trego, and that from Eli Trego and wife to Mrs. Elizabeth Trego were put upon record in the recorder's office in Northumberland county, on the 22d of June 1853, and if the jury believe that Mrs. Elizabeth Trego, in August or September 1853, entered upon the lot in dispute, and made valuable improvements upon the same, and kept possession thereof from that time until her death in 1858, and that after her death the lot remained in possession of Rebecca Caldwell, to whom she had leased in her lifetime, as the tenant of her daughter Marian, until the 21st day of March 1859, the date of the writ of ejectment by Eli S. Trego against Mrs. Caldwell, without any title or interest in the said Eli S. Trego having been acknowledged to exist by the said Elizabeth at any time during her said possession, or by any guardian of the said Marian, after the death of her said mother, then the 6th section of the Act of the 22d of April 1856, prevents the defendant from setting up his alleged equitable title against the said legal title of the plaintiff, Marian McNinch, and the verdict of the jury should be in favor of the plaintiffs.

The court answered: "We cannot answer this point as requested. The plaintiffs have shown a perfect legal title to the lot in dispute; the deed of Dr. William McCleery to Jacob K. Trego,

that from Jacob K. Trego and wife to Eli Trego, and that from Eli Trego and wife to Mrs. Elizabeth Trego were put upon record in the recorder's office of Northumberland county, on the 22d of June 1853; but under the evidence in this cause we cannot charge 'that if the jury believe that Mrs. Elizabeth Trego, in August or September 1853, entered upon the lot in dispute, and made valuable improvements upon the same, and kept possession thereof from that time until her death, in 1858, and that after her death the lot remained in possession of Rebecca Caldwell, to whom she had leased in her lifetime, as the tenant of her daughter Marian, until the 21st day of March 1859, the date of the writ of ejectment by Eli S. Trego against Mrs. Caldwell, without any title or interest in the said Eli S. Trego having been acknowledged to exist by the said Elizabeth at any time during her said possession, or by any guardian of the said Marian, after the death of her said mother, then the 6th section of the Act of the 22d of April 1856, prevents the defendant from setting up his alleged equitable title against the said legal title of the plaintiff, Marian McNinch, and the verdict of the jury should be in favor of the plaintiffs.'

"The said 6th section of the Act of the 22d of April 1856, provides that 'No right of entry shall accrue, or action be maintained for a specific performance of any contract for the sale of any real estate, or for damages for non-compliance with any such contract, or to enforce any equity of redemption after re-entry made for any condition broken, or to enforce any implied or resulting trust as to realty, but within five years after such contract was made, or such equity or trust accrued, with the right of entry, unless such contract shall give a longer time for its performance, *or there has been in part a substantial performance*, or such contract, equity of redemption or trust shall have been acknowledged in writing to subsist by the party to be charged therewith within the same period—provided, &c.: Purd. Dig. 654–5, pl. 13. I instruct you that if you find from all the evidence in the cause that in 1846 the two brothers E. Skiles Trego and Jacob K. Trego were partners, that they purchased from Dr. William McCleery two lots of ground adjoining each other, for which he was to receive from the firm, and was subsequently paid, five hundred dollars in work at their foundry—that Jacob K. Trego immediately took possession of the eastern lot, and E. Skiles Trego of the western lot of the two thus purchased—that these lots were paid for by castings out of the foundry, that Jacob K. Trego, without the knowledge of E. Skiles Trego, took the deed for the two lots, then the said E. Skiles Trego became the equitable owner of the western lot (being the lot in dispute in this case), and of a resulting trust to him for the same. This was so decided when this case was before the Supreme Court, in my opinion, and I so charge you that if you find the facts as here stated, there has been in

part a substantial performance, within the meaning of the said 6th section of said Act of Assembly, and the mere fact that Mrs. Elizabeth Trego, after the death of her husband, Jacob K. Trego, took possession and held it from 1853 to 1858, and by her tenant from that time to the 21st of March 1859, will not prevent the defendant setting up his equitable title against the legal title of the plaintiffs."

There were other points submitted by each party, not necessary to notice here.

The jury found a verdict for the defendant. The plaintiffs took out a writ of error and, with others, assigned for error the answer to their first point.

J. W. Comly (with whom was *J. W. Brown*), for plaintiffs in error, referred to Act of April 22d 1856, sect. 6, Pamph. L. 532, 2 Br. Purd. 930, pl. 14; Rider *v.* Maule, 10 Wright 376.

S. P. Wolverton and *G. F. Miller* (with whom was *J. Porter*), for defendant in error.—The limitation under the Act of 1856, in relation to a parol trust does not apply to cestui que trust in possession: Smith *v.* Tome, 18 P. F. Smith 158; Clark *v.* Trindle, 2 Id. 492; Richards *v.* Elwell, 12 Wright 361.

The opinion of the court was delivered, March 17th 1873, by

AGNEW, J.—When this case was here before, the only question was whether under the facts then in evidence a trust arose for E. S. Trego under the purchase by his brother Jacob. These facts, as stated in the opinion of the present Chief Justice, were that the brothers, partners in a foundry, purchased two lots of Dr. Wm. McCleery for $500, to be paid in castings out of the foundry. The purchase-money was so paid. Jacob took possession of the eastern lot, and Eli of the western lot, and Jacob without the knowledge of Eli took the deed in his own name. In answer to a point the court below instructed the jury against the trust, and this court reversed the judgment on this point alone, being of the opinion that a trust for Eli S. Trego did arise under the circumstances. In the present case a new question is brought up arising on these facts. The original purchase of McCleery was in 1846, and the deed was made to Jacob in February 1850. In March 1850 Jacob conveyed the lot in dispute (*inter alia*) to his father, Eli Trego, who with his wife conveyed this lot in April 1850 to Mrs. Elizabeth Trego, wife of Jacob Trego. Jacob was then in declining health: and the partnership was dissolved sometime afterward, perhaps in 1852 or 1853. The precise date is not given, but under the last date, 1851, the accounts of the partners appear to have been balanced, exhibiting in Jacob's account a balance against him of $3352.63 and against Eli a balance of $3850.61. In Jacob's account he was

charged with $500 by *Wm. McCleery*, being just the amount of the purchase-money of the two lots, and in the account of Dr. Wm. McCleery, he was credited with the same sum $500 by *Jacob Trego*. Thus with this charge against Jacob for the purchase-money, the balance against Eli S. Trego in the partnership account was, including subsequent entries, much greater than that against Jacob. Jacob died in June 1853, the deeds were recorded in that month, including the deed from Mr. Eli Trego and wife to Mrs. Elizabeth Trego, wife of Jacob. In the same year Mrs. Trego being in the possession of the lot went on to build upon it. She built a good brick house immediately in sight from Eli S. Trego's door and of the foundry, where he must have seen it from day to day. He gave no notice of any claim of title on his part during the progress of the building, and suffered Mrs. Trego to retain possession by herself and her tenants until the year 1859, when he brought the first ejectment, in which he obtained judgment by default against her tenant and upon this judgment turned out the tenant, Mrs. Trego having died in 1858. Thus Mrs. Trego being possessed of the legal title adversely to the trust under which Jacob had held, in the first instance, for Eli, was suffered to place valuable improvements on the property and to remain in possession for more than five years after 1853 and more than two years after the passage of the Act of 22d April 1856, without any acknowledgment on her part of the trust either verbal or written, and indeed without any assertion of the trust by Eli S. Trego. Under these circumstances the plaintiffs in their first point asked the court to charge that the 6th section of the Act of 22d April 1856, there being no acknowledgment of the trust, was a bar to the defendant's claim by way of a resulting trust. The learned judge in the court below seems to have misconceived the bearing of the point, or else relying too confidently on what he supposed was the decision of this court in the former writ of error, did not charge upon the question of limitation under the 6th section of the Act of 1856, but charged in substance and effect, that if the jury found the existence of the trust under the former opinion of this court, and that Eli S. Trego had gone into possession under it, his equitable title was sufficient and would prevail against the legal title of the plaintiffs. But the error of the learned judge was this, that the point conceded the trust and asked the court to charge that it was barred by the limitation contained in the 6th section of the Act of 1856, because there had been no acknowledgment of the trust by Mrs. Trego as required by that section for more than five years after the legal title had been vested in her, while he refused the instruction and rested the case on the mere existence of the trust. It is true he seems to have thought that the limitation contained in the 6th section was inoperative on the ground that Eli S. Trego had gone into possession: and in this court the charge has been en-

deavored to be supported on the same ground, under the decision in Clark *v.* Trindle, 2 P. F. Smith 492, and other cases. There is no question of the soundness of these decisions, that when the *cestui que trust* is in possession during the running of the statute, the limitation does not apply, the possession being a constant assertion and continual claim of the trust. But the plaintiff's point assumed, and the evidence very clearly established the fact of Mrs. Elizabeth Trego's possession under the legal title, and Eli S. Trego's non-claim of the trust during a greater period than five years from her taking possession and even more than five years after she had built her house. To meet this the 6th section of the Act of 1856 requires that the trust shall be acknowledged *by writing* to subsist, otherwise no right of entry shall accrue or action be maintained to enforce the trust. The court below ought to have affirmed the first point and submitted the facts on which it rested to the decision of the jury.

Judgment reversed, and a *venire facias de novo* awarded.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

EASTERN DISTRICT—PHILADELPHIA, 1873.

Bank of Commerce's Appeal.

1. The members of a building association were entitled to a loan on each share. One assigned his stock in the association and delivered the certificate to a bank for a loan, with power of attorney to transfer. He borrowed from the association the full amount to which he was entitled and transferred his stock to it, the bank still holding the certificate. The stock was not transferred to the bank on the books of the association—there was no provision in the charter for such transfer. The association expired and the assets were distributed by the officers amongst the stockholders shown by their books, including the association, without notice from the bank. *Held*, that the officers were not liable to the bank on the certificates held by it.
2. As between a corporation and corporator, the stock-book is evidence of their relation; the certificate is secondary evidence.
3. Assignment of a certificate is only an equitable transfer and must be produced to the corporation and a transfer made.

January 8th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Appeal from Nisi Prius: In Equity: No. 37, to January Term 1869.

This was a bill filed December 19th 1868, by the National Bank of Commerce against Henry Troemner (President), John H. Wahl (Vice President), Augustus C. Miller (Treasurer), Henry Eggeling (Secretary), Frederick Stacke and others, directors of the Citizens' Building and Saving Fund Association.

The bill set out:

1. The incorporation of the association on the 1st of December

1856, to continue for ten years; the articles of association were made part of the bill.

2. The association organized by the election of their officers, and issued 2000 certificates of stock.

3. Payments of $1 per share were made monthly.

4. The defendants were officers of the company, as above stated, and as such the whole "business and assets" of the association were confided to them.

5. John P. Persch became owner of 36 shares of the stock of the association, and in 1861, after he had paid $50 on each share, he transferred the same to the plaintiffs, and the plaintiffs subsequently applied to Eggeling, the secretary, to enter the transfer on the books of the association. He declined to do so; plaintiffs still owned those shares.

6. Whilst plaintiffs were owners of the 36 shares of stock, the defendants, without notice to them, and without their knowledge and consent, divided and distributed among themselves and other stockholders, to the exclusion of the plaintiffs, all the assets of the association.

7. The period for which the association was incorporated had expired, and the association had ceased to do business; the assets amounted to more than enough to pay the debts of the association, but although the plaintiffs were entitled to a share of the assets in proportion to the number of shares of stock owned by them, they had received no part of the balance of the assets, and had not been able "to procure or examine any account or statement in relation to their receipts and payments," &c.

The prayers were:

1 and 2. That the defendants should make a discovery of the business and assets of the association and the doings of the officers, and account for their receipts and expenditures on account of the association.

3. That the liabilities of the association be ascertained, and defendants pay plaintiffs their share of the surplus.

4. That the association be wound up under the direction of the court.

By the articles of association it was declared, that its object was the accumulation of a fund by the savings of its members, to enable every stockholder to invest his savings and purchase real estate; every stockholder, for each share that he should hold, to pay $1 initiation fee and $1 every month, until the value of the whole stock should be sufficient to divide to each share $200, and when $200 should have been paid on each share, the "association shall determine and close." Every stockholder should be entitled to have a loan for each share held by him.

Loans were to be taken by the stockholders in the manner specified in the articles, such loans to "be secured by the transfer

of the certificate of stock to the association, as collateral security, or by bond and warrant and mortgage on real estate." A stockholder obtaining a loan was to secure it by bond and mortgage, and transfer to the association "as collateral security, the same number of shares as he shall loan from said association," and on repayment, all the securities to be retransferred to him. Should he fail to repay, the securities to be sold, and the balance, if any, after deducting his indebtedness, to be paid to him. A stockholder in arrears to the association not to be entitled to any loans.

All transfers of shares shall be made by the secretary; the stock to consist of no more than 2500 shares.

The answers of defendants averred that Persch owned 80 shares of the stock of the association, on which $50 per share had been paid; that he owed the association $7200 on 36 shares of the stock, which were transferred to the association, that afterwards from July 10th 1861, to September 15th 1862, he borrowed on the rest of his shares $7803, and when the payments of instalments by stockholders ceased, Persch was indebted to the association $697.50; no notice was given to the association of the transfer of Persch's stock to plaintiffs until 18 months after the expiration of the charter: at the close of the association there were no assets to be divided, but about November 1866, the association in accordance with its articles had wound up its affairs, and all stockholders known to the defendants, or holding stock on the books of the company, with the exception of a few shares, having received for each share $200, a committee was appointed to collect the outstanding assets, and appropriate them to the payment of those shares. The plaintiffs did not apply during the continuance of the charter to have the stock transferred on the books; nor did they comply with the requirements of the charter as stockholders, and they were not entitled to be recognised as stockholders.

A replication was filed, and testimony taken by an examiner. On the filing of his report, John B. Gest, Esq., was appointed master. He found the facts substantially as set out in the bill and answer.

He further found, that there was nothing in the charter of the association, nor on the face of the certificates, providing any mode for transferring stock; but the company kept a book in which transfers were entered, and these were noted on the back of certificates when presented. In 1861 Persch became the owner of 80 shares of the stock, which were transferred to him on the books of the association, and the transfers noted by the secretary on the back of the original certificates, which were not surrendered.

He obtained loans from the association to as large an extent as his stock entitled him, and continued to pay the dues on said shares until they were paid up. On some of the shares loans had been granted to prior owners thereof, which loans he assumed to pay. These loans commenced in the year 1858, and continued

until August 1865; the loans for 30 of said shares being after the assignment to complainants.

To secure some of these loans, Persch gave security on his real estate, and also transferred to the association 20 shares of stock of the Jefferson Fire Insurance Company, and gave judgment bonds for the whole. He also offered to give the 80 shares of its stock as security, and they were accepted. There was no evidence of any actual assignment of the 80 shares of stock to the association. * * *

On the 14th day of November 1862, Persch transferred to the Bank of Commerce for value received, 36 shares of the stock of the association, and delivered to the bank a formal assignment thereof and the certificates for the 36 shares, which have ever since been held by the bank.

The assignment was absolute and purported to be for value; in the same instrument was a power of attorney irrevocable to transfer, with blank for the attorney's name.

The association under its charter expired December 1st 1866; the defendants were then officers of the association. As such officers, defendants, after the expiration of the charter, collected the outstanding assets of the association, and have divided the proceeds among the stockholders whose names appeared on the books, and were not indebted to the association for loans to the amount of the stock held by them. The association was never during the period of its charter, notified of the assignment of the 36 shares to complainants: but in the year 1868, a demand was made by complainants' counsel, of Henry Eggeling, the secretary, to have the transfer entered on the books; this was declined.

The defendants treated the whole 80 shares in the name of John P. Persch, as still being his, and as being more than repaid to him by the amount of the loans obtained by him, which exceeds the value of the stock.

1. The master reported that the assignment to the plaintiffs, dated November 14th 1862, gave them a good title to the 36 shares of stock. It is absolute in its form, purported to be for a valuable consideration, and is unimpeached by any evidence in the cause. There is no reason why such a chattel should not pass by assignment. It is true that the bank did not cause the transfer to be noted on the books of the association, and did not obligate themselves in writing to pay the monthly dues, interest and fines, and to fulfil the requirements of the constitution of the company. No dues and fines are claimed to be due upon the stock. * * *

2. Had the building association a lien on the 36 shares for the loans made to Persch? * * *

It is to be observed in the first place, that the building association were certainly as much bound to have the certificates of stock transferred to them when they lent money to the holder, as the bank could be.

[Bank of Commerce's Appeal.]

They did not take this precaution, either by the negligence of their officers, or because they were satisfied with the other securities received, they permitted Persch to retain the certificates and use them. * * *

As the charter provides that security for loans may be *either* the transfer of the certificates of stock to the association, *or*, bond and warrant, and mortgage on real estate, did not the possession of the certificates by Persch warrant the bank in assuming that no loan had been then made on the security of these shares, or could be made afterwards, the certificates being in their own possession? * * * The charter of the association gives it no lien on the stock for loans, except by a transfer.

The master reports that no such lien exists in this case.

The master recommended a decree:

1. That the plaintiffs, since the 14th day of November 1862, have been the lawful owners of 36 shares of the stock of the Citizens' Building and Saving Fund Association.

2. That the association had no lien upon the said shares, for moneys lent to John P. Persch by the association.

3. That the defendants were trustees for the stockholders of the association, in winding up the affairs thereof, and in dividing or otherwise disposing of its assets; and that the plaintiffs were entitled to have received as the holders of 36 shares, their proportion of the assets coming into the hands of defendants.

4 and 5. That it be referred to a master to take an account, &c.; and the defendants pay to the plaintiffs the amount, if any, due to them.

Exceptions were filed to the master's report.

On hearing at Nisi Prius the bill was dismissed with costs.

The plaintiffs appealed to the court in banc and assigned for error the dismissal of their bill.

F. Heyer and *G. M. Dallas*, for appellants.—The certificates in the hands of the plaintiffs were not subject to the equities between the association and Persch; they were practically negotiable securities: Bank *v.* Lanier, 11 Wallace 369; Railroad *v.* Lewis, 9 Casey 33; N. York & N. H. R. R. *v.* Schuyler, 34 N. York R. 30; Bridgport Bank *v.* N. York & N. H. R. R., 30 Conn. 231.

W. J. Aldrich and *H. R. Warriner*, for appellees.—The plaintiffs were bound to take notice of all the provisions of said charter: Union Bank *v.* Laird, 2 Wheaton 390; Sabin *v.* Bank of Woodstock, 21 Vermont 355; Rogers *v.* Huntingdon Bank, 12 S. & R. 77; Morgan *v.* Bank, 8 Id. 73; Mechanics' Bank *v.* Earp, 4 Rawle 384; Grant *v.* Mechanics' Bank, 15 S. & R. 140.

[Bank of Commerce's Appeal.]

Until a transfer upon the books, the assignee has a mere equitable claim, and is liable to every equity subsisting against the assignor: Bayard *v.* The Farmers' and Mechanics' Bank, 2 P. F. Smith 232; Farmers' Bank *v.* Inglehart, 6 Gill 50; Walsh *v.* Stille, 2 Pearson 17; Bury *v.* Hartman, 4 S. & R. 175; Gourdon *v.* Ins. Co. of N. A., 1 Binney 430; Wheeler *v.* Hughes, 1 Dallas 23; Wardel *v.* Edwards, 2 Johns. Cas. 260; Brindle *v.* McIlvaine, 9 S. & R. 74; Angell & Ames on Corporations, § 779; James *v.* Woodruff, 10 Page N. Y. Ch. R. 541; s. c. 2 Denio R. 474.

The opinion of the court was delivered, January 27th 1873, by AGNEW, J.—This bill is to make the officers of an expired corporation responsible for alleged negligence in the settlement of the affairs of the corporation and the distribution of its assets, on the ground that the complainant is the holder of an outstanding certificate of stock under an assignment, but without a transfer on the books, or notice to the corporation or these defendants, that the plaintiff held the stock. In point of fact, notice was not given for nearly three years after the dissolution of the corporation and the settlement of its affairs. As between a corporator and the corporation, the records of the corporation, or its stock-book, as it is called, is the evidence of their relation. Meetings of the stockholders, elections and dividends, &c., are regulated by this record. The certificate is but secondary evidence, and is never demanded, except when the stockholder deals with the corporation in a contract relation. Such was the case of the Building Association *v.* Sendmeyer, 14 Wright 67. The assignment of the certificate is only an equitable transfer of the stock, and to be made available must be produced to the corporation and a transfer demanded. As between adverse claimants of the certificate, the possession of it with the transfer upon it is often the test of the title. But when the corporation itself is not dealing with its stockholder on the security of his stock, and is merely performing a corporate duty, its own record is all it needs to consult, for whoever would demand the privileges of a stockholder should produce the evidence of his title and ask to be permitted to participate. These defendants acted officially as the trustees of the expired corporation, to settle its affairs under the powers conferred by the law, and in doing so made their distribution, according to the record of the corporation, which exhibited the membership of its corporation. In doing this, without any notice from the plaintiff of his equitable assignment of the stock, clearly they were not guilty of any negligence, while the loss of the plaintiff was attributable to his own negligence, and negligence on their part is the only ground of his bill. The decree of the Court of Nisi Prius dismissing the bill is affirmed, with costs to be paid by the appellant.

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Danzeisen's Appeal.

1. The plaintiff being embarrassed, upon defendant's advice conveyed to him real estate, on defendant's parol promise that he would obtain from a building association, on the security of the real estate, a loan, with which he would pay plaintiff's liabilities, repay the loan from the rents and reconvey to plaintiff when the loan should be repaid. *Held*, that the transaction was a mortgage.

2. The purpose not being to sell, but convey as security, it is immaterial that defendant was to procure the money at a future time and from a third person.

3. The defendant received the deed without consideration, except his promise to raise the money for plaintiff; if it was not intended to be raised it would be a fraud and the defendant a trustee *ex maleficio*.

4. The plaintiff's bill charged that defendant held in trust for him; did not allege that he was mortgagee, and prayed for account and reconveyance; it was dismissed below on the ground that there was no trust. The facts set out showing it to be a mortgage, the Supreme Court sustained the bill, to reach the justice of the case, disregarding the use in the bill of inappropriate terms.

5. Barnet *v.* Dougherty, 8 Casey 371, distinguished. Haines *v.* Thomson, 20 P. F. Smith 434; Harper's Appeal, 14 Id. 320; Sweetzer's Appeal, 21 Id. 264, followed.

January 10th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Appeal from the decree at Nisi Prius: No. 23, to January Term 1870.

The bill was filed December 14th 1869, by John Frederick Danzeisen, against August C. Miller and Harry E. Miller, and set out:

1, 2, and 3. Two lots of land on Apple street, Philadelphia, belonging to John G. Keyser, were on the 6th day of January and the 6th day of September 1847, respectively, conveyed by Keyser to the plaintiff.

4 and 5. In 1855 and 1856 the plaintiff having become pecuniarily embarrassed, consulted with A. C. Miller (defendant) as to a mode for his relief. A. C. Miller promised that if plaintiff would convey his real estate to him (Miller) he would purchase shares in a building association, apply the rents of the real estate to pay the dues, and on the security of the real estate borrow money, and thus discharge the plaintiff's liabilities. On the determination of the association he would reconvey the real estate to the plaintiff.

6 and 7. The plaintiff relying on A. C. Miller's promises, "and upon his discharging with fidelity the trust," on the 30th of October 1856, conveyed the real estate to him without consideration, but upon his agreement and "upon the trust that he would obtain money upon the security of the real estate, discharge the plaintiff's liabilities, apply the rents of the real estate to the payment of the borrowed money, and reconvey the property to the plaintiff when the rents were sufficient to satisfy the loan, whereby the said

August C. Miller became the trustee of the real estate for said purposes."

8 and 9. A. C. Miller obtained money from a building association on the security of the real estate, paid all the liabilities of the plaintiff, collected the rents sufficient to pay the building association the dues on the loans from them; the association had determined under its charter, and all dues and loans had been repaid.

10, 11 and 12. The plaintiff had requested A. C. Miller to render him "an account of his said trust," and reconvey the real estate to him. Miller had refused to do so, but in violation of his trust had conveyed the real estate to his son, Harry E. Miller, the other defendant, without consideration, and with the knowledge by H. E. Miller that A. C. Miller held in trust for the plaintiff.

The prayers were for an injunction restraining the defendants from encumbering or conveying the premises; for an account by A. C. Miller of his "trusteeship;" that they reconvey the real estate to the plaintiff, and for further relief.

A. C. Miller answered, admitting "the conveyance to him, but denying the allegations in the bill in relation" to borrowing from the building association, paying the dues from the rents, and that he would reconvey to the plaintiff on the determination of the association.

He averred that the plaintiff, being much embarrassed, and his real estate encumbered to its full value, and being in danger of having other judgments recovered against him, solicited the respondent to purchase the real estate for the amount of the liens, $5000, a larger amount than it would have produced at sheriff's sale. The respondent yielded to the solicitations of the plaintiff, and on the 30th of October 1856, the plaintiff conveyed to him the real estate for $5000. There was no understanding at the time of the conveyance that the respondent should obtain money to discharge the plaintiff's liabilities, pay the loans, &c., from the rents, and reconvey, &c. He never became plaintiff's trustee; no money had been borrowed by respondent from any building association. Respondent had frequently offered to reconvey to the plaintiff upon the payment of all moneys laid out by respondent, with interest, which plaintiff was not willing to do, and respondent had since conveyed, "for a good and valid consideration," to Harry E. Miller, who has ever since been the sole owner of the property.

Harry E. Miller, the other defendant, denied knowledge "of any transactions, statements, promises and agreements, between the plaintiff and August C. Miller," touching the real estate. He averred that plaintiff had instituted two actions of ejectment for the real estate, in which this respondent had been made co-defendant in the same by leave of the court, as he had become owner

"by conveyance for good and valid consideration, from A. C. Miller, by deed of March 18th 1867; and that the suits are still pending and undetermined."

Replications having been filed, an examiner was appointed. Upon the coming in of his report, George M. Dallas, Esq., was appointed master. He reported the facts as follows:—

"The plaintiff conveyed the property in question to August C. Miller, by deed dated October 30th 1856. The deed was in the usual form, contained no words of trust, and was expressed to be for the consideration of $5000.

"At the time of the making of this conveyance, and for some time previously, the plaintiff was in circumstances of pecuniary embarrassment, of which he had informed the said August C. Miller, who, as a means of relief to the plaintiff, suggested the making of the said conveyance, which was made in consequence of that suggestion, and upon the parol promise of said August C. Miller to use the property for the purpose of obtaining a loan from a building association, to apply the rents to the repayment of such loan, to use the money to be so borrowed for the payment of the plaintiff's liabilities, and finally, to reconvey the property to the plaintiff when the loan to be obtained as aforesaid should be repaid.

"August C. Miller, by deed dated March 18th 1867 (expressed to be for the consideration of $16,000), conveyed the property in question, together with several other properties, to his son Harry E. Miller. There was in fact, no valuable consideration paid for the said conveyance."

After reviewing the facts and discussing the law, the master, in his opinion said:—

"The conclusion of the master is that August C. Miller took the property in question as trustee for the plaintiff, that the conveyance thereof to Harry E. Miller did not transfer it to him discharged of the trust, but that he took only the naked legal title, and the equitable estate remains in the plaintiff; and that the plaintiff is entitled to an account and reconveyance as prayed in this bill, and to a decree accordingly."

Exceptions were filed to the master's report.

After hearing, the court at Nisi Prius dismissed the bill, SHARSWOOD, J., delivering the following opinion:—

"I am by no means so clear as to either the facts or the law of this case as to justify me in sending these parties to a long and expensive account before it is finally settled that there is a liability to account. Upon this principle I invariably act in this place. A decree for an account is interlocutory and not the subject of appeal, by which the whole question can be carried up and finally settled by a decree dismissing the bill.

"The law is very clearly laid down in Barnet *v.* Dougherty, 8 Casey 371, that since the Act of April 22d 1856, Pamph. L. 533,

a trust by implication or construction of law is raised only from fraud in obtaining the title or from payment of the purchase-money when the title is acquired; a subsequent payment of the purchase-money or a subsequent fraud is not sufficient.

"Mr. Justice Strong said: 'It is fraud in the purchase which makes the holder of the title a trustee. Subsequent fraud, if any exist, no more raises a trust than does subsequent payment of the purchase-money.' He adds, 'of course setting up the sheriff's deed as an absolute conveyance of both legal and equitable interest was not a fraud from which the law implies a trust. It was nothing more than a violation of an alleged promise, either implied or expressed, which is of no avail to induce a chancellor to decree the purchaser to be a trustee.' I do not understand Beegle *v.* Wentz, 5 P. F. Smith 369, as laying down any other rule. Mr. Justice Agnew says: 'The trust in such cases arises *ex maleficio*, on the principle that equity will not permit one to deprive another of a title he actually has by such a promise not intended to be performed.' There must be some evidence of fraud in the purchase that the party obtained the title on a promise which he did not intend to perform. To hold that whenever a deed is made by one man to another upon a parol promise to hold it for the benefit of the grantor and to reconvey it—the subsequent breach of that promise is evidence of original fraud in the promise—would be most effectually to repeal the 4th section of the Act of 1856.

"Now, upon the facts of this case, I have very great doubt whether there is anything more established than a subsequent breach of a parol agreement when A. C. Miller took the title for these lots. It is to be observed that the conveyance was upon the consideration that Miller undertook to pay Danzeisen's debts, to the extent of the agreed price. No evidence was given to show that $5000 was not a fair price. It does clearly appear from the plaintiff's own examination that Miller did pay $3611.48–100ths of his debts, and the property was subject to two building association mortgages of $1000 each. One of them was said to have pretty near run out. The other I infer from nothing having been said, was new. Now it may be conceded that at the time of the transaction Miller made to Danzeisen the promise that when he was reimbursed what he undertook to pay off, of debts and encumbrances, he would reconvey. There is not a syllable in the proofs that there was any relation of debtor and creditor created by the agreement, that Miller was to make advances to Danzeisen and hold the property as security. If the property had turned out to be an insufficient security, Miller could not have recovered the money of Danzeisen. The bill is not indeed framed upon any such idea. It is not a bill to redeem a mortgage but to establish a trust. If this were all, it must be admitted, I think, that the

case would be entirely bald of any evidence to establish a trust *ex maleficio*.

"There is indeed some evidence upon which my mind has hesitated, as to whether Miller did not represent to Danzeisen and his wife, that the deed executed by them was a deed of trust. The witnesses appear to use this phrase without any clear idea of its meaning. There was no evidence of what occurred at the execution of the deed to contradict what appears on its face. The conveyancer, who is one of the subscribing witnesses, was examined. He could not tell the particular circumstances of the execution of this deed, but he states that his invariable rule was, especially when the parties could not read, to be satisfied that they understood what they were doing, and that his partner since deceased, understood the German language, the plaintiff being a German and having an imperfect knowledge of English. An alderman of very high character as a gentleman of intelligence and integrity, certifies that the contents of the deed were made known to Mrs. Danzeisen. How much the testimony on the subject is to be relied on may be gathered from the fact he denies having acknowledged the deed before an alderman at all. Had the deed been without consideration there might have been very strong reasons for holding the evidence sufficient to show that the grantor executed the deed upon the false representation that it was a deed of trust, but in the face of the admitted and indisputable fact that the grantee assumed to pay debts of the grantor to the full amount or very near the full amount of the consideration named in the deed, and that he faithfully fulfilled the undertaking, and that Danzeisen has never been called upon for any of those debts, it seems to me that it would be very dangerous to hold that a trust *ex maleficio* can be established by the loose kind of testimony given in this case. Had Mr. Miller paid down to Danzeisen the $5000 in cash, it would not have been any stronger."

The plaintiff appealed to the court in banc, and assigned for error, not confirming the master's report, and dismissing the bill.

E. R. Worrell, for appellant.

G. Remak, for appellees.

The opinion of the court was delivered, January 27 1873, by

AGNEW, J.—The transaction between Danzeisen and the elder Miller in this case, was a mortgage. The former conveyed his property to the latter expressly as a security for money to be obtained to pay his debts. Miller agreed to take the property, raise the money through a certain building association, apply the rents to a repayment of the loan, and to reconvey when the building association expired. In Harper's Appeal, 14 P. F. Smith 320,

where the difference between a mortgage and a trust is very clearly shown by our brother Sharswood, and that the former is not within the Act of 22d April 1856, he says, whenever there is in fact an advance of money to be returned within a specified time, upon the security of an absolute conveyance, the law converts it into a mortgage, whatever may be the understanding of the parties. Here the intent to deliver the deed only as a security for money to be borrowed on the faith of it, is very clear, and the time for repayment is equally distinct.

In such a case, where the purpose of the parties is not to sell, but to make the deed a mere security, it cannot be material that Miller was to procure the money from an association whose business it was to lend money on real estate security. The fact that the parties, who were Germans, called it a trust, cannot overcome the distinct terms of their agreement, that it was to be a security only. Indeed, their use of the term trust, giving to it an ordinary signification, only confirms the intent not to make an absolute conveyance. It is very evident that the deed was a mortgage, or a trust *ex maleficio* would arise; for when the deed was delivered no consideration passed. Miller procured the estate without payment of any purchase-money, and therefore stood in no better situation in point of fact than one in whose name a deed is taken by another who pays the purchase-money.

In equity the estate should remain in Danzeisen, who had received nothing but a promise to raise money for his use, unless the promise to raise be the equivalent of the money when raised. If the promise was not intended to be performed by Miller, the deed was obtained by a deceit, and it was a fraud at the time it was delivered.

But if the promise be performed, the true intention of the parties is executed, and the deed should stand as a security for the money. It would be different had the deed been intended to enable Miller to raise money by a sale, for then Danzeisen would intend to pass an absolute estate, and to trust the promise of Miller to apply the proceeds to his use; a breach of such a promise would not convert Miller into a trustee, and the case in principle would resemble that of Barnet *v.* Dougherty, 8 Casey 371. But where no sale is intended, and the conveyance is only to be a security for a loan to be obtained on it, the parting with the title must be by way of mortgage, or the deed is procured by false pretence. The law, however, rather treats the deed as a mortgage, than to impute a fraud to Miller. In equity, where the estate is conveyed without consideration, and for the special purpose of security for a loan, what difference can it make that the money was not paid on the delivery of the deed? The grantor's intent in its delivery is the same in either event, while every breach of faith in the grantee partakes of a fraud. To say, therefore, that the relation of debtor

and creditor did not arise, because no money passed at the time of delivery, is to stand on a hard technicality, and ignore the true intent and relation of the parties.

Miller's intent to raise the money, which was the effective means of procuring the title, must be viewed as the equivalent of the money, when it is raised and applied to Danzeisen's use. Then the purpose of the deed is executed, and then it should stand as a security to reimburse the money borrowed on the faith of it. It is plainly a mortgage, therefore, and equity will so regard it, and compel a reconveyance when the money shall have been refunded. As was said in Haines *v.* Thomson decided in February 1872, 20 P. F. Smith 434, in all the cases the sum of the matter has been to determine by the true nature of the transaction, whether the conveyance was an actual sale, or a mere security for money. But without further discussion, the case of Sweetzer's Appeal, decided last year, is an authority in point, that even a sheriff's sale will be converted into a mortgage when it is made an instrument to carry out the agreement of the parties to raise money by way of loan, and when the loan is subsequent to the deed: 21 P. F. Smith 264.

At Nisi Prius this case was treated as a question of trust. The draftsman of the bill evidently looked at it in that light, and in that light the bill was dismissed. But a careful examination of the bill discloses all the essential facts to support it as a bill to redeem a mortgage, and it prays for an account and a reconveyance. With these substantial averments and appropriate prayers, and with the ample power of amendment possessed by the court to do equity and reach the justice of the case, we cannot turn the plaintiff out of court by reason of inappropriate terms used in the bill, indicating a trust instead of a mortgage.

Treating the bill as substantially one to redeem a mortgage, we are of opinion the evidence clearly proves the conveyance by Danzeisen to Miller to be a mere security for money to be borrowed for the use of Danzeisen, and therefore it was a mortgage in law, and that Henry E. Miller was not a bonâ fide purchaser for a valuable consideration without notice of the nature of the deed. The decree of the Court of Nisi Prius is therefore reversed, the plaintiff's bill restored, a decree for an account to be taken between the plaintiff and the defendants is ordered, and George M. Dallas, Esq., is appointed a master to take the account and report the same to the court, together with the proper form of a final decree, in accordance with the rules and practice in equity.

The Union Railroad and Transportation Company *versus* Riegel & Co.

1. Plaintiffs shipped goods to Indianapolis by defendants who gave this receipt: "Received, Philadelphia, &c., of (plaintiffs) the following articles, to be carried and delivered upon the terms, &c., on the back of this receipt. 'Marked F., Indianapolis, for J. Furniss, care S. F. Gray, agent" of defendants. One of the terms was, that packages should be marked with consignee's name, &c. The manifest corresponded with the receipt. There was evidence that by direction of Welsh, an agent at Philadelphia, the name of Furniss was not in fact on the box, and that he would order Gray not to deliver till directed. The receipt was filled in by the plaintiff's clerk and signed by defendants' clerk. Gray delivered the goods to Furniss who failed without paying. In a suit for negligence; the court charged "The contract depends entirely on the verbal arrangement, of which you are judges;" *Held* to be error; the contract was to be ascertained by the jury from both receipt and verbal arrangement.

2. Declarations of defendants' agent within a reasonable time after the transaction were evidence against them.

January 13th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J. at Nisi Prius.

Certificate from Nisi Prius: To January Term 1870, No. 404.

This was an action brought March 4th 1870, by Jacob Reigel, Samuel G. Scott and others, trading as Jacob Reigel & Co., against The Union Railroad and Transportation Company, for negligence in the wrongful delivery of goods, sent by the plaintiffs to the defendants, to be transported by them to Indianapolis.

The plaintiffs' allegations were that they had been negotiating with Furniss & Co., of Indianapolis, for the sale of dry goods, but being doubtful of the solvency of Furniss & Co., they agreed with the defendants to transport the goods to that place, to defendants' agent there, not to be delivered to Furniss & Co. without further instructions; that the agent delivered them to Furniss & Co. notwithstanding. After the delivery Furniss & Co. failed, and the plaintiffs were never paid for the goods.

The case was tried at Nisi Prius, February 7th 1871, before Read, J.

S. G. Scott, one of plaintiffs, testified:—

"In December 1869, a member of the firm of Furniss & Co., of Indianapolis, called in our store to purchase goods. There was nothing concluded between me and Furniss. I sent for Mr. Welsh, agent of the Union Railroad and Transportation Company. He came to see me on December 10th 1869. I told him we had goods to ship to Furniss & Co. They were not to be delivered until we instructed the Union line to deliver them. Mr. Welsh told me not to put Furniss & Co. on the boxes, but to mark them **F**, Indianapolis, care of S. F. Gray, agent." He said he would write to the agent next day not to deliver the goods until we instructed them. I told Mr. Welsh the reason, which was, because our salesman was anxious that Furniss & Co. should have the goods so that

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they might have them for sale during the holidays. After the 10th of December 1869, the first time I saw Mr. Welsh was after the delivery of the goods to Furniss & Co.

The plaintiff proposed to ask what Welsh then said: This was objected to by defendant.

Judge Read admitted the question, saying: "I think that what this agent would say within a reasonable period after the transaction would be evidence."

A bill of exceptions was sealed.

Witness: "I told him in the following month that I was surprised that the goods were delivered without our instructions. Mr. Welsh was also surprised. I told him we would have to look to the railroad company. I saw him a few days after. He then said we had given the consignees' name on the shipping receipt, and the company would not be responsible. I asked him whether he had given us any directions as to drawing the shipping receipt. He said he had not. The receipt was kept by us. The receipt did not go from Philadelphia. It was brought back by our drayman. This shipping receipt is in the handwriting of Fenner, our shipping clerk, who is now in our employ. It was written by our clerk, and sent by us to Thirteenth and Market streets, and brought back by our drayman."

John W. Emmet testified:—"I was salesman of Jacob Riegel & Co. in December 1869. I sold Furniss goods about this time. * * * I went to Indianapolis. I got there in the first part of January 1870; I went to the depot of the Union Line, and asked if any goods were there for Furniss & Co. They said no. The shipping agent opened a book and showed me some goods that were shipped to Furniss & Co., marked **F** I think, to care of Gray. He said they had been delivered. I told him they ought not to have been delivered until Jacob Riegel & Co. had sent instructions, as the goods were not paid for."

James M. Fenner testified:—"In December 1869, I was in the employ of Jacob Riegel & Co., as clerk in the store. My business was to receive goods sold, and send them out on drays. I took place of shipping clerk. These boxes, when I first saw them, were marked John Furniss & Co., Indianapolis. 'John Furniss & Co.' was planed off, and '**F**, care of S. F. Gray,' put on before they left the store. I gave them to drayman. The drayman brought back this slip receipt. The writing, 'Jacob Riegel & Co.,' 'John Furniss & Co.,' '**F**,' and everything in writing but signature, is in my handwriting. I knew of no arrangement Scott had made with Welsh. Scott told me to plane off 'John Furniss & Co.' These blanks are supplied by the railroad company."

Scott, recalled, testified:—"Mr. Welsh told me he had written to Gray about the goods, after I had heard of delivery of goods to

Furniss. He said he had written to Gray not to deliver the goods. The goods have never been paid for; they are insolvent."

For the defendant James D. Welsh testified: "I am the agent of the Union Railroad and Transportation Company. On the 10th of December 1869, Mr. Scott told me he had six cases of dry goods he wanted to ship to parties in Indianapolis, and he was not sure they were good. I suggested to him to mark [F] care of S. F. Gray, agent, Indianapolis, and give no other consignee. They were to be consigned to S. F. Gray, agent; so that our agent in Indianapolis would not know to whom to deliver them. I said I would write to Mr. Gray, telling him what was done. He would have asked who was the consignee; to avoid this I wrote to him to allow them to remain in his depot. I simply told Mr. Scott to mark the goods. I did not say to Mr. Scott that I would write to Mr. Gray not to deliver the goods, as that would have been foolishness. Mr. Gray would not know to whom to deliver. I wrote to Mr. Gray on the 11th day of December. I told Mr. Scott to mark the packages [F] care of S. F. Gray, agent, Indianapolis, Indiana. I wrote to Mr. Gray that as to six cases of goods, marked as I said before, to hold them subject to our order. This was to prevent him asking for a consignee."

D. Buist, the slip clerk of the Pennsylvania Railroad Company, testified that the manifest on which these goods were entered went with the car which took the goods.

The defendants gave in evidence the receipt for the goods and the manifest. The receipt, which was in a printed form, was:—

"*This receipt, properly filled up by the Shipper, must accompany the Freight.*

PENNSYLVANIA RAILROAD COMPANY'S FREIGHT STATION, * * *

Received Philadelphia, Dec. 10th 1869, of J. RIEGEL & Co., the following articles, contents and condition unknown, to be carried and delivered upon the terms and according to the agreement as specified on the back of this receipt.

Marked [F] Indianapolis, Ind. For J. FURNISS & Co., care S. F. Gray, Agt.

Number and description of packages.—Six (6) boxes dry goods.

BUIST."

On the back of the receipt was printed, among other things, as follows:

"It is agreed, and is part of the consideration of this contract:

"1. That all goods received for transportation shall be properly packed, and distinctly marked with the name of the consignee and the station where and to whom consigned." * * *

The manifest was:

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"Manifest of Merchandise forwarded by the UNION R. R. TRANSPORTATION Co. to Pittsburg from Philadelphia, Dec. 10th 1769.

MARK	DESTINATION	CONSIGNEE.	Point Receipted to.	ARTICLES.	Weight
[F]	Indpls, Ind.....	S.F.Gray, ag't J. Furniss.....	Home.....	Bx. D. G., 420, 380, 380, 360, 420, " " 180,.....	

Samuel F. Gray, agent of defendant at Indianapolis, testified: "We did receive six packages mentioned on manifest, and delivered them to Furniss & Co. I received a letter from Mr. Welsh, dated 24th of January, stating he had sent me a letter on the 11th of December. The letter of December 11th was never received by me or subordinates. Mr. Emmet first called between the 27th of December 1869, and first week in January 1870, to see me. He made inquiry concerning these six packages. I informed him they had been delivered to consignees, J. Furniss & Co. He said, had you no word from Philadelphia to hold goods? I said I had not." * * *

M. Horace McKay, a member of the firm of J. Furniss & Co., testified: "I remember the purchase of goods from Riegel & Co.; remember the receipt of the bill. I made no contract about the goods. These goods were received by our firm, and delivered from line by our draymen. We received bills from this firm by due course of mail. There were conditions at same time as bills were received. We received notice from Riegel & Co. There were no directions not to receive the goods; but after they were received, certain conditions were to be complied with. Goods were received about middle of December. Emmet's first visit was after the holidays, and about the 1st of January I saw him; visited store several times; came in in a friendly way. He did not tell us we ought not to have received goods, and found no fault with us for receiving them. We closed our house on the 26th of January, the day our failure took place. Emmet's next visit was two, three, or four days after this." * * *

The defendant proposed to ask witness: "What would your firm have done if you had received notice from the company, within a reasonable time, that the delivery to you had occurred through any mistake or alleged mistake of the company?"

This was objected to by plaintiff, overruled by the court, and a bill of exceptions sealed.

Welsh again testified: "On the 22d of January 1870, Scott notified me of the non-delivery of goods. I went up to the depot, and found the name of consignee on manifest, receiving book, and slip receipt book; came down and told Scott they must have put consignee on slip receipt. I then wrote to Gray. Scott did not then tell me he would hold the company responsible."

Read, J., charged:—"This is an action between Jacob Riegel &

Co., the plaintiffs, and the Union Transportation Company, the defendants, on a contract under which the defendants were to hold goods until further orders. [The contract depends entirely upon a verbal arrangement, of which you are the judges. The goods were not sent according to the usual and ordinary terms by which this company sends goods, but they were sent under a special contract.] The first question is, what the contract is? The second, whether the plaintiff has complied with the terms of the contract. If the plaintiff complied, and the defendants did not, then the defendants are answerable. One of the parties to the arrangement was a member of the firm of Riegel & Co., and I will read portions of his testimony. Then I will read a portion of the testimony of Mr. Welsh." (Judge Read here read Scott's testimony). "'I sent for Mr. Welsh on 10th of December 1869. I told him I had six packages to send—that they were not to be delivered until we instructed the Union Transportation Company to deliver them. Mr. Welsh told me not to put the name of the firm on the packages; he told me to mark **F**, care of S. F. Gray, agent, Indianapolis, Indiana. He said he would write to 'the agent there. I told Mr. Welsh the reason, and that I wanted goods to arrive in time for the holidays. I do not know whether I told him the terms of the sale.'

"Then in a subsequent conversation, 'I think it was in January, I said I was surprised, and said I would look to the company.' Mr. Welsh said we had given the name of the consignee in the [slip receipt], then I said 'Did you give any directions in regard to the shipping receipt?' He said 'No.'

"Then Mr. Welsh said: 'I am agent of the Union Transportation Company, my office is at No. 415 Chestnut street. In December 1869, Mr. Scott sent for me to come to his store. I went. He said he had goods to send to Indianapolis, to Furniss & Co., *who were not so good.* I told him he had better mark the goods **F**, and give no other consignee, and then the agent would not know to whom the goods were to be delivered. I said I would write. I did write to our agent there.'

"[There is the contract—there is no difference between them, in their recollection. It would appear, then, that the contract was specially to take these goods to Indianapolis, and not to deliver them to Furniss & Co. Did Mr. Scott follow the instructions of Mr. Welsh?]

"It is in evidence that the name 'Furniss & Co.' was planed off [the boxes.] It is in evidence that they were marked exactly as Mr. Welsh directed, so that the name of the station and name of consignee on the boxes was in accordance with Mr. Welsh's directions. If this be the case, then, Mr. Scott so far complied with the instructions of Mr. Welsh.

"[Then comes another element, that of the shipping receipt,

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which, as I understand it, is not a bill of lading, but merely a shipping receipt, given by the company to the drayman who delivers the goods, to show that the goods have been received. It is returned to the shipper, and does not go on with the goods. Where there is a special contract, such as this was, it is a question whether that receipt formed any part of the contract at all. The evidence is that Mr. Scott subsequently asked Mr. Welsh whether any instructions were given in regard to the shipping receipt, so that what was done with the shipping receipt does not make any difference in regard to the contract that was made.] Then this item of direction is on the back of the receipt. (Article 1 from the printed matter on the back of the receipt.)

"[The question is, whether Mr. Scott performed his part of the contract. If he did defendants are undoubtedly liable, for they have not performed their part; they did not keep the goods until instructions. If they made this contract, no matter whether the communication to their agent was made or not, they were bound to keep the goods.]

"Now there was another part. In order to make this more certain, there was a letter to be written. No doubt it was written. There is no doubt it never arrived. Whether it was not mailed by the agent or clerk of the transportation company, or whether it was mailed or miscarried, we have no evidence. It never was received. [If it was not put into the post-office, it was the negligence of the parties; and perhaps there should have been some testimony to show that that letter went into the post-office; because, when a party writes a letter and intended to send it, and it never arrives, it is proper to trace the letter into the post-office, if any one knows anything about it.] We can only assume that the letter was written, and that it did not arrive. There is a good deal in the other parts of the case, that have formed food for argument, that have nothing to do with the case. Did Riegel & Co. comply with their part of the contract? If they did the defendants are liable.

"I am requested to charge on the following points by the defendants:—

"'1. The terms set forth in the receipt of 10th December 1869, superseded the arrangement made with Mr. Welsh respecting the consignee of goods.'

"I decline so to charge.

"'2. On the arrival of the goods at Indianapolis, the agent there was authorized by the terms of the said receipt to deliver them to J. Furniss & Co.'

"I decline so to charge."

The verdict was for the plaintiffs for $1944.69.

The defendants took a writ of error and assigned for error:—

1, 2. The rulings on the offers of evidence.

3. The part of the charge first enclosed in brackets.
4. The part of the charge secondly and fourthly so enclosed.
5. The part of the charge thirdly so enclosed.
6. The answer to the 1st point.
7. The answer to the 2d point.

W. A. Porter, for plaintiffs in error.—Declarations of an agent, made not at the time of entering into a contract, but after the transaction is past, are not admissible in evidence against the principal: Hough *v.* Doyle, 4 Rawle 291; Hannay *v.* Stewart, 6 Watts 487; Hubbard *v.* Elmer, 7 Wend. 446; Stiles *v.* The Western Railroad Corporation, 8 Metc. 46; Clark *v.* Baker, 2 Whart. 340. The receipt was a contract between the shipper and the transporters: Bates *v.* Todd, 1 Moody & R. 106; Babcock *v.* May, 4 Hamm. (Ohio) 345; Ide *v.* Sadler, 18 Barb. 33. Previous conversations between Scott and Welsh were merged in the writing: Monongahela Navigation Co. *v.* Fenlon, 4 W. & S. 208; Mumford *v.* McPherson, 1 Johns. 414; Vandervoort *v.* Smith, 2 Cain. 161; Howes *v.* Barker, 3 Johns. 506; Creery *v.* Holly, 14 Wend. 26; La Farge *v.* Rickert, 5 Id. 187; Barber *v.* Brace, 3 Conn. 9. The receipt authorized the agent at Indianapolis to deliver the goods to Furniss: Bristol *v.* Rensselaer & S. R. R., 9 Barb. 158.

G. W. Biddle and *P. McCall*, for defendants in error.—Declarations of an agent acting as such, within a reasonable period of time after a transaction, are competent testimony against his principal: Stockton *v.* Demuth, 7 Watts 39; Hannay *v.* Stewart, 6 Watts 487; Clark *v.* Baker, 2 Wharton 340; McCotter *v.* Hooker, 4 Selden 407; Dodge *v.* Bache, 7 P. F. Smith 421. Parol evidence of what occurs at or shortly before the execution of a written instrument to control its effect is admissible: Bank *v.* Fordyce, 9 Barr 275; Rearich *v.* Swinehart, 1 Jones 238; Chalfant *v.* Williams, 11 Casey 212; Lewis *v.* Brewster, 7 P. F. Smith, 410; The Baltimore & Philadelphia Steamboat Co. *v.* Brown, 4 Id. 77; McCotter *v.* Hooker, 4 Selden 497; Blossom *v.* Griffith, 3 Kernan 569; Purcell *v.* Southern Express, 34 Georgia 315; Hutchins *v.* Ladd, 16 Michigan 493; Michaels *v.* N. Y. Central R. R., 30 N. Y. 164; Reed *v.* Spalding, Id. 630.

The opinion of the court was delivered, February 3d 1873, by

MERCUR, J.—The first and second assignments of error are not sustained. The 3d, 4th, 5th and 6th will be considered together. They all relate to the ascertainment of the contract under which the merchandise in question was delivered to the defendants.

The plaintiffs gave evidence that Furniss & Co., of Indianapolis, desired to purchase goods of them upon a credit. Not being satisfied as to their solvency, plaintiffs made an arrangement with Mr. Welsh, agent for the Union Railroad & Transportation Com-

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pany, before delivering the goods for transportation, by which the boxes should be marked "[F] Indianapolis, Indiana, care of S. F. Gray, Agent," and should not be delivered to Furniss & Co. until further orders from plaintiffs. The boxes thus marked were delivered to the defendants. The plaintiffs claimed this to be the contract under which they delivered, and the defendants received, the goods.

The defendants gave evidence that when the drayman subsequently, upon the same day, delivered the goods to them, he brought and presented for their signature, a shippers' receipt, filled up by plaintiffs' shipping clerk, in which the boxes were described as marked "[F] Indianapolis, Indiana. For J. Furniss & Co., care S. F. Gray, Agent." Upon the face of the receipt it declared they were "to be carried and delivered upon the the terms and according to the agreement as specified on the back of this receipt."

Upon the back of this receipt, *inter alia*, is printed, "it is agreed and is part of the consideration of this contract,

"1. That all goods received for transportation shall be * * * distinctly marked with the name of the consignee, and the station where and to whom consigned."

That the defendants signed said receipt and returned it to the drayman, who took it back to the plaintiffs. This direction, as contained in the receipt, was substantially copied into the manifest which was sent on to Gray.

It appears that upon the arrival of the goods Gray delivered them to Furniss & Co., who soon after failed and the goods were lost to the plaintiffs.

The counsel for the defendants requested the court to charge the jury that the said shippers' receipt superseded the arrangement made with Mr. Welsh respecting the consignee of the goods. The court declined so to charge. In this was no error. We think, however, the court did err in saying to the jury that the contract depended *entirely* upon the verbal arrangement. The court thus withdrew wholly from the consideration of the jury the shippers' receipt which was executed after the verbal arrangement. The receipt, as well as the verbal arrangement ought to have been submitted to the jury to enable them to find from the whole evidence, what the true contract was.

The 7th assignment is not sustained. It assumes the receipt alone embodied the terms of the contract. Whether the agent was authorized to deliver the goods, depended not upon the receipt alone, but upon what the jury found the contract to be under the whole evidence as we have indicated.

Judgment reversed, and a *venire facias de novo* awarded.

73 80
167 20

73 80
202 609

73 80
222 503

Connery *versus* Brooke.

1. Hatcher being owner of two lots used a lane from the back lot over the other to a turnpike with a gate there. In 1858 he conveyed the back lot, the gate remaining, "with the free use, right and privilege of a passage-way * * * extending from the * * * turnpike to the hereby granted premises with free ingress and regress at all times for ever." Through divers conveyances, all reciting the grant of the passage, Brooke became the owner of the back lot in 1867, and Connery of the front lot in 1869; the gate had been used in common by the owners of both lots till 1870, when Brooke took it down and Connery put it up. In an action against Connery for obstructing the passage: *Held*, that the grant of the privilege did not *per se* make the gate a wrongful obstruction; it was a question for the jury in connection with the circumstances.

2. If the gate was not a practical hindrance and an unreasonable obstruction to plaintiff's use of the passage, it was not illegal.

3. Generally a grant is to be taken in its natural and ordinary sense; and if there be doubt, most strongly against the grantor.

4. A grant is to receive a reasonable construction which will accord with the intention of the parties, and the court must look at all the circumstances under which it was made.

5. *Contemporanea expositio est optima et fortissima in lege*, applied.

6. The plaintiff took down the gate, defendant sued him in trespass before an alderman and obtained judgment against him. *Held*, not to be a bar to an action for the obstruction.

7. Cox *v.* Freedley, 9 Casey 124, recognised.

January 14th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Error to the District Court of *Philadelphia:* No. 61, to July Term 1870.

This was an action on the case brought September 17th 1869, by George G. Brooke against Lawrence Connery for obstructing a passage-way of the plaintiff. The defendant owned a lot fronting on the Bustleton and Somerton turnpike road; the plaintiff owned a lot directly back of it and adjoining it. Both lots had belonged to John Hatcher in 1856, and were separated from his neighbor, Wendle, by a fence, along which was a lane from the lot now the plaintiff's to the turnpike; there was no fence on the side of the lane next Hatcher's own land. Whilst Hatcher owned both lots he put a gate at the end of the lane on the turnpike. On the 26th of February 1858, the gate still being at the end of the lane, Hatcher conveyed the rear lot (plaintiff's) to C. C. Vandegrift, "together with the free use, right and privilege of a passage-way, ten feet in width, along Wendle's line, extending from the Bustleton and Somerton turnpike to the hereby granted premises, with free ingress and regress at all times hereafter for ever."

On the 14th of June 1862, the Vandegrift lot was sold by the sheriff and conveyed to David Saul; the sheriff's deed contained the clause in relation to the lane which was in the deed to Vandegrift. Through various conveyances the plaintiff became the

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owner of the lot March 25th 1867, all the deeds containing a grant of the privilege as in Hatcher's deed to Vandegrift; the gate continued at the turnpike up to the time of the plaintiff's purchase. Hatcher and his estate owned the lot on the turnpike until March 27th 1869, when it was sold by his administrator under an order of the Orphans' Court, to the defendant. Vandegrift and Hatcher and the plaintiff and Hatcher had used the gate in common. About March 1870, plaintiff took the gate down and it so continued about ten months; the defendant then put it up. He also brought suit on the 2d of April 1869, before an alderman against the plaintiff here, "in a plea of trespass in damage to real estate;" on the 8th of April, the return-day, Connery appeared before the alderman, Brooks not appearing, and claimed "five dollars and twenty-five cents in trespass for damages done by defendant to plaintiff's real estate in tearing down and breaking plaintiff's gate;" judgment was rendered for Connery on the same day for $5.25: after the issuing of an execution, the amount of the judgment was paid by Brooks and received by Connery.

The cause of action in this case was the erection of the gate by the defendant at the turnpike end of passage.

The court directed a verdict for the plaintiff, reserving these points:—

1. Whether or not the putting up of the gate by the defendant was an obstruction to the plaintiff's "free use, right and privilege of a passage-way ten feet wide along Wendell's line."

2. Whether the judgment obtained by the defendant against the plaintiff before Alderman Joseph H. Comly, barred the plaintiff from recovery in the present action.

The jury found for the plaintiff.

The court in banc afterwards entered judgment for the plaintiff on the verdict on the reserved points, Hare, P. J., delivering the following opinion:—

"The plaintiff is the owner and occupier of a messuage in the neighborhood of Philadelphia. It stands back from the road, and the only access to it is through the defendant's land. Both parties claim under John Hatcher, who was the owner of a tract of land near the Second Street turnpike. In the year 1858, J. Hatcher sold and conveyed the premises to Vandegrift, with the free use, right and privilege of a passage-way ten feet in width, through the land of the grantor, extending from the house to the turnpike. An execution was subsequently issued against Vandegrift, and his title came through divers mesne conveyances to the plaintiff. It appeared from the evidence given at the trial, that the way which had been laid out when Vandegrift went into possession in accordance with the provisions of the deed, was closed by a gate at the point where it led into the turnpike. This was presumably done with his consent, and remained without objection until the title vested

in the plaintiff. The gate was then taken down by him and put up again by the defendant. The plaintiff then brought suit to recover for the alleged obstruction of the right of way.

"The question may be considered as arising solely on the deed, or on the deed in connection with the parol evidence. The words of a grant are to be taken as strongly against the grantor as their natural import warrants. By the 'free use, right and privilege of a passage-way,' we can only understand a way unimpeded by any means whatever. If the plaintiff can erect one gate he may put up another, or close the access to the road by movable bars. It has been said that some precaution of the kind was requisite to prevent cattle from trespassing on the lot through which the way passed. If the gate was the only means of effecting this object it does not follow that it could be used. But there are other methods which might have been resorted to, as for instance, a fence separating the lane from the field. That this would be more expensive and less convenient than a gate, is no reason for detracting from the words of the grant. The question is not one of good neighborhood, but of legal right.

"We are also clear, that the deed is not varied by the parol evidence. When the ambiguity is latent, and results from the application of the instrument to the matter in hand, the contemporaneous acts and declarations of the parties may sometimes be taken into view in arriving at a conclusion. Such evidence, however, has never been thought admissible when the question is what was intended, and not to what the intention applies. This is peculiarly true when the words are clear, and admit grammatically of but one construction. That Vandegrift suffered the gate to be erected and allowed it to remain without objection would not have precluded him from requiring it to be taken down unless the adverse use had continued for twenty-one years, and the plaintiff cannot be in a worse position than the persons under whom he claims. It was at the most an admission, which, if made in terms, would not have controlled the construction of the deed: Hamilton *v.* Neel, 7 Watts 517, 520; The Boston Hat Co. *v.* Messinger, 2 Pick. 223; The Bank *v.* McFarland, 5 Hill 432, 436.

"On the remaining question, whether the plaintiff is precluded by a judgment in a former suit growing out of the same matter, although not for the same act, before a justice of the peace, it is enough to say, that a magistrate can have no jurisdiction by consent or otherwise, to determine the title to land."

The defendant took out a writ of error and assigned for error, the entering of judgment for plaintiff on the reserved points.

W. Hopple, for plaintiff in error.—The plaintiff being the owner of the land subject to the right of way had the right to protect his land by a gate: Maxwell *v.* McAtee, 9 B. Monroe 20;

Capus v. Wilson, 3 McCord 170; Houpes v. Alderson, 22 Iowa 160: and could exercise all the rights of ownership not inconsistent with the easement: 3 Kent's Com. 420; Washburn on Easements 188, 195; Senhouse v. Christian, 1 T. R. 560; Robbins v. Borman, 1 Pick. 122; Adams v. Emerson, 6 Id. 57; O'Linda v. Lothrop, 21 Id. 297; Atkins v. Bordman, 2 Metcalf 467; Chandler v. Goodrich, 9 Shep. 78; Jackson v. Allen, 3 Cowen 220; Underwood v. Carney, 1 Cush. 292. What is such a use must be decided by a jury. Vandegrift took title while the gate was standing, and used it several years in common with Hatcher; the court in construing the deed, will look at the circumstances under which it was made: Johnson v. Kinnicutt, 2 Cush. 152; Atkens v. Bordman, 2 Metcalf 464; Cox v. Freedley, 9 Casey 124; Gloninger v. Franklin Coal Co., 5 P. F. Smith 9. The defendant having had notice of the erection and consent by Vandegrift, is bound by such consent or condition of things at the time he purchased: Campbell v. McCoy, 7 Casey 263; Lacy v. Arnett, 9 Id. 169; Hagey v. Detweiler, 11 Id. 409; Erb v. Erb, 14 Wright 388; Arnold v. Cornman, Id. 361. These matters were for the jury, as well as whether the gate was an obstruction and an interferance with plaintiff's right of way: Johnson v. Kinnicutt, 2 Cush. 153; Houpes v. Alderson, 22 Iowa 160; Kieffer v. Imhoff, 2 Casey 438; Phillips v. Phillips, 12 Wright 178.

J. H. Sloan and *J. Goforth*, for defendant in error.—A right of way must be complete as granted: 2 Blackstone 36; 3 Id. 218, 241; Co. Litt. 36; Watson v. Bioren, 1 S. & R. 227; Shep. Touch. 88; Washburne on Easements 28. The deed must be construed most strongly against the grantor: Atkins v. Bordman, 2 Met. 463; Wissler v. Hershey, 11 Harris 333. The defendant in error even if the gate had remained across the lane for some time after he acquired title, would not by permitting it to remain waive any right: Lacy v. Arnett, 9 Casey 169.

The opinion of the court was delivered, May 17th 1873, by

WILLIAMS, J.—We are of the opinion that the court erred in holding that by "the free use, right and privilege of a passageway," we can only understand a way unimpeded by any means whatever, and that, as a necessary consequence, a gate hung across such way at its intersection with the turnpike, is a wrongful obstruction, for which an action will lie. Undoubtedly, as a general rule, the words of a grant are to be understood in their ordinary and natural sense, and if there is any doubt as to their meaning, they are to be taken most strongly against the grantor. But they are to receive a reasonable construction, and one that will accord with the intention of the parties; and, in order to ascertain their intention, the court must look at the circumstances under which the grant was

made: Cox *v.* Freedley, 9 Casey 124. At the time of the grant in this case, February 26th 1858, there was a gate across the passageway at its intersection with the turnpike, and it continued there, with the exception of the short interval it was out of repair, until the institution of this action in September 1869. What then was the intention of the parties, and what did they mean by "the free use, right and privileges of a passageway ten feet in width?" Did they mean that it should be an open passageway into the turnpike without any gate at its intersection? If so, why was not the gate removed as soon as the grant was made? Why was it allowed to remain? The fact that the gate was there at the date of the grant, and that it was allowed to remain, cannot change the plain meaning of the words of the grant, but it may help us to ascertain the intention of the parties, if there be any doubt as to their meaning. *Contemporanea expositio est optima et fortissima in lege.* Undoubtedly, the plaintiff was entitled to the free use, right and privilege of passageway ten feet in width, with free ingress and egress at all times, for this is the language of the grant. But what is meant by the free use of a passageway? Does it necessarily mean that there shall be no gate or door hung across it, or if there is, that it shall always be kept open? Has not the owner of a passageway its free use if he hangs a gate across it at its intersection with the street? If I grant the free use, right and privilege of the hall of my house, with free ingress and egress at all times, must I take off the door leading into it, or keep it wide open in order that the grantee may have the free use of it? Or can he not have its free use if he can enter it by opening the door whenever he chooses? Without doubt I cannot unreasonably obstruct his use of it, but if the door amounts practically to little or no inconvenience, it seems to me that it is not necessarily a wrongful obstruction. Free is a relative term when applied to the use of a thing. It does not follow that I have not the free use of a room because I have to open a door in order to get into it; nor does it follow that I have not the free use of an alley because I have to open a gate to go in and out of it. A gate may be so placed as to be a practical and unreasonable obstruction to the free use of a passageway; and it may be so constructed and placed as not to amount to any practical obstruction to its use. Whether the gate in this case amounted to a wrongful obstruction was, therefore, a question of fact for the jury. If it was not a practical hindrance, and, under the circumstances, an unreasonable obstruction to the plaintiff's use of the passageway, then it was not a wrongful or illegal obstruction for which an action will lie.

But the court was right in holding that the judgment in the action of trespass brought by defendant against the plaintiff, for tearing down and breaking the gate, is no bar to the present action. It was for a different cause of action, and did not necessa-

rily involve the defendant's right to keep up the gate. The plaintiff may have been guilty of trespass in breaking it down, though it is an obstruction to his free use of the passageway.

Judgment reversed and a *venire facias de novo* awarded.

73 85
22 SC 586

Macky *versus* Dillinger.

1. Dillinger consigned goods to Moorehead for sale; he pledged them for a loan to Macky, who knew they were owned by Dillinger: *Held*, that under the Factor Act of April 14th 1834, Dillinger could recover in replevin without tendering repayment of the loan.
2. Moorehead had advanced to Dillinger on the goods before pledging them; Dillinger demanded them from Macky, who declined to deliver without payment of his loan, saying nothing of Moorehead's advance. Dillinger might recover the goods without payment of the advance.
3. Macky gave a property bond and retained the goods; *Held*, that the amount due on the advance might be recouped from Dillinger's damages.
4. When a party declines to accept payment or performance, except in a way to which he is not entitled, he cannot insist that the action is prematurely brought.
5. There is no set-off in replevin, but if the goods are subject to a charge, it can be enforced by way of recoupment.
6. The Factor Act construed.

January 14th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J. at Nisi Prius.

Certificate from Nisi Prius: Of January Term 1869, No. 397.

This was an action of replevin, brought by S. Dillinger & Son against Samuel Macky & Co., for 40 barrels of whiskey, of the value of $2500. The defendants gave a claim-property bond and retained the goods; they pleaded "non ceperunt" and "property in themselves."

The plaintiffs were manufacturers of whiskey in Westmoreland county, and in February 1869 consigned to Moorehead & Co., who were commission merchants, 50 barrels of whiskey, to be sold for plaintiffs at $1.60 per gallon. Moorehead & Co. sold 10 barrels of the whiskey, and pledged the remaining 40 barrels, with other goods, to the defendants to secure a loan of $3700, made by them to him.

The cause was tried March 21st 1871, before Agnew, J.

J. L. Dillinger, one of the plaintiffs, testified that he called on defendants before suit, and demanded the whiskey; they refused, saying there was an order against it in favor of Craycraft & Co., and that they had made an advance of $3700 on different lots of goods including this; that they were willing to deliver the whiskey to witness, upon paying the advances they had made, and getting the order of Craycraft & Co. out of the way.

The defendants called G. Raphael, their book-keeper, who testified that the whiskey was received as the property of Moorehead & Co., and they knew of no one else being the owner; the whiskey

was sold, the account-sales made out to Moorehead & Co., June 10th 1869, and the net proceeds credited to them; the whiskey came into plaintiffs' hands in the usual course of business, and was so treated. The proceeds of the sale of the whiskey were $2002.13 gross; of all the goods $5333.21, gross off $538.65; the freight on *all* the goods was $117.36.

When the whiskey was received by defendants, Moorehead & Co. gave them the following paper:—

"Received and borrowed from Samuel Macky & Co., $3700, for which we hereby hypothecate the following described goods and merchandise, to secure the payment within 30 days of the aforesaid $3700, viz.: 44 barrels of Moss & Fox whiskey, 40 barrels of S. Dillinger & Son whiskey, and ten barrels of Dillinger & Stevenson whiskey. The whole 94 barrels being valued at and covered by their policy of insurance for $6500.

"We hereby authorize the said Samuel Macky & Co. to sell the said whiskey, or any part thereof, in default of the payment of the aforesaid loan at its maturity.

Philada., Feb. 13th 1869. MOOREHEAD & Co."

The order in favor of Craycraft & Co. was as follows:—

"Philadelphia, February 24th 1869.

Messrs. S. Macky & Co., 1232 Market St., Philadelphia:

Please hold subject to the order of B. B. Craycraft & Co., the balance of whiskey in your hands, received for account of Moorehead & Co., Craycraft & Co. paying advance and charges.

MOOREHEAD & Co."

They called J. R. Moorehead, of the firm of Moorehead & Co., who testified: "I received 40 barrels of whiskey from plaintiffs on consignment to sell, and advanced on them about $1500 to the plaintiffs; defendants advanced $3700 on this and other property."

On cross-examination witness said, "I told defendants that the 40 barrels were consigned to us by the plaintiffs, that their limit to us was $1.60 per gallon; defendants might sell at that price and I would divide the commissions with them; the advance of $1500 was on 50 barrels; I had sold 10 barrels to Geisinger & Co.; this sale amounted to nearly $700; this would have been a credit on the $1500."

S. Macky, defendant, testified, That the goods had been received in the course of their business, and he thought Moorehead & Co. had a right to dispose of them; the plaintiffs' mark was on the barrels. When Dillinger called he seemed to think he would take the amount over defendants' advances; witness understood plaintiff had no claim but for the excess.

The parties each submitted a number of points; the questions decided will however sufficiently appear in the charge, and in the opinion of the Supreme Court.

[Macky v. Dillinger.]

The court charged:—

"This case falls within the Factor Law of 14th April 1834. The plaintiffs manufactured the whiskey in dispute and consigned it to Moorehead & Co. of this city for sale, limiting the sale at $1.60 a gallon. Moorehead & Co. pledged the 40 barrels of whiskey in dispute with other property to secure a loan of $3700, raised from Macky & Co., on the 13th February 1869. These are facts about which there is no dispute. There is evidence tending to show that Moorehead & Co. advanced $1500 to the plaintiffs on a lot of 50 barrels, of which the 40 barrels are a part, and sold the 10 barrels for about $700, which would reduce the advance to about $800. There is also evidence tending to show that the defendant knew at the time of the loan of the $3700, that the 40 barrels in dispute had been consigned by the plaintiffs to Moorehead & Co. for sale. Mr. Moorehead testifies that he told Mr. Macky of the consignment, and offered to divide the commissions on the sale with him.

"These facts are for the jury to decide on the weight of the evidence.

"The first and principal question of fact to be decided by the jury is whether Macky, the defendant, knew at the time he took the 40 barrels of whiskey in pledge for the payment of the $3700, that the whiskey was held by Moorehead & Co., on consignment from the plaintiffs for sale by them as the factors of the plaintiffs.

"If you find that Macky did not know of the plaintiffs' ownership of the whiskey, he would be entitled to hold the whiskey under the Factor Act as though it were the property of Moorehead & Co., for the loan made upon the pledge of it by Moorehead & Co., and the plaintiffs having declined to pay Macky's advance upon it cannot recover.

"In that case Macky would be an innocent holder, and could retain the whiskey on the terms of the writing of the 13th February 1869. But if you find that the defendant did know of the consignment and ownership of the plaintiffs, the defendant would under the act have no greater right to retain the whiskey than Moorehead & Co. would; that is until their advance was refunded by the plaintiffs, or the balance due on the advance.

"The Factor Act enables the plaintiffs to follow their property into the hands of the defendant, as pledgee of the whiskey, upon tendering the advances they have received from Moorehead & Co. To this extent, therefore, the defendant taking the whiskey in pledge with knowledge of plaintiffs' right, had a right to retain the whiskey. But if the defendant with this knowledge of the plaintiffs' ownership at the time of the loan of the $3700 to Moorehead & Co., upon demand being made by the plaintiffs, refused to deliver the whiskey unless the $3700 were paid, and unless the order from Craycraft & Co. was lifted or put out of the way by the

plaintiffs, this refusal insisting on terms not binding on the plaintiffs, would be a waiver of the tender of the advance or balance of advance made by Moorehead & Co. on the whiskey to the plaintiffs. In that case the defendant having no right to demand these conditions, can now be permitted only to recoup the advance of Moorehead & Co. (or the balance unpaid) from the damages. But the right of the defendant to recoup the advance of Moorehead & Co. from the damages is, I think, a fair inference from the Factor Law, especially the latter part of the 4th section of the Act of 14th April 1834.

"If you find a verdict for the plaintiffs under these instructions, you will assess the damages of the plaintiffs at the value of the whiskey at the time of the demand by the plaintiffs, after allowing by way of recoupment the sum due by the plaintiffs to Moorehead & Co. for advances, with interest from the time of demand."

The Factors' Act of April 14th 1834, Pamph. L. 375, 1 Br. Purd. 664, is as follows:—

"Sect. I. Whenever any person intrusted with merchandise and having authority to sell or consign the same, shall ship or otherwise transmit the same to any other person, such other person shall have a lien thereon—

"For any money advanced * * * on the faith of such consignment, to or for the use of the person in whose name such merchandise was shipped or transmitted. * * *

"Sect. II. But such lien shall not exist for any of the purposes aforesaid, if such consignee shall have notice by the bill of lading or otherwise, before the time of such advance or receipt, that the person in whose name such merchandise was shipped or transmitted is not the actual owner thereof.

"Sect. III. Whenever any consignee or factor, having possession of merchandise, with authority to sell the same, * * * shall deposit or pledge such merchandise, or any part thereof, with any other person, as a security for any money advanced * * * by him on the faith thereof; such other person shall acquire by virtue of such contract the same interest in and authority over the said merchandise, as he would have acquired thereby if such consignee or factor had been the actual owner thereof: *Provided*, That such person shall not have notice by such document or otherwise before the time of such advance or receipt, that the holder of such merchandise or document is not the actual owner of such merchandise.

"Sect. IV. If any person shall accept or take such merchandise from any such consignee or factor, in deposit or pledge for any debt or demand previously due by or existing against such consignee or factor, and without notice as aforesaid, and if any person shall accept or take such merchandise from any such consignee or factor, in deposit or pledge, with notice or knowledge that the person making such deposit or pledge is a consignee or factor only, in

every such case the person accepting or taking such merchandise or document in deposit or pledge, shall acquire the same right and interest in such merchandise as was possessed or could have been enforced by such consignee or factor against his principal at the time of making such deposit or pledge, and no further right or interest.

"Sect. V. Nothing in this act contained shall be construed or taken—

"I. To affect any lien which a consignee or factor may possess at law, for the expenses and charges attending the shipment or transmission and care of merchandise consigned, or otherwise intrusted to him.

"II. Nor to prevent the actual owner of merchandise from recovering the same from such consignee or factor, before the same shall have been deposited or pledged as aforesaid, or from the assignees or trustees of such consignee or factor, in the event of his insolvency.

"III. Nor to prevent such owner from recovering any merchandise so as aforesaid deposited or pledged, upon the tender of the money * * * so advanced or given to such consignee or factor, and upon tender of such further sum of money, * * * if any, as may have been advanced or given by such consignee or factor to such owner * * *

IV. Nor to prevent such owner from recovering from the person accepting or taking such merchandise in deposit or pledge, any balance or sum of money remaining in his hands as the produce of the sale of such merchandise, after deducting thereout the amount of money * * * so advanced or given upon the security thereof as aforesaid."

The verdict was for the plaintiffs for $2545. The defendants had the case certified to the court in banc, and assigned nineteen errors to the charge of the court and the answers to the points.

S. Hood and *Porter*, for plaintiffs in error.

G. S. Selden, for defendants in error.

The opinion of the court was delivered, January 27th 1873, by AGNEW, J.—This was an action of replevin for forty barrels of whiskey. Dillinger & Son were distillers in the western part of the state, and consigned the whiskey to Moorhead & Co., of Philadelphia, for sale. Moorhead & Co. pledged the whiskey to Macky for the repayment of a loan of $3700. The instrument of hypothecation embraced other whiskey pledged for the same loan, including ten barrels testified to belong to Moorehead & Co. themselves. On the trial, James R. Moorhead, who transacted the business, testified that he had told Macky that the forty barrels of whis-

key were consigned to them by Dillinger & Son, for *sale* at a limit of one dollar and sixty cents a gallon. The question of Macky's knowledge of the ownership of the whiskey by Dillinger & Son, was submitted to the jury, with the instruction that if he did not know of the consignment by Dillinger & Son to Moorehead for *sale*, when he took the hypothecation, that the plaintiffs could not recover. The verdict establishes the fact of Macky's knowledge. This, therefore, raised the principal question in the cause, the defendant claiming the right of a consignee for sale, to pledge the goods for a loan to himself, made even with a knowledge that the consignee was not the owner, and had no authority from the owner to hypothecate. In Lausatt *v.* Lippincott, 6 S. & R. 386, it was said by Chief Justice Tilghman, "that a factor cannot pledge the goods of his principal for his own debt, seems to be too well settled to admit of dispute." He regretted that this will put it in the power of the factor to deceive innocent persons who deal with him bonâ fide, and on valuable consideration, for he says, "it bears extremely hard upon persons who deal with a factor, without a possibility of knowing that the goods do not belong to him." The Revisers, who reported the Factors' Act, passed on the 14th of April 1834 (1 Br. Purdon 664), referred to this case in their report, and to the alteration of the common-law rule by the statute of 6 Geo. IV., c. 94, passed in the year 1825, which they took as the foundation of the Factors' Act reported by them. They say, also, that "the evil complained of by the Board of Trade of Philadelphia, and by the mercantile community in general, is, that consignees and factors authorized to sell the goods of their principal, and who are held out to the world as the owners thereof, have not power to pledge the goods in their possession, for advances made by persons who have every reason to believe that they are the actual owners." They then add, "now we would apply a remedy for this particular evil, but we think that it would not be prudent at present to go further, lest evils should be produced on the other side." In remarking upon the third section, they say "it is intended to protect all persons, who, in the ordinary course of business may have lent or advanced money to consignees or factors, authorized to sell goods of their principal, without knowledge that they were not the actual owners of the goods." "The phraseology of this section (the report adds) is designedly guarded, and we have thought it best to limit the power of factors more than we find it expressed in the statutes of England and New York, which we have alluded to."

We have been referred by the plaintiff in error to the case of Navulshaw *v.* Brownrigg, 13 Law and Equity Reports 262, in support of the right of Mr. Macky to take the goods in pledge for a loan, even with the knowledge of Moorehead & Co. being consignees for sale only. That case, however, is decidedly against

him, it being decided on the force and effect of the statute of 5th and 6th Victoria, ch. 39, which has not been adopted in this state. The Lord Chancellor states there the common-law rule, and the statute of 4 Geo. IV., ch. 83, and 6 Geo. IV., ch. 94, and commenting on the statute of 6 Geo. IV., said: "So that the statute enabled the agent as regarded third persons, to sell or pledge provided the persons with whom he pledged did not know that he (the person that pledged) was not the actual and bonâ fide owner of the property."

With these guides to the interpretation of the Factors' Act of 1834, it would not be difficult to arrive at its meaning, if the language were more doubtful than it is. But the language is clear. The pith of the act is contained in the first and third sections. But the second section and the proviso to the third section, expressly except the case of one having notice by the bill of lading document or otherwise, that the person in whose name the merchandise was shipped, or transmitted, or who is the holder, is not the actual owner thereof. The fourth section is equally explicit; for one who accepts a pledge for a pre-existing debt, without notice, or one who takes the pledge with notice, shall acquire the same interest only in the merchandise, as the factor himself had at the time of making the pledge. The purpose of the 4th section, say the revisers, was to reserve to the person taking on deposit, goods for a precedent debt, without notice, or for any debt with notice, of the person being only a factor, all the rights of the factor over the property as against his principals, which might be supposed to be impaired by the preceding section. The 5th section is also intended (they say) to prevent the preceding sections from operating injuriously to existing interests. An examination of the several clauses in the 5th section, bears out the intent as obvious in the clauses themselves, and furnishes at once the answer to the argument of the plaintiffs in error, which sought to give an extension to the pledgee's rights by these clauses, instead of the protection they are designed to give to existing rights of the owner as well as the factor. On the trial of the cause, the defendant, Macky, rested his case wholly upon his right to hold the whiskey for his entire claim of $3700. Neither at the time of the demand of the goods by Dillinger, nor on the trial, did he set up any claim for the advances made by Moorehead & Co., but the jury were instructed by the judge, that if they found Macky had notice of the ownership of the whiskey, they would still allow the defendant for the advances made by Moorehead & Co. to Dillinger & Co. on the whiskey, or whatever balance was unpaid by way of recoupment from the damages. It was insisted in the argument, that, although no claim was made for freight or storage, and no attention called to them, the judge erred, because the language of his charge would, in effect, restrict Macky's claim to the advances of Moorehead &

Co., and the sum of $117.36, contained in Macky's account of sales, as charges for freight, ought to have been allowed. But evidently, the language was not intended to lay restrictions on the extent of the recoupment. The whole subject of the charge was upon the right of Macky to hold the whiskey in pledge for the repayment of the loan of $3700, and when it was said, the defendant in that case, having no right to demand these conditions, can now be permitted only to recoup the advance of Moorehead & Co. from the damages, it is clear this was by way of contrast of these two aspects of the case, and not to limit the rights of Macky to any claim he could legally set up by way of recoupment. It was his own fault, therefore, if he did not claim the freight. But in fact, as the evidence stood, he had no such claim on this whiskey. The hypothecation shows, that Macky had taken three lots of whiskey in pledge, of which, the testimony proved, that ten barrels were the property of Moorehead & Co. The account of sales shows that the gross proceeds of the three lots amounted to $5333.26; and gross off, $538.65; of this gross, the $117.36 was the freight on the whole. Thus, by his own showing, the freight was paid by the charge in the account; while the ten barrels of Moorehead's whiskey were ample to pay all expenses. No attempt was made to prove how much, if any, of this charge for freight applied to the forty barrels of Dillinger & Son's whiskey, and besides this, Macky's knowledge of Dillinger & Son's ownership of the whiskey being found by the verdict, how can a charge for expenses incurred by Macky in the transfer and storage of the whiskey, as a pledge in violation of Moorehead & Co.'s authority, stand on a higher ground than the loan itself; viewed in any aspect, therefore, the charge, in this respect, did the plaintiff no harm.

The only question remaining which we need notice, relates to the tender said to be necessary. Macky refused to deliver the whiskey unless Dillinger & Son paid him the loan of $3700, and put the Craycraft & Co. order out of the way. In charging that this refusal, and insisting on terms not binding on the plaintiffs, would be a waiver of a tender of the advance made by Moorehead & Co., clearly the judge did not mean to say that it was a waiver of Macky's right to these advances, but only of a *tender* as an act precedent to a suit; the instruction following immediately, to allow Macky the advances by way of recoupment, proves this. The instruction was according to the general doctrine of tender, that when a party declines to accept payment or performance, except in a particular way, to which he is not entitled, he cannot insist that the action is prematurely brought. Macky would deliver the whiskey only on his own terms, and these terms the verdict shows he was not entitled to demand. This necessarily left his rights to be determined by this suit. Set-off does not exist in replevin, but when the goods are the subject of a lien or charge,

the charge upon them can be enforced by way of recoupment, for the charge is inseparable from the thing itself, and therefore, when the value of the thing is to be allowed in damages, the charge necessarily reduces the damages by way of a recoupment, in order to do justice to both parties. As to the order to Craycraft & Co., there was no evidence given to show that it had fastened upon the whiskey, by such a bonâ fide sale or pledge as would attach to the property, and enable Mackey to use the title of Craycraft & Co. to defend his possession.

We discover no error, and the judgment is therefore affirmed.

73	93
207	*104
73	93
f 27 SC	*203

Hacker *versus* The National Oil Refining Co.

73	93
34 SC	83

1. By the Act of July 18th 1863 (Manufacturing Companies), a note given *after* the organization of the company for additional stock, is valid notwithstanding the provision in the act that "no note given by a stockholder shall be payment of any part of the capital stock."

2. A note was given for additional stock in a manufacturing company; *Held*, that evidence of a parol agreement when the note was executed that it was not to be paid except on a contingency, was inadmissible.

3. Hacker subscribed for additional stock in a corporation and she gave her note for the amount; a certificate was tendered her and refused and no credit was given her in the stock ledger: *Held*, the note was not without consideration; she had the right to demand and receive the stock.

4. Anspach *v.* Bast, 2 P. F. Smith 356; Erie & W. Plank Road *v.* Brown, 1 Casey 156; Phila. & W. C. R. R. *v.* Hickman, 4 Casey 318, followed. Hibernia Turnpike *v.* Henderson, 8 S. & R. 219; Leighty *v.* Susquehanna, &c., Turnpike, 14 S. & R. 434, distinguished.

January 15th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Error to the District Court of *Philadelphia:* No. 4, to July Term 1870.

This was an action of assumpsit by The National Oil Refining Company against Harriet B. Hacker. The writ was issued to March Term 1869 of the court below.

The cause of action was a promissory note for $2041, dated October 10th 1866, drawn by the defendant, payable four months after date to the order of James H. Stevenson, endorsed by him and held by the plaintiffs.

On the trial, May 3d 1870, before Stroud, J., the plaintiffs gave the note in evidence and rested.

The defendant offered to prove, that she was a subscriber for 500 shares of the stock of the National Oil Refining Company; that she was solicited by the said Stevenson, then the treasurer of the said company, to subscribe for additional shares of the stock of said company, at $10 per share; that she agreed with him orally to subscribe for 200 additional shares, provided

she should receive $2000 from Jeremiah L. Hutchinson, in part payment of his bond and mortgage to her, of which $2250 would become due November 13th 1866. That this note was given by her on the 10th of October 1866, at the instance of the said Stevenson, who drew it up for her signature, and was for the par value of the shares of stock with interest from date to the maturity of the note; that Mr. Hutchinson paid no part of this sum of money before the maturity of the note, nor until the year 1868; that having failed to receive the payment from him, she notified said Stevenson that she declined to take the stock; that she never received any certificate of the stock; that this note was taken in payment of such stock, and that there was no credit to her on the books of the company of this stock.

The court refused the offer, and sealed a bill of exceptions.

James H. Stevenson testified: "I am treasurer of the plaintiffs; on the 10th of October 1866, this note was given for a subscription for stock of the company, made by a nephew of hers, Wm. B. McMain, at a meeting called at the National Oil Refining Company's works; Mrs. Hacker subscribed through him, at a stockholders' meeting called in August 1866, for obtaining additional working capital. The subscription was not made in writing, but in the presence of the stockholders, and a record was made at the time by the secretary. It was announced at the meeting that subscriptions for additional stock would be made, and Mr. McMain announced his subscription of 200 shares for Mrs. Hacker. A certificate of 200 shares was tendered to Mrs. Hacker. It was announced that a subscription of a former subscriber would entitle the subscriber to have the stock at $8 a share. I wrote the date and amount. Mr. McMain brought the note to me signed. I called upon her afterwards and showed it to her, and she said it was all right. Mr. McMain filled up the blank with my name."

Defendant called Henry C. Stevenson, who testified that he was the secretary of the said company. The stock register of said company showed the following entry: "Harriet B. Hacker, October 13th 1866, for 500 shares." There was no other entry relating to Mrs. Hacker in it, except one in pencil in these words, "H. B. Hacker refuses to accept." The note in suit did not appear in the balance-sheets of the company for the years 1866, 1867, 1868 and 1869; he had never stated to Mr. Washington Bladen or Mr. Robert L. Allen that the note in suit was a private matter of Mr. James H. Stevenson, and that the company had nothing to do with it.

The defendant called Robert L. Allen, and offered to prove by him that the said Henry C. Stevenson had said to him, in answer to an inquiry made by him as the attorney in fact of the defendant, that the note in suit was a personal matter of Mr. James H. Stevenson, and not the property of the company.

[Hacker v. National Oil Refining Co.]

To the admission of this offer the plaintiffs objected; it was rejected by the court, and a bill of exceptions sealed.

The defendant gave in evidence letters patent, showing the incorporation of the plaintiffs under the Act of July 18th 1863 (Pamph. L. 1864, 1102, 2 Br. Purd. 1407).

The defendant's points were:—

1. Under the provisions of the Act of 18th July 1863, the plaintiffs were not authorized to take a promissory note in payment for stock subscribed. Consequently, if the note in suit was given by defendant in payment for stock agreed to be subscribed by her, no recovery can be had upon it.

2. If the note in suit was given by defendant for shares of stock verbally agreed to be subscribed by her, it could not, under the provisions of the Act of 18th July 1863, be considered as payment therefor; consequently no title to the stock passed to her. She did not become a holder of such stock, or entitled to the rights and privileges of a stockholder. There was no mutuality of obligation. The note was without consideration, and no recovery can be had on it. The plaintiffs' remedy, if any they have, is on the alleged agreement to subscribe, and not on the note.

Both points were refused, the judge saying that he did not consider anything thus presented to him as matter of defence.

The verdict was for the plaintiffs for $2434.57.

The following are sections of the Act of July 18th 1863:—

"Sect. 11. The capital stock of every company, the amount whereof has been fixed and limited by such company according to law, shall remain so fixed, subject to be increased or reduced pursuant to the provisions of this act.

"Sect. 13. Every company may at any meeting called for that purpose, increase its capital stock, and the number of shares therein, &c.

"Sect. 16. Every company may, from time to time, at a legal meeting called for the purpose, *assess* upon each share of stock such sums of money as the company may think proper, not exceeding the whole amount at which each share was originally limited. And such sums assessed shall be paid to the treasurer at such times and in such instalments as the company directs, and no note or obligation given by a stockholder, whether secured by pledge or otherwise, shall be considered as payment of any part of the capital stock.

"Sect. 17. If the proprietor of any share neglect to pay a sum duly assessed thereon, for the space of thirty days after the time appointed for payment, the treasurer of the company may sell by public auction, a sufficient number of the shares to pay all assessments then due, &c."

The defendant removed the record to the Supreme Court, and assigned for error:

1 and 2. Rejecting the defendant's offer of evidence.
3 and 4. Refusing to affirm the defendant's points.

J. Cadwalader and *E. S. Miller*, for plaintiff in error, cited as their first point, Hibernia Turnpike Co. *v.* Henderson, 8 S. & R. 219; Leighty *v.* Susquehanna & W. Turnpike Co., 14 Id. 434; Ogle *v.* Somerset, &c., T. R. Company, 13 Id. 256; President, &c., *v.* McConahy, 16 Id. 147; Clark *v.* Monongahela Navigation Company, 10 Watts 364.

On the second point, Essex Turnpike *v.* Collins, 8 Mass. 292; Taunton Turnpike *v.* Whiting, 10 Id. 327.

T. F. Clayton, for defendants in error.

The opinion of the court was delivered, May 17th 1873, by

WILLIAMS, J.—There was no error in rejecting the offer of evidence set out in the bill of exception embraced in the first specification. It was an offer to prove in substance a contemporaneous parol agreement at variance with the written contract, without any allegation or offer to show that the note was given or obtained by fraud or mistake. It is too well settled to admit of doubt that such evidence is inadmissible: Anspach *v.* Bast, 2 P. F. Smith 356. It did not tend to prove that the consideration for which the note was given had failed. There was no offer to show that the company had no stock which it was authorized to issue or sell, and it was not bound to transfer the stock on its books, or to deliver a certificate therefor to the defendant until the payment of the note. Nor was there error in rejecting the offer embraced in the second specification. If the evidence was offered for the purpose of contradicting the testimony of Henry C. Stevenson, the secretary of the company, it was rightly rejected, for it was not competent for the defendant to contradict the testimony of her own witness. If it was offered as a declaration or admission binding the company, it was inadmissible, because it was not within the scope of his authority, or in the course of his business as secretary of the company; and it was not offered to be shown that he had express authority to make the declaration.

The next specification presents the question, whether the company was authorized under its charter to take a promissory note for the stock subscribed by the defendant, and whether a recovery can be had thereon in this action? The company was organized under the Act of 18th of July 1863, Pamph. L. 1864, p. 1102, the 16th section of which provides "that every company may, from time to time, at a legal meeting called for the purpose, assess upon each share of stock, such sums of money as the company may think proper, not exceeding in the whole the amount at which each share was originally limited; and such sums assessed shall

be paid to the treasurer at such times and in such instalments as the company directs; no note or obligation given by a stockholder, whether secured by pledge or otherwise, shall be considered as payment of any part of the capital stock." It is strenuously contended that under the latter provision of this section, the company had no authority to take the note in payment of the defendant's subscription. But the clause does not in terms forbid the corporation from taking a note or obligation from a stockholder. On the contrary, it impliedly admits the right, but declares that no such note or obligation, however secured, shall be considered as *payment* of any part of its capital stock; and the reason is found in the next section, which authorizes the sale of the stock for non-payment of the assessments for the space of thirty days after the time appointed for payment. It is obvious that if a note given for the assessments was to be considered as payment, the authority of sale could not be exercised. The cases of the Hibernia Turnpike Road Co. *v.* Henderson, 8 S. & R. 219, and Leighty *v.* The Susquehanna and Waterford Turnpike Co., 14 Id. 434, have no application to the subscription in this case. In each of these cases the subscription was made to the commissioners prior to the organization of the company, under acts of incorporation requiring the payment of a specific sum on each share subscribed at the time of making the subscription.

In one case the subscriber paid nothing, and in the other gave a note for the amount required to be paid, and the subscriptions were held to be void, and the company not entitled to recover thereon. And why? For the simple reason that the giving of a note was not payment of money within the meaning of the act, and a subscription without such payment conferred no rights on the subscriber, and therefore, neither the commissioners nor the future company would enforce payment by action.

But here the defendant's subscription was made to the company after it was organized, under an express authority given by the act, to increase its capital stock; and therefore, as ruled in The Erie and Waterford Plank Road Company *v.* Brown, 1 Casey 156, and The Philadelphia & West Chester Railroad Company *v.* Hickman, 4 Id. 318, it had authority to accept subscriptions on such terms, as to time and mode of payment, as might in the exercise of a sound discretion be regarded for the best interests of the company. Nor was the note without consideration. It was given for the stock subscribed by the defendant, and though it was not transferred on the company's books, nor a certificate therefor delivered to the defendant at the time the note was given, she was entitled to demand and receive the stock on payment of the note. The contract was mutually obligatory. The defendant was bound to pay the note when it became due, and the company was bound to transfer and deliver to her the stock for which she subscribed;

and the evidence shows that before bringing suit the company tendered her a certificate for the stock.

Judgment affirmed.

McLoon's Administrator *versus* Cummings.

1. General average is a contribution by all the parties in a sea adventure to make good the loss of one of them for voluntary sacrifices of part of the cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more for the general benefit of all the interests in the enterprise.

2. General average extends to the loss of the ship when the cargo is saved; and the loss of the cargo when the ship is saved.

3. When after abandonment of the vessel the cargo is sent to the port of destination, as a general principle the parties are bound by an adjustment fairly made by an adjuster at that port, according to the rules, &c., there.

4. This rule does not obtain in case of fraud or gross mistake; or when a voyage is broken up and ended, where a final separation between the vessel and cargo has taken place and the relations of the parties have terminated: then the port of disaster would generally become the place of adjustment.

5. Where the cargo is sent from the port of disaster to the port of destination by another vessel at a higher rate of freight than under the original contract, the contribution is to be on the basis of the value of the cargo at the port of destination.

6. Where the deviation is justified, in case of disaster by a peril of the sea, disabling the vessel from proceeding, the master becomes the agent of all the parties in interest; the subject of the interests are the vessel, the cargo and the freight.

7. If the vessel cannot proceed, it is the duty of the master to reship the cargo if he can, to the port of destination, to protect all interests, doing what he fairly and conscientiously believes is for the interest of all.

8. If the master can save part of the freight to the owner, he will be considered his as well as the shipper's agent; if he can save nothing for the owner he will be agent of the shipper alone.

9. A vessel chartered at Baltimore to carry coal to San Francisco, having met with disasters at sea, bore away to Rio, where after the proper proceedings she was abandoned and the master shipped the cargo to San Francisco by another vessel at higher freight, by the bill of lading "to be delivered * * * unto order or ———, assignees, he or they paying freight," &c. The bill was endorsed to Wright, who endorsed it deliverable to Cummings, San Francisco. The master of second vessel would not deliver the coal except on payment of freight, &c., and Cummings would not so receive it; the coal was sold for less than the freight and expenses. The acts of the master were ratified by the owner of the ship. *Held*, that under the circumstances, the separation of interests was not complete at Rio, but continued until the arrival at San Francisco, and the sale of the cargo there.

10. The freight and charges at San Francisco having consumed the value of the cargo, in a suit by the owner against the shipper, it was *Held*, that there was nothing upon which the general average could be charged; and the recovery was confined to the special charges on the coal.

11. The master paid a premium for gold drafts at Rio to pay the expenses there; *Held*, that verdict should be for the amount found in gold, not for the premium paid.

January 16th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

[McLoon v. Cummings.]

Certificate from Nisi Prius: Of January Term 1870, No. 76½.

This was an action of assumpsit brought October 2d 1869, by William McLoon against Henry W. Cummings.

The history of the case by the plaintiff in error, the defendant in error having made no counter statement, is as follows:—

On June 17th 1867, the "Juliette Trundy," owned by William McLoon, of Rockland, Maine, was chartered by Henry K. Cummings, in Philadelphia, to carry a cargo of coal from Baltimore to San Francisco at $16 per ton, in currency. On July 18th 1867, the vessel sailed from Baltimore with her cargo of about 1181 tons of coal. Very soon after leaving port she began to experience exceedingly boisterous and tempestuous weather, which continued with scarcely an intermission for more than a month. Her masts were split and partly carried away, her sails were in like manner damaged, her whole hull was very much strained, she began to leak, and the storm still continuing and the leak increasing, the captain held a consultation, and for the safety and benefit of all concerned, on September 4th 1867, he determined to put into Rio de Janeiro. She reached Rio de Janeiro safely on September 14th. Four surveys were duly held under the directions of the American consul. By the direction of the surveyors all of the cargo was landed, and, after a thorough examination, they gave directions as to the repairs necessary to be made in order to put the ship in such condition as would enable her to pursue her voyage. The captain advertised for proposals for these repairs and submitted the offers to the surveyors. It was found that the cost of the repairs at Rio would exceed the value of the vessel, and the surveyors recommended her sale. Acting under this advice and that of the American consul and Wright & Co., the largest American house at Rio, Captain Perry sold the vessel at public auction and all her apparel.

Captain Perry then made full inquiries as to the value of coal at Rio and the prospect of disposing of the same. He found that while its real value there was 21 mille reis per ton, owing to the state of the coal market at that particular time, it could not be sold for more than 5 mille reis per ton. He then sought a ship in which to forward the coal to San Francisco, and found the "Shatemuc" was in port, and he sent forward the cargo at an increased rate over what it was to have paid in the "Juliette Trundy." All of this was done by the captain upon consultation with the American consul, Wright & Co., and others in Rio. He then paid all his expenses at Rio, drew on William McLoon for additional money (about $7000), and sailed for New York. His drafts were honored and paid by McLoon. The premium paid by him was 40⅜. In his whole dealings with the ship and cargo the captain acted without consultation with McLoon, as he could not get an answer from him at Rio in less than three months.

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The "Shatemuc" reached San Francisco on March 14th 1868, when it appeared that the value of her cargo was probably *less* than the freight due the "Shatemuc." The consignee refused to receive the coal and pay the freight, the captain requiring a general-average bond. The captain sold the cargo for payment of his freight, and it yielded less than the freight came to.

The bills paid by Captain Perry at Rio and his accounts were sent by Mr. McLoon to Richard S. Havens, Esq., the leading and well-known adjuster at Boston, who prepared an adjustment of the general average charges and the particular charges. In this he put the valuation of the cargo at the ordinary value of the same at Rio in September 1867.

This adjustment was sent, in April 1868, to Mr. Cummings and his insurers in Philadelphia, who insisted that the adjustment was to be made at San Francisco. The bills and accounts were then sent to San Francisco, where Thomas Cazeneau, Esq., made an adjustment.

Both of these adjusters agreed that it was a case for general average, and their aggregates of these charges and the special charges against the cargo differed but slightly; Havens making the general-average charges, in currency, $8880.62, and the particular charges against the cargo, in currency, $2313.30, and Cazeneau making them respectively, in gold, $6822, and $1604.93.

The action was by McLoon to recover these charges.

The facts in detail, so far as necessary to the understanding of the case, will be found in the opinion of the Supreme Court.

The case was tried December 13th 1871, before Sharswood, J.

He charged that the plaintiff was not entitled to recover the premium paid by him upon the gold expended for defendant in October 1867—but that the verdict of the jury should be rendered payable in gold.

He also reserved the following points:—

1. Whether, when a ship has been disabled by perils of the sea, puts into an intermediate port to repair, and the vessel is then condemned and sold, and the voyage broken up, the expenses so incurred are the subject of general average.

2. If so, whether the rate of contribution is to be adjusted upon the basis of the value of the cargo at such place of repairs, or at the port of destination, if the cargo is sent on by another vessel at a rate of freight exceeding that stipulated to be paid under the original contract of affreightment.

3. When the cargo is so sent to the port of destination, whether the parties are bound by an adjustment fairly made by a *despacheur* (adjuster) at such port according to the rules and usages there established?

He then directed the jury to render a special verdict finding the

[McLoon v. Cummings.]

amount of the special charges and of the general-average charges at Rio de Janeiro, separately.

The jury found a verdict for the plaintiff for the

special charge in gold,	$2069.56
General-average charge in gold,	5801.96
Total in gold,	$7871.55

Afterwards, Judge Sharswood overruled the motion for new trial, and entered judgment for the plaintiff on the verdict for the special charge for $2069.56, refusing to enter the verdict on the points reserved on the general-average charge.

The plaintiff died after judgment was entered, and Robert H. Hinchley, Jr., his administrator, was substituted as plaintiff.

The plaintiff took out a writ of error, and assigned for error:

1. That the court charged that the plaintiff was not entitled to recover the premium paid him for gold for payment of expenses, &c., in Rio Janeiro.

2. Not entering judgment on the general-average charges.

3. Not entering judgment for the plaintiff for the whole amount of the verdict on the points reserved.

G. Junkin and *G. W. Biddle*, for plaintiff in error.—1. The expenses in this case were the subject of general average: Star of Hope, 9 Wallace 228; 2 Arnould on Ins. 77, 881; McAndrews *v.* Thatcher, 3 Wallace Rep. 345; 2 Parsons on Ins. 210, 277; 1 Pars. on Ship. 246; 2 Phil. on Ins. 61.

In order to be complete, there must be—1st, a common danger; 2d, a voluntary sacrifice or expenditure; 3d, it must result in success. As to *expenditures*, this latter point is qualified.

This was a case of *expenditures* for the common good, and *not* one of *sacrifice*. In the case of sacrifice, if subsequently the vessel and cargo are lost before the end of the voyage, there is no contribution, because the presumption is, that if the thing sacrificed had remained on board it would have perished with the rest. But in the case of *expenditures* the rule is different: 2 Arnould on Ins. 924, sec. 340; Phillips on Ins. 133; Ins. Co. *v.* Jones, 2 Binney 547.

Disbursements made for the common safety, must be reimbursed in general average, whether the ship and cargo are ultimately saved or not: Sturgis *v.* Cary, 2 Curtis 382; 2 Pars. M. Ins. 210, 259, 277, 279, 280, 331; Caze *v.* Reilly, 3 W. C. C. R. 298; Berkley *v.* Presgrave, 3 East 228. Where, owing to stress of weather, &c., the vessel puts into a port to refit, from the moment the deviation commences the expenses, wages, &c., are the subject of general average: Star of Hope, 9 Wallace 228; Campbell *v.* The Allkomac, Bee's Rep. 124; 2 Pars. on M. Ins. 257, note; Potter *v.* Ocean Ins. Co., 3 Sum. 27; The Mary, 1 Sprague 17;

Willard *v.* Dorr, 3 Mass. 161; Arnould on Ins. 350, note. The claim for contribution may be maintained against the owner of the cargo, although the vessel is totally lost or sold, and the voyage broken up: Col. Ins. Co. *v.* Ashly, 13 Pet. 331; Gray *v.* Waln, 2 S. & R. 229; Caze *v.* Reilly, 3 W. C. C. R. 298; 3 Kent 237, note; The Natt. Hopper, 3 Sum. 542; Merithew *v.* Sampson, 4 Allen 193; Bell *v.* Smith, 2 Johnson 98; Job *v.* Langton, 6 Ellis & Bl. 779; Moran *v.* Jones, 7 Id. 532; M. & P. on Shipping 322; Nelson *v.* Belmont, 7 Smith (21 N. Y.) 36; McAndrews *v.* Thatcher, 3 Wallace 347.

The general rule of all contributory maritime interests is, that their contributory value is that which they have at the time and place where they are considered as finally saved: 2 Pars. on M. Ins. 343. Where the voyage is broken up and the separation takes place, then the cargo must contribute according to its value at the port of necessity: Arnould on Insurance 812, 933, 1373, 1374, 1375; 2 Phillips on Ins., sec. 1393; Mu. Ins. Co. *v.* George, 3 N. Y. Leg. Ob. 268; 3 Kent 242; Tudor *v.* Macomber, 14 Pick. 38; Abbott on Shipping 504, note 2; Marshall on Ins. 467; Rogers *v.* Mech. Ins. Co., 2 Story Ct. C. 173; Douglass *v.* Moody, 9 Mass. 547; Spafford *v.* Dodge, 14 Id. 79.

Where the ship is damaged so by sea perils as to be a wreck, or must be sold, her value at the port of necessity, or the price she there brings at a fair sale, is her contributory value: 2 Arnould on Ins., sec. 846, p. 435; Star of Hope, 7 Wallace 235; 2 Pars. on M. Ins. 329, 343; Bell *v.* Smith, 2 Johnson 98; Lee *v.* Grinnell, 5 Duer 400; Mutual Ins. Co. *v.* George, Olcott 157.

When the voyage is broken up by the loss or disablement of the ship, and the cargo is saved, the master becomes the agent, not only for the owner of the vessel, but also for the cargo; and it is his duty to forward the cargo to the port of destination: 2 Parsons on Ins. 274, note 2; Pars. on Ship. 234; 3 Kent 210; Skipton *v.* Thornton, 9 A. & E. 314; Saltus *v.* Ocean Ins. Co., 12 Johnson 107; Hugg *v.* Augusta Ins. Co., 7 Howard 595; Searle *v.* Scovell, 4 Johns. 218; Treadwell *v.* Union Ins. Co., 6 Cowen 270; Bryant *v.* Com. Ins. Co., 6 Pick. 130; Bost *v.* Norton, 2 McLean 422; Jordan *v.* Warren Ins. Co., 1 Story 342; Winter *v.* Del. Ins. Co., 6 Casey 334; 2 Phillips on Ins. 439, 449.

When the voyage is broken up, and the captain sends forward the cargo at an increased freight, he is the agent for the owner of the cargo alone, and not for the owner of the vessel. If he sends forward at a reduced freight, then he acts for the owner of the vessel: Jordan *v.* Warren Ins. Co., 1 Story Rep. 342; Gibbs *v.* Gray, 2 H. & N. 22; Nelson *v.* Belmont, 7 Smith (21 N. Y.) 44; Durnett *v.* Traphagen, 3 Johnson 156; The Saratoga, 2 Gallison 178, note 23, cases cited; Scott *v.* Libby, 2 Johnson 340; Thwing *v.* Wash. Ins. Co., 10 Gray 443; Lamont *v.* Lord, 52

Maine 365; The Gratitudine, 3 Rob. Adm. 240; Emerigon on Ins., c. 12, sect. 16, pl. 6, 343; 2 Phillips on Ins., sect. 16, 24.

Adjustment ought to be made at the port of separation: 2 Parsons on M. Ins. 361; Loring *v.* Nep. Ins. Co., 20 Pick. 411. A foreign adjustment, to a certain extent, may be binding, but it may be impeached: 2 Pars. 265, 266, 365, 366, 370; Thornton *v.* U. S. Ins. Co., 3 Fairf. 150; Chamberlain *v.* Reed, 13 Maine 357.

M. P. Henry and *R. C. McMurtrie*, for defendants in error.—The *sacrifice* for which the owners of the cargo are called upon to contribute, is the endurance or submission to an uncontrollable necessity: Barnard *v.* Adams, 10 Howard 270.

The three essentials of all general-average claims apply equally to sacrifices and expenditures; that is to say, they must be voluntary, necessary, and effectual: 2 Wharton's Digest, p. 48, title "Insurance," Myle *v.* The Harriet; Williams *v.* The Suffolk Ins. Co., 3 Sumner 510.

The rule of restitution can only apply to expenditures for the common benefit, extraneous to the adventure, and not to those ordinary expenses of the ship, caused by a deviation in a voyage which the vessel was unable to continue: Stevenson General Average 74. The American adjustments as a rule, but not universally, do allow these expenses as general-average charges: Walden *v.* LeRoy, 2 Caines 262. These expenses are to be borne by the ship, freight and cargo, in the proportions in which they receive actual benefit. The expenses on the cargo before it reaches the owner's hands are to be deducted, *e. g.* freight and salvage.

The voyage was continued under the same contract, and was a continuation of the voyage by the "Juliette Trundy": Pierce *v.* Columbian Ins. Co., 14 Allen 320; Winter *v.* The Del. Ins. Co. 6 Casey 334.

The breaking up of the voyage at the port of distress does not constitute the master the agent for the cargo, to accept it there for the owner, so as to render it liable to pay freight *pro rata itineris:* The Ann D. Richards, 1 Abbott's Admiralty Rep. 499; Ewbank *v.* Nutting, 7 Com. B. 797.

The right to general average, even if due, is lost by the refusal of the owner of the "Juliette Trundy" to deliver the cargo to the consignee, except on terms he had no right to exact: Scaife *v.* Sir John Tobin, 3 Barn. & Ad. 523.

The port of destination is the place for adjusting general-average charges; and an adjustment made there, according to the custom of the port, is binding on all parties: Strong *v.* The Firemen's Insurance Company, 11 Johns. 323; Loring *v.* The Neptune Insurance Co., 20 Pick. 411; Gray *v.* Waln, 2 S. & R. 229; Simmons *v.* White, 2 B. & C. 805; Dalglish *v.* Davidson, 5 Dow. & Ryl. 6; Richardson *v.* House, 3 B. & Ald. 237. The general

average is to be made on the *clear* value at the port of destination: 2 Parsons on Marine Ins. 344; Hugg *v.* The Augusta Ins. & Banking Co., 7 Howard 995.

The opinion of the court was delivered, March 17th 1873, by

AGNEW, J.—On the trial of this case at Nisi Prius three points were reserved. The first was: "Whether, when a ship has been disabled by the perils of the sea, puts into an intermediate port to repair, and the vessel is then condemned and sold, and the voyage broken up, the expenses so incurred are the subject of general average?"

Henry K. Cummings chartered the ship "Juliette Trundy" of the owner, William McLoon, for a cargo of coal from Baltimore, Maryland, to San Francisco, California. Storm and stress of weather injured the vessel, caused her to leak badly, and drove her for safety into the port of Rio de Janeiro, where, after the proper protests and necessary surveys, she was condemned as unseaworthy and sold, and the cargo was forwarded by her captain to San Francisco in the "Shatemuc," under a charter-party. It is evident that the vessel was disabled by the perils of the sea and her voyage broken up; and the deviation into a port of distress was voluntary, in order to save the vessel and cargo as far as possible, and the lives of those on board. The expenses which followed were necessarily incurred to ascertain the ability of the vessel to proceed on her voyage and to save the cargo from loss, and the cargo as thus saved was forwarded to the port of destination. The expenses incurred at Rio de Janeiro were *extraordinary*, and were necessarily incurred by the captain as the common agent for all interested, and therefore including the shipper.

General average has been defined to be a "a contribution by all the parties in a sea adventure, to make good the loss sustained by one of their number on account of *sacrifices* voluntarily made of part of the ship or cargo, to save the residue and the lives of those on board from an impending peril, or for *extraordinary* expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise:" Star of Hope, 9 Wallace 228; McAndrews *v.* Thacker, 3 Id. 365; Nelson *v.* Belmont, 21 New York 38. The right to general average extends to the loss of the ship when the cargo is saved in whole or in part, as well as to the loss of the cargo, when the ship is saved: Gray *v.* Waln, 2 S. & R. 229; Lage *v.* Richards, Id. 137; Bernard *v.* Adams, 10 Howard 270; 3 Wallace 365–6; 9 Id. 204. We see no reason to doubt, therefore, that the cargo in this case would be subject to general average if it had any value left when it arrived at San Francisco, and the cargo was sold for the charges.

The third point reserved was: "When the cargo is so sent to

the port of destination, whether the parties are bound by an adjustment fairly made by a *despacheur* at such port, according to the rules and usages there established?" We are inclined to affirm this as a general principle of maritime law. There are many reasons for this rule, some of which arise in the fact that this port is that of the intended market upon which the calculation of the shipper is founded, and is also the end of the ship's voyage as contemplated by the owners. Besides, the want of uniformity in the customs and rules of ports of different countries renders it essential that a certain port should be adopted as the place of adjustment, and the only practicable rule which can be followed in the midst of variety is to take that port for which the cargo is destined, and where the voyage is terminated. The circumstances and customs of this port, it is to be presumed, were in the minds of the parties in entering into the charter-party, while the market for the cargo there is to be presumed to be the best. Yet, conceding this to be a general rule, we must except the cases of fraud or gross mistake, and of a voyage broken up and ended, where, from the facts in the case, or the mutual acts of the parties or their agents, a final separation between the vessel and cargo has taken place, and the relations of the parties have actually terminated. In the last case the port of disaster would, generally speaking, become the place of adjustment. Such we think is the result of the authorities referred to.

This leads us to consider the second reserved point, which becomes the hinge of the case, viz.: "Whether the rate of contribution is to be adjusted upon the basis of the value of the cargo at the place of repairs, or at the port of destination, if the cargo is to be sent on by another vessel at a rate of freight exceeding that stipulated to be paid under the original contract of affreightment."

It is contended on behalf of the plaintiff that the voyage was broken up at Rio de Janeiro, the vessel and cargo actually separated, and that the relations of the parties finally terminated there. Is this so? McLoon, the owner of the vessel and plaintiff, seems not to have thought so in the first instance. He had the first adjustment made at Boston, February 1st 1868, and the second at San Francisco, September 17th 1868. None seems to have been made, or thought of, according to the rules of the port of Rio de Janeiro. We must, therefore, examine the facts to determine whether, in the contemplation of the parties, their relations finally terminated at Rio de Janeiro, and the separation of the cargo became so complete, that the port of destination ceased to be a common point for the adjustment under the charter-party, and that of distress became the end of their adventure.

First it may be noticed that the charter-party contains no covenant or proviso, enabling the owner of the vessel to terminate his voyage at Rio de Janeiro or any intermediate port; it does not contain even the common exception of the perils of the sea. He

must stand, therefore, only upon the law as it would arise upon the facts of his deviation into the port of Rio de Janeiro. But conceding the deviation to be justified, it is a well-settled principle of maritime law that in the case of a disaster by a peril of the sea, rendering the vessel unable to proceed upon her voyage, the master or captain becomes the common agent of all the parties in interest; the subjects of these interests are the vessel, the cargo and the freight. It is, therefore, the duty of the master, if the vessel cannot proceed, to reship the cargo, if he can, to the port of destination, so as to protect all interests. For this purpose he must exercise a large discretion, according to the circumstances. For in the absence of owner and shipper, and alone, as he is usually in a distant port, he must do what he fairly and conscientiously believes is for the interest of all. These are general principles borne out by the authorities: 3 Kent Com. 219, 212; 2 Parsons on Ship. 234; Lamont *v.* Lord, 52 Maine 388, *et seq.*; Thwing *v.* Wash. Ins. Co., 10 Gray 457 to 460; Winter *v.* Del. Ins. Co., 6 Casey 335. In forwarding the cargo to the port of destination the master may act for both owner and shipper. If he can save part of the freight to the owner he will be considered as his agent as well as the agent of the shipper. But if he can save nothing for the owner of the vessel, he will not be the agent of the owner but of the shipper alone. The foundation of this exception is, that an authority arising from implication only will not be presumed where the act of the master is clearly injurious to the interests of the owner of the vessel. These being governing principles, a separation of the relations between the owner and the shipper would be deemed to have taken place in this instance, if the only facts to be considered were the condemnation and sale of the vessel at Rio de Janeiro and the forwarding of the cargo by the captain at a greater rate of freight from Rio de Janeiro to San Francisco than the freight agreed upon in the charter-party from Baltimore to San Francisco. The stress of the argument for the plaintiff rests upon this view of the case. But these are not the only facts, while upon the whole evidence its weight carries the adjustment to the port of San Francisco. In addition to the fact already noticed, that the charter-party is without a saving covenant, leaving the question of deviation into Rio de Janeiro open to a controversy, which the owner of the vessel, or the captain as his agent, might prefer to avoid, the following elements are to be found in the evidence: Captain Perry, the master of the Juliette Trundy, entered into a charter-party with Captain Soule, master of the "Shatemuc," without disclosing a principal; the vessel was to be consigned to the *charterer's* agent at the port of discharge, and freight to be paid on unloading and right delivery of the cargo in cash. The bill of lading by the Shatemuc was signed by Wright & Co., as agent for Captain Perry, cargo to be delivered at San

Francisco "unto order or to ——, assignees," he or they paying freight as per charter-party. Wright & Co., for Captain Perry, endorsed this bill to the order of John S. Wright, Esq., agent at New York, and it was transmitted to New York, when John S. Wright, agent, endorsed it deliverable to William B. Cummings & Co. Captain Perry testifies that the bills of lading, charter-party per Shatemuc, and all the papers were forwarded to the *plaintiff*, McLoon; and in answer to a question why the bill of lading was not forwarded to San Francisco to await the arrival of the Shatemuc there, said he was told by Mr. Wright that the adjustment would be made in Boston, and the average would be forwarded to San Francisco. He also testifies, that in all he did he acted upon his own judgment for what he thought to be the best interests of *all* concerned. Now in all this it is clear he so acted to preserve to McLoon the power to control the cargo at the port of destination, so far as to protect any interest he deemed himself to possess there. In this his acts were met by McLoon and ratified. On the arrival of the Shatemuc at San Francisco, Wm. B. Cummings & Co., to whom Wright of New York finally endorsed the bill of lading, had no authority to receive the cargo. On the 14th of March, Captain Soule, after the arrival of the Shatemuc, notified Wm. B. Cummings & Co. of his readiness to deliver the coal on payment of the freight, delivery of the bill of lading, and *bond for payment of the general average incurred* for charges at Rio de Janeiro. Captain Soule, on the 19th of March, telegraphed to McLoon: "Where are the Shatemuc's bills of lading to Trundy's cargo?" McLoon replied by telegraph, March 21st: "Deliver your cargo to Wm. B. Cummings & Co. upon their giving *bond to pay general average*. Bill of lading on the way." Wm. B. Cummings having telegraphed to Henry K. Cummings the arrival of the Shatemuc without papers or bill of lading, the latter, on the 19th of March, wrote to McLoon. McLoon replied March 24th, saying he had received a despatch from Captain Soule, and telegraphed him to deliver cargo to Wm. B. Cummings *upon his giving general average bond;* also that he supposed H. K. Cummings would have paid the general average on cargo here (Boston), but if not should have to *send the paper to San Francisco*. The facts show plainly that none of the parties recognised the port of Rio de Janeiro as the place of final separation of interests; that Captain Perry considered himself as still acting for McLoon, to enable him to control the cargo, and that McLoon ratified his acts by assuming to control the delivery of the cargo on his own terms, and himself adopted San Francisco as the place of adjustment, failing to secure it at Boston. Under these circumstances the separation of interests was not complete at Rio de Janeiro, but they continued together until the arrival of the cargo at San Francisco, and its sale there to pay the freight and charges from Rio de Janeiro to San Francisco.

The reasons of McLoon for retaining control are not very apparent, but they may have arisen from a belief that San Francisco would be the best market for the cargo. It is certain, however, that he so acted as to control the cargo after it left Rio de Janeiro, and on its arrival at the port of destination. Having done so, the value of the coal at that port is the true criterion in the adjustment, and the evidence as clearly shows that its entire value was consumed by the freight and charges.

The proof is satisfactory that the adjustment at San Francisco was made "in accordance with the usage and customs of that port," and that the principle adopted there is, "that what is *saved* shall pay, and nothing remains where charges consume the whole value." "The custom at San Francisco is to deduct at San Francisco, from the value of the cargo at that place, the freight, special charges and commission of five per cent." In this state of the case, the entire cargo being lost to the shipper, there was nothing upon which general average could be charged. The judge at Nisi Prius was therefore right in confining the recovery to the special charges on the coal.

The remaining question is, whether the plaintiff was entitled to a verdict for the difference between gold and the national currency in legal tender notes. The judge directed the verdict to be rendered for the sum recovered in gold. We think this was right, in view of the nature of the transaction, and the contract to be implied from it. It is argued that there was no express contract, and therefore the judgment should have been for currency, adding the premium paid for gold as the actual expenditure of the plaintiff. But the expenses were incurred in a foreign country upon a gold standard, and the draft drawn by the master of the Juliette Trundy at Rio de Janeiro, on the plaintiff as her owner, was for gold. Gold, therefore, was the basis of the transaction and of the adjustment. The liability of the parties should be measured by that standard; gold coin also being one of the legal standards of money in the United States, and therefore directly applicable as a measure. The expenditure being founded on a gold basis, and being a foreign transaction, the contract to be implied from it must follow the same nature, especially in view of there being a legal national currency whereby it can be measured. The settlement of such a foreign transaction, on a uniform and proper basis, must result in due proportion of contribution among all interests. It is only in the payment in this country, in a currency of less value, the alleged loss arises, and that arises between the two species of legal currency, the result of local causes and not attributable in any way to the adjustment upon the foreign gold basis. The right of the party paying the draft seems to be that of receiving the proportion which others pay, and which he has advanced upon the basis of the transaction, which was gold and not legal tenders. The fluctua-

tions between the two species of lawful money, in the interval between adjustment and payment, ought not to be permitted to prejudice the judgment which is founded on the gold basis, itself a uniform and unchanging standard. If gold was now at twice the premium paid by the plaintiff, he would be entitled to his judgment payable in gold, and the loss would then fall on the defendant. Gold being the measure of the debt, it seems to us should be the measure of the payment also. Where all interests are measured by a common legal standard, no injustice is done to any one. The payment, therefore, should follow the nature of the liability.

Judgment affirmed.

Krier's Private Road.

1. The Act of April 21st 1846, vacating private roads by prescription, is constitutional.
2. Roads by prescription rest upon uninterrupted adverse user for twenty-one years, in analogy to the Statute of Limitations and not on the fiction of a grant.
3. An owner divided his land into lots and laid out a road for their use; the road was used for more than twenty-one years by an adjoining owner; all the lots afterwards vested in one person, upon whose petition the road was vacated under the Act of 1846. *Held*, that the adjoiner had no easement secured by grant taken from him, it was one originating in a wrongful use of another's land.
4. Stuber's Road, 4 Casey 199, recognised and followed.

January 20th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Certiorari to the Court of Quarter Sessions of *Montgomery county:* No. 114, to July Term 1872.

On the 18th of May 1871, the following petition was presented to the Court of Quarter Sessions of Montgomery county: * * *

"That many years ago a private way or road one perch in width, was reserved and laid out by the then owner of the land, for the use of certain lots into which he divided said land, which said way and lots were situated in the township of Moreland, in said county. That said way or private road was over the land now of your petitioner, Ann Krier, and along the line of her lands, and the line of land now of Robert Wamsley and James Neal, in said township of Moreland, and led from the public road leading from the Second street turnpike road to the old McDowell paper-mill, over what is now the land of your petitioner, Ann Krier, to the lots of ground which were in the rear of those fronting on said road. That the said Ann Krier has now become the owner of all of the said lots, for the use of which, said way or private road was laid out, whereby the said way or private road has merged, but that James Neal, and perhaps

others who own land adjoining the land of the said Ann Krier, by reason of having used the said way or private road for twenty-one years and upwards, claim that the same exists by prescription or lapse of time, and which claim your petitioner is unable to gainsay."

The prayer was for a jury to view and vacate the road.

It was signed by *Ann Krier* and a number of other persons.

Viewers were appointed in accordance with the petition, who reported, August 21st 1871, that the road ought to be vacated, and on the same day the report was confirmed nisi.

On the 13th of November, "Exceptions by James Neal, a land owner, who owns a right over said private way," were filed.

The exceptions were:

1. The Act of Assembly of April 21st 1846, under which the jury was appointed, is unconstitutional and void, as it takes away an acquired right without compensation to the owner.

2. The vacating of said road would almost wholly deprive the exceptant from the use of a portion of his property, and without this road a large part of his land would be valueless, as he would have to expend more money in building a bridge than his land would realize.

3. The only person to be benefited by the vacation of this road, would be Ann Krier, whose predecessor in the title owned all the land of the petitioner for the road and your exceptant, and he laid out and gave this road for the use of all said landowners.

On the 20th of May 1872, the exceptions were dismissed by the court (Ross, P. J.), and the report confirmed. Neal removed the record to the Supreme Court by certiorari, and assigned the dismissal of the exceptions and confirmation of the report for error.

C. Hunsicker, for certiorari, argued that the Act of April 21st 1846, sect. 1, Pamph. L. 416, 2 Br. Purd. 1277, pl. 35, relating to vacating private roads existing by prescription, is unconstitutional. He cited Worrall *v.* Rhoads, 2 Wharton 427; Reimer *v.* Stuber, 8 Harris 459; Wheately *v.* Chrisman, 12 Harris 298; Reading R. R. *v.* City, 11 Wright 325; Sharpless *v.* Philadelphia, 9 Harris 167; Pittsburg *v.* Scott, 1 Barr 309; Lambertson *v.* Hogan, 2 Id. 24; Rodgers *v.* Smith, 6 Id. 101; McMichael *v.* Skilton, 1 Harris 217; Schafer *v.* Enue, 4 P. F. Smith 304; Alter's Appeal, 17 Id. 341; Brown *v.* Hummel, 6 Barr 86; Richards *v.* Rote, 18 P. F. Smith 248; Pratt *v.* Eby, 17 Id. 396; Palairet's Appeal, Id. 479; Baggs's Appeal, 7 Wright 512.

B. E. Chain, contrà, cited Stuber's Road, 4 Casey 199; Heckman's Case, 4 Harrington 580; Fletcher *v.* Peck, 6 Cranch 186; Dartmouth College Case, 4 Wheaton 629; Aspinwall *v.* Commissioners of Davies Co., 22 Howard 377.

[Krier's Private Road.]

The judgment of the court was pronounced January 30th 1873.

PER CURIAM.—This private road, one perch in width, was laid out by the then owner of the land, for the use of certain lots into which he divided said land. The said private road was over the land now of the petitioner, Ann Krier, and led from a public road over what is now the land of the said Ann Krier, to the said lots of ground, which were in the rear of those fronting on the said public road. The petitioner had become the owner of all of the said lots, for the use of which said private road was laid out, whereby the said private road had merged and had become extinguished.

James Neal's land adjoined this private road, and although this private road was not laid out for his use, or that of the prior owners of his land, he by reason of having used the said private road for twenty-one years, and upwards, claimed that it existed by prescription, or lapse of time, which the said Ann Krier did not deny.

The viewers appointed by the court reported, that the said private road had become useless, inconvenient and burdensome, and ought therefore to be vacated, which report was confirmed by the court from which decree this appeal is taken, and it was argued here and in the court below, that so much of the first section of the Act of 21st of April 1846 (Pamph. L. 416), as authorizes the Courts of Quarter Sessions to vacate private roads "existing by prescription or lapse of time" is unconstitutional.

In Stuber's Road, 4 Casey 199, this court held this power, thus conferred upon the Courts of Quarter Sessions, to be a constitutional and valid exercise of legislative authority.

This decision was made sixteen years ago, and, so far as we know, has been acquiesced in up to the present time, and it would require a clear conviction of its unsoundness to induce us to reverse it at this late period. It extends only to private roads existing by prescription or lapse of time, and not to private roads resting upon express grant, drawing a clear line between the two kinds of title. The latter title is founded upon contract, the former upon mere lapse of time, by an uninterrupted use of it for more than twenty-one years, by analogy to the Statute of Limitations. This is the true title to such an easement, and not the fiction of a grant which has sometimes been resorted to as a reason for such a right, gained only by prescription or by adverse user for a long period of time. We must therefore be governed by the former decision in the case before us. It is not intended in any way to affect vested rights, or to trench in any manner upon property protected by the Statute of Limitations.

James Neal has no land taken from him, nor any easement secured by grant or contract, and only loses an easement originating in a wrongful use of another person's land.

Proceedings affirmed.

Piper's Appeal.

1. A testatrix owned a tract of land in Springfield township, Montgomery county, on which was a mill, and adjoining which was a lot in Philadelphia, which had always been used with it. She also owned, by a different title, another tract in the same township, about a mile distant, which had never had any connection with the first. She devised "all that certain grist-mill in Springfield township, Montgomery county, and all the real estate in the county of Montgomery, and lot of land in Philadelphia now used, with the mill property * * * to my nephew, William. * * * And as to the balance or residue of my estate, I order and direct to be divided equally between my brother John and my nephew William share and share alike." *Held*, 1. That the other lot did not pass to William by the specific devise. 2. That it passed by the residuary clause to John and William.

January 20th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Appeal from the decree of the Court of Common Pleas of *Montgomery county*, in the distribution of the proceeds of the sheriff's sale of the real estate of William W. Piper: No. 37, to January Term, 1872.

The question in this case was upon the construction of the will of Lydia Piper, deceased, under which it was claimed that William W. Piper had title to the land from which the fund distributed arose.

John Piper, in 1789, was the owner of a tract of 18 acres of land in Springfield township, Montgomery county, on which were a grist-mill and a saw-mill, and an adjoining lot of about one acre, in Philadelphia, separated only by the county line. These lots had been conveyed to him by one deed, and as one tract. This tract, composed of the two lots, by divers conveyances became vested in Lydia Piper, the testatrix, and had continued to be used as one until her death.

In 1846, the executors of Jacob Streeper conveyed to Henry A. Piper a lot of land at or near Flourtown, also in Springfield township, Montgomery county, containing about nine acres and a half, for part of the purchase-money of which Henry A. Piper gave to Streeper's executors a mortgage on this lot. It was conveyed in 1849 to Susanna Piper, a sister of Lydia, subject to the mortgage.

Susanna Piper died in 1863. By her will dated May 25th 1857, and proved December 31st 1866, she gave all her "estate and property, real, personal and mixed, * * * unto (her) sister, Lydia Piper, and to her heirs and assigns." Lydia Piper died in the latter part of the year 1866, leaving a will dated July 24th 1858, and proved December 31st 1866.

By this will she provided, amongst other things, as follows:—

"In case my sister, Susanna Piper, survive me, then my will is and I give, &c., all my estate, real, personal and mixed, * * * unto my sister Susanna Piper, and to her heirs and assigns for-

[Piper's Appeal.]

ever; but in case my sister Susanna does not survive me, then my will is, and I do order and direct as follows, concerning all my estate which I may have at my decease, whether obtained or acquired by me before or after the date hereof, by will, gift or otherwise."

She then gave a number of legacies of money and chattels, and proceeded:—

"I give and devise all that certain grist-mill situate in Springfield township, Montgomery county, and all the real estate in the county of Montgomery, and lot of land in Philadelphia, now used with the mill property, and all the premises and appurtenances thereto belonging, unto my nephew, William W. Piper, his heirs and assigns in fee simple. And as to the balance or residue of my estate, I order and direct to be divided equally between my brother John and my nephew William W. Piper, share and share alike."

The Flourtown lot had never been used with the mill property, and was in no way connected with it.

On the 3d of April 1868, a judgment was entered against William W. Piper in favor of Byron Woodward for $1591.

To April Term 1870, of the Court of Common Pleas of Montgomery county, a levari facias was issued on the mortgage of Streeper's executors, and the Flourtown property sold by the sheriff. The balance ($809.74) of the proceeds of sale, after deducting the Streeper mortgage and costs, was paid into court, and Charles H. Garber, Esq., was appointed auditor to make distribution.

Besides the Streeper mortgage and the Woodward judgment, there was a claim on the fund made by John G. Johnson, Esq., a mortgage-creditor of William W. Piper.

The auditor reported that the Flourtown land did not pass to William W. Piper, under the will of Lydia Piper, and therefore awarded $730.34, the remainder of the fund in court, after deducting costs, to John G. Piper, administrator d. b. n. c. t. a. of Lydia Piper, deceased.

John G. Johnson, Esq., filed exceptions to the auditor's report:

1. That the auditor erred in holding that the Flourtown land did not pass to William W. Piper by the will of Lydia Piper.

2. That he erred in awarding the fund in court to the administrator, &c., of Lydia Piper.

3. That he erred in not distributing the fund in court to the lien-creditors of William W. Piper, according to their priority.

4. That he erred in holding that William W. Piper had no title to the Flourtown land.

The court (Ross, P. J.) sustained the exceptions, being of opinion that the Flourtown land passed to William W. Piper by the will of Lydia Piper.

The report was therefore recommitted to the same auditor, who awarded the whole fund to the judgment of Byron Woodward, and the court confirmed the report.

John G. Piper, the administrator, appealed to the Supreme Court, and assigned the decree of confirmation for error.

D. H. Mulvany (with whom were *A. R. Warriner* and *H. Livezey*), for appellants.

J. G. Johnson (with whom was *J. R. Hunsicker*), for appellees.

The opinion of the court was delivered by May 17th 1873, by

WILLIAMS, J.—The question presented by this appeal is, whether the land sold by the sheriff on the levari facias in this case, the proceeds of which are in question, was devised to William W. Piper by the will of Lydia Piper? If it was, then his judgment-creditors are entitled, according to their priority of lien, to the residue of the proceeds of sale, after satisfying the mortgage upon which it was sold, and the decree of distribution must be affirmed.

At the time of her death Lydia Piper was seised of a tract of land, the larger portion of which, containing about eighteen acres, was situate in Springfield township, Montgomery county, on which there was a grist-mill; and the smaller, containing about one hundred and fifty perches, was situate in Philadelphia county, adjoining the larger, and separated from it only by the county line. Her title to the mill property was derived through intermediate deeds and devises from her father, John Piper, to whom it was conveyed on the 2d of January 1789. Through all changes of title these lots remained together, and the smaller was always used with the larger as part of the mill property. She was also the owner of a lot near Flourtown, Montgomery county, subject to a mortgage given by Henry A. Piper, the former owner, out of which the proceeds of the sheriff's sale in this case were realized. This lot was about a mile from the mill property, but was not a part of it, and was never used or occupied in connection with it in any way. It was devised to her by her sister, Susanna, who died in 1863, by her will dated May 25th 1857. Was this lot, then, devised to William W. Piper by the will of Lydia Piper? Her will was made July 24th 1858, and she died in December 1866. The clause of the will by which it is claimed to be devised is in these words: "I give and devise all that certain grist-mill situate in Springfield township, Montgomery county, and all the real estate in the county of Montgomery, and lot of land in Philadelphia, now used with the mill property, and all the premises and appurtenances thereunto belonging, unto my nephew, William W. Piper, his heirs and assigns, in fee simple." Now what was in the

mind of the testatrix when she made this devise, and what did she intend to give her nephew? Was it not the mill property situate, as we have seen, partly in Springfield township, Montgomery county, and partly in the county of Philadelphia? And does she not describe the subject of her gift precisely as she would if she intended to give the mill property, and no more? She naturally thinks of the mill first, and the place where it is situated, and she describes both: "I give and devise all that certain grist-mill situate in Springfield township, Montgomery county," and then she thinks of the land on which the mill is erected, and which has always been used in connection with it, and she describes the land: "and all the real estate in the county of Montgomery, and lot of land in Philadelphia now used with the mill property;" and to complete the description, showing that she intended to give the mill property in its entirety, she adds: "and all the premises and appurtenances thereunto belonging."

Can there be a doubt that the mill property, and the mill property alone, was in her mind as the subject of her gift, and that she describes it in the very order that it would naturally occur to her? She certainly intended to give the entire mill property with all its appurtenances to her nephew. Why should she break off the description of her gift in order to devise another property not connected with it, and then return to the subject of her gift and complete the description? If she had intended to give the lot near Flourtown, would the devise of it have been injected into the description of the gift of the mill property? Would it not have preceded or followed it? If she intended to give the Flourtown lot why does she say, "all *the* real estate in the county of Montgomery?" Why not, as would be more natural, all *my* real estate? And why does she say, "all the real estate in the county of Montgomery, *and* lot of land in Philadelphia, now used with the mill property?" The words "now used with the mill property," according to their grammatical construction, are as clearly descriptive of the real estate in the county of Montgomery, as they are of the lot of land in Philadelphia. They refer to their immediate antecedents, which are linked and bound together by the connective "and," and it is evident that they were intended to limit and qualify both. They constituted in fact but one property, and they are described as one property. The learned judge of the court below was clearly mistaken in saying that it does not appear that any of the Montgomery real estate was used with the mill property. On the contrary, it appears beyond all doubt—and the fact is confessed by the appellees—that there are eighteen acres of land in Montgomery county, on which the mill was located, and that the lot in Philadelphia, separated from it only by the county line, was always used with it, and through all changes of title had remained together. Reading the devise in the light of these admitted facts,

there can be no doubt that the only subject in the mind of the testatrix, when she made the gift, was the mill property as it then was and always had been, and that she intended to give it in its entirety to her nephew, and did not intend to include in the gift any real estate not connected with it.

But if the Flourtown lot did not pass by the devise in question, it does not follow that it was not disposed of by the will of the testatrix. It is clear that it was devised by the residuary clause, which immediately follows, in these words; "and as to the balance or residue of my estate, I order and direct to be divided equally between my brother John and my nephew William W. Piper, share and share alike." As there is no direction in the will to sell and convert the testatrix's real estate into money, there can be no doubt that the Flourtown lot passed to the residuary devisees as real estate, subject to the mortgage given by the former owner; and if so, the judgments against William W. Piper were liens on his undivided half of the lot, and entitled to a moiety of the proceeds of sale, after satisfying the mortgage on which it was sold; and the other moiety of the proceeds of sale belong to John Piper, the residuary devisee of the undivided half of the lot, if he has not parted with his title and there are no judgments against him which are liens on the fund. In no aspect of the case is the appellant, as administrator de bonis non, &c., of the testatrix, entitled to any portion of the fund for distribution. The title to the lot out of which it arose vested in the residuary devisees, immediately on the death of the testatrix, and in distributing the fund it must be treated as their estate.

The appeal must therefore be dismissed, and the record remitted to the court below, with a recommendation to open the decree of distribution, upon the application of John Piper, and distribute the fund in conformity with the rights of the parties.

Appeal dismissed at the costs of the appellant, and the record remitted to the court below, with a recommendation to open the decree of distribution as suggested in the opinion.

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Baker *versus* The Chester Gas Co.

1. Cornog owning land encumbered it by a judgment, laid it out in lots and streets and sold to Baker one lot described as bounded on Evans street, one of those laid out. The remaining lots were sold under a prior mortgage; some described as on Evans street were sold to Campbell; some also described as on Evans street were sold to Baker; Evans street *as a lot* and other lots, described as on Evans street, were sold by the sheriff to Hannum. Campbell conveyed to defendants, describing Evans street as a boundary; Hannum's title to Evans street became vested in the defendants; in all the

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sales by sheriff or individuals, Evans street was recognised. *Held*, that the description was in the line of defendants' title and it showing that Evans street had been dedicated to public use they could not close it.

2. The general rule is, that upon a sheriff's sale different lots should be sold separately; notwithstanding they are covered by a common encumbrance.

3. By the sheriff's sale of the lots as bounded on Evans street the purchaser obtained title to the middle of Evans street.

4. Cox v. Freedley, 9 Casey 124; Grier v. Sampson, 3 Casey 183; Paul v. Carver, 2 Casey 223, followed.

January 21st 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Error to the Court of Common Pleas of *Delaware county:* No. 176, to January Term 1873.

This was an amicable action for obstructing a street; Perciphor Baker was plaintiff and The Chester Gas Company were the defendants. The following facts appeared by a case stated filed in the cause.

On the 28th of June 1854, Thomas Maddock conveyed to Ferdinand Cornog and Cadwallader Evans, a tract of 3¾ acres of land in Chester, and at the same time the purchasers gave to their grantor a mortgage, which was duly recorded, for part of the purchase-money.

On the 16th of September 1854, a judgment for $2000 was recovered in Court of Common Pleas of Delaware county, by Thomas Steel against Cornog & Evans and R. E. Hannum (their surety).

Cornog and Evans divided the tract into 50 building lots and laid out Porter, Crosby and Evans streets through it: they also made a plot of the division and of the streets, it was uncertain whether the plot was made before Steel's judgment was entered; but there were then no marks on the ground to designate the streets or lots.

On the 25th of October 1854, Cornog & Evans conveyed to Baker, the plaintiff, a lot 110 feet square on the east side of Welsh street and bounded on the south by Evans street, one of the new streets laid out by them; this deed was recorded October 25th 1854, Maddock having released this lot from the lien of his mortgage.

A levari facias on the mortgage was issued to November Term 1855. Before the sheriff's sale under it, the streets and lots laid out by Cornog & Evans were marked on the ground. The description of the property in the levari facias was "All those 49 several lots or pieces of land situate on the south-eastwardly side of James Street, and on the north-westwardly side of Welch street * * * bounded by said streets and lands of Perciphor Baker, George Baker," and others; under this levari fifteen of the lots "bounded on the north by Evans street," were sold to James Campbell; and ten of the lots, "situate on the north-westwardly side of a street lately surveyed and called Evans street; each of said ten

lots having a front of 20 feet; on said Evans street, 110 feet" were sold to Baker, the plaintiff, who continued to hold them.

Under a venditioni to August Term 1856, on Steel's judgment, amongst other lots, the first-mentioned lot, which had been sold to Baker, was sold by the sheriff to R. E. Hannum, one of the defendants in the judgment. The lot was described in the writ as "bounded by land late of Cornog & Evans, by Welch street, by Evans street containing," &c. Under an alias venditioni to November Term 1857, on the same judgment, the sheriff sold the three streets laid out by Cornog & Evans. No. 2 was described as "A lot of land called Evans street, situate on the north-east side of Welch street and measuring thereon 45 feet, and extending the same width from said street 313 feet to the south side of the above-described lot, bounded on the west by Welch street, north by lots of R. E. Hannum and P. Baker, east by the aforesaid described lot, and south by the Gas Company. The lot mentioned in the foregoing description as P. Baker's, is the "*ten lots*" sold to him by the sheriff, as before stated.

On the 1st of May 1856, James Campbell conveyed to the Gas Company (defendants), the land purchased by him at sheriff's sale as before mentioned; it was described in the deed to the defendants as "bounded on the north-west by Evans street and containing along said Evans street 312 feet."

On the 5th of April 1860, Hannum conveyed to the defendants "a tract of land known as Crosby street," one point of the boundary as stated in the deed, "being the south-east corner of a lot belonging to the said Hannum known as Evans street."

On the 11th of March 1864, Hannum conveyed to Thomas Hollins part of the lot purchased by him at sheriff's sale and part of Evans street. The description in the deed is: "Lot of land on east side of Welch street, 154 feet south of south side of James street, a corner of a lot of John Wilde, thence east by said Wilde's lot, and parallel with James street, 110 feet, to the line of P. Baker's lot, and thence at right angles, between lands of Baker and Hannum, 120 feet, to land of Gas Company, and thence at right angles 110 feet to Welch street, and thence 121 feet to the place of beginning." Being part of the premises No. 2, in sheriff's deed book, &c., and also part of the tract known as Evans street, in sheriff's deed book, &c.

On the 13th of July 1870, Thomas Hollins conveyed the last above described premises to the defendants, the said Gas Company. They hold the premises, and claim to have a fee simple title thereto. Evans street is closed up by a fence or gate at each end of the 110 feet, maintained by the defendant; the plaintiff is not allowed passage thereover, and has no other means of access to his lot.

It was agreed that "If the court shall be of opinion that under the law applicable to the foregoing facts, the plaintiff is entitled

to recover, then judgment to be entered in favor of the plaintiff for six cents. If the court shall be of the contrary opinion, then judgment to be entered in favor of the defendants."

The court (Butler, P. J.) entered judgment on the case stated for the defendants.

The plaintiff removed the record to the Supreme Court, and assigned for error the entering judgment for the defendants.

J. B. Hinkson, for plaintiff in error.—The sheriff was bound to sell according to the divisions and streets marked on the ground although one encumbrance covered the whole land: Ryerson *v.* Nicholson, 2 Yeates 516; Rowley *v.* Brown, 1 Binney 61; Vastine *v.* Fury, 2 S. & R. 433; Donaldson *v.* Bank of Danville, 8 Harris 247; Tate *v.* Carberry, 1 Phila. R. 133.

W. Ward, for defendants in error.

The opinion of the court was delivered, February 24th 1873, by Mercur, J.—The plaintiff assigns for error the entry of judgment in favor of the defendant upon the case stated.

This depends upon the validity of the right claimed by the defendant to close up a portion of Evans street, in the city of Chester.

The land covered by this street is part of a larger lot bounded westerly by Welch street, which was purchased June 28th 1854, by Cornog & Evans. Upon the same day they executed a mortgage to the vendor to secure the payment of a part of the purchase-money. They purchased the land with a view of dividing it and selling it for building lots. They laid out three streets, to wit, Evans, Crosby and Porter, and fifty lots, and made a plot or draft thereof. October 23d 1854, the plaintiff purchased of them by deed one of the said lots, having a front of 110 feet on Evans street, bounded west by Welch street, and south by Evans street. Upon the same day the mortgagee released this lot, as described in the deed, from the judgment of the mortgage. Judgment having been subsequently entered upon the mortgage, a levari facias issued thereon to November Term 1855, and the remaining lots were sold by the sheriff. In the writ they were described as "all those 49 several lots." Fifteen of said lots, "bounded north by Evans street," and extending along the same 312 feet, were purchased by Campbell; ten of the lots on the northerly side of Evans street, east of and adjoining the plaintiff's lot aforesaid, with a frontage of 20 feet each on Evans street, were purchased by plaintiff. Prior to this sale, the streets and lots had been designated by marks upon the ground. May 1st 1856, Campbell conveyed his said 15 lots to the defendants bounding them by "Evans street."

It appears, however, that upon the 16th of September 1854,

one Steel obtained a judgment against said Cornog & Evans, and one Hannum. Whether the plot or draft of the lots and streets had then been made is uncertain.

The proceeds of the sale upon the mortgage were insufficient to reach this judgment. A venditioni exponas issued thereon to August Term 1856, by virtue of which the sheriff sold to said Hannum, the lot situate at the north-east corner of Welch and Evans streets, which had been conveyed to plaintiff in October 1854, as aforesaid; and to one George Baker, another lot, part of said mortgaged premises, bounded by Crosby street. Under an alias venditioni exponas, issued on the same judgment to November Term 1857, said Hannum purchased the land covered by each, Evans, Crosby and Porter streets, the former being described as "a lot of land called Evans street," measuring 45 by 313 feet, and bounding it on the north and on the south by lots previously sold at sheriff's sale as aforesaid.

By virtue of divers mesne conveyances all the title which Hannum acquired by his purchase of Evans street, for the distance of 110 feet easterly from Welch street, became vested in said defendant. They thereupon closed up the street, putting a fence or gate at each end of the 110 feet, thereby closing the plaintiff's passage through the street, and he has no other way of access to his said ten remaining lots.

Thus it appears, at each sale, both public and private, made prior to the sale of Evans street, it was distinctly recognised as a street. The lots lying north and south of it were bounded by it. The sale upon the judgment united with the sales upon the mortgage in proclaiming it to be a street. Every lot which the defendants own, when sold at sheriff's sale, was bounded upon it. This description is directly in the line of their title. Each deed showed it to be a street dedicated to the public. The fair presumption is that a larger sum was realized from the sale of the property in lots than if it had been sold in one body.

Upon a sheriff's sale of land the general rule prescribed by public utility is that different lots of ground should be sold separately. The reason is that the competition is thereby much increased; many persons might desire to purchase *one*, who would not, or could not purchase several. The primary object of selling at sheriff's sale is not to transfer the title; but to collect the money. A common encumbrance creates no reason for selling the lots together: 1 Troubat & Haly, part 2d, 1001. Upon an application to the court whence the execution issued, a sale will be ordered by such subdivisions as will be most likely to produce the largest sum. In this case, without an order of court, the sales were made, it is fair to presume, in the manner the court would have ordered, if application had been made thereto. The lots having been thus sold without objection from defendants in the executions, or from

any of the lien-creditors, and purchasers having invested their money therein, the titles thereby acquired must now be held to be of like force and effect as if the sales had been made in pursuance of a prior order of court. Great injustice would be done to the purchasers of lots bounded by Evans street to hold now that their titles extend no further than the edge of the street, and that a subsequent sale of the ground covered by the street, excluded them therefrom. Conceding then, what the case stated does not admit, that the lien of the judgment attached prior to the making of the plot dedicating the street to public use, yet we think the learned judge erred in holding that the sale of the lots bounded by Evans street did not divest the lien of the judgment upon the land covered by the street. By those sales the title to the whole land passed and nothing remained to be sold. The law is well settled, that upon a sale of a lot bounded by a street, the title passes to the centre of the street: Paul *v.* Carver, 12 Harris 207; Idem, 2 Casey 223; Grier *v.* Sampson, 8 Casey 183. Even if the lot be bounded by the *side* of the street, the grantee takes title to the centre thereof, if the street is not expressly or by clear implication reserved: Cox *v.* Freedley, 9 Casey 124.

We are of the opinion that the plaintiff was entitled to recover.

Judgment reversed, and judgment is entered in favor of the plaintiff upon the case stated.

The Philadelphia and Reading Railroad Co. *versus* Yerger *et al.*

73 121
176 33

1. A party is not answerable in damages for the reasonable exercise of a right, unless upon proof of negligence, unskilfulness or malice.
2. Buildings were burned by sparks, from a locomotive engine used in the ordinary way on a railroad; in a suit against the company by the owner, *Held*, there being no evidence to justify an inference of negligence, that the jury should have been instructed to find for the defendants.
3. Howard Express Co. *v.* Wile, 14 P. F. Smith 201, followed.

January 22d 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Error to the Court of Common Pleas of *Montgomery county:* No. 335, of January Term 1872.

This was an action on the case brought February 25th 1870, by Joseph Yeager and others against The Philadelphia and Reading Railroad Company, for negligence, in the burning by one of their locomotive engines of a block of four small tenements in Pottstown, about sixty feet from the line of the railroad. The fire occurred on the 4th of July 1868, about 3.45 o'clock in the afternoon. The case was tried August 16th 1871, before Ross, P. J.

[Philadelphia & Reading Railroad Co. *v.* Yerger.]

Henry M. Pile, a witness for plaintiff, testified that on the day mentioned, a train came down the railroad from Reading and stopped at a water-station about thirty-five yards below the houses; after the engine had taken in water the train backed up the road again; the engine puffed very hard, and attracted the attention of witness, who looked up and saw the roof of the houses on fire; the train was a long one; the puffing was as common until it backed up.

Joel Kulp testified that another train had passed not very long before; he did not hear it puff at the water-plug, the engine blew off as having too much steam; saw Pile run to the fire, ran after him and then saw the roof on fire; he saw no sparks.

John Barlow testified somewhat similarly as to the fire. He testified also that the engine made a great noise whistling, "trying to go backward and forward; she seemed to have some trouble the way she worked; went like engines do when they are heavily loaded."

Other witnesses testified that the engine made an extraordinary noise, as if there was a heavy load which there was difficulty in moving; that the wheels went around without moving; that the fire was discovered shortly after this engine, "The Lancaster," passed by with its train.

Jonas Smith testified:—

"I was sitting in my room at Pottstown, and heard a great noise at water-station at railroad. I thought if that fellow goes on in that way, he will set something afire. Noise seemed as if he was hauling backward and forward, and shortly after the noise I heard them halloo fire. My office is four hundred yards from the water-station, a little over three hundred feet from the railroad. * * * I was frightened, I thought it would set something on fire."

One witness testified that he saw the engine throwing out sparks across the turnpike, which was beyond the burned buildings.

The plaintiffs having rested, the defendants moved for a nonsuit; the court refused the motion, and sealed a bill of exceptions.

The defendants gave evidence for the purpose of showing that the fire originated inside of the house in the garret.

William Brown, engineer of the "Lancaster," testified that he had a train of eighty or eighty-five coal cars on the day of the fire; a full train is one hundred and twenty-five cars; his spark-arrester was in good condition; it had been examined the day before; the engine also was in good condition; he shut off the steam at the "Orchard," about a mile above Pottstown; the momentum carried the train three or four cars below the water-plug; he put on a fresh fire at the "Orchard," and in backing to the plug he did not throw fire by reversing, because it was a green fire; exhaust steam is used to fan the fire; he used some exhaust steam, but not much.

[Philadelphia & Reading Railroad Co. v. Yeager.]

Kelly, the fireman of the "Lancaster," testified that the steam was shut off at the "Orchard," and not put on until the train was backed up to the water-station; had put on about a ton of coal at Pottstown, and a ton and a half at Reading; when green coal goes on the sparks can't fly; takes four miles to get red with a heavy train.

Other witnesses testified in the same manner.

Christian Snyder was employed by the defendants at Richmond to examine spark-arresters; he examined the "Lancaster" on the 6th of July; it was all in good order; the spark-catcher was a little worn, but just as good as new; if the spark-arrester be good it can throw no large sparks.

Joseph Dill testified that his duty was to examine spark-arresters at Palo Alto; if the "Lancaster" was there on the 2d of July, she was examined; "if there had been any defect, she would have been removed; if we found her worn the least bit, it would have been removed."

John F. Wooten testified that he had been on the railroad for twenty-five, and had had charge of the machinery of the railroad for five years; he had made spark-arresters one of his studies and considered himself an expert; the "Lancaster" was built in 1864, it had been in use altogether in the coal trade between Palo Alto and Richmond; its spark-arrester is an efficient one; "it arrests sparks as far as it is possible to do so; there are no better with reference to grades, the business of the road, &c.; the arrester on the 'Lancaster' is the best we have reached for the uses of the road; the 'Lancaster' is one of our most improved engines." There are men employed to examine the arresters at certain stations every morning.

There was other evidence that the spark-arresters on the defendants' engines were of the most improved kind.

There was evidence that other engines which had passed about the time of the fire, were in good condition.

The court charged:—

"The counsel for the defendant has requested the court to charge that there is no testimony adduced before you, that would justify you in concluding that the defendant was guilty of any negligence. This, however, we cannot do, for we think the question as to the existence of negligence, under the facts in this case, must be submitted to you. We have carefully defined the rules by which you must be governed in your investigations; and you will take the entire testimony, and determine whether the defendant by his exclusive negligence, caused this fire."

The verdict was for the plaintiffs for $2125.18.

The defendants took a writ of error and assigned for error:—

1, 2. The charge of the court.

6. The refusal of the court to order a nonsuit.

[Philadelphia & Reading Railroad Co. *v.* Yeager.]

J. Boyd, for plaintiffs in error.—The burden of proof of negli- was on the plaintiffs: McCully *v.* Clarke, 4 Wright 399. There was no evidence of negligence and the jury should have been so instructed: Howard Express Co. *v.* Wile, 14 P. F. Smith 201.

B. M. Boyer and *D. H. Mulvany*, for defendants in error.

The opinion of the court was delivered, May 17th 1873, by

Mercur, J.—When the plaintiffs below rested their case the defendants moved for a nonsuit. This was refused by the court; that refusal is now assigned for error.

If the defendant had declined to give any testimony we would consider the sufficiency of the evidence then given. As, however, much evidence was afterwards introduced, the whole should be considered together.

The action was brought by the defendants in error to recover damages for the burning of a block of buildings. The fire was alleged to have been caused by sparks from the stack of the railway company's locomotive "Lancaster." The buildings were situated within a few feet of the railroad embankment, and near the water-stand, where the locomotive was supplied with water.

The evidence as to whether the sparks caused the fire, was properly submitted to the jury, who found they did.

The defendants requested the court to charge the jury, that there was no testimony which would justify them in finding the defendant guilty of any negligence. This the court refused to do, but left it to them to determine from the whole testimony, whether the defendant, by his exclusive negligence, caused the fire.

For this refusal and charge the principal errors are assigned.

Negligence is the gist of this action. To recover, the plaintiff must have established the defendant's exclusive negligence.

Was there such evidence of this fact, that it should have been submitted to the jury?

It was formerly held, that where there was a scintilla of evidence of a material fact, the question should be submitted to the jury.

This doctrine, however, has been overruled, both in England and by this court.

In Wheelan *v.* Hardisty, 8 El. & Bl. 262, it is said, that an end has been put to what has been treated as the rule, that a case must go to the jury, if there was what has been termed a scintilla of evidence. The question is, whether the proof is such, that the jury could reasonably come to the conclusion that the issue was proved.

Toomey *v.* Railway Co., 3 C. B. N. S. 146, was a case for negligence. It was there held, that it was not enough to say there was some evidence. A scintilla of evidence, or a mere surmise,

that there may have been negligence on the part of the defendant, clearly would not justify the judge in leaving the case to the jury. There must be evidence upon which they might reasonably and properly conclude that there was negligence.

In Ryder v. Wombwell, 4 Law Rep. Ex. 32, it was said by Willes, J., that it is now settled that the question for the judge is not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit, if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant.

The case of Ryder v. Wombwell is cited with approbation by the court, in Howard Express Co. v. Wile, 14 P. F. Smith 201. There the rule is more distinctly and clearly stated by Justice Sharswood, to be, that where there is any evidence which alone would justify an inference of the disputed fact, it must go to the jury, no matter how strong or persuasive may be the countervailing proof; but in a case in which a court ought to say that there is no evidence sufficient to authorize the inference, then the verdict would be without evidence, not contrary to the weight of it. Whenever this is so, they have the right, and it is their duty, to withhold it from the jury.

The uncontradicted evidence in this case, showed that the spark-arrester was perfect in mechanical construction, and in efficient condition at the time of the fire; the learned judge, upon disposing of the rule for a new trial, states these facts to have been admitted. He would have set aside the verdict upon the ground that it was against the weight of the evidence, had he not been constrained by the judgment of his colleagues, his associates not learned in the law.

Sitting as a court of last resort, we cannot reverse merely because we may think the verdict was against the weight of evidence. If any evidence was given, which, alone and uncontradicted, would justify an inference that the injury was caused by the exclusive negligence of the defendant below, we will not disturb it. If, upon the other hand, there was no such evidence, then the court erred in not affirming the point submitted by the defendant.

The rule is well settled, that a party is not answerable in damages for the reasonable exercise of a right, unless upon proof of negligence, unskilfulness or malice. In this case there is no allegation of malice. The proof is clear, that there was no negligence or unskilfulness in the construction of the locomotive or spark-arrester.

John F. Wootten testified that he was in charge of the machinery of the road. Was a machinist; had paid considerable attention to spark-arresters; had made that one of his studies; considered himself an expert upon that subject; had 800 engines under his charge,

having spark-arresters; knew this locomotive and this spark-arrester; considered it an efficient spark-arrester. It arrests the sparks as far as it is possible to do so, considering the purposes of the engine and other considerations required from spark-arresters. No better with reference to grades, the business of the road, and the necessary duties the engine has to perform, after eight or nine years' experimenting; that on the Lancaster is the best they have reached for the uses of the road, the Lancaster is one of their most improved engines; the size of the fire-box is increased in it, which results in slowness of combustion, economy of fuel, and *diminishes* the emission of sparks. No coal-burning engines, with smaller spaces than the Lancaster, nothing larger than an eighth of an inch, would pass through.

William Lorenz testified that he had been for twenty years a civil engineer; is now the chief engineer of the company; was formerly engineer in locomotive department; is familiar with spark-arresters on the road; from knowledge thus derived, and interest taken therein, considers himself an expert; knows the spark-arresters used on the coal-cars at the time of the fire, and knows of no better kind.

It thus appears that the greatest mechanical skill, and the most progressive mechanical science, have united in creating the most perfect machinery adapted to this purpose.

The proof is equally clear that it was in good condition.

Wm. Brown testified that he was the engineer on the Lancaster at the time of the fire. The spark-arrester was in good condition, nothing the matter with it; the day before it had been examined; he had examined it the day after. Re-examined it to see if it had caused the fire; found it all right. Three other witnesses, whose duties were to examine the spark-arresters daily, testify to the good order and condition of this one. It was not quite new, but just as good as new.

It was claimed, however, that an undue amount of coal had been put in the fire-box of the locomotive, and that the moving backwards and forwards while at the water-station, was negligence. A careful examination of the whole evidence fails to show us any negligence in either of these acts. It is therefore just that this company should have the benefit of the principle, that no person, whether natural or artificial, is answerable in damages for the reasonable exercise of a right, accompanied with a cautious regard to the rights of others: Railroad Co. *v.* Yeiser, 8 Barr 366.

To recover, the plaintiff must have established the negligence of the defendant. Yet he has been allowed to recover in the face of the most overwhelming proof that there was no negligence. The learned judge therefore erred in not charging the jury as requested, and the first assignment of error is sustained.

Judgment reversed, and a *venire facias de novo* awarded.

73 127
19 SC 378
73 127
26 SC 26
73 127
29 SC 180

Springfield Road.

1. A petition was for a road; "To begin in the Germantown turnpike at a point where the road from the Flourtown road intersects the said turnpike;" &c., the jury reported a road, "Beginning at a point in the *middle* of the Germantown turnpike where the same is intersected by the *middle line* of the road leading from the Flourtown road," &c. *Held*, that there was no variance between the beginning in the petition and in the report.
2. Reasonable certainty only is required in defining the termini and that the road as laid out shall begin and end substantially at the points designated in the petition.
3. The point of intersection of two roads is the point where their middle lines intersect.

January 22d 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Certiorari to the Court of Quarter Sessions of *Montgomery county:* No. 110, of January Term 1873. In the matter of a public road in Springfield township.

On the 26th of August 1871, a petition was presented to the court, setting forth the "want of a public road in the township of Springfield, to begin in the Germantown and Perkiomen turnpike road, at a point where the public road leading from the Flourtown and Norristown road intersects the said turnpike road, and to end in the Wissahickon turnpike road, at a point between the corner of lands of Samuel W. Paul and Peter Streeper, and the angle or curve in the said last-named road, opposite the dwelling-house of the said Peter Streeper, in said township," and praying the court to appoint suitable persons to view and lay out the same.

Viewers were appointed, who, November 17th 1871, reported, laying out a road; "Beginning at a point in the middle of the Germantown and Perkiomen turnpike road, where the same is intersected by the middle line of the road leading from the Flourtown and Norristown road, thence, * * * to the middle of the Wissahickon turnpike road, at a point between the corner of lands of said Peter Streeper and Samuel W. Paul, and the angle or curve in said Wissahickon turnpike road, opposite the house of the said Peter Streeper * * * a plot or draft whereof is hereunto annexed."

November 17th 1871. The report was confirmed *nisi*, and the road ordered to be opened thirty-three feet in width.

February 26th 1872. Exceptions of Peter Streeper were filed. The first was:—

The points of beginning and ending in the petition, do not correspond with the beginning and ending in the report.

The court set aside the report, ROSS, P. J., in his opinion saying: * * *

"There is, unquestionably, a variance in the point of beginning. The petition designates as the place of beginning, "*on* the Ger-

mantown and Perkiomen turnpike road, at a point where it is intersected by a public road: but the viewers have commenced in the *middle* of the pike, and not at the point of intersection, for the centre of the turnpike could not be *that* point, as appears from the draft—for the road leading to the Flourtown road runs to and does not cross the Germantown and Perkiomen turnpike. The point of intersection, therefore, as shown by the record, is the outside, and not the middle line of the turnpike road. It is said that it appears of record, that the road leading to the Flourtown road was laid out to the middle of the Germantown and Perkiomen turnpike; but it does not appear upon the record, which is a sufficient answer both to the argument and to the fact upon which it is based. This road is to be identified by its initial points, as designated by these proceedings, upon which alone the opening order can be framed.

"The error of the viewers has been in failing to recognise where the point of intersection is. Upon all plane surfaces, the point of intersection is where the intersecting line touches and divides the intersected surface, and not the extreme point of penetration. The point of intersection of the roads was at the right angles which their converging lines formed at the point of meeting. This, as a material variance, being one-half the width of the turnpike, and constituting a point of beginning other than that designated by the order, and therefore beyond the power of the viewers; it is fatal to the report.

"The first exception, as to the point of beginning, is sustained."

Charles Williams, a petitioner for the road, removed the record to the Supreme Court by certiorari, and assigned for error the order of the court setting aside the report.

H. Livezey and *B. M. Boyer*, for certiorari.

C. Hunsicker, contrà.

The opinion of the court was delivered, May 17th 1873, by

WILLIAMS, J.—The petition in this case defines with reasonable certainty the points of beginning and ending of the proposed road; and in laying it out the viewers complied substantially, if not literally, with the petition and order of view. The petition prays for a road "to begin in the Germantown and Perkiomen turnpike road, at a point where the public road leading from the Flourtown and Norristown road intersects the said turnpike road, and to end in the Wissahickon road, at a point between the corner of lands of Samuel W. Paul and Peter Streeper, and the angle or curve in the said last-named road, opposite the dwelling-house of the said Peter Streeper." The viewers laid out a road "beginning at a point in the middle of the Germantown and Perkiomen turnpike

road, where the same is intersected by the middle line of the road leading from the Flourtown and Norristown road," and ending at the point designated in the petition. There is no substantial variance in the point of beginning as described in the petition and the report of the viewers. Even if the point of intersection is, as the learned judge of the Court of Quarter Sessions suggested, the outside and not the middle line of the turnpike road, the variance is immaterial—*De minimis non curat lex.* All that the law requires is reasonable certainty in defining the points where the road shall begin and end, and that the road as laid out by the viewers shall begin and end substantially at the points designated in the petition. But, if mathematical exactness were required, it is by no means certain that there is any variance in the point of beginning. The viewers in laying out a road do not fix its width; nor run and mark the outside lines of the road on the ground. They run and mark but one line—the centre line of the road. The point of intersection of two roads, as laid out and marked on the ground by the viewers, is then the point where the middle or centre lines of the two roads intersect—the very point at which the viewers in this case commenced. But if this be not so, it is wholly immaterial whether they commenced at the intersection of the outside or the middle line of the turnpike and public road.

Order setting aside the report for informality is reversed; the report is reinstated, and a *procedendo* awarded.

Bartolett *versus* Dixon.

1. In an action for backing water, all matters in variance were submitted to three referees, "who shall go upon the ground, hear the parties, their proofs," &c., and determine whether the water had been maintained too high. "They shall fix one or more permanent marks": the award of any two of them to be final. The referees reported; that they all met, examined the premises, heard the evidence, &c., and adjourned; that two again met and adjourned: that two again met, the third being sick, and adjourned: that two again met and awarded that the defendant had the right to raise the water to the point named. *Held*, that the award could not be sustained, it appearing on its face that but two heard and deliberated.

2. Exceptions to the award were filed in the court below, they were after argument, overruled and the award was confirmed: the court filed an opinion setting out the facts. *Held*, that the opinion and facts in it were not part of the record and could not be considered in the Supreme Court.

3. It is not necessary where a majority have power to make an award, that it should appear on the face of the award that all the referees heard and deliberated; the presumption is where not made by all, that the minority refused to join.

January 24th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

23 P. F. SMITH—9

[Bartolett *v.* Dixon.]

Error to the Court of Common Pleas of *Chester county:* No. 42, to January Term 1873.

This was an action on the case brought to October Term 1871, by John Bartolett against John W. Dixon. The declaration was that the defendant had raised and maintained a dam on his land too high, by reason of which the water flowed back upon the plaintiff's land.

The following agreement was filed in the case:—

"It is agreed that all matters in variance between the parties in this cause be referred to Elijah F. Pennypacker, Enoch Harlan and George Walter, who shall go upon the ground, examine the same, hear the parties, their proofs and allegations, and determine whether the water of the stream passing through the land of the plaintiff into the land of the defendant, has been raised or maintained by the latter higher than it ought to be; and if so, they shall determine and award what damages shall be paid to the plaintiff therefor, up to the date of their award. They shall fix, by one or more permanent marks to be made by them and particularly described in their award, the height to which the defendant is entitled to flow the water of said stream back upon the land of the plaintiff.

"They shall meet at the dwelling-house of the defendant, on Saturday, October 28th 1871, at nine o'clock, A. M., and the award of any two of them agreeing shall be final, without appeal."

The referees made this award:—

"And now on the 28th day of October, A. D. 1871, The arbitrators within named all met, at the place and near the time appointed, and all of them being first affirmed according to law, they went upon the ground, examined the premises, held a session at the house of the defendant, and having heard the evidence and allegations of the parties, who were represented by counsel, they adjourned to meet at the house of the defendant on the 16th day of November, A. D. 1871.

"On said day two of the arbitrators met at the time and place appointed, to wit, Elijah F. Pennypacker and George Walters, and the waters of French creek being much swollen by recent rains they postponed the further consideration of the case until the spring of 1872 next following.

"May 25th 1872. Two of the arbitrators again met at or near ten o'clock, at the house of the plaintiff, to wit, Elijah F. Pennypacker and George Walter—Enoch Harlan not being present in consequence of being severely sick. They again proceeded to examine the premises, and had the water drawn down so as to expose the remains of an alleged fish-dam, and adjourned to meet again at the house of the defendant, May 28th 1872, at two o'clock, P. M.

"May 28th 1872. Said two arbitrators met at the time and

place proposed, and after fully considering all the facts and circumstances in connection with the case, they do award and determine that the defendant has the right and is entitled to the privilege in accordance with the provisions of a certain agreement entered into April 28th 1804, between Samuel Root and Daniel Root of the first part, and William Shuler of the second part, to raise and flow back the waters of the dam upon the lands of the plaintiff up to within six inches of the under side of an iron bolt, 1 1-16 inches in diameter, driven in a hole drilled in a large rock, situated on lands conveyed by John Hoffecker to defendant. And we further award and determine that in our opinion there is nothing due to the plaintiff by the defendant by way of damage.

"Witness our hands this 28th day of May, A. D. 1872.

"E. F. PENNYPACKER.

"GEO. WALTERS."

The plaintiff filed these exceptions to the award:—

"1. All the referees met upon the ground, viewed the premises, and heard all the testimony that the parties had to produce, and the arguments of counsel, on the 28th of October 1871, and considering that the defendant's dam was higher than it ought to be, adjourned to another day for the purpose of deciding the case and fixing the marks to which the defendant had the right to raise the water. The severity of the weather prevented anything further being done till the following spring.

"2. On the 25th of May 1872, two of the referees met again upon the ground for the purpose of proceeding in the discharge of their duties, and on that day, or on the 28th of May 1872, to which they adjourned, they opened the case and heard further testimony on the part of the defendant, without the consent of the plaintiff, and against his protest and in the absence of counsel.

"3. The two surviving referees have no authority without consent, to open the case or hear further testimony, and if they could legally proceed at all, it could only be to make the award to which all had agreed at the time of their first meeting.

"JOHN BARTOLETT."

The court (Butler, P. J.) overruled the exceptions, confirmed the award, and entered judgment on it. This was assigned for error on the removal, by the plaintiff, of the record to the Supreme Court.

R. T. Cornwell and *W. Darlington*, for plaintiff in error.—All the referees should have heard the case: Painter v. Kistler, 9 P. F. Smith 331; each party having a right to the benefit of the observation and suggestions of all: Backus's Appeal, 8 Id. 186. An authority given to more than one cannot be executed by fewer than the whole number, although one die or refuse: Paley on

Agency 177; Potter *v.* Sterrett, 12 Harris 411; Russell *v.* Gray, 6 S. & R. 145. The award must be according to the submission: McCracken *v.* Clarke, 7 Casey 498.

W. B. Waddell and *P. Frazer Smith* (with whom was *G. F. Smith*), for defendant in error.—Awards of referees being domestic proceedings for composing strife, are favored, and every legitimate presumption will be made to sustain them, and technical objections not be heard: Rogers *v.* Playford, 2 Jones 181; McAdams *v.* Stilwell, 1 Harris 90, 97. So a proceeding which has to be submitted for the approval of the court, has been so submitted, and has been approved, will be presumed to be right. In such case, *omnia præsumuntur rite esse acta.*

It is to be *conclusively* presumed that a judicial tribunal will not decide what it knows to be wrong, and if on its face the proceeding was wrong and the court heard and considered an application to set the award aside; and afterward approved it, there can be no other conclusion, than that there was that in the case which showed that the award was right as *e. g.* that the parties consented that the case should be considered by two: Kline *v.* Guthart, 2 Penn. R. 490; Browning *v.* McManus, 1 Wharton 177; Rogers *v.* Playford, *supra;* Buckman *v.* Davis, 4 Casey 211.

The opinion of the court was delivered, March 17th 1873, by

Mercur, J.—This was an action on the case for raising the defendant's dam too high, and setting back the water upon plaintiff's land.

The parties agreed to refer all matters in variance between them to three persons named, the award of any two of them to be final.

The report signed by two of the arbitrators shows that all three of them met the parties and their counsel upon the 28th October 1871, went upon the ground, examined the premises, heard the evidence and allegations of the parties, and then adjourned to meet on the 16th November 1871. On said day two of the arbitrators met, and in consequence of the waters being much swollen by recent rains, they "postponed the further consideration of the case until the spring of 1872." May 25th 1872, said two referees met, the other arbitrator "not being present in consequence of being severely sick." The two proceeded again to examine the premises, causing the water to be drawn down so as to expose the remains of an alleged fish-dam, and then adjourned to the 28th May 1872. The said two arbitrators met in pursuance of their adjournment upon the 28th of May, "and after fully considering all the facts and circumstances in connection with the case," did award and determine, and completed and signed the report.

To this report the plaintiff filed three exceptions. The first

and second alleged matters of fact not shown by the report. The third was to the action and award of the two referees in the absence of the third. The court overruled them and confirmed the report. To this decision of the court the plaintiff took no exception at the time; but sued out this writ of error. Afterwards, without the request of either party, the court filed an opinion. Several facts are therein averred that do not otherwise appear. This opinion so filed is no part of the record, and the facts therein alleged cannot be considered: Lancaster *v.* DeNormandie, 1 Whart. 49; Moyer *v.* Germantown R. R. Co., 3 W. & S. 91; Meese *et al. v.* Levis, *et al.*, 1 Harris 384.

The validity of this award must be determined by the record alone. An authority given to three cannot be executed by two: Russell *v.* Gray, 6 S. & R. 145; Potter *v.* Sterrett, 12 Harris 412. All the arbitrators must hear the case and deliberate: Backus's Appeal, 8 P. F. Smith 186. It was said in Robinson *v.* Bickley, 6 Casey 384, and again in Painter *v.* Kistler, 9 P. F. Smith 331, that it is not necessary it should appear on the face of the award to have been so done; but if a majority have power to make an award and do make one the presumption is that the hearing, consultation and execution were regular, and that the minority have refused to join in the award. This, however, is a presumption only of a fact. Like other presumptions of fact it may be overcome by competent and sufficient evidence. In this case it is overthrown by the record evidence. The award distinctly shows that the third arbitrator was present at the first meeting only. At the three subsequent meetings two only of the arbitrators met. The question then is, did the third arbitrator so far participate in the hearing and deliberation, as to make the award of the two valid?

Much of the evidence was to be acquired by an examination of the premises. A very important part of the award was to establish permanent marks on the ground. The report shows that the water was drawn down; the remains of the old dam were examined; and the iron bolt was driven or adopted by the two arbitrators only. The third arbitrator was not present. He was not consulted in regard to them. He had no knowledge that they were done. The two only consulted together. They alone considered and deliberated. They alone passed upon the question of damages down to the date of the award. They alone decided the case, seven months after they had held any conversation with the other arbitrator. The facts do not present such a joint consideration and deliberation as the law requires. The learned judge erred in entering judgment upon the award.

Judgment reversed, and the award of the arbitrators is set aside.

Youngman *versus* Walter.

1. Plaintiff sued on a note; the rules of court required only that the affidavit of defence should set out "the nature and character" of the defence; in his affidavit defendant averred, that he and plaintiff were partners and he was induced to sign the note, upon the representation that the plaintiff had received for the firm twice the amount of the note of a ward's money; defendant averred, for reasons stated in the affidavit, that he believed that amount had not been received: *Held*, that this was an averment that the note was executed on a false statement and judgment should not have been entered against defendant for the full amount of the note.

January 28th 1873. Before READ, C. J., AGNEW, WILLIAMS, and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Error to the Court of Common Pleas of *Union county:* No. 186, to January Term 1872.

This was an action brought September 13th 1870, by Jesse M. Walter, guardian, &c., of Sarah J. Walter, and now for her use, against John Youngman.

The following is the instrument on which the suit was brought:—

"$865.66.

"Winfield, June 29th 1863. One day after date I promise to pay Jesse M. Walter, guardian of Rosanna, Margaret and Sarah Jane Walter, the sum of eight hundred and sixty-five dollars and sixty-six cents, without defalcation, for value received, being for one-half of the sum Jesse M. Walter, guardian as aforesaid, received as committee of Abraham C. Eyer, who was committee of Abraham Eyer, Sr., deceased, the whole sum going to the use of Youngman and Walter, myself and Jesse M. Walter constituting said firm. Witness my hand and seal this twenty-ninth day of June, in the year of our Lord one thousand eight hundred and sixty-three, with interest on the above from the 6th of June 1861.

[Signed] "JOHN YOUNGMAN." [L.S.]

By endorsement on the note J. M. Walter assigned it to Sarah J. Walter, on the 6th of August 1870.

A declaration in debt in the common form was filed. The defendant, November 1st 1870, filed an affidavit of defence as follows:—

"John Youngman, the defendant, under oath deposes and says that he has a defence to the whole of the plaintiff's claim, which is as follows, to wit,—That Jesse M. Walter at the time the note was given was and still is a partner of the defendant; that plaintiff, as said partner, stated to defendant that the former had received the amount of the moneys specified in the note upon which suit was brought; that your affiant thinks the firm did not receive the amount specified in said note, as the note sued in No. 82, September Term 1870, of this court, which was for moneys due to the same parties, added to this note amounts to more than one-

[Youngman v. Walter.]

half the wards mentioned in the note were entitled to receive; that their whole share was $2540.76; the said firm having received $1427, for which the note in No. 82, September Term 1870, was given for one-half, or $713.50, thus leaving the one-half amount received by said firm for which this note was given $556.88; that your petitioner never did owe as an individual one dollar of the amount named in said note; that said moneys were all owing by the said firm of Youngman & Walter; that two-thirds of said note have been paid in cash by said firm to the plaintiff, Jesse M. Walter; that the affiant is informed and believes that the business of the firm of Youngman & Walter cannot be settled in this suit, as the partnership still exists, and that your petitioner believes upon a settlement of the accounts of said firm that the plaintiff will owe the affiant more than the amount of said note; that the affiant expects to prove all the facts herein set forth in the trial of the cause. JOHN YOUNGMAN."

It appeared by the docket entries that on the 19th of December 1870, the attorneys for the plaintiff obtained a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence. On the 25th of February 1871, a supplemental affidavit of defence was filed, and on the 1st of December 1871, the rule was made absolute and judgment was entered for the plaintiff for $1400.50. On the 23d of the same month a writ of error was filed.

Afterwards, on the 16th of January 1872, Judge Woods, who was president of the court when the rule was taken, made a certificate not filed amongst the records of the court below, but appearing in the paper-book of the plaintiff in error, and referred to in the opinion of the Supreme Court. In this certificate the judge stated that in deciding on the rule for judgment he had before him only the original affidavit of defence, and that if the supplemental affidavit was in his hands it had been mislaid and that he could not find it.

On the 23d of December 1872, the defendant made another affidavit, which, with the certificate of his counsel Hon. J. C. Bucher, now president of the court below, is as follows:—

"John Youngman, being duly sworn according to law, doth depose and say that the substance of the supplemental affidavit of defence drawn up by the Hon. Joseph C. Bucher, attorney for defendant, and sworn to by deponent, and filed and handed to Hon. Samuel S. Woods before he made his decision, which has been mislaid or lost by the said Hon. Samuel S. Woods, and which he states he never acted on, was in substance as follows:—

"That the note in suit was given for more than was due. That two-thirds of the amount of the note in suit was paid to the plaintiff, Jesse M. Walter, by the defendant, in cash, before the bringing

of this suit and prior to the transfer of the same to Sarah Jane Walter, the present equitable plaintiff,—all of which defendant expects to be able to prove on the trial of the cause.

"JOHN YOUNGMAN."

"I do certify that the foregoing affidavit of John Youngman, plaintiff in error and defendant below, contains the substance of the supplemental affidavit of defence which I, as attorney of said Youngman, filed on the 25th of February 1871, before the argument of the rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence, and handed to Judge Woods before he made his decision, which supplemental affidavit of defence, according to statement of Judge Woods, was mislaid or lost and was not before him when he made his decision.

JOS. C. BUCHER."

The rules of the Court of Common Pleas of Union county require that the affidavit of defence shall set forth "the nature and character of the same."

The error assigned was—that the court below erred in entering judgment for want of a sufficient affidavit of defence.

G. F. Miller, for plaintiff in error.—All that is required in an affidavit of defence is that it should exhibit a primâ facie defence: Leibersperger *v.* The Savings Bank, 6 Casey 531; Eyre *v.* Yohe, 17 P. F. Smith 477.

J. M. Linn, for defendant in error.—An affidavit of defence must exclude the possibility of evasion: Comly *v.* Bryan, 5 Wharton 261.

The opinion of the court was delivered, February 24th 1873, by MERCUR, J.—The alleged error is, that the court entered judgment for want of a sufficient affidavit of defence. The plaintiff claimed upon a note executed by John Youngman, under seal, payable to Jesse M. Walter, guardian of Rosanna, Margaret and Sarah Jane Walter, for $865.66, being for one-half the sum which said Jesse, as guardian, had received for himself and said Youngman. The obligation was assigned to said Sarah Jane before suit was brought. The original affidavit of defence filed was not drawn with great clearness and precision. Rejecting much irrelevant matter therein contained, we understand the defendant to aver that he and the plaintiff were at the time of the execution of the note, and still are, copartners. That he was induced to sign the note under the representation of the plaintiff that he had received twice that amount of his ward's money for the use of their said firm; but now he gives some reasons why he does not believe the firm received the sum alleged. Thus substantially affirming that he was induced to

execute the note under a false statement of existing facts, which might establish a partial failure of consideration. He further averred that two-thirds of said note had been paid in cash by said firm to said plaintiff. In his supplemental affidavit he distinctly avers, that the note was given for more than was due, and that two-thirds of the amount of the note had been paid to the plaintiff by the defendant in cash before the bringing of the suit, and prior to the assignment of the note to the equitable plaintiffs, all of which he expected to be able to prove upon trial. It appears by the certificate of the learned judge that he did not have the supplemental affidavit before him when he directed judgment to be entered. Considering the original affidavit insufficient he ordered judgment to be entered against the defendant for the full amount of the plaintiff's claim. In this we think the court erred. The rules of court require the affidavit to set forth the nature and character of the defence. The defendant does aver that he has a defence to the whole of the plaintiff's claim. The nature and character thereof is an absence in part of consideration for the note and an actual payment in cash, of two-thirds of the note. While the extent of the failure of consideration is vague and indefinite, yet the averment of the amount paid upon the note in cash is sufficiently positive and specific if proved to establish a defence against two-thirds of the amount of the claim.

Judgment is reversed, and *procedendo* awarded.

Menges *et al. versus* Frick *et al.*

1. A debt was due October 6th 1862, suit was brought October 6th 1868; *Held*, not barred by the statute.
2. When suit is brought within six years after the day on which the cause of action arose that day is to be excluded from the computation.
3. When a thing is to be done within a certain time from a prior date and the party is deprived of a right by its omission, the day from which the count is to be made is excluded from the computation.

January 29th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Error to the Court of Common Pleas of *Union county:* No. 77½, to July Term 1872.

This was an action of assumpsit brought October 6th 1868, by John Menges and Solomon Menges against Henry Frick and others, trading as Frick, Billmeyer & Co. The cause of action was a book-account for lumber furnished by the plaintiffs to the defendants. The declaration was in the common counts; the plaintiffs also filed a copy of their account, charging defendants with lumber furnished them. The account was:—

[Menges *v.* Frick.]

"Lewisburg, October 7th 1862.

"Frick, Billmeyer & Co. bought of John & Sol. Menges.

1862.				
June 8.	Timber, * * *	$88.23		
Oct. 6.	Timber, * * *	147.36		
				$235.59
June 8.	By Cash, ...	$50.00		
Sept. 24.	Do.	100.00		
				$150.00
	Due, ...			$85.59

The pleas were non assumpsit, set-off and the Statute of Limitations.

The case was tried February 22d 1871, before Woods, P. J.

The plaintiffs gave evidence that the foregoing account was in the handwriting of a clerk of the defendants, and had been handed to the plaintiffs as a copy taken from defendants' books.

The defendants gave evidence that they had bought the timber in the foregoing bill from John Menges alone, and their firm had never had a contract for timber with John and Solomon Menges until October 1862; defendants' books showed no entry of an account with them.

Defendants' books showed this account:—

"Oct. 6th '62, John Menges, Cr.

By 783 ft. oak on June 8th 1862,	C.H.	.	$ 86.13
" 30 ft. pine " " " "	7c.	.	2.10
" 551 ft. " Oct. 6th 1862,	7c.	. .	38.57
" 989 " oak " " "	11c.	. .	108.79
			$235.59"

Both parties gave other evidence in support of their respective cases.

The following are points of the plaintiffs with their answers:—

2. Even if the timber was to be paid for on the day of delivery (October 6th 1862), the defendants had the whole of that day to make payments, and plaintiffs could not sue until the next day, (October 7th 1862), from which latter date the statute would begin to run, and is no bar.

Answer: "Where personal property is sold and nothing said as to the time when it is to be paid for, it is payable immediately on the delivery, and an action would accrue immediately, and the party delivering the goods need not wait until the next day to bring suit, if the purchaser does not pay for the property at once on the delivery. We therefore refuse to answer this point as requested."

[Menges v. Frick.]

3. The statute in this case could not commence running until the plaintiffs' right to institute suit had arrived, which in no event was prior to the 7th of October 1862, and the statute is therefore no bar to plaintiffs' recovery.

Answer: "The first part of this point is correct, to wit: 'That the statute in this case did not commence running until the plaintiffs' right to institute suit had arrived,' but we cannot say that this right did not commence before the 7th day of October 1862."

The defendants' point and the answer were:—

The proof being clear and undisputed, that the last item in plaintiffs' claim was October 6th 1862, and the suit was instituted on the 6th day of October, 1868, which was one day too late, and the verdict must be for the defendants.

Answer: "This is so, and we answer it as requested."

The court charged:—

"The defendants rely for their defence mainly on the Statute of Limitations. From the showing of the plaintiffs this would be an available defence for this action, and the plaintiffs cannot recover the account claimed. We have answered the points of both plaintiffs and defendants to this effect."

The verdict was for the defendants; the plaintiffs took a writ of error, and assigned for error the answers to the points and the charge of the court.

G. F. Miller (with whom was *J. Porter*), for plaintiffs in error. —In computing the time for the running of the Statute of Limitations, the day on which the debt fell due is to be excluded: Overton *v.* Tyler, 3 Barr 346; Sims *v.* Hampton, 1 S. & R. 411; Cromelien *v.* Brink, 5 Casey 522; Pugh *v.* Duke of Leeds, Cowper 714; Webb *v.* Fairmaner, 3 M. & W. 473; Young *v.* Higgon, 6 Id. 49; Robinson *v.* Waddington, 13 A. & E. (N. S.) 753: Green's Appeal, 6 W. & S. 327; Marks *v.* Russel, 4 Wright 372.

J. M. Linn, for defendants in error.—The suit must be commenced within six years from the time the cause of action accrues: Vanhorn *v.* Scott, 4 Casey 316; Overton *v.* Tracey, 14 S. & R. 311. This is, therefore, to be taken to be the understanding of the parties: Thompson *v.* Ketcham, 8 Johns. 189. The presumption is that payment for goods sold is to be on demand: Warren *v.* Wheeler, 8 Metc. 97. The statute runs from the date of a note payable on demand: Tidd's Prac. 17; Taylor *v.* Whitman, 3 Grant 138; Girard Bank *v.* Penn Township Bank, 3 Wright 92; 2 Kent Com. 496. The defendants had not the whole of October 6th to pay, but were bound to pay immediately: Presbrey *v.* Williams, 15 Mass. 193; Glassington *v.* Rawlins, 3 East 407.

[Menges v. Frick.]

The opinion of the court was delivered May 17th 1873, by

WILLIAMS, J.—The only question necessary to be considered in this case is, was the plaintiffs' action barred by the Statute of Limitations? The last item of timber in the account sued on was delivered on the 6th of October 1862, and the action was commenced on the 6th of October 1868. The act provides that actions for account shall be commenced and sued "within six years next after the cause of such actions or suit, and not after." There can be no doubt that the cause of action in this case arose on the day the timber was delivered. If that day is to be excluded from the reckoning, the six years had not expired when the suit was commenced. But why, even if the words of the act are to receive a strict and literal construction, should it not be excluded? "Within six years next after the cause of action or suit," as applied to the facts of this case, must necessarily mean within six years next after the day on which the timber was delivered. The day of the delivery must, therefore, be excluded in counting the time within which the action may be brought. If suit may be commenced within six years next after the day on which the cause of action arose, then it is too plain for argument that that day is not to be included in the computation. But if there could be any doubt as to the proper construction and meaning of the act, the rule must now be regarded as settled that when an Act of Assembly requires a thing to be done within a certain time from or after a prior date, and deprives the party of a right for omitting it, the most liberal construction is to be chosen, and the furthest time given from which the reckoning is to be made. In other words, the day from or after which the count is to be made, is to be excluded in computing the time within which the act may be done: Green's App., 6 W. & S. 327; Cromelien *v.* Brink, 5 Casey 522; Marks's Ex. *v.* Russell, 4 Wright 372; Brisben *v.* Wilson, 10 P. F. Smith 452; Duffy *v.* Ogden, 14 Id. 240. The court below was, therefore, in error in instructing the jury that the Statute of Limitations is an available defence to this action, and the plaintiffs cannot recover the account claimed.

Judgment reversed, and a *venire facias de novo* awarded.

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Richard *versus* Brehm.

1. Richard cohabited with a woman as his wife for many years; they addressed each other as husband and wife; spoke of each other, and executed deeds with acknowledgments as such; she made a will calling herself his wife and devising to him as her husband. In ejectment against him by a devisee under a subsequent will, he, claiming by the curtesy, testified: "the marriage ceremony never was performed only by mutual consent, we lived as man and wife. I promised to marry her." *Held*, to be evidence of marriage as between themselves as well as to third persons.

2. The consent of the parties is all that is required for a valid marriage.

[Richard v. Brehm.]

3. If the contract be made *per verba de futuro* and be followed by consummation, it is a valid marriage.

4. Marriage may be proved by reputation, declarations and conduct of the parties: and other circumstances usually accompanying the relation.

5. Cohabitation *and* reputation are necessary to establish a presumption of marriage where there is no proof of actual marriage.

February 3d 1873. Before READ, C. J., SHARSWOOD, WILLIAMS and MERCUR, JJ. AGNEW, J., at Nisi Prius.

Certificate from Nisi Prius: No. 234, to July Term 1870.

This was an action of ejectment for a messuage and three lots of ground in Philadelphia, brought July 20th 1870, by Richard H. Brehm against John H. Richard.

The plaintiff claimed as devisee of Mary E. Richard; the defendant claimed as tenant by the curtesy as surviving husband of the same Mary E. Richard.

The question in the case was, whether Mary E. Richard had been the wife of the defendant, John H. Richard.

The cause was tried at Nisi Prius, February 6th 1871, before THOMPSON, C. J.

The plaintiff gave evidence showing that the title to the premises was in Mary E. Richard at the time of her death.

Also her will dated May 24th 1870, and proved July 5th 1870, in which she described herself as "Mary Elizabeth Richard wife of John H. Richard," and by which she devised "all my real estate situate in Philadelphia or elsewhere to my nephew Richard Holbrook Brehm," in fee.

The plaintiff having closed, the defendant testified that in 1831 he became acquainted with Mary E. Richard: "I am no relation to her, only she was my wife. I commenced to live with her on Second street near Carbon House; next to Catharine street near Second; lived there two years; next lived in Christian street; kept men; lived there 18 months. Went to Charleston, South Carolina; lived there from 1845 to 1848; her mother and father along. Came back and lived on Callowhill street; rented from Mr. Sellers; I went to Agassiz in Cambridge. Went to Washington; and then next to Falls of Schuylkill; lived 10 years before these properties were bought."

It was then proposed to ask defendant: If after the purchase he made a will in Mary E. Richard's presence and delivered it to her and she made a will and delivered it to him?

Also: Under what circumstances the will now handed to witness purporting to be a will of Mrs. Richard, prior in date to that given in evidence, was delivered to him?

The questions were each objected to by the plaintiff, severally rejected by the court, and bills of exceptions sealed for the defendant.

On cross-examination defendant said: "The marriage ceremony

was never performed, only by mutual consent; we lived as man and wife. I promised to marry her before we went to Charleston, about two weeks. Nobody knows that we were not married."

The defendant then gave in evidence a will of Mary E. Richard, dated March 27th 1858, executed in the presence of three witnesses.

The will commenced: "Be it remembered that I, Mary Elizabeth Richard, wife of John H. Richard * * * do make and publish my last will," &c.

She then directed the payment of her debts and proceeded:—

"All the rest * * * of my estate * * * I do give * * * unto my said husband, John H. Richard," &c.

The defendant gave evidence by a large number of witnesses that John H. Richard and Mary E. Richard lived together as husband and wife for many years; that they spoke of each other as husband and wife; that she said he sent her money for all her wants.

Mrs. Young, sister of Mrs. Richard, testified, that Richard told her Mary was not his wife, and never had been; he said he would expose her. On being told this Mrs. Richard said Richard had promised not to tell it; he said everything was hers; before this conversation they had lived together as man and wife; he said he thought it as good as any way.

The defendant gave in evidence, a mortgage executed and acknowledged by Richard and wife; three letters from him to "Mrs. Richard," dated January 1856, January 1858 and February 1858, also deeds of the premises executed to her as his wife.

The plaintiff's first point was:—

If the jury believe that the defendant was not married to the deceased; that he promised to marry her, and did not do so, then he has acquired no right, as her husband, to her real estate.

The defendant's first point was:—

If the defendant was the husband of the testatrix, plaintiff cannot recover.

The court charged: * * *

"To the first point on part of the plaintiff I assent. It has been proved by the defendant himself, that he never was married to the plaintiff's testatrix, but that they lived and cohabited for many years as man and wife. While this constituted a marriage as to all the world in matters pertaining to business transactions, yet it has not that effect as between themselves. To the public, so living and cohabiting raises a conclusive presumption of marriage, for it may know nothing to the contrary, but a party to the presumptive marriage who fully knows that no marriage exists and who has lived in violation of law in this respect, does not stand on that footing, and he cannot claim the incidents of marriage when no marriage existed. To allow this, would be to permit him to take advantage

of his own wrong, a thing the law always refuses to do. The defendant made no mistake when he testified that he and the testatrix were never married. Cohabitation did not as to either, amount to lawful marriage. They mutually agreed to live together, he said, and agreed to keep it a secret that they were not married. This was not a marriage as to them. If they had gone through a marriage ceremony in the presence of competent witnesses, I believe it would have been sufficient in law for all the purposes of a legal marriage and sufficient to have entitled the defendant to the possession of the property in question, as tenant by the curtesy, but they did not do this. The defendant ought not to expect immunity from the responsibilities of married life and possess its benefits also. For instance, under the facts disclosed he could not have been made to suffer the penalties of bigamy if he had married another woman during his supposed wife's life, nor be punished for adultery if he had committed that crime, for in these cases actual, not presumptive marriage must be proved. To this extent, we would loosen some of the most important bonds of matrimony, if we were to hold the defendant entitled to the incidents of actual marriage, although there was none without its responsibilities. The jury can have no difficulty in finding from the testimony the state of facts here referred to. We hear them from the defendant on the stand, and from the testimony of the sisters of the testatrix. Both concur that they were never married and were to keep the fact secret. If this be so the defendant cannot hold the property in question as tenant by the curtesy. About this we see no ground to doubt. We have legislation very particularly regulating marriage in this state, and people complying with it will be in no danger of difficulties like the present; if they do not, they must abide the consequences. * * *

"To defendant's first point I cannot assent. It is true as a general rule. But if there was no actual marriage between defendant and the testatrix, no such relation as husband and wife existed as to them, and defendant would not be entitled to hold the property in question as tenant by the curtesy. This is more fully explained in answer to plaintiff's point, which is adopted as a further answer to this point." * * *

The verdict was for the plaintiff. The defendant had the case certified to the court in banc, and assigned for error:

2, 3. The rejection of his offers of evidence before stated.

8. The answers to the plaintiff's first point and the defendant's first point.

D. W. Sellers, for plaintiff in error.—The concurrent publication of the will of the defendant *as husband*, and of Mary Richard *as wife*, was a celebration and proclamation of the marriage: Vincent's Appeal, 10 P. F. Smith 228. Taking each other as man and

wife, with cohabitation and reputation, constituted a marriage: Com. *v.* Stump, 3 P. F. Smith 132; Physick's Estate, 2 Brewster 179; Vincent's Appeal, 10 P. F. Smith 228; Omohundro's Estate, 16 Id. 113.

W. L. Hirst, for defendant in error.

The opinion of the court was delivered, May 17th 1873, by

MERCUR, J.—This was an action of ejectment in which the plaintiff brought suit to recover as the devisee of Mary E. Richard. Defence was made principally upon the ground that the defendant was the surviving husband of said Mary. That fact was denied and presented the controlling question in the case.

Marriage is a civil contract *jure gentium*, to the validity of which the consent of parties, able to contract, is all that is required by natural or public law. If the contract is made *per verba de præsenti*, though it is not consummated by cohabitation, or if it be made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary: 2 Greenl. Evid., § 460. Marriage is a civil contract which may be completed by any words in the present time, without regard to form: Hantz *v.* Sealy, 6 Binn. 405. The fact of marriage then may be proved and established by competent and satisfactory evidence.

What kind of evidence is held to be satisfactory? Marriage may be proved in civil cases, by reputation, declarations, and conduct of the parties, and other circumstances usually accompanying that relation: 2 Greenleaf's Evid. § 462. For civil purposes reputation and cohabitation are sufficient evidence of marriage: Senser *et al. v.* Bower *et ux.*, 1 Penna. Rep. 450. 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, 1 Casey 326. Both cohabitation and reputation are necessary to establish a presumption of marriage, where there is no proof of actual marriage; Commonwealth *v.* Stump, 3 P. F. Smith 132. Marriage is in law a civil contract, not requiring any particular form of solemnization before officers of church or state: Idem. Unequivocal and frequent admissions of marriage, accompanied by long-continued cohabitation and reputation, are frequently most satisfactory evidence of marriage: Vincent's Appeal, 10 P. F. Smith 228.

Ought the evidence in this case to have been submitted to the jury to find whether the marriage relation existed between John H. Richard and Mary E. Richard? It shows that from about the year 1832 down to the time of her death in 1870, they lived and cohabited together as man and wife. They recognised and addressed each other as husband and as wife. She called him her hus-

band, he called her his wife. During all that time she bore his name. The three several deeds given in evidence by the plaintiff below, bearing date in 1856 and 1857, show that the land was conveyed to her as the wife of John H. Richard. Upon the 27th of March 1858, she duly executed, in the presence of three witnesses, a last will and testament, in which she describes herself as "wife of John H. Richard." She therein gives all the residue and remainder of her estate "unto my said husband, John H. Richard, his heirs," &c.

Again, in the very will, under which the plaintiff claims, of the 24th of May 1870, she describes herself as "wife of John H. Richard."

More than a dozen different witnesses who had been acquainted with them for a time varying from eight to eighteen years, concur in testifying that during all that time they lived together as man and wife, and were so reputed by all their acquaintances. Thus, for nearly forty years, all those evidences of reputation, declarations, and conduct, which usually accompany the marriage relation, are clearly shown to have existed. The evidence which the learned judge held sufficient to overcome this long-continued and consistent life of the parties, was their separate declarations upon one occasion not long prior to her death, and his testimony upon the trial, that they had never been married. The declarations are proven by a sister of Mrs. Richard, who testifies that was the first knowledge she had of it; and he testifies that the marriage ceremony was never performed. He swears, however, "by mutual consent we lived as man and wife;" and again, "I am no relation to her, only she was my wife." Again he said, "I promised to marry her. Nobody knows that we were not married." It seems to us that the whole testimony is reconcilable, by assuming him to mean that no formal marriage ceremony had been performed by any third person uniting them in marriage; but that they had agreed to a marriage. That they recognised it as a marriage contract, and had always recognised and fulfilled it as such. His declaration made upon one occasion, when angry at his wife, to her sister, that they were not married, after more than thirty-five years of apparent wedded life, was certainly very weak evidence to rebut the presumption of marriage. Nor did his testimony upon the trial, necessarily go any further than to negative the one form of entering into a marriage contract. It did not preclude the jury from finding that a valid marriage contract had otherwise been entered into between the parties. The evidence was amply sufficient to have submitted this as a question of fact to the jury. Whether the agreement of marriage preceded or followed the first sexual intercourse, whether it was five or ten years thereafter, if clearly made and proved, it established a valid marriage. The learned judge therefore erred in virtually taking the case from

the jury, and in saying this was not a marriage as to them. He should have affirmed the first point submitted by the defendant below, and to the extent we have indicated qualified the first point submitted by the plaintiff.

We think the evidence referred to in the second and third assignments of error should have been received, so far as it tends to prove the acts and declarations of the parties indicating a subsisting marriage relation existing between them. The other assignments of error are not sustained.

Judgment reversed, and a *venire facias de novo* awarded.

Blaylock's Appeal.

1. B. was a special partner in the firm of H. & S. who owned the real estate, which was about to be sold by the sheriff, it was agreed that if B. would buy the property at sheriff's sale, S. would procure D. a lien-holder to accept from B. a mortgage on the property for his debt and if B. should sell at an advance he would apply the excess to the payment of the firm debts and would divide any further excess with S. Z. purchased for B. for enough to pay D's lien and costs, which were paid in cash: the deed was made to Z. *Held*, that the property was in trust for the purposes of the agreement, and, the firm debts having been paid, Z. was ordered to convey to B. for the trust.

2. The income until the sale was to be applied to reimburse B. for the purchase-money: and when sold B. to account for the rents.

3. S. was not entitled to a conveyance of the moiety subject to B.'s advance; but B. was enjoined from selling at private sale without the consent of S. or at public sale without notice to S.

February 3d 1874. Before READ, C. J., SHARSWOOD, WILLIAMS and MERCUR, JJ. AGNEW, J., at Nisi Prius.

Appeal from the decree at Nisi Prius: No. 350, to July Term 1869: In Equity.

On the 20th of July 1869, Henry Samuel filed a bill against Lewis Blaylock, George W. Zeigler and D. P. Cubberly. The bill set out:—

1. A limited partnership for manufacturing hats had been formed January 1st 1867, in which Samuel (plaintiff) and P. Herst were general partners, and Blaylock (defendant) special partner.

2. Plaintiff and Herst owned a lot of ground on Cherry street, &c., Philadelphia, on which were a factory and warerooms, where the firm of Herst & Samuel transacted their business.

3. In the winter of 1868–1869 the firm became embarrassed; several judgments had been recovered against them;—one in favor of David Samuel, for $10,250; another in favor of Eli Keen, for $1705.08;—under the second judgment the property had been taken in execution and was advertised to be sold by the sheriff on the 3d of May 1869.

[Blaylock's Appeal.]

4. The property being worth more than the liens against it, the plaintiff and Herst were desirous of saving it for the benefit of their creditors, and, if possible, for the firm after the payment of their debts; in this, before the sale, Blaylock appeared to acquiesce, and proposed to the plaintiff and Herst to buy the property at sheriff's sale to effect those purposes; in consequence, Blaylock, Herst, the plaintiff with his counsel and the counsel of the execution-creditor, met a few days before May 3d 1869, when it was agreed between Blaylock, Herst and the plaintiff, that if the property should bring at sheriff's sale no more than enough to cover David Samuel's lien and the expenses of the sheriff's sale, Blaylock would buy it and hold it for the benefit of the creditors of the firm of Herst & Samuel, and after the payment of the firm debts, then for the benefit of plaintiff and Blaylock. To enable Blaylock to do this, David Samuel agreed that if Blaylock should become the purchaser, he (Samuel) would receive for his debt a new lien on the property from the purchaser; the agreement between the plaintiff, Herst and Blaylock was reduced to writing and signed by Blaylock.

5. Blaylock, in violation of his agreement and in fraud of the plaintiff, colluded and conspired with Zeigler to buy the property at sheriff's sale for $10,800—just enough to pay David Samuel's lien and the expenses of sale; the premises were in fact bought by Blaylock, he furnishing the money, and Zeigler was merely his instrument, covinously allowing his name to be used to assist Blaylock in his fraud on the plaintiff and Herst.

6. The plaintiff, confiding in the good faith of Blaylock and believing that he would carry out the agreement, did not prepare himself to protect his interest at the sale as he could have done.

7. All the debts of the firm of Herst & Samuel had been paid.

8. The property was worth much more than $10,800 and prior encumbrances; and, as plaintiff was informed and believed, Blaylock had entered into an arrangement to sell it to the defendant Cubberly for $40,000, a part of which had been paid by Cubberly, who had gone into possession.

The prayers were that Blaylock and Zeigler be restrained from selling the property and executing a deed to Cubberly; that Cubberly be restrained from purchasing and accepting a conveyance; that Blaylock and Zeigler be declared trustees for the plaintiff and Blaylock in equal shares, subject to the $10,800 and prior encumbrances, and that Blaylock and Zeigler be decreed to convey to the plaintiff an undivided moiety of the property subject to the $10,800 and prior encumbrances; and for further relief.

The agreement named in the proceedings "Exhibit B." and referred to in the bill was:—

"This agreement made between Philip Herst and Henry

Samuel of the first part, and Lewis Blaylock of the second part, witnesseth: Whereas, a certain three-story brick factory, &c., have been taken in execution and are to be sold on the 3d day of May 1869, by the sheriff, &c., which said premises are bound by the lien of a judgment in favor of David Samuel for ten thousand dollars, exclusive of interest accrued thereon. And whereas, the said Lewis Blaylock intends to bid at the said sheriff's sale for the said premises: Now the parties of the first part do agree with the party of the second part, that if the party of the second part should become the purchaser of the premises aforesaid at the said sheriff's sale, that they, the parties of the first part, will procure the said David Samuel to accept from the said Lewis Blaylock, his bond, secured by mortgage upon the said premises, for the sum of ten thousand dollars, subject to the prior mortgage and ground-rents now on the said premises, to be made payable in instalments of two thousand dollars a year, in payment of so much of the judgment of the said David Samuel, and that upon the payment of the residue of the said judgment, the parties of the first part will procure the said David Samuel to enter satisfaction of record thereon, provided, &c., the said Lewis Blaylock, shall insure, &c., *and in consideration thereof* the said party of the second part does agree, &c., that if he should become the purchaser of said premises at the said sheriff's sale, and should thereafter at any time, sell the said premises for a greater sum than the price at which the same shall be so purchased by him, and the costs, charges, interest and expenses, suffered or expended by him in relation to the said premises after such purchase, that then he, the party of the second part, will apply such excess or net profit which may arise from such *subsequent sale* of the premises to the payment or settlement of the debts due by the said parties of the first part, as partners, under the firm of P. Herst & Samuel, and that if after such settlement or payment of said debts, any residue of the net profits aforesaid should remain, that such residue shall be equally divided between Henry Samuel, one of the parties of the first part, and him, the said Lewis Blaylock, the party of the second part.

"In witness whereof, the said parties hereto have hereunto set their hands and seals, this the day of A. D. 1869.

[L. S.]
[L. S.]
LEWIS BLAYLOCK, [L. S.]"

Blaylock answered admitting the first, second, third and seventh paragraphs of the bill.

4. He denied the fourth and averred, that he agreed if he purchased the property to hold it in trust for the firm, but did not agree to purchase at any price; he signed an agreement not in his possession which would determine his engagement.

[Blaylock's Appeal.]

5. He denied that he combined with Zeigler or procured him to buy the property; respondent bid $10,600, which was as much as he was satisfied to bid; he did not know, when the property was struck down, that it was purchased by Zeigler; respondent had no interest in the property; he denied that he violated any agreement or contemplated or perpetrated a fraud on the plaintiff.

6. He was ignorant of the allegations of the sixth paragraph.

8. He did not know that Zeigler had agreed to sell the property; neither he nor Cubberly had paid respondent any money; he was informed that Cubberly is in possession.

Zeigler answered that he was ignorant of the averments in paragraphs one, two, three, four, six and seven, of the bill.

5. He denied that he colluded or combined with Blaylock to become purchaser of the property at sheriff's sale; he attended the sale and purchased at his own instance; there was no privity between him and Blaylock; he had no knowledge of the arrangement and agreement mentioned in paragraph five.

8. He was exclusive owner of the property; had leased it to Cubberly for five years, with an option to him to purchase; and being no party to any arrangement between plaintiff and Blaylock, he had been advised it was not material for him to answer further.

Cubberly answered that he had no knowledge of the matters alleged in the bill, except that he was tenant of the property for five years, with an option to purchase which he had not exercised; he had given no money to Blaylock.

A replication was filed, and an examiner appointed.

On the coming in of his report, William M. Smith, Esq., was appointed master.

The master reported amongst other things: * * * "It is shown conclusively by the testimony, that David Samuel had agreed to accept Blaylock's bond and mortgage, had it been tendered him in lieu of the cash, for the amount which was due to him by the firm, and the fact that it was to be a *second* mortgage with ground-rents and another mortgage ahead of it on the property, is, I think, sufficient to prove that David Samuel was perfectly willing to *do anything* to assist the firm out of their difficulties.

"I leave this part of the case therefore with the conclusion that the paper marked 'Exhibit B,' does not accurately and truly set forth the real agreement between these parties, and that even if it did, it presents no such a case as would refer the plaintiff exclusively and entirely to his action at law, and estop him from going into equity for the purpose of restraining the continuation of an alleged fraud upon his rights in the property, which is the subject of this controversy. * * *

"The weight of the evidence is sufficient to satisfy me:

"That the agreement was positive and distinct between all the parties that Blaylock should buy the property, and that he *would* buy it for himself and the other members of the firm;

"That Blaylock himself originated the plan and personally proposed and urged it on the other partners, both of whom gave their consent to it, subsequently assisting him and co-operating with him as far as they could in carrying it out;

"That at Blaylock's instance, and without the knowledge of the other partners, an alteration was made in the agreement before the sheriff's sale, whereby Herst was to be excluded from its benefits; an alteration which was binding on Mr. Herst himself, only because he had ample notice of it, acquiesced in it, and never subsequently entered either objection to, or protest against it;

"That Blaylock actually became the purchaser at the sheriff's sale, furnishing all the money, and using the name of George W. Zeigler for the purpose;

"That while there is no positive evidence to show that the defendant Zeigler knew before the sale *all the terms* of the agreement between Blaylock and his partners, there is enough to show that he acted throughout the whole operation as the friend and confidant of Blaylock, that he took the title to the property from the sheriff *for* Mr. Blaylock, that if he yet holds the title, he holds it for Blaylock, and that he has permitted the use of his name in every necessary way since the date of the sheriff's sale for the purpose of giving a bonâ fide appearance to the transaction.

"The witness Herst says that Mr. Blaylock himself suggested that he should become the purchaser of the property; that Blaylock came to him and asked him whether he would not prefer that hs should buy the property and hold it for the benefit of all concerned; that he and Henry Samuel and Blaylock conferred together on the subject, and that finally it was agreed that Blaylock should be permitted to buy without objection or opposition on their part, with the understanding that he should hold the property for the benefit of all the members of the firm, subject nevertheless, only to the claims of bonâ fide creditors. This was the trust, therefore, which was assumed by Blaylock. * * *

"Recurring now to the only remaining, but most important question in the case, whether Blaylock actually did buy this property or not? I think the evidence establishes the fact that he did so buy it; that he used Mr. Zeigler's name for the purpose; that he furnished all the money that was necessary for the operation, and by an arrangement between himself and Zeigler, procured the latter to take the title, in order to give a bonâ fide appearance to the transaction, and to deprive the plaintiff of all interest in the property or in the profits of the resale. * * *

In the opinion of the master, therefore, it should be ordered,

[Blaylock's Appeal.]

adjudged and decreed that Lewis Blaylock holds the real estate described in the bill, to wit:

"'All that certain lot or piece of ground, with the buildings and improvements thereon erected, situated on the south side of Cherry street, between Third and Fourth streets," &c., in trust for himself, the said Lewis Blaylock, and for the complainant, Henry Samuel, in equal undivided moieties; subject to the payment to the said Blaylock of the sum of $10,800, with interest thereon from the 8th of May 1869, out of the proceeds of the sale of the same when sold, and subject also to prior encumbrances existing on 8th May 1869, the date of the execution and delivery of the sheriff's deed; that George W. Zeigler is a trustee for the same without any real interest therein, and that he, the said George W. Zeigler, is hereby ordered and directed to execute a conveyance in fee of the same to the said Lewis Blaylock, who shall hold the same for himself and the complainant, Henry Samuel, in trust as aforesaid.

"That an injunction be granted enjoining and restraining the said Lewis Blaylock and George W. Zeigler severally from conveying or encumbering said premises, and from executing any deed therefor, other than as is herein ordered.

"That said Blaylock be ordered and directed to pay to complainant the one-half of all the rents of said premises heretofore paid by the defendant, D. P. Cubberly, with interest from the date of collection, less the taxes and interest on said prior encumbrance, and that an account be taken thereof.

"And that the defendants, Blaylock and Zeigler, pay the costs of these proceedings."

Exceptions were filed to the master's report which, December 30th 1871, were overruled at Nisi Prius (SHARSWOOD, J.), and the decree recommended by the master made.

The cause was then referred to the master to state an account.

He reported an account which with a modification was confirmed by the court at Nisi Prius (AGNEW, J.), March 28th 1872.

The defendants appealed to the Supreme Court in banc; and in a number of specifications assigned for error the decree made at Nisi Prius December 30th 1871.

D. W. Sellers (with whom was *G. W. Dedrick*), for Blaylock, appellant.

J. Samuel, for appellee.—Zeigler and Blaylock made themselves trustees *ex maleficio* for complainant. Blaylock having put himself in a relation of confidence with plaintiff, by collusion with Zeigler, he got the premises in such a manner as abused that confidence: Kisler *v.* Kisler, 2 Watts 323; Morey *v.* Herrick, 6 Harris 123; Hogg *v.* Wilkins, 1 Grant 67; Seichrist's Appeal, 16 P. F. Smith 237; Seylar *v.* Carson, 19 Id. 81.

[Blaylock's Appeal.]

The opinion of the court was delivered, February 13th 1873, by SHARSWOOD, J.—Upon a careful examination of the testimony I am unable to discover anything which varies the agreement in writing set forth as the ground of the bill. The evidence before the examiner was given without objection, and was entirely proper as explaining the relation between the parties, and the circumstances which led to the agreement. These facts are always admissible and may be considered in the construction of a written agreement. It appears that the verbal understanding originally was, that Herst was to have an interest of one-third in the premises, if purchased by Blaylock, but with his acquiescence that was changed, and the final arrangement was as expressed in the writing, that if Blaylock became the purchaser at the sheriff's sale, he was to hold the property in trust to sell and after paying encumbrances, to apply the proceeds to discharge the debts of the firm of P. Herst & Samuel, and to divide the surplus, if any, equally between Blaylock and Samuel. It is in evidence, and is not a matter in dispute, that all the debts of the firm of P. Herst & Samuel have been settled and paid, so that Herst has no longer any interest in the controversy. It clearly appears also, that Herst and Samuel had performed their part of the contract by procuring the consent of David Samuel to accept the bond and mortgage of Blaylock for his judgment. It is true that Blaylock did not covenant to become the purchaser, but it is equally true, that if he did purchase, he could not throw aside the obligations of the agreement by paying David Samuel in cash, instead of giving his bond and mortgage. If he bought he must hold the property upon the trust upon which he had agreed to hold it in that event.

The master reports that Blaylock was in fact the purchaser, though in the name of Zeigler, to whom he lent or furnished the money to pay for it, and we think that he is fully sustained in that finding by the evidence, for the reasons he has stated. The testimony of Blaylock and Zeigler themselves, with the circumstances as detailed by other witnesses, lead the mind to this conclusion, and overcome the answers. This being so, Zeigler's legal title is equally affected and bound by the trust. Blaylock had no right to substitute another person as trustee without the consent of Samuel. So much, therefore, of the decree below as declared the trust to exist and ordered Zeigler to execute a conveyance in fee to Blaylock to hold in trust, as expressed in the agreement, was certainly right. But we think it should have stopped there. There is no right or equity in Samuel to be paid one-half the net income. Until the sale takes place the rents are applicable in the first instance to the reimbursement of the amount advanced by Blaylock. When the sale takes place Blaylock must, of course, account for the rents. The bill does not pray for an account, nor for a sale, and the prayer that a conveyance should at once be

[Blaylock's Appeal.]

made to Samuel of a moiety of the property, subject to the amount of $10,800 paid by Blaylock and the prior encumbrances, is clearly inadmissible, because its effect would be to destroy the power of sale and abrogate the very agreement which is made the basis of the relief prayed in the bill.

The only equity which the complainant has upon the bill was to enforce the agreement by a decree that the legal title should be transferred to and vested in the trustee named in it.

The decree below is reversed, and now it is ordered and decreed, that George W. Zeigler shall execute a conveyance in fee of the premises described in the bill to Lewis Blaylock, in trust, as expressed in the written agreement set forth in the bill, and that he be enjoined from conveying or encumbering said premises, and from executing any deed therefor other than is herein ordered; that the said trustee shall not sell the premises at private sale without the consent and approbation of the said Samuel in writing; nor at public sale without reasonable notice thereof beforehand, to be given to him, and that the parties to this appeal shall respectively pay their own costs.

Ashton's Appeal.

73 153
190 464

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1. The assignee of a mortgage, unless the mortgagor has estopped himself, holds it subject to all the equities to which it was liable in the hands of the assignor.

2. The mortgagor having given a certificate that he has no defence, is estopped from setting up a defence against an assignee.

3. Any subsequent assignee may avail himself of a certificate of "no defence," given to the first, if he shows that he or a prior one under whom he claims was an assignee for value without notice.

4. A purchaser with notice of fraud or trust may protect himself under a prior purchaser without notice.

5. A creditor taking a chose in action as collateral security for a pre-existing indebtedness is not a purchaser for value.

6. Although a rule to open a judgment and let the defendant into a defence, has been discharged in a court of law; the defendant is not precluded from resorting to a court of equity for relief.

7. Burns, through an agent of a trust company, borrowed from them on a note and assigned stocks, &c., as collateral; the agent borrowed from Ashton who afterwards took an assignment of Burns's note and collaterals. *Held*, That Ashton took the collaterals subject to the equities between Burns and the company.

8. Stock was pledged as collateral for a note, the pledgee took a mortgage as further security, the stock at the time was of greater value than the amount of the mortgage; the pledgee had not the stock during the pledge, so as to redeliver on redemption. The mortgage was to be credited with the value of stock when executed.

9. Gilpin *v.* Howell, 5 Barr 41, distinguished. Wistar *v.* McManus, 4 P. F. Smith 318, followed.

[Ashton's Appeal.]

February 3d 1873. Before READ, C. J., SHARSWOOD, WILLIAMS and MERCUR, JJ. AGNEW, J., at Nisi Prius.

Appeal from Nisi Prius: In Equity: No. 10, to July Term 1868.

On the 16th of May 1868, Charles M. Burns filed a bill against George H. Ashton, Joshua Spering, Assignee, &c., of the National Safety Insurance and Trust Company, and said Company.

The bill set out:

1. In the month of May 1857, the complainant was indebted to the National Safety Insurance and Trust Company in the sum of $12,600, for which the company held, as collateral security, 125 shares of the capital stock of the Lehigh Coal and Navigation Company, and 700 shares of the capital stock of the Union Canal Company. With these stocks the complainant had given to Stephen Coulter, who was the broker or agent of the company, powers of attorney, in blank, empowering him to transfer the said stocks. On the 11th day of May 1857, Coulter, acting as agent of the company, under one of the powers of attorney, transferred the whole of the 700 shares of stock of the Union Canal Company, the market price then was $11 per share. This transfer was made without any notice to the complainant, and without his knowledge or assent; he was not aware of it for nearly ten years afterwards, nor until after the bringing of the suits hereinafter mentioned.

2. In the fall of 1857 the company, without notice to the complainant of the transfer of the stock, required further collateral security, and the complainant on the 16th day of November 1867 executed his bond for $8000 and a mortgage for securing the payment of the same, to Horatio G. Jones, of premises on the west side of Broad street, Philadelphia, intended to be used as the additional collateral security required by the company.

3. On the first day of January 1858, the complainant gave his promissory note at ninety days, for $12,600, payable to his own order and endorsed by himself to Coulter. This note was given for the amount of the prior indebtedness, and the bond and mortgage were assigned by Jones to Coulter, as agent of the company, and as a collateral security for the note. On the face of the note the collateral securities held for the same were stated in the following form:—

"Collaterals.—A mortgage for $8000, and 125 shares Lehigh Coal and Navigation Company's stock, and 700 shares Union Canal Company's stock."

4. On the 6th and 7th of January 1858, Coulter, still acting as agent of the company, transferred to third persons the whole of the said 125 shares of the stock of the Lehigh Coal and Navigation Company. This transfer was made before the note became due, without notice to the complainant, and without his knowledge

or assent. The market price of the stock about the time of the transfer was $60 per share, at which rate the stock amounted to $7500.

5. The note was unpaid at maturity, and was held over by the company until March 26th 1861, when the complainant, at the request of Coulter and of Samuel K. Ashton, a director of the company, gave another note, also to his own order and endorsed by him, for $18,009—the difference between this and the first note being made up by simple interest to the amount of $2446.50, and by usurious interest to the further amount of $2962.50. At the time of making this new note the complainant was not aware that the stock of the Union Canal Company and of the Lehigh Coal and Navigation Company had been disposed of, nor was he so informed by the company or its agent or any of its officers; on the contrary, the mortgage of $8000, the 125 shares of the Lehigh Coal and Navigation stock, and the 700 shares of the stock of the Union Canal Company were entered on the face of the new note as collateral security in substantially the same form as that in which they had been entered on the first note, and as if still in the hands of the company.

6. On the 18th day of April 1861, the company made a general assignment for the benefit of their creditors to John Derbyshire, &c., and in the succeeding month of May, Spering, one of the defendants, was appointed assignee in their stead by the Court of Common Pleas of Philadelphia. He entered upon the duties of his trust and had since continued to fulfil them. The second note and its collaterals as such were set down in the inventory of the company's assets.

7. On the 24th day of May 1866, suit was brought in the District Court of Philadelphia, to June Term 1866, against the complainant on the mortgage of $8000, by George H. Ashton, as "assignee of Stephen Coulter, who was the assignee of Horatio G. Jones." Judgment was entered in this suit on the 1st of September 1866, for want of an affidavit of defence, and damages assessed on the same day at $11,680. At the time that this suit was commenced, the complainant was not aware that the stocks of the Union Canal Company and of the Lehigh Coal and Navigation Company had been transferred, and consequently made no affidavit of defence. Complainant averred that George H. Ashton held the note and securities as trustee of the assignee for the purposes of the assignment.

8. On the 8th of June 1867, the complainant obtained from the District Court a rule to open the judgment and to let him into a defence; all proceedings to stay in the meanwhile. And on the same day the complainant filed an affidavit of defence and in support of the rule. On the 16th of September 1867, this

rule was discharged on the motion of the counsel for Ashton, without notice to the complainant.

9. On the 9th of February 1867, Ashton brought suit against the complainant, in the District Court to the Term of March 1867, upon the said second promissory note, and filed a copy of the note, at the foot of which the mortgage, the Lehigh Coal and Navigation stock and the Union Canal stock are specified as collaterals for it. On the 22d of March 1867, the complainant filed an affidavit of defence in this suit, setting forth substantially the facts hereinbefore stated, with the exception of the transfer of the stock of the Union Canal Company, of which he was not then aware. No further proceedings have been had in this action.

10. On the 15th of February 1868, a writ of levari facias was issued in the suit on the mortgage, in which the real debt was stated as $11,680. This suit was stayed, and on the 22d of April 1868, an alias writ of levari facias was issued, which has also been stayed, upon payment by the complainant of the sum of $2000, on account of the mortgage, which payment was expressly made, by the complainant, and received by the counsel for the plaintiff in that suit, under an agreement that the same should be without prejudice to the rights of the complainant in the matter.

11. If credit had been given to complainant for the market price of the 700 shares of the Union Canal Company and of the 125 shares of the stock of the Lehigh Coal and Navigation Company, at the time they were respectively disposed of by Coulter, such credits would have amounted to $15,200, being $2600 more than the note of $12,600, and thereby more than paying his entire indebtedness. He averred that Lehigh stock was afterwards sold for $85 per share, which would have produced $10,625; that the dividends declared by the Lehigh Company upon the 125 shares of stock amounted to the sum of $2437.50.

The complainant averred that on an account (which he stated in his bill), in accordance with foregoing facts, there would be due to him $6580.85.

12. Complainant had been notified by the counsel for Ashton that he would issue a pluries levari facias, on the judgment on the mortgage, on or before the 20th day of the present month, and proceed to sell the mortgaged premises for the alleged balance of the judgment; whereas there is no balance due to the plaintiff, or to the assignee of the company, but, on the contrary, the company is largely indebted to complainant, as above stated.

The prayers were:—

1. An injunction against proceeding on the mortgage to enforce its payment.

2, 3. An account; and payment to complainant of the amount found to be due him.

[Ashton's Appeal.]

4. That Ashton be directed to satisfy the mortgage.
5. Further relief.

Ashton by his answer admitted the averments of the 6th paragraph of the bill so far as related to the assignment by the Trust Company to Spering and averred ignorance of the other allegations in the paragraph.

He further answered:—

7. Between the fall of 1860 and the spring of 1861 I lent to Stephen Coulter, in cash and securities, upwards of $50,000. For my security certain collaterals were transferred and delivered to me; among others the note of $18,009, 700 shares of Union Canal stock, and the mortgage of $8000. I hold these yet. I have realized on the collaterals other than these, sufficient to reduce the indebtedness to me to the sum of $26,845.06, without interest. The mortgage was delivered to me on the 15th day of December 1860, and an assignment sufficient in law to vest the title thereof was then made, but not in the usual form, and under advice, that of September 1861, was made, a copy of which has been filed in the record of the suit on said mortgage. At the assignment of the mortgage, a certificate signed by the complainant was also delivered me, a copy of which is hereto attached, (marked Exhibit A). I have been requested by the assignee of the company to proceed in the collection of my collaterals that he might fulfil the duties of his trust. I therefore placed the mortgage and note in the charge of my counsel, who has instituted the proceedings referred to in the bill. I deny that I am a formal holder of said securities, if by such averment it is meant that the assignment and delivery to me was for any fraudulent intent or for any other purpose than I have herein set forth.

9. I have brought the suit as averred in the ninth paragraph of bill. I did this to avoid the effect of the Statute of Limitations. I have been advised by my counsel not to proceed therein, until I have realized on the mortgage, and then to notify the complainant to pay the balance of his indebtedness on the note and accept the collateral, or failing so to do, to proceed to sell them on notice to complainant.

10. I admit the payment stated in the tenth paragraph of the bill. I instructed my counsel to stay the writ, on the express promise of the plaintiff to pay the balance within thirty days, in consideration of forbearance for that time.

11. I deny that Coulter ever disposed of the 700 shares of the Union Canal Company, inasmuch as he delivered them to me, and I have them yet. I do desire that my counsel shall proceed with the suits. As the mortgaged security is becoming impaired by delay, I am anxious that no further indulgence shall be given. Time has been lately given, at the request of Mr. Spering, on the assurance that the debt would be paid in a short time.

He then stated an account showing there were due him; $23,792.51. "This the collaterals in my possession and control would not pay. If the debt and interest due on the mortgage be collected and the market value of the Lehigh stock which is now $25 a share, and of the Union Canal stock which is now 25 cents a share, be realized and the amount of dividends claimed be allowed; yet the complainant would be the debtor."

EXHIBIT A.

"I do hereby certify, acknowledge and declare that I have no plea, set-off, or defence against a certain mortgage dated the 16th day of November last past, recorded at Philadelphia, * * * (which is now assigned to Stephen Coulter), and that the whole of the principal sum, to wit, eight thousand dollars, secured by said mortgage, with lawful interest from the date thereof, will fall due on the 16th day of November next ensuing the date thereof.

"Witness my hand and seal this 22d day of December, 1857.

C. M. BURNS. [SEAL.]"

Spering answered generally on information: that amongst the assets of the Trust Company were those stated in the bill as being contained in the inventory; that all but the Lehigh stock were held by Ashton, defendant, as collateral for advances made by him to the company; that this stock had not been sold but had been hypothecated by Coulter to raise money for Burns (complainant) and had not been redeemed; that when the alias levari was stayed, complainant, with all the knowledge he had at filing the bill, paid $2000 on account and expressly promised in hearing of this respondent to pay the balance in 30 days in consideration of forbearance for that time. Complainant had always, from the giving of the note, been unable to pay it; had never demanded his collaterals; he had made no complaint as to any dealing with the collaterals until the bringing of this bill; that considering the collaterals insufficient security for the note he had been indifferent as to them and taken no measures to learn anything about them. This respondent averred that the whole of the sum of $18,009, with interest and costs, was due by plaintiff, and should be paid on the surrender of the collaterals.

An examiner was appointed, and on the filing of his report, Duval Rodney, Esq., was appointed master.

The master found that Burns's stock was pledged through Coulter to the Trust Company, and that they almost immediately pledged it themselves without contract or notice to him; the mortgage for $8000 was given as additional security for the note of $12,600, given Jan. 1st 1858, although they had previously parted with his Union Canal stock at $11 per share without crediting him with it, and on 26th of March 1861, the note of $18,009, given still without

such credit, both notes having the collaterals noted on them; the mortgage, the master found, to be in the same condition as the notes.

He then reported:— * * *

"Under these facts and circumstances, without any attempt at explanation, one is forced to the conclusion that the plaintiff has a right to all the equitable set-off he claims in his bill against the company, or its representative, and is entitled to invoke the rules of law which apply to his case for his benefit.

"The company had no right to deal as they did with the securities which were confided to their care, even if the notes had matured, but they are not even upon that footing, for in neither case was the debt due." * * *

Upon the question—"Had Ashton notice of Burns's set-off?" the master, after referring to the facts, said:—

"There could scarcely be imagined a case where more notice of equities could be given by the subject-matter itself. At every step he was warned by reference to the securities themselves that sometime Burns would be entitled to an account of them, and he knew, as a business man, that the holder would have to encounter a set-off.

"When the absence of all or any of this stock came to his knowledge, it was his duty to inquire where it was, and in default of such duty he cannot complain if he is held to a strict accountability, though he may be forced to assume the liability of the Trust Company, even to a punitive extent. These circumstances should have put any one on his guard, and would have alarmed the most reckless money-lender; and if he intervened to assist the company, that fact could only serve to inform him more thoroughly on the subject. Burns, though a debtor to the company, was not deprived of his legal rights, for when called upon to account, he would always be entitled to a credit for collaterals which were not forthcoming.

"Mr. Ashton has not shown that he was or is a holder of these securities, without notice, and he cannot claim the protection of such a position.

"But suppose he had established his bona fides and want of notice, still did he not as pledgor take these securities subject to all the equities between the original parties? * * *

"It was contended by the defendant that a declaration of no set-off made by Burns on the 22d December 1857, estopped him from setting up this defence; but this declaration was made three years before Ashton took the mortgage, and the defences Burns had were not known to him at that time; and, besides, this declaration for Coulter's benefit could not avail Ashton.

"Upon both the facts and the law, the master reports that Mr. Ashton is subject to the equities existing between Burns and the

Trust Company, and being thus subject, Burns is entitled to the relief as prayed for against him." * *

The master recommended a decree: "That an account be stated between the complainant, on the one side, and George H. Ashton and Joshua Spering, as representing the National Safety Insurance and Trust Company, on the other side, in which the complainant shall be charged with the sum of twenty-eight thousand three hundred and seventy-eight dollars and eight cents, as of the date of October 24th 1871; and George H. Ashton, and the other defendants, shall be charged with seven hundred shares of the stock of the Union Canal Company at eleven dollars per share, with interest thereon since May 10th 1857; with one hundred and twenty-five shares of the stock of the Lehigh Coal and Navigation Company at sixty dollars per share, with interest thereon from January 6th 1858; and with two thousand dollars, paid to Ashton in April 1868, with interest thereon.

"That the defendants George H. Ashton, &c., be restrained from issuing any further executions on the said judgment of the said George H. Ashton, viz., No. 202 of June Term 1866, District Court of Philadelphia, and from proceeding to levy any such execution upon the mortgaged premises, or to sell the said premises, upon any levari facias or execution on said judgment, and from proceeding any further to enforce payment of the same.

"That the defendants, George H. Ashton and Joshua Spering, do pay to the said Burns the sum of 2129.39 and that the said George H. Ashton satisfy of record the said judgment and the mortgage upon which the same has been obtained."

The complainant and the defendants Ashton and Spering excepted to the master's report.

After hearing at Nisi Prius the court (SHARSWOOD, J.) overruled the exceptions and confirmed the report: holding however that Ashton was entitled to the benefit of the certificate of "no defence," given to Coulter. Ashton appealed to the court in banc and in eleven specifications assigned the decree for error.

D. W. Sellers, for appellant.—A purchaser for value of a mortgage, on the faith of a certificate of no set-off, cannot lose his security by what occurred prior thereto: Scott *v.* Sadler, 2 P. F. Smith 211; Stevenson's Appeal, 18 Id. 212. Ashton retained the collaterals. At one time he hypothecated the stock, but it was always under his dominion and control, which was sufficient: Gilpin *v.* Howell, 5 Barr 41; Wynkoop *v.* Seal, 14 P. F. Smith 361.

Burns had become the debtor of Ashton in September 1860. The advances were then made to Coulter on the mortgage and the Union stock. Coulter then, as is now alleged, had converted the Lehigh Coal and Navigation stock. If so, it was an appropria-

tion of a collateral by the agent of the plaintiff, the present debtor, the appellant, never having had it. The loss must fall wholly on Burns: Bank *v.* Peabody, 8 Harris 454; McConnell *v.* Weinrich, 4 Id. 365.

The defence could have been interposed on the sci. fa. to the mortgage. Where the opportunity to make defence is given and neglected, the judgment at law is conclusive in equity: City *v.* Girard, 9 Wright 9; Wister *v.* McManes, 4 P. F. Smith 318; Railway Co. *v.* Moore, 14 Id. 79.

G. W. Biddle and *J. A. Clay*, for the appellee.

The opinion of the court was delivered, February 18th 1873, by SHARSWOOD, J.—It is clear upon the facts as reported by the master, that on the 15th of December 1860, the debt due by Burns to the National Safety Insurance Company, for which the mortgage now in question was one of the collateral securities, crediting upon it the proceeds of the seven hundred shares of stock of the Union Canal Company, and of the one hundred and twenty-five shares of Lehigh Coal and Navigation stock, was then more than paid. It did not appear that the creditor, the pledgee of the first-named stock, had in possession during the pledge at all times, such stock on hand, ready to redeliver on redemption, which was necessary to bring the case within the decision of Gilpin *v.* Howell, 5 Barr 41. That the assignee of the mortgage, unless the mortgagor had estopped himself from taking the defence, held it subject to all the equities with which it was affected in the hands of the assignor, is a principle too familiar and well settled, to need the citation of decisions to sustain it. But undoubtedly the debtor may be estopped as against the assignee, by the declaration that he has no defence or set-off to the debt assigned. In the face of such a declaration, he cannot set up his defence against an assignee, who takes on the faith of it. The complainant had made such a declaration on the twenty-second of December 1857. Before that, the Union Canal stock had been sold, and a defence to that extent then existed. The sale of the Lehigh Coal and Navigation stock was on the 6th of January 1858, subsequent to it, and of course, the defence arising therefrom was not precluded. We agree with the court below, that the benefit of it is not confined to the immediate assignee to whom or for whose security it was made; but that any subsequent assignee claiming under him may avail himself of it. To hold otherwise, would have the effect of closing the market for the sale of his security on the first assignee, if the debtor should refuse to give a new declaration. Upon the same principle, a purchaser with notice of fraud or trust, may take shelter under the wing of a prior purchaser, without notice, otherwise such prior purchaser would be deprived of the principal value of his privilege.

But to avail himself of such an estoppel upon the debtor, the assignee who sets it up, must show that either he or some prior assignee from whom he claims, was an assignee for value, and without notice. It is not pretended that Stephen Coulter, the first assignee, sustained such character. In regard to the defendant Ashton, the master has reported it as his opinion upon the evidence, that the circumstances under which he became assignee, were such as ought to have put him on inquiry, and he ought, therefore, to be considered as affected with notice. We think he had good reasons for this conclusion, if we compare with the date of the note of March 20th 1861, for $18,009, upon which the stocks and mortgage were marked as collateral, the date of the assignment of the mortgage to Ashton, and the dates of the various assignments of the stock as stated in the testimony of Oscar Thompson, the secretary and treasurer of the Union Canal Company.

But without entering upon an examination of this question, we think that Ashton has not shown that he was a purchaser for value. A creditor who takes a mortgage, note, or other chose in action only, as security for a pre-existing indebtedness, and not for money advanced at the time, is not such a purchaser: Petrie *v.* Clark, 11 S. & R. 377; Irwin *v.* Tabb, 17 Ibid. 419; Hartman *v.* Dowdel, 1 Rawle 282; Twelve *v.* Williams, 3 Whart. 485; Depeau *v.* Waddington, 6 Id. 220; Trotter *v.* Shippen, 2 Barr 358; Ludwig *v.* Highly, 5 Barr 139; Kirkpatrick *v.* Muirhead, 4 Harris 123. If, therefore, when the note of Burns and the accompanying collateral were assigned to Ashton, it was merely as security for a pre-existing indebtedness, he cannot claim as a purchaser for value to exclude Burns from his equitable defence or set-off by reason of the estoppel raised by his declaration. It is plain, such an estoppel can only avail a purchaser for value as well as without notice. The onus is always on him who sets up such a plea, to prove it. The answer of Ashton on this point, upon which it ought to have been precise and clear, is general, and consequently vague and indefinite. He says: "Between the fall of 1860 and the spring of 1861, I loaned to Stephen Coulter, in cash and securities, upwards of $50,000. For my security certain collaterals were transferred and delivered to me, among others the note of $18,009, 700 shares of Union Canal stock, and the mortgage of $8000." Nor does his testimony render it any more certain. He testified: "I received the mortgage for $8000 and 700 shares of Union Canal stock. I got them from Stephen Coulter. I loaned money to him *at* or *about* that time. I was constantly loaning him money. I *had* loaned him altogether in the neighborhood of $50,000." Taking the answer and testimony together, certainly the most natural interpretation of the whole is, that the note of March 20th 1861, for $18,009, with the mortgage

and stock, was taken as security for loans previously made between the fall of 1860 and the spring of 1861.

The complainant has shown that when he suffered judgment to be entered by default for want of an affidavit of defence, the scire facias on the mortgage in the District Court, he did not know of this defence; and it is certainly settled by Wistar *v.* McManes, 4 P. F. Smith 318, that his failure to obtain relief by his motion in that court to open the judgment, will not preclude him from resorting to a court of equity, even if his case had been heard, and his rule, after hearing, discharged. It follows, that the injunction decreed against Ashton's proceeding to recover the amount of the mortgage, was right. But we think that the court below was in error in confirming that part of the decree reported by the master, which directed that the appellant, Ashton, and the assignee, Spering, should pay the complainant the balance found on the account with the insurance company in his favor. Ashton certainly had not received the proceeds of the Union Canal stock; nor, as far as appears, of the Lehigh Navigation stock. Spering, the assignee, with whom by the decree, Ashton is made a joint debtor, had not received any of it. There is no ground, therefore, upon which they can be held personally liable for the balance due to the complainant by the company. As the decree in this respect is joint, it must be reversed, though Spering has not appealed. It was insisted, indeed, upon the argument, that Burns is entitled to have refunded to him, with interest, the $2000 paid by him to Ashton, on account of the mortgage. Mr. Clay testifies, that this payment was to be "without prejudice." But this evidently meant without prejudice to his defence, that it should not operate as an admission by him that anything more was due. By this payment he purchased a stay of proceedings. It was, therefore, a perfectly voluntary payment, which, though not owing by Burns, yet Ashton could, with a good conscience, retain, and had it been intended that in any event it should be refunded, it should have been specially so agreed.

Decree reversed, and now it is ordered and decreed, that the defendants be restrained by injunction from issuing any executions on the judgment of the said George H. Ashton, No. 202, of June Term 1866, of the District Court for the City and County of Philadelphia, and from proceeding to levy any such execution upon the mortgaged premises, or to sell the said premises upon any levari facias or execution on said judgment, and from proceeding any further to enforce payment of the same, and that said Ashton shall enter satisfaction on the record of said mortgage, upon payment to him by the said Burns of the legal costs thereof, and that each party to this appeal shall pay his own costs.

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Mayer's Appeal.

1. A party-wall erected by Simpson projected unintentionally in several places slightly beyond the proper line, over land of Mayer who was erecting a building at the same time, by contract with a builder who was to pay for the party-wall. He knew the wall was projecting, but went on and paid for it; Simpson completed his building without correcting the projection. The court under the circumstances refused a decree to take down the wall.
2. This occupation of part of plaintiff's lot did not give defendant any title to it nor affect plaintiff's right to damages.
3. Vollmer's Appeal, 11 P. F. Smith 118, recognised.

February 4th 1873. Before READ, C. J., SHARSWOOD, WILLIAMS and MERCUR, JJ. AGNEW, J., at Nisi Prius.

Appeal from the decree at Nisi Prius: In Equity: No. 5, to January Term 1871.

The proceedings in this case were commenced by bill filed on the 22d of September 1870, by John Mayer against Robert F. Simpson.

The bill averred that the plaintiff, on the 25th of February 1870, became the owner of a lot of ground on the west side of Ninth street, 126 feet north of Arch street, Philadelphia, with old buildings on it, and shortly afterwards removed the buildings preparatory to the erection of a large store on the lot; that the defendant was the owner of a lot at the north-west corner of Ninth and Arch streets, which extended northward on Ninth street to the line of the complainant's lot; that he was erecting a large building of great height, for a museum and theatre, to cover his entire lot, and had nearly completed the northern wall of the building on the plaintiff's southern line, but instead of building a straight wall extending six and one-half inches on plaintiff's ground — the distance allowed for party-walls—he had extended it beyond that distance over plaintiff's ground from a quarter of an inch at one point to four inches and an eighth at another point.

The bill then set out the several points of overlapping, with the different distances at each point.

The bill further averred that after defendant had commenced his building, the plaintiff contracted with Jacob Rush to erect, under the supervision of an architect, on his lot above mentioned a store-house; that the builder and architect had had the entire charge of the plaintiff's property, had erected the front and rear walls of the building, put the roof on, using the adjoining party-walls for his joists; the plaintiff had no knowledge that the defendant had encroached on his property with the party-wall until in August 1870, or he would have taken earlier steps to have prevented this infringement of his rights.

The prayers were:—

[Mayer's Appeal.]

1. For an injunction restraining the defendant from completing the party-wall on the plaintiff's property.

2. That the defendant be restrained from maintaining the party-wall on the plaintiff's land, and that defendant be required to place the wall on a straight line in a perpendicular manner within the limits prescribed by law.

3. For a decree compelling defendant to pay plaintiff damages for the injury done him by erecting the wall beyond the line, and for the delay to plaintiff in the erection of his building caused by the defendant's action; and for general relief.

A preliminary injunction was awarded, which was dissolved September 29th 1870.

Defendant answered,—that he was ignorant of most of the allegations in the bill, and averred that he had made preparation in April 1870 to erect his theatre; that the building was entirely erected and roofed; since filing the bill, a survey of the building inspectors showed an overhanging of but from one-quarter to three-quarters of an inch; that whilst the wall was being constructed and before its completion, the builder of plaintiff's building told the builder of defendant's building that the wall was over the line; defendant's builder immediately offered to correct it, but was informed that it was unnecessary as when plaintiff's joists should be put in it would be all right; the overhanging could then have been corrected with little trouble and expense, and would have been corrected had it not been assented to by the builder; that the plaintiff had made payments on the party-wall, the last after the wall had been entirely erected and the overhanging discovered. Defendant denied the plaintiff's measurements of the overhanging were correct; averred that plaintiff's architect and builder had had entire control of his building, and that the overhanging had been known to them in July 1870, long before the wall was completed; that plaintiff had used the wall for his building.

A replication was filed and an examiner appointed. On his report being filed, George S. Selden, Esq., was appointed master, who reported that the plaintiff was entitled to the relief asked for in his first and second prayers.

The facts, not differing materially from the respective allegations in the bill and answer, are found in sufficient detail in the opinion of Chief Justice READ.

Exceptions were filed by the defendant to the master's report, and after argument at Nisi Prius the bill was dismissed, Judge SHARSWOOD delivering the following opinion, December 30th 1871:—

"I am not inclined to make a decree in this cause, which can be enforced only by compelling the defendant to pull down the party-wall between his house and the house of the plaintiff. Both

buildings rest for their support on this wall. The plaintiff's builder accepted this party-wall and paid for it. He has used it to insert his own joists in. The foundation wall was right, but owing to want of skill, it has encroached several inches in different parts. Had this bill been filed immediately when the plaintiff knew or ought to have known the encroachment, and the defendant had gone on pending the bill, there would be both reason and authority for saying that he could be decreed to pull it down: Clark *v.* Martin, 13 Wright 289. But here the wall was nearly finished before the bill was filed. No doubt a mandatory injunction may be granted on final hearing. But it certainly is not a matter of right. I may refer to Senior *v.* Pawson, L. R. 3 Eq. 330, where V. Ch. Sir W. Page Wood considered it a circumstance entitled to great weight 'that damage to a much larger amount would be done by granting the mandatory injunction,' and he adds: 'I do not think I ought to make a decree which would enable an extortionate price to be obtained for the injury sustained by the plaintiff. Seeing the time which has elapsed before any complaint was made, seeing also that the reasonable mode of doing justice between the parties is by a money compensation, I think that in fairness and in principle the power of the court should be so exercised as to give relief by damages instead of by injunction.' In England this relief in damages is given by the Court of Chancery 'in addition to or in substitution for' the specific relief to which the plaintiff may be entitled by virtue of the statute: 21 & 22 Vict. c. 27, commonly called Sir H. Cairns's Act. The intention of that act 'was to give the court power to grant complete relief whenever it had a well-founded jurisdiction to entertain the case, and not to compel a plaintiff to ask partial relief in one court and then turn him over to another in order to obtain supplemental relief:' Headley *v.* Emery, L. R. 1 Eq. 54. I have not the statute at hand to examine, but if it goes no further than is here represented, it seems to me that it does not extend the recognised power of the court: Denton *v.* Stewart, cited 1 Ves. p. 329; Greenway *v.* Adams, 12 Ves. 395; Phillips *v.* Thompson, 1 Johns. Ch. 131; Woodcock *v.* Bennett, 1 Cowen 711. Although these are cases on bills for the specific performance of contracts of sale, I see no reason why the same principle should not apply to other cases, and that whenever a court of equity originally has jurisdiction of the cause of complaint, and for any reason it becomes impracticable to give the relief specifically cited, it may not substitute compensation in damages. I have felt much inclined to refer this case back to the master to ascertain the damages. To decree that the wall should be removed, would be to enable the plaintiff to demand an extortionate sum. The plaintiff's builder, who, as to this matter, must be regarded as his agent duly authorized, having accepted, paid for, and used the wall, it seems to me he has no equity to ask a decree that it should be pulled

down. I have hesitated as to whether after the wall had been finished or nearly so, the case is not one in which the party should be remitted to his legal remedies. A reference would delay the final decision. On the whole, then, I have come to the conclusion to dismiss the bill."

The defendant appealed to the court in banc and assigned the decree at Nisi Prius for error.

J. S. Price, (with whom was *E. K. Price*) for appellant.—The regulation of a lot by the city surveyor is *conclusive:* Godshall *v.* Mariam, 1 Binn. 352; Evans & Watson *v.* Jayne, 11 Harris 34. Plaintiff having made his contract to build with his contractor, both as to the building and the payment of the party-walls, was under no obligation to look further after the building until it was finished: Allen *v.* Willard, 7 P. F. Smith 374.

Simpson had but a statutory right to cross the line which he was bound strictly to pursue: Tilford *v.* Wallace, 3 Watts 141; Bolton *v.* Johns, 5 Barr 149. The authority from Mayer to Rush was to build the building and to pay for legal party-walls on each side, and for nothing more: Co. Lit. 258, *a;* Story on Agency 157, sec. 166: Frailey *v.* Waters, 7 Barr 221.

There is no proof that Mayer had any knowledge of the payments, or in any way acquiesced in the position of the party-walls. He might have looked on in silence, and have remained unprejudiced in his rights: Hepburn *v.* McDowell, 17 S. & R. 383; Alexander *v.* Kerr, 2 Rawle 83; Crest *v.* Jack, 3 Watts 238: Goundie *v.* Northampton Water Co., 7 Barr 233; Knouff *v.* Thompson, 4 Harris 357. Silence will estop only when it is a fraud: Lawrence *v.* Luhr, 15 P. F. Smith 236; Kerr on Injunctions 202.

G. W. Harkins, for appellee.—An action at law would give the plaintiff ample compensation, whilst a decree ordering the removal of the wall, would enable him to extort any sum that he might conceive. Where there exists an adequate remedy at law, a court of equity will not interfere by injunction: Kerr on Injunctions 200. The mere diminution of the value of property without irreparable mischief, will not furnish sufficient ground for equitable relief: Atty. General *v.* Nichol, 16 Vesey 342; Winstanley *v.* Lee, 2 Swanston, p. 352.

The opinion of the court was delivered, February 13th 1873, by READ, C. J.—Robert F. Simpson owns a lot of ground at the north-west corner of Arch and Ninth streets, extending in front on Arch street forty-eight feet, and in length or depth on Ninth street one hundred and twenty-six feet, and John Mayer owns a lot adjoining it on the north, eighteen feet on Ninth street by forty-eight feet in depth. The defendant erected in 1870 a building,

intended for a museum and theatre, covering the whole of his lot, the north wall of which was an eighteen-inch brick party-wall, which by law should be six and a half inches on the plaintiff's lot. Mr. Shedaker gave to the defendant, or his agent, the true line between the two properties, in his capacity as Surveyor and Regulator of the Third District, and the stone foundation of the party-wall was correctly laid. The brick wall was carried up, beginning at stone foundation, as would appear by Mr. Shedaker's measurement of the 30th and 31st of August, 1870, three-eighths of an inch over on the plaintiff's lot beyond the limit allowed by law. In extending the wall back on the stone cellar wall, in different parts it overlapped three-quarters of an inch and seven-eighths of an inch, and in the middle of building the wall overhung the lot No. 110 top of first story 2¾ inches, at top of second story 3½ inches, and four feet above the floor on the third floor 4⅛ inches. A subsequent measurement by John F. Wolf, Surveyor and Regulator of the Fifth District, was more unfavorable to the defendant.

Jacob Rush entered into a contract with the plaintiff to erect on his lot, No. 110, a three-story building with a mansard roof, eighteen feet front by forty-six feet deep. It was for a certain price; Rush contracting to pay for all party-walls. Defendant's cellar wall was up before the contract was signed, and the excavation for the building on No. 110 was commenced on the 23d of June 1870. Defendant's wall was carried up ahead of the plaintiff, and Mr. Rush saw the wall was coming over, and notified Mr. John Bingham, who had charge of the work at the time, that the wall was coming over, and that he had better shore it. He did so, but put the shore in the wrong place. Mr. Rush put in the joists in the party-wall, and paid for the party-wall, according to his contract. The plaintiff having heard of its overhanging, employed Mr. Shedaker to make the measurement already stated, and immediately took measures to have this error corrected, which ended in filing this bill in equity on September 22d 1870. The wall is up and both buildings are under roof. The usual five days' injunction was issued and dissolved on the 29th of September. The case was then heard on bill, answer and proofs, and the bill dismissed with costs.

From this decree this appeal is taken. The occupation unlawfully of a portion of the plaintiff's lot does not convey any title to it to the defendant; nor does it affect the plaintiff's title or his right to recover damages for the trespass, but as an injunction is a matter of discretion with a court of equity, we do not feel bound to grant a mandatory injunction to tear down this wall, which is the practical meaning of the second prayer of the bill.

This case shows the necessity of great care and attention on the part of owners and contractors in the erection of party-walls from the time they are commenced until they are finished. The

party erecting, as in this case, will take care it is plumb as it is smooth on his side, and it is his interest to get the full use of his lot, but as was the fact here, more careless as to the encroachment on his neighbor's property. The Building Inspectors should be particularly careful in inspecting party-walls, for their powers are large in correcting all errors in such walls not built in accordance with law.

A full history and discussion of this subject is to be found in Vollmer's Appeal, 11 P. F. Smith 118.

We affirm the degree of the court below with a modification. This bill is dismissed with costs without predjudice.

Haines's Appeal.

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1. The legislature cannot give a tribunal, acting without a jury, power to determine *legal* rights unless there be some equitable ground of relief.
2. To sustain the chancery power to order deeds, &c., to be delivered up to be cancelled, there must be some danger of future litigation, when the facts will not be capable of proof, or have been become obscured by time.
3. The Act of April 28th 1868, authorizing the *court* upon petition on "due proof" that a ground-rent has "been extinguished by payment or presumption of law," &c., to decree that such ground-rent is extinguished, is unconstitutional; it violates the right of trial by jury.
4. A party is not concluded by the decision of a court not having jurisdiction to decide the controversy.
5. Norris's Appeal, 14 P. F. Smith 275; North Pennsylvania Coal Co. *v.* Snowden, 6 Wright 488; Tillmes *v.* Marsh, 17 P. F. Smith 507, considered.

February — 1873. Before READ, C. J., AGNEW, SHARSWOOD, WILLIAMS and MERCUR, JJ.

Appeal from the Court of Common Pleas of *Philadelphia:* No. 276, to January Term 1871.

This was a proceeding under the Act of April 28th 1868 (Pamph. L. 1147, 1 Br. Purd. 750, pl. 6), as follows, viz.: "In all cases in which ground-rents have been or may be extinguished, by payment, or by presumption of law, but no deed of extinguishment or release thereof shall have been executed, it shall and may be lawful for the owner or owners of the land out of which the rent issues, or any person interested, to apply by petition to the Court of Common Pleas, * * * whereupon such court shall make such order for giving notice, &c., * * * *and on due proof being made of the truth of said petition*, the said court are authorized and required to make a decree declaring that the said ground-rent is released, merged and extinguished," &c.

On the 12th of March 1870, George D. Parrish, William Hunt and Stephen S. Price, executors, &c., of Joshua Longstreth, deceased, presented a petition to the Court of Common Pleas of Philadelphia, setting forth that the decedent had died, seised of two

lots of ground on North street, between Fifth and Sixth streets, Philadelphia, on each of which there was a ground-rent of $80 per annum, payable to Reuben Haines; that no acknowledgment of the existence of the ground-rents had been made by the decedent or by any one on his behalf for twenty-one years, and the ground-rents were presumed to be released and extinguished, &c.; that Haines was deceased, and his residuary devisees were owners of the ground-rents. After setting out other facts, they prayed, that upon the notice required by the Act of Assembly to the parties interested, "a decree be made declaring said ground-rents extinguished," &c.

John S. Haines, executor, &c., of Reuben Haines, deceased, by his answer admitting the existence of the ground-rents and other allegations of the petition, averred facts in answer to it for the purpose of rebutting the presumption of a release of the ground-rent. He further said: "That he is advised, and believes that the Act of 1868 is contrary to the Constitution of the state of Pennsylvania, in that it deprives the respondent, and others, of their right to trial by jury, and usurps the judicial power vested in the courts; and further, that it is in violation of the Constitution of the United States, in that it impairs the obligation of contracts."

The matter was referred to W. B. Robbins, Esq., as examiner and master.

He took testimony and reported: "Upon the question of fact the master has no difficulty in arriving at a decision that, in the words of the Act of Assembly, no payment, claim or demand has been made on account of or for said ground-rents, and no acknowledgment or declaration of the existence thereof has been made within a period of twenty-one years past." * * *

"Being satisfied, therefore, that it has been sufficiently proven that no payment or demand for these ground-rents, or acknowledgment of their existence, has been made for more than twenty-one years past, and deciding the Act of 1868 to be constitutional, the master is of opinion that in this case the prayer of the petition ought to be granted."

The executor filed exceptions to the report of the master. It was confirmed by the court (Ludlow, J.), and it was decreed that the ground-rents "be and hereby are released, merged and for ever extinguished."

The executor appealed to the Supreme Court and assigned the decree for error.

H. Wharton, for appellant.—The question of extinguishment was one of fact, and to be decided by a jury: 1 Greenl. sect. 39; Foulk *v.* Brown, 2 Watts 215; Taylor *v.* Megargee, 2 Barr 225; Fladong *v.* Winter, 19 Vesey 196.

The act takes away the trial by jury and is therefore unconsti-

tutional: N. Penna a. Coal Co. *v.* Snowden, 6 Wright 488; Rhines *v.* Clark, 1 P. F. Smith 96; Norris's Appeal, 14 Id. 275; Tillmes *v.* Marsh, 17 Id. 510. The act did not design an equity proceeding. There is nothing in the case to bring it under any head of equity; neither mistake, fraud, accident or trust, and cannot therefore be withdrawn from a court of law: Hamilton *v.* Cummings, 1 Johns. Ch. 523; Kerr on Injunctions 13; Bromley *v.* Holland, 5 Vesey 618. The act operates on the contract itself, impairing its obligation, and is in violation of the Federal Constitution: Webster *v.* Cooper, 14 Howard 488.

J. Parrish and *J. E. Gowen*, for appellees.—If the court would be bound to instruct a jury that the defence was unavailable, a decree without a jury would be valid: Hoffman *v.* Locke, 7 Harris 59; Taggart *v.* Fox, 1 Grant 190. The proceeding is an equitable one: 1 Story's Eq. Jur. sect. 698, 709, and cases cited in notes: Eckman *v.* Eckman, 5 P. F. Smith 269; Craft *v.* Lathrop, 2 Wallace, Jr., 103; Kenton *v.* Vandegrift, 6 Wright 339; Bromley *v.* Holland, 7 Vesey 3.

The opinion of the court was delivered, March 6th 1873, by

Sharswood, J.—The only ground upon which the constitutionality of the Act of April 28th 1868, Pamph. L. 1147, can be supported under the decisions of this court in North Pennsylvania Coal Co. *v.* Snowden, 6 Wright 488, Norris's Appeal, 14 P. F. Smith 275, and Tillmes *v.* Marsh, 17 Id. 507, is that it is a proceeding within the jurisdiction of a court of equity. It must certainly be considered as settled by those cases, that an Act of Assembly cannot vest in a tribunal like a court of chancery, acting without a jury, the power to determine upon the legal rights of parties, unless there exists some equitable ground of relief. We may look in vain for any principle or authority to sustain a bill praying for a decree under the facts and circumstances, as disclosed in the petition filed in the court below. As to the power which has been principally relied on, to order deeds or instruments to be delivered up and cancelled, there is always some ground of equity upon which the chancellor has interposed, besides the mere fact that the instrument cannot be enforced at law. There must be some danger of future litigation, when the facts will be no longer capable of complete proof, or have become involved in the obscurities of time: 2 Story's Eq. Jur. sec. 705. This is the reason upon which a bill *quia timet* may be sustained. No case has been produced, and we think none can be, which goes the length which must be maintained here, that wherever there is an outstanding claim or encumbrance upon an estate which is barred by reason of lapse of time, and therefore cannot be enforced at law, but which nevertheless, is a cloud upon the title, and prevents it from being

marketable, the possessor can invoke the aid of a court of equity to remove the cloud, and for ever bar such claim or encumbrance by a perpetual injunction. If this could be done, there is not an ejectment in the common-law courts which by an inversion of parties could not be brought into a court of equity, and the question finally determined by one decree without a jury, instead of two verdicts and judgments. No doubt it is highly important to the parties, and, indeed, of public interest, that some mode should exist by law by which all such clouds may be removed, and thus valuable estates be brought into the market. We are very far from holding that the legislature cannot do this. But then trial by jury must be "as heretofore, and the right thereof remain inviolate." By the thirty-third section of the Act of June 16th 1836, Pamph. L. 701, entitled "An Act relating to the lien of mechanics and others upon buildings," whenever a mechanic's claim is filed against a building, it is made lawful for the owner, or any person interested, to call the claimant into court, which is thereupon authorized to proceed in like manner as if a *scire facias* had been issued, and duly served and returned. No one has ever thought of questioning the constitutionality of that section, which has been frequently acted upon and found very beneficial. Had there been a provision in the Act of 1868, giving the respondent the right to demand an issue, as by the eighty-seventh section of the Act of June 16th 1836, Pamph. L. 777, in questions arising upon the distribution of the proceeds of sheriffs' sales, all objections to the act on this score would have been obviated. The learned judge who delivered the opinion of the court below, appears to have thought that because "there is nothing in the law which would prevent the court from sending every such case as this by a general rule to a jury," it may therefore "very well be questioned whether this act does in fact absolutely deprive the parties of a jury trial." But as such a general rule, or the award of an issue in any particular case, would be entirely in the discretion of the court, it is clear that the parties have not secured to them their constitutional right of trial by jury. They would in effect hold it at the mere pleasure of the court.

The contention which has the most plausibility, is that upon the evidence in this case there was no question of fact for the decision of a jury, and that assuming all the facts to be true, the court before whom the trial might be had, would be bound to instruct the jury that the ground-rents in question must be presumed in law to be extinguished. Conceding this to be so, there is a fallacy which lurks in this argument. The respondent in his answer demurred to the jurisdiction of the court, and if in law he was right, he could not be affected by any failure in the evidence, which he was not at all bound to produce. No party can be concluded by the decision of a court which has no jurisdiction to decide the con-

[Haines's Appeal.]

troversy. We cannot strike from the act the words "on due proof being made of the truth of the said petition," and insert other words which would confine the jurisdiction to the case, where no evidence should be produced which would save the act from its unconstitutional operation. That would be judicial legislation. We assume in this judgment that the evidence brought the case in law entirely within the purview of the Act of 1855. Upon that, however, we give no opinion.

Order reversed at the costs of the appellee.

Leaming *et al. versus* Wise *et al.*

1. Plaintiffs sued defendants for the price of oil-stock, alleging that it had been bought on false representations as to the cost of the land; there was evidence that plaintiffs knew the cost in November and afterwards paid an assessment; subsequently the project failed; in March plaintiffs tendered the stock and offered to rescind. The court charged that if the jury found these facts and any unfavorable circumstance occurred between plaintiffs' knowledge and tender which left defendants in a worse condition than if the tender and rescission had been at the time of the knowledge, the verdict should be for defendant. *Held*, to be correct.

2. If there had been fraud, the plaintiffs could rescind and recover back the price; but the tender should be in a reasonable time after discovery of the fraud.

3. By an undue delay in tender and rescission the contract would be affirmed.

4. When the facts are undisputed, what is reasonable time or undue delay is for the court.

5. Negley *v.* Lindsay, 17 P. F. Smith 217; Pearsoll *v.* Chapin, 8 Wright 9, recognised.

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28 SC 525

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29 SC 147

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217 500
32 SC 434

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39 SC 444
41 SC 651

February 18th 1873. Before READ, C. J., SHARSWOOD, WILLIAMS and MERCUR, JJ. AGNEW, J., at Nisi Prius.

This was an action of assumpsit brought October 30th 1869, by I. Fisher Leaming and another, trading as Waln, Leaming & Co., against Charles Wise and Ellwood T. Pusey, to recover back money paid by plaintiffs to defendants for oil-stocks, alleged to have been sold under false representations.

The case was tried January 5th 1871, before Lynd, J.

The plaintiffs' evidence was that in March or April 1864 they bought from the defendants 3000 shares of stock in the Watson Petroleum Company and Great Western Oil Company at $3 per share for the one and $2.50 per share for the other; that the defendants represented to them that if they bought the stock they would get it at the same price at which the defendants themselves took it, being only the actual cost of the land and 50 cents per share for working capital; that defendants also represented that other persons, whom they named, and whose judgment as to oil-stock ranked high in the community, had purchased stocks at the same

price; that some time afterwards they learned that the statements in regard to the cost of the land, &c., were inaccurate, and March 2d 1866 they tendered the certificates of stock to the defendants, and gave them notice that they rescinded the contract.

The plaintiffs gave other evidence in support of their case and closed.

The defendants gave evidence in contradiction of the plaintiffs' as to the representations; amongst other things, that when the plaintiffs purchased the stock nothing had been said about the price of the land or the cost of the stock.

They gave evidence also that in October or November 1865, they had informed the plaintiffs what the land cost, which was less than the amount the plaintiffs said they had put it at when they bought the stock; that the plaintiffs had afterwards paid an assessment on the stock; that there was no tender of the stock till after the wells had been finished and the working capital exhausted; that the companies had put down two wells, but had not got any oil, &c.

The defendants submitted six points. The fourth with its answer was:—

"If the plaintiffs were informed by Charles Wise, in October 1865, of the original cost of the land, and did not then repudiate the contract, but waited until March 1866, taking their chances of oil being obtained in the meantime, and only made offer to return when the working capital was exhausted and the wells a failure, they are not entitled to recover."

Answer: "This I have pretty well covered in my general charge, and I say further, in specific answer, that if you find the facts as put in this point, then the conclusion of law that the plaintiffs are not entitled to recover is correct."

In the general charge, the court said on this point:—

"In the fall of 1865 it was that Mr. Wise told Mr. Leaming, Sr., the actual cost; it was after that that the assessment was paid. 'I think I went to his counting-house in October 1865. It was not more than three or four weeks later in October 1865. There was no tender of the stock until after the working capital was exhausted.'

"Now, gentlemen, upon this subject I simply instruct you:— 1. If you find that the plaintiffs were informed of the price of the land by Mr. Wise in October, or early in November 1865; 2. That the plaintiffs did not offer to return to the defendants the stock in question for one or more months after such information was given; (the date is given; the evidence is March the 2d 1866;) that the price of the stock had fallen between the time of the receipt of the information and the time of the tender, or that any other unfavorable circumstances appearing from the evidence occurred in the interval, so that the defendants would be in a

worse condition by taking back the stock at the time of the tender than they would have been if the stock had been previously tendered, or tendered at the time the information was given; then your verdict must be for the defendants."

The verdict was for the defendants.

The plaintiffs took out a writ of error. They assigned fourteen errors. The eleventh was the answer to the defendants' fourth point; the fourteenth was the portion of the charge given above.

S. S. Hollingsworth (with whom was *G. W. Biddle*), for plaintiffs in error.—The seller having by his fraud put the buyer in possession of the stock cannot complain of the delay of tender of the goods before suing for the purchase-money: Blake *v.* Mowatt, 21 Beavan 603. Where the rights of third parties have not intervened, the right to rescind can be lost only by confirmation: Kerr on Frauds 235 *et seq.*, and notes; Negley *v.* Lindsay, 17 P. F. Smith 217. The delay might be explained by other facts; and the question was therefore for the jury: Rowe *v.* Osborne, 1 Starkie 112; Lawrence *v.* Knowles, 5 Bingh. N. C. 399; Charnley *v.* Dulles, 8 W. & S. 353.

R. P. White, for defendants in error.—The question of reasonable time was one of law: Atwood *v.* Clark, 2 Greenleaf 249. The rescission must be in a reasonable time: Downs *v.* Smith, 32 Vermont 6; such time is the earliest moment after discovering the fraud: Weed *v.* Page, 7 Wisc. 513; Kingsley *v.* Wallis, 14 Maine 57; Mason *v.* Bovet, 1 Denio 74; Howe *v.* Huntingdon, 15 Maine 350; Hill *v.* Hobart, 16 Id. 168; Campbell *v.* Fleming, 1 A. & E. 40; Ayers *v.* Mitchell, 3 Shaw & McLean 683; Hoolbrook *v.* Bart, 22 Pick. 546; Clark *v.* Ascham, 1 Ellis, B. & Ellis 148.

The opinion of the court was delivered, May 17th 1873, by

WILLIAMS, J.—The only question worthy of consideration in this case is presented by the 14th assignment. The action was brought to recover the price paid for certain oil-stocks which the plaintiffs alleged that they had been induced to purchase upon the fraudulent representations of the defendants as to the cost of the land; and a recovery was sought to be had on the footing of the plaintiffs' rescission of the contract and a tender of the stocks to the defendants before bringing the action. The evidence shows that the plaintiffs bought the stocks in April 1864; that they were informed by the defendants, in October or November 1865, of the price paid for the lands; and that, on the 2d of March 1866, they tendered the stocks to the defendants and demanded back the money they had paid for them. Between the discovery of the alleged fraud and the tender of the stocks the assets of the company had been exhausted in boring unsuccessfully for oil, and the

stocks had consequently depreciated in price. The court charged the jury that if they found that the plaintiffs were informed of the price of the lands by Mr. Wise in October, or early in November 1865; that the plaintiffs did not offer to return to the defendants the stocks in question for one or more months after such information was given; (the date is given, the evidence is March 2d 1866;) that the price of the stocks had fallen between the time of the receipt of the information and the time of the tender, or that any other unfavorable circumstances appearing from the evidence occurred in the interval, so that the defendants would be in a worse condition by taking back the stocks at the time of the tender, than they would have been if the stocks had been previously tendered at the time the information was given, then their verdict must be for the defendants. The objection made to the charge is, that mere delay in making the tender, after discovery of the fraud, is not in itself a defence to the action; and whether it is such as to amount to a confirmation of the sale, or a loss of the right to rescind it, is a question of fact for the jury.

If the defendants were guilty of the alleged fraud, the plaintiffs, on discovering it, had the undoubted right to rescind the contract, and, upon a tender of the stocks, to demand back the price paid for them. But it was their duty to do it within a reasonable time. They were not at liberty to await the result of the experiments the companies were making to obtain oil, and to rescind the contract after their efforts had proved to be fruitless. If they intended to rescind the contract it was their duty to act promptly and to return or tender the stocks at the earliest convenient moment after discovering the fraud. If they unduly delayed to return them and demand back the price they affirmed the validity of the contract: Pearsoll *v.* Chapin, 8 Wright 9; Negley *v.* Lindsay, 17 P. F. Smith 217. What is reasonable time or undue delay, when the facts are not disputed, is, as is well settled, a question of law to be determined by the court. *Quam longum esse debet non definitur in jure sed pendet ex discretione justiciariorum:* 1 Tho. Co. Litt. 644, (52 b.)

Here the delay was for four months, and no evidence was given to explain or excuse it. Under the circumstances we have no hesitation in saying that it was unreasonable. The inference is pregnant that if, in the meantime, oil had been found in large quantities, there would have been no rescission of the contract, or offer to return the stocks. The plaintiffs could not take the chance of the speculation, and at the same time repudiate the contract if it turned out to be a losing bargain. Besides, the instruction complained of was not predicated of the mere fact of the plaintiffs' delay in offering to return the stocks, but of the delay coupled with the fact that the price of the stocks had fallen in the interval between the discovery of the alleged fraud and the date of the

tender. The verdict of the jury establishes both of these facts, and we are clearly of the opinion that they are sufficient to bar the plaintiffs' right to rescind the contract. There was then no error in the instructions of the court, and they were as favorable to the plaintiffs as they had any right to ask or expect.

There is nothing in the other assignments requiring special notice. The evidence complained of had more or less bearing upon the question in issue, and there was no error in its admission that calls for a reversal of the judgment.

Judgment affirmed.

Dillin *versus* Wright.

1. A devise was, "I leave my house in G. in charge of S. A. and E. W., for the benefit of my brother, to be used principal and interest if needed, and if any remains after his death, it is to become the property of E. and S. *Held*, that the brother had not an absolute power of disposition; the land being unchanged at his death passed to E. and S. in fee.

2. The discretion as to its disposition was in S. A. and E. W. as trustees; not in the brother.

February 18th 1873. Before READ, C. J., SHARSWOOD, WILLIAMS and MERCUR, JJ. AGNEW, J., at Nisi Prius.

Error to the District Court of *Philadelphia:* No. 341, to January Term 1873.

This was an action of assumpsit, brought September 2d 1870, by Emma Wright and Samuel Wright, minors, by their guardian, Isaac M. Post, against Eli Dillin.

Elizabeth A. Hamersley, by her will, dated August 6th 1864, amongst other things, devised as follows:—

"I leave the house at Germantown in charge of my uncle Samuel Albright and my aunt Elizabeth Wright, for the benefit of my brother Robert, to be used, principal and interest, if needed; and if any remains after his death, it is to become the property of my cousins Emma and Samuel Wright."

The testatrix died shortly afterwards. Her brother Robert subsequently died, the real estate remaining in the condition in which it was at her death.

The defendant collected the rents of the real estate, which had accrued since the death of Robert, and paid the charges and taxes on the same, and held the balance for such persons as were entitled to it.

It was agreed that if the plaintiffs were entitled under the will to the real estate, the verdict should be for them for $656.65.

The court below instructed the jury to find for the plaintiff, reserving the question whether the devisee Robert took an estate in fee or for life only, with remainder over to the plaintiffs; and

afterwards entered judgment for the plaintiffs upon the verdict on the point reserved, on the following opinion by Hare, P. J.:—

"It is well settled that a 'devise of an estate generally or indefinitely, with a power of disposition over it, carries a fee:' Church *v.* Disbrow, 2 P. F. Smith 219, 222. The result may be the same when the devise is for life, and the power implied from a gift over of the 'residue.' The reason is that the right to dispose of or alienate implies absolute control and ownership; in other words, the existence of a fee. The intention of the testator under these circumstances is to limit the interest of the first taker, and that what he does not use or assign shall go over at his death. But he has another purpose which is inconsistent with the first, and as both cannot stand, the effect will be given to that which favors the first object of his bounty. To say that a man may deal with property as he thinks fit during his life, but that he shall not have power to leave what he does not use to those who are dear to him, is an incongruity which the law will not tolerate. A great motive for economy would be withdrawn, and the donee might be led to squander that which he was not permitted to bequeath.

"The material words in the devise before us are as follows: 'I leave the house in Germantown in charge of my uncle, Samuel Albright, and my aunt, Elizabeth Wright, for the benefit of my brother Robert, to be used, principal and interest, if needed; and if any remains after his death, it is to become the property of my cousins, Emma and Samuel Wright.' Did this clause confer an absolute power of disposition on the devisee, Robert Rowand? The whole was to be applied to his use if needed, and the surplus only 'to become the property' of the plaintiffs. So far the case is with the defendant. But the question remains—Who was to judge of the extent of Robert's needs? and whether they could be satisfied from the interest, or required an absolute appropriation of the principal. It would seem very clear that this discretion was vested in the trustees, and not in the beneficiary. Otherwise the creation of the trust served no good purpose, and the introduction of the names of Samuel Albright and Elizabeth Wright was a mere form. Such an inference would be contrary to the rule that in construing a will, effect shall be given to every clause. It is significant that Elizabeth Wright, the mother of the devisees in remainder, was chosen by the testatrix to administer the trust. A discretionary power in the trustees to dispose of the property by sale and apply the proceeds to Robert's use 'if needed,' is obviously not consistent with the existence of a limited estate in him. In this aspect the several parts of the clause become harmonious; the gift to Robert, the gift over, and the power of disposition. It should therefore be preferred to the opposite construction, which

defeats the remainder, contrary to the express will of the testator. Judgment is entered for the plaintiffs on the point reserved."

The defendant took a writ of error, and assigned for error the entering of judgment for the plaintiffs on the reserved point.

E. Hopper, for plaintiff in error.—Robert, having a right to dispose of the property at pleasure, took a fee: 2 Washburn Real Property 752; 6 Cruise's Dig. (Greenleaf) 367, note; 4 Kent's Com. 297; Ide *v.* Ide, 5 Mass. R. 500; Hambright's Appeal, 2 Grant 320; Green's Appeal, 6 Wright 25; Presbyterian Church *v.* Disbrow, 2 P. F. Smith 219. The trust was not an active one: Dodson *v.* Ball, 10 P. F. Smith 492; Yarnall's Appeal, 20 Id. 335.

A. Thompson, for defendants in error.—The implication of absolute ownership may be rebutted by the express gift of a less estate: Hess *v.* Hess, 5 Watts 191; Flintham's Appeal, 11 S. & R. 16; Pennock's Est., 8 Harris 268; Upwell *v.* Halsey, 1 P. Wms. 651; Jauretche *v.* Proctor, 12 Wright 466; Barnett *v.* Deturk, 7 Wright 92.

Judgment was entered in the Supreme Court, February 24th 1873.

Per Curiam.—Judgment affirmed on the opinion of Judge Hare.

Cannon *versus* Boyd.

1. Where a continuous and apparent servitude is imposed by an owner on one part of his land for the benefit of another, a purchaser at private or judicial sale takes subject to the servitude.
2. An owner of land subject to a mortgage laid it out in lots, and built on two adjoining lots, on one was an alley which was used by the other; the land was sold in the distinct lots under the mortgage, the use of the alley being apparent. *Held*, that the first lot was sold subject to the use of the alley, although no reference to it was made in the sheriff's deed.
3. Whether the agent who purchased the dominant lot at the sheriff's sale expected when he purchased to get the alley—was not evidence to affect his principal's title.
4. Overdeer *v.* Updegraff, 19 P. F. Smith 110; Seibert *v.* Levan, 8 Barr 383, recognised.

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February 19th 1873. Before Reed, C. J., Sharswood, Williams and Mercur, JJ. Agnew, J., at Nisi Prius.

Error to the District Court of *Philadelphia:* No. 49, to July Term 1871.

This was an action on the case brought October 28th 1870, by John Boyd against Patrick Cannon, for closing an alley over which the plaintiff claimed he had a right of passage.

On the 17th of November 1845, Francis McCabe bought an

unimproved lot on Cotton street, Philadelphia, and gave a mortgage for part of the purchase-money. He divided it into three lots, and shortly afterwards built a house on No. 2. In 1856, he built on No. 3, adjoining the house on No. 2, leaving an alley on it —over which his house extended—opening into Cotton street. McCabe died about 1860. The entire lot was sold by the sheriff at the same time under the mortgage in the three separate lots, described as No. 1, No. 2, and No. 3. No mention was made in any of the proceedings of the alley, or an opening from No. 2 to No. 3. Lot No. 3 was sold to Cannon, and the deed made to him September 16th 1867. No. 2 to the plaintiff, and the deed made November 23d 1867.

The case was tried March 3d 1871, before Lynd, J.

The plaintiff testified that he had lived in the house on No. 2 and at the sheriff's sale, for three years before; there was a gate leading from the back porch of his house to the alley; he had never been interrupted in the use of the alley. He testified also that the defendant had closed the alley.

Another witness testified that McCabe had put up a gate from No. 2 into the alley for the use of those in the house.

Other witnesses testified that for seven or eight years before the sheriff's sale, the alley had been used by both parties; that lot No. 2 had a passage over lot No. 3, before the house on No. 3 was built; there was a gate into the alley from each lot at the sheriff's sale; that the tenants of lot No. 2 uninterruptedly used the alley.

The defendant's witnesses testified that the alley had been put there by McCabe, specially for his own use; that plaintiff had used it without license; "merely was not interfered with nor forbidden to use it."

A witness for defendant testified that he had bought No. 2 at sheriff's sale for the plaintiff.

The defendant then proposed to ask the witness:—

"Did you purchase that property expecting or believing that you got a title to that alley?"

The question was objected to by plaintiff, overruled by the court, and a bill of exceptions sealed.

The defendant gave other evidence in answer to the plaintiff's case.

The defendant submitted two points which were declined by the court, viz:—

1. "The sheriff's sale and deed to defendant under the mortgage, describing the land, vested the soil of the alleged alley in the defendant, clear of the easement claimed by plaintiff.

2. "If the jury believed that the alley was merely used by McCabe, the then owner, for his own accommodation, and not as an

easement, nor as a right annexed to the plaintiff's lot, the verdict should be for defendant."

The court also charged, that "the only question in this case is, what was the condition of these two properties at the time of the sheriff's sale; if the condition of the properties at the sheriff's sale was such as to indicate that the occupants of property now owned by plaintiff, used the alley in question, and had a right to do so, their verdict should be for plaintiff."

The verdict was for the plaintiff.

The defendant removed the record to the Supreme Court and assigned for error:

1, 2. Declining his points.

3. The charge.

4. Rejecting his offer of evidence.

W. L. Hirst, for plaintiff in error.—On 1st point, cited King *v.* McCully, 2 Wright 76. On 2d, Price on Limitation 189, 324, 326; Washburn on Real Estate 114, 116, 121; Reimer *v.* Stuber, 8 Harris 458.

J. Dolman, for defendant in error.—Each purchaser at sheriff's sale took all the benefits and burdens which were continuous and apparent: Nicholas *v.* Chamberlaine, Cro. Jac. 121; McCarty *v.* Kitchenman, 11 Wright 243; U. S. *v.* Appleton, 3 Sumner 502; Seibert *v.* Levan, 8 Barr 383; Dunklee *v.* R. R. Co., 4 N. H. 489; Seymour *v.* Lewis, 13 N. J. 439; Lampman *v.* Milks, 21 N. H. 505; New Ipswich Factory *v.* Bachelder, 3 N. H. 190.

The opinion of the court was delivered, May 17th 1873, by

WILLIAMS, J.—Where a continuous and apparent easement or servitude is imposed by the owner on one portion of his real estate for the benefit of another, the law is well settled that a purchaser at private or judicial sale, in the absence of an express reservation or agreement on the subject, takes the property subject to the easement or servitude: Seibert *v.* Levan, 8 Barr 383; Overdeer *v.* Updegraff, 19 P. F. Smith 110, and cases there cited. The sheriff sold and conveyed the lots to the parties in this case without reference to the existence of the alley on the lot purchased by the defendant; but the evidence shows that the alley was open and apparent at the time of the sale, and that there was a gate leading into it from the lot purchased by the plaintiff, clearly indicating that it was used in common by the tenants of both lots. It also appears from the evidence that the alley was laid out and opened by McCabe, the former owner of the lots, and that it was used in common by the occupants thereof for a period of more than ten years prior to the sheriff's sale. The court below was, therefore, clearly right in declining to charge that the sheriff's

sale and deed vested the soil of the alleged alley in the defendant, clear of the easement claimed by the plaintiff; and in charging that the only question in the case is, What was the condition of these two properties at the time of the sheriff's sale? If the condition of the properties at the sheriff's sale was such as to indicate that the occupants of the property, now owned by the plaintiff, used the alley in question and had a right to do so, the verdict should be for the plaintiff.

There was no error in refusing leave to ask the plaintiff's agent whether he purchased the property expecting or believing that he got a title to the alley. The expectation or belief of the agent could not affect the plaintiff's title.

Judgment affirmed.

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Zane *versus* Kennedy *et al.*

1. Husband and wife conveyed land in trust, amongst other things empowering the trustee to sell such parts as the wife by writing might request, and pay the purchase-money to the wife. *Held*, that the trustee had power on request in writing of the wife to mortgage the land.
2. At the request of the wife, the trustee sold the property to A., in order that he might mortgage it as collateral security for money to set up her son in business. *Held* to be a valid execution of the power in the trust-deed.
3. The wife having the entire control of the money raised by the mortgage, might give it to her son.
4. An absolute and unrestricted power to sell included a power to mortgage.
5. The mortgage was given to secure the payment of notes of the son; their times of payment were extended by the holders. There being no evidence of a consideration for such extension, *Held*, that this did not discharge the wife if she were surety.
6. An agreement without consideration to give time to a debtor is not binding on the creditor and would not prevent the surety from paying the debt and seeking reimbursement from the principal.
7. The trust provided first for the payment of debts of the husband; the land having been sold under the mortgage; in ejectment against the purchaser by the wife as cestui que trust to recover her equitable estate, she could not set up these debts; that could be done only by the husband's creditors or the trustee for their use.
8. Lancaster *v.* Dolan, 1 Rawle 231, affirmed.

February 20th 1873. Before READ, C. J., SHARSWOOD, WILLIAMS and MERCUR, JJ. AGNEW, J., at Nisi Prius.

Error to the District Court of *Philadelphia:* No. —, to January Term 1873.

This was an action of ejectment, brought April 26th 1856, by John Zane and Maria Antoinette Zane against Sybella S. Kennedy, Herbert M. Kennedy and Amelia T. Kennedy, for a lot of land in Moyamensing township, Philadelphia, marked in the plan as "Garlick Hall," containing 3 acres 136 perches.

[Zane v. Kennedy.]

The land, with other tracts, having been the property of Mrs. Zane, had been conveyed by herself and husband, the other plaintiff, to William L. Hirst, Esq., in trust; it had been subsequently mortgaged, and sold by the sheriff under the mortgage to James M. Kennedy; he devised to the defendants, who were his widow and children.

The question was—whether the mortgage was a valid exercise of the powers of the trustee under the deed of trust.

John Zane having died, his death was suggested on the record.

The case was tried February 1st 1867, before Sharswood, P. J.

The plaintiff gave in evidence deed dated February 28th 1832, between John Zane and Maria Antoinette (late Morris) his wife of the one part, and William L. Hirst of the other part, as follows:—

"Whereas, by the recent death of Mary Pancoast (late Morris), mother of the said Maria Antoinette Zane, they, the said John Zane and Maria Antoinette Zane, his wife, in her right, have inherited and become entitled to * * * certain real and personal estate situate in the city and county of Philadelphia which they desire and design to convey in manner following: Now this indenture witnesseth that they, the said John Zane and Maria Antoinette his wife, as well for and in consideration of the premises as of the sum of five dollars to them in hand well and truly paid by the said William L. Hirst, * * * have granted * * * unto the said William L. Hirst, * * * all and every the right * * * of them the said John Zane and Maria Antoinette, his wife, or either and both of them, of, in and to all and singular the estate real and personal * * * of the said Mary Pancoast, and which descended to and became vested in the said John Zane and Maria Antoinette, his wife, or either or both of them, upon the death of her the said Mary Pancoast, * * * to have and to hold the premises * * * unto the said William L. Hirst, his heirs and assigns, to and for his and their only proper use, benefit and behoof for ever. Upon this special trust and confidence, nevertheless, that he, the said William L. Hirst, * * * will, with due diligence and prudence, sell either at public or private sale, or retain and receive the rents, issues, profits, dividends and interest arising out of so much of the estate hereby granted as hath by the laws of this Commonwealth passed to, or vested in the said John Zane upon the death of the said Mary Pancoast, in his own right and not in right of said Maria Antoinette, his wife, and out of the fund created by the sale of the said interest of John Zane in the premises aforesaid, or by receiving the rents, * * * either of which modes the said trustee may choose or elect according to his best discretion, then upon the further special trust and confidence that he the said William L. Hirst * * * will pay to (several persons named, creditors of John Zane, sums specified); and after they shall all and each be paid, * * * then the surplus, if

any, is to be paid to the said John Zane; * * * and upon this further special trust and confidence that the said William L. Hirst * * * will faithfully apply the entire balance, remainder and residue of the said estate * * * and the full, entire and complete right, title and interest, property, claim and demand whatsoever of her the said Maria Antoinette, of, in and to the said estate * * * to and for the following uses, trusts, intents and purposes, and none other, that is to say:—that the said William L. Hirst * * * will collect all the rents, * * * then in case the said Maria Antoinette should survive the said John Zane, to pay over the same faithfully to her the said Maria Antoinette, regularly and as the same shall be received. And from and after the death of them the said John Zane and Maria Antoinette Zane, * * * that he the said William L. Hirst * * * shall hold all the said estate which shall then be unsold, by the said trustee according to the hereinafter recited authority to sell, to and for such uses, trusts, intents and purposes as she the said Maria Antoinette shall by writing, or last will, * * * appoint, * * * and on default of such appointment, * * * that he the said William L. Hirst * * * will hold the said estate * * * to and for the use of all the children of them the said John Zane and Maria Antoinette Zane. * * * And upon the further special trust and confidence, that the said William L. Hirst * * * shall be and he and they are hereby and by force and virtue of these presents authorized and fully empowered to sell and convey * * * all or such parts of the said hereby granted estate as the said Maria Antoinette shall by writing, under her hand, from time to time request and require, and for and as respects the purchase-money thereof, upon the special trust and confidence that he, the said William L. Hirst * * * will pay the same to the said Maria Antoinette, and her receipt for the same shall be his full voucher and protection for so doing, * * * but if she, the said Maria Antoinette, should not request or require the moneys aforesaid, then * * * to invest the same in productive stocks or safe mortgages or real estate, at the discretion of the said trustee, and all such stocks * * * shall become part of the estate which shall pass according to the hereinbefore recited trusts and provisions, * * * and upon the special trust that he, the said William L. Hirst * * * will when expedient make partition or compel to make partition at law among the several heirs of the said Mary Pancoast, * * * and shall have full power to collect and take any part of the said estate when thereto requested in writing by the said Maria Antoinette during her life, or after her death at his own discretion, in any proceeding in partition * * * and hold and consider the same as part of the estate hereby granted, and subject to all the rules, trusts, * * * hereinbefore set forth with reference thereto, and to the descending of the same, and if in any such proceeding the said

[Zane v. Kennedy.]

estate should be sold, then * * * the said William L. Hirst * * * will pay over the proceeds of such sale or any part thereof to the said Maria Antoinette." * * *

The plaintiff gave evidence also, that by virtue of proceedings in partition the premises were vested in Mr. Hirst under the trusts of the above-mentioned deed; and that on his own application Mr. Hirst was discharged from his trust in November 1842.

The plaintiff having rested, the defendants offered in evidence deed dated January 30th 1841; Maria A. Zane, wife of John Zane, of the first part; William L. Hirst, trustee, of the second part, and Anthony M. Zane of the third part. This deed recited the deed of February 28th, 1832 and the proceedings in partition, &c., and proceeded:—

"Now, this indenture witnesseth that the said Maria A. Zane, in consideration of the sum of $1, lawful money to her paid by the said Anthony M. Zane, at * * * and the said William L. Hirst, as aforesaid in consideration of $12,000, to her paid by the said Anthony M. Zane, at * * * they the said Maria A. Zane and William L. Hirst, trustee, have granted * * * (he, the said trustee, acting by the request of the said Maria A. Zane, testified by her becoming a party hereto,) * * * unto the said Anthony M. Zane, his heirs and assigns, all the estate, * * * which was of her the said Maria A. Zane, at the time of the execution of the above recited indenture, of, in and to all that lot or piece of land in Moyamensing township, in the county of Philadelphia, marked in the plan of 'Garlick Hall,' annexed to the aforesaid partition, * * * and all the estate of the said Maria A. Zane either at law or in equity, in and of the same, to have and to hold the said lot, &c., unto the said Anthony M. Zane, his heirs and assigns." * *

This deed is signed:

"MARIA A. ZANE, [SEAL.]
W. L. HIRST. [SEAL.]"

Appended to it are the following receipt and acknowledgment:—

"Received the day of the date of the above-written indenture of the above-named Anthony M. Zane, the sum of $12,000, being the full consideration-money above mentioned.

MARIA A. ZANE."

And the following acknowledgment:—

"Before me, the subscriber, an alderman, &c., personally appeared the above-named Maria A. Zane and William L. Hirst, and acknowledged the above-written indenture to be their and each of their act and deed," &c.

The defendants objected to the admission of the deed:—

1. That it was not a valid execution of the power in the deed of February 28th 1832.

2. That it was without consideration and void, no purchase-

money being shown to have been paid to the trustee or Mrs. Zane.

The court admitted the deed and sealed a bill of exceptions.

The defendants then, under similar objection and exception, gave the following evidence:—

Bond, Anthony M. Zane to Isaac M. Zane, dated February 1st 1841, conditioned for the payment of $4000 in one year with interest; mortgage, same to same (in the ordinary form), of the land conveyed by deed of January 30th 1841, to secure the payment of the above-mentioned bond. Deed, dated February 3d 1841, between "Isaac M. Zane, of the firm of Zane, Taylor & Co., of the one part, and James M. Kennedy, Alexander H. Julian, John S. Boyd and Elias W. Davidson, merchants, trading under the firm of Kennedy, Julian & Co., and James R. Dickson, merchant, of the other part;" reciting that Zane, Taylor & Co. had given their note dated February 1st 1841, to Kennedy, Julian & Co. for $2766.23, and to James R. Dickson their note of same date for $1233.77; and assigning the bond and mortgage to Kennedy, Julian & Co. and James R. Dickson, as and for a collateral security for the payment of the aforesaid two several debts or sums of money amounting together to the sum of $4000, in discharge of the said two several promissory notes, * * * provided always nevertheless, and it is hereby mutually covenanted and agreed by and between the said parties hereto that, if the said Isaac M. Zane * * * shall well and truly pay unto the said James M. Kennedy, Alexander H. Julian, John S. Boyd, Elias W. Davidson and James R. Dickson, * * * the aforesaid two several debts or sums of money amounting together to the sum of $4000 such as abovesaid (according to their respective interest therein) that, then and immediately thereupon the said James M. Kennedy, Alexander H. Julian, John S. Boyd, Elias W. Davidson and James R. Dickson * * * will reconvey and reassign the whole of the hereby granted and assigned premises * * * unto him the said Isaac M. Zane, his heirs, executors, administrators and assigns, as of his estate, title and interest in the same immediately prior the execution hereof."

Deed, dated March 30th 1841, between Anthony M. Zane of the one part, and William L. Hirst, "trustee of Maria Antoinette Zane, wife of John Zane, of the other part," by which Anthony Zane "in consideration of the sum of $12,000 unto him paid by the said William L. Hirst trustee as aforesaid, out of the proper moneys of the said Maria Antoinette * * * the receipt whereof is hereby acknowledged, hath granted * * * unto the said William L. Hirst, trustee as aforesaid, his heirs and assigns, all that lot or piece of land in Moyamensing township, in the county of Philadelphia, marked in a certain plan of 'Garlick Hall.' * * * To have and to hold the said lot * * * unto the said William L. Hirst, his heirs and assigns, * * * in trust, never-

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theless, to be held by the said William L. Hirst, his heirs and assigns, under and subject (and in trust for the said Maria Antoinette Zane) to all the uses and privileges and all the restrictions, reservations, trusts, limitations, conditions and appointments which are contained in and by a certain deed of trust from John Zane and the said Maria Antoinette Zane to the said William L. Hirst, dated the twenty-eighth day of February, Anno Domini one thousand eight hundred and thirty-two." * * *

Record of scire facias on the above-mentioned mortgage:—Isaac M. Zane to the use of James M. Kennedy *et al.* against Anthony M. Zane, judgment September 12th 1843; levari facias February 28th 1844; sale March 18th 1844, by sheriff to James M. Kennedy for $5. March 23d 1844, "rule on defendant to pay amount of interest due on mortgage or to show cause why the sheriff should not execute a deed for the property described in the levari facias to James M. Kennedy;" rule made absolute, April 6th 1844; deed, Morton McMichael, sheriff, to James M. Kennedy for the premises, acknowledged April 27th 1844.

Defendants gave evidence that on the 19th of November 1842, Thomas D. Smith was appointed trustee under the deed of February 28th 1832, in place of Mr. Hirst. They then offered in evidence deed dated May 7th, 1844, between Maria A. Zane, wife of John Zane, of the first part, Thomas D. Smith, trustee, of the second part, and James A. Kennedy of the third part. This deed recited the deed of trust to William L. Hirst; the proceedings in partition allotting the premises in dispute to William L. Hirst under the trusts in that deed; the conveyance of the same premises to Anthony M. Zane; and his reconveyance to Mr. Hirst of the same premises, and under the trusts, &c., of the original deed of trust to him; the appointment of Mr. Smith on the 19th of November 1842, as trustee in the place of Mr. Hirst. The deed offered in evidence is then as follows: "Now this indenture witnesseth that the said Maria A. Zane, in consideration of the sum of one dollar, lawful money, to her paid by the said James M. Kennedy, the receipt whereof is hereby acknowledged, and the said Thomas D. Smith, trustee of Maria A. Zane, aforesaid, in consideration of the sum of one dollar paid him by the said James M. Kennedy, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released and confirmed, and by these presents the said trustee, acting by the request of the said Maria A. Zane, testified by her becoming a party hereto, do grant * * * and confirm unto the said James M. Kennedy, his heirs and assigns, all that lot or piece of land in Moyamensing township, in the county of Philadelphia, marked in the plan of 'Garlick Hall,' * * * and all the estate, right, title, property, claim and demand whatsoever, of her the said Maria A. Zane, and of him the said Thomas D. Smith, trustee as aforesaid, * * * to have and to hold

the said lot * * * unto the said James M. Kennedy, his heirs and assigns for ever. * * *.

This deed was executed:

"THOMAS D. SMITH, [SEAL.]
"Trustee for Maria A. Zane.
"MARIA A. ZANE."

After which were the following receipt and acknowledgment:—

"Received the day of the date of the written indenture, of the above-named James M. Kennedy, the sum of two dollars, being the full consideration-money above mentioned.

"THOMAS D. SMITH,
"Trustee for Maria A. Zane.
"MARIA A. ZANE."

"Before me, the subscriber, an alderman, &c., personally appeared the above-named Maria A. Zane and Thomas D. Smith, trustee, and severally acknowledged the above-written indenture to be their and each of their act and deed," &c.

The admission of this deed was objected to for the reasons given on the former objections.

The deed was admitted and a bill of exceptions sealed.

The plaintiffs called Anthony M. Zane, who testified: That Julian, one of the firm of Kennedy, Julian & Co., told witness that they had done all they could for Isaac, that they had extended the notes for which the assignment of the mortgage was made as collateral, several times. On cross-examination, witness said nothing was said about any consideration having been given by Isaac, for the extension of the notes; witness did not know that there was any consideration, or that the old notes were given up.

The plaintiffs then offered to prove by John Zane and other witnesses, that the witness, John Zane, was present at Congress Hall, early in 1841, when Isaac Zane was negotiating with James M. Kennedy, one of the firm of Kennedy, Julian & Co., for the purchase of goods for Zane, Taylor & Co.; that Isaac Zane proposed to Kennedy to give, through Maria Antoinette Zane, a mortgage on Garlick Hall (the premises in dispute), as security for the goods; that James M. Kennedy said that he would submit the matter to his conveyancer, and if the mortgage was good, would make the arrangement; that subsequently he (the witness) accompanied James M. Kennedy and Isaac Zane to the office of Samuel L. Clement, a conveyancer, who informed them that Mrs. Zane could not create a mortgage, and suggested that the premises should be conveyed to a third person, who should mortgage them, and that the mortgage should be assigned to Kennedy and others; that Sarah Zane was named as the third person, but on suggestion of Clement that it should be a male Anthony M. Zane, another

child of Mrs. Zane, was selected; that it was then arranged that papers should be prepared and executed at different times conveying the premises to Anthony M. Zane; that Anthony M. Zane was to execute a mortgage to Isaac Zane, and to reconvey the premises encumbered, to the trustee; and that Isaac Zane was to assign said mortgage as collateral security to Kennedy and others for the goods; that no money was to be, or was in fact paid to Mrs. Zane or to her trustee, or to any other person; that Anthony M. Zane was not indebted to Isaac Zane to the amount of the mortgage or in any other amount; that Isaac Zane obtained a mortgage for $4000, whilst Maria Antoinette Zane was willing to be security for $2000 only; that the deeds and papers given in evidence by the defendants are the papers which were referred to by Mr. Clement, Mr. Kennedy and Isaac Zane; and further, that the consideration mentioned in the deed from Hirst, trustee, and Mrs. Zane, to Anthony M. Zane, and also the consideration in deed from Smith, trustee, and Mrs. Zane to James M. Kennedy are grossly inadequate; and further, that at the time of the execution of the deed—Hirst, trustee, and Mrs. Zane to Anthony M. Zane—the said trustee declined to sign the receipt for the alleged purchase-money, and caused the body of the deed to be altered, so as to make it appear that the alleged purchase-money had been paid to Mrs. Zane, and not to him as trustee.

The offer was objected to and rejected, and a bill of exceptions sealed.

The plaintiff requested the court to charge the jury:—

1. That the deed of January 30th 1841, being a deed of bargain and sale, and no consideration having been paid, neither Anthony M. Zane nor any person claiming under him having notice, acquired any title to the premises mentioned in the writ.

2. That the deed of January 30th 1841 is an invalid execution of the power contained in deed of trust John Zane and wife to William L. Hirst, dated February 28th 1832, and transferred no title to Anthony M. Zane nor to any person claiming under him.

3. That if any effect can be given to the deed of January 30th 1841, then it, and the mortgage from Anthony M. Zane to Isaac Zane, the assignment of said mortgage by Isaac Zane to James M. Kennedy and others, and the reconveyance of the premises by Anthony M. Zane to William L. Hirst, in trust, are to be construed as one paper, to wit, a mortgage of the premises by the trustee, William L. Hirst, to James M. Kennedy and others.

4. That the mortgagor not having been made a party to the proceedings in the Supreme Court, nor warned by the sci. fa., the judgment thereon and the sale thereunder confer no title on James M. Kennedy.

5. That the deed of January 30th 1841, the mortgage from Anthony M. Zane to Isaac Zane, and the transfer of said mort-

gage to James M. Kennedy and others, are fraudulent and void, conferred no title on those claiming thereunder, and were not capable of confirmation.

6. That the deed dated May 7th 1844, from Maria Antoinette Zane and Thomas D. Smith to James M. Kennedy, is an invalid execution of the power contained in the deed of trust, and being without consideration is void.

7. That if Anthony M. Zane was not indebted to Isaac Zane at the date of the mortgage, February 1st 1841, or no money or other value was given for said mortgage, and James M. Kennedy and those claiming under him had notice thereof, then no title passed to said James M. Kennedy or others claiming under him by virtue of the proceedings under the mortgage.

The court refused the points and instructed the jury to find for the defendants, and the jury so found.

Judgment was entered on the verdict May 1st 1867. The plaintiffs took out a writ of error May 1st 1867.

They assigned for error:—

1, 2, 3. The admission of defendants' offers of evidence.

4. Rejecting plaintiffs' offer of evidence.

5. Declining the plaintiffs' points.

6. The instructions to find for the defendants.

G. W. Biddle and *W. L. Hirst*, for plaintiffs in error.—A confirmation must be with a full knowledge of all the circumstances and deliberate examination by the parties interested: Campbell *v.* McLain, 1 P. F. Smith 203; Anderson's Appeal, 12 Casey 496; Owings *v.* Hull, 9 Peters 629.

The rule that a power to sell involves a power to mortgage does not apply to such a mortgage as in this case, where it was intended as collateral security, which was not for the purposes declared in the trust-deed: Pullen *v.* Rianhard, 1 Wharton 522. A married woman has no power under a deed except that clearly given to her by it: Thomas *v.* Fowell, 2 Wharton 16; Hoover *v.* Samaritan Soc., 4 Id. 452; Wallace *v.* Costen, 9 Watts 138; Dodson *v.* Ball, 10 P. F. Smith 496; Wright *v.* Brown, 8 Wright 224; Fisher *v.* Taylor, 2 Rawle 33; Holdship *v.* Patterson, 7 Watts 547; Ashhurst *v.* Given, 5 W. & S. 323; Brown *v.* Williamson, 12 Casey 338; Barnet's Appeal, 10 Wright 392; Rife *v.* Geyer, 9 P. F. Smith 393; Mansell *v.* Mansell, 2 P. Wms. 681; Cochran *v.* O'Hern, 4 W. & S. 100; Lancaster *v.* Dolan, 1 Rawle 247; Pennsylvania Company *v.* Austin, 6 Wright 263.

Equity will always defeat those who deal with trust property, or acquire it, with knowledge that it is diverted from the legitimate purposes of the trust: Story, §§ 1257, 1258; Pray's Appeal, 10 Casey 113.

[Zane v. Kennedy.]

C. Gibbons and *P. McCall*, for defendants in error.—The deed itself imports consideration. If a consideration of money be expressed in a deed of bargain and sale, no averment lies to the contrary: Wilt *v.* Franklin, 1 Binney 502; Allison *v.* Kurtz, 2 Watts 185; McMullin *v.* Glass, 3 Casey 151. Mrs. Zane had an absolute dominion over the property by virtue of her right to control the purchase-money, and therefore her deed of confirmation was valid: Coryell *v.* Dunton, 7 Barr 530.

The intention of the trust-deed was to withdraw the estate from the dominion of the husband, and at the same time, to remove by the instrumentality of a trust the disability annexed to coverture by the common law, and to give Mrs. Z. the power of a feme sole. The grantors had a right to do this: Thomas *v.* Folwell, 2 Wh. 16; Towers *v.* Hagner, 3 Id. 48; Hoover *v.* Samaritan Soc. 4 Id. 445.

A power to sell includes a power to mortgage, a mortgage being a conditional sale: Lancaster *v.* Dolan, 1 Rawle 248; Gordon *v.* Preston, 1 Watts 385; Cochrane *v.* O'Hern, 4 W. & S. 100; Pennsylvania Life Insurance Co. *v.* Austin, 6 Wright 263; Ball *v.* Harris, 4 Mylne & Cr. 267; Hill on Trustees 475.

The opinion of the court was delivered, March 6th 1873, by

Sharswood, J.—The only question which appears to have been raised on the trial of this case in the court below was, whether the power of sale which by the deed of trust of February 28th 1832, John Zane and wife to William L. Hirst, was vested in the trustee, was duly exercised by the conveyance of January 30th 1841, by William L. Hirst and Maria Antoinette Zane to Anthony M. Zane. It may be conceded, that if the evidence offered—the rejection of which forms the fourth error assigned—had been admitted, it would have proved that the deed was without consideration as between the parties, and was executed solely in order that the grantee, Anthony M. Zane, might mortgage the property to Isaac M. Zane, as was done accordingly, February 1st 1841; which mortgage was to be, and was assigned to Kennedy and others, as collateral security for certain notes of Isaac M. Zane, given to the assignee for goods purchased by him, the object of the whole transaction being to set Isaac M. Zane up in business. Isaac M. Zane was a son of Maria Antoinette Zane, who was the *cestui que trust* in the deed of trust of February 28th 1832, and who was a party to the deed to Anthony M. Zane. The power contained in the deed of 1832, is in these words: "And upon the further special trust and confidence that the said William L. Hirst, his heirs, executors, successors and assigns, shall be, and he and they are hereby, and by force and virtue of these presents, authorized and fully empowered to sell and convey, by all lawful assurances and conveyances, all or such parts of the said hereby

granted estate, as the said Maria Antoinette shall, by writing under her hand, from time to time request and require, and for and as respects the purchase-money thereof, upon the special trust and confidence, that he the said William L. Hirst, his heirs, executors, successors and assigns, shall and will pay the same to the said Maria Antoinette, and her receipt for the same shall be his full voucher and protection for so doing, notwithstanding her present or any future coverture." The question then is, whether the trustee, at the request, and with the consent in writing, of the *cestui que trust*, had power to mortgage the premises. It is perfectly clear that if he had, Mrs. Zane was entire mistress of the money raised by the mortgage, and could give it to her son, Isaac M. Zane, if she so pleased. In a case in which a married woman had power to mortgage for her separate use and disposal, it was held by this court that she could execute the power for the benefit of her husband: Hoover *v.* The Samaritan Beneficial Society, 4 Wharton 445. The whole case, then, is resolved into the question whether in this state an absolute and unrestricted power to sell includes a power to mortgage. We cannot regard this as an open question. It was expressly decided in Lancaster *v.* Dolan, 1 Rawle 231, that a power to sell does include a power to mortgage, which is a conditional sale. It was not a mere *obiter dictum*, but the very point upon which the judgment hinged as to the remainder of the estate, over which there was a general power of appointment. It has since been recognised as the settled law in several cases: Presbyterian Corporation, *v.* Wallace, 3 Rawle 109; Gordon *v.* Preston, 1 Watts 386; Duval's Appeal, 2 Wright 118; Pennsylvania Life Insurance Company *v.* Austin, 6 Id. 263. It is of no consequence whether the case of Mills *v.* Banks, 3 P. Williams 9, cited in support of the ruling in Lancaster *v.* Dolan, has or has not been subsequently disapproved of in England. We are bound to adhere to a determination of this court settling a rule of property, which has been so often recognised and affirmed. There would be no security for titles, nor could counsel advise with confidence if we were ready to listen to suggestions for the reconsideration of points solemnly determined by our predecessors whenever the courts of some other state or country have adopted a different rule.

There are two other objections to the judgment which were not made below, nor are they contained in the printed paper-book of the plaintiff in error; but we will, nevertheless, briefly dispose of them. The first is, that as there was evidence that the promissory notes of Isaac M. Zane, to secure which the mortgage was intended, had been extended without the consent of Mrs. Zane, who was known to all parties to be the real mortgagor, and should, therefore, to the extent of the mortgaged premises, be viewed as a surety, the mortgage was discharged by such extension. There

was no evidence to submit to the jury, upon which such a defence could be based. A witness for the plaintiff, indeed, testified that in a general conversation with Mr. Julian, one of the assignees of the mortgage, he said, "that they had done all they could for Isaac; that they had extended the notes for which the assignment of the mortgage was made as collateral, several times;" but on cross-examination he added: "Nothing was said about any consideration having been given by Isaac for the extension of the notes; does not know that there was any consideration, or that the old notes were given up." A mere agreement to extend the time without consideration, and without a surrender of the old notes, and the taking of new ones, would not be binding on the creditor, and would not prevent the surety from paying the debt and immediately seeking reimbursement from his principal, which is the reason of the rule that when time is given by a binding agreement, the surety is discharged: The United States *v.* Simpson, 3 P. R. 437; Clippinger *v.* Creps, 2 Watts 45; Rhoads *v.* Frederick, 8 Watts 448; Miller *v.* Stem, 2 Barr 286; 2 Jones 383; Brubaker *v.* Okeson, 12 Casey 519. There is nothing, therefore, in this objection.

The other ground upon which a reversal of the judgment is asked, is, that the execution of the power was subject to the prior charge of the debts of John Zane, specially secured by the deed of trust. But there are several conclusive answers to this. These debts were charged upon and made payable only out of John Zane's interest in the property, which was for his life, probably his estate by the curtesy, and that interest had expired at the time of the trial. Moreover, more than twenty years had elapsed since the execution of the deed of trust, and the presumption was that the debts were paid. Besides all this, the claims of these creditors could only be set up by themselves, or the trustees suing for their use. The plaintiff below was not the holder of the legal title, nor a trustee for them, but a *cestui que trust*, under the deed of trust, prosecuting this ejectment to recover the equitable estate, if it had not been legally divested by the mortgage, and the proceedings upon it, by which, however, both the legal and equitable title were vested in James M. Kennedy, the purchaser at sheriff's sale, a title which the plaintiff had herself solemnly confirmed, by joining the new trustee, Thomas D. Smith, in the deed dated May 7th 1844.

Judgment affirmed.

73 194
30 SC 620
30 SC 621

Collins *versus* The Society for Relief of Distressed and Decayed Pilots, &c.

1. The Act of March 24th 1851, provides that a vessel licensed to coast not taking a pilot shall pay *half pilotage* and one not licensed full pilotage:—"and all half pilotage, forfeitures and penalties in nature thereof, accruing by virtue of this act * * * shall be recovered in the name and for the use of the society," for relief of pilots, &c. *Held*, that a forfeiture of *full pilotage* was for the use of the society.
2. The appropriation of the penalty is not part of the penal provision and is to be construed reasonably to ascertain the intent of the legislature.
3. The penalty not being a tax, its appropriation to a private corporation is not unconstitutional.
4. Imposing full pilotage on vessels in foreign commerce and half pilotage on coasting vessels is not in conflict with sect. 10 of art. 1 of United States Constitution.
5. Association *v.* Wood, 3 Wright 73, distinguished; Cooley *v.* Wardens, 12 Howard 299, followed.

February 21st 1873. Before READ, C. J., SHARSWOOD, WILLIAMS and MERCUR, JJ. AGNEW, J., at Nisi Prius.

Error to the Court of Common Pleas of *Philadelphia:* No. 78, to July Term 1871.

This was an action of debt, commenced November 30th 1870, by "The Society for the relief of distressed and decayed Pilots, their widows and children," against Walter Collins.

It was brought under the 5th and 6th sections of the Act of March 24th 1851, Pamph. L. 229, 2 Br. Purd. 1316, 1317, pl. 28, 29. The sections are as follows:—

"Sect. 5. That every vessel arriving from or bound to any foreign port or place, and every other vessel of the burthen of one hundred tons or upwards, sailing from or bound to any port not within the river Delaware (except licensed coasting-vessels sailing from this port), shall be obliged to take a pilot; * * * And if the master of any such vessel, being licensed as a coasting-vessel, and of the burthen of one hundred tons or more, shall refuse or neglect to take a pilot, the master, owner or consignee of such vessel shall forfeit and pay the sum equal to half pilotage of such vessel; and if such vessel be not licensed as aforesaid, then and in such case the master, owner or consignee thereof shall forfeit and pay the full pilotage thereof: Provided always, That whenever it shall appear to the wardens that in the case of an inward-bound vessel, should a pilot not offer before such vessel reached the Brandywine light-house, bearing east, * * * the penalty aforesaid for not having a pilot shall not be incurred.

"Sect. 6. That all sums due for pilotage, half pilotage, and all other claims and penalties, in the nature or in lieu thereof, shall, as they accrue, become and remain a lien upon the vessel chargeable therewith, her tackle, apparel and furniture, until they are

paid; and for the recovery thereof, in addition to the remedies now provided (and which shall remain as heretofore), such process and proceedings shall issue and be had in the Court of Common Pleas of Philadelphia county, or in any court possessing admiralty jurisdiction, as are usually had in courts of admiralty for the recovery of seamen's wages; and all half pilotage, forfeitures, and penalties in the nature thereof, accruing by virtue of this act, and all other debts, claims and demands, to which the society for the relief of distressed and decayed pilots, their widows and children, are legally or equitably entitled to under any law whatever, shall be recovered in the name and for the use of the said society, to whom, or to whose agent duly constituted, the same shall be paid."

The declaration was:—

That the defendant was the master of a certain brig or vessel then named the "Henry Virden," not then licensed as a coasting-vessel, and being of more than one hundred tons burthen; and the said brig, while the defendant was the master thereof, as aforesaid, arrived at the port of Philadelpia, sailing from a port not within the river Delaware, the said brig thus drawing eight feet of water, and the plaintiffs aver that although a duly qualified and licensed pilot offered before the said vessel reached the Brandywine light-house, bearing east, yet the said defendant, as master aforesaid, neglected to take a pilot for the said brig, contrary to the Act of the General Assembly in such case made and provided; whereby, and by force of the said statute, an action hath accrued to the plaintiffs to demand and have of and from the said defendant, as master aforesaid, the sum of $29.92, being the full pilotage of the said brig.

The defendant pleaded "*nil debet*," and also a special plea, viz.:—

That after the said duly qualified and licensed pilot offered before the said defendant's vessel reached the Brandywine light-house, bearing east, and the defendant neglected to take a pilot for the said vessel as in said declaration mentioned, and before the commencement of this suit, to wit, on the 4th day of August, A. D. 1870, the said defendant paid the said full pilotage of $29.92 to Henry F. Virden, a duly qualified and licensed pilot.

The plaintiffs demurred to the special plea: the court sustained the demurrer and entered judgment for the plaintiffs.

The defendant removed the record to the Supreme Court and there assigned for error the entering of judgment for the plaintiffs.

E. H. Weil (with whom was *J. W. Coulston*), for plaintiffs in error.—It is only where the penalty is of *half pilotage* that it is for the benefit of the plaintiffs. This being a statute regulating trade, and penal, must be construed strictly: Dwarris on Stat. 736; Mayor *v.* Davis, 6 W. & S. 276; Aechternacht *v.* Watmough,

8 Id. 165; and cannot be extended by construction: Fletcher *v.* Sondes, 3 Bingham 580; it is in derogation of common right: McMullin *v.* McCreary, 4 P. F. Smith 230; Esterly's Appeal, Id. 195; Smith *v.* Spooner, 3 Pick. 229; Hubbard *v.* Johnstone, 3 Taunton 177; Sewall *v.* Jones, 9 Pick. 412. The act is against the Constitution of Pennsylvania, imposing a duty on an individual for the benefit of a private corporation: Philadelphia Association *v.* Wood, 3 Wright 73.

It is in conflict with the Constitution of the United States, Art. I., sect. 10, which prohibits states from laying imposts or duties on imports or exports: Brown *v.* Maryland, 12 Wheaton 419; Almy *v.* California, 24 Howard 169.

A. D. Campbell, for defendants in error.—In construing a statute, its intent is to be regarded: Dwarris on Statutes 246, 247.

Compulsory pilotage laws are necessary in all commercial nations: New York *v.* Miln, 11 Peters 102; Cooley *v.* Board of Wardens, 12 Howard 299, and cases there cited in argument for defendants in error. The law does not conflict with the Constitution of the United States: Cooley *v.* Board of Wardens, *supra*. Ex parte McNiel, 13 Wallace 236; Gibbons *v.* Ogden, 9 Wheaton 1; Passenger Cases, 7 Howard 283; License Cases, 5 Id. 504; Flanigen *v.* Insurance Co., 7 Barr 306; Craig *v.* Kline, 15 P. F. Smith 399; Crandall *v.* Nevada, 6 Wallace 35; The China, 7 Id. 53.

The opinion of the court was delivered, March 6th 1873, by

Sharswood, J.—Three contentions have been made in this case, which it will be necessary to consider, but they can be disposed of briefly.

The first is that the plaintiffs below were not entitled, upon the true construction of the sixth section of the Act of March 24th 1851, Pamph. L. 229, to recover the penalty of full pilotage demanded in their declaration. The established canon of interpretation, that penal statutes must receive a strict construction, has been invoked in support of the argument. It is not pretended, however, that the penalty was not incurred, applying to the act the most rigid rule. "If such vessel be not licensed as aforesaid, then and in such case the master, owner or consignee thereof shall forfeit and pay the full pilotage thereof." The subsequent clause appropriating the amount of the penalty to the pilot society is no part of the penal provision, and is to be construed fairly and reasonably to ascertain the intention of the lawmakers just like any other statute. It mattered not to the offender—formed no part of what it was necessary for him to read and understand, in order to avoid the infraction of the law—to whom the legislature might choose to give it. We have no doubt whatever, that

all the forfeiture accruing by virtue of the act, including the full pilotage in question, were intended to be granted to the plaintiffs below.

The second position of the plaintiffs in error is that this grant is contrary to the Constitution of this Commonwealth, and for this he relies upon the case of the Philadelphia Association *v.* Wood, 3 Wright 73. But the principle of that decision is entirely inapplicable here. It was there held that a tax upon a class of persons, such as two per cent. of their gross receipts, upon all agencies of foreign insurance companies in the city of Philadelphia, could not be appropriated by law before it reached the treasury of the state, to a corporation or an individual. But this penalty is in no sense a tax, and has no similitude to one. To say that the legislature could not appropriate it as they pleased, to the person grieved, the pilot whose services were refused, to an informer or to a charity, would be to contradict the uniform legislation of the state. The statute book is filled with such grants of penalties—one great object of it undoubtedly being to secure better the enforcement of the law, by making it the interest of private persons or corporations to prosecute offenders.

The third contention is, that the act inasmuch as it imposes full pilotage upon registered vessels which are mostly engaged in foreign commerce, and only half pilotage upon licensed or coasting vessels, is an infringement of sect. 10, par. 2 of art. 1 of the Constitution of the United States, which declares that "no state shall, without the consent of Congress, lay any imposts, or duties on imports or exports except what may be absolutely necessary for executing its inspection laws."

There might be devised, no doubt, a system of pilotage fees and penalties, which would be obviously intended to evade this inhibition, and would, therefore, be invalid, but that can no more be said of the Act of 1851 than it could of the Act of March 29th 1803, Pamph. L. 560. It is decided by the Supreme Court of the United States in Cooley *v.* The Board of Wardens, 12 How. 299, in affirming the constitutionality of the Act of 1803, that the states have power to pass pilotage laws, to license pilots to regulate their compensation, and to enforce their laws by appropriate penalties. They may discriminate between the different kinds of vessels, according to their size and character, requiring heavier fees and putting severer penalties upon some than others. If the fees are not an impost or duty, certainly the penalty is not. It is a substitute for the fees which ought to have been paid. In the case of small vessels there is less at risk, and they can be more easily navigated by an ordinary seaman. But it matters not what the reason for the discrimination was, it was in the discretion of the legislature. "The purpose of the law," said Mr. Justice Curtis in delivering the opinion of the court in the case cited, "being

to cause masters of such vessels as generally need a pilot, to employ one, and to secure to the pilot a fair remuneration for cruising in search of vessels or waiting for employment in port, there is an obvious propriety in having reference to the number, size and nature of employment of vessels frequenting the port; and it will be found by an examination of the different systems of these regulations which have from time to time been made in this and other countries, that the legislative discretion has been constantly exercised in making discriminations, founded on differences both in the character of the trade and the tonnage of vessels engaged therein."

Judgment affirmed.

73 198
191 588
73 198
193 465
73 198
24 SC [1] 20
73 198
27 SC [6] 358
73 198
35 SC [3] 198

Holt *versus* Green.

1. A commercial broker cannot recover commissions unless he has taken out a license under the 71st sect. of the Act of Congress of June 30th 1864.
2. An action cannot be maintained in Pennsylvania founded on a violation of an United States law.
3. Although a contract may not be declared by the statute void; and a penalty may be imposed for its violation; an action cannot be maintained on a contract in violation of a statute.
4. There is no difference whether the contract is *malum prohibitum* or *malum in se*.
5. The test is whether the plaintiff requires the illegal transaction to establish his case.
6. Public policy will not allow courts to aid one grounding his action on an illegal or criminal act.
7. Maybin *v.* Coulon, 4 Dall. 298, followed.

February 24th 1873. Before READ, C. J., AGNEW, SHARSWOOD, WILLIAMS and MERCUR, JJ.

Error to the District Court of *Philadelphia:* No. 73, to January Term 1871.

This was an action of assumpsit, brought January 18th 1869, by Frederick F. Holt, against Joseph Green.

The plaintiff's bill of particulars was as follows:—

"The plaintiff's demand is founded on his claim to commissions as a broker or salesman on commission for the sale of certain cards, and spinning and other machinery of a cotton or woollen mill put in his hands for sale by the defendant above named, on or about May 1866."

The case was tried May 5th 1869, before Stroud, J.

The plaintiff testified that he was employed by the defendant Joseph Green, to sell for him certain machinery, and that he advertised the same for sale; upon cross-examination he testified that his business was buying and selling machinery for other parties, and being asked whether he had ever obtained a United States

[Holt v. Green.]

license, or paid a United States license tax, answered that he had not done so, never having been asked to do so.

The defendant then moved the court to enter a *nonsuit* against the plaintiff, on the ground that he could not maintain his action for commissions for the sale of machinery, without having paid the United States license tax as a commercial broker or commission merchant; the court entered the nonsuit, which the court in banc refused to take off.

This was assigned for error by the plaintiff on the removal of the record to the Supreme court.

The Act of Congress of June 30th 1864, 2 Brightly's U. S. Dig. 227, 230, pl. 77, 79, 99, which was the ground of the nonsuit, provides as follows:—

"Sect. 71. That no person, firm, company or corporation shall be engaged in, prosecute or carry on any trade, business or profession hereinafter mentioned and described, until he or they shall have obtained a license therefor in the manner hereinafter provided.

"Sect. 73. That any person carrying on business, &c., without a license, shall be liable for each offence to certain fine and imprisonment as therein set out.

"Sect. 79. That commercial brokers shall pay twenty dollars for each license. Any person or firm whose business it is, as a broker, to negotiate sales or purchases of goods, wares, products or merchandise * * * shall be regarded a commercial broker under this act."

W. W. Montgomery and *R. L. Ashhurst*, for plaintiff in error.—The Act of Congress must be construed as affecting only the right to sue in the United States courts, since it would be unconstitutional if considered as affecting the right of action of a citizen of a state in the state courts. The Congress of the United States cannot prescribe rules of evidence in state courts, nor can it make the courts of a state the machinery for enforcing national laws: Prigg *v.* The Commonwealth of Pennsylvania, 16 Peters 539; Latham *v.* Scott, 45 Ill. 27; Heister *v.* Cobb, 1 Bush 239; Carpenter *v.* Snelling, 97 Mass. 452; Lynch *v.* Moore, Id. 458; People *v.* Gates, 43 N. Y. 40; Clemens *v.* Conrad, 19 Mich. 190; Griffin *v.* Ramsey, 35 Conn. 239.

L. C. Cleemann and *G. Sergeant*, for defendant in error.—Courts of justice will not assist a plaintiff in recovering under a contract made in violation of the law: Maybin *v.* Coulon, 4 Yeates 34; Mitchell *v.* Smith, 1 Binney 118; Seidenbender *v.* Charles, 4 S. & R. 159; Columbia Bank *v.* Haldeman, 7 W. & S. 235; Biddis *v.* James, 6 Binney 329; Evans *v.* Hall, 9 Wright 236; Bowman *v.* Coffroth, 9 P. F. Smith 19; Smith *v.* Mahood, 14

M. & W. 452; Marshall *v.* Railroad Co., 16 Howard 334; Tripp *v.* Bishop, 6 P. F. Smith 430.

The opinion of the court was delivered, March 17th 1873, by

MERCUR, J.—The plaintiff brought this suit to recover commissions for the sale of certain machinery sold by him for defendant. It appeared upon the trial of the cause, that the plaintiff was carrying on the business of a commercial broker, and as such broker rendered the services for which the commissions were claimed. He also testified that he had not taken out a license nor paid a special tax, under the Act of Congress. Upon this the learned judge nonsuited the plaintiff and judgment was entered thereon. This is assigned for error.

The question thus presented is, did the plaintiff's omission to pay the tax and obtain the license as a commercial broker, bar his recovery of commissions for services rendered as such broker.

The Act of Congress of June 30th 1864, sect. 71, provides, that no person * * * shall be engaged in prosecuting or carrying on any trade, business or profession hereafter mentioned and described until he * * shall have obtained a license therefor, in the manner, hereinafter provided. Section 73 provides, that any person carrying on the business without a license, shall be liable for each offence to a certain fine and imprisonment therein specified.

Sect. 79 provides that commercial brokers shall pay twenty dollars for each license. Any person whose business it is as a broker to negotiate sales or purchases of goods, wares, products or merchandise shall be regarded a commercial broker under this act.

An action founded upon a violation of the laws of the United States or of this state, cannot be maintained in the courts of this state: Maybin *v.* Coulon, 4 Dall. 298; s. c. 4 Yeates 24.

It is not necessary that the statute should expressly declare the contract to be void. An action founded upon a transaction prohibited by a statute, cannot be maintained, although a penalty be imposed for violating the law: Seidenbender *et al. v.* Charles's Admrs., 4 S. & R. 159. Hence where a contract is made about a contract or thing which is prohibited and made unlawful by statute, it is void, though the statute itself does not declare it shall be so, but only inflicts a penalty on the offender: Columbia Bridge Co. *v.* Halderman, 7 W. & S. 233. Nor is there any distinction in this state, whether the contract is *malum prohibitum* or *malum in se:* Id. 235.

The test whether a demand connected with an illegal transaction is capable of being enforced by law, is whether the plaintiff requires the aid of the illegal transaction to establish his case: Swan *v.* Scot, 11 S. & R. 164; Thomas *v.* Brady, 10 Barr 170; Scott *v.* Duffy, 2 Harris 20. If a plaintiff cannot open his case without

showing that he has broken the law, a court will not assist him: Thomas *v.* Brady, *supra.* It has been well said that the objection may often sound very ill in the mouth of a defendant, but it is not for his sake the objection is allowed, it is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. That principle of public policy is that no court will lend its aid to a party who grounds his action upon an immoral or upon an illegal act: Mitchell *v.* Smith, 1 Binn. 118; Seidenbender *v.* Charles's Admrs., *supra.* The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation: Coppell *v.* Hall, 7 Wallace 558.

Apply these principles to this case. The bill of particulars served on the defendant avers, "the plaintiff's demand is founded on his claim to commissions as a broker or salesman on commission, for the sale of certain cards and other spinning and their machinery of a cotton or woollen mill, put in his hands for sale by the defendant, on or about May 1866." Upon the trial he testified that his business was buying and selling machinery for other parties. The moment he opened his case, he showed that he was engaged in a business directly contrary to a clear and express Act of Congress. That for so doing, he was liable to a fine and imprisonment. The intent with which he did it, cannot be inquired into in this action. His right to commissions as shown rested upon his illegal acts. His right to recover in law, must depend upon his legal right to perform the services. The facts to which he testified, showed he had no such right.

Without the aid of his illegal transactions, he could not, and did not, show any services performed. His case as he exhibits it is based upon a clear violation of the statute. He grounds his action upon that violation. Thus resting his case, he cannot successfully invoke the aid of a court.

We are aware there are some English authorities, as well as decisions in some of our sister states, that make a distinction in cases of contracts predicated of a violation of the revenue laws, and especially that class of them which does not expressly declare the contract to be void. The case of Aiken *v.* Blaisdell, 41 Vermont 655, is a strong case, going to sustain a contract of sale contrary to law. We prefer, however, to stand by our own decisions. The case of Maybin *v.* Coulon, *supra*, was based upon a violation of the revenue laws of the United States, and the unbroken current of authorities in this state, is to hold a contract void which is grounded upon a clear violation of a statute, although it may not be expressly so declared by its terms.

Judgment affirmed.

SHARSWOOD and WILLIAMS, JJ., dissented.

Robinson *versus* Hodgson.

1. The owner of negotiable securities which have been stolen may follow them and reclaim them in whose hands soever they may be found, and when shown that the securities had been stolen from the owner, the burden is upon the holder to show that he took them in the usual course of business and for value.
2. In trover for such securities, merely showing that they were in possession of another from whom defendant or his immediate bailor received them is not a defence.
3. A holder's possession in primâ facie evidence of ownership, because the presumption is that it was honestly acquired.

February 25th 1873. Before READ, C. J., AGNEW, SHARSWOOD, WILLIAMS and MERCUR, JJ.

Error to the District Court of *Philadelphia:* No. 112, to January Term 1872.

On the 22d of September 1870, Henry D. Hodgson, executor, &c., of Mark A. Hodgson, deceased, brought an action of trover against Robert E. Robinson for certain bonds of the Philadelphia and Baltimore Central Railroad Company, which had been stolen from the decedent.

The case was tried June 13th 1871, before Thayer, J.

The plaintiff gave evidence, by James M. Ramsey, the treasurer of the company, that decedent had been the owner of six bonds of $100 each, and one bond of $200, issued by the Philadelphia and Baltimore Central Railroad Company; the bonds were coupon bonds, were payable to bearer, and were worth about par or slightly more.

He also gave evidence that these bonds, with a number more of the same kind belonging to other persons, were stolen September 24th 1864. All the bonds had been in a safe of Robert & George D. Hodgson in their warehouse in the borough of Oxford, Chester county; the door of the safe had been drilled and blown off, and the bonds taken. The whole amount of bonds taken was $4100. An advertisement by police officers of Philadelphia, and also one by Robert Hodgson were published, announcing the robbery and describing the bonds (except three) of all the owners; with a request to brokers and others to examine the lists, and give information at the mayor's office.

James A. Strawbridge (who was administrator, &c., of G. A. Hodgson, deceased, one of those whose bonds had been stolen) testified that in February 1870, he met the defendant at the office of the treasurer of the railroad company; the defendant said that he had come there to inquire about the stolen bonds; "I told him I represented most of the bonds, and asked him where they were; he said in New York; I asked him to give me all the information he had; he said he had seen them, and had had them in his hands; he said they were sent by his (defendant's) brother, in New York,

[Robinson v. Hodgson.]

through Drexel, Winthrop & Co., in New York, to Drexel's in Philadelphia; that his brother had received them from a diamond broker in New York;" at witness's request defendant, witness and Mr. Hodgson went to Drexel's office; the clerk there gave him the package, which was opened, and compared with a list of the stolen bonds which witness had; after the examination the defendant said, "I am satisfied these are the Hodgson stolen bonds." It was then agreed to leave them in charge of Mr. Drexel, but he refused to receive them; the defendant then took the bonds; they stopped before De Haven's; defendant went in there, and proposed to meet the others at the depot before the train started; witness then got a search-warrant from the recorder, and went with it to the depot "to attach the bonds on defendant's person." Defendant was at depot according to appointment, and on being asked said he had left the bonds at De Haven's; he and the officer went there, and he came to the recorder's office with the bonds, which were deposited with the recorder to remain till a hearing in the next week. Six days after witness, with his counsel, met defendant and Mr. Harrington, defendant's counsel, at the recorder's office, when the bonds were given to the defendant under a mutual agreement that he would hold them until a trial should be had in Philadelphia to determine their ownership; the defendant said he would be responsible for their forthcoming; he agreed to accept service, and try the right to the bonds.

On cross-examination witness testified that the defendant said he believed the bonds had been stolen, and that he would do all he could to get their owner; the defendant lived in Wilmington, Delaware.

James Given, Esq., the recorder, testified, that all the bonds alleged to have been stolen, including the three not mentioned in the advertisement, were before him and in his custody under a search-warrant; that they had gone out of his possession in pursuance of an agreement of the counsel of the parties, in their presence, that the right should be tried in court. De Haven, who was defendant's brother-in-law, was to hold the bonds for him; that before witness, the defendant said that he knew the bonds had been stolen from Hodgson.

Joseph Huddell, the secretary of the railroad company, testified, that in February 1870, the defendant came to him at the company's office and asked if there were not some stolen bonds of the company; to a question by witness, he said he knew it by information from Mr. Quigley, of Wilmington; defendant said he knew of bonds being offered for sale, and had a list of them; witness compared a list he had of the stolen bonds, with the list of defendant.

H. D. Hodgson, plaintiff, testified as Mr. Strawbridge as to most of the facts stated by him; and also that defendant said the bonds had

been sent to him by his brother, who was in Drexel's house, New York; defendant at the recorder's office agreed to accept service in a suit to be tried in Philadelphia to determine the ownership of the bonds.

A. De Haven testified, that he was a member of the firm of De Haven & Brother, brokers in Philadelphia, and recollected the bonds; the firm had sent the bonds to New York, by direction of the defendant or Mr. Harrington his counsel; the bonds had been received by their firm March 1st 1870, subject to defendant's order; and on March 6th 1870 they sent them to New York, to J. N. Robinson, care of Drexel, Winthrop & Co.

J. N. Robinson is a member of that firm and brother of defendant.

Plaintiff gave in evidence a letter from Mr. Harrington to Mr. McVeagh, one of plaintiff's counsel, written shortly before April 9th 1870, in which Mr. Harrington said that it had been his purpose when he received the bonds to hold them till the title to them should be settled in the suits to be brought without reference to time; that they were deposited with De Haven & Brother, subject to his order alone; and he had been surprised to learn three weeks afterwards that the defendant without his authority obtained possession of the bonds and returned them to Drexel, Winthrop & Co. After learning this he had insisted to defendant that he should inform plaintiff's counsel and tell them the exact state of the case, disclose the name of the party pretending to be the owner, who was then under arrest in New York, for receiving other stolen bonds and goods. Mr. Harrington enclosed in the letter slips from New York papers showing "the name, place of business and offences of the party who claimed to own the bonds."

The banking-house of Drexel & Co., Philadelphia, and Drexel, Winthrop & Co., New York, are one establishment, composed of the same partners.

The plaintiff rested.

The defendant testified that he had been in the banking business in Wilmington for about twenty years, that his brother, J. N. Robinson, lived in New York, and that the business he had with the New York house was transacted through his brother; he had received from his brother a letter dated,

"Banking House of Drexel, Winthrop & Co.
New York, February 9th 1870."

The writer said that a party had called on that day to sell 8100 Baltimore Central first mortgage bonds; he did not know much about the person offering them; he gave his name as William C. Brandon, 702 Broadway; the letter proceeded: "I am thus particular about giving you where they came from, as we don't want to take any responsibility in selling them, though I am

[Robinson v. Hodgson.]

told if you pay the value of bonds, and have no reason to suspect anything wrong, that the holder of coupon bonds, even if stolen, can keep them. I want you to inquire of the Philadelphia, Wilmington and Baltimore folks, and also of Bowen & Fox, who are the trustees, if any bonds have been stolen; if you find everything correct make us a bid for them, * * * his limit is 70 * * * If you can't pay 70 I think the fellow will take a little less. I enclose you the number of the bonds; part are for $100; part for $200 each."

Defendant further testified: "I went to Mr. Huddell (secretary of the company), and asked him if there had been any bonds stolen; he declined to answer; I told him if he did not tell me I would hold him responsible if I bought any stolen bonds; he said there were persons in the country who had lost some bonds, and wanted me to call again, and he would write to them. I called again, and he sent me to the office of the Philadelphia, Wilmington and Baltimore Railroad to see Mr. Ramsey, who was not there. I started out, and was called back by Hodgson and Strawbridge; they asked me what I would take to get the bonds; I said nothing; but would do all I could to get the bonds for the rightful owner; I told them the bonds were at Drexel's office."

He further testified as plaintiff's witnesses, as to the delivery of the bonds at Drexel's, and his arrest at the depot, and to giving him the bonds at the recorder's office; and that he afterwards, in company with Mr. Harrington, left them with Mr. De Haven; he afterwards got an order for the bonds, which was sent by his brother from New York; the order was as follows:—

"New York, March 3d 1870.

Messrs. Drexel, Winthrop & Co.,

Gentlemen:—

I hereby demand from you and each of you the return to me of the bonds given to you by me in the month of February 1870, to sell, amounting in all to the sum of three thousand one hundred dollars, and I demand that they be returned to me within a reasonable time.

WM. C. BRANDON,
702 Broadway."

In consequence of this order defendant sent the bonds to New York about the 4th or 5th of March. He had nothing to do with Brandon; did not receive the bonds from him or send them back to him.

A. H. De Haven testified that the bonds in the package and those on the slip of paper agreed. The agreement at the recorder's was that the bonds were to be surrendered to defendant, and to be put into the hands of De Haven & Brother, so as to remain in the

jurisdiction of Pennsylvania, that they might be attached and test the question of ownership; they were taken away March 6.

Mr. Harrington, defendant's counsel, testified that on his own account, defendant not agreeing to it, he said that plaintiff should have the opportunity to get a legal hold on the bonds, so that if the owner in New York demanded them, defendant would have a legal excuse; witness told plaintiff's counsel that they must get a legal hold on them at once or they would be ordered back; the understanding was that they should get a legal hold on them at once; it was no part of the understanding that the bonds were to be held in the jurisdiction of Pennsylvania until the title was determined; the bonds were sent back in violation of the order of witness as attorney for defendant to De Haven; the violation of the order was by the defendant.

Robert Winthrop, in his deposition taken under a commission, said that he was a member of the firm of Drexel, Winthrop & Co.; that the bonds in question were delivered to his firm February 9th 1870, by William C. Brandon, to be sold on his account; they were forwarded by Drexel, Winthrop & Co. to R. R. Robinson & Co., Wilmington, to be sold in accordance with Brandon's instructions; the bonds were returned to witness's firm, and delivered by them to Brandon March 10th 1870; the bonds were received by the firm that they might be sold in Wilmington on Brandon's account.

Defendant gave in evidence the receipt of Brandon to Drexel, Winthrop & Co., dated March 10th 1870, for bonds of the Philadelphia and Baltimore Central Railroad Company, amounting in all to $3100, amongst which were five, the bonds claimed by plaintiff.

A number of exceptions were taken to the rulings of the court on questions of evidence not necessary to notice here.

The defendant submitted these points, all which the court declined to affirm:—

1. To maintain this action it must appear that the defendant did a positively wrongful act. If the jury find that in all that he did from the time when the bonds came to his possession down to the time when he returned them to the party from whom he had received them, he acted in good faith and with an honest purpose to preserve them in his custody so that the rightful owner might with due diligence recover them, the defendant is not liable in this action.

2. If, at the time the bonds were delivered up to the defendant or his counsel at the recorder's office, the plaintiff's counsel was notified to proceed immediately while they were in the jurisdiction and that they would have to be returned, if an order to that effect was received from the party in New York who sent them, the delay of proceedings on the part of the plaintiff was a suffi-

cient justification for defendant in returning the bonds when the order was received. The defendant, in the absence of any legal proceedings being taken to hold the bonds or prevent him from disposing of them, was bound to comply strictly with the order of his principal to return them, and no action would lie against him for complying with the orders of his principal, received under such circumstances.

3. The return by the defendant of the bonds to the person from whom he had received them, in compliance with the order of that person, was not in itself a wrongful conversion of the bonds on the part of the defendant.

4. If the plaintiff delayed commencing his proceedings or making any formal demand for the delivery of the bonds until after they had been returned by defendant under the order of his principal, it was such laches on the part of the plaintiff as would bar his right of recovery in this action.

5. In order to make defendant responsible for the wrongful conversion of personal property on the ground of a demand and refusal, it must appear that the goods were in the possession of the defendant at the time the demand was made, or that at the time of the demand he had it in his power to give up the goods; hence, if the jury find that at the time the plaintiff demanded the bonds from the defendant, they were not in defendant's possession or control, but had previously been sent back to his principal in New York, the plaintiff cannot recover in this form of action.

6. If the jury find that Drexel, Winthrop & Co. were the agents employed by Brandon to sell the bonds, that they sent them to defendant for sale, and defendant returned the bonds to them between the 6th and 10th days of March, A. D. 1870, in compliance with their peremptory order, the verdict should be for the defendant.

7. If the plaintiff, at the time of giving up the bonds at the recorder's office, agreed with the defendant that the title should be tested by a legal process under which the bonds were to be seized immediately, and the plaintiff did not take any steps to seize and hold them by process of law until after they had been returned to Drexel, Winthrop & Co., of New York, the plaintiff cannot recover in this action.

The court charged:—

"[If the bonds were really the property of the plaintiff, and if the defendant had reason to suppose that the bonds had been stolen, and that they were the property of the plaintiff, and if he was notified of these facts, and after that did, notwithstanding such notice, and notwithstanding the claim made upon him for the bonds by the plaintiff, send them back to New York without the consent and against the will of the plaintiff, that was a wrongful conversion of the bonds for which the defendant is responsible.]

"[The law is, that a bailee who comes into possession of property that has been stolen or which bailor has no title to at all, is not excused for delivering it up to bailor after notice of that fact from the real owner, and if he does do so, it is at his own peril. If he finds himself in such a position as that, he must at any rate stand still until the right is determined. When he has notice that bailor has no title to the property, he has no right to deliver it to him; he must keep it.] And one reason of that is, that it was the duty of the man who delivered the property to have acquainted the broker with the truth. If he has not done that, then he has no right to complain if bailee withholds the property from him, for the real owner. If he has withheld the truth from the bailee, he has no right to demand that the bailee shall restore the property to him. The bailee who receives property for which bailor has no title, cannot, after notice of the real owner's title, return it to bailor without being responsible for it.

"Therefore, if these bonds were really the property of plaintiff, and defendant had reason to suppose they were stolen, and after notice of that fact from the plaintiff, returned them to New York, without consent of plaintiff, he is liable.

"Now with regard to the ownership of the bonds. You are to consider the evidence, and to determine whether the plaintiff has made out his ownership. If you are satisfied that he has, then it was incumbent upon the defendant, if he alleges ownership in another, to show it.

"[The least a man can do, if he comes into possession of stolen property, is to show how his bailor obtained the possession. Therefore, if the defendant rests his defence upon an alleged ownership of Brandon, then it was his duty to show how he acquired that ownership, how Brandon got it, and where he got it. Mere possession after robbery is no evidence of title. And if a man gets such bonds as these, which pass by delivery alone, after they have been stolen, he must show from whom he got them, whether in good faith and for what consideration. It was for defendant to show all that, if he relies on the title of Brandon.] [Mr. Ramsey, the treasurer, says the bonds were issued to Mark Hodgson, and identifies them by the numbers, and it has been shown that they were subsequently stolen. No evidence whatever has been given as to how Brandon got possession of these bonds.]"

The verdict was for the plaintiff for $824.

The defendant removed the record to the Supreme Court.

He assigned seventeen errors, of which

4–7. Were the parts of the charge in brackets.

8–14. Declining to affirm his points.

A. M. Burton and *G. W. Biddle*, for plaintiff in error.—The property in bonds payable to bearer passes by delivery: Beaver Co.

v. Armstrong, 8 Wright 65. A purchaser in good faith is not affected by his vendor's want of title, the burden of proof is on him who asserts his title: Murray v. Lardner, 2 Wallace 110; Goodman v. Simonds, 20 How. 343.

The plaintiff must prove a positive tortious or wrongful act on the part of the defendant: Bromley v. Coxwell, 2 Bos. & Pul. 438. Where the defendant refuses to deliver up the goods claimed, until some ownership is shown on the part of the claimant, it is no evidence of a conversion: Solomons v. Dawes, 1 Esp. 83; Green v. Dixen, 3 Campb. 215, n.; Jacoby v. Laussat, 6 S. & R. 305; 1 Bacon's Abr. "*Bailment*," 618; Edwards on Bailments 83, 84. Defendant is not liable for the acts of his agent in delivering the bonds: Shotwell v. Few, 7 Johns. R 302; Alexander v. Southey 5 Barn. & Ald. 247. By the return of the bonds to the defendant, plaintiff recognised the title of Brandon to the property. He never produced any evidence to defendant that Brandon had no title; nor allege that Brandon had obtained the property wrongfully: Shelford v. Scotsford, Yelv. 23. Upon the doctrine of "*Respondeat superior*," the defendant incurred no liability: Mires v. Solebay, 2 Mod. 242; Berry v. Vantries, 12 S. & R. 92. An agent cannot dispute his principal's title: Dixon v. Hamond, 2 Barn. & Ald. 310; Shotwell v. Few, 7 Johns. 302; Woodward v. Webb, 15 P. F. Smith 254; Carey v. Bright, 8 Id. 83.

J. Goforth and *W. MacVeagh*, for defendant in error.—If a bailor has no title, the real owner is entitled to recover the property in whose hands soever it may be found: Story on Bailments, §§ 52, 102; 2 Kent's Com. 767; King v. Richards, 6 Whart. 418.

Where negotiable paper has been stolen or lost, or obtained by duress, or procured or put in circulation by fraud, on proof of these circumstances it is incumbent on the holder to show himself to be a holder bonâ fide and for a valuable consideration; otherwise, he is considered as standing in no better situation than the former holder in whose hands the instrument received the taint: Beltzhoover v. Blackstock, 3 Watts 26; Knight v. Pugh, 4 W. & S. 448; Brown v. Street, 6 Id. 221; Gray v. Bank of Kentucky, 5 Casey 365.

The onus of proof of Brandon's title rests on the plaintiff in error: County of Beaver v. Armstrong, 8 Wright 63; Mercer County v. Hacket, 1 Wallace 83; Murray v. Lardner, 2 Id. 110; Grant v. Vaughan, 3 Burrows 1516; Lawson v. Weston, 4 Espinasse 56; Duncan v. Scott, 1 Campbell 100; Rees v. Marquis of Headford, 2 Id. 574; Douglass 611; Norris' Peake 342; Byles on Bills 394; Beltzhoover v. Blackstock, 3 Watts 26; Knight v. Pugh, 4 W. & S. 445; Brown v. Street, 6 Id. 221; Albrecht v. Strimpler, 7 Barr 477; Hutchinson v. Boggs, 4 Casey 294; Kuhns v. Gettysburg Nat. Bank, 18 P. F. Smith 448.

[Robinson *v.* Hodgson.]

Where a person is in the possession of stolen property, and has been notified by the rightful owner that such property is his, he becomes a bailee for such owner, and his refusal to deliver the property to such owner, is evidence of conversion, no matter upon what trust, or in what capacity he received the stolen property: Shelbury *v.* Scotsford, Yelv. 23; Yorke *v.* Grenaugh, 2 Ld. Ray. 866; Ogle *v.* Atkinson, 5 Taunton 759; Hardman *v.* Willcock, note to 9 Bing. 382; Wilson *v.* Anderton, 1 Barn. & Ad. 450.

The opinion of the court was delivered, May 17th 1873, by

WILLIAMS, J.—The main question in this case is, whether the plaintiff below gave such evidence of ownership as entitled him to recover the bonds alleged to have been wrongfully converted by the defendant? The evidence showing that the bonds were the property of the plaintiff's testator, and that they were stolen from him, was undisputed. The defendant did not claim to be the owner of them, but set up title in Wm. C. Brandon, who left them with Drexel, Winthrop & Co., of New York, the defendant's bailors, for sale. The court charged the jury in substance, that if the bonds were really the property of the plaintiff's testator, and were stolen from him, then it was incumbent on the defendant, if he alleged ownership in another, to show how he obtained the possession; and if he rested his defence upon Brandon's alleged ownership, it was his duty to show how he acquired that ownership; that mere possession after the robbery was no evidence of title. It is contended by the plaintiff in error that this instruction was erroneous, because the presumption is that Brandon obtained the bonds honestly, and, being negotiable, his possession of them was evidence of ownership. But the owner of negotiable securities, which have been stolen, has the right to follow them wherever he can find them, and to reclaim them in whose hands soever they may be found; and it is no defence to an action for their wrongful conversion, in refusing to deliver them up on the owner's demand, for the bailee merely to show that they were in the possession of another, from whom he or his immediate bailor received them. If the defendant's possession would not be a defence, how can his bailor's be? Why should the bailor's possession be higher evidence of title than his own? Undoubtedly the holder's possession is primâ facie evidence of ownership, because the presumption is that it was honestly acquired. But when it is shown that the securities were stolen from the owner, the burden of proof is on the holder, and he must show affirmatively that he took them in the usual course of business for value. The rightful owner may assert his title to stolen property whenever he can find it, and if he could recover it from the bailor he can recover it from the bailee. The bailee can never be in a better situation than the bailor. If the bailor has no title he can give none, for he can give no better title than he has. The owner of stolen securities has the same

right to recover them from the holder, unless he has taken them in the usual course of business for value, that he has to recover a chattel or other movable property that may have been stolen. There is this difference, however, the owner's right to the chattel is not divested if it has been bought by the holder in good faith without notice of the theft; but his right to negotiable securities that have been stolen is divested if they have been received by the holder in the usual course of business for value. But the burden of proof, of showing that they were thus taken, is on the holder. These are familiar and well settled principles, and require the citation of no authorities for their support. There was, therefore, no error in instructing the jury that if the defendant relied on Brandon's ownership of the bonds it was incumbent on him to show how he obtained it.

The other assignments of error need not be specially noticed. There is nothing in them that calls for a reversal of judgment, and no practical benefit would result from their discussion. There was no error in entering judgment on the verdict, and the discharge of the rule to amend the record of the verdict and judgment, with respect to the amount of damages, was a matter wholly within the discretion of the court below, and is not assignable for error here.

Judgment affirmed.

Philadelphia *versus* Lockhardt, to the use of Pyle & Hansell.

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73 211
19 SC 264

1. A contract for building a school-house in Philadelphia was made in the name of The Controllers of Schools, signed by the Mayor, under the corporate seal; it, with the sureties for its performance, was approved by ordinance of councils, and payments made on account of it. *Held*, that the city was estopped from denying that she was a party to the contract.
2. The contractor assigned the contract. *Held*, that the assignment was not within the Act of May 28th 1715, relating to assignment of bonds, &c.
3. An executory contract may be assigned before performance has been begun, or anything be due on it, and although the debtor be a municipal corporation.
4. Notice of the assignment given to the Board of School Controllers was notice to the city.
5. Notice to an agent, bound, in the discharge of his duty, to act upon it and to communicate it to his principal, is notice to the principal.
6. Danville Bridge v. Pomroy, 3 Harris 151, recognised.

February — 1873. Before READ, C. J., SHARSWOOD, WILLIAMS and MERCUR, JJ. AGNEW, J., at Nisi Prius.

Error to the District Court of *Philadelphia:* No. 433, to January Term 1871.

This was an action of debt, brought February 5th 1870, by George W. Lockhardt to the use of Pyle & Hansell against the City of Philadelphia. The claim was for a balance due for build-

ing a public school-house under a contract of Lockhardt with the controllers of public schools, in the First District of Pennsylvania, the claim having been assigned to Pyle & Hansell before anything was done.

The case was tried February 23d 1871, before Thayer, J.

The plaintiff offered in evidence an agreement dated October 8th 1867, between the controllers of public schools of the first district, &c., and Lockhardt, by which Lockhardt agreed to build a school-house according to certain specifications, on Wood street above Eleventh street, in consideration of which the controllers agreed to pay him $13,700 in six payments; the last being $4566.70 to be paid when the house should be finished, possession given and the contract fully complied with. The agreement was signed by "Morton McMichael, Mayor of Philadelphia," and sealed with the corporate seal of the city.

The defendant objected to the offer on the ground that the contract was not in the name of the city. The offer was admitted and a bill of exceptions sealed.

The plaintiff also offered in evidence the following assignment:

"*Know all men by these presents*, That I, George W. Lockhardt, of the city of Philadelphia, builder, do hereby authorize and empower Edw. H. Pyle and Edmund M. Hansell, trading under the firm of Pyle & Hansell, of the same place, as my true and lawful attorney, for me and in my name to receive from the proper officer of the Board of School Controllers, all moneys or warrants that are due, or shall become due to me upon any contract for the erection of the school building on the north side of Wood street, west of Eleventh street, in the Fourteenth Section, and I do hereby agree that this writing shall operate as an assignment of said warrants to said Pyle & Hansell, so that it cannot be revoked or recalled without their consent, the same being made and executed upon good and valuable consideration received by me of them.

"Witness my hand and seal, October 12th 1867.

GEORGE W. LOCKHARDT."

This was objected to, admitted and a bill of exceptions sealed.

The plaintiff gave evidence that the building was finished in the early part of 1868; it was accepted by the city, and occupied by it ever since.

Hansell, one of the plaintiffs, testified that he had furnished all the lumber for the school-house on the faith of the assignment; he accepted orders, and acted as trustee for all the mechanics and material-men; he got the money on five instalments; they were paid by Mr. Halliwell, secretary of the board of school control; Halliwell signed the warrants; he had notice of the assignment; knew all about it, and that others were doing work on the school-house on the strength of it; witness informed the board of

[Philadelphia v. Lockhardt.]

control at a meeting that plaintiffs had the assignment; Halliwell said they had a full release of liens; witness saw Mr. Green, chairman of the committee on city property, and explained the whole thing to them; plaintiffs received city warrants on orders from Lockhardt, who generally met plaintiffs at the school controllers' office when they went for the warrants.

W. B. Robbins, Esq., the attorney for the plaintiffs, testified that on the 22d of March 1869, he gave notice of the assignment to the city solicitor, and on the 9th of April 1869, he sent to the board of school controllers a copy of the assignment; Halliwell afterwards gave the warrants to Lockhardt; two warrants amounting to $4566.70 were given July 10th 1869; the warrants were signed by the officers of the controllers of public schools; also by the city controller.

For the defendant, Halliwell testified that he had never seen the assignment which plaintiffs said they had; the warrants had all been given to Lockhardt.

The defendant gave in evidence Lockhardt's receipt dated July 6th 1869, for the last warrant for $4592.30.

On the 1st of December 1864, the Councils of Philadelphia passed an ordinance entitled, "An ordinance to authorize a loan for school purposes;" the amount authorized was $1,000,000, to provide for the erection of school buildings in the First School District; specific amounts were appropriated to different sections.

Also, an ordinance passed November 1867, as follows, viz.:—

"That the following contracts for the erection of school buildings in the Fourteenth ward, both of which said contracts have been duly executed by the mayor of the one part, and the several and respective contractors of the other part, be and the same are hereby also approved, and the several and respective sureties therefor are hereby also approved, to wit: * * * No. 2, contract dated October 8th 1867, for the erection of school building on the north side of Wood street above Eleventh, for the sum of $13,700, by George W. Lockhardt, contractor, and John E. Whiteman and George W. Rankin, sureties therefor."

The defendant submitted 9 points.

The 1st, 4th, 7th, 8th, which were as follows, were unqualifiedly refused:—

1. In the form in which this action is brought a payment to George W. Lockhardt, the nominal plaintiff, before suit, is a satisfaction of the debt.

4. Notice of the assignment given to the board of school controllers is not such notice as would affect the city of Philadelphia under the Act of 1715.

7. If the jury believe from the evidence that the city of Philadelphia did not promise to pay to Pyle & Hansell the debt in said

suit and have paid said debt to Lockhardt, or order, the plaintiff cannot recover.

8. If the jury believe from the evidence that Pyle & Hansell, knowing that Lockhardt claimed this money notwithstanding the alleged assignment, and that he had sued for it, took no legal steps to enforce their claim to it, from July, to 1869, when it was paid to Lockhardt, then their laches estops them from recovering in this action.

The 2d, 3d, 5th, the court refused, but reserved the questions presented by them; they are as follows:—

2. A valid assignment cannot be made of a right not yet acquired, of a sum of money not yet earned, nor of a warrant or other evidence of indebtedness before the instrument is made or the right to it acquired.

3. A building contract is not such a specialty as passes by assignment under the Act of 1715, so as to make a payment to original contractor, after notice of assignment, no satisfaction of the debt.

5. The board of school controllers cannot by their acceptance of an order, or by their assent to an assignment, make the city of Philadelphia liable to the new debtor or assignee.

The 6th point, which was unqualifiedly affirmed, was as follows:—

6. If the jury believe from the evidence that the city of Philadelphia, before they received notice of this assignment, paid the money for which this suit is brought to Geo. W. Lockhardt or his order, the plaintiff cannot recover.

The 9th point and its answer were as follows:—

9. That notice to the secretary of the board of controllers is not notice to the board.

"Affirmed; if he did not communicate the notice to controllers, but a notice to him, communicated to the controllers, would be notice to the city."

The court left it to the jury to determine whether, upon the evidence, the city had notice of the assignment of October 12th 1867, and instructed them, if they were satisfied the city had such notice, to find a verdict for the plaintiff; subject to the opinion of the court on the reserved point.

And also charged, that if notice was given to the board of controllers of public schools and the councils thereof, and the city solicitor, there was notice to the city.

The verdict was for the plaintiff for $4566.70, on which judgment was afterwards entered for the plaintiff on the reserved points.

The defendant sued out a writ of error, and assigned thirteen errors:—

1–2. Admitting the plaintiff's offers of evidence.

3–10. The answers to defendant's points.

11–12. The portions of the charge above stated.
13. Entering judgment for the plaintiff on the reserved points.

R. N. Willson and *C. H. T. Collis* (with whom was *G. D. Budd*,) for plaintiff in error.—The contract was not in accordance with Acts of April 21st 1855, § 11, Pamph. L. 267, providing that contracts shall be in the name of the city of Philadelphia, and April 21st 1858, § 5, Pamph. L. 386, providing that no contract shall be binding on the city unless authorized by law, or an ordinance of councils, and sufficient appropriation be previously made by councils. The assignment was the grant of a thing not in existence and therefore invalid: Perkins, tit. *Grant*, pl. 65; Bacon's Maxims, Reg. 14; Lunn *v.* Thornton, 1 Manning, G. & S. 380. The assignment was not within the Act of May 28th 1715: 1 Smith's Laws 90, enabling an assignee to sue in his own name. There was nothing in existence that could be assigned: Fairlie *v.* Denton, 4 Barn. & Cress. 395; Crowfoot *v.* Gurney, 2 Moore & Scott 473; s. c. 9 Bing. 372. The reservation was of the whole evidence, and therefore bad: Winchester *v.* Bennett, 4 P. F. Smith 510.

J. G. Johnson for defendant in error.—The contract was for the benefit of the city, and being in the name of the controllers will not vitiate it: Angell & Ames on Corp., pl. 185; Dillon on Municipal Corp., pl. 121, 123, 131; Robinson *v.* St. Louis, 28 Missouri 488. The assignment was not governed by the Act of May 28th 1715. Lockhardt was the legal plaintiff with the equitable ownership in Pyle & Hansell, and the assignment being in good faith no act of Lockhardt's could defeat it: 1 Parsons on Contracts 227, and cases cited in *note;* Rodick *v.* Gendell, 1 De. G., M. & G. 763; Jones *v.* Farrell, Id. 208; Stocks *v.* Dobson, 4 Id. 11; Phillips *v.* Bank, 6 Harris 394; Jones *v.* Witter, 13 Mass. 304; Anderson *v.* Van Alen, 12 Johns. 342; Dawson *v.* Coles, 16 Id. 50. Knowledge acquired by the agent of a corporation in the performance of official duties is notice to the corporation: Bank *v.* Schaumberg, 38 Missouri 228; Trenton Bank *v.* Woodruff, 1 Green's Ch. 117; Bridge Co. *v.* Phœnix Bank, 3 N. York 156; Black *v.* C. & A. R. R. 45 Barb. 40; Trenton Bank *v.* Canal Co., 4 Paige 127; Danville Bridge *v.* Pomroy, 3 Harris 151. A contract may be assigned so as to give the assignee the title to the proceeds: Morrell *v.* Wootten, 16 Beav. 197; Leslie *v.* Guthrie, 1 Bing. N. C. 697; Lott *v.* Morris, 4 Simon 607; Bell *v.* London & N. W. Railway, 15 Beav. 548. That the debtor is a municipal corporation makes no difference: Bracket *v.* Blake, 7 Metc. 335; Crocker *v.* Whitney, 10 Mass. 319; Field *v.* New York, 6 N. York 179.

[Philadelphia *v.* Lockhardt.]

The opinion of the court was delivered, March 17th 1873, by

MERCUR, J.—The admission in evidence of the written contract under which the school-house was built is assigned as error. The objection to its admission is predicated of the fact that the instrument in its commencement purports to be an agreement between "The Controllers of the Public Schools of the First District of Pennsylvania," of the first part. It is, however, signed and attested on the part of the first party, by the mayor of the city, and duly sealed with its corporate seal. A short time after its execution the contract was duly approved by ordinance of councils. The sureties given by Lockhardt for his performance of the contract, were at the same time and in like manner approved. From time to time during the progress of the work, the city paid the instalments as they severally became due, according to the terms of the contract. After its completion the city took possession of the house, and have continued in the possession and enjoyment thereof. After all these recognitions and ratifications on the part of the city, it is too late for her successfully to deny that she was a party to the contract.

The fifth, sixth, seventh and eighth assignments are based upon the Act of 28th of May 1715, which provides for the assignment of bonds, specialties and notes in writing. The form of the suit in this case, however, does not admit of the application of that act. That act provides a mode of assignment by which a suit may be brought in the name of the assignee only. This action is brought in the name of the original party to the contract for the use of the assignee. This assignment is not made according to the Act of 1715. This suit is not brought under it. The plaintiff is unaffected by its provisions. The claim to recover is not put upon an alleged agreement made with the equitable plaintiffs, but upon the one made with Lockhardt, from whom they have an equitable assignment.

The remaining alleged errors that were pressed relate to the assignment made by Lockhardt to Pyle & Hansell, and notice thereof to the city. It is contended by the plaintiff in error that when Lockhardt made said assignment he had no interest to assign; that it was made four days only after the execution of the contract, and before he had done anything under it. We think this position is not sound. It is well settled that a contract may be assigned so as to vest in the assignee the equitable right to the proceeds, although the money may not have been due or earned at the time of the assignment. It is often done by builders and other contractors to enable them to procure the materials necessary to fulfil their contracts. This was the case in Scott *v.* Morris, 4 Simons 607, in which the assignment was held good. Nor does it make any difference, if, instead of a debt now due, the assignment is of money, which is expected to become due at a future day to the

assignor: Crocker *et ux. v.* Whitney, 10 Mass. 316. In Patton *v.* Wilson, 10 Casey 299, it was held, that an equitable assignment of unliquidated damages arising from a tort, and for the recovery of which an action was pending, was binding between the parties. Nor does the fact that the debtor is a municipal corporation change the right to assign money not yet earned: Brackett *v.* Blake, 7 Metc. 335; Field *v.* The Mayor of New York, 6 N. Y. 179.

The only remaining question is, that of notice to the city. Did she have such notice of the assignment and letter of attorney from Lockhardt to Pyle & Hansell, and their claim under it, as to prevent the subsequent payment by the city to Lockhardt, from being interposed against a recovery in this action. No objection is taken to the form of the notice given, but to the official upon whom it was served. It was urged upon the argument that the assignee should have given notice to the city controller or to the city treasurer. There is much force in the suggestion that if the assignees had given written notice of their rights to the city controller he would have retained the warrant, subject to the order of the assignees. It would be well if the law designated that officer as the person to whom it should be given, in such cases. In the absence, however, of any such law, we think notice to other officials equally valid. The jury found that notice had been given to the board of controllers of public schools, to the councils, and to the city solicitor. This the learned judge held upon the point reserved, was notice to the city.

By the Act of March 3d 1818, § 7, Smith's Laws 55, it is made the duty of the controllers to examine all accounts of moneys disbursed in erecting, establishing and maintaining the several schools within the district. The Act of the 15th of February 1832, 1 Pamph. L. 80, makes five members of the controllers a quorum for the making of orders, for the payment of money, and the transaction of business generally. There would then seem to be great propriety in giving notice to this board, which was most directly interested in looking after the subject-matter for which the money was to be paid. In Danville Bridge Company *v.* Pomeroy *et al.*, 3 Harris 151, it was held, that notice to the engineer of a company appointed to supervise and direct the work of an alteration in the structure by the builder, was notice to his principals.

In Trenton Bank *v.* Canal Co., 4 Paige 127, it was ruled, that notice to the agent, when it is the duty of the agent to act upon such notice, or communicate it to his principal in the proper discharge of his duty as agent, is notice to the principal, and applies to the agents of corporations as well as of others. In this case three official branches of the city having been notified, we must hold the notice sufficient to charge the city therewith. The court committed no error in entering judgment in favor of the plaintiff below upon the points reserved.

Judgment affirmed.

73 218
31 SC 513

Dickey's Appeal. Cresson's Appeal.

1. A testator devised lands in trust for a charity; and made a residuary devise. The residuary devisees and heirs at law commenced proceedings to have the devise declared void, and agreed as a family arrangement to avoid dispute amongst themselves, that in case of success it should be treated as intestate property. The court below decided the devise good, an appeal was taken under the same agreement; the husband of one of the heirs having means, (the others being poor), agreed to pay the expenses, &c., to be taken out of the land and the balance to be divided between his wife and the other heirs. *Held*, that these facts constituted a sufficient consideration for his agreement.
2. This agreement constituted the wife a tenant in common in equity with the other heirs in the title if any to the lands; and the husband was bound to proceed with the appeal until released by all the parties.
3. Any purchase of the lands made by the husband on behalf of his wife would enure to the benefit of the other heirs.
4. The appeal pending, the husband purchased the lands from the trustees in the devise and sold them at an advance. *Held*, that he was trustee for the heirs and must account for the profits.
5. The husband sold the lands and some of his own adjoining of greater value for an aggregate sum. *Held*, that he was entitled to be credited in his account with the excess of value of his own lands.

February 26th and 27th 1873. Before READ, C. J., AGNEW, SHARSWOOD, WILLIAMS and MERCUR, JJ.

Appeal from the decree at Nisi Prius: No. 35, to January Term 1868. In Equity.

The bill was filed January 3d 1868, by John Elliott Cresson, Clement Cresson, Ezra T. Cresson, James W. McAllister and Annabella his wife, late Cresson in her right, Alexander Porter and Emma his wife, late Cresson in her right, Ezra T. Cresson, executor, &c., of Jacob Cresson, deceased; said John Elliott, Clement, Ezra T., Annabella, Emma and Jacob, being children and heirs at law of Warder Cresson, deceased, against John M. Dickey and Sarah E. his wife, late Cresson in her right, and David Carscaddon.

The bill was for an account of the proceeds of certain lands in Clinton county, Pennsylvania, devised by Elliott Cresson, to trustees for a charitable use, purchased from them by John M. Dickey, D. D., one of the defendants, and afterward sold by him; the plaintiff in the bill alleged that the lands had been purchased and sold by Dr. Dickey as trustee for them and his wife, they being the heirs at law of Elliott Cresson.

The will of Elliott Cresson was dated September 3d 1853; there was a codicil dated October 7th 1853, both were proved February 27th 1854.

The clauses of the will and codicil which are at all involved in the questions of this case are as follows:—

"* * * Item. I give and bequeath to my friends Joseph R. Ingersoll, Eli K. Price, John W. Claghorn, E. F. Rivinus, Frederr-

ick Fraley, William Parker Foulke, Thomas S. Mitchell, Dr. Kirkbride, Joseph Harrison, and my executors hereinafter named, my lands in Clinton county, Pennsylvania, or the proceeds thereof if sold during my lifetime, in trust, for the foundation and support of a home for aged, infirm or invalid gentlemen and merchants, where they may enjoy the comforts of an asylum, not eleemosynary, but as far as may be, by the addition of their own means, and by reference to the Prytaneum of ancient Athens, an honorable home; with the hope that it may be perpetual and enlarged by the bequests of its grateful inmates, until it shall become worthy of the city of Penn, and a blessing to a class whose wants have hitherto been overlooked, leaving to my said trustees full power to conduct and carry out this institution on the best possible plan, and to provide for its permanent usefulness, in or near my native city.

* * * *

Item. I give and bequeath to my said executors, the sum of twenty-five thousand dollars in trust, the income whereof I direct to be paid to my beloved sister Elizabeth T. Cresson during the term of her natural life and at her death to be equally divided among her children, Jacob, John Elliott, Clement, Ezra and Annabella Cresson.

Item. I give and bequeath to the three sons of my sister Sarah, viz.: Ebenezer, Cresson and Clement Dickey, my reversionary interest in the estate of my beloved brother Clement. * *

Item. Aware that the foregoing bequests may not be phrased in due form, I request that they be nevertheless carried out in accordance with their obvious intent and meaning; and that in no event shall any portion of my estate, personal or mixed, fall into the hands of Warder Cresson. To my beloved sisters Annabella and Sarah I leave such articles of personal chattels or furniture as they may select; and finally revoking all former wills, I hereby declare this to be my will, and constitute and appoint Jacob Cresson, George V. Bacon and William Coppinger as my executors to the same.

By the codicil: * * *

"Finally: If any residue remains after the payment of the aforesaid legacies, I give the same in equal proportions to the forenamed children of Warder Cresson; but in no event shall any portion of my estate be diverted from the object designated, for the benefit of said Warder Cresson."

To the October Sessions 1856, of the United States Circuit Court of the Eastern District of Pennsylvania, John E. Cresson (one of the plaintiffs in this bill and a child of Warder Cresson) filed a bill against the surviving executors of Elliott Cresson, the trustees under his will, Jacob Cresson, Clement Cresson, Ezra T. Cresson and Annabella Cresson, children of Warder Cresson, Mary Cresson, Warder Cresson, and John M. Dickey and Sarah

E. his wife in her right. The object of the bill was that the court might declare the trust of the Clinton county lands void, that those lands were part of the residuary estate of Elliott Cresson and passed to the five children of Warder Cresson, named in the will as residuary legatees; and that one-fifth of them and of the rents, &c., belonged to the plaintiff in that bill.

St. G. T. Campbell was solicitor of the plaintiff in the bill.

The defendants demurred or answered to the bill.

John M. Dickey and wife answered that the devise of the Clinton county lands was inoperative, and that as to those lands Elliott Cresson the testator died intestate; that the lands, therefore, descended to his heirs at law and did not become part of his residuary estate; that Elliott Cresson left surviving him, as his heirs at law, Mary Cresson his mother, Warder Cresson, a brother, Annabella Cresson and Sarah E. Dickey, sisters; that Annabella Cresson afterwards died, directing by her will, that the share of her property which would have been Warder's should go to his wife, E. T. Cresson; the respondents, Dickey and wife, further averred in their answer, that one third of the Clinton county lands passed to Sarah E. Dickey as one of the testator's heirs at law, subject to the life estate of his mother, Mary Cresson.

On the 5th of October 1857, the Circuit Court of the United States dismissed the bill.

Warder Cresson died in November 1861.

The bill in this case set out the foregoing facts and averred, that the proceedings in the Circuit Court had been instituted on behalf of the residuary legatees of Elliott Cresson and with the "consent and agreement" of Emma Porter, one of these plaintiffs, and a child of Warder Cresson, and with consent of John M. Dickey and wife.

The plaintiff further averred that shortly after the dismissal of the bill in the Circuit Court of the United States, he removed to Texas, and John M. Dickey proposed to him that an appeal should be taken from the decree of the Circuit Court, to the Supreme Court of the United States, and agreed to enter bail, pay the costs, &c., on condition that if the decree should be reversed, Mrs. Dickey should have one half of the land or their proceeds if sold, and all the children of Warder Cresson, the other half. On these conditions the appeal was entered and agreed to be prosecuted by John M. Dickey.

That in the spring of 1860, John M. Dickey proposed to the trustees holding the Clinton county lands, that the suit in the Circuit Court should be compromised, and he purchase the land for $15,000, and that the compromise and purchase were to be mainly for the benefit of the children of Warder Cresson; in consequence of these representations, the trustees agreed to convey their title to John M. Dickey for a sum far below their value and less than they would have sold them to any other person, and that

[Dickey's Appeal.]

the sale was in compromise of the suit and of a doubtful right and for the benefit of all the claimants, but especially for the benefit of Warder's children, in trust as to one half for them, and as to the other half for Mrs. Dickey; that on May 18th 1860, Dickey wrote to John E. Cresson, informing him of the compromise and purchase, and saying that he expected to sign a paper to be left with Cresson's mother as representing her children, binding himself to give them "the half of the net proceeds from the property * * * after paying the purchase-money, interest and expenses of every kind;" that about the same time the trustees conveyed the land to Dickey, who afterwards said "that he had executed a paper which he would deliver to the mother of the plaintiff, stating that he held one-half of the lands in trust" for the plaintiff, "and in case of his decease it would appear how he held the lands."

That after the conveyance, Dickey took possession of the lands, and as they were distant, employed David Carscaddon, he to act as agent for all the owners of the lands and be paid out of their profits. That Dickey held the title of the lands in trust for his wife and the plaintiffs, to sell them and pay from their proceeds the necessary expenses, and the profits to be divided between Mrs. Dickey, Carscaddon and the plaintiffs. That Dickey and Carscaddon made large profits in using and selling the lumber from the lands, and from rents, improved lands and mills on them.

That in 1865, Dickey sold the lands, and $10,000 were paid on account of the purchase-money, which were forfeited by reason of failure by the purchaser to pay the residue; that about November 14th 1866, Dickey sold the lands to Ario Pardee for $100,000, thereby realizing a profit of $85,000.

The prayers were for an account of the timber, &c., sold for rents, and all moneys received in any manner by Dickey and Carscaddon; for a decree that Dickey pay to the plaintiffs their share of the forfeited $10,000, and of the proceeds of the sale to Pardee, and for general relief.

Dickey answered; admitting that the suit was instituted in the Circuit Court for the purpose alleged in the bill, with the approval of all the parties; there was no formal agreement, but a general understanding in the family that the suit should be prosecuted for the benefit of Mrs. Dickey and Warder Cresson's children. He averred that the decision of the court was so emphatic that the plaintiff and himself abandoned all claim to the lands and the prosecution of the suit; that after nearly two years, of his own motion, he proposed to the plaintiff in that suit, that with his permission he (Dickey) would take an appeal to the Supreme Court of the United States, but there was no such agreement as to the terms upon which bail was to be entered and expenses paid, as mentioned in this bill; that after the appeal he made efforts to compromise with the trustees; they declined to compromise, and no compro-

mise was ever made; after consultation with his counsel he came to the conclusion that success in the appeal was hopeless, and as he had, of his own motion, suggested the appeal, he in like manner abandoned it; that several months afterwards he proposed to the trustees to buy the lands; they had failed to sell the lands; had incurred a large debt to save them from sale for taxes, and in defending the suit; Dickey thought by individual attention and developing the lands he might make a good speculation, and therefore approached the trustees as an independent purchaser; he never proposed to compromise the suit; neither the suit, nor the claim of his wife or of the plaintiffs was an element in the purchase; he denied that the compromise and purchase were mainly on account of Warder's children, or that they were to derive the benefit and profits from the lands when they should be sold. He and the trustees had selected two competent persons to examine the lands and fix their value; they reported $15,000 as a fair value, and he agreed to pay that sum for them, but not by way of compromise of the suit; the trustees did not sell for a sum below their value, or at a price lower than they would have sold to any other person. He completed the purchase in May 1860; "paid in cash about $5000, and gave a mortgage for $10,000 without any personal bond, so little faith had he in the real value of the land; that his intention was, and so he declared to the trustees in his negotiations for the purchase, and repeatedly to the plaintiffs, or some of them, to embark in the purchase for the benefit of his wife and the plaintiffs, children of Warder Cresson—and at one time he proposed giving them a formal agreement to that effect; but when he found they were utterly unable to assist him, pecuniarily or otherwise, in the management of the lands, he was unwilling to place himself under any legal or equitable obligation to them, and declined to do so, and so repeatedly told them; but still he assured them that he would do as he had proposed to do, viz.: *give* them a share in the net proceeds, *not as a matter of right*, but only as a matter of family affection; and that for these promises and declared purposes there never was the slightest consideration; they were purely voluntary offers of his own." He agreed to give Carscaddon, whom he appointed to take care of the lands, one-third of them when sold, but Carscaddon was in no sense the agent of the plaintiff. The lands were a heavy burden to him; he had to advance and borrow large sums of money to meet demands on him from them; and the plaintiffs did not contribute or offer to contribute anything to aid him; within four or five years of the purchase he offered to several persons to share the speculation with him upon payment of a proportionate part of the outlay, and to one to sell the whole title on these terms; his offers were declined. The completion of the Philadelphia and Erie Railroad to the lands, the

close of the war, and the change in the whole circumstances of the country, afterwards gave increased value to the lands. A large part of the forfeited $10,000 was applied to improvement of the lands; large gains were not made from timber, &c., on them, but loss was sustained, except so far as the proceeds were applied to their improvement. He sold to Pardee in the fall of 1866 for $100,000, but did not realize the purchase-money until November 1867, and "then in fulfilment of his promise he offered to give the plaintiffs what he esteemed to be a full proportion of the net proceeds, which they declined to accept." He offered to permit them to examine the accounts of his agent; he rendered them no formal account; but he denied that he rendered them no account.

Carscaddon in his answer denied knowledge of any of the plaintiffs; that he ever had any business transactions with any of them, and that he ever was their agent.

A general replication was filed and Samuel Robb, Esq., was appointed examiner. He took a large amount of testimony; he was afterwards appointed master. By his report he found the facts in the case so fully that it will not be necessary to refer otherwise to the testimony. He found the will and codicil of Elliott Cresson and their probate; that he left the heirs at law, as before stated; and that Annabella Cresson, the sister, afterwards died, leaving a will, that letters testamentary were granted to the executors named in the will. He also found that the testator had left other legacies, amounting to about $138,000, to personal friends and for charitable purposes. The surviving relatives of the testator being dissatisfied with his will, instituted proceedings to have the trust of the Clinton county lands declared void, in the manner and with the result before stated. During the progress of that proceeding, the parties considered and discussed the question how the lands would pass, should the trust be declared void; whether to the residuary legatees or the testator's heirs at law as intestate estate. An amicable adjustment on this subject was made, and it was agreed that Mrs. Dickey as only surviving sister of the testator should take one half, and the children of Warder Cresson the other half, should the trust be declared void, and in pursuance of this family arrangement, the proceeding had been instituted in the Circuit Court of the United States.

The report then proceeds:—

"It would seem that the trustees, in their endeavors to carry out the trust, met with difficulties, and were embarrassed by want of funds to pay taxes and expenses (the testator not having made any provision therefor), and as the validity of the will was questioned, they could not sell a portion of the lands for this purpose, but were obliged to raise money on their individual notes and by mortgage.

"Meanwhile, in 1858, the trustees leased to parties, named

Myers & Quiggle, the timber-leave of several tracts of the said lands.

"On August 10th 1859, Dr. Dickey wrote to John E. Cresson (who, with his brothers Jacob, Clement and Ezra, had moved to Texas), as follows: 'On making inquiry in Philadelphia, I learned from Mr. Campbell, your attorney in the suit in reference to the Clinton county lands, that there was no movement on your part to continue it, and that it would not be taken further without the payment of previous costs and present fees. The time is passing beyond which it will not be possible to appeal, and as some of the trustees have no confidence in the ability to carry out the will in reference to them in a way to do much good—and this I think is a true and just opinion—I have assumed to pay the necessary charges, and given a fee to Mr. Campbell, and he engages to take an appeal to the Supreme Court of the United States. It may not amount to anything, but in that case you will not have any costs; but if it does, it will be proper to tax you and the rest of the family with their share. The arrangement your Aunt Sarah and I agreed to with the attorney was to unite the claim of her as the legal heir, with all the children of brother Warder as residuary legatee (he being cut off by the will), and as a just arrangement to make it without a trial of ownership afterward. This was done, as I suppose you know, in the previous trial, and I suppose it is best in this. If they sell the lands for the taxes, as it is to be apprehended will be the result, I will hold myself liable to you if you authorize me to buy them for the heirs (and I can raise the money), to the same division of them as if awarded by suit. Mr. Coppinger will send you in a few days a power of attorney from Mr. Campbell, authorizing him to appeal for you, which please sign before a *United States Commissioner* and return *as soon as* possible.' * * *

"On September 1st 1859, John E. Cresson replied as follows: 'Your favor, August 10th, is received. The proposition you made with regard to the Clinton county lands will be satisfactory to me. I have also consulted with my brothers Clement and Ezra, and they are all willing that you should proceed in the matter as proposed by you. As Jacob is absent in the mountains, and will not return for some weeks, and as he desired me to act for him in any matter of importance that might occur during his absence, I can, I think, with safety act for him; were he present I know he would cheerfully give his assent. He will, I hope, return in season to execute his part of the power of attorney. With regard to the payment of the taxes on the lands, we will not be able to meet our share if soon required. However, as Ezra will return to Philadelphia, he may, possibly, with your aid, raise sufficient for that purpose. He will see you and advise with you. As soon as the power of attorney you speak of comes to hand, we will

have it executed *as soon as possible*, and forward to your address. Ezra will be in Philadelphia in time to advise with you and to act for us in the matter. I trust that we may be successful in the undertaking; as it would be very unpleasant to us all to have a trial with Aunt Sarah for the ownership of these lands, it is with pleasure we accede to the plan you propose. * * *

"Accordingly, on October 22d 1859, a petition for appeal was presented, and appeal was allowed, and on November 3d 1859, bail was entered.

"In March 1860, Clement Cresson, for himself, and as attorney in fact for his brothers (John E., Ezra T., and Jacob B. Cresson), and John M. Dickey and J. W. McAllister, gave bond and instituted proceedings in replevin in the Court of Common Pleas of Clinton county, against Myers & Quiggle (known by them to be the trustees' lessees), for six thousand white pine saw logs, of the value of $8000, cut from the lands in question.

"The title of the trustees thus doubly contested, and the appeal to the Supreme Court thus threatening to increase their expenses, and this suit in replevin thus threatening to diminish, if not entirely suspend their only apparent present available resources, Dr. Dickey representing himself to be and understood to be acting in behalf of the heirs at law and residuary legatees, and expressing his desire to help (as he called them) the "more than fatherless children" of Warder Cresson, made a general proposition to the trustees for the purchase of these lands, and, after some negotiation between them, it was finally agreed that two gentlemen, Mr. Philip M. Price and Mr. Daniel A. Stone (one selected by Dr. Dickey and the other by the trustees), should make an appraisement or estimate of the value of the lands.

"On April 6th 1860, the said appraisers made a report in writing, wherein, after reciting the purpose of their appointment, viz.: 'to designate a price which in their opinion would be advisable for the trustees under the will of Elliott Cresson, deceased, to dispose of their interest in about 38,000 acres of land in Clinton county to parties representing the legal heirs of the said Elliott Cresson,' they state that they 'unite in the opinion that a fair valuation of the said lands, under all the circumstances, would be the sum of $15,000.'

"On the same day, Dr. Dickey addressed the following letter 'to Eli K. Price, Esq., chairman of the trustees under the will of Elliott Cresson, deceased.'

"Dear Sir:

"The undersigned having received notice that Messrs. P. M. Price and Daniel A. Stone, who were requested to value the Clinton county lands of the deceased, had set upon them the sum of $15,000, desires to say that he is willing to pay that amount on

behalf of the heirs at law of Mr. Cresson, provided the terms of payment are made such as to counterbalance, in some respect, what he considers the full value of the land sold under any circumstances, and provided also the money due for the logs lately cut from the property and only partially removed, may be used in part payment. The undersigned will agree to pay $5000 in four equal payments: the first when receiving the deed, the second at three, the third at six, and the fourth at nine months—the notes bearing interest from date and with approved security—and to give a mortgage for the balance payable in ten years, embracing a proviso that if the interest shall remain unpaid for more than six months after it has become due, or the taxes more than one year, the amount of the mortgage itself shall be due; the trustees to give to the undersigned their title, with the approval of the court, and all mortgages, taxes, collateral inheritance, and state claims for patent paid, or the undersigned will agree to pay all the claims against the property, as specified by the trustees and by such arrangement as he can make with the parties, giving a mortgage for the balance as above, taking their title with the approval of the court. Very respectfully submitted, by

JOHN M. DICKEY,
For Sarah E. Cresson, his wife, and residuary legatees mentioned in the will of Elliott Cresson."

"On April 14th 1860, the offer of purchase by Dr. Dickey, substantially as made, having been accepted by the trustees, the latter presented their petition to the Court of Common Pleas for the City and County of Philadelphia, wherein, after reciting and representing, *inter alia*, the clause in the will of Elliott Cresson, and 'that they have endeavored for several years past to sell said lands, which are wholly wild, uncultivated, and mountain lands, and have found no purchaser except the husband of one of the heirs of Elliott Cresson, namely, John M. Dickey, who is willing to pay $15,000 for the same—$10,000 to be secured upon the premises and payable out of the proceeds of lands and timber—which price, competent persons, after careful inquiry, have fixed upon as a fair one, under the circumstances,' * * * * * they pray the said court to approve of said sale; and the court granted the prayer of the said petitioners accordingly.

"On May 4th 1860, John E. Cresson (having been advised, as it would appear, of the progress made in the matter of the purchase), wrote to Dr. Dickey for information. This letter could not be found and was not produced, but it may reasonably be inferred from the contents of Dr. Dickey's reply (presently to be noticed), that the writer either assumed that one of his brothers, as the representative of the Cresson branch of the family, would, or suggested that he should be included as a grantee in the deed from

the trustees; and further assuming that the lands were to belong to the family, he inquired what Dr. Dickey meant by taking in a third party as (it would seem) he had been informed had been done.

"On May 18th 1860, Dr. Dickey replied: 'Yours of 4th inst. I have just received from your brother Clement, and sit down to give you the information you wish in relation to the Clinton county lands. I suppose the deed will be signed by the trustees to-day. I left $2800 with Mr. Junkin yesterday, with the promise of $2200 in a short time in cash, making $5000 in cash and a mortgage for $10,000 more, for which I am bound, as the best possible terms I could get, after a long negotiation and much trouble from the trustees; your lawyer, Mr. Campbell, as well as my own, told me to make any compromise I could with the trustees, as there was everything to fear, if we went to the Supreme Court, that it would result as the former did, against us; and as the last suit was revived by myself, and I must have necessarily borne all the expense of it, I could not with such advice do anything but what has been done. The title I took without having your brother associated in it, because the person furnishing the money to purchase, and running the risk, must necessarily have the property in his right as security; and, again, your brother cannot give you such security in a contract to the proper execution of his part as one having other property can do, so that the danger is only to myself. I expect to sign a paper to be left with your mother, as representing her children, so soon as I get the deeds recorded, binding myself and heirs to give your brothers and sisters the one-half of all the net proceeds from the property, and your Aunt Sarah for our children the other half after paying purchase-money, interest and expenses of every kind, which must first come out of all sales of lands and timber.' He then goes on to describe the lands and to show how unfit they are for farming purposes, and says: 'After getting first cost out of them, I shall be entirely satisfied to divide the balance among us and to aid you in getting the most likely part to be cultivated out of them. I do not now wish to keep any part of the land. I have taken in no third party, as you seem to have been informed, nor do I expect to, though, as the best means of realizing most from them, I expect to give thirty-three per centum to a first-rate land agent .... We may get from $20,000 to $50,000 out of them, but it cannot be told yet, nor is it time until the purchase-money is paid to talk of dividing the profits. This is, I think, as far as I can as yet carry it out, my original proposition. I have had no little trouble and risk as well as outlay of of capital, and as I am no land agent, and would for myself appoint one in Clinton county, in doing it I think I am doing the best for you; our interests in the matter are the same. I will deposit with

your mother also (from which your brother may send you a copy), a copy of the deeds, mortgages and other papers.'

"On the next day, May 19th 1860, the purchase was completed thus: Dr. Dickey and wife, by indenture dated May 16th, for the consideration of $1, granted and conveyed unto the said trustees in fee all land in Clinton county, Pennsylvania, whereof the late Elliott Cresson died seised, and which by his will he devised to trustees, together with all and singular the timber, logs, &c., 'and all the estate, right, title, &c., whatsoever of them the said John M. Dickey and wife or either of them, to have and to hold the said lands, &c., in trust nevertheless to grant the same by sufficient assurances unto the said John M. Dickey in fee." And the said trustees by indenture dated May 17th, for the consideration of $15,000 ($5000 cash and $10,000 mortgage), granted and conveyed unto the said John M. Dickey, in fee, all the lands, &c., which, by the above-recited clause in the last will and testament of said Elliott Cresson were given and devised to the said trustees as aforesaid, and all the estate, rights and interests to or in the same whatsoever, which the said John M. Dickey and Sarah E., his wife, by deed, &c., granted and conveyed unto the said trustees. And on the same day John M. Dickey executed to the said trustees a mortgage of the said lands for $10,000, stipulating for payment of taxes, interest semi-annually, and the principal sum by instalments of not less than $1000 per annum, out of the proceeds of sales, whether of land or timber, if sufficient, and if not, then the said sum annually to be paid 'at all events,' and with this, *inter alia*, further stipulation, 'and it is further expressly agreed that no objection, exception or defence shall be made or taken by the said John M. Dickey, his heirs, executors, administrators or assigns, by reason of any allegation of the invalidity of the said clause of the will of Elliott Cresson, deceased, above referred to, or against the payment of the said sum of $10,000, or any part thereof, or of the said interest or taxes, or any other money or thing hereinbefore agreed to be paid or performed.' There was no personal bond accompanying this mortgage.

"Dr. Dickey paid at the time, or afterwards, as the cash part of the consideration-money, the sum of $5000. This conveyance was made to Dr. Dickey with the understanding that he was acting for Mrs. Dickey and all the parties claiming an interest in the lands, and that it would be a settlement of the suit in the United States Court. He was dealt with by the trustees as the representative of the whole family, the Dickey branch and the Cresson branch, and he had stated to Mr. Coppinger, one of the most active of the trustees, that 'he would withdraw the suit if an arrangement could be made to purchase the lands,' and Mr. Frederick Fraley, the only other one of the trustees examined upon the subject, testifies that he 'considered him as acting as the agent of

the parties concerned in the matter, and not dealing with the trustees for his own interest alone, but there was no agreement, either verbal or written, to that effect,' and that he 'consented to the sale in order to settle the suit, and to give the parties in interest any profit that might be derived beyond the price that was agreed to be paid for the lands, but there was no written stipulation, that I recollect, to this effect.'

"The purchase was intended for the benefit of the family; and about the time of the purchase (whether before or after is not ascertained), Dr. Dickey stated to Mrs. Elizabeth T. Cresson (wife of Warder Cresson), that he would give her 'a piece of writing' to secure her 'children and their rights' to these lands, 'and also he would give his wife the same to secure her children.'

"On September 5th 1860, the replevin suit was discontinued. It would seem that Dr. Dickey, upon taking possession of the lands, appointed David Carscaddon his agent to manage the same, but it was not until March 22d 1861, that a formal agreement between them was executed, by which it was stipulated that the said Carscaddon should assume the personal management of the said lands, and sell the same and the timber thereon, for which he was to receive as compensation one-third of the net proceeds of such sales, or, after the payment of purchase-money, interest, taxes and expenses, one undivided third part of the said lands.

"In November 1861 Warder Cresson died.

"On July 18th 1862, in reply to Clement Cresson asking for 'all particulars' in reference to the lands, Dr. Dickey wrote, among other things, as follows: 'Had I known the difficulties and risks I would not have had anything to do with them, but having expended so much it will be necessary for me to endeavor to recover it;' and then after stating amount of purchase-money paid by him, $15,000, taxes $1200 settled, arrears of interest and instalments of mortgage expended, $1300 to get timber not yet ready for market, his journeys to Clinton county, and his anxiety and trouble, he proceeds: 'Had your family paid a share of this money, then it would have been right to give you part in the title as you wished, but not having done so, I must make my advances safe. If there be any net return after all is paid, as at first proposed, I will surely give your family a share with my own; but of the result I am very doubtful, even if the trustees wait for payment, which they have at their option to do or not,' and that the costs of agency are great, money is difficult to get, and he had been called upon to pay $350 counsel fees in the suit with the trustees, 'which went against us,' and which he supposed the Cressons should pay, &c.

"On January 13th 1863, Mary Cresson (mother of Elliott and Warder and Annabella Cresson, and of Mrs. Dickey), died.

"On August 13th 1863, David Carscaddon wrote to the trustees that he saw that Mr. Coppinger, one of their number, as 'sole

surviving executor of, &c., Elliott Cresson, deceased,' was advertising at Orphans' Court sale a part of one of the tracts owned by Mr. Cresson, in his lifetime, and believed to be embraced in his will to the trustees, and by them conveyed to Dr. Dickey, for whom he is acting as agent; that he has not a shadow of doubt that this tract was *intended* by the trustees and understood by Dr. Dickey, as embraced in their deed to him, and requesting they would give him their understanding of the transaction.

"On September 2d 1868, Eli K. Price, Esq., replied: 'It appears the tract you speak of is in Centre county, and the lands devised to us, and by us conveyed to Dr. Dickey, are all in Clinton county.'

"Dr. Dickey having purchased by deeds dated September 1st 1860, four tracts of land in Curtin township, Centre county, containing, three of them, each 420 acres and 48 perches, and the remaining tract 415 acres; on January 17th 1865, he and David Carscaddon agreed in writing with Ward McLean, of New York, to sell to him 'the property known as the Cresson lands, situated in Clinton and Centre counties, Pennsylvania,' and consisting of seventy-five tracts, each of about 415 acres and 16 perches, &c., together with the undivided half interest of the said Carscaddon in 329 acres, &c., the said McLean to pay for timber and logs already cut, also timber in the boom at Williamsport, at cost rate, and it being 'understood that some 420 acres in Centre county, adjoining the above lands now in the warranty name of Valentine Myers, which was originally a part of these lands, but to which the title may have been lost by Orphans' Court sale, are to be included in this sale, if the title can be recovered by reasonable diligence and effort, and at reasonable expense; the cost of such recovery to be paid by said McLean or his assigns.'

"On June 9th 1865, Dr. Dickey, for the consideration stated in the deed, of five hundred dollars, purchased the Valentine Myers tract, containing 420 acres, more or less, 'being the piece or tract of land sold by William Coppinger, sole surviving executor of Elliott Cresson, deceased,' &c.

"Under the above agreement, Dr. Dickey received from Ward McLean $10,000 on account of the purchase-money, which sum was forfeited because of his failure to comply with the terms of the purchase.

"Some time about the fall of 1865, Dr. Dickey was reminded of his promise to give 'a piece of writing' to secure the Cresson children and their rights to the lands, but he declined to give it, because 'he had given sufficient in letters written to John E. Cresson, and furthermore he had made provision in his will fully to secure' them, in case of his death.

"In November 1866, Dr. Dickey, through his then counsel, Joseph C. Turner, Esq., for the consideration of $100,000, sold

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and conveyed unto Arid Pardee the said 'Cresson lands,' consisting of seventy-six tracts of land, some situated in Clinton county and some in Centre county. Part of the purchase-money was paid in cash, but the whole of it was not realized until November 1867.

"On November 14th 1866, the mortgage executed by Dr. Dickey to the trustees, with arrears of interest, was paid, and on November 16th, the said mortgage was satisfied of record.

"The Cressons having heard of this sale, Mr. McAllister (one of the plaintiffs), at the request of Mrs. Elizabeth T. Cresson, wrote to Dr. Dickey that she would be glad to see him as soon as he could conveniently call on her.

"On November 22d 1866, he replied that on his return that afternoon from Clinton county, he was told of this short note, and says of it: 'A note similar to one from you some time ago, which I at once answered by calling on your mother, and when she wished me to give a *written* bond or pledge in reference to the interest of her children in the lands in Clinton county, which I *declined* to do, on the grounds that I had *purchased* them, which was my title, had great expense with them, and knew not that they would yield me anything, but that when sold and expenses paid with a proper compensation, they should receive a portion of the proceeds. * * * I say now I have sold the lands, but have not received enough in money to pay advances made and commission already paid, but when obligations given for one or two years are paid, a proper report and settlement will be made.'

"Subsequently Dr. Dickey sent to Alexander F. Porter (one of the plaintiffs), for the use of his wife and the other children of Warder Cresson, a 'statement of the distribution of the proceeds from sale of lands in Clinton county, bought from the trustees of Elliott Cresson by John M. Dickey,' dated December 24th 1866, showing expenses $41,177.70, balance for distribution $58,822.30, and distribution as follows: $10,000 to Dr. Dickey 'for labor and risk;' one-third net proceeds to D. Carscaddon, as per contract; one-third to children of Warder Cresson, and one-third balance; and setting forth 'The above statement is rendered in accordance with a promise given by me to the children of Warder Cresson, which promise I made and always held to be on no other grounds than those strictly of a family nature. The title was purchased under an appraisement of the court, the purchase-money for which is now in the hands of the trustees under the will of Elliott Cresson, where any legal satisfaction rests. The above sums will be paid (and I so instruct my heirs, administrators and assigns) so soon as the bonds given by A. Pardee, for one and two years, from November 14th 1866, become due and are paid, and with interest from that date, and when a proper receipt is given.'

"This statement was not satisfactory, and during 1867 there was

some correspondence looking to an amicable adjustment of the differences between the parties, but without result.

"To complete the history of the case, it should be stated that Dr. Dickey, in carrying out the purchase and in endeavoring to make the lands profitable, met with embarrassments and misfortunes; he was obliged to borrow quite largely to pay instalments, interest and taxes, and to build roads and dams, and defray the expenses of prosecuting the business of lumbering. In 1861 and 1862, money was scarce in consequence of the derangement of finances by the war; and so difficult did he find it to obtain means sufficient for his plans and purposes, that, seemingly despairing of success, he offered, without meeting a purchaser, to sell the whole or a part of the property at the rate it had cost him. The winters of 1862 and 1863 were unfavorable for lumbering, and in 1864 an ice freshet, and on March 17th 1865, a water freshet swept away great quantities of logs theretofore cut for market. It does not appear that the Cressons contributed, or were asked to contribute any of the money used or needed, or that they assisted or were asked to assist, in the operations on the lands.

"In 1860, wild lands in Clinton county were assessed at over fifty cents an acre, but evidence was offered that, in the estimation of persons well acquainted with the Cresson lands, fifty cents an acre, that is $15,000 for the whole tract, was rather above than below their real market value, and it would seem that after the close of the war they rose rapidly in value because, among other things, of the building of the Philadelphia and Erie Railroad, which runs along their front on the other side of the river.

"It was contended for the plaintiffs:—

"1. That the plaintiffs and Dr. Dickey and his wife were tenants in common of the lands in question, and that if one tenant in common purchases an outstanding title it enures to the benefit of his co-tenants—that the law raises an implied or resulting trust for them.

"2. That in the letters and papers in evidence there is an express declaration of trust by Dr. Dickey, that he was a trustee in fact of the plaintiffs in the purchase of the said lands.

"3. That Dr. Dickey was the agent of the plaintiffs, and as such purchased the said lands in their behalf.

"And for the defendants: * * *

"1. That Dr. Dickey was neither a tenant in common with the plaintiffs, nor an express trustee of or agent for them in the said purchase.

"2. That to hold Dr. Dickey as a trustee at all, there must have been mala fides in the purchase, or he must have got the lands at an inferior price, or there must have been a definite agreement upon sufficient consideration to buy for the plaintiffs, or the purchase-money must have belonged to them, or he must have ac-

cepted the lands with a trust imposed by the grantors at the time, and that the evidence establishes none of these things, but on the contrary it shows that Dr. Dickey bought as an independent purchaser, and that his promise to give the plaintiffs a share in the profits was a mere voluntary promise which cannot be enforced, and a breach of which does not make him a trustee.

"That the Statute of Limitations, Act April 22d 1856, sec. 6, settles this case, as no acknowledgment of the trust in writing by Dr. Dickey within five years before the filing of the bill has been shown." * * *

The report proceeded: "Before his purchase from the trustees in May 1860, Dr. Dickey neither had nor claimed to have any title whatever to the 'Cresson lands.' If the devise to the trustees had been decreed to be inoperative and invalid, then, whether, as contended on the one side, the lands would fall into the residuary estate and pass to the residuary legatees, or, as contended on the other side, the testator would be held to have died intestate as to the lands, and they would pass to the heirs at law (questions which it would answer no profitable purpose now to discuss), it is very certain that they would not have passed to Dr. Dickey, for he was neither a residuary legatee nor an heir at law—he was a stranger to the blood of the testator, a stranger to the will, and, even under the family agreement, a stranger to the title. Nor was Mrs. Dickey a tenant in common with the plaintiffs; she claimed only an undivided part of the lands, and that as an heir at law, while they (excepting Mrs. Porter, who claimed nothing) claimed the whole as residuary legatees; her title was adverse to their title; if she had any title, they had none, and *vice versa;* none of them were in possession, and although, under the family agreement, she and they were to be entitled in common, she was not the purchaser from the trustees. Assuming then that Dr. Dickey purchased the lands under an agreement with or promise to the plaintiffs that they, as children of Warder Cresson, should share in the purchase, if he and they were not tenants in common before the purchase, and if therefore a breach of the agreement would not make them tenants in common, the master is unable to see how, on the ground of a tenancy in common, he is to be held accountable as a trustee.

"But on other grounds, the master is of opinion that the plaintiffs are entitled to an account as prayed by their bill, and that Dr. Dickey is a trustee, if not by express declaration, by implication and construction of law.

"That the family arrangement by which the conflicting claims between the heirs at law and the residuary legatees were adjusted, and in pursuance of which the suit in the United States Circuit Court contesting the validity of the devise to the trustees was instituted, was an efficient contract, the master does not question.

It was not necessary that as an agreement it should be in writing. This is not seriously disputed, but it is contended that the agreement extended no farther than the suit, that it ended with the decree sustaining the devise—that the whole matter of the appeal was a mere voluntary thing on the part of Dr. Dickey—that he had a right to abandon it, and did abandon it, and that afterwards, dealing with the trustees, as he had a right to do, as an independent purchaser, he bought for himself and paid with his own money the full value of the lands, and that therefore under no authority of equity can he be held accountable as a trustee. * * * If the family agreement fell with the decision of the Circuit Court on October 9th 1857, then Dr. Dickey's letter of August 10th 1859, and John E. Cresson's reply of September 1st 1859, taken together, either revived it or constituted a new agreement, and if a new agreement, under which of them were the parties acting when they joined in the replevin suit in March 1860? Neither the old nor the new agreement provided in terms for contesting the trustees' title by such a suit, and without some amicable adjustment of their conflicting claims, the interests of Mrs. Dickey and the Cresson children, as has been seen, were adverse, and no other or third agreement has been shown. * * * The trustees' title was to be got out of the way by one means or another before either the heirs at law or the residuary legatees could successfully assert their own title, and thus carry out the compromise not to oppose the title of the one against the title of the other, but to divide the property between Mrs. Dickey and the Cresson children. To this end the suit in the Circuit Court was brought by John E. Cresson, the appeal was taken at the suggestion of Dr. Dickey, and he and the Cressons joined in the replevin.

"But it is said that Dr. Dickey's letter was addressed to John E. Cresson alone, and even if this letter and the reply taken together *do* constitute an agreement, it was an agreement only between these two, and not with the Cresson family. The answer is threefold—first, the reply shows that John E. Cresson was writing for himself and his brothers; second, he, as the representative not only of the Cresson family but of all the parties to the family agreement, was the complainant in the bill; and, third, * * * the parties were not acting and dealing formally, as strangers, at arm's length; they were working together for a common purpose *as a family*, each for himself and the others, and all against the title of the trustees, * * * and Dr. Dickey acting with them, as one of them, the eldest male member of the family, and its adviser, not only on behalf of his wife and their children, but also on behalf of the children of Warder Cresson, whom * * * he regarded as 'more than fatherless,' and to whom he stood *quasi in loco parentis*, in their efforts and endeavors to get possession of these lands. It may be that the suggestion of the appeal in Dr.

Dickey's letter was merely voluntary on his part, and that he was not bound to assume the payment of all the costs and charges of it if unsuccessful, but John E. Cresson having acceded to the plan proposed in the letter, and having done all he was requested to do, viz.: executed the power of attorney, authorizing counsel to appeal, and the appeal having been thus taken, and Dr. Dickey thus representing the complainant with counsel, it seems to the master that, independently of the obligation resting upon Dr. Dickey as a member of the family, here was an especial obligation imposed upon him to act on behalf of all concerned; and if he had a right to abandon the appeal without the consent of or notice to the Cressons, he certainly had no right to abandon it for his own benefit, or to use it in any way in which the Cressons would not be equally interested. * * * The appeal was not abandoned when, on March 14th 1860, Dr. Dickey joined with the Cressons in the replevin, or when, some time between this date and April 6th 1860, Dr. Dickey approached the trustees with an offer to purchase the lands. Up to at least the date of the replevin * * * it is clear beyond question that they were acting together as members of a family in pursuance of an understanding between them, the object of which was to obtain the lands held by the trustees and divide them, one-half to Mrs. Dickey and the other half to the Cresson children.

"The trustees were in difficulties * * *; the suit had cast a cloud upon their title, and the appeal threatened to increase their expenses, and the replevin to cut off their only source of revenue. In this condition of things, Dr. Dickey, referring to the trustees' embarrassments, and, among other things, expressing his confidence 'that that decision (of the Circuit Court) would be set aside by the court at Washington, and his desire to help these more than 'fatherless children,' made a general proposition to purchase the lands. Whether or not he originally intended this proposition as made by him 'as an independent purchaser,' that is, as made by himself alone for himself alone; it is very clear from the evidence that the trustees did not consider him as such or deal with him as such, nor did he as such carry on the negotiations with them. He and they could not agree as to terms, and two appraisers were selected to designate a price for which it would be advisable for the trustees to sell, *not* to Dr. Dickey, but 'to *parties representing the legal heirs of the said Elliott Cresson*,' and these appraisers on April 6th 1860, reported 'that a fair valuation of the said lands, *under all the circumstances*, would be the sum of $15,000. * * * It may be fairly and reasonably inferred that the difficulties in which the trustees were involved, and that the purchasers were to be, not strangers, but representatives of the testator's family, who were claiming a title to the property, were at least among the circumstances that thus controlled their opinion,

and, if so, induced them to fix a lower price upon the lands than they would otherwise have done. That Dr. Dickey so thought * * * is quite clear from his letter of the same date with the report, to the chairman of the trustees, conditionally accepting or agreeing to take the lands at their appraised value. '*For Sarah E. Cresson his wife and residuary legatees mentioned in the will of Elliott Cresson*,' he signifies his willingness 'to pay that amount on behalf of the heirs of Mr. Cresson, *provided* the terms of payment are made such as *to counterbalance* in some respect what he considers the full value of the land sold *under any circumstances*, and *provided* also the money due for logs lately cut from the property and only partially removed may be used in part payment,' and then he submits his terms, $5000 in four equal payments within nine months, and a mortgage for the balance, payable in ten years.

"The trustees accepting the offer substantially as thus made, the purchase was consummated on May 19th 1860. * * * This testimony would seem to show pretty conclusively that the trustees were not negotiating with Dr. Dickey as 'an independent purchaser,' but as the representative of the family; that the sale was made to him not for himself but for the family, and in terms including a settlement of the controversy between them and the family—in short, as a compromise between them. And so it would appear Dr. Dickey regarded the transaction at the time." * * *

After referring to testimony bearing on this point and discussing it, the report proceeds:—

"But it is contended in the argument and by Dr. Dickey, in his answer, that 'for these promises and declared purposes there never was the slightest consideration whatever, they were purely voluntary offers of my own.' This may be conceded so far as it may mean that the Cressons did not pay down any part of the cash purchase-money, but if a compromise be a sufficient consideration for a promise, and it will not be questioned that it is, then it seems to the master that there was sufficient consideration here, for the purchase was the result of a double compromise—a compromise between the family of their conflicting claims, and a compromise between Dr. Dickey, representing the family, and the trustees, without which it does not appear that he would have been able to purchase on such favorable terms, either as to price or payment, even if he had been able to purchase at all. Besides, if these promises were mere gratuities and not made in pursuance and on the consideration of the family agreement, and what had been done by Dr. Dickey and the Cressons under it and in furtherance of it, how and from whom and for what consideration did Dr. Dickey or his admitted agent, Mr. Carscaddon, derive the authority to discontinue the replevin suit on September 5th 1860 (several months after the purchase), and thus obtain the benefit

'of the money due for logs lately cut from the property, and only partially removed,' in part payment of the purchase-money, as stipulated for in his letter of April 6th 1860, to the trustees, submitting terms of purchase on behalf of his wife and the residuary legatees? The replevin had been instituted by him and the Cressons together; and attempt to explain this discontinuance as one may, the explanation will lead back to the original family agreement, and disclose the consideration and the authority for everything done by every member of the family and Dr. Dickey as one of them, acting with them and for them, to get the lands from the trustees and divide them between Mrs. Dickey and the Cresson children.

"And here would seem to be the appropriate place to notice the argument founded on the fact that the appeal to the Supreme Court still stands open on the record, and the only notice it is deemed necessary to take of it is this: the appeal and the replevin were but parts of the same machinery, put in motion to effectuate the purpose of the family agreement, and while they failed of directly wresting the title from the trustees, they contributed, as has been seen, to induce the trustees not only to sell to Dr. Dickey, representing the family, but to sell on favorable terms; and if it was right in Dr. Dickey to discontinue the replevin it would be as inequitable as it would be useless for the plaintiffs to proceed with the appeal. The whole controversy ended as it was promised by Dr. Dickey, and understood by the trustees, and intended by all the parties that it should end, in and with the purchase. * * *

"And as to the explanation set forth in the answer, it is sufficient to say that the impecunious and comparatively helpless condition of these children of Warder Cresson was as well known to Dr. Dickey before as after the purchase; it was used by him as an argument to induce the trustees to sell to him that they might be benefited, and, as has been seen, was among 'the governing reasons with Mr. Coppinger, and others of the trustees, to accept Dr. Dickey's proposition' to purchase; it was not expected or intended that they should assist, nor does it appear that they were ever able or were ever requested to assist, pecuniarily or otherwise.

"That Dr. Dickey encountered unexpected difficulties in carrying out his purchase and in managing the lands, may be conceded, and he may be entitled to a liberal measure of credit for overcoming them; but these difficulties resulted chiefly, if not exclusively, from the derangement of business in consequence of the war, and from unfavorable seasons and floods or freshets, matters over which the plaintiffs had no control, and for which it would scarcely be equitable to hold them responsible. Nor can the attitude of the parties be changed or affected by anything shown to have occurred after the purchase; their status and respective rights and responsibilities were fixed at the date of the purchase; and

looking back to that date and considering the confidential relation between them, the family agreement and what had been done under it, and all the circumstances which induced the trustees to sell, and which enabled Dr. Dickey to buy, it seems to the master that Dr. Dickey placed himself and was intended to be placed in the position of a trustee to the plaintiffs, and that his letter of May 18th 1860, candidly read in this light, was an informal declaration or confession of the trust. It certainly was not understood by the plaintiffs or the trustees, nor was there anything then said or done by Dr. Dickey which would give them to understand that the interest of the plaintiffs in the purchase was to be a mere matter of favor and not a matter of right. That the plaintiffs did not so understand it, is manifest from the correspondence between them and Dr. Dickey, and that the trustees did not so understand it, is clear from the whole dealings between them and Dr. Dickey. It is clear that the sale was made to him as the representative of the family, and that excepting as such representative it would not have been made to him at all at that time or on such favorable terms, and that entering into the consideration for it and of it were, among other things, the settlement of the controversy between the trustees and the family and a beneficiary purpose in favor of the family, and especially of the plaintiffs, who were deemed peculiarly unfortunate. If, then, the letter of May 18th 1860, shall not be read as an informal declaration or confession of a trust, assumed and imposed at the time and supported by abundant consideration, it seems to the master that Dr. Dickey must be held accountable on other grounds; that is, as a trustee by construction of law. One class of this sort of trusts, and it may be proved by parol, is where the acquisition of the legal estate is tainted with bad faith. The rule of the authorities is that if a person gets property which otherwise he would not have got at all, or gets it at a better bargain than he would otherwise have got it, by representing that he will hold it or use it or is purchasing it for another, equity will turn him into a trustee, 'to get at him,' and *a fortiori* if a confidential relation exists between the parties, or the party by the influence of whose name the title has been acquired had a previous interest in it or claim to it. * * * Now, it seems to the master that this rule may be properly applied to the present case, if Dr. Dickey, dealing as the representative of the family with the trustees and making the purchase under the circumstances here disclosed, only intended that whether or not the plaintiffs should have any interest in the property or its proceeds, should be optional with himself, and if they should have any interest at all, it should be only such interest as he might choose as a matter of grace to bestow upon them." * * *

As to the limitation under the Act of 1856, the master said: "Dr. Dickey's letter of November 22d 1866, to Mr. McAllister,

one of the plaintiffs, was a sufficient acknowledgment of the trust within the limit of the statute,—and if it was a trust by reason of bad faith, it does not appear that the mala fides was discovered or discoverable until after Dr. Dickey rendered his account on December 24th 1866.

"Upon, then, a careful consideration of the whole case, the master is of opinion, and so reports, that Dr. Dickey is accountable to the plaintiffs, as a trustee, as prayed in their bill, and that David Carscaddon, as the admitted agent of Dr. Dickey, was agent also of the plaintiffs, and as such should account to them; but it is not perceived on what grounds Mrs. Dickey is accountable, and as to her the bill should be dismissed, and a form of decree to this effect is accordingly annexed."

Exceptions to the report were filed with the master and overruled by him. His report having been made to the court, the cause was referred to him to state an account between the parties.

At the second hearing before him, Dr. Dickey under protest presented an account headed: "John M. Dickey in account with Cresson lands in Clinton county, including all moneys paid and received in the purchase, management and sale, viz., seventy-two tracts."

The debits were for cash received for timber, forfeit by W. McLean on articles for sale of Clinton county land with interest on the several sums.

Also: "Cash and notes from A. Pardee, deducting 1665 acres in Centre county, which were not bought from the trustees under the will of Elliott Cresson. As the sale to Mr. Pardee was not by the acre, but as a whole, it is necessary to estimate the land in Centre county by its relative value, which I do at $10 per acre. $83,350."

Also: "To proceeds of lumber taken from the lands by D. Carscaddon, of which no account was rendered in my former report to the family of Warder Cresson, that report referring entirely to the proceeds from the sale of the lands, there being no proceeds of lumber, but what went to the land in payment of taxes, interest, making roads, dams, &c. Besides, the proportion offered them from that source, I deemed sufficient when added to the large sums they received by will from Mrs. Mary Cresson in 1863, fulfilling my promise to them, and regarding myself in no sense their trustee $67,131.41

The whole amount of debits was: . . $162,950.63

The credits were for expenses in travelling, searches, court charges, taxes and interest on outlay, on mortgage and money borrowed, &c. Also the amount of purchase-money paid to the trustees.

Also: "Cash to Joseph C. Turner, Esq., proportion of commissions on sale $4,162.50

"Cash to Rev. Thos. McCauley for services and expenses as per agreement; proportion for lands in Clinton county $416.25

"Amount due Jas. David, H. Speering and C. David, exploring and estimating timber employed by W. McLean and his bills accepted by D. Carscaddon $508

"Cash advances to J. L. Proctor in consideration of his losses on lands $455

"Payments of D. Carscaddon $73,061.40

"Services of self in purchase, management and sale . . . . . $10,000"

The whole amount of credits was: $105,874

"One-third net proceeds as per agreement to David Carscaddon $19,025.39

Balance $38,050.77

$162,950.63

The plaintiffs objected to all the items in this account, except the purchase-money to the trustees, $15,000 and interest; six years' taxes on the lands $6000, and interest.

Very much testimony in support of Dr. Dickey's account and against it, was taken by the master.

One of the items in his account was on the ground, that as the sale to Pardee was "a lumping sale," including in it lands of Dickey in Centre county, as well as the Clinton county lands, the respective values of those lands should be considered, and Dickey should be charged only with such portion of the purchase-money as should remain after deducting the value of the Centre county lands. On this question the master reported:—

"The master cannot think so. It is true that the evidence shows that the Dickey tracts were more favorably located than the Cresson tracts, were much better timbered and could be used (as the larger portion of the Cresson tracts could not) as farm land after the timber should be stripped from them, and were consequently much more valuable than the Cresson tracts. But what difference can it make whether or not the Dickey tracts were worth $10 or $15 an acre and the Cresson tracts only about $3 an acre? It nowhere appears that Mr. Pardee or any one for him visited the lands to examine them, or visited them at all. He would seem to have relied entirely upon the representations, as to their condition and character, made to him by Mr. Turner, the agent employed by Dr. Dickey to negotiate the sale, and what these representations were the evidence does not disclose. It is not shown or even pretended that Mr. Pardee was induced to make the purchase by the real or represented superiority of the Dickey tracts, and there is nothing in the proofs, from which it can be conclusively inferred,

that he would have bought these tracts alone, or the Cresson tracts alone, or paid more for the former and less for the latter, than at the rate he agreed to pay and did pay for the whole. He paid $100,000 for the whole, comprising seventy-six tracts of an ascertained number of acres each, apparently without regard to the comparative value of any particular acres or tracts. In this condition of things, where no distinction is made as to the respective values of the component parts of a body of land purchased as a whole, there is no rule of law or equity with which the master is acquainted, which would authorize or justify a distinction as to the purchase-money, and settled law of the relation between Dr. Dickey and the plaintiffs will not permit him to derive any especial individual advantage from the bargain in this case. The whole tract sold to Mr. Pardee contained 31,563 acres and 32 perches, of which the four tracts owned by Dr. Dickey contained 1676 acres, and the 72 tracts of the Cresson land contained 29,887 acres and 32 perches, and in the proportion of the Cresson land to the whole land, he has been charged with the purchase-money."

After considering and allowing other credits in Dr. Dickey's account, the master reports:—

"5. As to credit claimed for amount retained to pay Messrs. Davids and Speering, exploring and estimating timber, employed by Mr. McLean, and for which Mr. Carskaddon, acting for Dr. Dickey, made himself responsible.

"After Ward McLean had contracted to purchase the lands, he wished to have them explored and the timber upon them examined and estimated. Mr. Carskaddon introduced Messrs. Davids and Speering, as competent parties for the purpose, who were willing to undertake the business, but not, as it would seem, on the sole credit of McLean, a stranger to them, and Carskaddon engaged to be responsible for him. They were on the land for weeks making examinations, and McLean paid them by a draft, endorsed by Carskaddon, on a Mr. Page of Boston, for or with whom McLean was acting in the purchase. This draft was discounted at the bank in Lock Haven, but before it was paid, Page died, and the bank placed it in the hands of their attorney for collection. It has not been paid, nor does it appear that any steps have been taken to exact payment from Carskaddon, but it is contended, nevertheless, that as Carskaddon, and therefore Dr. Dickey, is liable for the amount thereof, the credit should be allowed. Why? It is not shown beyond doubt that Carsdaddon's liability was not assumed rather for the accommodation of McLean, to enable him to sell to advantage to others, than to assist him to complete his own purchase and thus benefit the trust. And conceding the principle, that a trustee is as fully entitled to credit for money for which he is liable as for money actually paid in furtherance of the trust, it is evident that such liability must be, not a primary, but an ulti-

mate liability. The ultimate liability for this debt rests upon McLean or Page's estate, or, it may be, on both; and it has not been shown that they are, or either of them is, insolvent, and that therefore the defendants must ultimately be obliged to pay. And again, the master has not been able to satisfy himself that a trust estate should, in any event, respond for a liability of this sort, and he has accordingly disallowed the credit.

"6. As to credit claimed for money advanced or rather presented to J. L. Proctor in relief of his losses incurred in operating on the lands.

"Proctor agreed in the winter of 1861 or in 1862 to log off the lands for Dr. Dickey and Carskaddon, on terms by which, in consequence, as it would seem, of the unfavorable character of the season and the rise in the price of labor, he lost almost all he owned, and they released him from his contract. He continued, however, in their employ at wages, until after the memorable freshet of 1865, when the lumbering operations ceased. Out of consideration of his misfortunes, and apparently to give him another start in the world, the money for which credit is here claimed was presented to him. The money was actually paid, and, it must be admitted, for a laudable object; but as the plaintiffs except to it, not very graciously, as it strikes the master, he does not perceive on what grounds he can allow it, and the credit is therefore refused.

"7. As to claim for commissions.

"It is contended that this should be disallowed, because—(1) Dr. Dickey denied the trust; (2) He did not render a correct account; and (3) It is excessive."

The master elaborately considered all the objections to this credit, in connection with the evidence bearing upon it, and reported that the credit should be allowed.

The master also allowed the credit for the one-third paid D. Carskaddon and the other items of the account, not before specified, and concluded his report:

"Correcting the account brought in by Dr. Dickey in the particulars indicated, and carrying the corrections through both sides of the account, the master submits and annexes a statement of account in conformity with the opinions herein expressed, by which it will appear that there is due from Dr. Dickey to the plaintiffs the sum of $22,796.95, with interest from November 14th 1866, or to each of the plaintiffs, John E. Cresson, Clement Cresson, Ezra T. Cresson, Annabella McAllister, Emma Porter, and Ezra T. Cresson as executor of Jacob Cresson, deceased, the sum of $3799.49, with interest from said date."

A stated account in detail showing this result accompanied the report.

[Dickey's Appeal.]

Both parties filed exceptions with the master to the report. Those by Dr. Dickey were:—

1. Because the master has not allowed John M. Dickey a credit for the value of his private lands in Centre county, viz: 1676 acres, which the evidence showed was worth from $10 to $20 an acre.

2. Because the master has not allowed defendant credit for $455 paid to J. L. Proctor.

3. Because the master has not allowed defendant credit for $508, for which the defendants are liable to James David and others.

4. Because the master has reported that John M. Dickey should be charged with interest from November 14th 1866.

Those by the plaintiffs were:—

1. Because the master has erred in allowing a credit under date of March 17th 1860, the sum of $42.80 expenses for Dr. Stone and the respondent to the land.

2. Because the master has erred in allowing a credit for cash paid James C. Turner, Esq., for commissions under the date of the 15th of November 1866, the sum of $2367.25.

3. Because the master has erred in allowing a credit under the date of the 20th of November 1866, for cash paid the Rev. Thomas McCauley, for services in efforts to sell the land, the sum of $473.45.

4. Because the master has erred in allowing the sum of $624, interest on those sums.

5. Because the master has erred in allowing the sum of $73061.40 as a credit in said account for expenses paid to David Carskaddon for lumbering, &c.

6. Because the master has erred in allowing a credit of $10,000 to John M. Dickey, for commissions as the trustee of the estate.

7. Because the master has erred in charging Dr. Dickey upon the debit side of the account only, with the sum of $94,690.02, as the proceeds of the sale of the land to Pardee, when the uncontradicted testimony in the cause showed that he paid the defendant the sum of $100,000.

All the exceptions were overruled by the master, and his report unchanged made to the court was confirmed *pro forma* April 17th 1871.

Both parties appealed to the court in banc.

The assignments of error by Dr. Dickey were:—

1. Because the court did not dismiss the bill.

2. Because by confirming the first report of the master the court held that Dr. Dickey was accountable to the plaintiffs as a trustee.

3. Because the court held Dr. Dickey to be a trustee, without stating under which of the several allegations in the bill he was to account.

4. Because the evidence shows that neither Dr. Dickey nor

David Carskaddon was liable to account as trustee or otherwise to the plaintiffs, or to any of them.

5. Because the court made Dr. Dickey accountable as a trustee to the executor of Jacob Cresson, when there was no proof of his death, of any letters testamentary, or administration, or of his heirs or next of kin.

6. Because the court did not dismiss the bill as being barred by the Act of 1856, April 22d.

7. Because the court did not allow Dr. Dickey a credit on the account for the value of his private lands in Centre county, viz.: 1676 acres, which the evidence showed were worth $10 to $20 an acre.

8. Because the court did not allow Dr. Dickey credit for $455 paid J. L. Proctor.

9. Because the court did not allow Dr. Dickey credit for $508, for which he and David Carskaddon's estate are liable to James David and others.

10. Be cause the court charged Dr. Dickey with interest from March 14th 1866.

The errors assigned by the plaintiffs were, the refusal to allow their exceptions to the report of the master on Dr. Dickey's account.

The case was argued January 6th 1873, (Justice SHARSWOOD being at Nisi Prius), by *Porter* and *W. L. Hirst* (with whom was *G. Junkin*) for Dr. Dickey; and by *G. W. Biddle* and *A. V. Parsons* for the Cressons. The decree at Nisi Prius was affirmed by a divided court.

A reargument having been ordered, it was again argued by *Porter* for Dr. Dickey, and *G. W. Biddle* for the Cressons.

The space necessarily taken by the report of the case will not permit presenting the argument of counsel in a way which would do justice to them or to the case.

The opinion of the court was delivered, March 17th 1873, by

SHARSWOOD, J.—It will be necessary to inquire and determine what was the relation sustained by the defendant to the plaintiffs on May 16th 1860, when the trustees under the will of Elliott Cresson, by deed of that date conveyed to him the Clinton county lands. For this purpose it will not be required that we should enter upon a full examination and discussion of all the evidence which is spread upon the paper-books. A few indisputable, and indeed, undisputed facts, have led a majority of the court to the conclusion that Dr. Dickey did then occupy a confidential relation to the plaintiff; that he had that "community of interest," which, in the language of Chief Justice Lewis (1 Casey 272), "produces community of duty."

[Dickey's Appeal.]

By the will of Elliott Cresson the lands in Clinton county had been devised to certain gentlemen as trustees "for the foundation and support of a home for aged, infirm, or invalid gentlemen and merchants." After giving many legacies, he bequeathed the residue of his estate in equal proportions to the children of Warder Cresson, his brother, then living. He left surviving him as heirs at law, his mother, Mary Cresson, his brother, Warder Cresson, and two sisters, Annabella Cresson, and Sarah E. Dickey, the wife of the defendant. Mary Cresson, Annabella Cresson, and Warder Cresson, are dead, leaving as the heirs at law of Elliott Cresson, the children of Warder, who are plaintiffs, and Sarah E. Dickey.

Elliott Cresson died February 21st 1854, and his will was admitted to probate on the twenty-seventh of that month. John E. Cresson, then a citizen of New Jersey, on October 16th 1856, filed a bill in equity in the Circuit Court of the United States for the Eastern District of Pennsylvania, against the executors and trustees, the heirs at law, and the rest of the residuary legatees, charging that the devise to the trustees was invalid, and that by reason thereof, the said lands constituted a part of the residuary estate. The defendant and his wife answered, that they were advised that the devise was invalid, as alleged, but charged that the testator died intestate as to said lands. According to the report of the master, it seems to have been informally agreed between the parties contesting the validity of the devise, that, if it should be decided to be void, whatever might be their respective rights, Sarah E. Dickey, as the only surviving sister of the testator, should have one-half, and the children of Warder Cresson should have the other half of the lands. On the 9th of October 1857, the said bill, after argument, was dismissed, the court deciding in favor of the validity of the trust. As far as it appears, the community of interest created by the previous agreement between the plaintiffs then ended. Warder Cresson was then alive. His children, the plaintiffs, were not tenants in common, as heirs at law, with the defendant. Mrs. Dickey, however, as heir at law, was a tenant in common with her brother Warder, of whatever title there might be in them to these lands. It is unnecessary to consider what the effect in equity of a purchase by Dr. Dickey would have been at that time as to Warder Cresson, who, by the express terms of the codicil, was excluded from any benefit in the estate: "In no event shall any portion of my estate be diverted from the object designated for the benefit of said Warder Cresson." We may concede that after the decree of the court, Dr. Dickey and his wife were strangers to the plaintiffs, and had no community of interest which could lay the foundation for a relation of confidence. Had Dr. Dickey rested there, he might have purchased the lands for the benefit of his wife exclusively, and having paid

his own or her money, no declaration, not supported by a consideration, or under seal, which imports a consideration, whether such declaration had been verbal, or evidenced by writing, would have constituted him a trustee for the plaintiffs. If he had intended, and so communicated to the plaintiffs that he would divide the net proceeds of the sales and lands, after the payment of expenses, if they contributed nothing in time, labor or money, which would constitute a sufficient consideration, it would have been a nude pact not enforceable in equity. What occurred afterwards, however, placed him in a different position. The defendant was not content to accept the decree of the Circuit Court of the United States against the title which had been set up in the bill in equity. He assumed to act on behalf of John E. Cresson—the plaintiff in the Circuit Court—and retained counsel to prosecute an appeal to the Supreme Court of the United States. He communicated what he had done to John E. Cresson, by letter dated August 10th 1859. "I have assumed to pay the necessary charges, and given a fee to Mr. Campbell, and he engages to take an appeal to the Supreme Court of the United States. It may not amount to anything, but in that case you will not have any costs; but if it does, it will be proper to tax you and the rest of the family with their share. The arrangement your Aunt Sarah (Mrs. Dickey) and I agreed to with the attorney, was to unite the claim of her as the legal heir, with all the children of brother Warder as residuary legatees (he being cut off by the will,) and as a just arrangement, to make it without a trial of ownership afterwards. This was done, as I suppose you know, in the previous trial, and I suppose it is best in this." What had thus been done was ratified by John E. Cresson, acting for himself and the other plaintiffs, by a letter to Dr. Dickey, dated September 1st 1869, in which he said: "I trust that we may be successful in the undertaking; as it would be very unpleasant to us all to have a trial with Aunt Sarah for the ownership of the lands, it is with pleasure we accede to the plan you propose." Surely here was an agreement founded upon sufficient consideration; the defendant, Dr. Dickey, agreeing to conduct and be at the costs of the appeal in the event of failure, and the plaintiffs agreeing, in consideration thereof, to abandon their claim as residuary legatees, and come in equally with Mrs. Dickey as heirs at law in case of eventual success. Dr. Dickey avers that he afterwards abandoned this appeal, but it is clear that after this agreement he had no right to do so without the consent of the other parties. He had constituted his wife a tenant in common in equity with them of the title, such as it was. Mrs. Dickey, with his consent, might release her own share or interest to the trustees, but Dr. Dickey was, nevertheless, bound to go on with that appeal until he was released by the other parties from the obligation he had assumed with them, and for which they had

given value in their release of their rights as residuary legatees. It is entirely immaterial, so far as any question before us is concerned, whether the title they thus set up in opposition to the trustees of the will, was good or bad, was perfect or worthless; whether, if the trust was bad, the heirs at law would have the lands, or the residuary legatees. The relation of Mrs. Dickey, and as standing in her shoes, of Dr. Dickey, to the other parties, cannot be affected by that consideration. That Dr. Dickey, then considered that he stood in this relation to the plaintiffs, is manifest, we think, from the terms of his formal proposal in writing made to the trustees for the purchase. He says that he is willing, "on behalf of the heirs at law of Mr. Cresson," to pay the amount at which they were appraised by Messrs. P. M. Price and Stone, and he subscribes his name "for Sarah E. Cresson, his wife, and residuary legatees mentioned in the will of Elliott Cresson." If then Mrs. Dickey was in equity a tenant in common with the plaintiffs, any purchase made by her, or by her husband in her behalf, of the outstanding title in the trustees, must enure to the benefit of her co-tenants at their election. In Smiley *v.* Dixon, 1 Penna. R. 441, Huston, J., refers to the case of Legget *v.* Bechtol, which is not reported, in which it was decided by this court that two tenants in common, who had heard of an adverse title, and agreed to join in defence against it, were bound to deal fairly with each other, and that one of them, who purchased the adverse title, must hold it for the other, upon that other paying his proportion of the purchase-money. So in Weaver *v.* Wible, 1 Casey 270, it was held that 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 come in under the same title, and are holding jointly or in common. To the same effect is Lloyd *v.* Lynch, 4 Casey 419, and Keller *v.* Auble, 8 P. F. Smith 410. In answer to a letter of John E. Cresson, of May 4th 1860, who, it seems, had heard of the purchase, and wrote to inquire about it, Dr. Dickey, under date of May 18th 1860, replied as follows: "The title I took without having your brother associated in it, because the person furnishing the money to purchase, and running the risk, must necessarily have the property in his right as security; and again, your brother cannot give you such security in a contract to the proper execution of his part as one having other property can do, so that the danger is only to myself. I expect to sign a paper to be left with your mother, as representing her children, so soon as I get the deeds recorded, binding myself and heirs, to give your brothers and sisters the one-half of all the net proceeds from the property, and your Aunt Sarah, for our children, the other half, after paying purchase-money, interest and expenses of every kind, which must first come out of all sales of lands and timber." It will be observed that he

made no condition that the plaintiffs should advance any part of the purchase-money, but distinctly proposed to depend for his reimbursement upon the sales of lands and timber. He stated also in this same letter that he made this purchase of the trustees by way of compromise of the pending appeal by the advice of the counsel whom he had retained for the heirs. "Your lawyer, Mr. Campbell, as well as my own, told me to make any compromise I could with the trustees, as there was everything to fear, if we went to the Supreme Court, that it would result as the former did, against us." Whether, therefore, Dr. Dickey be regarded as acting for his wife as tenant in common, and having himself a curtesy estate in her share, or as attorney in fact of the other parties, in prosecuting their appeal, in either view he occupied a confidential relation, and any purchase made by him must be held in equity to enure to them and according to their respective shares. We are therefore of opinion that Dr. Dickey was a trustee, and the decree below that he should account as such was right.

In regard to the questions growing out of the account, we concur with the learned master below upon all points except one. We think Dr. Dickey should be credited with the fair market value of his own lands, which were included in the sale. It is altogether immaterial how Mr. Pardee, the purchaser, regarded it, and whether he viewed the lands in person. This is not the ordinary case of a person executing an express trust, where it may be said that it was the plain duty of the trustee to keep his own lands separate from those of his cestui que trust. Dr. Dickey was not a lawyer, and not acquainted with the doctrines of courts of equity upon the subject of constructive trusts. He was advised by his counsel that he was not a trustee, and the division of opinion upon this bench may at least show that it was not a clear case. He held himself bound *in foro conscientiæ* only. It would be a hard measure of equity to visit him with the loss of his own lands or their value, because, supposing himself not legally accountable to any one, he made a lumping sale of his own land with the lands of the cestui que trust. There is no difficulty in separating and distinguishing them, and so far from the Clinton county lands having been injured by this confusion, if we may judge by the testimony of the witnesses as to the actual value of the Clinton county lands, compared with what they were sold for by Dr. Dickey, they were very much benefited. Nor is there any difficulty in determining the value of these lands. The only witness who speaks of it from actual knowledge is Mr. Carskaddon, and he was an entirely competent expert. He says: "These lands are very favorable specimens, worth from $10 to $15, or $20 an acre." We lay aside what Dr. Dickey says, as evidently mere conjecture. Taking then $14 as an average for 1676 acres, deducting $3.16 per acre, the amount at which he is already credited

[Dickey's Appeal.]

and crediting him with the same proportion on the forfeit of Ward McLean, it will be found, without calculating the precise arithmetical result, that if Dr. Dickey be credited with these sums, the amount due the plaintiffs is somewhat less than that brought out on the first statement of Dr. Dickey, dated December 24th 1866, and offered to be paid by him, namely: $16,274.10. We think the decree below ought to be so modified as to find this amount to be due and payable to the plaintiffs, with such an order as to the costs as will be just and equitable.

And now it is ordered and decreed that the defendant, John M. Dickey, pay to each of the plaintiffs, John E. Cresson, Clement Cresson, Ezra T. Cresson, Annabella McAllister, Emma Porter and Emma J. Cresson, as executors of Jacob Cresson, deceased, the sum of $2712.35 cents, with interest from November 14th 1866; that each party pay his own costs in the court below; that the appeal of the plaintiffs be dismissed at the costs of the appellants, and that the costs of the appeal of John M. Dickey be paid by the appellees.

WILLIAMS and MERCUR, JJ., concurred in the modification of the decree, but would go further and dismiss the bill.

Williams's Appeal.

73	249
208	597
73	249
211	71

1. A testator devised his whole estate (after some legacies) to his executor, in trust to select and purchase a lot in Philadelphia, thereon to erect a building for the Philadelphia Library Company; and as soon as the building should be completed to convey the lot to the company; he afterwards purchased a lot himself; a few days before his death he directed that the building should be erected on that lot; and at his request the executor verbally promised the testator that he would erect the building there; after the testator's death he selected it. He answered to a bill to declare him disqualified to act as a trustee by reason of having trammelled his discretion by his promise, that he had selected the lot not only in accordance with the testator's wishes but with his own judgment, after a careful deliberation. *Held*, that his discretion was not so controlled as to disqualify him.

2. Such trust could not be taken from the donee except on the clearest evidence of his incapacity, or that he was acting in fraud of his powers.

3. The verbal direction of the testator and promise of the executor, were not a fraud on the power in the will, and the trustee was bound to perform the promise.

4. A chancellor will so control a trustee that he shall not disappoint the intent of the donor, as gathered from the instrument containing the power.

5. An innocent motive will not save the exercise of the power if it violate the true purpose of the trust.

6. When a testator, to fulfil his own purpose, confers an absolute discretion, it is his right to have the power executed by his own trustee, and a court cannot displace the trustee without clear and adequate cause.

7. Hoge *v.* Hoge, 1 Watts 163; Naglee's Estate, 2 P. F. Smith 154; Pulpress *v.* African Church, 12 Wright 204, recognised.

[Williams's Appeal.]

February 27th, 28th and March 1st 1873. Before READ, C. J., AGNEW, SHARSWOOD, WILLIAMS and MERCUR, JJ.

Appeal from the decree at Nisi Prius: No. 1, to July Term 1871. In Equity.

The proceeding in this case was by a bill filed April 11th 1871, by The Library Company of Philadelphia, against Henry J. Williams.

The questions in the case arose under the will of Dr. James Rush and its codicils.

The will was dated February 26th 1860, and contained the following provisions: * * *

"It is my intention, by a codicil or codicils to this my will, to give considerable legacies, annuities, and devises to different persons, but as I desire to take some time for reflection on this subject, and as I have made up my mind as to the disposition of my residuary estate after the payment of these legacies, annuities, and devises; now, therefore, I do hereby give, bequeath and devise my whole estate, real and personal, legal and equitable, whatsoever and wheresoever the same may be, unto my brother-in-law, Henry J. Williams, of the city of Philadelphia, his heirs and assigns, to be held by him for and upon the following trusts and purposes, and for and upon no other use, trust, or purpose whatever—that is to say:— * * *

"In trust, to select and purchase a lot of ground not less than one hundred and fifty feet square, situate between Fourth and Fifteenth and Spruce and Race streets, in the city of Philadelphia, and thereon to erect a fire-proof building sufficiently large to accommodate and contain all the books of the Library Company of Philadelphia (whose library is now at the corner of Fifth and Library street), and to provide for its future extension according to plans, directions, and specifications which I shall hereafter make or give; but if I should not make or leave any such plans, directions, or specifications, then to erect the same according to his best judgment and to the views which I have expressed to him. It is my wish that this building should be exceedingly substantial, completely fire-proof, without any large, lofty, or merely ornamental halls or lecture-rooms; the whole interior to be divided in such a way as to contain the greatest number of books, to be well lighted, and so arranged as to be of easy and convenient access.

"AND UPON THIS FURTHER TRUST, so soon as this building is completed and ready for occupation, then in trust to convey the same, with the lot of ground whereon it is erected, unto 'The Library Company of Philadelphia' aforesaid, and their successors, for the uses and purposes of their library, and for no other use or purpose whatever.

"*Provided*, however, that before any such conveyance shall be made to the said Library Company, they shall, either by an alter-

ation in their charter, or in some other way satisfactory to my executor, bind themselves and their successors to conform to and comply with the following express conditions, and any others I may hereafter impose, under which they are to hold the said property and all other bequests and devises herein or hereafter given to them:—

"*First.* That the said Library Company shall not cause, allow, or permit any lectures, * * *

"These are objects foreign to and inconsistent with the legitimate purposes of a public library, and it is only for the preservation, extension, and free and convenient use of such a library, without any ambitious or pretentious display, that it is desired to make provision.

"*Second.* That all the accounts of the receipts and expenditures from the estates aforesaid, real and personal, shall be kept separate and distinct from all other accounts of the said Library Company, and shall all be headed and kept as the accounts of 'THE RIDGWAY BRANCH OF THE LIBRARY COMPANY OF PHILADELPHIA,' so that it may be always easily and certainly ascertained whether the application of those estates and the income derived therefrom has been in accordance with the provisions of this my will.

"And I further will, direct, bequeath, and devise that whenever the said building shall have been completed and transferred to the said Library Company, and the preliminary conditions complied with, then my said executor shall assign, transfer and convey, by one or more deeds and instruments, all the rest and remainder of my residuary estate not laid out and expended in the purchase of the lot and the construction of the building aforesaid, and in the legal and customary charges and expenses, unto the said Library Company, to be held and used by them and their successors for the following uses, trusts and purposes:—

"*First.* In trust to keep the whole of the real estate granted and conveyed to them by my executor, in good order and repair, and to make from time to time such additions to the library building as may be found necessary for the extension and preservation and convenient use of the said library and all additions thereto.

"*Second.* In trust, after paying all necessary taxes, charges and expenses incident to the said property, to set aside annually ten per cent. of the clear net income, to form a contingent fund, to be invested, and the interest added to the principal, which fund, or so much thereof as may be required, shall be applied:—

"First. To build upon, improve, alter, and renew any lands and tenements hereby devised to the said company, so as to increase the income derived therefrom.

"Second. To make good and replace any losses from the failure of any investments made of or from the property hereby bequeathed for the said company; and,

"Third. Whenever the said contingent fund shall amount to $80,000, then to pay over and apply the whole surplus beyond the said $80,000 for the general purposes to which the income of this residuary estate is herein directed to be applied.

"*Third.* In trust to pay all necessary salaries, &c. * * *

"*Fourth.* And in trust, after complying with and fulfilling the previous trusts and purposes hereinbefore contained and expressed, to apply the remainder or surplus of the said net annual income, or so much thereof as may be necessary or desirable, to the increase and extension of the said library. * * *

"Lastly. I hereby appoint my brother-in-law, Henry J. Williams, executor of this my last will and testament."

By a codicil dated May 16th 1866, the testator provided: * *

"*Whereas*, By my said last will and testament, I have provided that the bequests and devises to the Library Company of Philadelphia are to be held under the conditions and restrictions therein contained, and any others which I might thereafter impose; now, therefore, in accordance with, and in execution of that provision, I add and impose the following conditions, restrictions and directions:—

"*First.* One of my objects in giving my residuary estate for the use of the said Library Company was to express my respect and regard for my father-in-law, the late Jacob Ridgway, and my affection for and gratitude to his daughter, Phœbe Anne Rush, by erecting to their memories a monument which I hope will prove more durable than any other grateful record I could make, and be infinitely more useful to the community. As it was from them I derived the greater part of my property, which has enabled me to devote happily, and undisturbed, the latter part of my life to pursuits of scientific inquiry, which I have designed to be more beneficial than the more common enjoyment of an ample fortune, it is both just and proper that I should thus employ it, the more especially as Mrs. Rush had led me to believe that if she had survived me, she would have applied it to a similar purpose. Now, in order to carry out this intention in a public and permanent form, I direct my executor to have a marble slab, with the following inscription: * * *

"*Sixth.* I give and bequeath all my pictures, my private library, my manuscripts, copyrights and papers, and also those of my father, Dr. Benjamin Rush (in my possession) to the Library Company, to be by them placed in a room in the new building, and there safely kept. The books may be used as the other books of the Library Company, but this room is not to be opened to gratify idle or objectless curiosity.

"*Seventh.* I will and direct that the building to be erected for the Philadelphia Library Company, under the provisions of my

will, shall have a basement story, of a height not less than eight feet six inches above the level of the pavement at its front. * * *

"*Eighth.* If the Philadelphia Library Company should omit or decline to accept my residuary estate on the terms and conditions in my will and codicils contained, or fail to comply with any of the preliminary stipulations and directions therein mentioned, then I give and devise the whole residue of my estate, real and personal, whatsoever and wheresoever the same may be, after paying and securing all annuities, bequests, legacies and devises, other than those to the said Library Company in this, or any future codicil contained, unto Henry J. Williams, my executor, in my said last will named, his heirs, executors and administrators in trust therewith, to found and endow a public library entirely distinct from and independent of the Philadelphia Library Company, to be named and called the Ridgway Library, under the rules, regulations, conditions and stipulations in my said last will, and the codicils thereto expressed and contained. I wish that the greater part of my estate may be spent in completing the new library building. The annuities as they expire and fall into my residuary estate will be amply sufficient for all the legitimate purposes of a library. * * *

"*Twenty-eighth.* I desire my executor to be allowed a commission of three per cent. upon the administration of my estate; and, in the case of the death of my brother-in-law, Henry J. Williams, whom I have named as my executor in my last will, either before or after me, I nominate and appoint Colonel Alexander Biddle and Thomas Craven to be my executors in his room. They are not, however, to assume the executorship, or be qualified therefor, until after his death, resignation or refusal to act."

By another codicil dated April 18th 1867, the testator provided: * * *

"*First.* I have given and devised the greater part of my estate to my executor for the purpose of erecting for the Library Company of Philadelphia a building not only large enough to contain their present books, but also their probable increase for many years to come. Now, as I do not desire that the Library Company shall have an income greater than is required to provide for the legitimate (not a competing) increase of the library and their current expenses (not to be so large as to invite extravagance and waste), for which purposes the sums to be set apart to secure the legacies and annuities given by my said will and testament will be sufficient, I hereby authorise and direct my said executor to expend the whole remainder of my estate in the purchase of a lot and the erection of the library building, construction of bookcases, &c., leaving the said company only an income sufficient to defray the ordinary and strictly appropriate expenses of such an institution. * * *

[Williams's Appeal.]

"*Second.* I have in my will limited the extent of the lot to be purchased for the library building, as well as its locality; but as I desire that it shall have not only strength, durability and accommodation, but also be of sufficient magnitude for any future or contingent, but not an ambitious or competing, increase of the library; in order to prevent, if possible, its being torn down in twenty years, and the lot sold at a speculative profit to suit the hyperbole of the times, I authorize and allow my executor, under a broad and thoughtful foresight, to increase the size of the lot, and select any situation he may deem most expedient, without regard to any provision of my will or codicils. * * *

"*Fourth.* In order to insure, as far as is in my power, the application of the various devises and bequests which I have made for the use and benefit of the Library Company, in accordance with my wishes and directions, I hereby devise, direct, will and declare that the whole and every part of my estate, real and personal, given or devised for the use and benefit of the said Library Company, and all the books and furniture purchased by them with the income and proceeds thereof, shall be taken and held by them (whenever the same by the provisions of my will, or of any codicil thereto, shall come into their possession, and become subject to their control), as trustees, for the uses, objects, trusts and purposes in my said will, and any codicil thereto mentioned and expressed." * * *

The bill set out the incorporation of the plaintiffs by the proprietaries on the 25th of March 1742, &c., and that by the will of James Logan and from other donors they had become the owners of the Loganian Library and other libraries.

After setting out the purposes of their incorporation they averred that they were a corporation for charitable and literary uses, and were entitled therefore to the aid of a court of chancery for preserving and protecting their rights.

They further averred that for the safety of their books, &c., and the better to accommodate the community, they had taken steps to procure means to change the location of their library building, and to erect one more secure against fire, &c.; that Dr. James Rush, an active stockholder in the library, was interested in it, and knew the anxiety of the company as to their books, &c.

The bill further set out: that for carrying out that end Dr. Rush "conceived the munificent design of providing such a building for said libraries." The bill then goes on, and in the 8th, 9th 10th and 11th paragraphs sets out in substance the provisions of the will and codicils, so far as they relate to the library, and proceeds:—

"XII. Your orators are advised and charge, that, from the tenor of the said will, it is clear that the testator expected and designed that the building he directed his executor to put up would

be used, if the Library Company were willing to accept the conditions imposed upon them, as a place of deposit of their own books, as well as those purchased with the funds provided by him.

"They aver that there is nothing in the will of the testator tending to show a desire to interfere with, or trammel the corporation in the use of its books as a circulating library—that is, lending them for use at the homes of the members—or to confine either the present library, or the library bought with his funds, to being used within the building, or to encourage that mode of user.

"They aver and charge that the discretion given to his executor to select the site of the intended building is in the nature of a trust for the benefit of your orators as a charitable corporation, and that the whole tenor of the will indicates that it was the intention of the testator to found a charity which should be beneficial to your orators as a library company having a collection of books, by affording or providing them a building for that purpose—that this general intent was clogged with no conditions, saving such as have been already distinctly set forth, and that the power to select the site was merely incidental to the execution of that main purpose—that, on complying, or being ready to comply with such regulations and conditions, your orators have the right to have the said powers exercised in aid of that general object and intention; and that, as it was incompetent for the testator, by verbal or unsigned directions, to revoke or vary the said gifts and trusts, so it was incompetent for him to change or affect the general intent of the will, or to qualify the powers thereby given to carry out that general purpose.

"XIV. On the 29th of June, at a special meeting, the shareholders appointed a committee on the devise to report at an adjourned meeting of the shareholders.

"XV. At an adjourned meeting held on the 5th of October 1869, the committee reported, among others, the following resolution:—

"*Resolved*, That the stockholders of the Library Company of Philadelphia do hereby accept the legacy of Dr. James Rush, according to the terms expressed in his will."

This resolution was adopted at a subsequent meeting of the stockholders held October 19th, and another committee appointed to recommend what further action should be taken.

XVI., XVII. At a meeting of the shareholders, held May 25th 1870, the committee reported that an Act of Assembly had been passed February 23d 1870, authorizing the Library Company 'to act as trustees of the Ridgway Branch of the Philadelphia Library, and the trusts pertaining thereto,' under the will and codicils of Dr. Rush; and the company was further authorized to apply from time to time to the Court of Common Pleas of Philadelphia for such amendments to their charter as might be necessary to carry the

provisions of the will and codicils into effect. The company accepted the provisions of the act, and applied to the Court of Common Pleas for certain amendments (set out in the paragraphs) to their charter, which the court decreed should be made.

"XIX. Shortly after your orators had heard of the dispositions of the testator's will, they also learned that the defendant, his executor, had formed the intention to select, as the site of the building to be erected under the terms of the trust, a lot of ground at the south-east corner of Broad and Christian streets, in the city of Philadelphia. * * *

"XX. This site was, in the general opinion both of the directors and shareholders, an undesirable one for the purpose. It was especially undesirable as a site for a building which should contain the collection of books of the Library Company. It was believed by all to be very inconvenient for the purposes of the said company as established and used up to this time, and it was believed by much the larger number that such a site would be injurious, if not destructive, to the interests and future prospects of the company, as the remoteness of the location from the residences or places of resort of all the shareholders, or persons accustomed to make use of the books, would, practically, prevent the library being used for the purpose for which it had been founded and had always been maintained,—and hence the income derived from contributions of shareholders, without which the institution could not be supported or continued, would cease. And your orators expressly show to the court that the said proposed site is not less than half a mile south of the usual places of resort of nearly all their shareholders, and more than a mile out of the line of travel of the large majority using, or entitled to use the library.

"XXII. Your orators, therefore, deeply impressed with the great advantages that might be derived from a proper use of the discretion given by the testator to his executor,—the desirableness of having a proper building for the preservation and use of their library in a convenient location—the waste of money consequent on the erection of two buildings so remote from each other, for one common object—the still further waste in the maintenance of two distinct establishments therefor, and the apparent violation of the cardinal intent of the testator by so doing, used all the influence they possessed to prevent such a selection of the site by the defendant."

XXIII. When the company had accepted the bequest and the amendments to their charter had been allowed, on the 10th of December 1870, the directors passed resolutions to notify Mr. Williams, the executor, that the amendments had been allowed and that they were "now ready to undertake the performance of their duties as trustees of the Ridgway Branch of the Library." They also adopted resolutions that in their opinion, the erection of the

library building on the lot on the corner of Broad and Christian streets would be destructive of the interests of the library and against the wishes of a large majority of the stockholders, and that they expressed to Mr. Williams "their earnest hope and request that he would reconsider his intention of building on the site named." They also appointed Dr. Willing, Judge Hare and Mr. Lea to communicate these resolutions to Mr. Williams and to confer with him on the subject.

"XXIV., XXV. At and before this time, your orators had learned that the defendant, in making the selection of the said site at Broad and Christian streets, was not acting either under the directions of the testator as contained in his will, nor in the proper and legal exercise of the discretion which the will had given to him, but that before and at the time when the said will was admitted to probate, he had disqualified and disabled himself from exercising any discretion whatever in the premises; by a most solemn verbal promise, made to the testator in the extremity of his last illness, and within a month of his death, not to exercise any discretion at all, but to use a particular piece of ground, and no other, as the site of said building.

"XXVI. At a meeting of their shareholders, held on the 29th of June 1869, the defendant was present, and he then verbally mentioned his determination to place the said library on the Broad street lot. After the meeting, being strongly urged by the committee to change that site for another equally good, and in a more central location, he assigned, among other reasons for his determination, that a loss to the estate would ensue if the lot was not used for that purpose. In answer to this, it was at once arranged that any such loss would be met by voluntary contributions in relief of the estate; whereupon the defendant declined the proposition, and announced his final determination to place the building upon that lot, under all circumstances and regardless of all consequences, unless prevented by a court of competent jurisdiction.

"XXVII. In answer to a letter from Dr. Willing, the chairman of the committee appointed on the 10th of December 1870, the following communication was received from the defendant:—

"Chestnut Hill, Dec. 30th 1870.

"My Dear Doctor:—I did not intend my note of the 17th instant to be a formal reply to the resolutions of the directors of the Library Company, nor to prevent the committee from having the conference they requested. So far from it, that I mentioned both time and place at which I would have been happy to meet them. I cannot, however, conceal my conviction, that nothing they would say would change my intention of placing the Ridgway branch of the Philadelphia Library on the lot purchased by Dr. Rush for its site; and, after all that has taken place, I must con-

fess I am a little surprised that they should again ask me to do so. Judge Hare and yourself must both be fully aware of the circumstances connected with the selection of that lot for this purpose; but, as Mr. Lea, one of your committee, is a new member, I shall repeat them, even at the risk of being unnecessarily tedious in my answer; for I cannot believe the directors could expect *me* to make the change they desire, if they fully appreciated my position.

"Some weeks before Dr. Rush's death he was very anxious to have the location of the intended building finally fixed and settled; and he desired me to ascertain the size and cost of all the vacant lots on Broad street, on which street he desired it to be placed. I procured statements of the sizes and prices of all I thought at all suitable, from Vine to South street, but he was satisfied with none of them. Another gentleman brought him a plan of the lot on Christian street, and he was so much pleased with it that he directed me to buy it at once. I did so; and when the contract was signed and a part of the consideration paid, he expressed great pleasure that it was concluded, as it relieved his mind from all anxiety. Some days after, he recurred again to this subject, as it had probably occurred to him that he had given me an absolute discretion as to the situation of the library by the terms of his will, and that I might be induced to overrule his decision after he was gone. He called me to his bedside and asked me to give him a promise that I would *build the library on that lot, and nowhere else.* I gave him this promise as fully and solemnly as language could express it, and he then thanked me and said he could now die in peace. Now, do you think it would be at all consistent with truth and honesty for me voluntarily to violate a pledge given under circumstances which render it as sacred as an oath, and made to a dying man who had confided to me the management of his whole estate? Would you, with your well-known delicacy and sensibility to all honorable engagements, feel yourself justified in doing so, were the case your own, and should I not lose your respect and regard (which I value very highly) were I to hesitate for a moment as to what was my duty?

"And what is the reason assigned why I should do this?—'to gratify the wishes of the shareholders.' But have these shareholders shown such an appreciation of the magnificent gift of Dr. Rush (which is only subject to their future acceptance) as to render his representative very desirous to comply with their wishes, in opposition to the repeatedly and earnestly declared intentions of Dr. Rush, and to his own deliberate judgment? When the question was first presented to them, these shareholders, by a majority of five, accepted his bequest, but, by a very much larger majority, refused to pass a resolution expressing their gratitude for his gift. True, at a subsequent meeting they adopted such a

resolution, but it was only on second thoughts; and it may be doubted whether it was not agreed to because of the extraordinary position in which they would be placed, if they were to take his money and refuse to admit they were obliged to him.

"I have said that to assent to the wishes of the shareholders would be in opposition to my own deliberate judgment, and I mean this in its fullest extent. I think that, considering its size, its price, and the description of library Dr. Rush intended to endow, there is not an attainable position on Broad street, of sufficient size to meet his views, which is preferable to the one he has himself selected.

"Now, the Library Company give me notice that the company 'are now ready to undertake the performance of their duties as trustees for the Ridgway branch of the Library,'—*duties* and *trusts* which I understand commence only when the building is finished; but I am not aware that they have shown, in any one instance, a disposition to comply with the last instructions of one whom I shall always consider as their munificent benefactor.

* * * * * * *

Very truly yours,

H. J. Williams.

Dr. Ch. Willing, Chairman.

"XXVIII. While your orators are ready to appreciate the high moral conviction which the defendant feels, of his duty to abide by the promise thus made by him to his testator, and to fulfil the same, yet they are advised that it cannot be thus fulfilled to the prejudice of your orators, for the following reasons:—

"They are advised, and they so submit to the court, that all discretionary powers given to trustees are themselves trusts, and that in the exercise thereof the trustee is bound to use the same for the furtherance of the purpose for which they were given, and not otherwise; that, in the exercise of discretionary powers, the donee thereof cannot and must not act under the influence of motives other than such as should of right direct him in dealing with property not his own, and intrusted to him for a special purpose, and that if he be disabled from using his natural, unbiassed discretion or judgment in the exercise of the power, from any cause which binds or warps, or has a manifest tendency to warp the same, a court of equity will interfere to restrain such abuse of the trust, and to direct what should be done by such trustee according to a sound and unbiassed discretion.

"And they are further advised that the discretionary power given to the defendant by the will and codicils of the testator was in the nature of property of your orators, inasmuch as its exercise will vary and modify their rights, and will certainly, if exercised according to the defendant's expressed intention, destroy or

greatly impair the usefulness of the literary charity to be administered by them—that the verbal directions of the testator, varying the nature of the trust and confidence reposed by him in the defendant, and the rights which your orators, as devisees, had in the beneficial enjoyment of the exercise of that power, were as absolutely null and void as those of a stranger—first, by reason of being made within one calendar month prior to the death of the testator, and, therefore, void under the statute in such case provided—and, secondly, by reason of their not being in writing and signed by the testator at the end thereof, in accordance with the statute relating to wills.

"And they are further advised that, under the circumstances of this case—while it is true that a court of equity will not interfere with a trustee in the exercise of a discretionary power (save to see that a discretion is really exercised), yet, that looking to the fact that the object of this testator was to found a charity of this particular sort—a literary charity—by furnishing it with books and maintaining said building, and that it was certainly designed that your orators should administer that charity in connection with their own, and under one management, and, it was probably intended, in one building, and with one corps of servants and assistants—a court of equity, having control of charities, would, even if the donee had not so surrendered and bound his discretion before the trust had vested in him, interfere to prevent its improper exercise.

"XXIX. Your orators aver that nothing but the high moral conviction under which the defendant labors—of his duty to abide by his promise—blinds him to these consequences. And although true it is that the promise so made by him to his testator was wholly illegal and could not lawfully bind the former nor be enforced against him, yet your orators charge that the defendant did and does believe that his conscience was and is bound thereby, and that he would be doing a dishonorable act if he made any other selection.

"XXX. But the defendant at times insists that he has selected the said site in the exercise of *his own* discretion, unbiassed by said promise; but your orators charge that the defendant, having made the promise and believing himself bound by it, was and is utterly unable to determine what line of conduct he would have followed if he had not made such promise, and that a court of equity will not regard any assertion of what might or would have been the defendant's determination, had no such influence existed.

"XXXI. At other times the defendant alleges, as an excuse, that, as the testator agreed to buy the said lot for the purpose of having a library building erected thereon, he, the testator, did thus *himself* select the site for the building; and that he, the defendant, as trustee, had not the less a right to select voluntarily

the *same* lot which the testator had thus selected, or else that the testator's alleged selection, in some way or other, took the place of that to be made by the defendant, and was either binding, or could, at his option, be made binding, and, in fact and law, has been made binding, on all claiming under the will; the contrary whereof your orators charge to be true, and they aver that, by his own showing, it was not possible for the defendant, after the testator's death, to make a voluntary selection of that or any other site, because he had already, in the testator's lifetime, bound himself by his promise not to exercise the discretion which the will had given him, but to build the library on that site, and nowhere else. * * *

"XXXVII. Wherefore they pray equitable relief as follows:—

"1. That the rights of your orators and of the defendant in the premises may be ascertained and declared.

"2. That it may be declared and decreed that the power conferred on the defendant by the will of the testator was a trust to be administered by him only in the manner in which all trusts can or of right ought to be administered.

"4. That the court may decree and declare that the defendant, being, at and before the time when the said trust vested in him, or supposing himself to be, under an obligation which bound his discretion as to the selection of a site for the said building, was and is thereby disqualified from and incapable of exercising the power and trust in that behalf given to him by the said will, and that the same may be exercised by this court having jurisdiction in the premises.

"5. That it be referred to a master, to inquire and report what would be a proper and fit location for the said building, to the end that the true intent and purpose of the testator, as contained in his will, may be carried into full effect.

"6. That the court may, from time to time, give such further instructions, and make such further orders and decrees in the administration of the trust as to them shall seem fit; and especially that it may declare how much of the corpus of the estate shall or ought to be expended and employed in the purchase of a convenient lot of ground, and the erection of a suitable building thereon.

"7. That the defendant may be restrained by injunction, preliminary until the hearing and perpetual thereafter, from proceeding to erect the said building on the said lot situate on the southeast corner of Broad and Christian streets.

"8. General relief."

In his answer the defendant set out:—

1. The wills and codicils and proceeded: * * *

"This will was proved on the 31st May 1869, on which day I took an oath to perform my duties as executor in accordance with

law. I have, from the outset, acted under advice of counsel. Until his appointment to the Bench of the Supreme Court of the United States, the Hon. William Strong was one of my legal advisers. I have never, since assuming the executorship, in act or thought, done anything contrary to what I believed to be my legal duty, as such executor, and I have taken no important step without first obtaining the advice and approbation of my counsel.

"The testator knew that the Library Company had, for very many years, been striving to secure funds sufficient to erect a fireproof building large enough to contain all their books, and their probable increase, and his provision that such a building should be erected in accordance with his views, was, with him, a favorite and constant matter of thought.

"He made many inquiries for eligible lots and as to proper places for building. He ascertained that the lot which, in 1860, he had thought sufficient would be too small, and that there would be a great difficulty if not an impossibility in obtaining with the funds he could leave, within the area first designated, such a one as would be required, and therefore, in 1867, removed all restriction as to limits. He was very anxious to have the matter of site determined before his death, and desired me and others to ascertain the size and cost of vacant lots on Broad street, on which street he particularly desired the building to be placed. I procured descriptions and prices of all I considered suitable, between Vine and South streets, but he was satisfied with none of them. Another gentleman brought him a plan of the lot at Broad and Christian streets, and he was so much pleased with it, that he instructed me to buy it, and I did so. The contract was signed on the 18th day of May 1869, and the title papers were directed to be sent immediately to Mr. Henry Wharton for his opinion thereon. A few days after this, the testator inquired whether I thought the Library Company would make any objection to the site, and I answered that from what I knew of the board, I believed they would not. He asked me to ascertain to a certainty their feelings on this subject, but not being willing that his testamentary intentions should be generally known, he only authorized me to communicate them to two of the managers, viz., Mr. Henry Wharton and Colonel Alexander Biddle, whose opinions I was requested to ask. I desired Colonel Biddle to accompany me to Mr. Wharton's office, and then stated to them that Dr. Rush had given almost his whole fortune, amounting to a million of dollars, to build a library at Broad and Christian streets, and asked them if they thought the Library Company would object to that location. They declared that, considering the magnificence of the gift, the Library Company ought not, and they believed would not, make any objection to his wishes as to its position. Dr. Rush, to whom I immediately returned, was informed of the result of the interview—was greatly pleased, and having obtained the views of

three members of the board, appeared entirely satisfied. Had he known that his wishes, thus approved, would have been disregarded when he was gone, he would most unquestionably have embodied them in a form *legally* binding. It was after this, that the promise stated in my letter of 30th December 1870, was made to him. This was given with a knowledge of almost every circumstance which led subsequently to my decision, when, as his executor, it became my duty to determine the site of the library. Knowing, as I do, that this promise is not binding upon *me* the trustee in law, however it may be in morals and good faith upon the beneficiaries, I aver that I have never heard any reason assigned which would justify me in changing my opinion as to the propriety of this site. I have certainly seen none assigned in the bill which has been filed.

"If there had been a conflict between my sworn duty under my oath as executor, and my promise to the testator, I could have ended it by resignation of my executorship: but as no such conflict ever arose, it has never become necessary for me to determine what course, under such circumstances, it would be right for me to pursue.

"I selected the Broad and Christian street lot when I had assumed the executorship, after calm, careful and deliberate consideration—having thought of it in every shape, favorable and unfavorable, in which it had been presented—because it was, in my judgment, the best I could obtain for the objects and purposes of Dr. Rush's will—and because it combined adequate dimensions with cheapness and position. I announced my selection at the meeting of shareholders of the Library Company on the 29th of June 1869, and at the meeting held on the 5th of October 1869, the resolutions, alleged to have been resolutions of acceptance, were adopted.

"I was advised by my counsel in writing on the 9th of July, 1869:—

"'As executor you are guided by the written will. In the exercise of the discretion reposed in you by that instrument, you may regard Dr. Rush's views and wishes orally expressed, but, after all, *your* judgment, however it may be made up, must be your guide in matters left to your discretion.'

"In pursuance of this advice—for I have felt, and still feel, under the obligation of my oath of office, bound to perform my duty in accordance with the *law*—I considered, in all its bearings, without any bias, the matter of the site, but my conviction that it was the one by far the most expedient remained, and still remains, unchanged.

"Though protesting that the complainants have no concern with or control over my reasons for this decision so long as they are honest, which is not, I believe, denied, yet, in deference to the court, I will state some of those which influenced me at the outset,

and govern me still." (The answer then sets out these reasons very much in detail.)

"The testator's 'cardinal intent' was, that a building should be erected by me sufficiently large to accommodate for all time the books of the Philadelphia Library, such as would be an ornament to the city, and a lasting monument to his wife and her father. Broad street, in my opinion, is infinitely preferable as a site for such a building, because of the handsome private and public structures already upon it, and of the probability of many more being erected there in the future; because of its length and centrality, and of its great width, which furnishes an opportunity for architectural display that our narrow streets fail to afford. In this preference my testator shared. A location of the library upon any other street in the city would be decidedly against my judgment."

The answer then specifies a number of lots examined by him and the reasons for declining to take them.

"Neither the company nor the court can interfere with me in the selection of a site without cramping me in the matter of the building, over which I have a control that I believe has not been questioned.

"The site which I have selected is within easy reach of all parts of the city. South of it is an immense population which is annually increasing, and, in the opinion of many—an opinion in which I join—this portion of Broad street will ultimately be filled with magnificent residences. The facilities afforded by passenger railways are such, that to those north of it who may wish to use the library, a ride of a few squares additional will make no difference in cost and but little in time. * * * The city through which the 900 stockholders are scattered is sixty miles in circumference.

"The great size of this lot will always protect the library from the noise and bustle of the more crowded portions of the city, and from all danger from fires or nuisances in its neighborhood.

"I have chosen this site for these, among other reasons:—

"1. It is on the finest street of our city.

"2. It is, so far as I know, the only lot on that street sufficiently large for the building I must erect, which I can obtain at a reasonable cost.

"3. If compelled to purchase a lot elsewhere, I will not be able to erect the building ordered by the testator.

"4. I know of no suitable lot on any other street which can be had at the same cost.

"5. It is but little distant from the centre of the city, and is within easy reach, by car, of all portions of it.

"6. It will not be necessary to have the library building torn down in twenty years and the lot sold because of its limited dimensions.

[Williams's Appeal.]

"7. Its size insures, for all time, light, air, retirement, quiet, and safety from external dangers.

"8. It already belongs to the estate.

"9. It is exactly suited for the kind of library Dr. Rush proposed to endow—not a reading-room, nor one containing the light and ephemeral literature of the day, but one for readers and students of a higher grade.

"10. It will carry out the cardinal intent of the testator as *he* understood it, because it is the one he selected himself.

"I adhere to this choice and to my determination to build thereon notwithstanding the opposition which has been raised, because it was to my judgment, and not to that of others, Dr. Rush confided the performance of his testamentary dispositions. My judgment being at variance with that of others, I would lay myself open to charges which might be made in another bill, if I abandoned that which I have deliberately formed and announced. I may be wrong, and they may be right, and the testator might well have chosen many very much better fitted than myself to do the work imposed upon his executor, but *he* did not think so. We had been friends and connections from early manhood through lives so long protracted that almost all those whom he had known and trusted had gone. For twenty-five years I had been the trustee of himself and his wife. For upwards of half a century I had been his counsellor and adviser, and for these reasons he preferred me. Because I knew his *legally expressed* wishes, and intended, to the utmost of my ability, faithfully to execute them, I accepted the trusts he confided to me. * * *

"Since the filing of this bill I have consulted with the gentlemen who are named in the will as my successors—Alexander Biddle and Thomas Craven—and I have ascertained that they agree with me in the opinion that the site I have selected is the 'most expedient' which could be chosen. * * *

"3. I am advised, and therefore aver, that the complainants are not a corporation for *charitable* uses, as charged in the fifth paragraph, and that they are not as such entitled to the aid of a court of chancery for preserving and protecting their rights.

"5. * * * I am advised, and therefore aver, that the complainants are not a charitable corporation, and that the discretion given me to select a site for the library building is not therefore in the nature of a trust for them; but that if the law and the facts are as stated in the bill, then as the will speaks as of the day of the testator's death, if, in his lifetime, by his own act, he disqualified me from the exercise of the discretion given to me by the will, the bequest to the Library Company being dependent upon the exercise of that discretion as a condition precedent to the vesting of the estate, no court of chancery can dispense with the performance of that condition.

[Williams's Appeal.]

"I am advised, and therefore aver, that my disqualification to exercise my discretion, supposing it to exist, having arisen from acts of the testator himself, the complainants can take no benefits under his will conditioned upon a prior exercise of my discretion, however ready they may be to comply with all the 'other conditions and regulations.' * * *

"11. I deny that I have ever disqualified or disabled myself from exercising a discretion as to the site of the library building. I aver that in making selection of the site at Broad and Christian streets, I acted under the direction of the testator as contained in his will, and in the proper and legal exercise of the discretion thereby given to me.

"12. I deny the truth of the averments in the 25th paragraph, in the form in which they are put. I admit that I did, at his request, 'not in the extremity of the testator's last illness,' but whilst his intellect was as clear and strong as ever, within a month of his decease, promise him verbally, to use the said lot of ground at Broad and Christian streets as the site of the library building; and I aver, that at the time I made said promise I thought it the best lot for the purchase which could be obtained; and I aver, that after careful reflection and subsequent examination, I still entertain this opinion. I deny that I ever made 'a promise not to exercise any discretion at all' in reference to the site, or that any such words ever passed between Dr. Rush and myself.

"I said nothing which deprived me of the full power to form a judgment or opinion in reference to the propriety or expediency of selecting that situation. A promise to do a particular act does not prevent the formation or the expression of an opinion in relation to its propriety or expediency, and I believe that I am just as able to determine whether the site at Broad and Christian streets is proper or beneficial, as if I had made no promise at all. * * * I believe I can determine the question as to the eligibility of the site as correctly as if the subject had never been mentioned by Dr. Rush.

"I am sworn to execute the provisions of the will. One of these requires me to exercise an honest discretion, and I believe I have done so. If, however, my discretion under my oath had been in opposition to my promise, then I would have been obliged to reflect upon the course I should pursue; but as my oath—my opinion—that of the testator—and my promise all point to the same conclusion, I conceive my way to be clear, and my discretion not to be subject to be limited or controlled.

"When I gave my promise I was fully acquainted with most of the facts upon which I have since, under the will, formed my opinion. I was aware of the power I would be called upon to exercise if I became the executor, and believed that, in the proper exercise of that discretion, I would be able to fulfil my promise.

[Williams's Appeal.]

"16. I do insist, as charged in the 30th paragraph, that I have selected the said site in the exercise of my *own* discretion, unbiassed by any promise; and I deny that any promise, however it may be felt to be morally binding, did prevent or can prevent my exercising, or knowing that I have exercised, my judgment. I aver, that I am now able to say what line of conduct I would have followed if I had never made a promise, and that I would have selected the site at Broad and Christian streets, if Dr. Rush had been silent as to his wishes.

"17. I do aver, as alleged in the 31st paragraph, that I had a right to select voluntarily the same lot which the latter had selected, 'none the less' because he had selected it; and I admit my infinite satisfaction at being able conscientiously, and in fulfilment of his *written* requests, made 'more than one calendar month before his decease,' to gratify his wishes as to the manner in which his money should be expended." * * *

The defendant also demurred to the bill:—

1 and 2. That there had been no valid acceptance of the bequests; as there could be no binding acceptance until the building should be completed none of the preliminary conditions of the will had been complied with—(setting out these conditions.)

4. The plaintiffs are not a charitable corporation, nor within the protection afforded by courts of chancery to charities.

6. The court had no jurisdiction to control the defendant's discretion in selecting a site or exercising any of the trusts of the will.

A general replication having been filed, Richard S. Hunter, Esq., was appointed examiner. Upon the filing of his report P. Pemberton Morris, Esq., was appointed master.

The master, after having given the will in full and other undisputed preliminary matters in his report, found as follows:—

"The testator, on the 18th of May 1869, eight days before his death, agreed, through Mr. Williams, for the purchase of a square of ground situate at Broad and Christian streets, intending that the library building should be erected on that lot. The conveyance was not executed until some time after the death of Dr. Rush.

"Between the 18th of May, the day the contract for the purchase bore date, and the day of the death of Dr. Rush, some conversation passed between Dr. Rush and Mr. Williams as to whether the Library Company would approve of the location.

"After this conversation, and in consequence of it, as it would seem, Mr. Williams called upon Mr. Henry Wharton and Mr. Alexander Biddle to obtain their views on the subject.

"They failed to understand each other, owing, probably, to the fact that the conversation was hurried, and Mr. Williams and Mr. Wharton, at least, were looking at the matter from different standpoints, and were on an unequal footing so far as their knowledge of Dr. Rush's will was concerned.

"Mr. Wharton, under the impression that the lot at Broad and Christian streets was to be given for the building, with a large endowment fund to extend and increase the library (meaning the books), expressed it as his personal opinion that the directors ought to advise the stockholders to accept this gift, rather than that such a munificent gift should be lost to the city of Philadelphia.

"Mr. Williams, knowing the contents of Dr. Rush's will, and what he himself intended to say, had a different impression of the conversation, and takes the result of the conversation to be an absolute approval by Messrs. Wharton and Biddle of the projected purchase, and on the strength of that conviction, reported the conversation in that sense to Dr. Rush.

"About the second day after the interview with Messrs. Wharton and Biddle, when he was seated by Dr. Rush's bedside, the doctor turned and said, 'Harry, now you will promise me to put the building on that lot.' I said, 'Certainly, doctor, if you desire it, I will promise you that I will put it there, and nowhere else.' The doctor merely expressed his satisfaction." * * *

Amongst other correspondence reported by the master was the following:—

"916 Spruce Street, December 13th 1870.

"Dear Sir:—I take this opportunity of enclosing a copy of resolutions passed by the Board of Directors of the Philadelphia Library Company, and to ask when it will suit your convenience to give the committee an interview to confer with you upon the subject to which they refer.

I remain with great respect, &c.,

CHARLES WILLING.

HENRY J. WILLIAMS, Esq."

"My Dear Sir:—

"I shall be happy to meet the gentlemen named in your note either as a committee or as individuals, but I must say that I feel it impossible to make any change in the location of the library upon the lot selected by Dr. Rush himself. It seems to me a sacred duty to carry out the clearly and repeatedly expressed wishes of the testator, and to perform what he undoubtedly understood to be a fundamental condition of his bequest. I moreover fully believe that, a few years hence, the position selected by him for his library building will be in all respects admirably suited to the objects which the doctor had in view, and which he has expressed in his will. * * *

With sentiments of great esteem and regard, believe me, &c.

HENRY J. WILLIAMS.

DR. CH. WILLING.

December 17th 1870."

[Williams's Appeal.]

Also the letter of December 30th 1870, from Mr. Williams to Dr. Willing, set out at large in the bill.

The master having considered the facts and discussed the reasons of demurrer proceeds:—

"It thus appears that at the time of Dr. Rush's death the defendant was under a pledge, given under circumstances which rendered it '*as sacred as an oath*,' to put the building on a particular site.

"Did that disqualify him from exercising the discretion which the testator had confided to him, and to the exercise of which the complainants were entitled by the terms of the will? * * *

"The discretion which the complainants were entitled to, was the free, voluntary, untrammelled judgment on the question of site of a gentleman long a member of the Library Company, familiar with its wants and wishes. No single individual could have been named upon whose spontaneous opinion as to site the complainants would probably have been more willing to rely. But it was *that* they were entitled to, and nothing less. That was Dr. Rush's will. The will spoke from May 26th 1869, the day of Dr. Rush's death: Potts *v.* Briston, Law Rep. 11 Eq. Cas. 438. * * * To give effect to Dr. Rush's parol wishes as his wishes, declared a few days before his death, would be to alter his will contrary to the Statute of Wills. The keeping of the promise to Dr. Rush is not what the plaintiffs are entitled to. That promise was upon Mr. Williams with all the solemnity of an oath, when the duty of exercising an untrammelled discretion was cast on him by the will. Had he at that date any discretion to exercise? He says he had. It is a question, perhaps, on which he is incompetent to judge. In passing upon it, the character and person of the present defendant must be put out of view. Was his discretion free in the view of a court of equity? Cases somewhat analogous will, perhaps, afford us a clue to the answer. * * *

"Mr. Williams avows his intention to carry out the testator's wishes and directions; he denies being a passive instrument, but asserts that in the selection of this site he exercises an untrammelled discretion, which, happily for him, enables him to carry out the testator's instructions, and his counsel insist that this statement being in the answer, and in response to the bill, must be taken to be the fact, unless overthrown by two witnesses, or one witness and sufficient circumstances.

"The master is of opinion that this is not a case for the application of that principle of equity evidence.

"It is impossible for any man, however cool and unimpassioned he may be, to know exactly how far his judgment would be influenced by a promise so solemnly given as that given by the respondent in this case. * * *

"We come, then, to the third question, how is the will to be carried out.

"The answer is, that the court will, either through a new trustee to be appointed by them, or by a decree framed after a report from a master, carry out the intention of the donor if it can be ascertained. * * *

"The conclusions then to which the master has come upon the questions submitted are that the will was not affected by the promise; that the trustee, by his promise, has so crippled his discretion as to make it impossible to say how much his preference for the lot in question is due to his unbiassed opinion that it is the most expedient for the purpose, and how much to his promise to Dr. Rush; that his action in the premises must therefore be under the direction of the court.

"That the complainants have an interest in the selection of the fittest site, which gives them a standing in a court of equity to ask that the selection be made under the supervision of the court; that this course is not to be viewed as an expression of opinion adverse to the site proposed by the executor; that it be referred to a master to inquire and report to the court whether the proposed site is a proper and expedient location for the said building, and if not, what would be such a site? and that the defendant be restrained by injunction from proceeding to erect the said building on the said lot on the south-east corner of Broad and Christian streets until further order. Of course the last specification of demurrer fails with the rest."

The master submitted a form of decree drawn in conformity with his report.

Exceptions were filed to the master's report by the defendant, which after argument, were dismissed December 31st 1872.

Mercur, J., delivered the following opinion:—

"This case comes before me upon exceptions to the report of a master. He was directed to report the law, the facts, and a decree proper to be made therein. Twenty-two exceptions have been filed to his report. The very able arguments of counsel, however, have not been directed to each exception separately, but rather to the discussion of two questions, which may be stated to be covered by these, to wit:—

"First. What powers were vested in the defendant under the trust created by the will of Dr. James Rush in regard to the location and purpose of the library building?

"Secondly. Has he properly executed those powers in selecting the lot at Broad and Christian streets as the site for said library building?

"The first question can be more satisfactorily answered by referring at some length to different portions of the will.

"The testator, by his will of the 26th of February 1860, de-

vised and bequeathed the whole of his real and personal estate to his brother-in-law, Henry J. Williams, his heirs and assigns, in trust, to pay certain legacies, annuities, gifts and bequests, to be thereafter expressed in codicils, and then to hold the residue and remainder of his estate 'in trust, to select and purchase a lot of ground, not less than one hundred and fifty feet square, situate between Fourth and Fifteenth and Spruce and Race streets, in the city of Philadelphia, and thereon to erect a fire-proof building, sufficiently large to accommodate and contain all the books of the Library Company of Philadelphia.' And upon the further trust, 'so soon as this building is completed and ready for occupation, then in trust to convey the same, with the lot of ground whereon it is erected, unto 'The Library Company of Philadelphia' aforesaid, and their successors, for the uses and purposes of their library, and for no other use or purpose whatever.' Providing, however, before such conveyance should be made to the said Library Company, they should, either by an alteration in their charter or in some other way satisfactory to his executor, bind themselves and their successors to conform to, and comply with, certain express conditions therein specified. One of the conditions was 'that all the accounts of the receipts and expenditures from the estates aforesaid, real and personal, shall be kept separate and distinct from all other accounts of the said Library Company, and shall all be headed and kept as the accounts of 'The Ridgway Branch of the Library Company of Philadelphia.''

"He also appointed Mr. Williams executor of said will.

"By a 'first codicil' thereto, dated the 16th of May 1866, he imposed additional restrictions upon the Library Company, and designated the beneficiaries of the legacies, annuities and gifts indicated in his original will.

"In his 'additional codicil' of the 18th of April 1867, he says, 'I authorize and allow my executor, under a broad and thoughtful foresight, to increase the size of the lot and select any situation he may deem most expedient, without regard to any provision of my will or codicils.'

"On the 18th of May 1869, Dr. Rush purchased by contract a lot at Broad and Christian streets in the city of Philadelphia, for the avowed purpose of having the library building erected thereon, and made a payment of $1000 upon the contract. He held this lot subject to the payment of the residue of the purchase-money at the time of his death. That occurred on the 26th of May 1869. The defendant has selected this lot as the site for the library building. Had he the power in equity so to do? He says, he had: that the will left it to his sole judgment and discretion, and not to the judgment and discretion of anybody else; and in the exercise of that judgment and discretion he has made the selection. Superadded to the power given him in the will he points

to the purchase of this identical lot by the testator, after the execution of his will, with the express object of having the library building located thereon, and claims that was an ademption *pro tanto*.

"I, however, am of the opinion that the doctrine of ademption or double portion cannot be applied to the facts in this case. The defendant must fall back upon the will, and rely upon that alone, for his authority. By that instrument he was authorized to select any lot which commended itself to his own free, unbiassed judgment as most suitable. If no improper influences were operating upon his mind and warping his judgment in the exercise of his discretion, and he acted in good faith, a court of equity will not interfere with that discretion: Hill on Trustees 489; Gochenauer *v.* Froelich, 8 Watts 19; Chew *v.* Chew, 4 Casey 17; Pulpress *et al. v.* Af. M. E. Church, 12 Wright 204. But discretionary powers like other authorities must be exercised in the manner prescribed by the trust instrument: Hill on Trustees 488.

"To the defendant was given by this instrument the power to select any lot which 'under a broad and thoughtful foresight' commended itself to his judgment. The selection must be made under and by the exercise of the defendant's judgment entirely free from any obligation imposed upon it by the testator other than those contained in the will and codicils. Such a discretion the defendant must bring to the discharge of his trust, and then it only marks the limits of the power given to him. The exercise of such a discretion the claimants have a right to demand. They can require no more, and may not submit to any less.

"Secondly. Did the defendant properly use his own discretion, and execute the power intrusted to him in the selection of the lot in question? The complainants aver that this site will be prejudicial to the interests of the library, utterly destructive of the trusts which they have hitherto administered, and which they claim it was the manifest design of the testator to promote. They further allege that the defendant assumed the trust under such a trammelled and crippled discretion that he was thereby disabled from using his natural unbiassed judgment in the selection of the lot. The master concurred in this, and in his very able report has found 'that the trustee, by his promise to the testator, had so crippled his discretion as to make it impossible to say how much his preference for the lot in question is due to his unbiassed opinion that it is most expedient for the purpose, and how much to his promise to Dr. Rush;' and that the action of the defendant should be subjected to the control of the court.

"This presents the controlling question in the case. Do the facts and the law justify the master in his conclusions?

"The evidence shows that some weeks before the death of the testator he became very anxious to have the location of the intended

library building fixed and settled; and he desired the defendant to ascertain the size and cost of all the vacant lots on Broad street (upon which street he desired it to be placed). The defendant procured statements of the sizes and prices of all he thought suitable, from Vine to South street; but Dr. Rush was not satisfied with any of them. Some other gentlemen brought him a plan of the lot on Christian street, and he was so much pleased with it that he directed the defendant to buy it at once. The defendant did so; by the aforesaid contract of May 18th 1869. The doctor thereupon expressed great pleasure that it was concluded, as it relieved his mind from all anxiety. 'Some days after,' says the defendant (in his letter of the 30th December 1870, to Dr. Charles Willing, chairman of a committee appointed by the complainants), "the doctor recurred again to this subject, as it had probably occurred to him that he had given me an absolute discretion as to the situation of the library by the terms of his will, and that I might be induced to overrule his decision after he was gone. He called me to his bedside and asked me to give him a promise that I would build the library on that lot, and nowhere else. I gave him this promise as fully and solemnly as language could express it, and he then thanked me, and said he could now die in peace.'

"In his testimony taken before the examiner on the 17th of April 1872, he says: 'I think it was about the second day after the interview with Mr. Wharton (which he had just stated was on the 20th or 21st of May 1869), when I was seated by Dr. Rush's bedside. I think the lot had been the subject of conversation between us, when the doctor turned to me and said, "Harry, now you will promise me to put the building upon that lot?" I said, "Certainly, doctor, if you desire it; I will promise you that I will put it there, and nowhere else." The doctor merely expressed his satisfaction. I think he said, as near as I can recollect, "Well, I am very glad of it; it is now all settled."'

"The docter died within five or six days thereafter. This promise, then, was demanded and given a very few days prior to his death. It was two years after the last codicil to his will had been executed. It was demanded of a brother-in-law to whom he was about to intrust more than a million of dollars—I say about to intrust, for there was yet time for him to revoke the will and all of its trusts. He was unwilling to pass all his vast estate into the hands of the defendant upon the implied assurance that the library building would be located upon the lot which he had purchased for its site. Hence he made the specific demand. What his action would have been, had the defendant's answer not been in accord with his judgment, is left to conjecture. He suffered his will to remain unchanged. He passed from this earth, there is every reason to believe, in an abiding faith that he had restrained the free

choice of the defendant, and that he had secured the erection of the library building upon the lot designated by himself.

"What was the position of the defendant? He knew that he had been named in the testator's will as his trustee and executor. Sitting by the bedside of his dying friend and brother—recognising the doctor's right to control his own property—wishing to relieve his mind from all doubt upon the subject that troubled him, the defendant then and there promised, as fully and as solemnly as language could express it, to put the building on that lot and nowhere else. Do not all the attendant and surrounding circumstances impress the mind of every conscientious and reflecting person with the very strong moral obligation thereby imposed upon the defendant? I can scarcely conceive one stronger. The greater the integrity, the higher the moral sense, the stronger would be the obligation upon the conscience. That the defendant possesses both in a high degree is manifest in his letter of the 30th of December before referred to. When asked, in behalf of the claimants, to reconsider his intention of building on said lot, and locate the building elsewhere, his answer was such as did credit alike to his conscience and to his heart. After repeating the promise which he had made, and the circumstances under which it was made, he says:—'Now, do you think it would be at all consistent with truth and honesty for me voluntarily to violate a pledge given under circumstances which render it as sacred as an oath, and made to a dying man who had confided to me the whole of his estate? Would you, with your well-known delicacy and sensibility to all honorable engagements, feel yourself justified in doing so were the case your own, and should I not lose your respect and regard (which I value very highly) were I to hesitate for a moment as to what was my duty?'

"Therein and thereby he proves the indelible stamp made upon his mind. Conscience, resting under an obligation strong as an oath, bound him to the observance of his promise. With that deep recognition of moral obligation resting upon his conscience, he assumed the duties of the trust. He thinks he executed the power and discharged the trust under the written will alone, wholly uninfluenced by his promise.

"The well-known integrity and the high moral character of the defendant do not permit me to doubt that he honestly thinks so. If, however, he be correct, there must have been a time when his conscience was absolved from this deep moral obligation—a time when he threw it off, and when the lawful one took exclusive possession of his judgment. I understand the answer to be that it was at the time he was obligated to take the usual oath in order to assume the duties of executor. This was on the 31st of May 1869. This latter oath, he says, created a legal as well as a moral obligation. Did it, however, wholly eradicate the moral obligation,

'sacred as an oath,' under which he had rested up to that time? In his letter of 30th December 1870, he refers to it as still resting strongly upon him, and that his duty required him to be influenced thereby.

"It is contended, however, inasmuch as the defendant has sworn in his answer, and again before the examiner, that he has considered and decided the question as to the site of the library building entirely irrespective of and uninfluenced by any promise made by him to Dr. Rush, that the complainants have failed to make a case in which a court of equity will interfere with the discretion which he has exercised.

"In considering the act which the defendant has committed, or is about to commit, we must look at the position of the donor, the donee, and of the beneficiaries of the power. The beneficiaries have the right to require the power to be executed according to the terms of the written instrument creating it. If the donor induced the donee to accept the trust under a pledge that he would execute it otherwise than was provided in the instrument, he committed, in equity, a fraud upon the power. If the donee accepted it under such pledge and so executed it, he committed a fraud upon the power. It is not necessarily a moral fraud. A wilful departure from the terms of the power is a fraud upon it, without regard to whether the motive thereto was good or bad: Topham *v.* The Duke of Portland, 1 De Gex, Jones & Smith 571. Nor does it change the rule of law in regard to the agreement to pervert the trust from the original purpose for which the power was intended, whether that influence be exerted before the appointment or after it, provided that in both cases it secures the consent of the appointee to fulfil the wishes of the appointer: Topham *v.* Portland, 31 Beav. 539, 540.

"No American authority has been found which covers the case under consideration, but in Topham *v.* The Duke of Portland, reported in Law Rep. 5 Ch. App. 40, it is held that although the donor and the donee both swore that the power was not executed to carry out any agreement between them, other than those specified in the written instrument, yet that a chancellor might look beyond the oaths and see whether the presence of a moral obligation did not at the date of the appointment, and when the trustee came to act, weigh upon her mind with such force as to make her a passive instrument of the donor's intentions.

"A judge or juror is forbidden to sit in a case wherein a party litigant is closely related to him by blood or marriage. He will not be permitted to purge himself of his disqualification by answering that he can, and will act wholly uninfluenced by such relationship.

"Certain facts, which the wisdom of ages has recognised as in-

fluencing the judgment of mankind generally, create a conclusion of law that they will influence the judgment of each individual.

"Applying the law and reasons to this case, testing the uncontradicted evidence by all those principles which I have ever been taught to believe influence the human mind, and control the actions of men, it does establish such a state of facts as would naturally and reasonably restrain and trammel the free judgment of the donee of a power. Such a general presumption cannot be removed by the honest opinion of a donee that in his particular case he is not influenced thereby. Hence I am unable to conclude that the defendant had, when he made the selection of the lot in question, or has now, such a free discretion and unbiassed judgment as the complainants are entitled to invoke and a court of equity bound to provide. It should, therefore, be referred to a master to inquire and report what will be the most expedient location for said library building, without my indicating any opinion as to whether or not the lot at Broad and Christian streets is a suitable one.

"The exceptions to the report are dismissed, the report of the master is confirmed, and decree accordingly."

The decree was:—

"And now, this 31st day of December, A. D. 1872, this cause came on to be heard upon bill, answer, replication and proofs, and was argued by counsel; whereupon, in consideration thereof, the court are of opinion and so declare, First, that the complainants are competent to, and of right may, when the proper time shall arrive, assume the trust confided to them by the will of the testator, Dr. James Rush; Secondly, that all the powers to that end conferred on the defendant by the will of the said testator are trusts, in which the complainants have an interest in the nature of property, and which are to be administered by the defendant only in the manner in which all trusts can, or of right ought to be administered; and it appearing to the court as well by the written admissions of the defendant as by his answer and testimony in this cause, that at and before the time when the said trust vested in him, he had absolutely bound the discretion intended to be given to him by the said will as to the selection of a site for the building proposed by the testator to be erected, and was and is thereby disqualified from, and incapable of exercising the power and trust in that behalf given to him by the said will, and that, in order to carry out the true intent and meaning thereof, the said trust may, and should be now exercised under the supervision of this court according to the course and practice of chancery; it is, therefore, ordered and decreed that it be referred to

Esq., as master, to inquire and report what would be the most expedient situation for the said building, to the end that the true intent and purpose of the testator, as contained in his will, may be carried into full effect. And that he have au-

[Williams's Appeal.]

thority to take testimony in addition to that taken before the examiner; And that the defendant be restrained, until further order, from proceeding to erect the said building on the lot situate at the south-east corner of Broad and Christian streets; And the court reserves all questions of costs and expenses for its further consideration."

The defendant appealed to the court in banc and assigned the decree for error.

J. G. Johnson and *G. Junkin* (with whom was *Woodward*), for appellant.

W. H. Rawle and *R. C. McMurtrie* (with whom was *Meredith*), for appellees.

The opinion of the court was delivered, May 17th 1873, by

AGNEW, J.—This is not an ordinary proceeding. It is an endeavor to set aside a man's solemn act, done in the exercise of his right of property, in his lifetime, when he had absolute power over his own estate. It is an effort also to declare his friend, the chosen agent to execute his purpose, invested with absolute discretion to this end, disqualified to perform his will, because at his earnest request this friend has adopted and followed the testator's act. As a consequence, the bill seeks, on the ground of entire disqualification, to take the actual execution of the will into the hands of the court, and to declare how much of the *corpus* of the estate shall be used for that purpose. As a further consequence, the will must be executed by a stranger—a master acting under decrees procured from time to time by plaintiffs; for, by the total disqualification of the executor, the testator is no longer represented. This is the frame and purpose of this bill. Such a proceeding violates the right of private property and the spirit and purpose of the bill of rights, and cannot be justified except upon the clearest evidence of the incapacity of the executor, or that he is acting in fraud of his powers.

The case, briefly stated, is this: Dr. James Rush, a gentleman of education and fortune, though somewhat peculiar, conceived the thought of founding a noble charity, at once a public benefit to his native city, Philadelphia, and a monument to those from whom he derived his wealth. He pondered the subject and then made his will. At first he restricted the site of the building to certain central limits; but the rapid progress of the city during the eventful period of 1860 to 1867, altered his views of location. Fearful, if his charity were placed near the centre of the city, where property was rising rapidly, that the building might be swept away by the tide of speculation, he made a codicil, revoked the restriction, and enabled his executor to go beyond the limits stated in

his will. Still reflecting upon his scheme for about two years more, and anxious to locate his charity to suit his own thoughts, he had careful examinations made by his friend and executor, and finding no other site suitable, either in price or size, he finally chose a spacious square on the great central avenue of the city, a few squares south of the original limit, and bought it at a cost of $130,000, or about one-eighth of his entire estate. Upon this ground he directed his executor to build, and, to secure his co-operation, obtained his promise to do so. This promise was given, the executor swears most positively, not only out of regard to the testator's wishes, but because the lot and site were approved by his own judgment, founded on a previous examination of all the known eligible sites. Within a month after the death of Dr. Rush, Henry J. Williams, the executor, consulted eminent counsel as to the obligation of the contract of purchase upon the estate and upon his own duties in making the selection, and was advised by Judge Strong that the purchase was binding, that his power of selection was absolute, and was to be exercised upon his own judgment.

Dr. Rush died on the 26th of May 1869. Mr. Williams made the selection under the will, and communicated it to the Library Company on the 29th of June 1869, having previously stated it to individual members. Mr. Williams, the executor, a member himself of the Library Company, having no selfish or hostile interest, an old and skilful lawyer, well informed of his duties, a gentleman of intelligence and refinement, one whose integrity and purity of character are conceded by the plaintiffs to the fullest extent, is admitted to have acted in perfect good faith, and he, on his oath, attests that he acted upon his own judgment. It is alleged that the selection of the site at Broad and Christian streets, chosen and purchased by the testator, and adopted by the executor, must be set aside, not because of any intent to disappoint the trust, or of the slightest *mala fides*, but because the mind of the trustee was, by reason of a promise to the testator, under a constraint, of which he was unconscious when he made the selection, which made him incapable of exercising his judgment, notwithstanding he swears that he did act upon his own judgment, and because it accorded with his promise. The proposition, instead of being so plain and clearly established that a court of equity can act upon it to set aside the testator's choice and oust his trustee, is simply incredible, and is destructive of the right of private property. It denies the power of self-knowledge and the capability of self-examination, upon which the doctrine of accountability for the thoughts and purposes of the heart rests. It asserts a want of power to introspect our consciousness and motives of action under the responsibility of an oath, and our ability to distinguish between the obligation of a promise and the determination of the judgment in doing an act of importance pondered for weeks. The case is

brought directly to this point, for the positive, distinct and reiterated assertions of Mr. Williams, in his answer and his testimony, that he did act upon his own judgment, compel us to decide either that he does not know the operations of his own mind, or that he is forsworn. The latter alternative is conceded on all hands to be untrue. Can it be possible that a court, in such a case and on such ground, will depose the executor, cast the property purchased by the testator back upon the estate, wrest the power from his hands, and place it in the hands of others? There is no such case to be found in the books here or elsewhere; and if any can be found abroad, it cannot be imported into this free state. Before examining the law let me state the bearing of the facts.

Was the selection in the line of Dr. Rush's written will? The will is dated in 1860. Dr. Rush devises to Mr. Williams all his estate, in trust, to select a lot not less than 150 feet square, between Fourth and Fifteenth, and Spruce and Race streets; and to erect a fire-proof building sufficiently large, not only for the present wants of the Library Company, but for future extension, according to his own plans and directions; and if he should leave none, then according to Dr. Williams's best judgment and to the views he had expressed to him.

Thus, by the terms of the will, the testator reserved to himself the right to leave written instructions; and if he did not, that the executor should act upon his *verbal* directions. His verbal instructions to his executor are therefore within the very line of the written will. It is a matter of history that the war of the rebellion changed the whole surface of affairs in this city as well as elsewhere, by the inflation of the currency, the rise of prices, and increase of business.

These had a strong influence on Dr. Rush's mind. Let the language of the first codicil express his own thought. Paragraph 26—"Events and circumstances occurring within the last six years have obliged me to make several changes in my will." Then he proceeds to state the risk of making a new will, lest his death within thirty days afterwards might avoid it. "To avoid the possibility of such a result (he proceeds), I must let it stand as it is, and add other provisions as they may occur to me."

The codicil is dated May 16th 1866. No better exposition of the testator's thoughts can be made than thus given to us in his own words, to exhibit the state of his mind when he made the second codicil, of the 18th of April 1867. Remembering this, the testator's change of views since 1860, when the original will was made, is clearly expressed in the language of the second codicil.

Sect. 2. "I have in my will *limited the* extent of the lot to be purchased for the library building, as *well as its localities;* but as I desire that it shall have not only strength, durability and accom-

modation, but also be of *sufficient magnitude for any future or contingent*, but not ambitious or competing increase of the library, *in order to prevent*, if possible, it being torn down in twenty years *and the lot sold at a speculative profit to suit the hyperbole of the times*, I authorize and allow my executor under a broad and thoughtful foresight to *increase the size of the lot*, and select *any* situation *he may deem* most expedient, *without regard to any* provisions of my will or codicils." I have italicised the language to bring out its meaning.

Now, what was the testator's own idea as contained in this very provision (the power in question) of a *broad and thoughtful foresight?*

He tells us himself to *increase the size of the lot*, and to go out of the original limit to select *anywhere*. In a broad and thoughtful foresight he foresaw that the centre of the city would not suit his purpose or his means. He said to his executor, go out and choose elsewhere, so that the magnitude of the building will suit all future time, and that the edifice itself shall not be swept away by the irresistible tide of speculation, to suit, as he termed it, the hyperbole of the times; a figure to express the superlative fancy and spirit of an inordinate inflation of prices.

In the next place, did the testator follow the line of his own thought, as expressed in the will itself? The proof of this is very clear, and is not contradicted. He made inquiries for eligible lots—new examinations made were both within the original limits and without. Mr. Williams himself explored, but found nothing suited to Dr. Rush's purpose. Finally, the lot at Broad and Christian streets presented itself, and here the testator found a site suited to his thought—a large, open square, on the main great avenue of the city, 299½ feet on Broad street, and running back 527 feet on Christian; containing about 3½ acres; at a price of $130,000—a large sum, indeed, but still leaving enough, as he believed, to put up the extensive building which filled his thought, as expressed in the codicil itself. In view of the rapid extension of the city within the last thirteen years, what right have we to say this selection was not made under a broad and thoughtful foresight, and does not meet the views and purposes expressed in the written will and codicils? The views and wishes of the Library Company are outside of the true question, which must be decided upon the will itself.

Next, what were the grounds on which Mr. Williams exercised his discretion? These are best stated in his own words in his answer and sworn testimony.

"I have chosen this site for these, among other reasons:—

"1. It is on the finest street of our city.

"2. It is, so far as I know, the only lot on that street suffi-

ciently large for the building I must erect, which I can obtain at a reasonable cost.

"8. If compelled to purchase a lot elsewhere, I will not be able to erect the building ordered by the testator.

"4. I know of no suitable lot on any other street which can be had at the same cost.

"5. It is but a little distance from the centre of the city, and is within easy reach, by car, of all portions of it.

"6. It will not be necessary to have the library building torn down in twenty years and the lot sold because of its limited dimensions.

"7. Its size insures for all time light, air, retirement, quiet and safety from external dangers.

"8. It already belongs to the estate.

"9. It is exactly suited to the kind of library Dr. Rush proposed to endow—not a reading-room, nor one containing the light and ephemeral literature of the day, but one for readers and students of a higher grade.

"10. It will carry out the cardinal intent of the testator, as he understood it, because it is the one he selected himself.

"I adhere to this choice and to my determination to build thereon, notwithstanding the opposition which has been raised, because it was to my judgment, and not that of others, Dr. Rush confided the performance of his testamentary dispositions."

Certainly these are good reasons, and aside from all other evidence, vindicate Mr. Williams's assertion that he acted on his own judgment, for they are processes of thought, or steps which lead to his conclusion. Now, let us see what he says on oath as to the exercise of his own judgment; and first in his answer in direct response to the bill: "I selected the Broad and Christian street lot when I had assumed the executorship, after calm, careful and deliberate consideration, having thought of it in every shape, favorable and unfavorable, in which it had been presented, because it was in my judgment, the best I could obtain for the object and purposes of Dr. Rush's will, and because it combined adequate dimensions with cheapness and position." In regard to his promise to Dr. Rush—the alleged ground of disqualification—after stating his efforts to find a suitable lot, he says: "It was after this that the promise stated in my letter of the 30th December 1870, was made to him. This was given with a knowledge of almost every circumstance which led subsequently to my decision, when, as his executor, it became my duty to determine the site of the library." Again: "I aver that at the time I made said promise I thought it the best lot for the purpose which could be obtained, and I aver that after careful reflection and subsequent examination I still entertain this opinion." There is much more in the answer to the same effect.

His testimony is as strong as his answer. When asked whether his judgment was not influenced by his promise, he replied: "Not that I am conscious of at all. I believe if I had made no promise, and had not known the wishes of Dr. Rush, my judgment would have been the same." Again he said: "If my promise to Dr. Rush, and my oath as executor had been at all in conflict, I would have resigned my executorship at once, and left some other person to put up the building."

Much more he said to the point, but this will suffice to show the strong and positive convictions of his mind. In these assertions he is also strongly corroborated by the testimony of many witnesses as to what took place just before Dr. Rush's death, and the communication of the selection of the lot to Mr. Wharton, Mr. Biddle and others. He consulted counsel, as proved by Judge Strong's letter of the 15th of June 1869, before the meeting of the Library Company, on the 29th of June, when his selection was formally made known. A committee of conference was appointed at this meeting. To Mr. Fraley, one of the committee, who suggested other lots, he replied that they had all been examined, and that the prices were so high they did not suit Dr. Rush, and that the lot at Broad and Christian streets had been selected because, in the judgment of both Dr. Rush and *himself*, it combined all the advantages which he wished to secure. He again consulted Judge Strong, who replied July 19th 1869, saying: "As executor, you are guided by the written will. In the exercise of the discretion reposed in you by that instrument, you may regard Dr. Rush's views and wishes orally expressed; but after all *your* judgment, however it may be made up, must be your guide in matters left to your discretion." Again urged by Mr. Fraley to change the selection on the 6th of August 1869, he replied: "*I deem* that situation (the Broad and Christian lot) most expedient under all the circumstances of the case, for I *consider* its distance from the centre of the city as far outweighed by its other advantages, and I have the consolation of knowing that this decision is in entire accordance with the wishes of the testator, who selected and purchased this lot for this very purpose in his lifetime." The Library Company themselves knew he had exercised his own judgment in the matter. A meeting was called for the 19th of October 1869, to vote on the acceptance or rejection of the provisions of Dr. Rush's will. Committees were raised *pro* and *con* to influence the opinions of the members when the meeting should take place, and circulars were issued.

On one site it was said: "But the executor of Dr. Rush, both from the expressed wishes of the testator during his life, as well as from *his own judgment of the suitableness* of the selected site, is indisposed to change it." The other side said: "The will gives to the executor the *absolute right* to select the location, and to

construct the building, and *this discretion has been exercised*, by selecting Broad and Christian streets as *the most suitable spot* in the city for the purpose." Against this overwhelming evidence, the positive oath of Mr. Williams, the contemporary circumstances, and the understanding of the Library Company, how can the conclusion be drawn that Mr. Williams did not exercise his own judgment?

It was after all these things had occurred, and nineteen months after the death of Dr. Rush, the letter of December 30th 1870, was written, the stronghold and fortress of the plaintiffs' bill. The object and purpose of this letter are made obvious by the circumstances which have evoked it. Controversy had arisen, and the Library Company had made several efforts to induce Mr. Williams to revoke his selection, and finally, at a meeting of the company, on the 10th of December 1870, resolutions were passed, one of which expressed the "earnest hope and *request* that Mr. Williams would *reconsider* his intention to build on the site chosen." Dr. Willing, Judge Hare and Mr. Lea were appointed a committee to confer with Mr. Williams, and a correspondence ensued, in which Mr. Williams adhered to his selection. The letter of December 30th 1870 was then written, at the invitation of Dr. Willing, as a *formal* expression of Mr. Williams's intentions. He restates his convictions, and expresses his surprise that he should be again asked to change his intentions, and proceeds to defend himself against censure for refusing to change his mind. Then he pleads the sacred character of his promise. He cannot yield his judgment, but pressed hard to do so, he appeals to the well known sensibility of the gentlemen composing the committee, to all honorable engagements, if the case were their own. He repeats, also, what he has always said, that to change would be in opposition to *his own deliberate judgment;* and "*I mean this* (he adds) *in its fullest sense.*" This letter, written at the close of the year 1870, long after the controversy had existed, in defence of his motives and his reputation, evoked by the direct action of the Library Company, instead of proving that Mr. Williams acted without judgment, and from unconscious restraint, proves the convictions of a mind thoroughly convinced, and a heart that was fixed upon a just purpose. Admit that he was also influenced by his promise to his friend. So he ought to be, when, as he swears, it was an approving judgment. This is a proper influence, and does not show a man void of discretion, and so bound by conscience that his judgment is lost in the obligation of a foolish pledge.

How far, then, will a court of equity go in regarding a promise to a testator, as in fraud of his written will? Here I think the plaintiffs do not discriminate well. That a verbal direction of a testator in conflict with a power contained in his will, cannot alter

the written terms of the power, is beyond contradiction, and to this extent this argument may fairly go.

But that a court of equity can pronounce the verbal direction, and, still stronger, the *act* of this testator, in the very line of his own power, and a promise to conform to it, *ipso facto*, a fraud on the power, is contrary to reason and the plainest principles of equity. The reverse is true, for it is the province of equity to follow the mind of the testator. So clear is this principle, that a court of equity will sometimes convert the devisee, even of an absolute estate, into a trustee, in order to compel him to perform a solemn promise given to his testator to dispose of the property according to his verbal direction. In doing this the written will is struck down to reach the equity that lies in the verbal direction. Such was the case of Hoge *v.* Hoge, 1 Watts 163, where the testator devised an estate to his brother absolutely, under a verbal direction that it should be for the benefit of his illegitimate son. Chief Justice Gibson cites in his opinion a number of cases where the verbal direction was sustained against the text of the will—one, for instance, where a testator having devised his lands to a nephew, desired his heir-at-law not to disturb the nephew in possession of certain lands acquired after the execution of the will, and it was so decreed. Now if a court of equity, to prevent a fraud upon the testator's actual intention, will disregard the written text, how much more consonant to equity is it to regard the solemn act of a testator who has involved his estate in the obligation of a contract in the line of a will, and to carry out its very intent; and how can it regard the promise of the executor to follow the wishes of the testator in this respect, as *ipso facto*, a fraud upon the testator's power.

On what principle of sound reason, conscience, or equity can the selection of this lot by the executor be pronounced a fraud on the power, or a disappointment of the power, or as an undue and improper execution of the purpose of the testator as contained in his written will? How has the promise to the testator vitiated the selection? What provision of the will does it offend? How can we say the selection is not made with a broad and thoughtful foresight? On the contrary, it conforms both to the will and the purpose of the testator. In following the testator's own act of purchase, nothing but the clearest evidence of incapacity in the testator to select, or of folly in the selection, and of blind and unreasoning obedience in the executor, can set it aside. I am willing to concede the authority of all the cases cited for the plaintiff, including the Duke of Portland's case. They may be summed up in a single view—that a chancellor will so control a trustee that he shall not disappoint the true intent and purpose of the donor, as gathered from the instrument containing the power. To execute it otherwise is a fraud on the power. Hence, it is said,

"he must execute it *bonâ fide for the end designed.*" It may be a corollary, also, that an innocent motive will not save the exercise of the power, if it violate the true purpose of the trust. Broader than this there can be no conception of chancery power in Pennsylvania, where the citizen is secured by the constitution in his rights of property. When a testator, to fulfil his own purpose, confers an absolute discretion as to his property, it is *his* right to have the boon executed by his own trustees; and no court can, without clear and adequate cause, displace the trustee without violating the right of property.

This is well expressed in the letter of advice of 15th June 1869, from Judge Strong, under which Mr. Williams acted. "A court of equity does not interfere with a discretion reposed, except in cases of *clear* abuse, when the court *can* conclude that the donee of a power is *acting in fraud of it.* But when, as in your case, the trustee acts in accordance with his own best judgment, and in so doing, follows the positive directions of his testator, it would be altogether *unprecedented for a court to interfere and substitute* its discretion for that invoked by the will." In this statement he is most distinctly supported by two recent cases decided by this court: Pulpress *v.* African Church, 12 Wright 204, and Naglee's Estate, 2 P. F. Smith 154. To these may be added a few citations from elementary writers. In the recent work of Mr. Perry on Trusts, the modern decisions are brought up. On page 455, section 508, he says, when the discretion to be exercised is a matter of personal judgment, "the trustees alone can exercise these powers, and courts cannot generally interfere to control mere personal judgments in personal matters." For this, numerous cases are cited. Again on page 457, section 511, "If the trustees exercise their discretionary power in *good faith*, and without fraud or collusion, the court cannot review or control their discretion." For this, twenty-four cases are cited. "Nor will a bill be entertained to compel the execution of a mere discretionary power." Id. Mr. Hill, in his work on Trustees, ed. 1846, p. 482, says, "as a court of equity will not, in general, assume the exercise of a discretionary power vested in trustees, so it will not interfere to control the trustees acting bonâ fide in the exercise of their discretion." He cites many cases for this statement.

In conclusion, there is no ground in fact or in law, on which the prayers of this bill can be supported.

The decree of the court at Nisi Prius is, therefore, reversed, and the bill is ordered to be dismissed at the cost of the plaintiffs.

READ, C. J., and MERCUR, J., dissented.

73 286
207 *232

Heist *et al. versus* Hart.

73 286
34 SC 84

1. Defendant gave to Hevner a negotiable note in payment of a patent which defendant alleged was a fraud: plaintiff being about to discount the note, defendant told him not to buy it, that Hevner had promised when the sale was made that he would not negotiate it; that if plaintiff bought it he would buy a lawsuit; no notice was given to plaintiff that the sale was fraudulent. Plaintiff having discounted the note, *Held*, in a suit on it, that these facts were no defence although Hevner had committed a fraud on defendant in the sale.

2. A parol agreement although made at the time of making negotiable paper, that the payee will not negotiate it and would renew it, &c., is inadmissible to vary the effect of the paper.

March 3d 1872. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Bucks county:* No. 220, to January Term 1873.

This was an action of assumpsit brought August 16th 1871, by Josiah Hart, survivor of the firm of J. Hart & Co., against Allen H. Heist and Thomas H. Heist, trading as Allen H. Heist & Co.

The cause of action was the following note:

"$2000. Philadelphia, October 19th 1870.

Seven months after date we promise to pay, to the order of ourselves, Two Thousand Dollars, without defalcation, for value received. ALLEN H. HEIST & Co."

Endorsed 'ALLEN H. HEIST & Co., P. HEVNER.'

The case was tried, December 11th 1872, before Roberts, J., notice having been given to plaintiff that he would be required to show that he was a bonâ fide holder of the note for value.

The plaintiff gave the note in evidence and rested.

Allen H. Heist (defendant) testified that Hart (plaintiff) told witness that there was a man at plaintiff's bank who held a note against defendants and wanted it discounted. "I asked what note. He said a note for this machinery and patent right. I told him I thought it very strange that a man was here with that note, because he (P. Hevner) had promised me not to negotiate that note; he would lock it up in his fire-proof and there it should remain until due. Mr. Hart then said that of course it ought to have been put in the note, that it was not negotiable. I told him of course it would have been better, but Hevner made such fair promises that I thought everything would be right and that he would not negotiate the note. Mr. Hart said he thought he would come up and see about it whether it was all right. He then said the note could be gotten at a good discount. I then told him if it could be got right so as to let me out I would buy it myself, but I did not think I could buy it so as to let me out. He then asked me if he should buy it for me. I asked if he would furnish the money. He said if he would furnish the

[Heist v. Hart.]

money he would buy it for himself. I told him again I did not think I could buy it so as to let me out, but asked to go and see Tom, my brother, and see what he would have to say in regard to the matter. Hart and I then started towards Tom's office, and met Tom; told Tom that Hart was here with a note that this man from Philadelphia had come up to have discounted; he told Hart he thought it very strange that that man was here trying to negotiate that note, because he had made such fair promises not to negotiate it, but lock it up in his fire-proof until it was due. Mr. Hart then said that 'not negotiable' should have been put in the note. Tom said it would have been better. Then Hart said, 'But of course if I buy the note it can be collected.' I spoke up, 'But you have notice of it now.' I think he asked if the machinery did not work; we told him we could not tell much about it yet, but did not think it was all right; knew it was not all right. I do not recollect all here, but Hart got warmed up a little. Tom and I then stepped back and talked the matter over what we had better do. Tom then walked up to Mr. Hart and said, 'Mr. Hart, I now give you notice not to buy that note.' Hart said, 'If you do not want me to buy the note I won't buy it;' before he said that he also said he did not want to buy a lawsuit, and then said, 'If you do not want me to buy it I won't buy it,' then started down the street; think it was in the latter part of December 1870, shortly after the machinery was put up."

Witness further testified that he had given this note for part of the purchase-money of a whiskey-refining machine which he had bought from Peter Hevner, one of the endorsers of the note; at the time of negotiating the purchase, Hevner told him that new whiskey run through the machine was equal to any three-year-old whiskey; Hevner showed witness a paper in which it was said that Hevner had paid $40,000 for the patent right for Pennsylvania; witness and Hevner agreed for the purchase of the right for Bucks county and a machine, for $9000, for which a check and notes, including that in suit, were given. Hevner said when the notes became due he would help defendants to renew them; would give defendants all the time they wanted. Hevner said he would put the notes in the fire-proof and not negotiate them. The machine was worth nothing, but as second-hand machinery; none of Hevner's representations were true. He said the machine would run ten barrels per day, and it did not run over three or four.

T. H. Heist, the other partner, testified as to the interviews with the plaintiff much as the previous witness; he said also:

"I told Hart the notes were given for patent and machinery, that they were not to be negotiated, and that we had not had time to tell whether the machinery was right or not; that he would buy a lawsuit, and that there was a dispute. Stated no facts in re-

lation to the machinery. Told him not to buy the notes. Hart said if he bought we would have to pay for them; told him I guessed not; he had notice, now. I told him we had not had time to test machinery, and Hevner had promised not to negotiate the notes."

A witness who had sold the patent to Hevner said that "$40,000" was put into the assignment as the consideration, in order to enable him to sell the patent better; the actual consideration was between $4000 and $5000.

The defendants gave other evidence of Hevner's agreement not to negotiate the notes, to renew them until defendants could meet them, &c.; and of his misrepresentations as to the patent; also that the machine was not in fact what he had assured them it was.

The plaintiff in rebuttal testified that he had asked Allen Heist if the note, which had been offered to him for discount by a stranger, was all right, Heist said he did not want plaintiff to buy it; if anything was made out of it he wanted it himself; at this interview Thomas Heist was not present. Defendant afterwards bought the note, and paid $1800 for it. Four weeks after he had bought the note he had the conversation substantially as stated by defendants. He did not then tell them that he had bought the note. When witness first saw Allen about the note he made no objection to its validity, nor to plaintiff's buying it, except that he wanted to buy it himself; nothing was said about the machine not running right.

There was much more evidence on both sides substantially of the same character.

Neither party submitted points.

The court charged as follows:—

"I charge you, gentlemen, positively, that the holder of a promissory note, who took it bonâ fide for value before maturity without notice of the fraud, can recover, even though he took it under circumstances which ought to have excited the suspicion of a prudent man. [If you should believe the evidence of the Messrs. Heist upon the subject of the notice given by them to Mr. Hart, it is not, in the judgment of the court, a sufficient notice to enable the defendants to set up the fraud,] if there was fraud practised upon them by Peter Hevner.

"[This conclusion of the court compels me to say to you, that if you believe the evidence, you will render a verdict for the plaintiff in full of the principal of the note with interest from the time it falls due."]

The verdict was for the plaintiff for $2188.35.

The defendants removed the record to the Supreme Court by writ of error, and assigned for error the parts of the charge in brackets.

[Heist v. Hart.]

N. C. James and *G. Lear* (with whom were *H. Lear*, *J. M. Shellenberger*, *L. L. James*, *T. H. Heist* and *G. Ross*), for plaintiff in error.

H. Yerkes, for defendant in error.—The notice to plaintiff to prove he was a bonâ fide holder did not put the burden on him to prove that: Swift *v.* Tyson, 16 Peters 1. It must be shown he took the note malâ fide: Phelan *v.* Moss, 17 P. F. Smith 59; 2 Hilliard on Contracts 396, note; Goodman *v.* Simonds, 20 Howard 343. The notice must not be ambiguous: Parsons on Notes 259, 260; Perkins *v.* Challis, 1 N. H. 254.

The opinion of the court was delivered, March 10th 1873, by

SHARSWOOD, J.—The question raised by the first assignment of error, is whether there was sufficient evidence to submit to the jury, that the plaintiff below, the endorsee of the note in suit, before he took it, had notice of the fraud in the sale of the patent right which formed its consideration. It is not pretended that distinct notice of the fraud was given to him, or even that the Heists gave him notice generally, that they had been defrauded. Unaccompanied with any allegation, that there was a representation or warranty at the time of the contract, that the machine was to produce certain results, the mere statement that it did not work right, was no defence to the note. Nor was the fact that Hevner had agreed not to negotiate the note, and to renew it until it could be paid out of the profits, any more available, even as between the parties. Such a parol agreement, though made at the time, is inadmissible in evidence to vary the effect of the written contract in the case of negotiable paper: Hill *v.* Gaw, 4 Barr 493; Mason *v.* Graff, 11 Casey 448. Hart understood this, for he told Heist that if such was the agreement, the note should have been made non-negotiable on its face, and Heist assented to it. The information communicated by the Heists to Hart, so far from notifying him of any defence, was calculated to mislead him to believe there really was none. A mere general notice that there was some defence, and that the note would not be paid, might be enough to put a party on inquiry. Hart may have been bound to ask the maker what was his defence. When he does so, however, and is only told what is clearly no defence, there is nothing which ought to impeach his bona fides. The first assignment of error is not sustained.

Nor is there any ground for the second error assigned. Conceding that the production of the assignment of the patent right for Pennsylvania by Harris & Oliver to Hevner, for the consideration of $40,000, and the representation by Hevner, that he had paid that sum, when in fact, the true consideration was only four or five thousand dollars, and that the larger amount had been inserted by Hevner's request to enable him to impose upon the purchasers of county rights, was a fraud, which, between the parties,

avoided the note, and conceding that the proof of this was sufficient to entitle the makers after notice, to require the holder to prove that he had given value, yet the evidence of Hart, which was entirely uncontradicted, was, that he had paid $1800 for it. The charge of the learned judge below, so far as regarded this point, that if the jury believed the evidence, they should find for the plaintiff, was therefore entirely correct.

Judgment affirmed.

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26 SC 209

Knapp *versus* Hartung.

1. A declaration in trespass q. c. f. d. b. a. complained of breaking his close, cutting and taking oak, ash, beech and chestnut trees; by leave of the court he filed another count, complaining of entering another close and taking cordwood and railroad sills; by leave he filed a third, which without alleging a breach of close, complained of taking with force and arms, &c., oak logs and *hickory* logs. *Held*, that the amendments did not change the original cause of action.

2. The cause was called for trial and jury sworn when the amendments were allowed, on application of defendant the cause was continued at the costs of plaintiff, defendant pleaded to the counts; when the cause was again called the court struck off the first additional count and "hickory logs" from the other, as being for a different cause of action. *Held* to be error.

3. A plaintiff may add a count substantially different from the declaration, if he adheres to the original cause of action.

4. The rule applies to actions *ex delicto* as well as actions *ex contractû*.

March 3d 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Schuylkill county:* No. 206, to January Term 1871.

This was an action of trespass q. c. f. d. b. a. commenced July 12th 1862, by Alanson Knapp against Samuel Hartung.

On the 11th of February 1869, the plaintiff filed a declaration in which he complained that on the 1st of July 1862, the defendant "broke and entered the close of the plaintiff," and cut down "500 oak trees, 500 ash trees, 500 beech trees and 500 chestnut trees, * * * then being and growing in and on the close aforesaid, and took and carried away the same and converted them to his own use," &c. On the 2d of July the plaintiff ruled the defendant to plead; and on the 26th the defendant pleaded "not guilty."

On the 28th of September the cause being called for trial and a jury sworn, the plaintiff by leave of the court, and without exception by the defendant, filed an additional count. In this count plaintiff complained that "on the day and year aforesaid, the defendant broke and entered another close of the plaintiff * * * and took and carried away 1000 cords of wood, 1000 railroad sills, then and there being the property of the plaintiff, * * * and converted them to his own use." On the same day the court on the

application of the defendant, discharged the jury and continued the cause at the costs of the plaintiff. On the same day the defendant pleaded to this count, "not guilty," and the Statute of Limitations. On the same day the plaintiff by leave of the court filed another count, in which he complained that the "defendant on the day and year aforesaid, with force and arms, &c., did take and carry away and convert to his own use 100 white-oak logs, 50 hickory logs, 10 black-oak logs, then and there being the property and in possession of the plaintiff," &c.

To this count the defendant, on the 10th of November 1870, pleaded "not guilty" and the Statute of Limitations. On the same day a jury was sworn and afterwards the defendant moved to strike off the two additional counts. The court allowed the defendant an exception *nunc pro tunc* to the filing of the additional count of September 28th 1869, and struck out "50 hickory logs" from the third count.

Ryon, P. J., in making the order said:—

"This action was brought 12th July 1862. Jury sworn in September 1869. Upon the trial the plaintiff filed an additional count; and on same day third count was filed declaring for other timber.

"The defendant now move to strike off both the amended counts as changing the original cause of action.

"The first *narr.* charges the defendant with breaking and entering the plaintiff's close, and cutting and carrying away five hundred oak trees, five hundred ash trees, five hundred chestnut trees, and five hundred beech trees.

"The second count (amended count) declares for entering and breaking another close, and carrying away one thousand cords of wood and one thousand railroad sills.

"And the third amended count declares for one hundred white-oak logs, fifty hickory logs, ten black-oak logs. This third count waives the damages to the close and goes to recover for the asportation.

"But this third count claims for other timber than that claimed in the first declaration. The allowance of the second count amendment was during the trial, and when we could not examine the case with as much care as the importance of the subject required. We are satisfied that upon authority the second count was error, because the first declaration did not charge the taking of trees, but from one close, and after the lapse of six years it would be improper to allow a new cause of damages even upon the same close; and to allow the amendment to cover damages in breaking another close and carrying away cordwood and sills, is introducing a new cause of action. We must therefore strike off this second count. The third count (amendment) contains other timber than that declared for in the first *narr.* We will strike

out of it the words 'fifty hickory logs.' Thus limiting the count to the same cause as originally declared upon."

The plaintiff then gave in evidence an agreement dated February 15th 1859, between Michael Hartung and Alanson Knapp, by which "Michael Hartung, for the consideration hereinafter mentioned, hath agreed * * * to leave Alanton Knapp have a certain lot of timber, beginning at a certain white-oak tree in the meadow, thence east * * * to the place of beginning, so as to enclose all the timber on the meadow side of said fence about 69 poles; and the said Michael Hartung also agrees to let said Alanson Knapp have a convenient road or way to get out on the public road with said timber, without charging any damages, and to let said Knapp have all said timber excepting the bark which is peeled, and the staves which are made already, and to give him possession of the timber immediately, and also to leave him four years' time from the above-stated date to take off said timber. And the said Alanson Knapp, on his part, doth hereby covenant and agree to pay unto the said Michael Hartung $175 for the above-named timber, in manner following," &c.

Michael Hartung afterwards died, and the land from which the timber was to be cut, and also that over which Knapp was to have the road, descended to the defendant as his heir at law.

The plaintiff testified that he took possession of the timber tract under the agreement, and commenced cutting timber within six months of its date; he had not had the use of it for four years until the defendant warned him to keep off.

Witness had logs cut off the land within the limits mentioned in the agreement, some in the woods and some on the meadow part near the road; he wanted to get in on the land to get the logs; defendant warned him off, and said he would haul the logs himself; told him to keep off the land entirely.

The plaintiff offered to prove "that the defendant took and carried away a large number of oak, ash and birch trees, which plaintiff had previously cut down into cordwood, and in that condition were taken away by defendant."

On objection by the defendant the offer was rejected, and a bill of exceptions sealed.

There was much other evidence by the plaintiff to sustain his part of the issue; and by the defendant in answer to the plaintiff's case.

During the trial a number of exceptions were taken to the rulings of the court on questions of evidence.

Both parties submitted points.

The court charged that the plaintiff was entitled to recover for part of the timber which he had cut.

The questions ruled by the Supreme Court do not require that there should be a further statement of the case.

The verdict was for the plaintiff for $121.33.

The plaintiff took out a writ of error.

He assigned eight errors:—

The 1st was striking off the second additional count, and striking out "50 hickory logs" from the third.

The 4th was the rejection of the defendant's offer above stated.

G. E. Farquhar and *F. W. Hughes*, for plaintiff in error.—In the amendment of the declaration a new and different cause of action may not be introduced, but whatever is a mere variation of the mode of charging that which is already on the record is admissible: Beates *v.* Retallick, 11 Harris 288; Hartman *v.* Keystone Insurance Company, 9 Id. 466; Steffy *v.* Carpenter, 1 Wright 41. A declaration in trespass q. c. f. d. b. a. can be amended so as to charge asportation to the goods: Mechanics' & Tradesmen's Ins. Co. *v.* Spang, 5 Barr 113. So a declaration containing the common money counts may be amended to charge the defendant as drawer and also as endorser: Cabarga *v.* Seeger, 5 Harris 514. So a declaration on a note may be amended by a count for goods sold, Schoneman *v.* Fegley, 7 Barr 433, and counts for money had and received, for one for exchange for horses: Cunningham *v.* Day, 2 S. & R. 1. Unless objection be made at the time consent will be presumed to an amendment: Wilson *v.* Jamieson, 7 Barr 126; Lea *v.* Hopkins, Id. 492.

C. Shindel and *J. W. Ryon*, for defendant in error.—The reporter received no paper-book of defendant in error.

The opinion of the court was delivered, May 17th 1873, by

Mercur, J.—This was an action of trespass *quare clausum fregit et de bonis asportatis.*

The original declaration filed, charged the defendant with entering the plaintiff's close, and with cutting down, taking away and converting oak, ash, beech and chestnut trees. After the jury was sworn, by leave of the court, upon the payment of the costs by the plaintiff, and without any exception on the part of the defendant, two separate additional counts were filed. The one charging the defendant with entering another close of plaintiff's, and taking therefrom, and converting the cordwood and railroad sills. The other with taking and converting white-oak, hickory, and black-oak logs. The defendant alleged surprise, and the case was continued. To these amended counts the defendant pleaded not guilty, and the Statute of Limitations.

More than a year thereafter, another jury was called. After they were sworn, upon motion of defendant's counsel, the court struck off the first amended count, and "hickory logs" from the second amended count. To this the first assignment of error is made.

[Knapp v. Hartung.]

The substance of the plaintiff's cause of action was, that the defendant had entered the close of the plaintiff, and had cut thereon, and removed therefrom, and converted his trees and lumber. They had all been cut upon a piece of land to which the plaintiff had acquired title from the father of the defendant. The plaintiff charged the defendant with a series of trespasses upon it.

The Act of 21st March 1806, permitting amendments, has received a liberal construction. Under it the power of the courts extends to every informality which will "affect the merits of the case" in controversy, except they cannot permit an entirely new cause of action to be introduced. If the plaintiff adheres to the original cause of action, he may add a count substantially different from the declaration: Cassell *v.* Cooke, 8 S. & R. 268; Yohe *v.* Robertson, 2 Wharton 155. This right is mandatory upon the courts: Maus's Lessee *v.* Montgomery *et al.*, 10 S. & R. 192; Sandback *v.* Quigley, 8 Watts 460.

In actions *ex contractu*, so long as the plaintiff adheres to the original instrument or contract on which the declaration is framed, an alteration of the grounds of recovery upon that instrument or contract, or of the modes in which the defendant has violated it, is not an alteration of the cause of action: Coxe *v.* Tilghman, 1 Wharton 287; Yost *v.* Eby, 11 Harris 327.

This rule is not restricted to actions *ex contractu*. In an action of slander, where the words spoken were so defectively set forth as not to be actionable, the declaration may be amended by setting out a good cause of action, provided the words substituted import a charge generically the same: 3 Penna. Rep. 65. In actions *ex delicto*, the rule is the same; the foundation of the complaint laid in the declaration must be adhered to; but the mode of stating that complaint may be varied by the amendment: Clymer *et al. v.* Thomas *et al.*, 7 S. & R. 178; Coxe *v.* Tilghman, 1 Wharton 290. Amendments should be liberally allowed; and the test of their propriety is, whether they introduce a new cause of action: Steffy *v.* Carpenter, 1 Wright 41.

Here the cause of action was for breaking the plaintiff's close, and taking therefrom the timber and lumber. It is unimportant whether it was taken in the form of trees, or in that of wood, railroad sills or logs, all taken from, and originally forming a part of the trees cut upon the land in question. Whatever the kind of tree might have been, did not substantially change the cause of action. The amendments merely pointed out the additional modes, and more fully described the manner in which the defendant had committed the trespasses and aggravated the damages.

The court, however, had permitted these amendments to be filed, and imposed costs upon the plaintiff in consequence thereof. The defendant made no objections; but admitted those counts, and pleaded to the amendments. More than a year thereafter, and after

another jury had been sworn in the case, he moved to strike them off. We think the learned judge erred in granting his motion. This view of the case will necessarily make the evidence admissible, which is set forth in the fourth assignment of error. We discover no other errors in the record.

Judgment reversed, and a *venire facias de novo* awarded.

Faust *versus* Haas.

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166 515

1. In a suit at law to administer equity, the judge sits as chancellor, assisted by the jury, who are to determine the credibility of witnesses and conflicting testimony; but the conscience of the chancellor must be satisfied of the sufficiency of the evidence.
2. If the evidence be too vague, uncertain or doubtful to establish the equity set up, the judge must withdraw it from the jury.
3. Faust's property was about to be sold by the sheriff, an attorney by arrangement with Faust and a judgment-creditor agreed to buy it for Faust; under this it was struck down to the attorney; it was afterwards agreed that Haas, another judgment-creditor whom the proceeds would reach, should pay the purchase-money to the sheriff, take the deed and give Faust a time named to repay him. Under this arrangement the deed was made to Haas under the direction of the purchaser; Haas claimed to hold the property. *Held*, that he was trustee *ex maleficio* for Faust.
4. Where artifice or trick are resorted to to procure property at sheriff's sale at an under value, the purchaser takes as trustee for the person misled.

March 4th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Schuylkill county:* No. 244, to January Term 1871.

This was a proceeding by Adam S. Haas against Henry H. Faust, under the Act of June 13th 1836, section 105 (Executions), to recover possession of land of the defendant sold under an execution at the suit of W. B. Monroe against him; the sheriff's deed was made to the defendant June 22d 1868. The purchase-money was $1200. To the venditioni the sheriff returned, "land sold to Adam S. Haas for $1200. Faust continuing in possession, Haas on the 22d of July 1868 gave him notice to give up the possession in three months; having failed to do so, Haas made application to two justices of the peace to institute proceedings for recovery of the possession. A precept was accordingly issued by the justices to the sheriff for summoning a jury and to Faust, to meet on the 13th of February 1869. On that day Faust made an affidavit, viz.: "I claim to hold the (premises in dispute), under the sheriff of Schuylkill county, who sold the same as my property, but the same was purchased for me by Herman Graeff, Esq., as my attorney, and he took and acquired the same at said sale as my trustee; and any title acquired by the said Adam S. Haas

was not as purchaser at said sheriff's sale, but as the vendee of said Graeff, subject to my equitable interest in the same." Faust having given bond with sureties according to the Act of Assembly, the case was removed into the Court of Common Pleas. Haas filed a declaration to which Faust pleaded "not guilty;" the case was tried before Ryon, P. J.

For the defendant H. B. Graeff, Esq., testified that he purchased the property at sheriff's sale as agent for Faust; witness had charge of a judgment in favor of Seitzinger and of executions against Faust, which would have been covered if the property had brought $1400 or $1500; Faust applied to witness to make an arrangement as to the Seitzinger judgment, so that he, Faust, could retain the property; at witness' suggestion Faust went to see Seitzinger, to ascertain if he would assist him to purchase the property at the sale; Seitzinger and Faust made an arrangement in witness' office; witness was to buy the property for Faust; Seitzinger was to furnish the money to pay the purchase-money, and in consideration Faust was to secure Seitzinger's judgment, and at the time Faust gave Seitzinger an order on one of his debtors for $60 on account of the judgment. Within a day or two Faust and Haas came together to the office of witness; Haas held a judgment against Faust; they made an arrangement by which Faust was to secure to Haas his interest at his mother's death in his father's estate; this was accepted by Haas, and it was understood that he was not to bid at the sheriff's sale, Haas knowing that witness was to buy the property for Faust; Mr. Shindel, attorney for a Saving Fund Association, which held a mortgage of $800 against the property, authorized witness to buy it for the Saving Fund to protect it, if the other arrangement should not be carried out. Witness attended the sale and bought the property for Faust for $1200. Subsequently Seitzinger, Haas and Faust came to office of witness and said there had been an arrangement by which Haas was to take the title to the property, he to be paid $400—the difference between the amount of the mortgage and the $1200 purchase-money—and Saving Fund mortgage to be a lien on the property. Haas was to advance the $400 for the purchase-money, and Faust to have three and six months to pay it back and to pay any assessments which Haas might pay in the meantime to the Saving Fund.

"I stated to the parties at the time (says Graeff), that this arrangement ought to be in writing, but I had no time that day to write it, but would have the deed acknowledged on Monday, and bring it home with me, and draw up the writing, and they were to come on the next Monday, and I was to deliver the deed to Haas. The $400 was then raised. Seitzinger was to endorse Haas's note for $500, and in that way the money was to be raised from Judge Heilner. The parties then all left my office together. Haas brought a check of Judge Heilner to my house that evening for

$400. On Monday I directed the sheriff to have the deed acknowledged. The other attorneys and myself were desirous to have the $400 distributed without costs, and we got together and agreed in writing how the money should be distributed. We made out the list; we then discovered that the Saving Fund would not be paid from an accumulation of interest on dower. I knew of the interest on dower, and represented the claim. Mr. Shindel then said that unless the difference should be made up by the purchaser he would not agree that the $800 Saving Fund claim should be continued on the property. I, of course, could not say for Mr. Haas that he would pay the difference, and I kept the check. The next day I went and saw Seitzinger, and told him of the hitch in the arrangement. The next day, or a day or two afterward, Mr. Haas came to me and got the check. I can't say anything further about it. Haas, it seems, came down and took the deed; I had not authorized him to take the deed. Seitzinger gave me no money; I received from Faust no money; all the money I got was the check of Judge Heilner, payable to Haas's order; Seitzinger had made the arrangement with the Saving Fund without reference to Haas or any other one; Haas was not required to make that part of the arrangement; the arrangement was made before Haas came into it. * * * I was to bid $1200 for the Saving Fund; I directed the sheriff to make Haas a deed; * * Shindel told me he would not agree to let the mortgage remain on the property, unless the purchaser would pay the $80; I could not agree that Haas should pay this; at this time I had no power to represent Haas; I approved the second arrangement; I had nothing to do with this arrangement, except to pay the $400 to sheriff."

The defendant made the following offers, which were rejected, and bills of exception sealed:—

1. To prove by H. B. Graeff, Esq., that the property purchased by him for H. H. Faust had a market value of $1800, and that he could have sold the same for that amount before any arrangement was made with Adam S. Haas to become a trustee for H. H. Faust in his stead.

2. The assignment by Henry H. Faust, dated the 26th of May 1868, to Adam S. Haas of the interest of said Faust in the money remaining in said land for his mother's dower, which would accrue to him on the death of his mother, Rebecca Faust, to secure to said Haas the sum of $111.79, the amount of a judgment of said Haas against said H. H. Faust, in consideration whereof, said Haas agreed not to become a bidder at the sheriff's sale of the property of H. H. Faust, but assented to the arrangement that Graeff should or might purchase the property of H. H. Faust at the sheriff's sale for Faust pursuant to his arrangement with Seitzinger. This it is proposed to follow with proof of the same

facts outside of said written assignment by Nicholas Seitzinger, a witness now in court.

Nicholas Seitzinger testified: "I found I was pretty well back on the list, and saw one of the officers of the Tamaqua Saving Fund, and I asked him if the mortgage could stand, and he said if the dues in arrears were paid up he thought an arrangement could be made. After a few days Adam S. Haas and old man Haas came over to my house, and asked if I intended to bid on the property. I told them I should not lose my claim. They then said they would give me their note for the amount of my claim, if I would not bid. I told them that would do. Shortly before the sale, Haas notified me that I would have to look out for my claim against Faust; that they had got security for their claim, and they did not intend to bid on the property of Faust, and they did not want the property. Then I expected I would have to buy the property. Faust came to see me before the sale a short time, and said if I would help him (Faust) he would pay my claim, and we went to Graeff's office. Faust gave me an order for $60, and I told Graeff he might bid $1500 or $1600. After the sale a day or so, Haas allowed, that better let them have the land, as I did not want it; I can't tell which one of Haas's said this; I said if you will bring Faust in and he says so, I will agree to it. Faust did agree to it, but the Saving Fund would not agree to it; the Saving Fund claimed $60 higher than they first claimed; I did not know that Haas would pay this, and I went to Haas's house and saw them, and they refused to take it; I then said I would have to take it; then the Haas's came again and agreed to take it at the $60, but then Mr. Graeff came again and said the Saving Fund demanded $75 or $70; the four hundred was fixed before this; I went to Judge Heilner and told him he must give Adam Haas $500, I would endorse his note; Haas said they could not raise the $1200; when I first told Graeff to bid the $1500 or $1600 Haas knew nothing about the arrangement; I was to buy the property for Faust; I expected Faust would pay me back; Haas agreed to give Faust three and six months; I told Haas that Faust was to have the property back upon paying me the purchase-money; I went up to Haas's two or three days after Haas had got the deed; I saw Adam S. Haas and told him that Faust said he was not going to let him have the property back, and Haas said, I have got the sheriff's deed, and I am going to keep it; I had a balance to get yet; I had only $60 on my claim, and I said I only want you to sign this note for my balance; Haas said he had paid enough for the property; I said you are most too young to act the rascal that way; then I said you will give Faust the property back; he said no, I have got the sheriff's title and I am going to keep it; I said, Adam, if you don't live up to your agreement I will give Faust the money to redeem this;

[Faust v. Haas.]

there was no agreement made, because we were afraid the Saving Fund would object to the acknowledgement of the deed, and that is the reason we did not put the agreement in writing; there was an arrangement by which Faust was to sign an agreement, but the reason we did not put it in writing before Haas got the deed was for fear Mr. Shindel would object to the acknowledgments; I gave Faust the money, $1250; this was within the bound of the time Haas was to give Faust to pay the money; Faust was still in possession of the property."

The defendant gave evidence in rebuttal in answer to defendant's evidence and generally to his case.

Plaintiff then offered to prove that Faust, the defendant, said that he had given up the land bought by Haas; that he could not redeem it, and was going to move out of the county.

The offer was objected to by the defendant, admitted by the court, and a bill of exceptions sealed.

The evidence was in accordance with the offer.

The defendant submitted the following points; the court refused them all, and instructed the jury to find for the plaintiff.

1. If the jury believe that the agreement between Haas and Faust, or Graeff, as the attorney of Faust, was that before the sheriff's deed was to be delivered to Haas, that he, Haas, was to execute a written contract, whereby he was to agree that Faust should have the right to repay Haas in two instalments, at three and six months, for the money paid by Haas to the sheriff, and his other outlay and expenses on account of the property, and that Haas, in violation of this agreement, went to the sheriff's office and took up the deed, he is a trustee, malâ fide, and cannot now take advantage of the fact that such written agreement was not entered into.

2. If the jury believe the facts as stated in the next preceding point, and that he procured the deed through negotiations with Faust, and Graeff as his attorney, and knew that Graeff purchased at the sheriff's sale for Faust, then Haas became a trustee, malâ fide, for Faust.

3. If the jury believe the facts as stated in the next two preceding points, and that within a day or two after he took up the deed he was called on by Faust; and that he, Haas, then declared that Faust should not have the property; that he didn't care for his agreement with him, Faust—then the jury may infer that Haas took up the deed from the sheriff with the intent to defraud Faust, and that Haas became thereby a trustee for Faust, malâ fide.

The verdict was for the plaintiff, the defendant took a writ of error; he assigned for error:

1, 2. The rejection of his offers of evidence.

3. The admission of plaintiff's offer of evidence.

4, 5, 6. The answers to the points.

7. The instructions to the jury.

G. E. Farquhar and *F. W. Hughes*, for plaintiff in error, cited as to 4th to 7th errors, Strimpfler *v.* Roberts, 6 Harris 283; Edwards *v.* Edwards, 8 Wright 369; German *v.* Gabbald, 8 Binn. 302.

M. Strouse and *J. W. Ryon*, for defendant in error, cited Fox *v.* Heffner, 1 W. & S. 372; Barnet *v.* Dougherty, 8 Casey 371.

The opinion of the court was delivered, March 10th 1873, by

SHARSWOOD, J.—It is perfectly well settled that in the administration of equity in the courts of this state through common-law forms, the judge sits as a chancellor, assisted by the jury, who are to determine the credibility of the witnesses and the effect of conflicting testimony. But the conscience of the judge as chancellor must be satisfied of the sufficiency of the evidence if believed. If it be too vague, uncertain, or doubtful, to establish the equity set up, it is his duty to withdraw it from the jury by a nonsuit or a binding instruction in his charge, as the case may require: McBarron *v.* Glass, 6 Casey 133; Todd *v.* Campbell, 8 Casey 252; Bennett *v.* Fulmer, 13 Wright 162; Miller *v.* Hartle, 3 P. F. Smith 111; Church *v.* Ruland, 14 Id. 432. But applying this principle to the evidence in this case, we think that there was quite enough to satisfy the conscience that Haas should be decreed to be a trustee for Faust. It is an undisputed fact that the property was bid off at sheriff's sale by Mr. Graeff as attorney for Faust. The relation in which he stood to Faust was a confidential one, and he acknowledged the trust. To whom the deed was to be made was not then finally arranged, but it was afterwards distinctly agreed, Haas being a party, that if the mortgage to the Tamaqua Saving Fund Association could remain, the balance of the purchase-money should be raised and paid by Haas, under an agreement that Faust was to have three and six months to pay it back, and was also to reimburse Haas any assessments he might subsequently have to pay on the mortgage. Mr. Graeff testified: "I stated to the parties at the time, that this arrangement ought to be in writing, but I had no time that day to write it, but that I would have the deed acknowledged on Monday, and bring it home with me and draw up the writing, and they were to come on the next Monday, and I was to deliver the deed to Haas." When they came to settle at the sheriff's office, it appeared that there was interest due on a dower right which was prior to the mortgage, and the attorney of the Saving Fund insisted that this interest should be paid before he would agree that the mortgage should remain. In consequence of this difficulty the arrangement was

not carried out. But anticipating no such difficulty, Mr. Graeff had directed that the sheriff's deed should be made to Haas and acknowledged, which had accordingly been done. Haas then raised the full amount of the bid, paid it to the sheriff, and received from him the deed. This was done without the knowledge and consent of either Graeff or Faust. He then claimed, and now claims, to hold the property as his own absolutely. That this was a breach of good faith on the part of Haas cannot be doubted. It was not merely the violation of a verbal agreement. He obtained the legal title by an artifice—by getting possession of the deed without the consent of those who alone had a right to direct to whom it should be delivered, Mr. Graeff, the actual purchaser at the sheriff's sale, and Faust, for whom he had bought. Haas, indeed, by a previous agreement with Faust, by which Faust was to secure him the payment of a judgment which he held on the premises by an assignment of all his (Faust's) interest in his father's estate after his mother's death, had promised that he would not be a bidder at the sale. "That," says Mr. Graeff, "was clearly the understanding."

Under these circumstances we are of opinion that Haas was a trustee for Faust *ex maleficio*, not within the prohibition of the Statute of Frauds, which, having been intended to prevent fraud, is never itself to be made the instrument of one. It is certainly true, that if a man buys at sheriff's sale, or otherwise, and pays his own money for the purchase, no verbal agreement before or afterwards to hold for another will make him a trustee: Fox *v.* Heffner, 1 W. & S. 372; Jackman *v.* Ringland, 4 Id. 149; Barnet *v.* Dougherty, 8 Casey 371. But where artifice and trick are resorted to in order to procure the property at an undervalue, as for example, by deterring bidders at a sheriff's sale, or in any other way, the rule is different. It will be sufficient to refer to Gilbert *v.* Hoffman, 2 Watts 66; McKennan *v.* Pry, 6 Id. 187; Brown *v.* Dysinger, 1 Rawle 408; Haines *v.* O'Conner, 10 Watts 313; Beegle *v.* Wentz, 5 P. F. Smith 369; Lingenfelter *v.* Ritchey, 8 Id. 485; Seichrist's Appeal, 16 Id. 287. "Although," says Mr. Justice Agnew, in the case last cited, "no one can be compelled to part with their own title by force of a mere verbal bargain, yet when he procures a title from another which he could not have obtained except by a confidence reposed in him, the case is different. Then if he abuse the confidence so reposed he is converted into a trustee *ex maleficio*. The statute which was intended to prevent frauds turns against him as the perpetrator of a fraud." We think, therefore, the learned judge below erred in directing the jury that the plaintiff was entitled to recover. He should have submitted the case to them upon the whole evidence, with instructions, that if they believed that Haas obtained possession

of the sheriff's deed malâ fide, their verdict should be for the defendant.

In the view we have taken of the case, it follows also that the evidence offered by the defendant and rejected, which form the subjects of the first and second assignments of error, was relevant, and should have been admitted, and that which was offered by the plaintiff and received, which is complained of in the third assignment, was irrelevant, and should have been rejected.

Judgment reversed, and *venire facias de novo* awarded.

Heffner *versus* Lewis *et al.*

1. Plaintiff and defendants leased adjoining coal-lands to the same lessees; a tunnel was made through plaintiff's land to reach defendants', on which was the outlet of the slope; rails were laid by lessees on the track in the tunnel. Their leasehold interest in the defendants' land was levied on, with the appertenances, consisting of a breaker, &c., "and railroads in and about and connected with said mines." The rails had been removed from the track, and plaintiff claimed that they had been delivered to him for rent. In an action of trover for them, *Held*, that whether the rails were included in the levy was properly submitted to the jury.

2. Machinery erected by a lessee to carry on his business is personal property during his term; it may be sold on execution, and the purchaser may remove it before the expiration of the term.

March 4th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Schuylkill county:* No. 51, to July Term 1871.

This was an action of trover, brought August 1st 1865, by Samuel Heffner against Lawrence F. Lewis Jr. (who was served), and others not served, for 890 yards of iron rails.

On the 10th of February 1854, Lawrence Lewis and Robert M. Lewis leased to William Brittain and Charles Brittain, for the term of fifteen years, the right to mine, dig and carry away coal from the land of the lessors, near Minersville, in Schuylkill county, "from a series of veins of coal which have been proven and cut by a tunnel driven by George Sponsler to the Peach Mountain vein on said tract," &c.

On the 15th of November 1854 the Brittains, to secure the payment of $2000, with interest on the first days of June and July then next, mortgaged to their lessors the above-mentioned mining right, "together with the engines and breaker-machinery, slope fixtures and buildings and improvements, mining implements, &c., on, at, or erected at and appertaining to said coal-lease, colliery, &c., on said tract of land as used and now in the possession of the said William and Charles Brittain on said premises, as far as their right to or interest in the same under said lease extends."

[Heffner v. Lewis.]

The defendants are the successors of the above named Lewises.

On the 24th of May 1856, the plaintiff leased to the Brittains, "the right and privilege to mine and raise coal as the right and property," of the Brittains "on the tract of land * * * adjoining lands late of R. M. and S. Lewis, and known as the Dreibelbies tract," for thirteen years from February 10th 1856, "said mining of coal to be restricted to the veins of coal, one known as the Peach Mountain vein, and the other the vein next north of the Peach Mountain vein." It was further agreed by the lease, that the Brittains might "have the right to drive the tunnel they are now driving upon the Lewis tract of land in and through the said Dreibelbies tract, from where the said tunnel now strikes the last mentioned tract to the Peach Mountain vein, and also that the said (Brittains) may draw, carry and take through or over the said tunnel, so far as the same may be driven on the said Dreibelbeis tract, all the coal they may mine on the Lewis tract * * * without any charge for the same"; the Brittains to pay 25 cents per ton for coal mined from the plaintiff's veins; the plaintiff to have the same remedy for collecting the coal rent as in other cases under the landlord and tenant acts.

The cause was tried April 24th 1871, before Ryon, P. J.

The plaintiff, Heffner, testified that the Brittains sank a slope on the Lewis tract and tunneled to plaintiff's land; the Brittains leased to one De Haven, who put all the iron in dispute on the gangway which was not opened till De Haven went in; the Brittains paid plaintiffs no rent; De Haven paid him some rent and gave him the railroad iron which De Haven had laid on plaintiff's land. Morgan and Weist afterwards leased from plaintiff, and at that time he owned the iron on the land; it was taken up before the lease expired because it was necessary to sink a slope, and the tenants could not agree with the Lewises, and abandoned the workings; Weist showed plaintiff the iron at the head of the slope, and told him to haul it away; he sent for it but did not get it; it was taken out and sold; there were 1337 feet of the gangway laid with iron on plaintiff's land.

T. Morgan, testified that the iron was on the land leased from Heffner; Morgan and Weist had taken out under this lease all the coal on the Heffner tract; witness took the iron to the top of the slope on Lewis's land and showed Heffner the iron which witness understood belonged to him; he said if they sank again he would leave it for their use.

R. Winlack testified that he purchased from the Lewises all the machinery and iron at the colliery including that in dispute.

The defendants gave in evidence a fi. fa., Mourer & Witzel v. W. & C. Brittain, to September Term 1858, and an alias fi. fa., Same v. Same, to December Term 1858; the levy was as follows:

"Levied on all the right, title, interest of William Brittain & Chas. Brittain, of, in and to a certain coal-lease having about eleven

years to run, on lands of R. M. & L. Lewis, situate in the borough of Minersville, and partly in Branch township, Schuylkill county, and known as the Lewis colliery, with the appertenances, consisting of a frame coal-breaker with a double set of schutes and screens, &c., a forty-horse breaker engine, a sixty-horse power hoisting and pumping engine, a thirty-horse power engine, frame slope-house, frame stable, frame office, frame oil-house, frame powder-house, frame blacksmith shop, railroads in, about and connected with said mines, twenty drift cars, and all other machinery belonging to said breaker, as the property of William Brittain and Charles Brittain.

The writ was endorsed: "1859 January 22d. Property within mentioned sold on this writ and writ of levari facias, No. 168, March T. 1859, to George S. Repplier, for three thousand dollars and proceeds of sale, applied as follows, to wit: on account of rent claim of Lawrence Lewis *et al.*, $2943.46; to costs on this fi. fa., $35.95, and to costs on levari facias, No. 168, March T. 1859, $20.59, and nulla bona as to debt within mentioned.

Also levari facias at the suit of the Lewises against the Brittains, on the coal-lease-mortgage of November 15th 1854, to sell the property as described in the lease.

The sheriff returned: "1859, January 22d. Property within described sold on this writ, and writ of alias fi. fa., No. 285, Dec. T. 1858, to George S. Repplier, for three thousand dollars, and proceeds of sale applied as follows: on account of rent claim of Lawrence Lewis *et al.*, $2943.46; to costs on this writ, and on fi. fa. No. 285, Dec. T. 1858, $35.95.

Also fi. fa., No. 106, to October T. 1860, Pott *et al. v.* George S. Repplier, and No. 107, to same term, Charles A. Repplier *v.* Same, under which the sheriff levied "on all the right, title and interest of Geo. S. Repplier, of, in and to a certain coal lease having about nine years to run, on land of R. M. & L. Lewis, situate partly in the borough of Minersville, and partly in Branch township, Schuylkill county, and known as the "Lewis colliery," with the appertenances, consisting of a frame coal-breaker, with a double set of schutes, screens, rollers, and elevators, a forty-horse power steam-engine for breaking coal, with boilers and gearing, a sixty-horse power hoisting and pumping engine, with boilers and gearing, pumps, pump-rods, slope-chain, frame slope-house, frame stable, frame office, frame oil-house, frame powder-house, frame blacksmith shop and carpenter shop, frame slope-house with twenty-five horse power steam-engine, drum with wire rope, railroads in, about and connected with said mines:" and on the 26th of October 1860 sold the property to the Lewises for $4750.

Also lease dated Oct. 29th 1860, from the Lewises to Charles A. Repplier, for the "Lewis colliery," and assignment of this lease January 17th 1862, to Wiest & Morgan.

[Heffner *v.* Lewis.]

J. Weist, one of the assignees, testified that they went into possession of the colliery under the assignment, and took possession of the railroad tracks in the veins to mine the coal; the tracks were necessary for the working the Peach Mountain vein; there was no way of working it at this point but through Lewis's land: they got the lease from Heffner after they went into the colliery under the assignment; about May 1862, they had had no understanding with Heffner until after the assignment from Repplier.

The defendants gave evidence that the Brittains owed De Haven about $10,000, on August 1st 1856; Brittains and De Haven entered into a contract by which De Haven was to have the Lewis colliery and another colliery until the profits paid the debt, when Brittains were to have the collieries, &c., back; there was no transfer on the leases, the personal property was at the date of the contract transferred to De Haven; he never got his money out; the colliery was sold as Brittains'; De Haven worked under Heffner and took coal from his land.

James H. Campbell, Esq., testified that he had been agent for the Lewises from 1844 to 1866, and had charge of the Lewis colliery; Weist & Morgan threw up the lease about December 1863, and witness made arrangements with Morgan & Harris to take out the iron. Heffner claimed the iron as owner of the land on which it was; witness never heard him claim as purchaser from De Haven.

W. Brittain testified that the Brittains did not sell the colliery lease to De Haven, but gave it to him to work out their debt; the leases were sold out and De Haven had nothing more to do with it.

The defendants gave evidence that on the 29th of August 1868, De Haven made an assignment for the benefit of his creditors to L. C. Dougherty.

The plaintiff in rebuttal offered in evidence the record from the docket of a justice of the peace of a proceeding by Heffner against the Brittains and De Haven to dispossess them for the non-payment of rent; he gave evidence also for the purpose of supplying part of the record which was not produced. The court rejected the offer, on the ground that the evidence of the lost record was not sufficient, and sealed a bill of exceptions.

He gave evidence that Dougherty, the assignee, &c., of De Haven, had worked the Lewis colliery until it was sold by the sheriff, when he at once gave up the possession; Heffner claimed rent whilst Dougherty was in possession; De Haven owed Heffner $1400 or $1500 for rent. Heffner further testified that De Haven gave him the iron before December 1857, and afterwards owed him between $1200 and $1500. De Haven said he would give Heffner this iron on account of rent; no price was fixed for the iron.

The plaintiff's points, with their answers, were:

1. "The levy and sale by the sheriff of the leasehold property

of the Brittains did not include the lease of Heffner to the Brittains, and consequently passed no title to any improvements on the land of Heffner, but must be confined to the leasehold interest fixtures and improvements of the Brittains on the land of the defendants."

Answer: "The lease by Heffner to Brittains was not sold by the sheriff, but the levy being upon all the railroads in and about the colliery, was in terms sufficiently comprehensive to include the railroad in the Peach Mountain, for that vein was worked in connection with the colliery, and was a part of the same colliery, and the railroads were all connected, forming one line of road from the bottom of the slope to the various points from which coal was dug. We do not however instruct you that the sheriff's sale did or did not convey any title to any improvements on the land of Heffner; you must determine that from the evidence and the instruction in our general charge. We therefore decline to give this instruction, but refer the facts to the jury."

2. "The levy and sale by the sheriff of the leasehold interest, fixtures and improvements of George S. Repplier, passed no title to the purchaser of any of the improvements on the land of Heffner, nor were the same included in any of the subsequent transfers or assignments of the leasehold interest in the colliery leased and owned by defendants."

Answer: "The sheriff's levy and return of sale was comprehensive enough to embrace all the railroads which were connected with this colliery and belonging to George S. Repplier. We decline however to say what did or what did not belong to Repplier, and what particular property passed by the sheriff's sale and the subsequent transfers—that is a question of fact for the jury. For the reasons given above and in our general charge we decline to affirm this point."

3. "The defendants have failed under the evidence, documentary and parol, to show any outstanding paramount title to the railroad iron in dispute, either in the defendants or any other persons."

Answer: "This instruction we decline to give, as it is a question of fact for the jury."

The court charged:

"This action was brought by the plaintiff to recover damages from the defendants for taking and carrying and converting to their use a quantity of railroad iron. The plaintiff claims to have purchased the iron in question in the spring or summer of 1857 from William De Haven, who was then working the Lewis colliery, and who claimed the iron. You will recollect the plaintiff's testimony upon this subject and any other testimony bearing upon this question. The plaintiff also swears that he was in the possession of this iron by himself and his tenants, and if you should find the fact of purchase by the plaintiff as claimed by him and that he re-

mained in possession, we then instruct you that the plaintiff would be entitled to recover.

"The defendants claim title to this iron also by purchase, and allege the following facts as evidence of title:

"The defendants leased the land upon which the Lewis colliery was originally erected to the Brittains in 1854 for fifteen years. Brittains sunk a slope and put up the breaker improvements, but found that they could not work the Peach Mountain vein without working some of it on the plaintiff's land, and they obtained a lease from the plaintiff in 1856, to run for the term of fifteen years.

"The lessees, Brittains, became involved and sold the lease and personal property belonging to this colliery to William De Haven, and also the right to use the fixtures, railroads, &c., until he got out of the colliery what Brittains were owing him, and then the whole was to revert to Brittains.

"De Haven went into possession of the colliery and mines, but becoming involved he made a general assignment for the benefit of creditors to L. C. Dougherty and Mr. Garner. The assignees worked this colliery until January 22d 1859, when it was sold by the sheriff to George S. Repplier.

"Now what property was sold must be determined from its levy under the circumstances of this case. The levy is upon all the right and title of the Brittains in the coal-lease of R. M. & L. Lewis, known as the Lewis colliery, with the appurtenances, buildings, breaker, machinery, &c., *railroads in and about the mines and connected with said mines.* The question is whether the levy on the railroads was a levy upon the railroad on Heffner's lands. The Brittains, as we have said, had a lease from R. M. & L. Lewis, for the land upon which the slope was erected. They subsequently to the date of that lease, in 1856, obtained a lease from Heffner to work the Peach Mountain vein, and drove a tunnel from the slope across to that vein, at the point where the tunnel reached the Peach Mountain vein, and for a considerable distance east and west from that point; the coal in the vein was partly upon the Heffner tract; by these two leases the workings in the two tracts constituted but one colliery. When the levy was made upon all the railroads in and about the mines and connected with said mine it was a levy upon all the railroads at the colliery, and undoubtedly embraced the railroad upon the Heffner land, and if the roads belonged to Brittain in 1859 (January 22d) then the sheriff's sale conveyed the title to the iron upon the Heffner tract to Mr. Repplier.

"Again, Oct. 9th 1860, the sheriff levied a fi. fa. upon a judgment against Geo. S. Repplier, upon the Lewis colliery, and the railroads in, about and connected with said mines. On 26th Oct. 1860, the sheriff sold this colliery as levied upon, and railroads to the Lewises, the defendants. This levy and sale undoubtedly

conveyed all Repplier's interest in all the railroads connected with the mine which embraced the road on Heffner's land. If Geo. S. Repplier had a title to the railroad iron on Heffner's land, then the sale to Lewises conveyed that title to Lewis.

"R. M. & L. Lewis made a lease of the Lewis colliery, and its appertenances to Charles A. Repplier, binding the lessee to keep all the gangways, railroads, &c., in repair.

"On the 17th Jan. 1862, the leesee, Chas. A. Repplier, assigned his interest in this lease to Weist & Morgans, who with the consent of the Lewises went into possession. You will observe that the lease to Charles A. Repplier by the Lewises did not sell the premises, but gave the right to the tenant to use the fixtures for the term of the lease. It gave to Repplier no right to remove any of the landlord's property, and the transfer to Weist & Morgans bound them to keep all the covenants in the lease to Repplier, and of course Weist & Morgans could not take up any of the railroads and let Heffner nor any body else other than the landlords have it if the iron belonged to Lewises.

"But it is contended by the plaintiff, that Weist & Morgans, in June 1862, took a lease from Heffner, and agreed in that lease to take up the iron, and deliver it at the head of the slope to Heffner; now if Lewises took a title to the iron upon Heffner's land by virtue of the sheriff's sale as the property of Repplier to Lewises, Weist & Morgans could not enter into any arrangement with Heffner, by which they could give or Heffner could get any right to the iron; such an arrangement would be without any effect as against the interest of Lewises.

"Some question has been raised about the right of Lewises to purchase and use the railroad on Heffner's land. You will bear in mind that at the time the iron was removed Heffner's lease to Brittains, under which the iron was laid upon the gangways, had not expired. A colliery is an improvement for manufacturing purposes, and a tenant may erect fixtures like a railroad in a mine, and remove them again from the land during his term. When the fixtures are sold as the property of the tenants, and bid in by third parties, such third persons may remove the fixtures if the purchaser goes into possession of the fixtures as is claimed by the defendants in this case without removing it, but does remove it before he is lawfully ejected, and before the expiration of the lease, the purchaser's title is good if he acquired a title by the sale under which he claims." * * *

The verdict was for the defendants.

The plaintiff removed the record to the Supreme Court and there assigned for error:

1–3. The answers to his points.

4. The rejection of his offer of evidence.

The remaining assignments were, in a number of specifications, to the charge of the court.

J. Wright and *B. W. Cummings*, for plaintiff in error.—What property passes by a sheriff's sale is to be determined by the levy: Grubb *v.* Guilford, 4 Watts 223. The sheriff could not sell fixtures without consent of the owner of the land: Mitchell *v.* Freedley, 10 Barr 198.

W. R. Smith and *J. W. Ryan*, for defendants in error.—The levy containing ambiguity that might be removed by parol evidence to be submitted to the jury: Scott *v.* Sheakly, 8 Watts 50; Dolan *v.* Briggs, 4 Binney 496; Shoemaker *v.* Ballard, 3 Harris 92.

The opinion of the court was delivered, May 17th 1873, by

Mercur, J.—This action was brought to recover the value of a quantity of iron rails. They had been taken and converted by the defendants.

The plaintiff has filed fourteen assignments of error. The first three may be discussed together. The Brittains had leased, for mining purposes, adjoining lands of the plaintiff and of the defendants respectively. They worked veins upon the land of each. In order to mine some of the coal on defendants' land it was necessary to cross plaintiff's land, but making the outlet on defendants' land. They sunk a slope, erected a breaker, built engines, &c., on the land leased from the defendants, and drove a tunnel and gangways upon the land leased of plaintiff. Under authority from the Brittains these rails were laid in track, in the tunnel and gangways. Subsequently all the Brittains' leasehold interest acquired from the defendants was sold at sheriff's sale, under a mortgage. At the same time the sheriff also sold upon a fi. fa. all the right, title, and interest of the Brittains in the lease on the defendants' land, with the appertenances, consisting, *inter alia*, of a breaker, schutes, screens, engines, slope-house, other buildings and machinery "and railroads, in about and connected with said mines." At both sheriff's sales the property was purchased by one Repplier, under whom the defendants claim title to the rails. Whether these rails in question were included in the levy and sale was properly submitted to the jury and the points were correctly answered.

The fourth assignment of error is not sustained. Sufficient ground had not been laid to prove the contents of lost records; and the evidence offered was also irrelevant.

The remaining assignments of error relate to the charge of the court. The proof of plaintiff's purchase of the iron from De Haven, and his subsequent possession thereof, was so meagre and unsatisfactory, that the court submitted it to the jury quite as

favorably for the plaintiff as ought to have been done. The rails were laid to facilitate the working of the mines under the tenancy. The tenant had the right to remove them during the term. De Haven went into possession under the Brittains. He assigned to Dougherty, who was in possession at the time of the sheriff's sale. Dougherty at once gave up the possession to Repplier. All Repplier's interest in the property was purchased by the defendants. They took away the rails before the expiration of the term for which the plaintiff had leased the premises.

The jury has found that the rails were covered by the levy and sale. It is well settled that an engine or other machinery erected by a lessee to carry on the business in which he is engaged is personal property, during his term: Lemar *v.* Miles, 4 Watts 330; White's Appeal, 10 Barr 253. As such, they may be sold on execution, and the purchaser thereof may, like the tenant, remove them before the expiration of the term. Taking the charge as a whole we see no error therein.

Judgment affirmed.

The Manhattan Coal Co. *versus* Green.

1. A younger block of surveys called for older blocks on the north and on the south; there not being sufficient vacancy to answer the calls of all, the younger must give way.
2. No mistake in the calls of the younger survey could affect the location of the older; it could not be changed by the calls of the younger.
3. To locate the younger the proper way was to run out the older blocks; the first surveys of the younger would be entitled to the vacant land.
4. Precisely descriptive warrants are those which so clearly describe the land that it can be readily identified and the warrant applied; they take title from their date.
5. A vaguely or loosely descriptive warrant ascertains only propinquity, and the land must be surveyed in order to identify it and render it certain; it takes title from the survey.
6. A warrant to Myer was "400 acres on a branch of Big Schuylkill called 'Big Run,' adjoining lands surveyed on a warrant to John Hartman, down the said creek one mile, near the Tory path, Berks county." There was no survey for John Hartman earlier than the warrant; but one later. *Held*, that the Myer warrant took title only from the survey.
7. A survey without a warrant is void, excepting surveys allowed to actual settlers under Act of April 3d 1792.
8. Hubley *v.* Van Horne, 7 S. & R. 185; Norris *v.* Monen, 3 Watts 469; Patterson *v.* Ross, 10 Harris 340, followed.

March 6th 1873. Before READ, C. J., AGNEW, SHARSWOOD, and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Schuylkill county*: No. 167, to January Term 1870.

This was an action of ejectment brought April 3d 1856, by

[Manhattan Coal Co. v. Green.]

John Green against Thomas J. Atwood, for a tract of land in Foster township, containing 350 acres of land or thereabouts, and bounded by lands surveyed on warrants granted to John Hartman, John Kunkle, Christina Levenburg and others. The Manhattan Coal Company were on the 3d of November 1869, substituted as defendants.

The plaintiff claimed under a warrant of February 27th 1793, to Philip Myer, for 400 acres surveyed May 19th 1794; the land as described in the writ was claimed by defendants as part of four warrants of November 18th 1793, in the name of John Shomo, Anna Maria Shomo, Henry Thiell and Susanna Sillyman, surveyed in January and February 1794.

The case was tried November 3d 1869, before Ryon, P. J.

The plaintiff's title was as follows:—

Application February 27th 1793: "Philip Myer for 400 acres of land on a branch of Big Schuylkill, called 'Big run,' adjoining lands surveyed on a warrant granted to John Hartman, down said creek one mile, near the Tory path."

Warrant February 27th 1793, to Philip Myer (same description), in the county of Berks.

Survey May 19th 1794, by Henry Vanderslice, deputy-surveyor, situated on the branches of Big Schuylkill, in Berks county, containing 400 acres, 145 perches and allowance.

In the draft a stream; calls to adjoin on the north John Kunkle; on the east Christina Levenburg—one part west marked vacant, and on south and south-west no call. Return of Philip Myer on 3d September 1794. Patent 31st December 1838, of same tract to William C. Levensworth.

By various conveyances, fifteen-sixteenths of the Philip Myer survey were vested in the plaintiff before the commencement of the suit; the remaining sixteenth was acquired by him May 8th 1865.

The Philip Myer survey was one of a block of thirteen surveys, warranted February 27th 1793 and February 18th 1794, and surveyed from May 19th to May 27th 1794; the batch was not marked on the ground; this block included surveys in the names of Killian May, Mary and John Kunkle, Robert Kinnear, Christina Levenburg, &c.

The calls on the northern side of the block of thirteen are for surveys in another block having the original marks; the surveys in this block were made in 1787, 1788, 1790, 1792, in the names of Zerbe, Yarnall, Kunkle and others.

On the south of the thirteen is a block of sixteen surveys warranted November 18th 1793; two of them in the name of Susanna Sillyman and Henry Theill respectively, surveyed by William Wheeler, deputy-surveyor, January 22d 1794. The remaining fourteen warrants were surveyed from 11th to 18th of February

1794, by Henry Vanderslice, deputy-surveyor; amongst these were surveys in the name of John Shomo, Ann Maria Shomo, George Groh, Jr., &c.

There were no marks on the ground on the *northern* side of *this* block, but upon the south side and on some of the intermediate surveys there were marks by which, and by the calls, the whole block including the lines of the northern surveys can be located.

On the 5th of August 1793, a warrant was issued to John Hartman, for 316 acres on Broad mountain, including several springs and a run emptying itself into the west branch of Schuylkill, in Brunswick township, Berks county, and surveyed 21st August 1793, by William Wheeler, deputy-surveyor, "for land in Brunswick township, Berks county, 317 acres." Calls for vacant land all around.

No warrants or survey in the name of John Hartman earlier than the above could be found.

The defendants owned the whole of the block of the sixteen surveys. In locating this block there was not room between its northern line and the southern line of the northern block for the block of thirteen.

According to the plaintiff's theory, the deputy-surveyor made a mistake in the call on the southern side of the block of the thirteen surveys, and that therefore by protracting those surveys from the distinctly-marked surveys of the northern block, the location of the Philip Myer would be on the Sillyman, Thiell and Shomo surveys in the defendant's block of sixteen; and where plaintiff claimed it to be.

The evidence in the case was very voluminous, very much of it was as to where the "Big run" and "Tory path" were; a great deal also bore upon the location of the surveys in the block of the sixteen and that of the thirteen surveys.

There was much evidence on questions not considered in the opinion of the Supreme Court. Also, bills of exception on questions of evidence.

What has been given, with the answers of the court below to the points of the parties, and the opinion of the Supreme Court, will sufficiently exhibit the case. The plaintiff's 1st and 4th points, with their answers, are as follows:—

1. "The warrant to Philip Myer being reasonably descriptive on its face, if it was surveyed on the land described in the warrant on the 19th May 1794, and returned into the land office on 3d September 1794, the title refers back to the date of the warrant, and no person had authority to interfere with the land described in the warrant after its date. The title being fixed in the owner of the warrant at its date, and followed by a survey returned within a reasonable time, any survey made for other parties after its date, on the same land, is merely void as against the owner of the

prior warrant, and cannot affect him without his consent, and the plaintiff has a right to recover."

Answer: "The first point affirmed, with the remark that whether there was a 'Big run,' a branch of the Big Schuylkill, in 1794, and a 'Tory path,' and whether there was at that time (27th February 1794) a survey made upon the ground, in the name of John Hartman, and this fact was known to Philip Myer, and whether the Philip Myer was located and surveyed upon the land described in the warrant, are questions of fact for the jury."

4. "If the jury believe that the Philip Myer warrant was located by the lines of older surveys marked upon the ground, as testified to by Lewis and Rockafellow, it must remain where it was put, and cannot be shifted or changed from its location by arbitrary or inconsistent calls in the return of survey."

"This point affirmed."

The following are points of defendants, with their answers:—

1. "The call in the Philip Myer warrant for 'land surveyed on a warrant granted to John Hartman,' cannot be filled by the survey of August 21st 1793, to John Hartman, under a warrant of August 5th 1793, later than the date of the Myer warrant."

Answer: "The call in the Philip Myer warrant for the survey in the name of John Hartman, was a call for a survey whose lines were actually run and marked upon the ground at that date (27th February 1793). If there was no such survey then marked upon the ground, the call for the John Hartman is not a valid call, and the warrant to Philip Myer not such a descriptive warrant as to make title from the date of the warrants. If the John Hartman tract was surveyed and marked upon the ground on or before the 27th February 1793, although the survey by the deputy-surveyor purports to have been made on the 21st August 1793, and Philip Myer knew the fact that the John Hartman was then (27th February 1793) actually surveyed and marked upon the ground, the call in Philip Myer warrant for the John Hartman was a valid call.

"The presumption is, that the survey for the John Hartman was made on the 21st August 1793, as returned by the deputy-surveyor; but if there are marks on the ground which satisfy you that the survey was made prior to that date, and old enough to answer as a call for warrant of 27th February 1793, it would be a valid call. The question is one of fact for you. If the Hartman is not a valid call, the defendants are entitled to recover.

7. "In order to make title under a descriptive warrant, it is necessary that a survey upon it should be made upon the ground, within a reasonable time; and as the Philip Myer survey was never made upon the ground, but is chamber work, the title of the plaintiff under the Myer warrant to the land claimed in this suit is void as against that of the defendants, under the Shomos, Thiell, Silly-

man and Groh surveys, and their verdict must be for the defendants."

Answer: "This point calls upon us to pronounce the title of the Philip Myer void as against the title of the defendants. If the Philip Myer has no marks upon the ground from which its location and position can be determined, then we affirm this point; but in determining this, you must take all the evidence which relates to this survey. It is admitted that the Philip Myer is one of a block of thirteen surveys which were located from calls to adjoin older blocks of survey on the south, and a series of older surveys on the north and east, well marked upon the ground. The Philip Myer (in question) is one of the leading surveys of this block of thirteen, *perhaps the leading survey*. If there is a leading warrant, you begin to locate this block by locating the leading warrant and the survey upon it, fixing that by its boundaries; the rest would be located by the first in consecutive order, the second bounding on the first, with its proper courses and distances, unless excluded by an actual line on the ground made for that tract, or adopted for it by the deputy-surveyor as the line of an older survey *actually located* upon the ground, and so on until the whole block is located.

"Now the block of which the land in question is one, calls for the old Yarnells and Kunkels on the north and east, and for the block of which the Shomo (defendants' land) is one, on the south. If these calls of the younger block for the older are not a mistake, the younger block must be located with reference to them; or, if it cannot be located so as to answer all, then to answer as many as possible of the calls, and ignore as few as possible. If this younger block is located in this way, though it may be chamber work, it is not such a chamber survey as is made void as against younger surveys upon the same land, surveyed and returned within twenty-one years from the date of the first survey, for the reason that a call for an older survey by the younger is a call for the lines of the older survey to be a line for the younger, and it is not necessary for the surveyor to re-mark the lines; the lines of the older become the line of the younger upon the side to which the younger is called to adjoin. Now, upon this rule, to locate this block of thirteen surveys, the calls for older surveys, upon any part of the block, is a call for each tract, so far as it may go to locate the tract, and to give it the character of a good survey; and hence, as the block of thirteen surveys, of which the Philip Myer is one, calls to adjoin older surveys on the south, east and north, all the tracts of that block may be located by older surveys, and the survey is good, although the surveys may have been made by protraction, and not by actual marks made for these individual tracts."

8. "As the south line of the block of thirteen tracts, of which the Philip Myer is one, calls for, and adopts precisely, the northern line of the block of fourteen owned by the defendants, and as no

lines of the junior block are found upon the ground to carry it beyond its calls, there can be no interference between the two blocks, and their verdict must be for the defendants."

Answer: "This affirmed, unless you should find this call upon the south *was a mistake*. The old surveys on the north were well marked upon the ground. The location of this tract of thirteen began with the Philip Myer, and then John Kunkel, or *vice versa*, and then Mary Kunkel and Killian May. Philip Myer and John Kunkel are returned as surveyed on the 19th May 1794. The Mary Kunkel, Killian May and Robert Kinnear were returned as surveyed on 20th May 1794. The Philip Myer does not call for the Shomo upon the south, but vacant on the south and west. The Myer calls for Christina Levenburg on the east. Christina Levenburg was returned as located on the 22d of May 1794, three days after the survey of Philip Myer. Yet the Levenburg calls for Myer, and the Myer for Levenburg, and the Levenburg calls for John Shomo on the south, and so with the southern tier of batch of thirteen, except the Philip Myer calls to adjoin the north line of the defendants' batch of fourteen tracts. But the line between these blocks was not marked upon the ground, or no marks are now to be found. These blocks were located by Vanderslice, and if there was no enclosing line on the north of the batch of the fourteen surveys marked upon the ground, then this line is to be ascertained by surveying and locating the blocks and drawing the line from the north-east to the north-west corners. This is the line then called for. But did Vanderslice know where this line would come? If he did, he made a mistake somewhere else, for the distance between the older surveys on the north and west, and the block of fourteen on the south of the batch of thirteen, is not large enough to put the thirteen surveys in, and the question for you to find is, which are the reliable calls and which are the mistaken calls, and locate this batch according to the valid calls, as explained before.

"Another point is the calls of the Philip Myer and others of the batch as to the waters and other natural monuments. The Myer calls to be on a branch of the Schuylkill. If it is thrown over to adjoin the Shomo, it would extend over the mountain upon Deep creek, which empties into the Susquehanna. The return of the deputy-surveyor does not always have the water correctly laid down, even when the survey was made upon the ground; but when the survey was made by protraction, the waters are not so reliable a guide as to the correct location of the waters laid down upon plot, as returned into the land office by the deputy-surveyor. But the survey calls for the Schuylkill; and as that is a natural monument, it is to be taken into consideration in ascertaining the true locality of the survey."

11. "The proper way to locate the block of thirteen tracts, of

which the Philip Myer is one, is first to run out the lines of the two older blocks, for which it calls, and, if there is not sufficient vacancy to contain the thirteen tracts, those of the thirteen first surveyed will be entitled to the vacant land, to the exclusion of the later ones; but, in no event, can any of the younger block exclude any of either of the older blocks; and therefore, the verdict of the jury must be for the defendants."

Answer: "The law is properly stated in this point, and we affirm it; but decline to direct the verdict in favor of the defendants."

The verdict was for the plaintiff for fifteen-sixteenths of the land described in the writ.

The defendants took out a writ of error and assigned for error, amongst others, the answers to the foregoing points.

F. B. Gowen (with whom was *G. DeB. Keim*), for plaintiffs in error.—As to the 8th and 11th points. The location of the block of the thirteen surveys was the younger, and must be controlled by the block of sixteen the older, and no mistake in the younger could change it; Hagerty *v.* Mathers, 7 Casey 357, s. c. 1 Wright 66. The question is as to the location of the older survey: Bellas *v.* Cleaver, 4 Wright 267; Carbon Iron Co. *v.* Rockafeller, 1 Casey 55; Boynton *v.* Urian, 5 P. F. Smith 142. Junior surveys cannot be extended against the intention of their surveyor: Malone *v.* Sallada, 12 Wright 419; Robeson *v.* Gibbons, 2 Rawle 48. If the surveyor makes an older survey a call for a younger, he asserts that there is no interference: Harper *v.* Mechanics' Bank, 7 W. & S. 211; Porter *v.* Ferguson, 3 Yeates 60. The location is to be made where there are several warrants from the one which has known boundaries: Fox *v.* Lyon, 9 Casey 479; Gratz *v.* Hoover, 4 Harris 239.

As to the 7th point, they cited Fugate *v.* Cox, 4 S. & R. 293; Morris *v.* Travis, 7 Id. 22; Sergeant's Land Law 117 and cases cited. An actual survey is necessary on a descriptive warrant to give title from its date: Hunter *v.* Meason, 4 Yeates 108. The survey must be made with due diligence: Lauman *v.* Thomas, 4 Binn. 58; Lilly *v.* Paschal, 2 S. & R. 396; Starr *v.* Bradford, 2 Penna. R. 384; Strauch *v.* Shoemaker, 1 W. & S. 173; Chambers *v.* Mifflin, 1 Penna. R. 74; Addleman *v.* Masterson, Id. 454; Emery *v.* Spencer, 11 Harris 271; McGowan *v.* Ahl, 3 P. F. Smith 89; Kirkpatrick *v.* Vanhorn, 8 Casey 137. As to whether the call in the Myer warrant of February 1793 for the John Hartman warrant can be filled by a warrant of August 1793. The efficacy of a warrant must depend on its words: Galbraith *v.* Mauss, 2 Yeates 244; De Haas *v.* De Haas, Id. 317; Ormsby *v.* Ihmsen, 10 Casey 473; Carmalt *v.* Post, 8 Watts 411. After twenty-one years the return of is conclusively presumed to be regular: Nieman *v.* Ward, 1 W. & S. 79; Mock *v.* Astley, 13 S. &

R. 382; Caul v. Spring, 2 Watts 390; Lamborn v. Hartsvich, 13 S. & R. 113; Bellas v. Levan, 4 Watts 300; Schable v. Doughty, 3 Barr 395.

F. W. Hughes (with whom was *T. B. Banman*), for defendant in error.—When the lines are not run and marked on the ground and there are no other circumstances equally decisive, calls for adjoiners and other fixed boundaries govern the calls for courses and distances when there is a discrepancy between them, for the reason that it is easier to be mistaken in a measurement, than it is in a boundary: Brolasky v. McClain, 11 P. F. Smith 163; Mackentile v. Savoy, 17 S. & R. 104; Murphy v. Campbell, 4 Barr 485; Cox v. Couch, 8 Id. 147; Petts v. Gaw, 3 Harris 218; Mathers v. Hegarty, 1 Wright 64; Speakman v. Forepaugh, 8 Id. 372. The lines actually marked on the ground constitute the survey and control the distances, even where the draft of the survey calls for natural or other fixed boundaries: Mageehan v. Adams, 2 Binn. 109; Walker v. Smith, 2 Barr 43; Thomas v. Mowrer, 3 Harris 139; Younkin v. Cowan, 10 Casey 200; Quinn v. Heart, 7 Wright 341.

The lines of older surveys marked upon the ground and adopted by the surveyor are of the same validity as the lines of the younger survey and become its lines: Eister v. Paul, 4 P. F. Smith 198; Parshall v. Jones, 5 Id. 153.

They may be adopted and returned for the new survey with the same effect as if the survey had traced them on the ground; McRhea v. Plummer, 1 Binn. 227; Caul v. Spring, 2 Watts 390; Dreer v. Carskadden, 12 Wright 38.

The opinion of the court was delivered, May 17th 1873, by

Agnew, J.—John Green, the plaintiff below claimed title under a warrant in the name of Philip Myer, one of a block of thirteen surveys made by Henry Vanderslice, deputy-surveyor, on the 18th to the 25th of May 1794. The Myer survey as claimed to be located, embraces parts of two surveys claimed by the defendants contained in a block of fourteen surveys made by Henry Vanderslice, deputy-surveyor, on the 11th to the 18th of February 1794; and also parts of two surveys claimed by the defendants, made by William Wheeler, deputy-surveyor, on the 22d of January 1794. Neither the Myer survey, nor the four surveys claimed by the defendants, can be located by marks on the ground, applicable to them individually, but in each case the location is ascertained by the places they occupy in their respective blocks. The block surveys, however, are readily ascertained and identified by original marks, and older surveys found on the ground on the north side of the block of thirteen surveys, and on the south side of the block of fourteen surveys. As thus ascertained there is not room between the older surveys for the whole number of surveys in each

block. In this state of the case that portion of the block of thirteen surveys, on its south side, which interferes with the northern portion of the block of fourteen surveys, must give way, the thirteen being younger in date than the fourteen. The instruction of the judge on this part of the case, given in answer to the 8th, 9th and 11th points of the defendants, was correct, except in the qualification of the answer to the 8th point, as to the supposed mistake in the call upon the south side of the block of thirteen surveys. The qualification was in effect contradictory; for the block of thirteen surveys being younger than the block of fourteen surveys, no mistake in the call of the former could affect the location of the latter. An older survey cannot be changed or contradicted by the lines of a junior survey. The calls of the latter, whether mistaken or true, do not limit the lines of the former: Carbon Run Improvement Company *v.* Rockafeller, 1 Casey 49; Bellas *v.* Cleaver, 4 Wright 260. In affirming the defendants' 11th point the court correctly informed the jury, that the proper way to locate the block of thirteen was first to run out the older blocks for which it called, and if there was not a sufficient vacancy left to contain the whole thirteen, those of the thirteen first surveyed would be entitled to the vacant land, but in no event could any of the younger block exclude any of the older block. The fact that the Philip Myer survey called for vacant land on the south and west, or that the call of the block of thirteen for the surveys in the block of fourteen was owing to a mistake in some way by Vanderslice, the deputy-surveyor, could not affect the older block of fourteen, or carry the Myer survey within its lines.

The call of Philip Myer for vacant land south and west makes it probable the surveyor thought it extended westward past the block of fourteen, as shown in a connected draft of three blocks (these two and the block on the north of both), but this would not justify an interference with the older surveys. The defendants were therefore entitled to an unqualified instruction that the block of fourteen surveys being previously located, none of the surveys in the younger block of thirteen could interfere with any of the former, and no mistake of the surveyor in locating, or in the calls of the thirteen, could affect the surveys in the block of fourteen.

In this attitude of the case the plaintiff was driven to another position. He claimed that the warrant of Philip Myer was precisely descriptive of the land in controversy, and on this ground, if found in its proper location, it ante-dated the defendants' title, even though the location fell within the block of fourteen. This raises the question as to the description in the Myers warrant. Descriptive warrants are of two kinds, those which are precisely descriptive, and those which are only vaguely or loosely descriptive. The former are such as so clearly describe the land that it can be readily identified and the warrant applied. These take

title from their date, the subject of the purchase being defined with sufficient certainty at the time of the application. On the other hand, a vague or loose description only ascertains propinquity, and the land must still be defined by a survey in order to identify the subject of the purchase, and render it certain. In the latter case the title takes date only from the time of survey: Hubley v. Van Horne, 7 S. & R. 185; Norris v. Monen, 3 Watts 469; Patterson v. Ross, 10 Harris 340. In Patterson v. Ross, the warrant was for four hundred acres of land north and west of the rivers Ohio and Allegheny and Conewango creek, on the west bank of Big Beaver creek, and to include the walnut bottom lying on the run that falls into said creek nearly opposite an island between the big and little falls, by estimation one mile above the block-house. The evidence on the ground readily identified the big and little falls, the island, the site of the blockhouse, and the run falling into the creek on the west side nearly opposite the island; but the identity of the walnut bottom lying on the run was not clearly ascertained, the bottom along the run being large enough to admit of several tracts of 400 acres. It was held that the warrant was not precisely descriptive, and the title took date only from the time of the survey. In regard to that particular description I think the idea of vagueness was carried to an extreme, and that probably that part of the description which required the tract to be on the west bank of the creek was not given its full force. But this does not change the principle on which the case was decided, that a vague or loose description gives title only from the survey, nor does it lessen the force of the illustration the case affords, in determining what is a vague description.

The description contained in the Philip Myer warrant, is as follows: "400 acres of land on a branch of Big Schuylkill, called 'Big Run,' adjoining lands surveyed on a warrant granted to John Hartman, down the said creek, one mile, near the Tory path, in Berks county."

Excepting so much of this description as locates the tract "adjoining lands surveyed on a warrant granted to John Hartman," the entire description is very loose and vague. No land is precisely ascertained by its being on Big Run. It is not said on what side of the run it lies, or whether across it. Nor is it said how near or on what side of the Tory path it lies. "Down the creek one mile," must mean, if it means anything, one mile down the creek from the survey of John Hartman; otherwise, the fact of adjoining that survey would be in itself a vague description, for it is not said on what side of the Hartman survey the Myer land is to lie. The Hartman survey is therefore the key to the description. In Fox v. Lyon, 9 Casey 479, it was held that a warrant to John Fox, for land adjoining a survey in the

name of Mordecai Massey, on the north, and land of Fowler & Co., surveyed to adjoin Mordecai Massey on the north, but lying 150 perches from the Fowler & Co. lands, was a shifted location. So in De Haas *v.* De Haas, 2 Yeates 317, a survey including a path, and a chief part of the land lying *westward* of it, was viewed as deviating from the call in the warrant, which was for land adjoining the path from Mahoning to Muncy creek, *eastward* of the said path, &c." It is evident, therefore, that the description in the Myer warrant depends for its precision wholly on that which calls for its "adjoining lands surveyed on a warrant granted to John Hartman."

Without that, "down the creek one mile" is meaningless, and the Big Run and the Tory path afford no evidence of precise locality. It will be noticed that the call is not for a *survey* merely, which might send the inquirer in the land office, to the ground, to search for such a monument; but it is for land surveyed on a *warrant* granted to John Hartman. This description sends the inquirer directly to the files of the land office, and they discover no trace of such a warrant and survey existing at the date of the Philip Myer warrant on the 27th of February 1793. The only warrant to be found in the office, according to the evidence, in the name of John Hartman, bears date afterwards on the 3d of August 1793, and the survey under it was made on the 21st of August 1793. It is very clear, therefore, that this portion of the description in the Myer warrant was notice of nothing, to those who desired to take up lands in this vicinity, and was void for uncertainty. When an applicant for land is informed of an office right and survey under it, he has the means at once, by resorting to the files of the office, of ascertaining its location, and thus of avoiding an interference with it, in making his own survey. This is all important to him, for the state does not guaranty against loss, where a junior warrant-holder surveys in land appropriated to an older warrant. Hence, when no search he can make will lead to information, it is clear he cannot have legal notice of the former appropriation, by such a false description. In such a case he must suffer, who, by his false description, leads away from notice. Nor is the fact that a survey is mentioned to be disconnected from the statement that it was made on a warrant. A survey without warrant is void, since the proprietary government and customs have ceased to exist, excepting surveys allowed to actual settlers under the Act of 3d April 1792. Under the Penns surveys were sometimes made without a precept, and the custom to receive them has been permitted to be proved: Woods *v.* Galbreath, 2 Yeates 306. But since the divesting Act of 27th November 1779, the practice has not been allowed: Barton *v.* Smith, 1 Rawle 403.

The importance of notice of pre-existing rights to those who take up lands from the Commonwealth, cannot be overrated, and is

strongly set forth by Judge Rogers, in Roland *v.* Long, 1 Harris 464, and by Judge Woodward, in Emery *v.* Spencer, 11 Harris 271. Judge Rogers said, that an applicant is not bound to look beyond the land-office, and although a warrant may be issued and survey paid, yet if there be no return of survey in the office, the title under the junior warrant will be good. This is not to be taken in an unqualified sense, yet it is evidence of the importance attached to the records of the land-office. Any one, therefore, reading the description in the Philip Myer warrant, and then finding in the land-office no such warrant as that of John Hartman referred to in it, would not be bound to look further; for there is no other place than the land-office where such warrants are legally to be found. And knowing that a survey without a warrant is void he would not be led to believe that such a survey could be meant, when the description asserts that it was made on a warrant. The result is, that the description in the Philip Myer warrant, that the tract adjoined lands surveyed on a warrant, to John Hartman, is nugatory, and gives the warrant no precedence over junior claimants, and the remainder of the description being vague and uncertain, the title under the warrant takes date from the time of survey. This disposes of the case, and renders it unnecessary to pass upon the other assignments of error. The question becomes one of location merely; and if, as the evidence appears to show, the block surveys are identified by marks on the ground clearly indicating their location, the block of thirteen, being younger than the block of fourteen, must give way to the latter, and the Philip Myer warrant, not being precisely descriptive, must give way so far as it interferes with any of the surveys of the block of fourteen.

Judgment reversed, and a *venire facias de novo* awarded.

Brown *versus* The Commonwealth.

73	321
126	204
73	321
148	39
73	321
e206	279
73	321
207	277
23 SC	106
73	321
32 SC	618
32 SC	621

1. The Criminal Court of Dauphin, Lebanon and Schuylkill counties, created by the Act of April 18th 1867, is constitutional, and it has, under Act of April 21st 1870, concurrent jurisdiction with Courts of Oyer and Terminer, &c., of Schuylkill county.

2. On the hearing before a justice of the peace of a prisoner charged with murder, the testimony of a witness for the Commonwealth was taken in writing. The witness having died, the notes of his testimony were admissible on the trial.

3. A man was found dead in a road about three hundred yards from his house with marks of violence. His wife was found in the house the same day with wounds of which she afterwards died, and there were marks about the house showing that it had been robbed. *Held*, that the dying declarations of the wife were not evidence for the Commonwealth on the trial for the murder of the husband.

4. The sheriff and jury commissioners, after selecting names for jurors, placed them in the wheel, which was sealed with but one seal. *Held*, that

the array of jurors drawn from the wheel should have been set aside and the indictment found by the grand jury quashed.

March 7th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Criminal Court of *Schuylkill county:* No. 78, to January Term 1873.

At April Term 1872 of the court below, the grand jury found a true bill against Joseph Brown for the murder of Daniel S. Kraemer.

On the 27th of May 1872, he challenged the array of jurors, "for the reason that the sheriff and jury commissioners of Schuylkill county, at the time of the selecting and placing in the wheel the names of jurors, did not secure the jury-wheel in the manner required by law, they having failed to secure the said wheel by sealing the same with their respective seals, the said wheel being sealed with only one seal, if any."

On the same day the prisoner moved to quash the indictment, for the same reason as that given for challenging the array.

The court (Green, P. J.) heard the testimony of the jury commissioners and the sheriff on the challenge and the motion to quash.

The evidence was that after the wheel was filled it was locked and placed in a box, which was also locked with a padlock, tape drawn across the lid of the box, tied and sealed; there was but one seal put on the box, that was the private seal of one of the jury commissioners; both jury commissioners were present when the box was locked and sealed; the sheriff was not present; the key was obtained from him and returned to him; the box had always been kept in that way, and had always been found by the jury commissioners intact and where they left it.

On the 28th of May the court sustained the challenge and ordered the sheriff and jury commissioners to take all the names of jurors from the wheel, and deposit new names, &c.

On the 29th of May the court revoked the foregoing order, "no action having been taken as yet by the said sheriff and jury commissioners in the premises."

On the 27th of August the court overruled the motion to quash the indictment.

At the request of the prisoner, the court sealed bills of exception.

The prisoner was indicted at the same time for the murder of Annetta Kraemer, the wife of Daniel S. Kraemer.

The prisoner pleaded to the jurisdiction of the court, alleging that the Act of April 18th 1867, establishing the Criminal Courts of Dauphin, Lebanon and Schuylkill, and its supplement of April 21st 1870, were unconstitutional. The court overruled the plea.

The indictment was tried August 27th 1872.

The evidence was that the deceased was found on the 26th of

[Brown v. Commonwealth.]

February 1872, in a lane about three hundred yards from his house, and that the wife shortly before, on the same day, was found on her bed in the house, with her head beaten badly; she died from the injuries on the 4th of March. The husband was about sixty years old, and the wife about fifty.

Daniel M. Kraemer, a son of the deceased, not living at home, testified that his father was alive on Sunday, the 25th of February. He went to the house on Monday morning before 7 o'clock, and in a back room found his mother lying on her bed insensible; he found blood around the front room; she was covered with blood so that her face could not be seen; she had her day clothes on; he then went out and found his father lying on his back in the road; there was blood on his face and in the road; he, with some neighbors, then returned to the house, they found a chest and desk in the front room broken open.

Other witnesses testified to similar circumstances, and also to the bruised and wounded condition of Mrs. Kraemer; also, that they found coin in a secret drawer which was unopened, of the chest and also in the bottom of an old-fashioned clock.

There was a large amount of evidence tending to connect the prisoner with the murders.

Sophia Fehr, a sister of Mrs. Kraemer, testified that she came to the house on Monday morning and found Mrs. Kraemer lying on the bed, bloody and bruised; she was then conscious. The witness testified much in detail as to the condition of her sister and also as to there having been money in the house.

The Commonwealth having examined a great number of witnesses and having shown that one Isaac Hummel had been arrested with the prisoner upon suspicion of being connected with the murder, called B. B. McCool, Esq., a member of the Schuylkill county bar, who testified:—

"I was present at the examination of Charles Ewing before 'Squire Reed in this court-house. 'Squire Reed is a justice of the peace in the borough of Pottsville. Charles Ewing is dead. He was killed on the 14th day of April last on Market street, in the borough of Pottsville. Joseph Brown was present at that hearing and represented by counsel. There were two members of the bar, Messrs. Farquhar and Strouse, there. They represented Brown and Hummel. It was on a preliminary hearing before the committing magistrate. I took notes of the testimony as given by Charles Ewing; (notes shown witness) these are the notes. These notes are correct of Charles Ewing's testimony. Mr. Ewing was very much excited and embarrassed, and not very coherent. I took down nearly every word he said, and the order in which he said it, and I think in his language. I will say that I think the notes contain the exact words of the witness. In taking the notes I made the question and answer to conform to the exact words of

the attorney and witness. I had not time to write down the questions, but took questions and answers together. I was not acting as counsel, but as clerk for the district attorney, at his request. I am now counsel in the case, retained for the Commonwealth. I think my notes contain the exact words of the witness."

The Commonwealth then offered to read the testimony of Ewing, from the notes of Mr. McCool. The offer was objected to by the defendant, admitted by the court, and a bill of exceptions sealed.

The Commonwealth recalled Sophia Fehr, and proposed to examine her as to dying declarations of Mrs. Kraemer on Monday and Tuesday, upon the subject of the murder of her husband.

The defendant objected, amongst other things, that the dying declarations of Mrs. Kraemer, as a part of the *res gestæ*, or surrounding circumstances, proposed to be offered, on Monday following, are inadmissible, because not accompanying the transactions, not concomitant with the murder of Daniel S. Kraemer, on Sunday evening, preceding, but are mere hearsay evidence, not made in the presence of the prisoner; and they are irrelevant in this issue as to the murder of Daniel S. Kraemer.

The court admitted the offer and sealed a bill of exceptions.

The Commonwealth then gave in evidence the declarations of Mrs. Kraemer tending to connect the prisoner with the murder.

In the course of the trial a number of exceptions were taken to the rulings of the court on questions of evidence, and also to the charge of the court; none of which were considered by the Supreme Court.

The jury found the prisoner guilty of murder in the first degree. A motion for a new trial was made; it was overruled; and on the 7th of October 1872, the prisoner was sentenced to be hanged.

The prisoner sued out a writ of error.

He assigned for error that the court erred—

1. In not quashing the indictment, because the grand jury was drawn from a wheel not secured according to law.

2. In revoking the order directing the sheriff and jury commissioners to make a new selection of jurors, &c.

3. In overruling the motion to quash the array of petit jurors.

4. In overruling defendant's plea to the jurisdiction of the court.

5. In admitting the notes of the testimony of Charles Ewing, a deceased witness, before the committing magistrate to be read in evidence.

14. In admitting evidence of the dying declarations of Annetta Kraemer, the wife of deceased.

G. R. Kaercher, *F. G. Farquhar*, and *B. W. Cummings*, for plaintiff in error.

[Brown *v.* Commonwealth.]

J. B. Reilly, District Attorney, and *L. Bartholomew* (with whom was *B. B. McCool*), for the Commonwealth.

The opinion of the court was delivered, April 5th 1873, by

READ, C. J.—This is a writ of error to the Criminal Court of Schuylkill county, sued out under the Act of the 15th February 1870, upon the oath of the defendant, and brings up the whole record.

The constitutionality and jurisdiction of this court have been finally settled in Commonwealth *v.* Green, 8 P. F. Smith 226, and in Commonwealth *v.* Hipple, 19 Id. 9, and its concurrent jurisdiction with the Courts of Quarter Sessions of the Peace and Oyer and Terminer and General Jail Delivery of the County of Schuylkill, is fully recognised and established by the Act of 22d April 1870 (Pamph. L. 1254), and the court below were therefore right in overruling the plea to the jurisdiction, entered by the defendant.

On the preliminary hearing before the committing magistrate, the defendant and his counsel being present, a witness was examined whose testimony was taken down by defendant's counsel, and the witness having died before the trial, the notes of his evidence proved by the counsel under oath, were offered in evidence, objected to and admitted. It was objected that by the Constitution of the state, the defendant was entitled to meet the witnesses face to face.

The doctrine on this subject is thus laid down in the 3d volume of Russell on Crimes, by Greaves, 4th edition, 1865, page 249. "If there has been a previous criminal prosecution between the same parties, and the point in issue was the same, the testimony of a deceased witness, given upon oath at the former trial, is admissible on the subsequent trial, and may be proved by any one who heard him give evidence," and the same is repeated at page 424, in the note. We find the same rule in 1 Phillips & Arnold's Evidence, pp. 306–7, and in 1 Pitt Taylor on Evidence, 4th edition, 1864, pp. 445 447. Dr. Wharton, in his valuable Treatise on Criminal Law in the United States, vol. 1, p. 667, says: "The testimony of a deceased witness given at a former trial or examination, may be proved at a subsequent trial by persons who heard him testify. Even the notes of counsel of the testimony of such witness on a former trial between the same parties, touching the same subject-matter, are evidence when proved to be correct in substance, although the counsel does not recollect the testimony independently of his notes. The better opinion seems to be that it is sufficient to prove the substance of what the deceased witness said, provided the material particulars are stated, though it has been sometimes held, that unless the precise words could be given, the testimony would be rejected."

In The Commonwealth *v.* Richards, 18 Pick. 434, it was held that the 12th article of the Declaration of Rights, which provides

that in criminal cases the accused shall have the right "to meet the witnesses against him face to face," is not violated by the admission of testimony in a criminal trial before a jury to prove what a deceased witness testified at the preliminary examination of the accused before a justice of the peace."

This case was affirmed seven years afterwards in Warren *v.* Nichols, in 6 Metc. 261, and the further ruling in that case "that the whole of the testimony of the deceased witness upon the point in question, and the *precise words used by him* must be proved," was substantially affirmed. Hubbard, Justice, dissented from this ruling and assigned very cogent reasons against it. "As the decision now stands," says this able judge, "it prescribes a rule for the admission of testimony, which the imperfection of our nature, in the construction of our memories, will not warrant. It in truth excludes the thing it proposes to admit, and at the same time opens a door for knaves to enter, where honest men cannot approach." "Other learned judges have maintaned, that a rule so rigid was unwise, and I confess, I prefer the reasoning of Gibson, J., in the case of Cornell *v.* Green, 10 S. & R. 16, to that of the learned judge in Commonwealth *v.* Richards, and with him agrees also the learned author of the Treatise on the Law of Evidence." 1 Greenl. § 165.

Upon this subject the ablest discussion of the whole question is to be found in the opinion of Judge Drummond, in The United States *v.* Macomb, 5 McLane's Rep. 286, delivered in the Circuit Court of the United States for the District of Illinois, at July Term 1851. At the preliminary examination, a witness, since deceased, testified in relation to the offence, which was robbing the mail. The accused was present and his counsel cross-examined the witness. Witnesses were permitted on a trial before a jury, under an indictment found for the same offence, to prove what the deceased witness testified to at the preliminary examination. It is sufficient in such case to prove substantially, all that the deceased witness testified upon the particular subject of inquiry. A decision upon the same point is to be found in United States *v.* White, 5 Cranch's Circuit Court Rep. 460.

The 6th article of the amendments to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right "to be confronted with the witnesses against him."

The Constitution of Pennsylvania of 1776, provided "that in all prosecutions for criminal offences, a man hath a right to be confronted with the witnesses." The Declaration of Rights, in the Constitution of 1790, changed the phraseology from confronting, to "to meet the witnesses face to face."

The doctrine enunciated by Judge Drummond in 1851, was followed by the Supreme Court of Missouri, after a very exhaustive argument on the constitutional question, in The State *v.* Mc-

O'Blenis, in 24 Missouri (3 Jones) 402, and The State v. Baker, Id. 437, in 1857, and in The State v. Houser, 26 Missouri (5 Jones 431), in 1858, and by the Supreme Court of Ohio in Summons v. The State, in 5 Ohio (N. S.) 325, in 1856.

In this state the most liberal rule has been adopted, in relation to the evidence of what was testified to by a deceased witness on a former trial or examination, as will be seen by referring to Cornell v. Green, 10 S. & R. 14; Chess v. Chess, 17 Id. 409; Moore v. Pearson, 6 W. & S. 50, and Rhine v. Robinson, 3 Casey 30, in which case Chief Justice Lewis said: "The notes of counsel, showing what a deceased witness testified to on a former trial between the same parties touching the same subject-matter, are evidence when proved to be correct in substance, although the counsel did not recollect the testimony independent of his notes, and although he did not recollect the cross-examination." To which may be added the decision in Phila. & Reading R. R. v. Spearen, 11 Wright 306, the opinion being delivered by my brother Agnew.

There was, therefore, no error in the court admitting the notes of Mr. McCool of the testimony of Ewing, a deceased witness, in the examination before the committing magistrate, or the notes of any other counsel, or those of the committing magistrate himself.

"Upon the trial of any indictment for murder, or voluntary manslaughter, it shall and may be lawful for the defendant or defendants to except to any decision of the court, upon any point of evidence or law, which exception shall be noted by the court, and filed of record as in civil cases, and a writ of error to the Supreme Court may be taken by the defendant or defendants after conviction and sentence." "If, during the trial upon any indictment for murder or voluntary manslaughter, the court shall be required by the defendant or defendants to give an opinion upon any point submitted and stated in writing, it shall be the duty of the court to answer the same fully and file the point and answer, with the records of the case:" Criminal Procedure Act of 31st March 1860, §§ 57, 58, Pamph. L. 444.

Under this head is ranged the reception under objection of the dying declarations of Mrs. Kraemer, the wife of the murdered man. "The dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal injury, are constantly admitted in criminal prosecutions, where the death is the subject of criminal inquiry, though the prosecution be for manslaughter; though the accused was not present when they were made, and had no opportunity for cross-examination, and against or in favor of the party charged with the death." "When every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and awful is con-

sidered by the law as creating the most impressive of sanctions." 1 Wharton's Criminal Law, § 669; 3 Russell by Greaves 250; 1 Greenleaf, §§ 156, 162, 346; 1 Taylor on Evidence 616.

"The contitutional provision," says Dr. Wharton, "that the accused shall be confronted by the witnesses against him does not *abrogate* the common law principle, that the declarations *in extremis* of the murdered person in such cases are admissible in evidence:" Id.

In Woodsides *v.* The State, 2 Howard (Miss.) 655, the court, at p. 665, in answer to the constitutional objection that the prisoner had a right to be confronted with the witness against him, say: "But it is upon the ground alone, that the murdered individual is not a witness, that his declarations made *in extremis* can be offered in evidence upon the trial of the accused. If he were or could be a witness, his declaration upon the clearest principle would be inadmissible. His declarations are regarded as facts or circumstances connected with the murder, which, when they are established by oral testimony, the law has declared to be evidence. It is the individual who swears to the statements of the deceased that is the witness, not the deceased." In Anthony *v.* The State of Tennessee, 1 Meigs 277, the court say, upon the first ground of objection, "We are all of opinion that the Bill of Rights cannot be construed to prevent declarations properly made *in articulo mortis* from being given in evidence against defendants in cases of homicide."

The same doctrine is to be found in The State of Iowa *v.* Nash, 7 Iowa 347, and in Robbins *v.* State of Ohio, 8 Ohio St. R. (N. S.) 131; Com. *v.* Casey, 11 Cushing 417, and very directly in Com. *v.* Carey, 12 Id. 246. There are also various statements to the same effect in most of the decisions cited above in relation to the admission of evidence of the testimony of a deceased witness.

All these cases are confined to the dying declarations of the murdered person upon the trial of the individual accused of the murder. At the York assizes on the 17th July 1837, in Rex *v.* Baker, 2 Moo. & Rob. 53, it was held, on an indictment against a prisoner for the murder of A. by poison, which was also taken by B., who died in consequence, that B.'s dying declarations were admissible. Coltman, J., after consulting Parke, B., expressed himself of opinion that as it was all one transaction, the declarations were admissible, and accordingly allowed them to go to the jury, but he said he would reserve the point for the opinion of the judges. The prisoner was acquitted. This case is entitled to greater weight, as Baron Parke, the year before, in Stobart *v.* Dryden, 1 Mees. & Welsby 615, had been considering the question of dying declarations, after full argument, and delivered the opinion of the court. This case is mentioned in 1 Phillips and Arnold 243, in 3 Russell 268; 1 Taylor on Evidence 618.

In The State *v.* Terrell, 12 Richardson (S. C.) 321, it was held upon the trial of an indictment for the murder of A. by poison,

which was taken at the same time by B. and C., both of whom as well as A. died from its effects, the dying declarations of B. are admissible against the prisoner, although the general rule seems to be, that dying declarations are admissible only, where the indictment is for the murder of the party making the declarations. The murder was effected by putting strychnine in a bottle of whiskey, administered by the defendant, at the same time, to three persons, and caused the deaths of the grandfather and uncle of the prisoner, and of a third person, whose dying declarations were received in evidence upon the trial of the accused for the murder of his grandfather.

Upon the authority of these cases the learned judge admitted the dying declarations of the wife, upon the trial of the defendant for the murder of her husband. In this there was error, for the husband was found dead on Monday morning 26th Feb. 1872, three hundred yards from his dwelling, and his wife was discovered on the same morning lying across her bed in the house in an insensible condition and with her face and head terribly beaten and disfigured. Kraemer and his wife were both advanced in years and there was no doubt that robbery of gold and silver which was known to be in the house led to their murder, but we do not see any facts that would bring these dying declarations of Mrs. Kraemer within those two authorities, supposing them to be good law.

If the prisoner had been tried upon the indictment for the murder of Mrs. Kraemer, her dying declarations would have been strictly legal evidence against him.

The array of grand and petit jurors was challenged from their being drawn from a jury-wheel not secured according to law. By the existing law two jury commissioners are elected triennially, who are substituted for the county commissioners, and who with the law judges and the sheriff perform the duties prescribed by the 2d section of the Act of 10th April 1867 (Pamph. L. 62), who shall "place the names of the persons so selected in the proper jury-wheel, and the said *jury-wheel, locked as now required by law*, shall remain in the custody of the said *jury commissioners* and *the keys thereof* in the custody of the *sheriff* of the said county."

The mode of drawing the jurors is prescribed by the 3d section, and the 4th section, after repeating certain acts, provides "that all acts and parts of Acts of Assembly now in force in relation to the custody, sealing and unsealing, locking and opening of the jury-wheel of the respective county, and all Acts and parts of Acts of Assembly now in force imposing any penalty or punishment on the sheriff and county commissioners or either of them for anything done or omitted by them or either of them, in relation to the keeping, locking, opening, sealing or breaking the seal of any jury-wheel, or in relation to the selecting or drawing of jurors shall be taken, deemed and held to apply to the said jury commissioners and

sheriff." The duties of the sheriff and commissioners, now jury commissioners, are distinctly prescribed, as may be seen by reference to 1 Brightly's Digest 830, 831.

The 16th paragraph, which is sect. 90 of the Act of 14th April 1834, expressly provides, "as soon as the selection of jurors and the depositing of their names in the wheel as aforesaid shall be completed, the sheriff shall cause the same to be locked and secured by sealing-wax, and thereon the said sheriff and (jury) commissioners shall impress distinctly their respective seals." It is the *jury-wheel* that is to be locked and sealed.

It is clear that only one seal was used, and that it was not sealed with the respective seals of the two jury commissioners and sheriff, making three seals. Of course this was error, and the array so challenged should have been set aside and the indictment for the murder of Kraemer should have been quashed. The same objection will apply to the indictment for the murder of Mrs. Kraemer. New bills therefore should be presented to a new grand jury.

Strict attention should be paid to the execution of the jury law, so as to avoid these technical objections, which if not made at the time, are cured by the 53d section of the Criminal Procedure Act of 31st March 1860.

The judgment is reversed and the record remanded, with this opinion, setting forth the causes of reversal to the court below for further proceeding.

Rigoney *et ux. versus* Neiman.

1. In an action against husband and wife for necessaries furnished on the credit of the wife; the plaintiff in order to recover judgment need not prove that the husband has no property or is insolvent or refuses to support his family.
2. To recover judgment against the husband, it is necessary only to prove that the debt was contracted by the wife for necessaries for the support of the family of the husband and wife.
3. Book entries against husband and wife are not conclusive evidence of a joint contract by them; there being evidence that goods were purchased by the wife on her credit, the question whether any and how much were for necessaries for the family is for the jury.

March 8th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Schuylkill county:* No. 294, to January Term 1872.

This was an action of assumpsit to June Term 1868 of the court below, brought by Herman Neiman against Peter Rigoney and Johanna Rigoney his wife.

The plaintiff declared in two counts: The first was for $200

[Rigoney v. Neiman.]

"for necessaries furnished by the plaintiff to the family of the defendant, at the special instance and request of the said Johanna." The second for $200 "for necessaries furnished by the said plaintiff, for the support and maintenance of the family of the said Johanna, wife of the said Peter, which said debt was contracted and incurred to and with the said plaintiff by the said Johanna, wife of the said Peter, and was incurred for articles necessary for the support of the family of the said Peter and Johanna Rigoney."

The case was tried before Ryon, P. J.

The plaintiff testified that he kept a flour, provision and grocery store in St. Clair, Schuylkill county; he had dealings with Mrs. Rigoney in 1866; the dealings had commenced in 1865, the first entry in his book was March 8th 1865, the last August 14th 1866.

His books, which were given in evidence, showed that from March 2d to March 11th 1865, the charges were to Johanna Rigoney; they were in several items: oil, potatoes, sugar, &c., and amounted in the whole to $8.22.

On the 13th of March 1865, he opened an account in the name of "Peter and Johanna Rigoney."

This account was from that date until August 14th 1866, and contained a large number of items, of somewhat similar character. The balance appearing to be due the plaintiff at the last date was $112.84. He further testified: "These goods were ordered by Mrs. Rigoney; she is the wife of Peter Rigoney; she came to my store to get goods on credit; I gave her the goods; she then wanted a pass-book; she ordered the goods and I furnished them on her credit. Peter Rigoney has no property. * * * I don't know that Peter Rigoney worked any then; he is a laborer; he kept a porter shop; they kept a few boarders; I don't think Peter was at the head of the establishment; I think Mrs. Rigoney was; I did not know they intended keeping boarders when the account was opened; I learned it right after the 8th of April. * * They had no family except an adopted daughter and the boarders."

On motion of the defendants the court entered a judgment of nonsuit.

In delivering the opinion of the court, Judge Ryon said:—

"In order to change the policy of the law it is necessary for the plaintiff to bring himself within the exception of the Act of 1848, and prove that the articles were purchased by the wife or some one for her in her name, and that they were necessary for the support and maintenance of her family, and that her husband was insolvent or refused to support her and her family, or that he was living away from her and refused to support her. When the husband, as in this case, was a laboring man and living with his family, and was able to support them, and was industrious, the wife's purchases were as the agent of her husband, and the law will not raise any inferences that the husband did not supply suffi-

cient means for a proper support of his family. In the case before us the evidence shows nothing more than a case of sale of goods in the ordinary way, and a charge to both husband and wife. If this is sufficient to charge the wife's estate, it is difficult to imagine a state of facts where the wife's separate estate might not be charged."

The plaintiff removed the record to the Supreme Court and assigned the entry of the judgment of nonsuit for error.

L. Bartholomew and *W. R. Smith*, for plaintiff in error, referred to Married Woman's Act of April 11th 1848, sect. 8, Pamph. L. 536, 1 Br. Purd. 1006, pl. 15.

G. E. Farquhar and *F. W. Hughes*, for defendants in error, cited Heugh *v.* Jones, 8 Casey 432; Glyde *v.* Keister, Id. 85; Robinson *v.* Wallace, 3 Wright 129; Mohney *v.* Evans, 1 P. F. Smith 80; Parke *v.* Kleeber, 1 Wright 251.

The opinion of the court was delivered, March 17th 1873, by

SHARSWOOD, J.—Before the passage of the Act of April 11th 1848, Pamph. L. 536, the plaintiff would have had no case; not against the wife, for she could bind herself by no contract, nor against the husband, on account of the misjoinder of the wife. The husband could be made liable only for necessaries sold to the wife upon her implied authority as his agent, in like manner as when she made contracts in the course of a business, carried on with his express or implied consent: Nutz *v.* Reutter, 1 Watts 229; Jacobs *v.* Featherstone, 6 W. & S. 346; Alexander *v.* Miller, 4 Harris 215; Williams *v.* Coward, 1 Grant 21. It is by the eighth section of that act, that suit is authorized against husband and wife for the price of necessaries for the support and maintenance of the family of any married woman, and the act provides that on a judgment in such action, the plaintiff shall have execution in the first instance against the husband alone, and if no property of the husband be found, an *alias* execution may issue, to be levied and satisfied out of the separate property of the wife. It is not necessary, in order to entitle the plaintiff to a judgment, that he should prove that the husband has no property, or is insolvent, or that he has refused to provide for his wife and family. He may have ample property, out of which the debt may be paid on the first execution. It is only necessary, before judgment can be rendered against the wife in such joint action, that it should be proved that the debt sued for was contracted by the wife, and for necessaries for the support of the family of the husband and wife —the word "or," used in the act, having been construed to mean "and": Murray *v.* Keyes, 11 Casey 384; Parke *v.* Kleeber, 1 Wright 251. The book entries were not conclusive evidence of a

joint contract by the husband and wife. There was evidence that the goods were purchased by the wife, and on her credit. The question, whether any, and if any, how much were necessaries for the family, was for the jury.

Judgment reversed, and *venire facias de novo* awarded.

McCue *versus* Ferguson.

1. It is not competent in slander to prove by the opinion of the witness, the averment that words spoken in the third person, were spoken of the plaintiff.
2. When the words are spoken in the second person, to whom they were addressed of a number present is a question of fact, and if the name of the person is not used it is necessarily dependent upon opinion.
3. In slander the defendant put in a plea of justification and afterwards withdrew it; on a second trial he testified that he had not said that the words were true. The withdrawn plea of justification was not evidence in contradiction of his statement.
4. Rangler v. Hummel, 1 Wright 130, affirmed and distinguished.

March 11th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Luzerne county:* No. 258, to January Term 1873.

This was an action of slander, brought August 9th 1869, by Ettie Ferguson against Richard McCue; the words imputed want of chastity of plaintiff.

The case was tried June 17th 1871, a verdict found for the plaintiff for $1700 and a new trial granted. It was again tried February 13th 1872; the defendant filed a plea of justification; the verdict was for the plaintiff for $2333, and a new trial again granted.

The plaintiff, on the 28th of October, by leave of the court, withdrew the plea of justification and pleaded "not guilty."

The case was again tried October 29th 1872, before Harding, P. J.

The plaintiff testified, that in June 1869, she was at the office of Alderman Jay in Scranton; the defendant came there to go bail for some persons. "He said to me, 'You keep a damned (disreputable house), and it is damned easy to prove it,' Mrs. Flynn and her daughter, Mrs. Mucklow, P. J. Collins and Norton Wolcott were present; so were my mother and myself. * * * McCue stopped, turned around on the step and looked me full in the face and made use of the words already stated."

On cross-examination she said that her mother had had Mrs. Flynn arrested, and she and her mother had gone to the alderman's office to have them bound over. The plaintiff offered in

evidence the plea of justification, which had been filed and withdrawn; the court rejected the offer.

Another witness testified: "McCue said to Ettie," the same words which plaintiff testified to. The plaintiff having rested, the defendant testified, that he had addressed the words to Mrs. Ferguson and not to the plaintiff.

On cross-examination he said, "I never said this assertion about her was true in person; never said the words were true as to the plaintiff and her mother. I believe I said they kept the stock or the stock kept them."

The defendant proposed to ask Bridget Flynn, who was present when the words were spoken, to whom she thought the words were addressed. This was objected to by the plaintiff, on the ground that speaking the words was a fact, and while the time, place and manner of the speech were evidence, the opinion of the witness was not competent.

The court rejected the offer and sealed a bill of exceptions.

The plaintiff in rebuttal offered in evidence the plea of justification; it was objected to by the defendant, admitted by the court and a bill of exceptions sealed.

The defendant was recalled and on cross-examination plaintiff asked him if he had subpœnaed a number of witnesses to support the plea of justification. The defendant objected to the question, it was admitted, and a bill of exceptions sealed.

The court, amongst other things, charged as set out in the third assignment of error as given below.

The verdict was for the plaintiff for $1500.

The defendant took out a writ of error, and assigned for error:

1. Refusing to allow defendant to prove by bystanders to whom the words were addressed.

2. Admitting in evidence the withdrawn plea of justification.

3d. In charging the jury:—

"Whatever may be the rule elsewhere, in this country it is not competent for a witness to state to whom he understood the words charged in the declaration to apply. He can testify only to facts or declarations; his understanding of the intention of a party is not evidence; it is a matter resting entirely in his own mind, and cannot be disproved. In short, it is solely the province of the jury to draw such conclusions from the facts or declarations testified to, as they shall conscientiously believe to be warranted. In other words, *twelve* men, and not *one*, must determine who was meant.

"While it is conceded that such is the rule applicable to testimony sought to be introduced in aid of a plaintiff's case, where the purpose is to support an innuendo by the opinion of a witness, still, it has been ably argued on the part of the defence that, as the injury alleged to have been inflicted depends entirely upon the

understanding which the bystanders got as to the person meant when the words were spoken, therefore, the opinion of the bystanders upon this point, is not only material, but competent for the consideration of the jury. We must decline so to charge you."

H. W. Palmer (with whom were *F. Gunster* and *W. W. Ketcham*), for plaintiff in error.

C. Smith (with whom was *A. H. Winton*), for defendant in error. —It was the province of the jury, not of the witness, to state facts: Rangler *v.* Hummel, 1 Wright 133; Van Vechten *v.* Hopkins, 5 Johns. R. 211; Murray *v.* Bethrons, 1 Wendell 196; Gibson *v.* Williams, 4 Id. 320; Beardsley *v.* Maynard, Id. 337; 2 Starkie on Evid. 261.

The opinion of the court was delivered, March 17th 1873, by

SHARSWOOD, J.—It was certainly settled in Rangler *v.* Hummel, 1 Wright 133, that in an action of slander it is not competent to prove the averment that the words were "spoken of and concerning the plaintiff," and thus aid the *innuendo* by the opinion of a witness that the defendant meant the plaintiff in the word used. The authorities relied upon were Van Vechten *v.* Hopkins, 5 Johns. 235; Gibson *v.* Williams, 4 Wend. 320; and Snell *v.* Snow, 13 Metcalf 278. Later cases are in conflict with these decisions: Miller *v.* Butler, 6 Cushing 71; McLaughlin *v.* Russell, 17 Ohio 475; Smawley *v.* Stark, 9 Ind. 388; Tompkins *v.* Weisse, 1 Sand. 458. We do not mean, however, to cast any doubt upon Rangler *v.* Hummel, but to adhere to and re-affirm it. We think that there is a plain distinction to be drawn between that and all the other cases cited and the one presented on this record. They were all cases of the slander of an absent person. The opinion of a witness could only be as to the meaning of the words used, of which, when all the facts and circumstances were given in evidence, the jury would be as good judges as any witness. But when the words are in the second person, addressed to some one present, the question to whom addressed is a question of fact, necessarily dependent upon opinion more or less distinct. If the name of the person addressed is not used the bystanders can only have an opinion as to who was meant to be addressed, and this may depend upon many things in the voice, eyes, and gestures, of the utterer. Two witnesses for the plaintiff below testified that the words were addressed to her, but however positive was their testimony, it was after all, nothing but their opinion. It was not an opinion necessarily formed from the interpretation of the words used. The question should have been permitted to be put in the first instance, and if, upon the cross-examination, it had appeared

that the opinion was grounded merely on the words used, the jury should then have been instructed to disregard it.

We think, also, that there was error in the admission in evidence of the plea in justification. When offered originally, the learned judge was perfectly right in rejecting it—for having been withdrawn by leave of the court it was no longer any part of the record—it was as though it had never been entered. Nor did McCue say anything which opened the way for it in rebuttal. When he testified that he never said the assertion was true about the plaintiff, it could not be tortured to refer to the formal plea put in by his attorney. He might have been asked, whether he had ever instructed his counsel to plead in justification, and if he denied it, perhaps it might have been contradicted by evidence of such instruction. But the plea itself was inadmissible to prove any such instruction.

Judgment reversed and *venire facias de novo* awarded.

Bolin *versus* Connelly.

1. Benedict sold land in 1850 to Timmons, who in same year sold part to Burns, he in same year assigned to Connelly, who paid all the purchase-money of the part to Timmons in 1854 but did not take possession. Benedict *conveyed* to Timmons in 1855; he *conveyed* to Whitmore in the same year. In 1865 Connelly brought ejectment on his equitable title against Whitmore, which was indexed under the Act of April 22d 1856. Whitmore conveyed to Bolin *pendente lite;* Connelly obtained a verdict. In ejectment by Bolin against Connelly, *held*, that Bolin was concluded by the one verdict against Whitmore, being in privity with him and the former ejectment being notice.

2. Peterman *v.* Huling, 7 Casey 432; Seitzinger *v.* Ridgway, 9 Watts 496, followed.

March 11th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Luzerne county:* Of January Term 1873, No. 264.

This was an action of ejectment brought April 9th 1870, by Michael Bolin against John Connelly, for one acre of land in Pittston.

The cause was tried January 14th 1873, before Harding, P. J.

The evidence of the plaintiff was as follows:—

The premises were part of a lot of five acres, which prior to March 1850, was owned by Thomas Benedict; he about that time sold to Terrence Timmons. On the 13th of March Benedict conveyed the five-acre lot to Timmons.

On the 6th of June 1855, Timmons conveyed 1⅞ acres, including the premises in dispute, to Thomas Whitmore; the deed

[Bolin v. Connelly.]

was recorded December 17th 1855. On the 19th of June 1867, Whitmore conveyed the same 1⅞ acres to Bolin the plaintiff.

The defendant gave in evidence an article of agreement between Timmons and Barnard Burns, dated March 2d 1850, for the land in dispute, the consideration being $240, to be paid in annual instalments of $40 with interest. Burns paid one instalment, and on the 28th of October 1850, assigned the agreement to Connelly the defendant. In January 1854, Connelly paid the balance of the purchase-money to Thomas Benedict, the authorized agent of Timmons, but no deed was ever made to him.

On the 25th of September 1865, John Connelly brought an action of ejectment for the land in dispute against Thomas Whitmore, Thomas Benedict and Terrence Gaffeney; the writ was served on all the defendants. This action was indexed against all the defendants under the Act of April 22d 1856, sec. 2, (Pamph. L. 532; 1 Br. Purd. 537, pl. 24). On the 25th of February 1870, a verdict was rendered in favor of the plaintiff, Connelly, for the land described in the writ, and judgment was entered on the verdict, March 18th 1870.

On the present trial Connelly, under objection and exception, testified: "I gave in evidence on that trial this contract and these receipts. It was an equitable ejectment, and the contract was used for the purpose of having specific performance of it had. I had paid for the land in full; I brought that ejectment to obtain possession of the land."

The plaintiff, in rebuttal, gave evidence that Timmons was in possession when Whitmore purchased; several tenants had lived there; Connelly was not in the neighborhood; Gaffeney lived in the house once.

The court after going over the facts, charged:— * * *

"This showing, gentlemen, gives quite another aspect to the present case. The counsel for the plaintiff, in their argument to the court, request us to charge you that there is no evidence in the case showing that Thomas Whitmore, the vendor of the plaintiff, had any knowledge at the time of his purchase from Timmons of the contract of the latter for the sale of the land to Burns, and of the transfer of that contract to, and consequent claim by, the defendant here, to the land, and that, therefore, Whitmore is to be regarded in law as an innocent purchaser without notice; and further, that having thus acquired a good title to the land in question, which he subsequently conveyed to the plaintiff, the latter is entitled to recover.

"In answer to this request we say to you [if you are satisfied of the correctness of the defendant's testimony as to what formed the basis of his action of ejectment against Whitmore, Benedict and Gaffeney, and as to what was then actually in issue, that action is to be regarded in law as a bill in equity, or as having

taken the place of a bill in equity, and not as a possessory ejectment at common law. Moreover, the verdict and judgment therein being a verdict and judgment in ejectment upon an equitable title, was conclusive between the parties, and a bar to any subsequent ejectment, so far as they were concerned, for the same land. And the fact that there is no evidence in the present case, that Thomas Whitmore was originally a purchaser with notice, is not at all material now.

"His rights, whatever they may have been, were passed upon in the equitable ejectment between himself and co-defendants on the one side, and the defendant here on the other. The vital point, as we understand the law, depends not so much on the character of that verdict, that is, whether it was conditional or otherwise, as upon the actual matter in issue. If, therefore, it has been clearly and satisfactorily shown that the equitable title was then directly in issue and decided upon, we repeat, it was conclusive between the parties. The plaintiff here, a subsequent vendee of Whitmore, cannot now try over again the very equity involved in, and settled by that case.] * * *"

The verdict was for the defendant.

The plaintiff removed the record to the Supreme Court.

He there assigned for error the part of the charge in brackets.

E. S. Osborne (with whom was *C. S. Stark*), for plaintiff in error.—In action of ejectment brought for land under articles of agreement, and paid for, one verdict against the title claimed is not conclusive; because no conditional verdict could be required; and therefore, nothing like a decree in equity for specific performance: Seitzinger *v.* Ridgway, 9 Watts 496; Brown *v.* Nickle, 6 Barr 391; Taylor *v.* Abbott, 5 Wright 352; Peterman *v.* Huling, 7 Casey 432.

D. R. Randall, for defendant in error.

The opinion of the court was delivered, May 17th 1873, by

AGNEW, J.—Michael Bolin, the plaintiff, bought *lite pendente*, and therefore with notice; the ejectment of Connelly, against Whitmore to November Term 1865, being indexed according to the requirement of the Act of 22d April 1856. The difficulty he encountered in this action was the fact that Connelly, the plaintiff in that action, and as assignee of Barnard Burns, the vendee of Terrence Timmons, held an equitable title only, upon which he recovered, the parol evidence showing that it was the only title he set up. No evidence was given to show that Whitmore, the defendant in that action, and grantor of Bolin, the plaintiff in this, set up any defence, other than non-payment of the purchase-money. In this state of the case the recovery of Connelly in the ejectment

of 1865 was final, according to the doctrine of Seitzinger *v.* Ridgway, 9 Watts 496 and Peterman *v.* Hulings, 7 Casey 432. Had Whitmore in that trial set up the deed from Terrence Timmons to himself as a purchaser for a valuable consideration, and without notice of the sale of Timmons to Barnard Burns, and that he had duly recorded his deed, a different question might have arisen in the trial of this case. But as no such issue was presented and tried in the former ejectment, we must presume now, that Whitmore failed to set up the defence because he knew then it would not avail him, and therefore defended against the plaintiff's equity alone. Bolin, the present plaintiff, standing in privity with Whitmore, and having notice of the pendency of the former ejectment when he bought, stands now in no better situation than Whitmore. The verdict and judgment in the former ejectment were therefore final, and now estop the plaintiff from a new trial.

Judgment affirmed.

Palmer *versus* Wilkinson.

1. In a scire facias on recognisance of bail in an appeal from an award of arbitrators, under "*nul tiel record*," the defendant cannot set up that the costs of the suit were not paid when the appeal was taken
2. This plea puts in issue only the existence of the record recited in the writ.
3. When the non-payment of costs on appeal is by the exclusive fault of the prothonotary in withholding a knowledge of part of them, the payment of the omitted part may be enforced by attachment.
4. If no objection be made to the irregularity of the appeal and the appellant secures another trial, it is too late for him or his surety to interpose that to a recovery on the recognisance.

March — 1873. Before READ, C. J., AGNEW, SHARSWOOD, and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Bucks county:* No. 250, to January Term 1873.

This was a scire facias sur recognisance of bail, brought to December Term 1870 of the court below, by Edward Palmer against Daniel B. Emerick and James M. Wilkinson. Emerick was not summoned, and as to him the suit was discontinued.

To December Term 1867, Palmer had brought an action of assumpsit against Emerick; the suit was arbitrated and an award made, February 8th 1868, for the plaintiff for $117.16. The record showed that the docket costs were $15.50, and the plaintiff's bill of costs $31.76. On the 28th of February the defendant Emerick paid the docket costs $15.50, and appealed and entered into recognisance in $100 with James M. Wilkinson as his surety. The case was tried on the appeal and a verdict was found for the plaintiff for $160.69.

The scire facias was afterwards issued; it also was arbitrated, and an award found for the plaintiff; the defendant Wilkinson appealed and pleaded "Nul tiel record."

There were eight reasons alleged for sustaining the plea.

The 6th was: "The recognisance was illegal, as was the appeal, because the former was taken and the latter entered without the payment of accrued costs."

The court held all the other reasons insufficient, but for the 6th sustained the plea and entered judgment on it for defendant, Ross, P. J. saying:—

"It appears from the record that but a portion of the accrued costs, taxed at the time of appeal, were paid when the appeal was entered, and that the residue were left unpaid, and are unpaid at this date. The appeal therefore was never legally taken. It is a condition precedent to an appeal that the accrued costs should be paid in cash: Ellison *v.* Buckley, 6 Wright 281. This was not done. The appeal was in law not perfected. It fails; and the recognisance, one of its incidents, is void. This is an insuperable difficulty; it appears upon an inspection of the record, and sustains the plea of nul tiel record."

The plaintiff took a writ of error and assigned for error the entering of judgment for the defendant.

L. B. Thompson, for plaintiff in error.—The plea put nothing in issue but the recognisance: Cooper *v.* Gray, 10 Watts 442; Burkholder *v.* Keller, 2 Barr 51.

H. Yerkes, for defendant in error.—There was no appeal taken from the award, because the costs were not paid and therefore the recognisance a part of the record is void; to a void record "Nul tiel record," is a good plea: Donley *v.* Brownlee, 7 Barr 109; Miller *v.* Fees, 2 Penna. L. J. R. 242; Hull *v.* Russell, 4 Id. 129.

The opinion of the court was delivered, May 17th 1873, by

MERCUR, J.—This was a sci. fa. sur recognisance. The plaintiff pleaded nul tiel record, and assigned eight reasons therefor. The court sustained the sixth reason, and entered judgment in favor of the defendant. A prior suit had been pending between the plaintiff and one Emerick, in which the plaintiff obtained an award before arbitrators. Upon the twentieth day thereafter Emerick paid to the prothonotary all the costs except the plaintiff's bill, appealed from the award, and with Wilkinson, the present defendant, entered into a recognisance. That case was subsequently tried, and the plaintiff recovered a verdict and judgment for a larger sum than the award. Thereupon the plaintiff issued this sci. fa. upon the recognisance.

The ground upon which the court sustained the plea was, "that

the recognisance was illegal, as was the appeal; because the former was taken, and the latter entered, without the payment of accrued costs."

It is true one of the requirements of the statute to perfect an appeal from the award of arbitrators is that all the costs that may have accrued in the suit shall be paid. This fact, however, cannot be inquired into under the plea of *nul tiel record*. The writ of scire facias is not set forth in the paper-book, yet it is no part of the writ to recite the amount of costs that had accrued prior to the appeal, nor to aver anything in regard to their payment or non-payment. This plea merely puts in issue the existence of the record as recited in the writ, and therefore is proper only where there is either no record at all, or one different from that upon which the plaintiff has declared: 1 Chit. Plead. 485; Burkholder *v.* Keller, 2 Barr 51. The non-payment of a part of the costs was not admissible in evidence under the pleadings. It did not contradict the existence of the record as recited, nor that it differed therefrom. This plea puts in issue nothing but the recognisance, the rest being merely inducement; and if the variance is material it should be specially pleaded: Cooper *v.* Gray, 10 Watts 442.

When the taxed costs have not all been paid, through the fault or negligence of the party appealing, the appeal may be stricken off upon the application of the opposite party; but where their non-payment is caused by the exclusive fault of the officer in withholding the knowledge of the existence of a portion of them, the payment of the omitted portion should be enforced by attachment: Fraley *v.* Nelson, 5 S. & R. 234; Carr *v.* McGovern, 16 P. F. Smith 457.

If, however, no objection is made to the irregularity of the appeal, and the party appealing effects his object by securing another trial, it is then too late for him or his surety to interpose such an irregularity as a bar to a recovery upon the forfeited recognisance.

The ground of which the learned judge predicated his action being untenable, and being unable to discover in the other reasons assigned to sustain the plea any cause to sustain the judgment, it must be reversed.

Judgment reversed, and judgment is entered in favor of the plaintiff.

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The Farmers' Mutual Insurance Co. *versus* Taylor for the use of Grow.

1. An application was made to the agent of an insurance company for a risk of $4000; the agent in forwarding the application said if the company would not take $4000, he would place $1000 in another company of which he was agent; the secretary said he would take but $3000, which was placed in the first company and $1000 in the other, both policies being issued at the same time: the conditions of first company avoided the policy unless other insurance were *immediately* notified to the secretary and endorsed on the policy; eight months after and before any loss, the *agents* endorsed the other insurance on the policy and notified the company, who made no objection; the agents wrote policies for the company, to be countersigned by the agents. *Held*, in an action to recover for a loss, there was evidence for the jury that the company had notice of the additional insurance when their policy was issued.

2. The company could not with knowledge of the facts retain the premium and withhold their objections till after a loss.

3. A policy was to be void if assigned without the written approval of the secretary. It was assigned and an approval signed by the agent "for secretary;" the agent was accustomed to approve assignments and report monthly to the company on blanks furnished for that purpose by the company; this assignment was immediately reported in addition to the monthly reports. *Held*, that the policy was not avoided after loss, by the assignment.

4. The agent informed the secretary the next day after the loss. This was sufficient notice.

5. A statement of loss may be waived by the company, and if there be evidence from which a waiver may be inferred it is for the jury. Evidence of waiver in this case sufficient to go to the jury.

6. If a company expressly gives an agent powers outside his written authority, or encourages him to exercise them for a long time and ratifies them, so as to induce the public to rely on his enlarged agency, they cannot after a loss fall back upon his written authority to avoid acts done by their encouragement in the general scope of the business.

7. The public is justified in presuming that such continued acts are within the agent's authority.

8. The acts and declarations of the general agent and adjuster of an insurance company in the scope of his employment communicated to the insured, are admissible in evidence.

March 11th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Susquehanna county:* No. 133, to January Term 1873.

This was an action of covenant on a policy of insurance brought July 20th 1870, by David Taylor to the use of F. P. Grow against the Farmers' Mutual Fire Insurance Company, to recover for loss sustained by the plaintiff by the burning of his property insured by the defendants.

The cause was tried April 16th 1872, before Morrow, J.

C. L. Brown testified that he and Billings Stroud were agents for the defendants in 1868, and had been for some years.

Stroud testified that he had been their agent for some years before Brown was united with him.

[Farmers' Insurance Co. v. Taylor.]

Both witnesses then proved the policy which was issued October 8th 1868, from the defendants to D. Taylor, Jr., and which was given in evidence, to wit:—

"THE FARMERS' MUTUAL FIRE INSURANCE COMPANY OF PENNSYLVANIA, by this policy of insurance, in consideration of seventy dollars, &c., do insure David Taylor, Jr., of Owego, &c., against loss or damage by fire, to the amount of three thousand five hundred dollars, on the following property as described in application and survey No. 34,618, which is hereby declared to be part of this policy and a warranty on the part of the assured, viz.: On his frame hotel building, with hall, woodhouse and kitchen attached, situate detached in Glenwood, Susquehanna county, Penn., $3000. On his frame hotel barn, &c. 'Other insurance in Lycoming of $1000, in Imperial of London $1000.'

STROUD & BROWN."

"And the said company do hereby promise and agree to make good, &c., all such immediate loss or damage, &c., to be paid within three months after notice, proof and adjustment thereof, in conformity to the conditions annexed to this policy: Provided always, that in case the assured shall already have any other insurance against loss by fire on the property hereby insured, not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect; and the assured hereby covenants and engages that the representation given in the application for this insurance is a warranty on the part of the assured, &c.

"And that if any fact or circumstance shall not have been fairly represented; or if the said assured, or his assigns, shall hereafter make any other insurance on the same property, and shall not give immediate notice thereof to the secretary and have the same endorsed on this instrument, or otherwise acknowledged by him in writing, then this policy shall cease and be of no effect. * * *

"*And it is moreover agreed and declared*, that this policy is made and accepted in reference to the application, also the conditions hereto annexed, which are hereby made a part of this policy, and to be used and resorted to, in order to explain the rights and obligations of the parties hereto.

"This policy shall not be valid until countersigned by the duly authorized agent at Montrose, Pa.

"In witness whereof, the said Farmers' Mutual Fire Insurance Company have caused these presents to be sealed with their seal, and signed by their President and Secretary, at their office, in York, Pennsylvania. H. KRABER, D. STICKLER,

[L. S.] President. Secretary.

"Countersigned at this day of A. D. 186 Agent."

[Farmers' Insurance Co. *v.* Taylor.]

"CONDITIONS OF INSURANCE.—* * * * * * * * * *

"6. This policy shall not be assignable in whole or in part, without the written approval of the secretary, and in case of any transfer of interest in this policy, or any part thereof, either by sale or otherwise; or if the property herein insured, or any part of it, shall be transferred by any contract, or any change of partnership or ownership, whether prior or subsequent to any loss or damage to the property insured, without the written consent of the secretary, this policy shall thenceforth be void. * * *

"9. In any case where the consent of this company is granted to a transfer of the policy as collateral security, then in case of loss or damage by fire to the subject insured, the assured party, and not the mortgagee or assignee, is required to make the requisite proofs of loss.

"10. Persons sustaining loss or damage by fire, shall forthwith give notice thereof, in writing, to the secretary of the company, and as soon after as possible shall deliver a true copy of the written part of the policy, with the endorsements thereon (if any) and a particular account of the loss or damage; and they shall accompany the same with their oath or affirmation; declaring the said account to be true and just; showing also what other insurances (if any) have been made on the same property, and giving a copy of the written portion of the policy of each company with the endorsements thereon. * * *

"And said company shall in no case be deemed to have waived a full, literal and strict compliance with, and performance of each and every of the terms, provisions, conditions and stipulations in this policy contained, and hereto annexed, to be performed and observed by and on the part of the insured, and every person claiming by, through or under them, unless such waiver be express, and manifested in writing, under the signature of the secretary of said company."

This assignment, endorsed on policy, was admitted by the court after objection by defendants that it was without the approval of the secretary, after hearing the evidence on the subject, as hereafter stated, and sealing a bill of exceptions:—

"For value received, I hereby transfer, assign and set over unto F. P. Grow and his assigns, all my title and interest in this policy, and all advantage to be derived therefrom.

"Witness my hand and seal this 14th day of November 1866.

"DAVID TAYLOR, Jr. [SEAL.]

"Sealed and delivered in presence of Approved.

"DAVID TAYLOR. STROUD & BROWN, for Secretary."

Stroud testified: "We had authority to make transfers and inform the company of what we had done in our monthly reports—made first of each month. We made these transfers for three or

four years and reported to the company, and our reports were approved. If not, they called our attention to such matters as they would not approve. I think I signed assent of secretary, to policy before this. We reported this to the company the day of the date of this assignment, our books will show. Think it was written authority to make these assignments."

C. L. Brown testified: "This is my signature, approving this assignment. They sent us blanks to fill out, making reports of such assignments as this. This assignment was reported and no objection made until after the fire. We were in the habit of making such assignments as this, and report to the company. They were not blanks for making monthly reports, but for reports of cases where we approve assignments. This case was reported to the company. I notified the company the same day I approved of the assignment. It was the 21st of November 1868. The notice was by mail."

The agents' certificate of appointment was as follows:—

"No. 92. Stroud & Brown, Agents.

"The Farmers' Mutual Life Insurance Co., of York, Penn'a.

"This certifies, That Messrs. Stroud and Brown, of Montrose, county of Susquehanna, and state of Pennsylvania, have been duly appointed as agents of The Farmers' Mutual Fire Insurance Company, of York, Pa., and are authorized to receive applications, premium-notes and cash premiums for said company, agreeably to the by-laws and instructions given and furnished to them by said company, from time to time, through their secretary or general agent. This authority of the said Stroud & Brown, nevertheless, is subject at all times to be revoked by the president or secretary of the said company."

The application for the insurance described the property as set out in the policy.

To the 12th interrogatory accompanying the application, to wit, "Is the property insured?" the answer was, "No."

Following the application are these clauses:—

"And the undersigned applicant for the proposed insurance hereby covenants and agrees with this company, in case of loss, to adjust the same in accordance with the by-laws of the company, and the conditions of the policy and application. * * * Dated Glenwood, September 22d 1868. DAVID TAYLOR, Applicant,

"STROUD & BROWN, Agent. per Cafferty.

"The following questions must be answered fully and definitely by the agent, and when this is not done the application will be declined.

"1. Has this company any other insurance in this building? If so, for whom and what amount? No.

* * * STROUD & BROWN, Agent."

The plaintiff then gave evidence of the destruction of the

property by fire on the 18th of March 1870, and that the property destroyed was worth about $8000.

F. P. Grow the use-plaintiff testified, that E. R. and F. P. Grow built the buildings and sold the premises to A. F. Snover. They took a judgment for $3599.80, part of the purchase-money, to April Term 1856, which was revived against Snover October 9th 1865. Snover sold to J. Cafferty and wife; the deed was dated October 23d 1865; he took a judgment-note from them payable in instalments, for $4815, "in part payment of Glenwood hotel, on which E. R. and F. P. Grow had judgment, and defendant in Snover's judgment had a right to pay Grows;" judgment was entered on the note October 23d 1865.

On the 20th of February 1867, this judgment was assigned by Snover to E. R. and F. P. Grow. About the same time Cafferty and wife sold to D. Taylor, Jr. By an amicable scire facias between the Grows plaintiffs, and Cafferty and wife and D. Taylor, Jr., defendants; the Cafferty judgment to Snover was revived September 29th 1870.

The policy was assigned by Taylor to Grow to secure the judgment to E. R. and F. P. Grow, and whatever the parties owed them; at the time of the assignment Taylor owed them $5500.

The plaintiff gave evidence that B. F. Walker was in 1870 the agent and general adjuster of the defendants.

Plaintiff offered to prove, by C. L. Brown the agent for defenddant and others, that Grow informed him of the fire immediately after it occurred; that he accepted the information, and communicated the fact at once, by letter, to the secretary of the company; that soon after, and in consequence of said information, the company sent Walker, who was their general adjusting agent (having power to settle and pay losses), to Glenwood. That he examined the premises, the parties, &c., and informed plaintiff that he was satisfied, and would pay the policy. Then he (Walker) went to Owego, and there made up the formal proofs, for and with Taylor (the assured), and then he informed the Montrose agent (Stroud) that Taylor had made all the necessary proofs. That he would pay it. Stroud at once informed plaintiff of this, and that no further proofs were necessary: plaintiff rested upon this.

Defendant objects to the offer, on the ground that the notice of loss and preliminary proofs, being in writing, are the best evidence, and it is within the power of the plaintiff to offer the written notices and proofs.

The offer was admitted, and a bill of exceptions sealed for defendants.

Brown testified that he received from Grow notice of the loss, and notified the company of it by letter by the next mail, addressed to the secretary, and that on the 31st of March Walker came to the office of Stroud & Brown, and said they had received

the notice and that he came to adjust the loss; he went next day with a letter of introduction from witness to Grow; witness showed the policy to Walker when he came to their office.

F. P. Grow testified that Walker came to their place April 5th and made inquiries about the property; after witness had answered his inquiries he said he did not see why the loss should not be paid; told witness to get the policy from Stroud & Brown, and when he received the check to endorse the payment on the policy; he asked witness to deduct the interest; he consented to deduct six per cent. Walker said he was the defendants' general agent, and had come to adjust and pay the loss.

Stroud testified that Walker told him that he had got the proofs of Taylor's loss, that they were all satisfactory, and they would pay the loss immediately; witness told Grow of this. Walker previously to that time had settled and adjusted other losses in connection with the agency of Stroud & Brown, who were the agents of the defendants, and had made the contract of insurance; took the application, fixed the rates, forwarded to the company and received this policy.

For the defendants, Brown testified that an application for $4000 was first sent to defendants, with a suggestion that, if they would not carry so much, $1000 might be put into another company; the $1000 was put into the Lycoming, and the policy for $3000 by defendants and $1000 by the Lycoming took effect the same day. On the 10th of July 1869, Cafferty wanted more insurance; witness then took the risk for $1000 in the Imperial, and notified the defendants and the Lycoming; the words "other insurance in the Lycoming" were then written on this policy; Stroud & Brown had letters recognising acts done by them beyond the authority in their certificate of appointment; the application was forwarded to the defendants before the policy issued; it was to take effect October 23d, when all previous policies expired; when the words were added on July 10th 1869, Stroud & Brown wrote policies for the defendants, and had for several months previously; Walker knew what had been written on the policy when he was at Stroud & Brown's after the fire; the application was first for $4000; when returned, and the secretary said they would take but $3000, witness struck out "$4000," and wrote "$3000." The "Imperial" policy was issued by Stroud & Brown; the Lycoming issued their policy.

Stroud testified for the plaintiff in rebuttal, that he had knowledge of Grow's encumbrance from the time that Snover had insured down; and that the property was insured for the purpose of having the insurance assigned for Grow's benefit.

The following were points of defendants:—

2. The plaintiff having stated in his application that there was no other insurance on the property, and the undisputed evidence

being that there was other insurance, the policy issued on that application was void, and the plaintiff cannot recover.

3. The clause in the policy relative to the delivery of preliminary proofs of loss must be strictly complied with, and the declaration of Walker, the travelling agent or adjuster, that he had received the proofs, and they were all right, is not sufficient evidence of compliance with that clause of the policy nor a waiver of the same on the part of the company.

4. Stroud & Brown had no authority to endorse on the policy an approval of subsequent insurance, nor assent to a transfer of the policy to Grow.

5. Subsequent insurance, or insurance obtained upon the same day upon the property, having been obtained without the written consent of the defendants, the policy is void; and the memorandum endorsement of Stroud & Brown on the face of the policy after it was delivered to Taylor, and nearly one year after the date of the Lycoming policy, did not cure this defect.

The court after giving a synopsis of the evidence said:—

"1. [If the jury believe the evidence of F. P. Grow as to the fact that he took the assignment of the policy to secure the payment of the judgment which he and his brother held against Cafferty and wife, and that Taylor, the owner of the property, was to pay it, he and his brother had such an interest in the property, that the policy in their hands as assignees was not made void, but was good and valid, and a recovery in this case can be had, if at all, in the name of F. P. Grow, the equitable plaintiff.]

"2. [If the jury believe that Stroud & Brown had authority to make transfers of policies for this company and inform the company thereof in their monthly reports, as testified to by Stroud, and did approve of this assignment and report the same to the company, and the company acquiesced in it, the assignment was binding upon the company, for the reason that what the company did by its authorized agents was the act of the company itself.]

"3. [If the jury believe that Mr. Brown, agent of the defendants, received notice of the loss by fire from Mr. Grow at the time mentioned by him, and communicated it to the company by next mail, and B. F. Walker was general agent or adjuster for the company, and that he called on Brown about the 31st March 1870, examined the policies, afterwards examined the premises, and then went to Owego, and took the proofs of loss of Taylor, as testified to by Stroud, it was a waiver on the part of the company, of what was required of the assured by item 10 of the 'conditions of insurance,' as printed on the policy. In other words it had the same effect in law as if Grow or Taylor, or both, had done all that is required in said 10th item.]

"4. [The application and the policy must be considered together. They form but one contract, and hence if the jury be-

lieve the evidence of Brown, that at the time the application was made and forwarded, he informed the company that Taylor would like to be insured in the sum of $4000, but if they were unwilling to carry that amount, he would put $1000 in another company, that the application was returned to him, with the information that they would take $3000, and it was changed accordingly, and sent back, and the policy was issued in pursuance of the amended application, and an insurance of $1000 was placed upon the property in another company, viz.: the Lycoming —this last insurance did not invalidate the policy of the defendants. It cannot be said that it was a prior insurance, neither was it a subsequent one. Both took effect at the same time, and in pursuance of an understanding to that effect. If the defendants had notice that the sum of $1000 was to be put upon the property in another company, it would not be necessary to give immediate notice thereof to the secretary, and have the same endorsed on the policy, or otherwise acknowledged by him in writing, in order to keep the policy issued by the defendants in full force and effect. It would be useless to give the defendants notice of what had been done, when they knew beforehand it was to be done.]

"5. [If the jury believe that Stroud & Brown on the 10th of July 1869, were the agents of the defendants, and had authority to write policies for the defendants, and at that time took in good faith a risk in the Imperial of London for $1000, and wrote upon the face of the policy issued to Taylor, as follows:

"'Other insurance in the Lycoming, $1000
" " Imperial of London, $1000'

and notified the defendants of what they had done, it did not invalidate and made void the policy in question. If they had authority to write policies, their act in this case bound the company, and it was not necessary for the assured to give 'immediate notice' to the secretary of the subsequent insurance.

"Finally, if all the evidence in the case is believed, the jury would be justified in finding for the plaintiff under these instructions; but if the evidence fail to establish each and all the points to which your attention has been specifically called, then the verdict should be for the defendants.

"If you find for the plaintiff, your verdict should be for $3000, with interest for three months after 'notice, proof and adjustment of loss.']

"We refuse to affirm the defendants' 2d point, for the reasons given in the general charge.

"The 3d point is denied, provided the jury find that the notice, proof and adjustment of loss were made as claimed by the plaintiff; otherwise the point is affirmed. The plaintiff does not rely on the declaration of Walker alone, and the jury should take into

consideration all the evidence as to whether he was the agent for the adjustment of this loss. If the jury find he was, the plaintiff was relieved from that clause in the policy relative to the delivery of preliminary proofs of loss. If the jury find he was not the agent, this point is affirmed, and the plaintiff cannot recover.

"The 5th point depends upon questions of fact submitted to the jury in our general charge. If the jury find that Stroud & Brown had authority to write policies for this company, also to approve of the assignment of policies, and did approve of this assignment, and give notice to the company, &c., this point is denied —otherwise it is affirmed.

"We refuse to charge you as requested in the defendants' 6th point, for the reasons that the question whether the subsequent insurance, or insurance obtained the same day without the written consent of the defendants, and the effect of the memorandum by Stroud & Brown on the face of the policy, depends upon questions of fact, which we have submitted to you in our general charge."

The verdict was for the plaintiff for $3329.50.

The defendants took a writ of error and assigned 11 errors.

1. Admitting the assignment of Taylor to Grow in evidence.

2. Admitting the testimony of Brown in relation to notice to the company, the acts of Walker, &c.

3–7. The parts of the charge in brackets.

8–11. The answers to the points.

W. D. Lusk, for plaintiffs in error.—The authority of Stroud & Brown could not be shown by parol: Jordan *v.* Stewart, 11 Harris 248. Secondary evidence cannot be given of contents of papers without proving their loss: Carland *v.* Cunningham, 1 Wright 228. There must be knowledge to establish a waiver: Diehl *v.* Adams Co. M. Ins. Co., 8 P. F. Smith 443; Elliott *v.* Lycoming Ins. Co., 16 Id. 22. As to 3d error, a judgment-creditor has no interest in his debtor's estate: Grevemeyer *v.* Southern M. Ins. Co., 12 P. F. Smith 340. The right to recover is in the legal party, not in those entitled to the money: Irish *v.* Johnston, 1 Jones 487; Armstrong *v.* Lancaster, 5 Watts 68; Pierce *v.* McKeehan, 3 Barr 136. The assignment being without the consent of the company was void: Smith *v.* Saratoga M. Ins. Co., 1 Hill 497; s. c. 3 Id. 508; Ferree *v.* Oxford Ins. Co., 17 P. F. Smith 373; Carpenter *v.* Washington Ins. Co., 16 Peters 495. Notice of loss should have been given to the secretary in writing: Lycoming Ins. Co. *v.* Updegraff, 4 Wright 311. The application is a warranty that its statements are correct: Sayles *v.* N. W. Ins. Co., 2 Curtis 612. Parol notice does not fulfil a condition, requiring additional insurance to be endorsed in writing on the policy: Levitt *v.* Western M. & F. Ins. Co., 7 Rob. (La.) 351; Barrett *v.* Union

M. Ins. Co., 7 Cush. 175: Forbes v. Agawam M. Ins. Co., 9 Id. 470; Pendar v. American Ins. Co., 12 Id. 469; Lehigh Co. v. Harlan, 3 Casey 430. Stroud & Brown had no authority to note the insurance of the Imperial and the Lycoming on the policy: Brander v. Cola. Ins. Co., 2 Grant 470; Wilson v. Genesee Mut. Ins. Co., 4 Kernan 418; Insurance Co. v. Johnson, 11 Harris 72; Mitchell v. Lycoming Ins. Co., 1 P. F. Smith 402.

R. B. Little, for defendant in error.—The presumption is that the company ratified the acts of their agent: 3 Phillips Ev. 185; Ackland v. Pearson, 2 Campb. 601. The authority to the agents need not be in writing: Story on Agency 52, 55; Conover v. Mutual Ins. Co., 3 Denio 254; Insurance Co. v. Smith, 1 Jones 120. The acts of the company, &c., were a waiver: Inland Ins. Co. v. Stauffer, 9 Casey 404; Com. Ins. Co. v. Sennett, 5 Wright 164; Franklin F. Ins. Co. v. Updegraff, 7 Id. 350; Flanders on Ins. 541, 542. Waiver may be by the adjusting agent: Post v. Ætna Ins. Co., 43 Barb. 351; Taylor v. Merchants' Ins. Co., 9 Howard 390; Lycoming Ins. Co. v. Schreffler, 6 Wright 188; Buckley v. Garrett, 11 Wright 212. A general agent for effecting insurances has full power to insure, to renew and to receive notice of other insurances: Carroll v. Charter Oak Ins. Co., 40 Barb. N. Y. 292; Post v. Ætna Ins. Co., 43 Id. 351; Beal v. Park Fire Ins. Co., 16 Wis. 241; Gloucester Man. Co. v. Howard F. Ins. Co., 5 Gray 497.

The opinion of the court was delivered, May 17th 1873, by

MERCUR, J.—A question as to the validity of the policy is raised at the threshold of this action. It is contended that it is void by reason of the omission of the assured to give notice in his written application, of another insurance upon the same property, and to have it endorsed upon the policy. If this notice was not given to, or waived by, the company, such would be the effect. What are the facts?

Stroud and Brown, who resided at Montrose, were the agents of the company at the time this risk was taken, and had been for some three years prior; they made the contracts of insurance, fixed rates, took applications, and forwarded the same to the company. Stroud had also been an agent for the company for three or four years preceding their joint agency. They were also agents for the Lycoming Insurance Company. There was an existing insurance upon the same property in each, the Farmers' Mutual and the Lycoming, which was to expire the 23d of October 1868; for what sum does not appear. September 22d 1868, Taylor, by his agent Cafferty, applied to Stroud & Brown for an insurance of $4000 upon the property in the Farmers' Mutual, to take effect

upon the said 23d of October. Stroud & Brown forwarded the application to the secretary of the company, at the same time saying, if the company would not like to carry $4000, they could place $1000 or $1500 in the Lycoming, and would do so. The secretary replied, that he would not take the $4000, but would take the $3000. Thereupon the $4000 was changed by Stroud & Brown to $3000 in the application, and this policy was issued to Taylor for $3000, and another by the Lycoming for $1000, both to take effect upon the 23d of October 1868. The $1000 taken in the Lycoming was not mentioned in the policy, upon which this suit is brought, at the time it was issued. Strictly speaking, this insurance of $1000 was neither prior, nor subsequent, to the one taken by the plaintiff, but was concurrent. It took effect and became operative at the same time. Thus the company was notified by its own agents, that they would, if desired, take $1000 or $1500 in the Lycoming; but the reply of the secretary was in effect requesting it to be $1000, and that the plaintiff would take the residue of the $4000. The risks were both taken in accordance therewith. Subsequently, but more than eight months prior to the loss, "other insurance in the Lycoming of $1000" was written in the policy by Stroud & Brown, as agents for the company, and they notified the company of it. The defendant then made no allegation of the absence of the previous notice, nor any objection to this addition to the policy. Besides, at the time of this addition, and for several months previous, these agents wrote the policies for the company; and a clause in the policy stipulated that it should not be valid until countersigned by its only authorized agents at Montrose.

The property insured was of the value of about $8000. So far as it appears, the defendants were entirely satisfied with the acts of their agents. If the company was dissatisfied then was the time to have indicated it. If they desired to repudiate the policy, then was the time to have done so. They could not, after a full knowledge of the facts, retain the money paid for the insurance, and withhold their objections until after the loss, thereby inducing the assured to rely upon the validity of his policy. The evidence then was sufficient to submit to the jury to enable them to find that the company had actual notice of this additional insurance at the time they issued their policy, and that it was entered in writing upon the policy by the agent, and with the knowledge of the company, some eight months prior to the loss.

Next in chronological order was the assignment of the policy from Taylor to Grow. That there was sufficient consideration between them to support this assignment does not admit of a doubt. It is assailed, however, upon the alleged ground that immediate notice thereof was not given to the secretary, and the same endorsed upon the policy, or otherwise acknowledged by him in writing.

What are the facts? The assignment given in evidence, is written upon the policy, and immediately under the name of the subscribing witnesses thereto is signed "Stroud & Brown, for secretary." That was the manner in which they indicated their approval of the assignment. They testified that they were accustomed to make such assignments and report the same to the company, and had done so for three or four years. That the company sent them blanks to fill out to make reports of such assignments as this, executed with their approval. That this assignment was reported by them to the company upon the same day of its approval. This was the 21st of November 1868. The loss was on the 18th of March 1870. The report of this assignment was in addition to the monthly reports, which they made upon the first of each month to the company. We see no error in the third and fourth assignments.

The fifth and ninth assignments of error relate to the notice and proofs of loss. The uncontradicted evidence is, that Grow gave notice to Stroud & Brown, who, by the next mail, informed the company by letter addressed to the secretary. Such notice is sufficient: West Branch Ins. Co. *v.* Helfenstein, 4 Wright 490. In response to this notice, Walker, who was the general agent and adjuster of the company, came to Montrose, March 31st 1870. He called upon Stroud & Brown, inquired in regard to the fire, and said he came to adjust the loss. Upon the 5th of April he went to the place of the loss, saw Grow, had full conversation with him in regard to the property, insurance and loss. He told Grow that he came as the general agent of the company, to adjust, and to pay the loss, and did not see any reason why it should not be paid. He asked to have the interest deducted, and Grow agreed to deduct six per cent. Walker then left, saying he would go to Owego, see Taylor, and there take the proofs of the loss. A few days thereafter Walker told Stroud that he had gotten the proofs of Taylor, and they were all satisfactory, and they would pay the loss immediately. Stroud informed Grow of all this, and told him not to be uneasy, that the company would settle the loss. Grow relied upon this assurance. No evidence was given to contradict these facts, nor the presumption that the proofs were actually made as stated by the adjuster. If not made, the jury found the company waived them. The evidence justified the finding: Shaw *v.* Turnpike Co., 2 P. R. 454; Lycoming Ins. Co. *v.* Schreffler, 6 Wright 188. A particular statement of the loss may be waived by the company, and if there be any evidence from which such a waiver may be inferred it is for the jury: Franklin Fire Insurance Co. *v.* Updegraff *et al.*, 7 Wright 350; Buckley *v.* Garrett, 11 Wright 205, and cases there cited. It follows that the court did right in submitting these facts to the jury, and we discover no error in the manner of their so doing.

[Farmers' Insurance Co. *v.* Taylor.]

If an insurance company will confine the business of its agents within the limits of the special written authority given to them, it has a right to ask that it shall not be bound by any act of the agent not warranted thereby. If, however, the company itself ignores that special authority; if, outside and beyond it, it either expressly gives, or encourages an agent, to exercise great additional powers, for several years; and ratifies and confirms the same, thus holding him out to the world as rightfully exercising all those powers, thereby inducing the public to believe in, and to rely upon, his said enlarged agency, the company cannot, after a loss has occurred, repudiate his action, and fall back upon the written authority for the purpose of avoiding the legal effect of those acts, which he has done by their encouragement in the general scope of the business. The public do not see the written authority, but they do see the acts which the agent does. They know that the company ratifies them. They then have a right to presume such continued acts are within the scope of his authority, and to act upon such presumption. Such a rule is necessary to protect the people, who are obliged to transact business relating to insurance remote from the main offices of insurance companies.

The fact that Walker was the general agent and adjuster of the company, was unquestioned. His acts and declarations connected therewith, in the general scope of his employment, and communicated to Grow, were correctly received in evidence. The non-production of the written proof of loss by the plaintiff below, under the other evidence, was not fatal to his cause of action.

We think the learned judge, upon the whole, submitted the case correctly to the jury.

Judgment affirmed.

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Connay *versus* Halstead.

1. The Act of February 24th 1806, sect. 28 (*Judgments*), does not give the prothonotary *all* the powers of an attorney at law to confess judgment.
2. The prothonotary can confess judgment on warrant, only when on the instrument the amount due appears, or can be rendered certain by calculation from its face.
3. A contract was for the sale of land at $10 per acre, the quantity to be ascertained by a survey, with warrant to enter judgment. *Held*, that the prothonotary could not enter judgment on the instrument.
4. On a rule to strike off a judgment entered on the instrument, the court upon plaintiff filing a statement of the survey and affidavit of the amount due, discharged the rule. *Held*, to be error; such judgment could not be aided by evidence outside the instrument.

March 12th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Susquehanna county*. No. 26, to January Term 1873.

[Connay v. Halstead.]

The proceedings in this case were on a motion in the court below to strike off a judgment H. P. Halstead *v.* Thomas Connay, entered March 28th 1872, by the prothonotary, on the following instrument:—"

"This agreement, made, &c., the 20th day of March 1871, between H. P. Halstead, of, &c., of the one part, and Thomas Connay, of, &c., of the second part, witnesseth that the said party of the first part, his, &c., doth hereby covenant, &c., with the said party of the second part, upon payment of the purchase-money hereinafter stipulated, to grant, &c., unto the said Thomas Connay, the following described lot of land, situate, &c., bounded as follows: Beginning at north-west corner of land contracted to Martin Milon, running along same in an easterly direction to corner, in line of land contracted to Henry Shick; thence in a northerly direction along said Shick and P. M. Smith to corner, in line of land sold Ellen Mack; thence in a westerly direction along said Mack's land to corner thirty-two feet east of D. L. & W. R. Road; thence in a southerly direction to place of beginning; number of acres to be ascertained by survey, reserving, &c. And for the said lot of land, &c., the said party of the second part doth hereby covenant, &c., to pay the sum of ten dollars per acre, in the following instalments, to wit: twenty-five dollars, with interest on whole sum, on the 1st day of May next, 1871, and the balance in yearly payments of twenty-five dollars each, with interest annually, together with interest from the date hereof, payable with each instalment on the whole amount then unpaid. And in default of payment of any instalment of principal or interest more than one month, the entire sum of principal and interest shall become legally due upon the happening of such default, and the payment thereof may be enforced accordingly, by ejectment or other legal remedy.

"And the said party of the second part doth hereby authorize any attorney of any court of record in Pennsylvania to appear for me, and after one or more declarations filed as of the last, next, or any subsequent terms, to confess judgment against me for the whole amount due, according to any of the conditions or stipulations in this agreement, with waiver of inquisition and without stay of execution."

The order to the prothonotary to enter judgment was:—

"G. B. Eldred, Prot.: Enter judgment on this contract for three hundred and twelve 87-100 dollars; and issue fi. fa. to next Term. J. B. & A. H. McCollum,

"$312.87. Attorneys for Plaintiffs.

"March 28th 1872."

The paper was filed the same day.

On the 8th of April 1872, the court granted a rule to show cause why the judgment should not be stricken off.

[Connay *v.* Halstead.]

On the return of the rule the court delivered the following opinion:—

"The judgment in this case was entered upon a land contract containing a power of attorney authorizing judgment for the amount due, &c. It is objected on the part of the defendant that the amount cannot be ascertained from the paper itself, and therefore no judgment can be entered upon it. But the writing provides the mode of ascertaining the amount of purchase-money; and that is by a survey of the number of acres, the price per acre being fixed in the contract. The defendant does not allege that the quantity has not been determined by a survey, nor does he allege that the judgment has been entered for too large a sum. The writing authorizes a judgment to be entered for the amount of the purchase-money, and points out the manner of ascertaining the amount due. If the amount due has been ascertained by a correct survey and judgment has been entered for no more than is due, we think the judgment is regular and fully authorized by the writing of the parties.

"The plaintiff should file a statement of the survey, with the affidavit of the plaintiff, or some one for him, that the sum for which the judgment is entered is actually due. Upon the filing of such statement and affidavit the rule will be discharged."

The plaintiff subsequently filed a statement of the survey showing that the tract contained 30 acres and 102½ perches, with the following affidavit:—

"H. P. Halstead, the plaintiff above named, being duly sworn according to law, says that the sum for which judgment is entered in the above case is actually due and unpaid. Said defendant has never paid any part of said judgment. H. P. Halstead."

Thereupon, August 12th 1872, the rule to strike off the judgment was discharged.

This was assigned for error on the removal of the record to the Supreme Court by writ of error.

R. B. Little, for plaintiff in error.—The prothonotary can enter judgment on a warrant only for the amount which on the *face of the instrument* appears to be due: Act of February 24th 1806, sect. 28, 4 Sm. L. 278, 1 Br. Purd. 825, pl. 32. The warrant must contain a clear delegation of authority: Rabe *v.* Heslip, 4 Barr 139; White *v.* Shriver, 2 Watts 471.

J. B. & A. H. McCollum, for defendant in error.

The opinion of the court was delivered, May 17th 1873, by

Agnew, J.—By the Act of 24th February 1806, Brightly's Purdon 577, pl. 32, it is made the duty of the prothonotary upon the application of the holder of a bond or other instrument con-

taining a warrant of attorney to confess judgment, "to enter judgment against the person or persons who executed the same for the amount, which on the face of the instrument may appear to be due," &c. This act does not confer upon the prothonotary all the power of an attorney at law to confess a judgment, but only authorizes him without the agency of an attorney to enter a judgment in the way specified in the act, to wit, for the *amount* which from the *face* of the instrument may appear to be due. This would probably embrace a case where the sum due can be ascertained by calculation from the face of the writing, upon the maxim, *id certum est quod certum reddi potest.* But in this case the sum or amount due, could by no possible calculation be made to appear from the face of the instrument. It was an agreement for the sale of a tract of land by loosely-stated boundaries and no quantity stated. The price was to be at the rate of ten dollars an acre, and the number of acres was to be ascertained by a survey. Until the number should be thus determined, a matter wholly outside of the face of the paper, the amount of the purchase-money could not be known. The prothonotary had no guide, therefore, in entering the judgment. In fixing the sum he must rely upon evidence outside of the writing, and this would not be according to the letter or spirit of the act, which intended that a judgment should be entered only on the acknowledgment of the party himself contained in the writing. It is evident the law did not intend to make the prothonotary an arbitrator or umpire to determine uncertain things, and to conclude the party by his act; for by entering the judgment the party is brought into court and the judgment is final and concludes him, unless set aside or reversed. The filing of a survey and the affidavit of the plaintiff, as permitted by the court on hearing the rule to set the judgment aside, did not mend the matter; for at the bottom lay the want of authority in the prothonotary to bring the defendant into court on this writing. His act must be strictly according to the law, and is not like the general authority of an attorney at law, who may appear and confess judgment and arrange the details of the judgment.

Judgment reversed, and the writing ordered to be stricken from the file.

Bowen *versus* Goranflo.

1. In an issue, *devisavit vel non*, the executor who is also a devisee, is a competent witness in support of the will.
2. Parties claiming an estate under the same decedent, devolved on them by descent or succession, are competent witnesses in the trial of an issue to settle their rights.
3. Karns *v.* Tanner, 16 P. F. Smith 297, followed.

[Bowen *v.* Goranflo.]

March 17th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the court of Common Pleas of *Lehigh county:* No. 76, to July Term 1872.

This was a feigned issue to try the validity of a paper writing, purporting to be the will of Hannah E. Bowen, deceased. The issue was framed November 10th 1871; William A. Goranflo, the executor named in the will, was plaintiff, and Thomas Bowen, who was husband of the decedent, was defendant. William Goranflo was brother of the decedent. The will was dated April 19th 1871, and gave all her property "unto my child or children absolutely and for ever," to be paid to the child or children at the age of twenty-one years, "but if they should die before they arrive at twenty-one years leaving no issue, then I direct that all my property shall go and be divided to and among my brother and sister," &c.

The testatrix left only one child, who survived her about one month; it was dead without issue at the trial of this case.

On the trial, April 9th 1872, before Longaker, P. J., the plaintiff made the formal proof of the execution of the will.

In the course of the trial, William Goranflo, the plaintiff, was offered as a witness. He was objected to by the defendant as incompetent, being a devisee under the will.

The court admitted him to testify and sealed a bill of exceptions.

There was much evidence given as to undue influence, &c., in order to invalidate the will; the defendant submitted points the answers to which were assigned for error, but the only question considered in the opinion of the Supreme Court was the competency of Goranflo.

The verdict was for the plaintiff, and amongst other errors, the defendant on the removal of the record to the Supreme Court, assigned for error the admission of Goranflo as a witness.

J. S. Biery and *C. Albright*, for plaintiff in error, cited Act of April 15th 1869, sect. 1, Pamph. L. 30, 1 Br. Purd. 624, pl. 16; Karns *v.* Tanner, 16 P. F. Smith 297; Post *v.* Avery, 5 W. & S. 509; Phinney *v.* Tracey, 1 Barr 175; Clover *v.* Painter, 2 Id. 46; Asay *v.* Hoover, 5 Id. 37; Haus *v.* Palmer, 9 Harris 298.

R. E. Wright, Jr., and *E. Harvey* (with whom was *R. E. Wright*), for defendant in error.

The opinion of the court was delivered, May 17th 1873, by

MERCUR, J.—The first error assigned is as to the competency of the party to testify. He was both a devisee and the executor. It was admitted upon the argument, that if he had been the ex-

ecutor only, he would have been competent under the exception to the proviso of the Act of 15th April 1869, Pamph. L. 30; but inasmuch as he was a devisee also, it was argued that he was incompetent. We are not able to see the force of the reasoning nor to adopt the conclusion. The language of the exception to the Act is to make parties competent "in issues and inquiries *devisavit vel non* and others, respecting the right of such deceased owner, between parties claiming such right by devolution on the death of such owner."

This is an issue *devisavit vel non*. It is between parties claiming a right by devolution on the death of the former owner. The subject-matter is respecting the right so acquired. Thus the form of the suit, the parties thereto, and the subject-matter bring it within the exception. We see nothing in it to exclude a party who is either devisee or executor only. A union of two conditions of competency, each unquestioned by itself, will not create incompetency as its joint product. It follows that both parties claiming an estate, under the same decedent, which has devolved on them by descent or succession, are competent witnesses in the trial of an issue to settle their respective rights thereto: Karns *v.* Tanner, 16 P. F. Smith 297.

No error is assigned to the general charge, but the answers of the court to the specific points submitted are assigned for error.

We have carefully examined the whole testimony. All the points submitted are substantially answered in the general charge. It contains a clear and correct statement of the law as applied to the evidence in the case. The errors are not sustained.

Judgment affirmed.

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Seibert's Appeal.

1. At the time of a levy the defendant claimed of the sheriff his exemption; no appraisement, &c., was made by the sheriff, who shortly afterwards went out of office. At the request of defendant made the day before the sale on the vend. ex., the next sheriff, on the day of sale, had the defendant's real estate appraised. *Held*, that the defendant was entitled to his exemption from the proceeds of the real estate.

2. When the sheriff wrongfully allows an appraisement, the remedy of the plaintiff is to move to set it aside.

March 18th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Appeal from the Court of Common Pleas of *Lehigh county*: No. 296, to January Term 1873. In the distribution of the proceeds of the sheriff's sale of the real estate of Daniel Seibert.

The distribution was referred to George H. Rupp, Esq., as auditor, who reported the following facts:—

[Seibert's Appeal.]

On the 23d of September 1871, a fi. fa. was issued at the suit of Reuben Kriebel and others against Daniel Seibert. On the 28th of September, the deputy of Miller the sheriff made a levy and Seibert properly claimed the benefits of the exemption law; neither sheriff Miller nor his deputy appraised or set apart property to Seibert under his claim nor took any notice of it. A venditioni was issued, and the real estate was advertised for sale on the 8th of December 1871. Miller's term of office as sheriff expired November 11th 1871, and sheriff Faust's commenced on that day. On the day before the sale, the attorney of Seibert made a written request of Faust to appraise the property which Seibert might elect under the exemption laws; this was the first notice that Faust had of Seibert's claim for exemption. Appraisers having been appointed, they set apart to him $30.25 of personal property, and December 8th certified that the real estate was of greater value than $269.75, and that it could not be divided without prejudice to, or spoiling the whole. It was agreed on the same day by the attorneys of the respective parties, that "the above appraisement is made and allowed without prejudice to the plaintiffs."

The real estate was sold to the plaintiffs in the execution and $350 paid into court to await the defendant's claim for the exemption. The auditor in concluding his report said:—

"It may perhaps be well to say, that the principal objection urged against the claim of Seibert was, that the appraisement was made too late and worked injury to the plaintiff. How did it work injury to the plaintiff, and if it did why was there no exception taken to it? If there was an irregularity in the appraisement it should at once have been brought to the notice of the court."

He awarded to Seibert on his claim for exemption $269.75 of the fund in court.

The plaintiffs filed exceptions to the report of the auditor.

The court, Longaker, P. J., in his opinion on the exceptions, amongst other things, said:—

"If the demand for exemption was made at the time of levy (and it is quite probable it was, because the sheriff, it appears, made no levy upon the personalty), then it was the plain duty of the sheriff to make the appraisement and return it with the writ, and he having failed to do so, the incoming sheriff had no authority to make an appraisement which on the 8th day of December 1871, was absolutely void: Bowyer's Appeal, 9 Harris 210.

"For these reasons the distribution of the auditor must be set aside, and the amount distributed to Daniel Seibert must be decreed to the judgment-creditors, in accordance with the priority of their liens, * * * and the report must go back to the auditor for the further distribution."

The auditor reported in accordance with the opinion of the

court, distributing the fund after deducting expenses to the plaintiffs in the execution.

The court confirmed the report of the auditor.

Seibert appealed to the Supreme Court and assigned the decree of confirmation for error.

E. Albright, for appellant, cited Marks's Appeal, 10 Casey 37; Weaver's Appeal, 6 Harris 309; Hammer *v.* Freese, 7 Id. 257; Shaw's Appeal, 13 Wright 180; Lauck's Appeal, 12 Harris 429.

J. W. Wood and *E. J. More*, for appellees.—The remedy of Seibert is against the sheriff: Wilson *v.* Ellis, 4 Casey 238; Freeman *v.* Smith, 6 Id. 264; VanDresor *v.* King, 10 Id. 201; Hammer *v.* Freese, 7 Harris 255. An appraisement made on the day of sale is too late: Bowyer's Appeal, 9 Harris 213; Diehl *v.* Holben, 3 Wright 213.

The opinion of the court was delivered, May 17th 1873, by

AGNEW, J.—The auditor making the distribution of the proceeds of the sheriff's sale, found the fact distinctly, that on the day of the levy by the deputy sheriff, Daniel Seibert properly claimed the benefit of the exemption law. The sheriff, from some unexplained cause, omitted to make an appraisement; but on the day of sale, the new sheriff, on the application of the defendant, made the day before, set apart $30.25 of the personal property, and $269.75, to come out of the proceeds of sale of the real estate, the appraisers finding that the real estate could not be divided without prejudice. The auditor allowed the exemption, but the court below set it aside on the ground that the request to appraise came too late. In this, we think the court erred. The fact that Daniel Seibert made claim to the exemption on the day of the levy, is not disputed. The sheriff failed to perform his duty in time, but this was no fault of the defendant in the writ. He could do no more than he did. True, if the sheriff had entirely omitted to allow the exemption, the defendant had his remedy against the sheriff: Marks's Appeal, 10 Casey 36; Freeman *v.* Smith, 6 Casey 264; Wilson *v.* Ellis, 4 Casey 238. But when the sheriff finally complied with the claim, and had an appraisement made, why should we encourage litigation, and suffer the officer to be harassed with a suit, when justice can be so easily done, by allowing the defendant his right in this proceeding? It does no injury to the plaintiff in the execution, for the defendant had entitled himself to the exemption by his prompt claim. It would be doing a wrong to the defendant and to the officer to turn the defendant round to his action against the sheriff. Where the sheriff mistakenly or wrongfully allows an appraisement, the plaintiff has an easy remedy by moving the court to set aside the

appraisement. But here the defendant has entitled himself to an appraisement, and the sheriff had actually had it made, and there is no reason to withhold the money from the defendant. The decree of the court is, therefore, reversed, the defendant is allowed his exemption, to be paid out of the fund in court, and final distribution is ordered to be made, in accordance with this opinion, and the costs of the appeal are ordered to be paid by the executors of the plaintiff in the execution, out of his estate.

Swift's Executors *versus* The Beneficial Society of the Borough of Easton.

1. A beneficial society whose benefits and benevolence are confined exclusively to its contributing members is not a charitable use within the 11th sect. of Act of April 26th 1855 (Bequests to Charities).
2. Babb *v.* Reed, 5 Rawle 155, approved.

March 18th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Lehigh county:* No. 310, to January Term 1873.

This was an amicable action, filed February 8th 1873, and case stated, in which The Beneficial Society of the Borough of Easton were plaintiffs, and Edward C. Swift and Robert I. Jones, executors, &c., of Elizabeth L. Swift deceased, were defendants.

The facts agreed on the case were:—

Elizabeth L. Swift by her will, dated May 22d 1872, after giving a number of legacies to her relatives and others, bequeathed as follows:—

"Should there be any money left after paying the foregoing legacies, I desire that the same may be disposed of in the following manner. One thousand dollars to go to Walter Ross, and after he has been paid, one thousand dollars to go to The Old Easton Beneficial Society, of which my late husband was a member; and after that has been paid, one thousand dollars to go to Charles Swift, Sr., of Chicago."

The testatrix died on the 27th day of the same month of May, being less than thirty days after the execution of her will.

The constitution and by-laws of the society provide: That the object of the society was for the relief of its members when unable from bodily infirmity to pursue their ordinary avocations. Every member to pay such entrance-money and monthly dues and contributions as the society shall from time to time declare; the benefits to be distributed as should be provided by the by-laws; no person to be entitled to benefits until after one year's member-

[Swift's Executors v. Easton Beneficial Society.]

ship; no member in arrears to be in full standing nor entitled to benefits; a member might be expelled if in arrears; weekly benefits and the amount to be paid on the death of a member or his wife were specifically fixed and forfeited for misconduct. By the case stated it was agreed that: "If the court be of opinion that the said The Beneficial Society of the Borough of Easton, is a society for charitable uses, under the Act of the General Assembly of the Commonwealth of Pennsylvania, approved April 26th 1855, then judgment shall be entered for the defendants. But if the said plaintiff is not a society for charitable uses, then judgment to be entered for the plaintiff in the sum of one thousand dollars," &c.

The court (Longaker, P. J.) entered judgment for the plaintiff for $1000.

Section 11 of the Act of April 26th 1855, Pamph. L. 332, 2 Br. Purd. 1477, pl. 22, provides that, "No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible and at the time disinterested witnesses, at least one calendar month before the decease of the testator or alienor, and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee next of kin, or heirs according to law."

The defendants took out a writ of error, and assigned for error the entering of judgment for the plaintiffs.

O. H. Myers, for plaintiffs in error.—The limitation of benefits to a class does not destroy the charitable character of the society, Mayer *v.* Society, 2 Brewster's Rep. 385. He cited also Cresson's Appeal, 6 Casey 437; Price *v.* Maxwell, 4 Id. 23; Brendle *v.* German Congregation, 9 Id. 415; Wright *v.* Linn, 9 Barr 433; Miller *v.* Porter, 3 P. F. Smith 292; Taylor *v.* Mitchell, 7 Id. 209; Yard's Appeal, 14 Id. 96.

E. Allis, for defendants in error.—A society for the purpose of benevolence amongst its members only, is not a charity: Babb *v.* Reed, 5 Rawle 151; Beaumont *v.* Meredith, 2 Vesey & B. 180. To create a charity there must be a public benefit open to an indefinite number: Perry on Trusts, secs. 697-699, 710.

The opinion of the court was delivered, May 17th 1873, by

Read, C. J.—The plaintiffs in this case are a beneficial society, both in name and by the provisions of their charter, and their benevolence and benefits are exclusively confined to contributing members of the association. The members must be regularly admitted, must not be infirm, must be citizens and between the ages of twenty-one and forty-five years of age; and no person shall be

entitled to any benefits from this society until he shall have been one year a member. Each person, on being admitted a member of their society, shall pay such entrance-money and monthly dues and contributions as the society may by their by-laws from time to time declare. A member is not in full standing if in arrears for fines, contributions or monthly dues; and not entitled to benefits in sickness if in arrears for dues, contributions, or fines, for three successive stated meetings, and may be expelled for arrears of dues or fines. The amount to be paid in case of death of a member or his wife is fixed. There are other provisions showing that the benevolence is strictly a matter of contract, and may be enforced in a court of justice. The object of this society shall be the relief of its respective members when sick, or disabled by bodily infirmities to pursue their ordinary avocations. Its benevolence begins and ends at home. In Babb *v.* Reed, 5 Rawle 155, it was held that an association for the purposes of mutual benevolence among its members only, is not an association for charitable uses. This was a lodge of Odd Fellows. In Blenon's Estate, Brightly's Reports 338, the beneficial societies who were claimants under the will of the testator, as "institutions of charity and benevolence," were so considered by the auditors, which decision was reversed by the Orphans' Court, who decreed "that no friendly or beneficial society is entitled to any share in the bequest of the testator," which decree was affirmed by the Supreme Court. These decisions are the settled law of this court.

The 11th section of the Act of 20th April 1855, Pamph. L. 332, provides that "no estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor, and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin, or heirs according to law: Provided that any disposition of property within said period, bonâ fide made for a fair valuable consideration, shall not be hereby avoided."

No case comes within the English statute, of which this section is a copy in principle, unless the gift be for a charitable use, and the three cases which have been decided in this state under our act, were all charitable uses, and one of them also a religious use. Charitable uses are well understood in Pennsylvania, and the general subject has been largely discussed by Mr. Justice Strong, in The Domestic and Foreign Mission's Appeal, 6 Casey 433; Cresson's Appeal, Id. 437; and The Evangelical Association's Appeal, 11 Casey 316, and clearly fix the meaning of charitable uses in the 11th section of the Act of 1855.

Mrs. Elizabeth L. Swift made her will on the 22d of May 1872,

[Swift's Executors v. Easton Beneficial Society.]

evincing great care in distributing her property, and recollecting friends by various gifts, and towards the close of it gives the legacy of "one thousand dollars to go to the old Easton Beneficial Society, of which my late husband was a member," and died on the 27th of the same month of May.

It is clear this is not a religious use, and it seems equally clear it is not a charitable use, and if so it is a perfectly valid legacy, and must be paid by the defendants.

Judgment affirmed.

McHose *versus* Fulmer.

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19 SC 303

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21 SC 558

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1. When a vendor fails to comply with his contract, the general rule for the measure of damages is the difference between the contract and market price at the time of the breach.
2. When the article cannot be obtained in the market, the measure is the actual loss the vendee sustains.
3. McHose, a manufacturer, contracted for iron from Fulmer, who failed to comply, and McHose could not supply himself in the market. *Held*, that the measure of damage was the loss he sustained by having to use an inferior article in his manufacture, or in not receiving the advance on the contract price upon contracts he was to fill relying on Fulmer's contract.
4. Bank of Montgomery v. Reese, 2 Casey 143, recognised.

March 18th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Lehigh county:* Of January Term 1873, No. 165.

This was an action of assumpsit, brought January 25th 1872, by Henry Fulmer and Peter Uhler, trading as the Easton Iron Manufacturing Company, against Samuel McHose and others, trading as Samuel McHose & Co.

The cause of action was the following note:—

"$1237.25. Allentown, Oct. 27th 1871.

Sixty days after date we promise to pay to the order of Easton Iron Manufacturing Co., twelve hundred and thirty-seven dollars and twenty-five cents, at First Nat. Bank of Allentown, Penn., without defalcation, for value received.

SAMUEL MCHOSE & Co."

The defendants filed an affidavit of defence, to wit:—

The plaintiffs and defendants entered into a contract about the 20th of October 1871, by which the plaintiffs agreed to furnish defendants with 100 tons of pig iron, to wit: 50 tons at $30 per ton, and 50 tons at $32.50, to be furnished in the months of October and November 1871. In October plaintiffs in pursuance of said contract did furnish to defendants 40 tons of pig iron to wit: 30 tons at $30 per ton, and 10 tons at $32.50, making total of $1225.

the amount for which the note in this case was given with interest added.

The residue of the iron according to said contract was to be furnished in the month of November, and the defendants being engaged in the manufacture of iron, relying upon the undertaking of plaintiffs, made no other engagement for iron. In the month of November the defendants gave notice to the plaintiffs that they were in need of said iron to wit, the 60 tons which the plaintiffs neglected and refused to furnish, although often requested so to do, in the months of November and December. The contract for payment was notes at 60 days.

The defendants therefore say, that by the refusal of the plaintiffs to furnish said iron as per contract, they (the defendants) have suffered damage to an amount exceeding the whole amount of the note in which suit is brought.

The nature of the damage sustained by defendants is as follows:

The defendants are the owners of the Hope Rolling Mill, situated in the city of Allentown, and are carrying on the business of making merchant bar iron, and employ about sixty hands, and had heavy contracts for iron to be furnished in November and December. By the neglect and refusal of plaintiffs to furnish said iron, defendants were obliged to get an inferior quality of iron than that which plaintiffs were to furnish, in order to carry on the business of said mill, and being inferior they lost the contract with the parties with whom they had contracted for the sale and delivery of iron, and sustained other serious damage and loss by the breach of said contract on the part of plaintiffs.

They afterwards made a supplemental affidavit of defence, "that by reason of the plaintiffs neglecting and refusing to comply with the contract set forth in said affidavit of defence, the defendants were unable to get the same quality of iron, and iron had advanced in price one dollar per ton, which would make $60 damages in price of iron.

"The defendants further say, that the loss of contracts and in the sale of manufactured iron greatly exceed the amount of the note on which suit is brought. That defendants not being able to make good iron for the parties with whom they had contracts, they sustained losses as follows: With Brinton & Johnson, of Philadelphia, they sustained losses in iron returned, $639.47, which amount is composed of labor and freight in sending and returning said iron, and the damages for the loss of the contract with said Brinton & Johnson will exceed the sum of $600. Making a total of more than the amount of said note. That they have suffered other damages by reason of the failure of said plaintiffs to comply with their contract."

On the 17th of July 1872, the court (Longaker, P. J.) entered

judgment for the plaintiffs for $1218.45, the amount of the note and interest, "less $60 claimed as the appreciation of the iron."

The defendants removed the record to the Supreme Court and assigned the entering of the judgment for error.

J. D. Stiles, for plaintiffs in error.

E. J. More, for defendants in error.

The opinion of the court was delivered, March 24th 1873, by

SHARSWOOD, J.—When a vendor fails to comply with his contract the general rule for the measure of damages undoubtedly is, the difference between the contract and the market price of the article at the time of the breach. This is for the evident reason that the vendee can go into the market and obtain the article contracted for at that price. But when the circumstances of the case are such that the vendee cannot thus supply himself the rule does not apply, for the reason of it ceases: Bank of Montgomery *v.* Reese, 2 Casey 143. "It is manifest," says Mr. Chief Justice Lewis, "that this (the ordinary measure) would not remunerate him when the article could not be obtained elsewhere." If an article of the same quality cannot be procured in the market, its market price cannot be ascertained, and we are without the necessary *data* for the application of the general rule. This is a contingency which must be considered to have been within the contemplation of the parties, for they must be presumed to know whether such articles are of limited production or not. In such a case the true measure is the actual loss which the vendee sustains in his own manufacture, by having to use an inferior article or not receiving the advance on his contract price upon any contracts which he had himself made in reliance upon the fulfilment of the contract by the vendor. We do not mean to say, that if he undertakes to fill his own contracts with an inferior article, and in consequence such article is returned on his hands, he can recover of his vendor, besides the loss sustained on his contracts, all the extraordinary loss incurred by his attempting what was clearly an unwarrantable experiment. His legitimate loss is the difference between the contract price he was to pay to his vendor and the price he was to receive. This is a loss which springs directly from the non-fulfilment of the contract. The affidavits of defence are not as full and precise upon this point as they might and ought to have been, but they state that the defendants below had entered into such contracts, and that they were unable to get the same quality of iron which the plaintiff had agreed to deliver, and this, we think, was enough to have carried the case to a jury.

Judgment reversed, and a *procedendo* awarded.

Meitzler's Appeal.

1. The wife or a member of the family of an absent defendant in an execution may claim his exemption for him.
2. There was conflicting evidence before an auditor, whether at the time of the levy the wife of an absent defendant had made a claim for the exemption, no appraisement was made under the claim. The auditor holding that if the claim had been made by the wife, the remedy was by action against the sheriff, declined to decide the question of the claim. *Held* to be error, and the record was remanded with directions to refer the matter to an auditor to determine the facts.

March 18th 1873. Before READ, C. J., AGNEW, SHARSWOOD, and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Appeal from the Court of Common Pleas of *Lehigh county:* Of January Term 1873. No. 261. In the distribution of the proceeds of the sheriff's sale of the real estate of William Meitzler, under an execution in which Trexler & Meitzler were plaintiffs.

The distribution was referred to John Rupp, Esquire, as auditor.

He reported that the fi. fa. was returnable to April Term 1872. On the 5th of April the land was condemned; on the 10th of April the vend. ex. was issued and the property was advertised for sale; on the 25th of April the defendant made a written claim on the sheriff for the benefit of the exemption laws; on the 1st of May, four days before the sale, an appraisement was made, the personal property appraised at $18.25, and the appraisers reported that the real estate could not be divided without spoiling the whole. The property was bought by the plaintiffs at the sheriff's sale, for $325, and $255.63 ruled into court.

He further reported that the wife of the defendant swore positively at the hearing before him, that when the sheriff made the levy, her husband was absent from home, and she made the claim for the benefit of the exemption law; the mother of the defendant testified that she was present when the levy was made, and heard the wife make the claim of the sheriff. The sheriff testified that no such claim was made on him.

He further said in his report that, in the view he took "of the case, it is an immaterial question whether any claim at all was made at the time the levy was made. This obviates the necessity of deciding the question of credibility between the witnesses. Whether any claim was made by the wife or not, the sheriff entirely disregarded it, and made no appraisement, but went on to condemn the property. Where a claim for the benefit of the exemption laws is made, and the sheriff disregards it, and neglects to make an appraisement, as he did in this case (if the claim was ever made), the defendant is not entitled to the benefit of the exemption laws out of the proceeds of sale, but his only remedy is against the sheriff in an action for damages. This has frequently

been ruled by the courts. The claim made on the 25th of April, after the property had been condemned and a vend. ex. issued, was clearly too late, and was the same as no claim at all. This is so well established that no authorities are needed to sustain it. That the appraisement made in this case on the 1st day of May was void has lately been ruled by this court in the case of Kriebel *et al. v.* Seibert. He has therefore rejected the claim of defendant for the exemption laws, and has distributed the fund in court to the lien-creditors, according to their priority, as per the annexed schedule."

After exceptions, the court confirmed the report of the auditor, and Meitzler appealed to the Supreme Court, assigning the decree of confirmation for error.

L. Smoyer and *E. Holben*, for appellant, cited Wilson *v.* McElroy, 8 Casey 82; Waugh *v.* Buckel, 3 Grant 319; McCarthy's Appeal, 18 P. F. Smith 217.

G. K. Wilson, for appellees, cited Miller's Appeal, 4 Harris 303; Bowyer's Appeal, 9 Id. 213; Hammer *v.* Freese, 7 Id. 255; Wilson *v.* Ellis, 4 Casey 238; Freeman *v.* Smith, 6 Id. 264.

The opinion of the court was delivered, May 17th 1873, by

AGNEW, J.—It has been held repeatedly by this court that the wife, or a member of the family, of the defendant in an execution who is absent from home at the time of a levy on his property, may claim his exemption for him: Waugh *v.* Bucket *et al.*, 3 Grant 319; Wilson *v.* McIlroy, 8 Casey 82; McCarthy's Appeal, 18 P. F. Smith 217. The reason of this is said to be a presumption of agency in such case for the debtor, who is absent, and incapable of protecting his interest, until it might be too late, and interfere with the execution of the writ; and the interest which the family of a debtor has in retaining the property that the law intends to secure to the family, as well as to the debtor himself. Indeed, there are cases where the exemption has been denied to him, when it was manifest the interests of his family would fail to be promoted by its allowance: Hammer *v.* Freese, 7 Harris 555; Weaver's Appeal, 6 Harris 307.

In the present case, the demand of the benefit of the exemption made by the wife at the time of the levy, is proved clearly by two witnesses. This was denied by the sheriff, who testified that not finding the defendant at home, he went after him, found him, and explained the object of his visit, and that the defendant made no claim of his exemption. After the vend. ex. had been issued, and the property advertised, the defendant made a written request for the benefit of the exemption law, on the 25th of April, and an appraisement was made on the 1st day of May, four days before the sale; the appraisers having appraised personal property to the

value of $18.25, found that the real estate was worth more than the remainder, $281.75, but that the land could not be divided without prejudice. The auditor declined to find the fact, whether the wife of the defendant had made the claim of exemption on the day of the levy, on the ground that the written claim came too late, being governed, as he states, by the decision of the court below in the case of Kriebel *v.* Seibert. That decision has been reversed in an opinion just read. We think the auditor, acting under this stress, erred in refusing to decide the question of claim. Had he done so, and found the claim of the exemption had been properly made by the wife on the day of levy, it would have brought the case within the principle of the decision just made in Seibert *v.* Kriebel *et al.*

The decree of the court is therefore reversed, and the record remanded, with an order that the case be referred to an auditor to determine the facts necessary to make a final distribution of the fund, and the costs of this appeal are directed to be paid by the appellee.

Weber *versus* Reinhard and Eisenhard, Supervisors, &c.

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1. An act (April 14th 1868) provided that in addition to taxes then collectible, owners of ore-beds in Saucon township should pay to the supervisors 1½ cents for every ton of ore mined and carried away with teams over the roads in the township, to be paid at the end of each six months and in default of payment to be collected as debts of like amount. *Held*, that the act is constitutional.

2. The court cannot pronounce a tax unconstitutional on the mere ground of injustice and inequality.

3. The owner of the land had leased it for a term of years: *Held*, that he and not the lessee was liable for the tax.

4. Durach's Appeal, 12 P. F. Smith 491; Hammett *v.* Philadelphia, 15 P. Smith 146; Washington Avenue, 19 P. F. Smith 352, followed.

March — 1873. Before READ, C. J., AGNEW, SHARSWOOD, WILLIAMS and MERCUR, JJ.

Error to the Court of Common Pleas of *Lehigh county:* No. 71, to July Term 1871.

This case was commenced March 5th 1870, before a justice of the peace, at the suit of James Reinhard and Benjamin Eisenhard, supervisors of Upper Saucon township, against Charles B. Weber, for the recovery of taxes imposed by the Act of April 14th 1868 (Pamph L. 1127).

The act provides: "That in addition to the taxes collectible under existing laws, the owner or owners of ore-beds, situated in Upper Saucon township, Lehigh county, shall from and after the

[Weber v. Reinhard.]

passage of this act, pay to the supervisors of the roads in said township one and a half cent for each and every ton of ore mined and carried away with teams over the public road, in said township, which said payments shall be made at the end of every six months after the passage of this act; and in default of payment the same to be collected as debts of like amount are collectible by law; Provided, That the said supervisors shall appropriate to the same purpose, and render an account in the same manner for the funds coming in their hands under this act, as they are required by law with respect to other funds coming to their hands by virtue of their office."

The plaintiff's claim was for iron-ore carted from the ore-beds of defendant over the public roads in said township, to wit: $37.02 for ore so removed up to October 14th 1868, and $38.08 for the same from October 14th 1868 to October 14th 1869, with interest, together amounting to $78.82. The justice entered judgment for the plaintiffs for $78.82, and the defendant appealed to the Court of Common Pleas.

The plaintiffs then filed an affidavit of claim, referring to the above-given Act of Assembly and averring that "the defendant is the owner of an ore-bed situated in said township; that since the passage of said act there has been mined and carried away with teams over the public roads in said township, from the ore-bed of said defendant, the following quantities of iron ore during the times following, to wit: From April 14th 1868, to October 14th 1868, inclusive, 2468 tons 13 cwt.; from October 14th 1868 to October 14th 1869, inclusive, 2539 tons 13 cwt.; that the tax on the first-mentioned quantity (2468 tons 13 cwt.) at 1½ cents per ton, is $37.02, and upon the last-mentioned quantity (2539 tons 13 cwt.) is $38.08; that the tax due as aforesaid, after the same became due and before the bringing of this suit, was duly demanded by said plaintiff of said defendant, but that the said defendant has neglected and refused to pay the same or any part thereof; that the sums aforesaid, with interest from the time when they respectively became due as aforesaid, to date (May 14th 1870), to wit, seventy-nine eighty-five hundredth dollars (79.85), is now due and owing in manner aforesaid by said defendant to said plaintiff."

The defendants put in the following affidavit of defence: * * *

"An act was passed by the legislature of Pennsylvania, and approved April 14th 1868, entitled 'An act authorizing the supervisors of Upper Saucon township, Lehigh county, to collect an additional road tax on ore beds,' enacting that the owners of ore beds in said township shall pay to the supervisors therein one and a half cent. for each and every tone of ore mined and carried away with teams over the public roads in said township. Said defendant is the owner of an iron ore-bed in said Upper Saucon

township, which he has let to the Bethlehem Iron Company by article of agreement dated August 18th, A. D. 1864, and said ore-bed has been ever since and is now, worked by said company, under said lease or article of agreement; said iron company mine and cart away all the ore raised from the ore-bed on said farm, and the said defendant does not mine or cart away any of the ore, nor does he keep or own any teams or wagons or horses for the purpose of carting ore from said ore-beds. The farm owned by said defendant in which said ore-bed is situated, and said ore-bed are already separately assessed and taxed as follows: Said farm is valued for the purpose of taxation at $4825, and said ore-bed at $3000. The taxes due and to be paid are as follows: Road tax on farm $19.30, on ore-bed $12; school tax on farm $14.47, on ore-bed $9; county tax on farm $24.12, on ore-bed $15. According to the terms of said agreement with the said The Bethlehem Iron Company, said defendant has no control whatever over said ore-bed, but the same has been leased to the said iron company for a period of twenty years, and the term of said lease has not yet expired; that at and before the time of bringing of this suit, said ore-bed was and is now under the sole control, management and ownership of the said Bethlehem Iron Company, who dig, mine and cart away all the ore that is taken away therefrom.

"And further, said Act of Assembly, by virtue of which said tax is assessed, is null and void, because it is in violation of the Constitution of the United States and of the state of Pennsylvania."

The court (Longaker, P. J.) directed judgment to be entered against the defendants, for want of a sufficient affidavit of defence, for the amount of the plaintiffs' claim with costs.

This was assigned for error by the defendant on the removal of the record to the Supreme Court by writ of error.

E. J. More and *Woodward*, for plaintiff in error.—This imposition is an excise rather than a tax. There is no *provision* for assessment, and no provision for appeal from an assessment however arbitrary. If an excise, it cannot be enforced; if a tax it is so unequal and unjust, and its mode of enforcement so uncertain the courts will refuse to carry it out: Philadelphia Association *v.* Wood, 3 Wright 73; Durach's Appeal, 12 P. F. Smith 491.

E. Albright, for defendants in error.—In taxing, things may be classified, and if the tax is on all of a class it may be composed of one or many: Durach's Appeal, *supra*. He cited also Sharpless *v.* Philadelphia, 9 Harris 147; Speer *v.* School Directors, 14 Wright 150; Pittsburg and C. R. R. *v.* Commonwealth, 16 P. F. Smith 73.

[Weber *v.* Reinhard.]

The opinion of the court was delivered, March 24th 1873, by SHARSWOOD, J.—Hammett *v.* Philadelphia, 15 P. F. Smith 146, was twice argued, each time before a full bench, and was a well-considered case. The principle of it has since been reaffirmed in Washington Avenue, 19 P. F. Smith 352. It did not question the constitutional right of the legislature to confer upon municipal corporations the power of taxing properties benefited by local improvements for the cost of making or maintaining them, but placed upon it the just and salutary restriction that it should be limited to the special benefits conferred by the improvements, and not extend beyond them; that the legislature could not authorize a tax to be levied on particular property in a designated locality for a general purpose, to which the whole community ought equally to contribute. Such a tax was in effect only a mode of taking private property for public use without making compensation. An examination of the facts will evince that the judgments in those cases have this extent—no more. The opinion in Hammett's case had been published immediately after the first argument, though not reported until after the second. It was cited, and was the main reliance of the appellant in Durach's Appeal, 12 P. F. Smith 491, which settled, however, the principle which seems to us to be decisive of the main question raised on this record, to wit, the constitutionality of the tax imposed upon the owners of ore-beds in Upper Saucon township, Lehigh county, by the Act of Assembly of April 14th 1868 (Pamph. L. 1127). It was there held that while the legislature cannot, under the name of taxation, take private property for public use without compensation, and that therefore a special tax on individuals or particular properties would be unconstitutional, yet in the exercise of the power of taxation, persons and things may be legitimately classified—some kinds may be assessed and others not—and that even special exemptions are not unconstitutional. There is no provision in the Constitution that taxation shall be equal. Sound policy requires that it should be so as far as possible. But perfect equality is not possible. Indeed, if this were necessary there could be no taxation, except such as would include every person and every thing, which would manifestly be impracticable and unjust.

It is gravely contended, however, that this court has the power to set aside unjust, unequal and improper legislation relating to taxation, and Philadelphia Association *v.* Wood, 3 Wright 73, is relied on as establishing this position. There are many things contained in the opinion in that case entirely aside from the point decided, and therefore mere *obiter dicta*. All that was determined was that an Act of Assembly which required all agencies for foreign insurance, trust and annuity companies in the city of Philadelphia to pay two per cent. of their gross premiums to an association for the relief of disabled firemen, was not taxation at

all; it was taking the property of A. and giving it to B., whether for a charitable or any other mere private purpose it mattered not. No doubt after money raised by taxation has reached the public treasury it may be appropriated by the legislature to charities or individuals. It was admitted, indeed, that the tax in that case would be clearly constitutional, if it had been levied for and paid into the public treasury, and the idea that the court could pronounce a tax unconstitutional on the mere ground of injustice or inequality was expressly repudiated.

It has been urged, however, grounded upon an opinion expressed by Chief Justice Lowrie, in the case last cited, that it is not competent for the legislature to provide for the collection of taxes by action in the courts; that it would turn the courts into tax collectors. But all personal actions are processes for the collection of money, and the courts are no more collectors of taxes in the one case than they are collectors of private claims in the other. It is the sheriff who is the collector when it is adjudged that the tax or debt is due, and surely there is nothing incongruous in that. He is the best and most efficient of all collectors, and never objects to the performance of that function, for he is well paid for it. All that the courts are required to do is to decide whether the debt or tax is payable by the defendant, and what the amount of it is. That is a purely judicial transaction. This mode of enforcing the payment of taxes may be unusual, but what provision of the Bill of Rights or of the constitution of government does it infringe? As well might it be maintained that fines, forfeitures and penalties could not thus be enforced, and of examples of these the statute-book is full. So municipal liens for taxes and assessments have been collected by actions of scire facias in the courts, and no one has ever thought that it was unconstitutional. No doubt the legislature might provide a summary process in all cases of public claims. But what right has the citizen to complain if instead of this he is secured a trial by jury to ascertain his liability before he can be compelled to pay? He would have better ground to complain if it had been denied to him.

It is also maintained, and in this contention it must be admitted that there is much plausibility, that there are difficulties in carrying this Act of Assembly into execution, by reason of the want of any provision for the ascertainment and assessment of the amount payable by each owner of an ore-bed. It would have been better if the legislature had provided that the owner should make a return of the number of tons hauled over the public roads, and in default of his doing so, authorized the supervisors to assess the amount. But can we set aside an Act of Assembly, because its machinery is lame and imperfect? Our duty is to execute the legislative will in the way prescribed, when that way is constitutional, though a much better way might have been devised. We

are bound to give the act a reasonable construction, *ut res magis valeat quam pereat.* When the owner refuses or neglects to pay the tax, the legislature has imposed upon the township the burden of proving by evidence, satisfactory to a jury, all that is required to fix liability upon the owner of the ore-bed. This may be unwieldy, but it is surely not unjust to the tax-payer. He can save himself from the costs of a suit, by a tender, in time, of the amount actually due. It is not a case where a valuation of property is required. It is a fixed rate upon the number of tons, and that the owner may be presumed to know, or to have the means of ascertaining, whether he is a landlord, or himself the actual occupant. It is not, indeed, expressly provided that the supervisors shall ascertain and assess the amount. But they must do so in order to maintain their suit, and recover a judgment; and they must do more; they must prove it by competent evidence. In this case, as appears by the affidavit of claim filed, there was a demand of a certain sum, and the plaintiff in error did not deny in his affidavit that the amount was correct.

Nor can it be doubted that the plaintiff in error is liable for the tax. He admits himself to be the owner of the ore-bed, and in the sense of tax laws of this Commonwealth, the owner of lands is always the landlord, and not the tenant, when they are occupied under a lease. See Act of April 6th, 1802, sect. 8, 3 Smith 516; Act of April 3d 1804, sect. 6, 4 Smith 203; Act of April 15th 1834, sect. 46, Pamph. L. 518; Caldwell *v.* Moore, 1 Jones 58.

It is unnecessary to consider the contention, that the imposition of this tax impairs the obligation of the contract between the landlord and tenant, for it is too clear for argument, that a tax upon the subject-matter of a contract, by whichever party it is made payable, can never produce that effect. Judgment affirmed.

READ, C. J., and WILLIAMS, J., concurred in this opinion, except as it relates to the extension of Hammett *v.* The City, beyond the case itself.

AGNEW, J., *dissenting.*—With my views of the Act of Assembly in this case, I cannot assent to the judgment just given. The point I make upon this act is, that, when no specific tax is laid, but a rate only, the citizen is not charged with the tax, until the subject of taxation is assessed and the tax is laid upon him. Here is an act which imposes upon the owners of ore-beds in a single township, a tax, at a rate of a cent and a half a ton, payable every six months, for every ton of ore mined and hauled away from their banks, over the public roads of the township, without providing for any assessment or mode of ascertaining the tax before payment, or for any redress or appeal from an unjust and exorbitant demand by the collector, and which, in default of payment of

an unadjusted and unknown sum, subjects the citizen to the penalty of a suit and costs to enforce collection. The fundamental error in the opinion just read, is, in my judgment, the confounding of a rate fixed by the act, with the tax itself. It confounds the measure of a duty with the duty. The law furnishes a rate, but the rate is only the measure of the tax, when applied to the subject of taxation. As to each citizen, his tax is not laid until the subject is ascertained, and the rate applied to it. To escape from this dilemma, the opinion falls into a second error, by assuming in the next place, that the remedy for *non-payment* is itself an assessment. The words of the act are, "and in *default of payment*, the same to be *collected* as *debts* of like amount are collected by law." Here the law provides for *collection*, not assessment, in default of *payment*, and assumes that a debt or duty exists, which has not been laid on the tax-payer. I concede that a tax may be assessed by a judicial proceeding, though it be an onerous mode of assessment. But the vice of this law is that it establishes no mode of assessment, judicial or otherwise, but first commands payment of an unascertained sum, and then in default of payment, commands collection by a suit, and the infliction of costs. It is the most elementary principle of law, that there can be no remedy for a breach of duty, until the duty is ascertained. Under this act, no tax is individuated, and no duty imposed before collection. The Act of 1844, in relation to state taxes, will serve to illustrate this subject. That act directed moneys at interest to be taxed, and fixed the rate at three mills. Warrants of assessment were issued, and the citizen was required to make a return of the *subjects* of taxation to the assessor, and if he failed or refused, the act then directed the assessor to ascertain the subjects, and assess the tax from the best light he could obtain. Thus a tax was laid on the citizen, and the duty of payment attached. The proceeding to levy the United States income tax was similar. It is evident, that neither the three mills rate, nor the five per cent. rate was a tax, and without a proceeding to assess upon each individual his specific tax, that no tax was laid upon him, and no duty rested upon him to pay it. Had the State, or the United States, after fixing the rate only, ordered payment, and in default of payment, commanded the collector to distrain for the tax, or to bring a suit to recover it, every one could perceive the outrage on the rights of the citizen. No tax had been laid upon him, and payment would be impossible Were any one in reply to the hardship, to say to him, well, gather up your bonds, notes and other securities, make a calculation, and assess yourself, every one would perceive its absurdity; yet that is precisely the present case. A rate is given, a command to pay, and then a suit and costs ordered for non-payment, notwithstanding not a citizen has been assessed, and not a tax ascertained. I say, that this act has not

provided due process of law to ascertain the citizen's duty, and, therefore, that the infliction of the penalties of a suit and costs, to collect what has not been laid on the citizen by lawful process, is in violation of the Bill of Rights, which provides that no one can be deprived of his property, unless by the judgment of his peers, *or the law of the land.* The words "or the law of the land," have been decided to mean the same thing as "due process of law." Fettar *v.* Wilt, 10 Wright 457; Craig *v.* Kline, 15 P. F. Smith 413.

It is too clear for argument, that the tax of an individual is the result of the rate applied to the subjects of taxation which belong to him, and consequently, that he is not taxed until the rate is applied to his property by some legal mode of adjustment. Then it is equally clear, that until his tax is legally adjusted, no duty of payment can arise, and consequently no proceeding to collect the alleged tax is justifiable, until the tax is so adjusted and laid. The order to collect, whether by distress or by suit, before the tax is legally laid, is therefore without due process of law. Had the act directed an assessment even by a magistrate, the duty of payment would have existed, and then payment could be enforced by suit, though it be onerous to do so. But here the law visits the citizen with the duty of payment first, and assessment afterward, if a suit to collect in default of payment can be called an assessment.

It is said, the citizen may avoid suit by a tender. But a tender implies a tax to be tendered. No sum has been laid on the citizen which he is bound to pay, or the collector is bound to receive. The tender is impossible. If he tender what he believes to be just, the collector may deem it insufficient. And again, the law has made no provision, either for a return or for an account to be kept. Then it is said, the court will supply a proceeding to remedy the defect in the law. I grant, that in judicial proceedings, a court through its general powers, may supply defects of legislation. But taxation is not a judicial proceeding, and the courts have no power to supply an assessment. The case is not in the power of the court until suit is brought to collect the tax; but then it is too late, for the suit cannot be lawfully maintained until the duty has been imposed on the citizen by the assessment. If there be no mode of assessment, the law-making power only can supply it. Look at this law how you will, it is as clear as the noonday, that it has provided only a rate and no mode of laying the tax on the individual tax-payer; that it first orders payment, and in default of payment, inflicts the penalty of a suit with costs, for not performing an unimposed duty. Imagine a collector calling on a mine-owner for his tax, without duplicate, assessment or known tax. "How much is it?" says the citizen. "I don't know," says the collector. "How, then, can I pay?" "That's your business," says the collector. "No, it is not; the law did not re-

quire me to make a return, or keep an account, or assess myself." "Well, I want your tax," says the man in authority. "Here are five dollars." "No, I want thirty dollars," rejoins the officer. "I can't pay that." "Well, I'll collect the tax by suit, and compel you to pay the costs." This is called taxation. I call it arbitrary exaction, without due process of law. It is evident, this act is the product of that vicious practice prevailing among legislators to object to no local bill a member from the district chooses to champion as his local measure, a custom in violation of the oath of office, and of the duty of the representative to the people of the state. I would say to those who procured this act, in the language of this court in Philadelphia Association *v.* Wood, 3 Wright 73: "Considering, then, that this imposition is so extraordinary in its character, of such doubtful constitutional validity, so dangerous in its tendencies as a precedent, and so unusual in the form of its enforcement, we most respectfully decline, for the judiciary department of the government, the enforcement," &c.

Worman *et al. versus* Kramer.

1. A sale of goods in the hands of a bailee is good against an execution-creditor, if the vendor do not retake possession.
2. Kramer bought an omnibus and horses from Berkenstock, whom he immediately employed as driver; the horses were kept at the stable of a third person. *Held*, that this was not *per se* fraud, if the stock was really kept by the bailee in an open and notorious manner, and this was for the jury.
3. The court charged, "a concurrent possession exists only where the person in actual possession has some interest in it as part owner." *Held* to be error.
4. Where the control and use of goods by vendor and vendee are so confused and mixed, as to leave the question of possession uncertain, the sale however honest, cannot be sustained.
5. A constable levied on horses, &c., of a vendee for the debt of the vendor; he offered to return one horse as taken in mistake, and it was refused unless with the return of all. He returned the horse to the stable whence he had taken it. *Held*, that this was evidence in mitigation of damages.
6. The horse being offered back in a reasonable time in good plight, it was the duty of the vendee to receive him.

March 19th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Lehigh county*: No. 97, to July Term 1872.

This was an action of trespass d. b. a., brought August 17th 1870, by Robert D. Kramer against Abraham Worman, Walter J. Grim, George Steininger and Peter Dorney. The goods taken were an omnibus, horses, harness, &c., which were seized and sold by Worman, constable, as the property of one Harrison Berken-

stock under executions against him at the suit of the other defendants.

The plaintiff testified that he kept the "Allen House" in Allentown in 1870, and that he bought an omnibus, a pair of horses and double set of horses from Berkenstock, and gave him his note for $500, payable in twelve months; he got them on Saturday in front of his house, where he took possession; and on the following Monday he ran them from his hotel to the depot; he kept them at the stable of Keim & Einstein, he put them there the same day he bought them; that firm agreed with him to furnish hay for the horses and keep the omnibus at $1.50 per week. He hired Berkenstock to drive for him at $50 per month; the coach was brought directly from the coach-making shop to his house; he bought another horse from George Snyder afterwards which had never belonged to Berkenstock, but was driven to the omnibus; the three horses, omnibus and harness were levied on by Worman in June 1870. Berkenstock, shortly before the sale to plaintiff, told him that he, Berkenstock, had been running a coach for Levi Hottenstein at "The Eagle;" that he had sold a coach to Hottenstein and agreed with him not to run an opposition, and wished plaintiff or his brother to run one in plaintiff's or his brother's name; plaintiff said he would not have anything to do with it in that way; plaintiff bought the concern out and out, and told Berkenstock to take it to Keim & Einstein's stable. Berkenstock was to employ the boy to assist him for the $50 per month, and plaintiff to board the boy. Berkenstock kept an account of the receipts; out of them he paid for the feed, &c., and kept the balance for his salary; plaintiff's name was on the coach; the driver was forbidden to carry passengers to any other hotel than the plaintiff's. Berkenstock had no interest in the coach or horses; Berkenstock continued in plaintiff's employ after the constable's sale, running a carriage from his hotel to the depot. Plaintiff never got any of the property after it was seized, he demanded it twice in writing.

Berkenstock testified that in April 1870, he owned four horses and two coaches; he sold two horses, coach and double set of harness to the plaintiff; he further testified, much as plaintiff did, as to his wishing plaintiff to run it for witness and his afterwards buying it; and as to his own and the boy's wages, &c. Witness never told plaintiff that he was indebted; the coach was run only from "The Allen House" and "The Fountain House;" witness paid for keeping the horses so long as there was anything from the earnings, and plaintiff paid the rest and the smith's bills and revenue taxes.

Worman testified that he was indemnified by the other defendants, plaintiffs in the executions.

There was evidence also that the plaintiff paid the note which he had given to Berkenstock for the property.

The defendants gave evidence to show that the sale to the plaintiffs was colorable and fraudulent; that the possession had never been changed from Berkenstock or that he had at least a concurrent possession with the plaintiff.

Worman, defendant, testified that after he had made the levy, he took the property to "The La Fayette House;" shortly after he got there, Walter Kramer, brother of the plaintiff, gave witness notice to bring back everything he had taken away. "I told him I would return the brown mare (that purchased from Snyder); he said if I did not return all they would take none. I saw R. D. Kramer (plaintiff) a day or two afterwards, and he told me he would let me see for moving his property, then I told him I would be willing yet to give up the mare; he said if I would not return everything he would not take the mare; after the sale I brought back to the place where I took them from, the brown mare, bobtail horse, and one set of double harness, and one set single harness, and then I saw Berkenstock and Kramer together at the Allen House porch; I gave them notice that I had returned the goods, naming them; they said they wouldn't receive them; it was thirteen to fourteen days from time of levy until return of the goods."

The plaintiff in rebuttal testified that he had never removed any of the property levied on.

The defendants submitted these points:—

2. If the property mentioned in the first point was capable of immediate and manual delivery it is not sufficient for the plaintiff to take merely constructive possession, and his failure to take actual, visible and continued possession of the same is a fraud in law, and renders the alleged sale void as to the creditors of Berkenstock, and the plaintiff cannot recover as to said goods.

3. As H. Berkenstock continued in visible possession of the property mentioned in the first point, the allegation that he was the servant of R. D. Kramer cannot avail the plaintiff, "for this would be a secret trust, contrary to the visible ownership and possession;" "there cannot, in such case, be a concurrent possession; it must be exclusive, or it would, by the policy of the law, be deemed colorable."

4. The allegation by the plaintiff that H. Berkenstock was his servant, and in that capacity had possession of the property mentioned in the first point, obliges the plaintiff to remove all doubt and color of fraud from the alleged transfer, and if he fail to do that, then he cannot recover for the same.

6. If the jury believe, from the evidence, that the sale was made by Berkenstock for the purpose of hindering, delaying or defrauding his creditors, and that Kramer, the plaintiff, paid no

money, but gave his note which was not legally negotiated, then Kramer was not such a purchaser under all the circumstances as the law would protect against Berkenstock's execution-creditors; and the alleged subsequent payment of said note by Kramer will not entitle him to recover on this point.

9. If the jury find that the mare was offered back to Kramer by the defendants, or any of them, as soon as they had ascertained the fact that she had been bought from G. Snyder by R. D. Kramer, and he refused to accept her, and that she was not sold under the constable's levy, but was offered to Kramer again after the constable's sale, in as good a condition as she was before the levy, and was again refused when so offered; that the mare was then taken to the stables of the Exchange Hotel, where she had been kept and boarded before the levy was made by the constable and left there subject to the plaintiff's order, then he cannot recover any damages on account of the subsequent sale of her for feed.

The court declined to answer the points, except as they were answered in the general charge.

The court amongst other things charged:—

"The defendants allege that the sale was fraudulent in law as well as fraudulent in fact.

"A fraud in law arises where a sale takes place and there is no actual delivery of things sold to the vendee, but the vendor is permitted to retain the possession. A fraud in law is usually declared to be such by the court, when the evidence is of such a character as to require no fact in relation to the delivery to be found by the jury. In this case there are certain facts to be found by you before a fraud in law shall arise.

"Whenever an honest, bonâ fide sale takes place, the vendor must give the vendee such a possession as the nature of the property sold will best admit of, and if the property be capable of it, the transfer of possession should be actual, open, notorious and visible.

"[If you find that Mr. Kramer was an actual purchaser without actual fraud, or fraud in fact, and that at the time he purchased he ordered the omnibus and the horses to the Exchange stables, with the directions to the keepers of those stables that the horses should be kept at his own charges, and that in addition thereto, he had his name inscribed upon the coach, and that all the bills, which were incurred in the running of the coach, were contracted in the name of Mr. Kramer, and as his debt, and that the line was held out to the world generally as his property, then he did all that the law required of him to do as regards a transfer or a change of the possession.]

"If you find that there was such an open, visible and notorious transfer of the possession accompanying this alleged sale, then I

say to you that the transaction is not a legal fraud; and the employment of Berkenstock as the driver of the line, under such circumstances, did not of itself render the sale a fraud in law. If, however, you find that Berkenstock was a part owner, and as such part owner that he held concurrent possession with Kramer, then the sale would be a fraud in law, because there would be no transfer of the entire possession to Kramer.

"[A concurrent possession exists only where the person in actual possession of the property has some interest in it as a part owner. As to whether there was such a part ownership in Berkenstock, is a question of fact to be found from all the evidence in the cause.]

"If then you find that there was a transfer of the possession, and no concurrent possession in Berkenstock as part owner, the plaintiff's case thus far will be such as will entitle him to recover; but if you cannot find these propositions in his favor, then there will be an end to his case, and your verdict will be in favor of the defendants. Before, however, the plaintiff can recover, the case must be free from a fraud in fact.

"A fraud in fact arises where the parties to a transaction, by any scheme, device or contrivance, so use and hold property with intent to hinder, delay or defraud the creditors; and if this intent exist on the part of the vendor and is known to the vendee, a full and honest consideration will not protect the sale from taint of fraud in fact. What is meant by this rule as applied to this case is this: That if Berkenstock informed Mr. Kramer that he desired to make a sale of the property in dispute, for the reason that he was afraid that his creditors would seize it and sell it, then the sale would be a fraud. If such were the intent of Berkenstock and Kramer had a knowledge of it from any source, the payment of a full price will not protect the sale from a fraud in fact. Whether there was any such fraudulent intent is a fact to be found by you from all the testimony. The proof to establish a fraud should be clear and satisfactory, being sufficiently strong to produce an honest conviction.

"A fraud in fact would also exist if it were understood, or if it were agreed upon between Berkenstock and Kramer, that the $500 note was not to be paid by the plaintiff, but that the property should still belong to Berkenstock. How this fact was you will say from all the testimony.

"[You will remember what is sworn to by Kramer and Berkenstock as to the honesty of the transaction: and although Berkenstock may have told other persons while he was driving the line that the line was his, Kramer can only be affected by it so far as he had knowledge of it, and it is for you to say that if he spoke of the team as his to others, whether he meant to say anything more than that he was the driver of the line.]

[Worman v. Kramer.]

"[I am asked to charge you that if the plaintiff gave his note, and it was not legally negotiated, then the plaintiff is not such a purchaser as will be protected. I cannot so instruct you. The negotiability or non-negotiability of the note has nothing to do with this case. The note, I believe, was negotiable; it was drawn payable to the order of Berkenstock.]

"It is alleged that the Snyder mare was to become Berkenstock's as soon as he paid for her. I say to you, that if this mare, or any other property, was in the possession of Berkenstock, or held with the understanding or agreement that it was to become Berkenstock's as soon as he would pay for it, then this would be a fraud; and if Mr. Kramer owned part of the property only, and so mixed it with the property of Berkenstock that it was so promiscuously used that the ownership of the one could not be distinguished from the ownership of the other, and it was done with a fraudulent intent to hinder, delay or defraud creditors, then this alleged sale would be void, and the property would be liable for the executions of the defendants.

"Again—if this sale were made by Berkenstock to Kramer for the purpose of avoiding the penalty of the contract, which Berkenstock had contracted with Hottenstine, prohibiting him to run an opposition line of omnibus, and if Kramer knew of this purpose, intent or motive, before or at the time he made this purchase, then he acted with a full knowledge of the intended fraud, and aided in its commission; and if a fraud has been actually so committed, then no title to this property passed to Kramer. You will then generally inquire if a fraud in fact has been actually committed between Kramer and Berkenstock in any of the ways it is alleged by the defendants to have been committed; and if by clear and satisfactory proof you are convinced there has been committed actual fraud, or a fraud in fact, then in law Kramer could acquire no title to the property, not even if he paid full value for the same, but the title still remained in Berkenstock so far as the creditors are concerned, and for their debts it was liable to seizure and sale by execution; and in that event your verdict will be generally for the defendants. Your verdict will also be for the defendants if you find there was no transfer of the possession to Kramer as indicated in the first part of the charge; or if Berkenstock retained a concurrent possession as part owner. If none of the defences as alleged by the defendants are sustained, then your verdict will be in favor of the plaintiff.

"The damages to which the plaintiff is entitled are the value of the property at the time of its seizure. You are at liberty to find, if you are so satisfied, that only a portion of the property belonged to plaintiff. [It is contended, as regards the mare purchased from Snyder, that title was never in Berkenstock, and as to this the plaintiff must certainly recover. This, however, is a question of

fact for you, and in the event you find for the plaintiff you will say whether it is for a whole, or only part.] That a portion of the property remained unsold, and was returned to the place from which it was taken at the time of seizure, is not a fact to be received even in mitigation of damages. The plaintiff was not bound to receive back any of the property taken, and if he had done so then the fact would go in mitigation of damages. In assessing the damages, you will inquire as to the fair market value at the time of seizure, and when that is ascertained the plaintiff will be entitled to interest on that amount from the time of seizure to this date."

The verdict was for the plaintiff for $739.12.

The defendants took out a writ of error and assigned for error the refusal to answer their points specifically and the parts of the charge in brackets.

J. S. Biery and *C. D. Erdman*, for plaintiffs in error.—Retained possession, without visible change, is fraudulent in law and void: Clow *v.* Woods, 5 S. & R. 275; Babb *v.* Clemson, 10 Id. 419; Carpenter *v.* Mayer, 5 Watts 485; Hamilton *v.* Russell, 1 Cranch 310; Milne *v.* Henry, 4 Wright 357; McKibbin *v.* Martin, 14 P. F. Smith 356. Legal fraud, where the facts are undisputed, or are ascertained, is for the court: Dornick *v.* Reichenback, 10 S. & R. 90; Dewart *v.* Clement, 12 Wright 414.

But, as the law in Pennsylvania is so well settled on these two points, it is perhaps more pertinent to the case at bar, to determine, if possible, what *indicia* of fraud are requisite to warrant the court in pronouncing a case fraudulent in law. "Retained possession, without visible change," says Thompson, J., in Milne *v.* Henry, *supra*, "is fraudulent. There must be an actual separation of the property from the possession of the vendor at the time of the sale, or within a reasonable time afterward, according to the nature of the property: Billingsley *v.* White, 9 P. F. Smith 466; Chase *v.* Ralston, 6 Casey 541; Brawn *v.* Keller, 7 Wright 106; Hugus *v.* Robinson, 12 Harris 13.

E. Harvey and *J. D. Stiles*, for defendants in error.—When there has been a sufficient delivery, actual or constructive, and the vendor is in possession, the fact that the vendee is employed about the establishment in a capacity holding out no *indicia* of ownership, is not such a concurrent ownership as the law condemns, and the question is for the jury: McKibbin *v.* Martin, 14 P. F. Smith 352; Dunlap *v.* Bournonville, 2 Casey 72; McVicker *v.* May, 3 Barr 224. Separation of the property from the vendor's possession means only a change of his relation to it as owner, and consists in the surrender and transfer of his power and control over it to the vendee: Billingsley *v.* White and another, 9 P. F. Smith 464. There being evidence of a change of possession, the bona fides was

for the jury: Craver v. Miller, 15 P. F. Smith 456. The possession of the servant is the possession of the master: Ward v. McCawley, 4 T. R. 490. It is not the place the property occupies that gives color of possession to the vendor; but the connection the *place* has with the vendor: Barr v. Reitz, 3 P. F. Smith 256. The action being trespass *de bonis asportatis*, our remedy was complete after the seizure and asportation of the property: Erisman v. Walter, 2 Casey 467; Waldron v. Haupt, 2 P. F. Smith 408; Berry v. Vantries, 12 S. & R. 93; Miller v. Baker, 1 Met. 27; Thomas v. Snyder, 11 Harris 515; Gibbs v. Chase, 10 Mass. R. 128; Hoofsmith v. Cope, 6 Wharton 53.

The opinion of the court was delivered, May 17th 1873, by

AGNEW, J.—This case was tried below on the grounds of fraud in law and fraud in fact, and in the argument the facts bearing on each branch have been somewhat blended. Fraud in law in this case, had relation to a retained, or a concurrent possession, and not to the intent to hinder and delay creditors, which enters into the question of fraud in fact. It is only by separating the evidence bearing distinctly upon each ground, that we can judge properly of the correctness of the judge's charge. Looking at his charge in this light, we do not discover any good reason to complain of it, except in two respects, which shall be noticed.

On the question of fraud in law, one fact of importance must not be overlooked, to wit, that the actual possession of the property appears to have been in the bailee of Kramer. The coach and horses were kept at Keim and Einstein's livery stable, and on the day of the sale to Kramer he bargained with Einstein to keep the coach, and the horses at hay, at $1.50 per week. In Linton v. Butz, 7 Barr 89, it was held that a sale of personal property in the hands of a bailee is good against an execution-creditor, though there be no actual delivery, if the vendor do not retake the possession. We cannot say, therefore, that there was error in that part of the charge set out in the first assignment of error; read as it must be, with the sentences immediately preceding and succeeding, in which it was left to the jury to say whether there had been an open, visible and notorious transfer of the possession. The mere employment of Berkenstock afterwards as a driver, would not, in itself, stamp the character of a legal fraud upon the sale, if the property was really kept by a third party, as bailee of Kramer, in an open and notorious manner. The facts were for the jury, as to how the coach and horses were kept, and for whom; and whether Berkenstock returned into such an immediate and visible possession, as deprived the transaction of that open and notorious character, which would fairly indicate to the public an actual transfer of the possession at the time of the sale, and following it.

The evidence in this case did raise a serious question as to the openness and the visible character of the possession. The intimate relations Berkenstock sustained to the property, after the sale, raised a question of fact, whether his possession was not, at least, concurrent with that of Kramer, and the defendants were, therefore, entitled to full and clear instructions on that point. In this part of the case the learned judge fell into an error, by his qualification of the instruction, that a concurrent possession exists only where the person in actual possession of the property has some interest in it as a part owner. There was no question as to a part ownership, either as tenants in common or as partners. The sale was out and out, and the question was only upon the possession. The defendants alleged that the possession of the coach and horses was, at least mixed or concurrent between Kramer and Berkenstock, and if so, it was insufficient to indicate an open and complete transfer of the possession, and in this view they were entitled to an answer which would not mislead. The concurrent possession alleged, was such as that spoken of by Judge Strong in Brawn *v.* Keller, 7 Wright 104, where the control and use of the property by the vendor and vendee, were so confused and mixed, as to leave the question of possession uncertain. If that were the kind here, the defendants were entitled to an instruction that the transfer of possession was not such as to protect the sale, no matter how honest and fair. But when the judge defined a concurrent possession to be one only where there is a part ownership of the property, he narrowed the instruction to the prejudice of the defendants. There was no evidence of a tenancy, either joint or in common, and the jury were, therefore, led away from what was meant by a concurrent possession; that is to say, a mixed or uncertain possession, apparently as much in one as in the other.

We think he erred, also, in refusing to give the defendants any benefit from the offered return of the brown horse, bought by Kramer of Snyder. If, as the evidence tended to show, the constable, after he found he had made a mistake in levying on the horse, as the property of Berkenstock, offered to return him to Kramer, who refused to take him, and the former then returned him to the stable, whence he took him, with notice to, or the knowledge of Kramer, it went in mitigation of damages. It might not atone for the trespass, in the taking, but if the horse were offered back, in as good plight as when taken, and in a reasonable time, clearly it was the duty of Kramer to receive him, unless he could show a good reason for not doing so. For these reasons the judgment is reversed, and a *venire facias de novo* is awarded.

Laubach *versus* Laubach.

1. J. sold stock to T., and agreed that when T. should desire it, he would take it back and repay the price. *Held*, that upon tender of the stock T. might recover the price with interest.
2. On a refusal by a vendee to accept goods sold him, the measure of damages is the difference between the contract and the market price at the time of refusal.
3. Where the contract is that the vendee may rescind the contract, the vendor to pay back the price, or the contract is rescinded by the vendee by reason of inherent vice, the measure of damages is the price paid and interest.
4. Where there is a general objection to evidence and part is admissible, it is not error to overrule the objection, although part of the offer be inadmissible. In such case there must be a special objection to the inadmissible part.

March 20th 1873. Before READ, C. J., AGNEW, SHARSWOOD, and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Lehigh county:* No. 152, to July Term 1872.

This was an action of assumpsit, brought April 22d 1870, by Thomas Laubach against Joseph Laubach.

The plaintiff alleged that in August 1858 he bought from the defendant, his brother, 100 shares of the capital stock of the Brown Silver Mining Company for $5000, the defendant agreeing at the time, as part of the contract, to take it back if the plaintiff should desire it and repay the sum paid for it. The plaintiff having tendered the stock and demanded the repayment, the defendant refused, and this suit was brought for the recovery of the money with interest.

The plaintiff testified that in August 1858 he met the defendant at Catasauqua, in the Eagle hotel, kept by Frank Laubach, defendant's son. The defendant, after he and his son had exhibited the promising prospects of the mine and solicited the plaintiff to purchase stock, said that if plaintiff would take stock he would insure it to him, and if at any time plaintiff wanted his money back, defendant would take the stock and give him his note for it. Defendant said that they had $20,000 worth of stock for the Laubach family and their friends. Upon these assurances, the plaintiff took 100 shares of stock and paid the defendant $5000 for it. Subsequently three certificates of the stock, making in the aggregate 100 shares, were delivered to plaintiff.

On March 5th 1870, the plaintiff signed transfers on the back of the certificates, and tendered them to the defendant, and said to him, "Here is the stock you said you would take back any time I did not want it, and give me my money back;" defendant denied having promised him that he would take the stock and pay back the money.

The plaintiff testified to other facts in support of his case, and gave other evidence in corroboration of his own statements as to the contract and of the tender of the stock and demand of the money.

Plaintiff also testified that Frank and William Laubach, sons of the defendant, were present when the contract was made, and were called by their father to bear witness to what he said, and also that they were present on other occasions when the father made similar statements.

Frank Laubach testified in direct contradiction of the plaintiff, as to the interview and what was said to have occurred in his presence.

On cross-examination he said:—"Thomas offered, in the parlor, in presence of Adam, on my inducement, to take the stock; my father wasn't in the habit of selling this stock; he never sold any stock; my father never sold any stock to Mrs. Strauss; nor to John Laubach; nor to John A. Laubach; nor to Adam Laubach; nor to Captain John Laubach; nor to Michael O. Newhart; don't know that he offered to sell to Samuel Straub; nor do I know whether he guarantied the stock to Mrs. Strauss; he never guarantied stock to anybody in my presence; * * * I didn't direct my father to sell this stock to Mrs. Strauss; I sold it to her indirectly; I saw her before the sale was made, at Catasauqua, and induced her to take it: * * * my father was not my agent to sell stock for me; * * * I never heard my father say anything to Capt. John Laubach about the sale of this stock; nor did I ever hear that he guarantied the stock to him; nor that he guarantied it to any one else; I sold the stock to Mrs. Matchett; she never paid the whole of it; I sold it for her to my father; it was not sold on a guaranty; it was three shares; Michael and Owen Newhart got stock from me; I sold it directly to them; I got the money; it did not pass through my father's hands; it was paid to me directly; my father knew nothing about my transactions with these people, except with plaintiff; Adam Laubach got forty shares from me directly; my father didn't guaranty it to Adam; am sure he didn't; plaintiff was at my house in March 1870, when he tendered the stock back; he was there once after that."

William Laubach also testified in direct contradiction of plaintiff's testimony.

Joseph Laubach, defendant, testified in the same manner as his sons.

He further testified:—"I was not the owner of the 100 shares sold to Thomas; had no interest in them at all; I got none of the proceeds of the sale, nor did I tell my brother, John Laubach, that if Thomas took stock I would take it back; I never promised any man that I would take stock back; I had some conversation with my brother John, but I didn't say that to him; I think it was in November 1869 that plaintiff for the first time came to

me and said he wanted me to pay him for the stock I guarantied to him. I said 'What stock?' He said, 'The Brown Silver Mining stock;' I said I had never sold him any stock, and had never guarantied him any; he came to me several times about it, and teased me about it; I told him if he didn't like me as a brother he could shoot me and have me out of the way; I never made him any promise that I would take the stock back from him at any time."

On cross-examination, he said:—

"I sold some stock to Mrs. Strauss, with the consent of my son; her name was Laubach; I got the money for it and gave it to my son; I got two checks, payable to me; I made the contract with her to take the stock; I didn't guaranty to take it back; I told her at any time she didn't want it I would take it back and pay her the money with interest; I told her that at any time she was tired of it I would take back the stock and pay the money with six per cent. interest; I did take it back; I never sold Capt. John Laubach one share of stock; I didn't sell him a share, nor make the same promise to him as I did to Mrs. Strauss; on my return from Easton, I stopped to see my sister, Mrs. Bachman; I offered to sell her stock, and told her if she would take it I would guaranty it, the same as I had done to Mrs. Strauss; I did not to my recollection ask Samuel Straub to buy stock; I didn't tell him that we had $20,000 expressly for the Laubach family and their friends, and that he was one of their friends; I didn't tell him that I had sold stock and had guarantied it; didn't tell him I had sold stock at Catasauqua, and that I had guarantied it all or insured it, nor anything of the kind; I told Aaron Fretz that I had got all in except Adam, and I would have him in yet; I said I would try; didn't sell stock to my brother John; didn't guaranty it to him the same as I did to Mrs. Strauss; didn't sell to Capt. John Laubach and guaranty it also; nor to John A. Laubach and guaranty it, nor to Adam Laubach and guaranty it, nor to Michael and Owen Newhart and guaranty it; nor did I tell Owen Newhart, in the presence of Michael, that I would take the stock back if he didn't like it; nor to Michael, and guaranty it in the presence of Owen; I didn't say anything to Captain John Laubach, John Laubach, John A. Laubach, Adam Laubach and Michael and Owen Newhart, and Samuel Straub about selling stock to them; I offered Hannah Schadt stock, but I never said anything about $20,000 worth of stock for the Laubach family; I told her I would take the stock back at any time she was tired of it, and pay the money back; I went to see her, to know if she wanted stock; she had no money and took no stock; I told her it was paying one per cent., but I didn't tell her she would get back all her money in two or three years; I told David Schadt it was a good thing, and told him he should get his

sister to buy; I didn't tell Thomas and Adam nor any of the Laubachs that there was $20,000 reserved expressly for the family." * * *

The plaintiff in rebuttal called Capt. John Laubach, and offered to prove by him "that Joseph Laubach offered to sell him stock, and did sell it to him, and guarantied it, alleging at the time that it was a portion of the $20,000 worth of stock which he had expressly reserved for the Laubach family."

Objected to by the defendant's counsel as not rebutting testimony; that it is in relation to matters collateral to this suit; that it is irrelevant and cannot be offered to contradict the testimony of Joseph Laubach; that if it is evidence at all it is evidence in chief. "Plaintiff says the testimony is offered for the purpose of rebutting the allegations of the defendant, that he was not engaged with the sale of the Brown Silver Mining Company, and for the purpose of contradicting Frank, Joseph and William Laubach."

The offer was admitted and a bill of exceptions sealed.

Witness said: "The defendant offered to sell me stock of this company in the beginning of August 1868; it was at his place at the Eagle Hotel; he said he had $20,000 worth expressly for the Laubach family; I told him I couldn't see the point yet; I had enough water-hauls; then he said, if you don't like it I'll pay your money back; then he told me the per cent.; one, two and three per cent. a month; he said, you shall just take it, and if you don't like it you come to me and I will pay your money back, and if I haven't the money I will give you my note; he said he had all the family in except Adam and John, and he would get them in yet; I gave this note as part payment of the stock; I gave defendant all the money, I gave him $5000 in all."

Plaintiff then called each of the other persons to whom the defendant denied in his testimony that he had sold stock, and proposed similar questions to each of them. They were admitted under exception and objection to testify.

They testified substantially in accordance with the offer.

The plaintiff offered in evidence the book, the pamphlets and circulars of the company and the notes and checks testified to by the witnesses. They were objected to by the defendant, admitted by the court, and a bill of exceptions sealed.

The court (Longaker, P. J.), amongst other things, charged:— * * * "Before you proceed to weigh the strength or power of the evidence, it becomes the duty of the court to admonish you that if you find it to be a fact that the defendant was engaged in selling the stock to others, and that he guarantied to them and promised to redeem at par the stock thus sold, the fact so proven is not a circumstance from which you are at liberty to infer or find that the defendant made a like promise to the plaintiff. Because the defendant may have promised others to redeem the stock sold to

them is no reason which will enable you to say that he promised the plaintiff to redeem the stock in suit.

"The plaintiff was permitted to prove that the defendant made the guaranties to others, in order to show that he was engaged in the sale of this stock, and to meet that part of the defence in which it is said that the defendant was not engaged in the sale of this stock, but that his son Frank was the agent of Watson; and that he, and not his father, made this sale, and that the father had nothing to do with effecting a sale of this stock to plaintiff."

* * *

"If under these instructions you cannot find a contract of guaranty in favor of the plaintiff, your verdict will be generally in favor of the defendant; [if, however, you do find in favor of the plaintiff, the amount of your verdict will be for $5000, with interest from March 5th 1870.]"

The verdict was for the plaintiff for $5582.50. The defendant took a writ of error, and assigned for error:—

1. That part of the charge in brackets.

2–10. Admitting John Laubach and the other witnesses objected to.

11. Admitting the pamphlets and circulars of the company, &c., in evidence.

H. Green and *C. M. Runk*, for plaintiff in error.—The measure of damages was the difference between the contract price and the value of the chattels at the time of the breach: Story on Sales, sect. 348; Phillpot *v.* Evans, 5 M. & W. 475; Laird *v.* Pine, 7 Id. 478; Boorman *v.* Nash, 9 Barn. & Cress. 145; Andrews *v.* Hoover, 8 Watts 239; McCombs *v.* McKennan, 2 W. & S. 216; Thompson *v.* Algeo, 12 Metc. 428; Bowser *v.* Cessna, 12 P. F. Smith 148. If a witness be asked on cross-examination as to a collateral fact, his answer is conclusive against the party asking him: 1 Green. Ev., sect. 449; Elliott *v.* Boyles, 7 Casey 65; Hollingham *v.* Head, 4 Com. B. N. S. 338.

E. Harvey and *J. D. Stiles* (with whom was *C. D. Erdman*), for defendant in error.—This was not a contract to sell shares of stock, but to pay back the money and interest; after refusal the plaintiff could have sold it or held it subject to defendant's order, and recovered the whole sum: 3 Parsons on Contracts 209; Bement *v.* Smith, 15 Wend. 493; Crookshank *v.* Burrell, 18 Johns. 58; Towers *v.* Osborne, 1 Strange 506; Thompson *v.* Algeo, 12 Metc. 443; Ballentibe *v.* Robinson, 10 Wright 180.

The opinion of the court was delivered, March 27th 1873, by

Sharswood, J.—The first assignment of error is intended to raise the question, whether the instruction of the learned judge

below to the jury, as to the measure of damages, was correct. There was no dispute as to the amount which the plaintiff had paid for the stock, nor that he had made a regular and formal tender of it back to the defendant, and demanded the return of the money, or a note, in conformity with the agreement. The plaintiff in error supposes that the same rule is applicable in this case as in the ordinary case of the refusal of a vendee, before any title to the property has passed to him, to accept goods which he had previously agreed to buy. The authorities which have been cited abundantly show that there the measure of damages is the difference between the contract and the market price at the time of the refusal or breach. But the mistake is in considering that this was a contract to purchase or repurchase. If the jury believed the testimony of the plaintiff, and that was left to them, and upon his credibility the whole controversy hinged, then it was an agreement by which, as one of the terms of the sale, the plaintiff was to be at liberty to rescind the contract, and the defendant undertook in that event to pay back the price or give his note for the amount. It is like the very common case of the purchase of a horse, where the buyer pays the price, but stipulates that after a reasonable trial, if he should not be satisfied with the animal he may return him and receive back the price paid. No one has ever supposed that this was to be construed as a contract to repurchase, or that upon the exercise by the vendee of the option reserved, the title does not revest in the original vendor, and the right to the price in the vendee. This is the legal effect of the rescission of a contract, whether the rescission be by reason of an inherent vice, such as fraud, or by virtue of the terms of the contract itself: Smethurst *v.* Woolston, 5 W. & S. 106.

The nine following assignments all relate to one and the same question. The plaintiff had testified that the defendant stated to him as an inducement to the purchase, that he had reserved twenty thousand shares of the stock of the company in dispute, for the Laubach family, from which the inference was, that he was the agent of the company for the sale of the stock. When the defendant was put upon the stand as a witness for himself he denied that he had made this statement, and that he had ever said anything to certain persons named about selling stock to them. This was certainly relevant to the issue trying, and the defendant might be contradicted in regard to it, for it bore directly upon the main question, whether he or his son Frank had made the sale to the plaintiff. It was true he was also asked whether he had guarantied the stock sold to these persons, as it was alleged he had done to the plaintiff. It may well be that this was entirely collateral and irrelevant, and his answer conclusive according to the familiar rule, that a witness cannot be contradicted as to collateral and irrelevant matter brought out upon cross-examination. It is, how-

ever, unnecessary to decide this, because the offer to contradict him in this respect by the testimony of the persons, who had been named to him, was made in connection with an offer to contradict him as to the other relevant matter that he had not spoken to them about the sale of the stock. The objection to the offer was a general one, and if any part of it was admissible the judge cannot be convicted of error in overruling such general objection. In such a case it is the duty of the party objecting to call the attention of the judge particularly to that part which is inadmissible by a special objection. This is but fairness to the judge. In the pressure upon his mind in the necessary hurry of a jury trial, he cannot be required to scrutinize narrowly every part of an offer, and to distinguish in it the admissible from the inadmissible, though he may do so; and especially is this true, when the objection goes merely to relevancy, the shades of difference as to which are often so slight. The learned judge below, in his charge, instructed the jury that the fact that the defendant had guarantied and promised to redeem stock which he had sold to others, was not a circumstance from which they were at liberty to infer or find that he had made a like promise to the plaintiff. We think, therefore, that there was no error in the admission of this evidence, of which the defendant below, the plaintiff in error, has any right to complain.

As to the eleventh assignment, it is enough to say, that we have not been furnished with copies of the books and circulars of the company, so as to enable us to judge of their competency and relevancy. If the defendant was the agent of the company in making sale of the stock, of which there was some evidence, these books and circulars may well have been admissible if their contents were relevant. Indeed, this assignment does not seem to be pressed, as the counsel for the plaintiff in error did not notice or explain it, either in his printed or oral argument.

Judgment affirmed.

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Kistler's Appeal.

1. A sheriff's sale is made against the will of the defendant, and he has no control of the direction the title is to take, and if there be no fraud practised by the bidder, the defendant can obtain a title only by repurchase.

2. Saeger's property being to be sold by the sheriff, he consulted with German, Kistler and others, and it was understood that Kistler should purchase for his benefit. At the sale Kistler was absent, the property was struck down to German for the benefit of Saeger at its full value, and at Saeger's request deed made to Kistler, who paid the money, he agreeing to hold it for Saeger that he might have a home. Saeger was insolvent and continued to be unable to refund the money. *Held*, not sufficient to make Kistler trustee *ex maleficio* for Saeger.

3. Such agreement is within the Statute of Frauds and cannot be enforced.

4. The evidence to establish a resulting trust, especially one *ex maleficio*, should be clear, explicit and unequivocal.

[Kistler's Appeal.]

March 20th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Appeal from the Court of Common Pleas of *Lehigh county:* In Equity, No. 148½, to July Term 1872.

On the 9th of July 1868, Joseph Saeger and Maria his wife filed a bill against Samuel J. Kistler. The bill set out:

1, 2. Joseph Saeger on the 20th of December 1858, owned a house and lot in Allentown, and on that day the premises were sold by the sheriff under an execution against Saeger for $1200; subject to a mortgage, &c.

3, 4. Before the sale, the plaintiffs had agreed with a number of their creditors that the premises should be purchased at sheriff's sale by Nathan German, one of the creditors, and that in pursuance of the agreement the property was struck off to German for $1200, "subject to the said conditions."

5, 6. After the sheriff's sale and upon the same day, German agreed with Kistler, the defendant, that Kistler should be substituted as purchaser instead of German, on the condition that the title should be held by Kistler for the benefit of the plaintiff; Kistler was so substituted and agreed so to hold the title, that upon the payment by the plaintiffs of the yearly interest upon the purchase-money and of the principal sum $1200, he would convey the property to them.

7. In accordance with those arrangements, the plaintiffs entered into possession of the property and made valuable improvements at a cost of $1035; paid the taxes on the property, interest on the purchase-money and on the mortgage, subject to which it was sold.

8. The plaintiffs occupied the property until the 3d of April 1865, when they were notified by the defendant Kistler to deliver possession to him, "and thereupon compelled them to quit and deliver up possession as aforesaid."

9. Since April 3d 1865, the defendant had the sole use of the property; received rents to the amount of $1000, and has refused to account to them; and although plaintiffs were willing to pay him the purchase-money and do all required by the agreement between the defendant and German, the defendant refused to convey to them.

The prayer was that the defendant should be decreed specifically to perform the agreement; to hold the property in trust for the plaintiffs and give them possession; they offering to perform their part of the agreement and pay the purchase-money and interest, &c.

The defendant answered:—

1. He admitted the allegations of this paragraph of the bill.

2. He bought the property at sheriff's sale December 20th 1858, and paid from his own money $1200, the purchase-money,

[Kistler's Appeal.]

and a deed was delivered to him by the sheriff January — 1859; he afterwards paid $990.40, the amount of the lien which remained on the property, with the interest which had accrued on it.

3, 4, 6. He denied the allegations of these paragraphs.

5. He denied the allegations of this paragraph, and averred, that prior to the sale he intended to purchase the property if not sold for more than it was worth, and to make arrangements satisfactory to himself for the occupancy of the property by the plaintiffs; when defendant came to the sale, the property had been struck down to German, who on being informed of defendant's intention, allowed his name to be substituted as purchaser, and defendant was in consequence returned by the sheriff as purchaser; he never entered into any agreement with plaintiffs to convey the property to them; but his intention to purchase was merely from friendly feelings to the plaintiffs. After receiving the deed, he verbally agreed with the plaintiffs that they should occupy the property at a rent equal to $148.01, being interest on the cost to the defendant, taxes and repairs to be paid by plaintiffs, who were in possession at the time of the verbal agreement and so remained until April 1st 1865; plaintiffs paid part of the taxes and paid $546.53 on account of rent; they gave up possession in pursuance of the notice and without further action; they removed part of the improvements they had put upon the property, and about June 7th 1865, presented a claim of $1035 to defendant for taxes, improvements, &c.

7. Plaintiffs did not *enter* into possession in accordance with any arrangement alleged in this paragraph, but they remained in possession under the verbal agreement above mentioned. Defendant had no knowledge of the improvements made by plaintiffs, but such as were made were for plaintiffs' own benefit without the consent of defendant, some were useless and an injury. Plaintiffs paid no interest except what was paid as rent, and a large amount is still unpaid.

8. No further compulsion than the notice to quit was used to cause the plaintiffs to leave the property.

9. Defendant has received rent since the plaintiffs left, but is not bound to account to plaintiffs for it.

A replication was filed, and William H. Glace, Esq., appointed examiner and master.

A large amount of testimony was heard before the examiner, which he returned to the court, and as master, he reported a decree that the plaintiffs' bill be dismissed.

On exceptions by the plaintiffs, the court (Longaker, P. J.) held that the evidence established a resulting trust, and the whole matter was again referred to the master, with instructions to state an account between the plaintiffs and defendant, &c., and to report a form of decree in accordance with the opinion of the court.

The master again reported, presenting a form of decree as directed by the court.

Exceptions were filed by the defendant to the second report.

After argument the exceptions were overruled and the court decreed: "That the defendant execute and deliver to the plaintiffs a good and sufficient deed in fee simple for the house and lot in controversy, within fifteen days after the plaintiffs shall have paid to the prothonotary of the Common Pleas of Lehigh county the sum of $3918.87, with interest from April 1st 1872, subject to the order of the defendant, and that the plaintiffs notify the defendant of said payment, and that the defendant pay the costs."

The facts of the case are so fully set out in the opinion of the Supreme Court that no other statement of them is required.

The defendant appealed to the Supreme Court, and assigned the decree for error.

C. M. Runk and *Thompson*, for appellant.—The case is within the Act of April 22d 1856, sect. 4, Pamph. L. 533, 1 Br. Purd. 724, pl. 3, and is ruled by Barnet *v.* Dougherty, 8 Casey 371. If there be nothing more than the violation of a parol agreement, equity will not decree a purchaser to be a trustee: Williard *v.* Williard, 6 P. F. Smith 119; Kellum *v.* Smith, 9 Casey 164; Jackman *v.* Ringland, 4 W. & S. 149. A parol agreement to purchase land and convey on payment of advances is void: Myers *v.* Byerly, 9 Wright 368. A purchaser at sheriff's sale can be held trustee only on the ground of fraud: Haines *v.* O'Conner, 10 Watts 313; Merritt *v.* Brown, 6 C. E. Green 402; Sample *v.* Coulson, 9 W. & S. 62; Brown on Fraud, sect. 94.

E. J. More and *Woodward*, for appellees.—Wherever a person obtains a title from another through a confidence reposed in him, which he could not have obtained except by such confidence, if he abuse such confidence he is converted into a trustee *ex maleficio:* Hoge *v.* Hoge, 1 Watts 163; Sheriff *v.* Neal, 6 Id. 534; McCullough *v.* Cowher, 5 W. & S. 427; Miller *v.* Pearce, 6 Id. 97; Morey *v.* Herrick, 6 Harris 123; Plumer *v.* Reed, 2 Wright 46; Church *v.* Church, 1 Casey 278; Beegle *v.* Wentz, 5 P. F. Smith 369; Lingenfelter *v.* Richey, 8 Id. 485; Seichrist's Appeal, 16 Id. 237.

Where one procures a conveyance to be made to him, upon the promise and assurance that he will hold it in trust for another, and refuses to carry out such promise, it is a fraud; *and because of the fraud* the vendee is a trustee *ex maleficio:* Hill on Trustees 224, 225; Thompson *v.* White, 1 Dallas 424; Gilbert *v.* Hoffman, 2 Watts 66; McCullough *v.* Cowher, 5 W. & S. 430; Jackson *v.* Summerville, 1 Harris 359.

[Kistler's Appeal.]

The opinion of the court was delivered, May 17th 1873, by

AGNEW, J.—The finding of the master, who had also been the examiner in this case, was against the plaintiffs upon every material fact alleged in their bill, and his clear conclusion was that there was no trust on part of the defendant, on any ground. Exceptions being taken to these findings of fact, the court below, rejecting the report, found the facts for themselves. The opinion of the judge evinces a mind favorably impressed by the evidence in behalf of the plaintiffs. His statement may be regarded, therefore, as exhibiting the entire strength of their case. It is as follows:—"That in December 1858 the real estate in question was to be sold at sheriff's sale; that Joseph Saeger, a deaf mute, one of the defendants in the execution, and now one of the plaintiffs to this bill, was desirous, prior to the sale, to secure the purchase of it, so that it might eventually enure to the benefit of his wife; and in order to effectuate his desire, he called on Mr. German, Christian Pretz and Samuel J. Kistler, and that as the result of his conferences, it was understood that the defendant would so purchase, and that Mrs. John Saeger, an aunt of the plaintiff to this bill, would also assist by furnishing some money. German attended the sale, fully believing that an arrangement existed by which Kistler was to buy; but not finding Kistler at the sheriff's sale, he bought for the benefit of the plaintiffs, and so informed A. L. Ruhe, who was also bidding on the property. German became the purchaser, and signed the conditions of sale; but before the down-money was paid, at the instance of Joseph Saeger, Kistler was substituted, by an agreement between him and German, at the sheriff's office, by which Kistler should take and hold the property for the plaintiffs, so that they should have a home; that if Kistler had not agreed to hold for the plaintiffs' use, German would not have allowed him to succeed to his purchase; that the property brought its market value at the sheriff's sale, and has since greatly appreciated; and that after Kistler received the deed, Joseph Saegar and wife continued in the possession of the property and made important repairs and alterations; that the property was assessed in the name of Maria Saeger, and continued to be assessed in her name until 1864, and that the taxes were paid by the plaintiffs, and that interest on the amount of the purchase-money paid by Kistler, and the interest on the liens were paid by the plaintiffs until the year 1862, which in some receipts is called rent, and the others, interest; that about January 1864 the plaintiff, Joseph Saeger, was notified by Kistler to leave the premises, there having been served a landlord's notice to quit. The plaintiff surrendered the possession, and subsequently made several demands, by presentation of bills to the defendant, as a compensation for repairs made. "These facts (says the judge) clearly establish a resulting trust, and the defendant,

Samuel J. Kistler, will be treated as a trustee *ex maleficio* of the plaintiffs." We cannot assent to this conclusion. These facts establish only a judicial sale *in invitum* as to Saeger, struck down to German, who paid no money, and that Kistler stepped into his place, paid the bid, and took the deed upon a parol agreement to hold the property for the benefit of the plaintiffs, so that they might have a home. It is wholly unlike those cases where one receives a conveyance without consideration or purchase, in confidence that he will hold it for another. A sheriff's sale is made against the will of the defendant, and he has no control over the direction the title is to take. If no fraud at the sale be practised by the bidder, the defendant in the writ can obtain a restoration of his title only by a contract of repurchase. That such an agreement to repurchase or to redeem, as is found by the judge, is within the Statute of Frauds and Perjuries, and could not be enforced even before the passage of the Act of 22d April 1856, is attested by abundant authority. The case of Fox *v.* Heffner, 1 W. & S. 372, is a counterpart of this in every respect, if, indeed, it is not stronger, as Morris, who took the place of Patterson at the sheriff's sale, repeatedly acknowledged the right of Heffner to redeem his land on payment of the money. "The plaintiff below (said Judge Sergeant) claims the land under a parol agreement between him and Morris, one of the defendants, made at the time when the sheriff's deed conveyed the land to Morris." After stating that such an agreement is within the Statute of Frauds and Perjuries of 1772, he says: "It is now settled by repeated decisions of this court that if one buys the defendant's property at sheriff's sale, and verbally agrees to hold it in trust for the defendant, with a right of redemption in the defendant within a limited period, it is a contract resting in parol merely, and not transferring any title in the land. In Kisler *v.* Kisler, 2 Watts 327, and Robertson *v.* Robertson, 9 Watts 42, it was determined that unless there is in the transaction more than is implied from the mere violation of a parol agreement, equity will not decree the purchaser to be a trustee. In Haines *v.* O'Conner, 10 Watts 320, these cases are recognised, and it is laid down that a purchaser at sheriff's sale, who has paid his own money, can be held a trustee *ex maleficio* only on account of the existence of fraud, and when that is the case, he is a trustee for the creditors and the debtor also, unless the debtor be *particeps criminis*. In the case before us there is no evidence of any collusion or act of fraud on the part of Morris, in the purchase of the property which could make him a trustee *ex maleficio*, and the fraud which may be alleged to exist in the mere violation of an agreement is no more than that which attends every violation of an agreement." This language is so applicable to the case of Kistler, I have transcribed it in lieu of my own. Here Kistler was not present at the sheriff's sale, and committed no act of

fraud, but merely took German's place at the instance of Saeger, and paid his own money upon an agreement to suffer Saeger to redeem. The following cases are to the same effect: Leshey *v.* Gardner, 3 W. & S. 314; Jackman *v.* Ringland, 4 Id. 149; Sample *v.* Coulson, 9 Id. 62. The case is made still stronger against the plaintiffs by the Act of 22d April 1856, the fourth section of which provides that "all declarations or creations of trust or confidences of any lands, tenements or hereditaments, and all grants and assignments thereof, shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or be void." This case is ruled by Barnet *v.* Dougherty, 8 Casey 371, and Kellum *v.* Smith, 9 Id. 158. Both in the court below and here, it has been said the trust arose *ex maleficio*, though nothing of the kind is found in the evidence; yet, as this has led to an inquiry into the conduct of German, who bid off the property at the sale, it will be proper to refer to this aspect of the case. But how can that question arise? The bill is filed against Kistler alone, and is founded wholly on his agreement to hold the property for the plaintiffs. No averment is made of fraud in the purchase at sheriff's sale, by German or Kistler, or that the property was bought at an undervalue. Neither the judge below, nor the solicitors of the plaintiffs, in their statements of the case, place it on the ground of fraud in the sale. The facts as proved disclose no fraud. German was under no promise to buy for Saeger, and did not go to the sale for that purpose. He went as a lien-creditor, to protect his own interests, but finding neither Kistler, nor Saeger, nor his friends there, he bid himself, with the intention of securing the property for Saeger, an intention communicated to Saeger immediately after the sale, and fairly carried out. Ruhe, a bidder also, asked him when bidding, whether he wanted the property for himself. He replied, he wanted it for Joseph Saeger. "Then," said Ruhe, "I won't bid any more." This is German's own account of the matter. Elisha Forrest testifies that before the property was knocked down, German said he was bidding, and wanted to buy the property for the benefit of Joseph Saeger. This was all he said. No unfairness is imputed to German, and none is alleged against the sale, or is found by the master or the court. The evidence shows, and the court found as one of the facts, that the property brought its market value at the sheriff's sale. There is nothing in the case, therefore, which would authorize us to shift the position the plaintiffs have assumed in their bill, and to treat this as a trust *ex maleficio*, arising out of German's conduct. Clearly no fraud was intended; his purpose was fair; and no injury was done either to creditors or to the defendant. Whatever supposed benefit he might have derived from the sale, he suffered to pass over to Kistler without consideration and for Saeger's benefit. The evidence to

establish a resulting trust, especially one arising *ex maleficio*, which is an imputation of fraud, should be clear, explicit and unequivocal: McGinity *v.* McGinity, 13 P. F. Smith 38; Nixon's Appeal, Id. 279; Lingenfelter *v.* Richey, 12 Id. 123.

Nor is there anything in the conduct of Joseph Saeger which invokes equity in his behalf. He admits that he was insolvent at the time of the sale, and unable to refund the money, and has so continued. Mrs. John Saeger, who was to have assisted him, soon after the sale, refused to do so, and Kistler was obliged to give his own bond, with surety, to pay off her mortgage. Joseph Saeger occupied the property for years, and failed to pay all his rent. When notified by Kistler, as landlord, to quit possession, he did so, and then presented to him a large bill for repairs, materials and taxes, and finally did not file this bill for more than three years after he had surrendered possession, and more than nine years after the sheriff's sale.

Upon a full review of the case, we can discover no equity to support the plaintiffs' bill. The decree of the Court of Common Pleas is therefore reversed, and the bill of the plaintiffs is dismissed, and they are ordered to pay the costs.

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148 [illegible]
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Ritter *et al. versus* Singmaster *et al.*

1. An endorsed note was discounted by a bank for the drawer, at maturity he took it up by a similar note on which the endorsements were forged, and destroyed the original note; he took up the second note by another note with forged endorsements. *Held*, that taking the last two notes in renewal did not extinguish the original note.
2. The record of the protesting notary being proved to contain a true copy of the first note, was admissible in evidence.
3. The bank who discounted the first note was entitled to recover, on proof of its destruction and the genuineness of the signatures.

March 21st 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Lehigh county:* Of January Term 1873, No. 192.

This was an action of assumpsit, commenced January 24th 1871, by James Singmaster and others, trading as the Millerstown Savings Bank, against John M. Ritter and Peter Marck.

The plaintiffs filed a declaration, averring that Erwin Burkhalter, on the 20th of September 1870, made a promissory-note for $1000, payable to the order of the defendants, at the Millerstown Savings Bank, in ninety days, and the defendants endorsed it to the plaintiffs; that the note was not paid at maturity, and that the defendants were notified, &c.

They afterwards filed another declaration, averring: In the first

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count that Burkhalter, on the 8th of April 1870, made a promissory note to the defendants, promising to pay $1000 at the Allentown National Bank in ninety days, and the defendants endorsed it to the plaintiff, but it was unpaid at maturity, and the defendants were notified, &c.

The second count was upon another note for $800, by the same drawer to the defendants, dated July 2d 1870, payable in ninety days at the Millerstown Savings Bank, endorsed by the defendants to the plaintiffs, and remaining unpaid, and they notified of the non-payment, &c.

The third count was on a note by the same drawer to the defendants, dated July 8th 1870, for $1000, payable at the Millerstown Savings Bank in sixty days, endorsed to the plaintiffs, remaining unpaid, and the defendants notified, &c.

The case was tried November 14th 1872, before Longaker, P. J. On the trial the plaintiffs withdrew their claim upon all the notes, but that dated April 8th 1870, payable at the Allentown Bank. The evidence was that this note was discounted at the plaintiff's bank for Burkhalter, and that at maturity it was unpaid and protested, the endorsers being notified.

On the 26th of July 1870, Burkhalter brought to the bank another note, dated July 8th, for $1000, drawn by himself, payable to the defendants in sixty days, with the defendants' names endorsed. This note was taken by the plaintiffs as a renewal of that of April 8th, which was then given up to Burkhalter; it was unpaid and protested, notice being sent to the endorsers. Burkhalter in November brought to the bank another note for $1000, dated September 9th 1870, payable to the defendants in ninety days, with their names endorsed on it. This note was received by the plaintiffs in renewal of the note of July 8th, which was then delivered to Burkhalter; being unpaid, it was protested, the defendants being notified.

Burkhalter testified that the endorsements on the notes of July 8th and September 9th were forgeries, and that he had destroyed the note of April 8th.

The plaintiffs then called Samuel Colver, the notary public, who produced his record and testified that a copy of note in the record was a true copy of the note of April 8th. The court then, under objection by the defendants and exception, admitted the notary's record of the protest of that note in evidence.

Numerous points, not necessary to note, were submitted by each party.

The court amongst other things charged: * * *

"The plaintiffs have shown by testimony which is not disputed, that this note was delivered after protest to Erwin Burkhalter, the maker, by the bank receiving another note from him of same amount, and signed by Burkhalter, and purporting to be endorsed

by the defendants. This second $1000 note is now admitted by the plaintiffs to be a forgery as regards the names of the defendants, and this fact is not disputed; when this second note fell due, a third note of $1000 signed by Erwin Burkhalter, with the names of the defendants forged as endorsers, was received by the bank, and the second note was delivered to Erwin Burkhalter. As a matter of law I say to you that the receiving of notes whose endorsements were forged, will not amount to a payment of a genuine note or extinguish the right of action against the defendants as endorsers upon the first note, if that first note dated April 8th 1870, drawn by Burkhalter and endorsed by the defendants, bears their genuine signatures.

"The only question therefore for your consideration as a matter of fact is, as to the signatures of the defendants, are these signatures genuine? If you find the signatures genuine, then the plaintiffs will be entitled to recover whatever remains due and unpaid on this note." * * *

The verdict was for the plaintiffs for $1049.03.

The defendants took out a writ of error and assigned sixteen errors; amongst others the admitting the notary's record in evidence and the charge of the court.

C. J. Erdman and *J. D. Stiles*, for plaintiffs in error:—As to the extinguishment of the original note by taking the forged notes, cited, Chitty on Bills 173; Hill *v.* Bostick, 10 Yerger 410; Letcher *v.* Bank, 1 Dana (Ky.) Rep. 84.

W. H. Lowden and *E. Harvey*, for defendants in error:—As to the same point, cited Eagle Bank *v.* Smith, 5 Conn. 71; Packford *v.* Maxwell, 6 Tenn. R. 52; 2 Parsons on Notes 595; Ramsdale *v.* Horton, 3 Barr 330; Watson *v.* McLaven, 19 Wendell 587.

The opinion of the court was delivered, May 17th 1873, by

READ, C. J.—The plaintiffs, who are partners, trading under the name of The Millerstown Savings Bank, are engaged in the banking business in the Borough of Millerstown, in Lehigh county. On the 9th of April 1870, they discounted a note drawn by Erwin Burkhalter and endorsed by the defendants, dated the 8th of the same month, for $1000, payable ninety days after date at the Allentown National Bank. At maturity this note not being paid was protested for non-payment, of which the endorsers had notice. About seventeen days afterwards said Burkhalter brought to the plaintiffs his promissory note, dated 8th July 1870, payable sixty days after date, for a similar amount, to the order of the defendants, and purporting to be endorsed by them, and which was given to the said plaintiffs as a renewal of the note of 8th April 1870. On

the 9th September 1870, this note became due, and not having been paid, was protested for non-payment, of which the endorsers had legal notice.

On the 3d November 1870, the said Burkhalter brought his promissory note dated 9th September 1870, to the plaintiffs for similar amount, payable ninety days after date, drawn by himself and purporting to be regularly endorsed by the defendants, which note was again given to the plaintiffs by the said Burkhalter as a further renewal of the antecedent and original debt. On the 11th December 1870, this note was protested for non-payment, of which the defendants had legal notice.

On the 24th January 1871, suit was brought by the plaintiffs on this last note, and on another note for $800 against the defendants. In an affidavit filed by the defendants, the endorsements on these notes were sworn to be forgeries. It was also proved on the trial that the endorsements on the second note for $1000 were forgeries. A *non pros.* was suffered on the counts in the *narr.* on this last note of $800, and an additional *narr.* filed, counting on the first and second notes for $1000.

The first note discounted by the plaintiffs was a genuine one, endorsed by the defendants, protested for non-payment, and due notice of it given to the endorsers, who became bound to pay. The note given on renewal was a forgery and worthless, and the third note given in renewal was also a forgery and enabled the forger to get possession of the first note and the second note, and he destroyed both of them. This note, upon which this suit is brought,—was therefore never paid by these spurious and fraudulent and forged notes which were mere nullities—given in renewal of the first note.

The learned judge was therefore right in saying to the jury: "The receiving of notes whose endorsements were forged will not amount to a payment of a genuine note, or extinguish the right of action against the defendants as endorsers upon the first note, if the first note dated April 8th 1870, drawn by Burkhalter and endorsed by the defendants, bears their genuine signatures."

An exact copy of the first note was proved by the notary who protested it for non-payment and gave legal notice to the defendants, and the record of the notary was also admitted in evidence. This is the real point in the case, and there is nothing in the numerous errors assigned by the defendants.

Judgment affirmed.

Allentown *versus* Henry.

1. A water company was incorporated in Allentown, and authorized "to lay reasonable assessments in the nature of water-rents on every dwelling in any street, &c., in said city in which and as far as the water-pipes are now laid, or may be laid, and to collect," &c. Under an act for the purpose the city bought the works of the company with their franchises, privileges, &c. *Held*, that although these powers might be unconstitutional when applied to the company, they were not so when transferred to the city, a municipal corporation.
2. Authorizing the assessment to be made in streets, &c., where pipes were laid, was not imposing a local assessment for a general benefit, but was a local tax for a local benefit.
3. An ordinance by the city laying a tax "upon dwelling-houses *not supplied with hydrants*," was not in accordance with the Act of Assembly, and could not be enforced.

March 21st 1873. Before READ, C. J., AGNEW and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Lehigh county:* No. 249, of January Term 1873.

On the 13th of May 1872, the city of Allentown brought an action before a justice of the peace against William Henry for water-rent, for two houses of defendant in the city. The justice gave judgment for the city for $11; the defendant appealed to the Court of Common Pleas.

By a supplement to the charter of the Allentown Water Company, approved April 14th 1868, it was provided that "they shall have the liberty, privilege and power to lay reasonable assessments in the nature of water-rents, upon every dwelling-house situated in any of the streets, lanes and alleys of the said city, in, through and along which, and as far as the water-pipes of said company are now laid and shall hereafter be laid, and to collect the said assessments or rents in the same manner as water-rents are now collected."

By Act of March 22d 1870, the city of Allentown was authorized to supply the city with water, and it might erect water-works or purchase works already erected, and there were conferred upon it all the rights, privileges, powers and franchises of the Allentown Water Company. The city purchased the works of that company and passed the following ordinances:—

September 24th 1869: "That all rents or other emoluments which may arise from the use and application of said water, shall be applied for defraying the expenses of superintendence and of repairs and improvements of necessary works for the better accommodation and supply of the city with water, and to the payment of the interest and redemption of the city loan, and thereafter for any further improvement or in aid or alleviation of taxes on its inhabitants as may be directed by councils."

May 12th 1871: "That from and after the passage of this

[Allentown v. Henry.]

ordinance, a tax of five dollars be levied *upon such dwelling-houses not supplied with hydrants*, which are situated upon any of the streets or alleys of this city, in, through and along which the water-pipes are now laid, and those hereafter to be laid, and that said assessment or tax shall be collected in the same manner as water-rents are now collected."

On the trial, January 10th 1873, before Longaker, P. J., the plaintiff gave evidence that the defendant was assessed for two houses, in neither of which was there a hydrant, but which were on streets through which the water-pipes were laid.

The defendant testified that he used a cistern in each of his houses and used no hydrant water.

The verdict was for the defendant, under the direction of the court.

Judge Longaker, in his opinion, on motion for a new trial, held that although the Act of 1868 might be unconstitutional in conferring on the Allentown Water Company the powers mentioned in it, it was not therefore unconstitutional when by the sale of their works those powers were transferred to a municipal corporation.

He further held that the act was unconstitutional, as imposing a local tax for general purposes.

The plaintiff removed the record to the Supreme Court by writ of error, and assigned for error that the court directed the jury to find for the defendant.

H. C. Hunsberger, for plaintiff in error.

E. Holben and *E. J. More*, for defendant in error.

The opinion of the court was delivered, May 17th 1873, by

Mercur, J.—We think the learned judge correctly held that although the Act of 14th April 1868 might be unconstitutional, so far as it sought to authorize a private corporation to levy and collect a tax upon a citizen, yet it does not follow that that power may not be conferred upon a municipal corporation. The manifest intent and meaning of the Act of 22d March 1870, are to give to the plaintiff all the rights, privileges, powers and franchises which previous acts had declared to be given to the Allentown Water Company, as fully as the language used therein professed to give the same, so that the plaintiff now holds and possesses them as fully as if they had been re-enacted in the same words.

We, however, are unable to concur in his conclusion that the said acts are unconstitutional. We do not understand this Act of 14th April to impose an assessment for a general public benefit. Upon the contrary, it is a local tax, substantially for a local benefit. The tax is local, as it is imposed upon those dwelling-houses

only, situate upon the lines of the water-pipes. The benefits are local, as the use of the water must necessarily be mostly restricted to the benefit of the property on those lines, both for domestic purposes and the extinguishment of fires. The effect of supplying those streets with water is to enhance the value of the dwelling-houses thereon. The maintenance of the pipes, and the supplying of water, are necessarily a continuing expense, and this tax is evidently designed to defray those expenses. It is well settled, that the legislature has the constitutional right to confer upon municipal corporations the power of assessing the cost of local improvements upon the properties benefited: Hammett *v.* Philadelphia, 15 P. F. Smith 146; Kirby *v.* Shaw, 7 Harris 258.

We concur that the verdict was correctly taken. The ordinance did not follow the Act of Assembly. The act authorized the assessment to be levied upon "every dwelling-house situated in any of the streets, lanes and alleys of the said city, in, through and along which, and as far as, the water-pipes are now laid, and shall hereafter be laid." The ordinance imposes the tax upon such dwelling-houses only as are "not supplied with hydrants."

This is an unwarranted departure from the letter and spirit of the law.

Judgment affirmed.

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36 SC 3 47

Allentown *versus* Kramer.

1. A municipal corporation has a right to raise its streets and bridge them in order to improve their usefulness.
2. When a municipality exercises its lawful authority derived from the state, it is not liable for collateral injuries from the exercise of its power.
3. For negligence in the construction or repair of public works (when repair is a duty), the corporation is responsible for special damage caused by its negligence.

March 21st 1873. Before READ, C. J., AGNEW, and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Lehigh county:* No. 285, to January Term 1873.

This was an action on the case by J. A. Kramer against the city of Allentown, for damages to his property from the overflow of the water from the streets of the city, occasioned by the construction of a bridge or culvert across Sixth street. It was tried December 16th 1872, before Longaker, P. J.

The plaintiff gave evidence that he owned a lot at the corner of Sixth and Linden streets, since April 3d 1866 when he bought it; his house was on Sixth street; the lot was low and he filled it up four or five feet; he got orders from the mayor to put up a

new curb, and put it up according to instructions in the fall of 1866; at the same time he laid a pavement, which was approved by the city engineer; about December 1870, Sixth street was macadamized, and the authorities of the city put bridges across the gutters; the bridges were made of iron and plank; the bridge was not high enough to allow the water to pass through, the water soaked through the loose ground into plaintiff's cellar; this occurred frequently during the summers of 1870, 1871 and 1872; it tore open his sidewalk by reason of being forced back from the bridge; the water had never run into plaintiff's yard before the building of the bridge. The grade of the street had been altered by councils, and his curb lowered three inches at his request.

There was evidence by the defendant that the gutter complained of had the same capacity for passing the water as it had previously to constructing the bridge; they gave evidence also, for the purpose of showing that the defendant had contributed to the injury in the construction of his pavement, &c.

By the charter of the city of Allentown, the corporate authorities have power "To regulate roads, streets, lanes, alleys, courts, common sewers, public squares, common grounds, footwalks, pavements, gutters, culverts and drains, and the heights, grades, width, slopes and forms thereof, and they shall have all needful jurisdiction over the same."

The plaintiff's points which were affirmed were:—

1. If the jury believe that the bridge erected by the defendant on Sixth street is an obstruction to the flow of the waters which in ordinarily severe showers are conducted by the city through the gutter on the north side of Linden street and on Sixth street, and that by reason of such obstruction the waters are backed up Sixth street and turned over and upon the premises of the plaintiff, without any default or negligence on his part, the defendant is liable for the injury directly resulting to the plaintiff's property from such overflow. * * *

3. The city of Allentown has power by its charter "to cause common sewers, drains, &c., to be made in any part of the city." Although passing an ordinance for the construction of such a work is a judicial act for which the city is not liable, yet the doing of the work, in carrying it out, is ministerial, and it is their duty to see that it is carefully and skilfully done. If by the want of care or skill of its agents, this bridge or culvert was constructed of insufficient capacity or so as to obstruct the passage of the water, the city is liable to the plaintiff for the damages thereby occasioned.

The court charged: "You are instructed as a matter of law, that the city has the right to construct culverts where one street crosses another; but while they have that right they must so use it as not to obstruct the flow of water which will usually flow there

in ordinarily severe showers. Great and extraordinary flows of water need not be provided for. Your inquiry then will be, has the culvert complained of been so constructed as to be an obstruction to the flow of water in ordinarily severe showers, and by means thereof, has the water been caused to flow in and upon the premises of the plaintiff? If you find this fact, and find the further fact that the plaintiff has in no way by his own negligence contributed to the damages complained of, he will be entitled to recover in this action. If you cannot so find, your verdict will be in favor of the defendant."

The verdict was for the plaintiff for $280. The defendant took out a writ of error and assigned for error the answers to the points and the charge of the court.

H. C. Hunsberger, for plaintiff in error, cited Green *v.* Reading, 9 Watts 385; Clarke *v.* Birmingham & Pittsburg Bridge Co., 5 Wright 158; Monongahela Nav. Co. *v.* Coon, 6 Barr 382; Same *v.* Same, 6 W. & S. 101; Grant *v.* Erie, 19 P. F. Smith 420; as to liability of a municipal corporation for consequential injuries from public improvements.

R. E. Wright, Jr. (with whom were *W. H. Sowden*, *G. B. Schall* and *R. E. Wright*).—A municipal corporation is liable for negligence in constructing improvements. Henry *v.* Pittsburg & Allegh. Bridge Co., 8 W. & S. 85; Carr *v.* N. Liberties, 11 Casey 324; Rochester White Lead Company *v.* City of Rochester, 3 N. Y. (3 Comst.) 463; Lloyd *v.* Mayor, &c., of N. Y., 5 N. Y. (1 Seld.) 369; Delmonico *v.* Mayor, &c., of N. Y., 1 Sandf. 282; Philadelphia *v.* Fox, 14 P. F. Smith 169.

The opnion of the court was delivered, May 17th 1873, by

AGNEW, J.—The question presented by this record is more limited than the range of the argument. It is true the evidence raised a question upon the power of the city of Allentown to grade, regulate and improve the streets; a power fully conferred by the charter of the city; but the court seems to have committed the case to the jury on the single question of a negligent and unskilful construction of the bridge over the gutter of Linden street. It appears that the plaintiff's lot lies low, and that at his own request the curbing along it was lowered three inches. Had the case been determined on these facts alone, there would have been error in the verdict; for the right of a city to raise its streets and to bridge them, in order to improve their public usefulness, is undoubted. A large number of cases support this position. Among them are the following: Green *v.* Borough of Reading, 9 Watts 382; The Mayor *v.* Randolph, 4 W. & S. 514; Henry *v.* Bridge Co., 8 W. & S. 85; Commissioners *v.* Wood, 10 Barr 93;

[Allentown v. Kramer.]

Phila. & Tren. R. R. Co., 6 Wharton 25; O'Connor v. Pittsburg, 6 Harris 107; Carr v. Northern Liberties, 11 Casey 324. The principle at the bottom of these cases is, that when a municipality is in the lawful and proper exercise of the power of the state, such as in the improvement and regulation of a highway, under an authority conferred by law, it is not liable for the injuries which flow collaterally from the execution of the power. Hence in this case, the plaintiff, whose lot lay below the grade of the street as improved under the ordinance of the councils, could not recover for the consequential injury arising from an increased flow of surface water caused thereby. But the cases referred to, or some of them, state the distinction, upon which this case was submitted to the jury, and which has been sustained in many other cases, to wit: that for negligence, either in the construction or repair of public works (when repair is a duty) the corporation itself must respond in damages for a special injury caused by its negligence: *Supra*, 9 Watts 385, 386; 8 Id. 86, 87; 10 Barr 95, 96; 11 Casey 329. And see Erie City v. Schwingle, 10 Harris 384; Humphreys v. Armstrong Co., 6 P. F. Smith 204; Pittsburg, Ft. Wayne & Chi. R. R. Co. v. Gilleland, Id. 445; Penn. & Ohio Canal Co. v. Graham, 13 P. F. Smith 290; Norristown v. Moyer, 17 Id. 355; Rapho v. Moore, 18 Id. 404. The single point submitted to the jury was, whether the culvert (or bridge) over the gutter in Linden street had been so constructed as to be an obstruction to the flow of water in ordinarily severe showers, and thus caused it to flow in and upon the plaintiff's premises; with the instruction, that if they so found the fact, and that the plaintiff had in no way by his own negligence, contributed to his injury, he was entitled to recover. In view of the points of the plaintiff, and in the absence of any request for instruction on part of the defendant below, it is evident this instruction of the court had reference to the negligence and want of proper care on the part of the city in the construction of the bridge, whereby it became an obstruction to the ordinary flow of the water. The right of the city to raise the street and to construct the bridge as a necessary part of the improvement, does not appear to have been drawn into question. The faulty and negligent construction of the bridge, making it an obstruction to the flow of the water in ordinary rains, was a proper ground of recovery. If any other question was intended to be raised, it was the duty of the defendant to have asked for an instruction which would bring it before us. Finding no error in the record, the judgment is affirmed.

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Kaul *et al. versus* Lawrence *et al.*

1. Plaintiffs having given evidence of a treasurer's sale and of diligent and fruitless search for his deed, the record from the prothonotary's docket of the acknowledgment of the deed, was admissible to prove its contents.
2. Ejectment was brought by two for a whole tract of land; it appearing that one-twentieth was owned by another, an amendment adding his name was proper.
3. Amendments should not be allowed so as to deprive the opposite party of any right.
4. A party will not be allowed by amendment to shift or enlarge his ground by introducing an entirely new cause of action, especially when by reason of the Statute of Limitations, an injury would result to the opposite party.
5. In ejectment a name was added as plaintiff after suit brought; upon request, the court should charge, that if at the time of the amendment the title of the new party was barred by the Statute of Limitations he could not recover.
6. Payne, a surveyor, located a warrant on a wrong tract; the land as under the warrant was sold according to his location, improvements made, &c. He became owner of the tract *on* which he located the warrant; he sold. *Held*, that his successors in title were not estopped by his mistake from claiming the land.
7. Every owner is presumed to know the identity of his own land.

March 24th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the court of Common Pleas of *Elk county:* No. 28, to January Term 1872.

This was an ejectment for 500 acres of land, the east half of warrant No. 4883, in Benzinger township, Elk county, formerly Shippen township, McKean county; the action was commenced July 16th 1867, by John J. Lawrence and A. J. Cassatt, against John Kaul, Ignatius Garner and a large number of other defendants, several of whom afterwards disclaimed as to parts of the land.

On the 16th of January 1868, on motion of plaintiff's counsel, the record was amended "by adding the name of Alfred L. Tyler as plaintiff, he being a party in interest to the land in controversy and his name having been omitted."

No. 4883 had been warranted in the name of William Willink; the plaintiffs derived their title through Hiram Payne, who claimed through treasurer's sales. The defendants claimed title through Benzinger and Eschbach, who had been the owners of No. 4886, an adjoining warrant in the name of Willink. The allegation of defendants was that Payne, who was a surveyor, induced Benzinger and Eschbach to purchase No. 4886 and to allow him to run the lines and locate their warrant; that in doing so he located it on the eastern side of No. 4883, the land in dispute, and afterwards became the owner of this part, and that therefore he and those claiming under him, were estopped from claiming against Benzinger and Eschbach, or their successors in title.

[Kaul v. Lawrence.]

The cause was tried November 10th 1870, before Johnson, P. J., of the Sixth district. It had been tried before, and the judgment reversed: Lawrence v. Luhr, 15 P. F. Smith 236.

The plaintiff gave in evidence assessment of No. 4883, and treasurer's sale August 1832, of 409½ acres; and traced the title of 159¼ acres to Payne, September 1st 1848.

Also, assessment in McKean county of No. 4883, for 1840 and 1841; land sold for taxes June 13th 1842, to Nelson Richmond. Deed, Richmond to A. McCreery, September 4th 1846, reciting that the grantor claimed by deed from the treasurer of McKean county. Deed, McCreery to Hiram Payne, January 3d 1848, No. 4883 for 143 acres, reciting the land to be same, sold by D. Crow, treasurer to N. Richmond in 1842.

The plaintiff then gave evidence by Brewster Freeman that he was the husband of N. Richmond's widow; she was his administratrix; witness had charge of the business; he had made search amongst Richmond's papers for a treasurer's deed, dated June 13th 1842, for 143 acres of warrant No. 4883, and could not find such deed. McCreery, a former owner, died in 1868; witness went to his residence and had access to his papers; he searched diligently and could not find the deed; Crow, the treasurer, died about 1867. The plaintiffs gave evidence also by the deposition of Hiram Payne, of his unvailing search for the deed from Crow the treasurer to Richmond.

The plaintiff then offered in evidence the record from the prothonotary's office of the acknowledgment of deed in open court by David Crow, treasurer, on the 13th of July 1842, for 143 acres of No. 4883 to N. Richmond. The offer was objected to by the defendants, admitted by the court and a bill of exceptions sealed. Plaintiff further gave in evidence: Assessment in Shippen township, No. 4883, 209 acres for 1844 and 1845, sold to Hiram Payne for taxes, and deed to him, dated September 24th 1846.

Deed, H. Payne to Newell Matson, dated June 17th 1852, for an undivided half of the east half of No. 4883, 511½ acres. Deed, April 17th 1853, same to same for the other undivided half of east half of No. 4883, 511½ acres. Also, assessment and payment of taxes by Payne and Matson, respectively, from 1846 to 1858. Treasurer's sale for taxes in the name of Payne, and deed July 14th 1860, to J. C. Chapin, and deed Chapin to Matson for same tract, November 19th 1860. Deed July 18th 1865, Matson to J. J. Lawrence and A. J. Cassatt, plaintiff, for nineteen-twentieths of the same tract. Deed, January 8th 1868, Matson to A. L. Tyler, plaintiff, for one-twentieth of the same tract.

Lawrence, one of the plaintiffs, testified that he bought of Newell Matson, of Milwaukee, nineteen-twentieths of three tracts of land, one being the east half of No. 4883, containing 511½ acres; the deed was dated July 18th 1865; he paid Matson

$23,500 in cash, and afterwards paid him $2000 for the remaining one-twentieth bought by Tyler.

On cross-examination, he said he saw the land before he bought; saw the corners and some lines on all the warrants; there was something said about some settlers who were supposed to have located across the line on the land witness and his associates had purchased; he learned this after they purchased; it was said some settlers had cleared over a few acres by mistake.

The defendants gave evidence that warrant No. 4883 was bounded north by No. 4882, south by No. 4886, and east by the district line. On the 22d of February 1845, Benzinger and Eschbach, who resided in Baltimore, purchased No. 4886 and other Willink warrants from Thomas P. Stryker, they being ignorant of the location. Benzinger testified that, being in St. Mary's, Elk county, in 1845, Hiram Payne called on him and said that he (Payne) had been agent for the Stryker lands, was a surveyor, and desired to do Benzinger and Eschbach's surveying; said he would locate the lands. Payne commenced work in June, and three or four days afterwards told witness that he had found the "maple corner," and he would have no difficulty in locating the lands. Witness acted on Payne's location: roads were laid on No. 4886, with the other warrants, and divided into farm lots, and sold, according to Payne's location. In September 1846, Payne and Benzinger and Eschbach were at the "maple corner;" he said, "This is the bugbear in the way of the Sunbury and Erie railroad; he had bought lands in that vicinity which we ought to have;" they were located north of those he had located for Benzinger and Eschbach; No. 4883 was one of the numbers; they never owned or pretended to own No. 4883; Payne used his own papers and maps.

Eschbach testified that he relied entirely on the ability of Payne, who professed to be fully acquainted with the corners, courses, &c.

Hiram Payne, by his deposition, testified that he had first called Benzinger's attention to the Stryker lands, including No. 4886. After Benzinger's purchase witness surveyed for him; no part of No. 4886 or No. 4883 was then improved; it was an unbroken wilderness; in the opinion of witness, "then and now," his location of No. 4886 was correct; there were then no subdivision lines or improvements; witness had no hand in making the final contract with Benzinger; witness gave no encouragement to Benzinger to purchase the land; he did not know what land the defendants occupied.

Defendants gave evidence that Benzinger and Eschbach located lots and farms on No. 4883, supposing from Payne's location that they were on No. 4886.

Also evidence that the portions of the land claimed by the defendants had been purchased by them and their predecessors

from 1849 to 1860, and had been improved; also that Payne had been on the property and along the line in 1845, when there were some settlements of the Benzinger and Eschbach lands; that at that time Payne went out to show his own land.

There was evidence that there were settlers on the land as early as 1845.

Newell Matson (by deposition) testified that he purchased half of the east half of No. 4883 from Payne April 17th 1853, and afterwards purchased from him the other half; witness "quit-claimed" to John J. Lawrence and others in the spring of 1865; he was on what he supposed to be the lands; they were shown him by Payne; witness could not state the position of the lands with reference to roads, streams and settlers.

The facts in the case will be found fully set out in Lawrence *v.* Luhr, *supra*.

The plaintiff submitted these points, which were affirmed:—

1. The facts given in evidence in this case do not raise the question of an estoppel, and the doctrine of an equitable estoppel does not apply to the plaintiffs so as to prevent a recovery by them of all the premises described in the writ except that portion for which disclaimers are filed.

2. Under all the evidence the plaintiffs are entitled to recover all the lands claimed in the writ, which are not disclaimed.

The defendant's first three points, which were denied, were:—

1. If the jury believe that Hiram Payne was a surveyor by profession, and by his assurance of professional skill, and that he possessed important information for the work, secured from Benzinger and Eschbach the job of locating their lands, and their implicit confidence in his ability to do it properly; that he did locate warrant No. 4886, on the land occupied by the defendants, that he ran roads through it, and ran off lots for settlers upon it, that Benzinger and Eschbach relied upon his location, made sales of lots according thereto, to actual settlers, and entangled themselves by conveyances thereof, with covenants of warranty; that Payne purchased the east half of 4883 in 1846, believing it to be located north of the land now sued for, continued the owner thereof until 1853, claiming all the time that his land 4883 was north, that during all this time the defendants and those under whom they claim, were buying, settling upon and improving this land with Payne's knowledge, they knowing also that Payne claimed the land north and not this; then Hiram Payne would be estopped from asserting his title against the defendants.

2. If the jury believe in addition to the facts stated in the first point, that Newell Matson bought of Hiram Payne after a personal inspection and examination of the lot north of the land in controversy, and in view of its advantages; that in the contemplation of both Payne and Matson it was the said lot north of this which

passed at the sale; that at the time of Matson's purchase, the defendants were living upon the land and Matson knew of their improvements, then Matson is in no better position than Payne, and could not recover against the defendants.

3. The possession of defendants at the time of the purchase by Matson from Payne, and at the time of the purchase by the plaintiffs from Matson, was notice of their equities against Payne.

Their 4th point was:—

4. The amendment of the record by the addition of A. L. Tyler as a party plaintiff, cannot avail the plaintiffs so as to enable them to recover in this action the one-twentieth owned by him; the said Tyler's ownership being distinct and supported by additional evidence; the said amendment not affecting the merits of the suit so far as concerned the original plaintiffs, and the omission so to amend not affecting Tyler's rights in any suit he might bring.

To this the court answered:—

"We think the defendants' fourth point not tenable. The court has at a previous time passed and we think properly upon the plaintiffs' right to amend. If they erred in that, exception can be taken to it, upon a writ of error."

The court further charged: * * *

"The plaintiffs here being equally innocent with the defendants in producing the collision between them, having by no word or act induced or encouraged the defendants settling on or improving their land, should not be visited with the consequences of Payne's blunder of which they had no knowledge. The claim of the title to the land they purchased had no broken link or flaw in it, perceptible to the eye by the closest scrutiny. It has therefore been ruled that under the facts in this case the doctrine of estoppel does not apply to the plaintiffs." * * *

The verdict was for the plaintiffs.

The defendants took out a writ of error and assigned for error:

1. Admitting the record of the acknowledgment of the treasurer's deed.

2. Allowing the amendment to the record by adding Tyler's name as plaintiff.

3, 4. The answers to the plaintiffs' points.

5–8. The answers to the defendants' points.

J. G. Hall, for plaintiffs in error.—If there was no delivery of the deed from David Crow, treasurer, to N. Richmond, he acquired no title to the land: Donnel *v.* Bellas, 10 Barr 341; Donnel *v.* Bellas, 1 Jones 341; Gault's Appeal, 9 Casey 99; Hoffman *v.* Bell, 11 P. F. Smith 444. To supply its place by secondary evidence of its contents, it was necessary to prove the deed had been delivered: McCredy *v.* The Schuylkill Nav. Co., 3 Whart. 424; Jack *v.* Woods, 5 Casey 375. A recital in a deed is not

evidence against a stranger: Morris v. Vanderen, 1 Dallas 65; Dean v. Connelly, 6 Barr 239; Meals v. Brandon, 4 Harris 225. At the date of the amendment, the Statute of Limitations had vested some of the defendants with a complete defence as against Tyler. Whenever the rights of a party are liable to be defeated by having joined too few or too many plaintiffs or defendants, these amendments may be made. The amendment was not necessary to the recovery of Lawrence and Cassatt. They recover neither more nor less than if Tyler had not been joined.

An amendment will not be allowed which introduces a new cause of action: Gardner v. Post, 7 Wright 19. Especially one which introduces a cause of action barred by the Statute of Limitations: Wright v. Harts, 8 Wright 454; Stout v. Stout's Administrator, Id. 457.

Where a loss must fall upon one of two innocent persons, it shall be borne by him whose act occasioned it: Robinson v. Justice, 2 Penna. R. 19; Maple v. Kussart, 3 P. F. Smith 352; Millingar v. Sorg, 5 Id. 225. Where one encourages another to settle upon land, improve it, &c., he will not be permitted to take it, though he has an older and better title to it: McKelvey v. Truby, 4 W. & S. 323. Where an act is done or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel shall be given to what would otherwise be mere matter of evidence: Stephens v. Baird, 9 Cowen 274; Derry v. Field, 5 Metc. 381; Congregation v. Williams, 9 Wend. 147; Com'th v. Moltz, 10 Barr 530; Ludlam's Estate, 1 Harris 192; Patterson v. Lytle, 1 Jones 53; Beaupland v. McKeen, 4 Casey 131. The only one whom the law protects against a trust or equity existing against the grantor is an innocent purchaser for a valuable consideration without notice. And he must show that he has paid the purchase-money: Bellas v. McCarty, 10 Watts 29; Rogers v. Hall, 4 Id. 362; Lewis v. Bradford, 10 Id. 82; Union Canal v. Young, 1 Whart. 431; Bolton v. Johns, 5 Barr 145. A purchaser is liable not only for all that he actually discovers, but for all that, with due diligence, he might have discovered: Jacques v. Weeks, 7 Watts 272; Hood v. Fahnestock, 1 Barr 474; Kerr v. Day, 2 Harris 112; Wright v. Wood, 11 Id. 121.

H. Souther and *R. Brown*, for defendants in error.—As to the admission of the record of the acknowledgment of the deed of Crow, treasurer: cited, Reinboth v. Zerbe Run Improvement Co., 5 Casey 139. The case is not varied from Lawrence v. Luhr, 15 P. F. Smith 236.

The opinion of the court was delivered, May 17th 1873, by Agnew, J.—After having given evidence of a treasurer's sale

and laid the usual ground by proof of a diligent and fruitless search for the treasurer's deed, the plaintiffs offered the record in the prothonotary's docket, of the acknowledgment of the deed, to prove its existence and contents. To this the defendants excepted, but we think without sufficient reason. This is the usual and proper mode of proving the existence of the deed, and identity of the land sold and conveyed by the treasurer. The case has been argued in this court, on the question of the delivery of the deed, but this was a fact to be submitted to the jury. The defendants made no point on the delivery. Doubtless the court would have submitted this question with proper instructions, had a request been made. There was evidence of a strongly presumptive kind to go to the jury. The sale was made and acknowledgment of the deed entered of record in 1842, a period of thirty years before the trial. A claim of title has since been made under the sale, and sales and conveyances made accordingly. These facts, together with the Act of 13th March 1817, requiring the purchasers at treasurer's sale, so soon as the property is struck down, to pay the purchase-money, or so much thereof as shall be necessary to pay the taxes and costs, and also one dollar, the fee of the prothonotary for entering the acknowledgment of the deed, in connection with the fact that the acknowledgment was so entered, were ample evidence from which the jury might have inferred a delivery of the deed. We discover no error in this bill of exception. Nor do we think the court erred in permitting the name of Alfred L. Tyler to be added as a plaintiff, and part owner of the land. The plaintiffs brought their ejectment for the whole tract of 500 acres, as an entirety. They did not claim an undivided interest. On discovering that the title to one undivided twentieth was in Tyler, the motion to amend was made on the ground of an omission of his name. The legislature has gone far to prevent the loss of a trial and delay, by allowing amendments, even to the form of action, and the courts have seconded the effort to reach the merits of the cases and prevent a failure of justice through technicalities: Trego *v.* Lewis, 8 P. F. Smith 46; Heidelberg School District *v.* Hunt, 12 P. F. Smith 307; Election Cases, 15 P. F. Smith 35; Leonard and Wife *v.* Parker *et al.*, 22 P. F. Smith 236. In doing this, it is our duty, however, to see that amendments are not made in a manner to deprive the opposite party of any valuable right. As remarked in Trego *v.* Lewis, *supra*, the court will not permit a party to shift his ground or enlarge its surface, by introducing an entirely new and different cause of action, especially when, by reason of the Statute of Limitations, or an award of arbitrators, or from other good reason, it would work an injury to the opposite party. It is claimed in this case, that at the time Tyler's name was added to the record, his title was barred by the Statute of Limitations. But it is very evi-

dent that when it concerns title to real estate, a defence under the Statute of Limitations must necessarily go to the jury. Such a defence is affected by such a variety of circumstances, as to the extent and nature of the possession, condition of the parties, length of time, &c., it must be left to the jury on all the facts. It is the right of the parties to have proper instructions to the jury, and the defendants in this case might have asked the court to say, that if Tyler's title was barred by the statutes when his name was added, there could be no recovery in the action of his proportion of the land. Substantially, all these questions were determined in Leonard and Wife *v.* Parker *et al.*, *supra*. It was right, therefore, to allow the amendment, leaving the defendants to their prayer for proper instructions, according to the nature of the case, as developed in the evidence.

In regard to the question of estoppel, we think the state of the case is not different from that which was presented when it was here before, and is governed by the opinion then delivered. See Lawrence *v.* Luhr, 15 P. F. Smith 236. The mistake of Payne, as a surveyor, in locating tract No. 4886 on tract No. 4883, was an innocent act. This is evident from the testimony, and also from the fact that when he bought 4883 afterwards, he located it north of its true location, and adjoining No. 4886. He also sold 4883, according to this mistaken location, to Matson, a non-resident, and, like himself, ignorant of the mistake. In buying 4883, there was no want of good faith to the owners of 4886, either on Payne's part or Matson's. It was long after Matson bought 4883 from Payne before he, or his vendees, became aware of the fact that the true location of 4883 was that occupied by the owners of 4886. It was impossible, therefore, when Matson bought 4883, that he could make inquiries of the occupants of the tract, supposed to be 4886, to know by what title they held the land they were thus occupying. It was then unknown that there was a conflict of title. The same mistake which misled the vendors of the defendants, misled Matson, and he was equally innocent with them. Each claimed a different tract, as known by the original number, and held by a different title. The common presumption applicable to every owner that he knows the identity of his own land, applied equally to each, and yet each was innocently mistaken, and neither was the cause of the mistake in the other.

If he was bound to know the location of 4883 on the ground, so were they to know where 4886 lay. If they were misled by Payne, he was likewise. Payne, though the innocent cause of the mistake, might be estopped when he became the owner of No. 4883, from claiming it from those whom his mistake had injured; on the principle, that as between innocent persons, one of whom must suffer a loss, he shall bear it who was the cause of it. Matson, however, is not only an innocent party, but was not instru-

mental in causing the loss, and was incapable of avoiding the position he fell into, by any inquiry he could be led to make. The subsequent discovery of the error of location not only shifts them, but also shifts him. He has the title to 4886; they have not; both are equally innocent, and therefore he must prevail. The argument so strongly pressed upon us, and the authority cited upon the notice which actual possession furnishes, and the duty to follow up the challenge it gives, fails in this case, owing to its peculiar circumstances.

Judgment affirmed.

George *et al. versus* Messinger *et al.*

1. Residence without cultivation, or cultivation without residence, will prevent land from being sold as unseated.
2. Cultivation is sufficient without regard to the value of the product or its adequacy to discharge the taxes.
3. Residence or cultivation commences at the moment of entry, and if continued seats the tract; but a residence may be so short or the cultivation so slight as to make the intention a controlling element.
4. Timber land was used for lumbering, the owner erected buildings, barns, &c., for those employed, there was some cultivation and there were wagons, teams, &c., on the premises. *Held*, that the land could not be sold for taxes as unseated.
5. That the land was decreased in value by the lumbering did not alter the case.
6. Lackawanna Iron Co. *v.* Fales, 5 P. F. Smith 98, followed.

March 24th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Elk county:* No. 19, to January Term 1872.

On the 13th of April 1869, George D. Messinger and Gilman T. Wheeler issued a writ of ejectment against James George and William Dilworth, Jr., for warrant No. 2954, in Spring Creek township, containing 900 acres, &c.: the writ was served on George only.

The plaintiff's title was under a treasurer's sale for taxes, for 1864; the sale was to L. J. Blakely; deed acknowledged July 5th 1866; and assigned by endorsement November 8th 1866, to Joseph C. Law, who conveyed to plaintiffs July 27th 1868.

The defendants gave evidence of a treasurer's sale for taxes of the same warrant to Silas Blake and deed acknowledged September 24th 1850. Deed, Silas Blake to John B. Brown and others, February 16th 1852; deed, John Brown and others to Henry E. Perley, June 27th 1855; deed Henry E. Perley and others to J. N. Breeden and others, June 16th 1857; deed, J. N. Breeden and others to William Dilworth, Jr., and A. S. Rhines, January 23d

[George v. Messinger.]

1862. Death of Rhines in 1865, leaving a widow and seven minor children. Receipt of treasurer of Elk county, February 6th 1869, "for redemption of tract No. 2954, sold to L. J. Blakely, for taxes of 1864, for minor heirs of A. S. Rhines."

The defendants gave evidence by Henry R. Moore, that the first improvement was made in 1859, for the purpose of lumbering; a log barn and house were built for that purpose; they were permanent buildings as long as they would last; the tract was operated on that winter by Richard and Bill; their men lived there; one had a family; they took lumber for two years, and sold to Robertson & Ittle; they took lumber off, increased the improvements, planted potatoes, &c.; in 1860, another house was built, and about one acre cleared; they had teams of their own and hired a good many; had household furniture in their house, operated one winter, 1862–63; George bought out Robertson & Ittle in 1863; he lived there till 1867 or 1868; James Burns lived in one of the houses till 1871. Until 1864, there were four houses on the land, new barn built in 1865, teams, sleds and wagons on the place all the time from 1859 till 1864; about 3½ acres of land cleared and worked, hay, potatoes and garden stuff raised on it from 1863 and before; the land had been used continually for lumbering purposes since 1859; the personal property on the land in 1863 and 1864, was worth $500 or $600, besides the logs, worth $400 or $500. The men who lived on the land were jobbers under Rhines and Dilworth; the houses were lumbering shanties, and for carrying on lumbering business. The barn built in 1865 was a frame barn, with stables on each side and floor between, and lofts for hay, &c., with shingle roof; not usual to build such barns for lumbering purposes.

There was other evidence of the same character as to the mode of occupying the land.

The plaintiffs, in rebuttal, gave evidence by Thomas Irwin, that he was assessor in 1861, and that he then assessed the land as unseated under the instructions of Rhines; the buildings on the land were such as are usually put up for a job of such magnitude; none of the land was good for agricultural purposes. Other witnesses testified in the same manner.

The plaintiffs' third point and its answer were:—

If the jury believe that Rhines returned the tract with such improvements thereon as is shown by the evidence as unseated, then he and those claiming under him are estopped from claiming the land as stated and occupying a different character for taxation purposes than claimed by him when assessed.

Answer: "We are not quite prepared to affirm this point fully, but if you believe that Rhines did so state to the assessor when asked how he wished the land assessed, it is evident that he did

not consider the improvements made permanent in their character, or with a view to seating the land."

Their fourth point, which was affirmed, was:—

The redemption of 6th of February 1869, by the administrators for the minor heirs of A. S. Rhines, deceased, is a nullity, as the interest of said heirs in the land was divested by the administrators' previous sale in pursuance of an order of the Orphans' Court to William Dilworth, Jr., of 4th March 1869.

The defendants' first point, which was denied, was:—

Andrew S. Rhines was the owner of the undivided half of the land in controversy at the time of his decease, and left heirs who were all minors and continued so to be until after the 6th day of February 1869; the redemption of the undivided half of said land on the 6th day of February 1869, by the administrators of said Rhines, was valid, and as to the said undivided one-half of said land the verdict must be for the defendants.

The second point and the answer were:—

If the jury believe that Rhines and Dilworth were by their tenants in actual possession of the land in 1864, at the time of the assessment thereof, and were using the same for the purpose of making profit therefrom, the character thereof has changed from unseated to seated, and the plaintiffs cannot recover.

Answer: "We answer this point in the affirmative, if the jury believe that the improvements made on this land were made with the intention on the part of the occupants to make them permanent and to derive profit from the land so improved, but if these improvements were made only to enable the occupants to cut the timber off the land, and to be abandoned when they had served that purpose, they did not change the land from unseated to seated, and it could be sold as unseated land."

Their third point and the answer were:—

If the jury believe that at the time of the assessments in 1864 there were persons residing upon and improving the land in dispute, and there was sufficient property upon the land to pay the taxes, the character of the land has changed from unseated to seated, and the sale of the same would pass no title, and the plaintiffs cannot recover.

Answer: "We have already told you in our general charge that if the occupants were there not as tenants but only as jobbers or workmen, with no intention to occupy the land permanently or to make themselves personally liable for the taxes assessed on the tract, it matters not how much personal property they have on the land, that fact would not change the land from unseated to seated, and we refer you to our answer to defendants' second point for further answer to this point."

The court (Vincent J., of Sixth District,) further charged:—

* * * ["Did, then, the persons who built or occupied the houses

[George v. Messinger.]

and shanties, and made these small improvements on the land, do so with a view to a permanent occupancy and use of them as their property?

"Did they, when they went on this land and made these improvements, intend to make themselves personally liable for the taxes assessed upon the land?

"Unless both these questions can be answered in the affirmative, the improvements made by these occupants would not change this land from unseated to seated."] * * *

"According to the evidence, these houses and improvements, or at least a large part of them, were then on the land, and if you believe that under such circumstances Rhines declared the land unseated, it is evidence that he did not then consider these improvements or the then occupancy of the land permanent, and the Supreme Court has said that in a doubtful case, such an act, on the part of the owner of the land, should have a preponderating effect.

"[If in 1864, the land was unseated, or in other words, if the occupancy was only temporary, the fact that the occupants so on the land had personal property on it sufficient to pay the taxes, would not transfer it from the unseated to the seated list."] * * *

The verdict was for the plaintiffs.

The defendants took out a writ of error and assigned for error:

1, 2. The parts of the charge in brackets.

3, 4. The answers to the plaintiffs' points.

5, 6, 7. The answers to defendants' points.

H. Souther, for plaintiffs in error.—It is sufficient that there is a personal responsibility for taxes, to make it the assessor's duty to assess the land as seated: Rosenburger *v.* Schall, 7 Watts 390; Scheaffer *v.* McKube, 2 Id. 422; Kennedy *v.* Daily, 6 Id. 269; Fisk *v.* Brown, 5 Id. 441; Biddle *v.* Noble, 18 P. F. Smith 279.

J. G. Hall and *R. Brown* (with whom was *C. B. Curtis*), for defendants in error.—A temporary occupancy of wild land for a temporary purpose, by persons not pretending to any claim to the land, and having no intention to make themselves liable for the taxes, does not give a seated character to the whole tract, notwithstanding the express instruction of the owner to assess the same as unseated. To seat land, the residence or improvement must be permanent in its nature, and must be made by one claiming as owner or tenant: Mitchell *v.* Bratton, 5 W. & S. 451; Ellis *v.* Hall, 7 Harris 296. The intention must necessarily enter into the question, for no man can properly be charged with taxes on land which he does not claim to own or use, nor beyond the extent of his claim: Wallace *v.* Scott, 7 W. & S. 248; Campbell *v.* Wilson, 1 Watts 503. Where an owner suffers his land to remain on the

unseated list, and pays taxes for it as such, this in a doubtful case may turn the scale: Foster v. McDivit, 9 Watts 348.

The opinion of the court was delivered, May 17th 1873, by

Mercur, J.—The right of the plaintiff below to recover, was predicated on a treasurer's sale of the land, as unseated, made in 1866, for the taxes of 1864. The defendant held an earlier title, and claimed such a residence upon the tract and cultivation of it as to make it seated in 1864, and invalidate the plaintiff's purchase of 1866.

As the attempted redemption of a portion of the land in 1869, was in behalf of persons who had no interest whatever in the land, the fourth and fifth assignments of error are not sustained: Chadwick *et al. v.* Phelps *et al.*, 9 Wright 105.

The remaining five assignments will be considered together.

It is well settled that residence without cultivation, or cultivation without residence, will prevent land being sold for taxes, as unseated: Kennedy *v.* Daily, 6 Watts 269. Cultivation is sufficient for the purpose without regard to the value of the product or its adequacy to discharge the taxes: Wilson *v.* Waterson, 4 Barr 214. It is the actual residence, or actual cultivation, which changes the character of the tract. A mere intention to take up the one or to perform the other, will not suffice. Residence or cultivation commences at the moment of entry, and if continued, must be considered as seating the tract. We do not wish to be understood as saying, that a term of residence might not be so short, or the cultivation so trifling, as to make the intent a controlling element in the case. Such, however, is not the case here. The acts necessary for a person to do to seat land which he owns, must not be confounded with those acts which are necessary to create a title in a pre-emptor. In the latter class of cases it was said, in Wilson *et al. v.* Waterson *et al.*, *supra*, that the intention to use the land only, while timber remained, or for any other temporary purpose whatever, gives no pre-emption right. That was an attempt to establish a pre-emption right prior to the entry under which the other party claimed title.

In this case, Dilworth was the owner of the land. In the autumn of 1859, he set men to work upon it. They built two houses and a barn. During the winter, one of the men remained upon it. In each year thereafter some land was cleared, and potatoes, hay, oats, rye and vegetables were raised thereon. Two or three more houses were erected thereon. So that in 1864 there were four houses standing upon it, and from three to four acres of improved land. During all these years, several families continued to reside upon the land. Most of the time several teams, sleds, wagons and chains were kept there. The personal property kept on the land in 1863 and in 1864, was worth from $500

to $600, besides the logs cut thereon, which were worth from $400 to $500 more. In 1865 the log barn was torn down, and a framed barn built. It is not necessary that the owner should have been personally residing upon the land, or personally cultivating it. Nor is it necessary that the persons performing the work should have been technically his tenants under leases from him. It is sufficient that they were in possession under him, and were there engaged in his employ. Nor does it matter that these improvements which were made, were designed only to enable the occupant to cut the timber off the land, and to be abandoned when they had served that purpose. They were not trespassers. The work in which they were engaged was being done under the direction and for the benefit of the owner of the land. They were holding it under him and for him. It was well said by Justice Thompson, in Lackawanna Iron Company v. Fales, 5 P. F. Smith 98, "residence with a bonâ fide intention to hold it as owner, or for the owner, and performing labor on it, such as mining coal, raising ore and the like, in the character of owner, would undoubtedly give the land the character of seated." This case shows that it is not necessary that the value of the land must be enhanced, for the removal of the coal, as well as the removal of the timber, may lessen its value. Yet the act of doing such work upon the land may seat it. Nor do we think it necessary to prove that when these employees went upon the land, and made these improvements, they intended to make themselves personally liable for the taxes assessed upon the land. These acts were sufficient to seat it, if the evidence is believed. The owner of the land was personally liable, and there was abundance of personal property upon the land out of which the taxes might have been collected. The defendant below was entitled to an affirmative answer to his second and third points submitted, and the errors are sustained.

Judgment reversed, and a *venire facias de novo* awarded.

73 423
142 596

Green *et al.*, Adm'rs, *versus* Brennesholtz.

1. A warrant and survey were in the name of McNair; after his death, a patent was made to the plaintiff reciting that the land had been conveyed to him by the executor of McNair; there being no evidence of authority in the executor to sell, the recital was not evidence of plaintiff's title against one in possession.

2. Plaintiff having a patent sued in trover under Act of March 29th 1824, for timber cut from the land before the date of the patent, not showing that he then had the title of the warrantee. *Held*, that he could not recover.

3. The defendant's liability was fixed to the owner at the time of the conversion.

4. Gingrich v. Folts, 7 Harris 38; Penrose v. Griffith, 4 Binney 231, followed.

[Green v. Brennesholtz.]

March — 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Warren county:* No. 364, to January Term 1872.

This was an action of trover under the Act of March 20th 1824, sect. 3 (8 Smith's Laws 283, 2 Br. Purd. 1397, pl. 2), for timber-trees cut, brought January 28th 1869, by Peter Brennesholtz against Luther Green and others, administrators, &c., of Luther Green, deceased.

The trees had been cut by the defendants' intestate, in the winter of 1867–1868, from lands claimed by the plaintiff. The land was unimproved and the plaintiff was not in actual possession.

He gave in evidence warrant dated October 8th 1840, to Andrew McNair and Robert McNair for 357 acres, and survey for 331 acres and 17 perches May 25th 1841; patent September 8th 1868, to plaintiff for 114 acres.

The patent contained the following recital: "Which said tract was surveyed in pursuance of a warrant dated October 8th 1840, granted to the said Andrew and Robert M. McNair, and whereas Robert M. McNair, executor of the said Robert McNair, deceased, who inherited the estate of the said A. McNair, conveyed said part of the tract, by a certain conveyance dated 4th March 1867, to the said Peter Brennesholtz."

On the 14th of March 1833, Andrew and Robert McNair gave a power of attorney to Charles McNair, which was recorded, authorizing him to sell and convey certain lands mentioned in it. On the 2d of July 1845, Andrew and Robert McNair by their attorney Charles McNair, contracted in writing to sell to Joseph Green 245 acres 119 perches, and had received payments to the amount of $348.20. The description was by a survey made by James Hilands, which was lost. The question whether the land on which the timber had been was included in the contract, was submitted to the jury.

The defendants' points were:—

2. The plaintiff having shown the title to have been in Robert and Andrew McNair in 1840, he cannot recover unless he shows their title to be vested in himself prior to the time the timber was taken from the premises, and the recital in the patent that Robert W. McNair, executor of Robert McNair, deceased, conveyed the land from which the timber was taken to the plaintiff is no evidence that the title of Robert and Andrew is vested in the plaintiff.

4. There is no evidence that the title of Andrew McNair was vested in the plaintiff prior to the taking of the timber in the declaration mentioned, and the plaintiff is not such owner of the land as enables him to recover under said Act of 29th March 1824.

The court (Johnson, P. J.) after stating plaintiff's title said: * *

[Green v. Brancholtz.]

"These recitals are primâ facie evidence of the facts therein stated as against the Commonwealth, and all claiming title under grant therefrom subsequent to the date of the patent in which they are contained. They are also sufficient evidence of the facts stated as against a naked trespasser on the land, a mere intruder without title, but not against one claiming title either from the Commonwealth, or from the equitable owner anterior in date to that of the plaintiff's patent. As against a party holding a paramount title they are not evidence of anything. But if good at all they are good for all they contain, good as evidence of the date as of the fact of transfer of title. If the defendants have shown no title in themselves or in Joseph Green, the plaintiff is entitled to the benefit of the recitals, and to be treated as owning the land by the title as conveyed and recited in the patent. This brings us to the real question, and the only one of disputed fact in the case, and that is whether the defendants have shown any title whatever in Joseph Green." * * *

To defendants' second point the court answered:—

"If you believe the defendants have shown no title to the lands in question, then the plaintiff has shown sufficient title to enable him to recover, and the recitals in the patent are primâ facie evidence of the facts stated against a mere intruder."

To the defendants' fourth point the court said: "We have already given an answer."

The verdict was for the plaintiff for $197.20.

On the removal of the record to the Supreme Court the defendants assigned for error the answers to their third and fourth points, and the charge of the court.

Brown & Stone, for plaintiffs in error.—Recitals in a patent are not evidence against one holding by right prior to its date: Penrose *v.* Griffith, 4 Binney 221; Gingrich *v.* Foltz, 7 Harris 40; Read *v.* Thompson, 5 Barr 329; Bell *v.* Wetherill, 2 S. & R. 350.

Dimmore & Reeves, for defendant in error.—Recitals in a patent are evidence against a defendant who shows no title but possession: Whitmire *v.* Napier, 4 S. & R. 290; Downing *v.* Gallagher, 2 Id. 456; Steiner *v.* Coxe, 4 Barr 13; Gingrich *v.* Foltz, 7 Harris 40.

The opinion of the court was delivered, May 17th 1873, by

SHARSWOOD, J.—Admitting the application to this case of the rule that the recitals of title in a patent are primâ facie evidence, not only against one claiming by subsequent grant from the Commonwealth, but also against one who relies on possession alone, and shows no title, the learned judge was not warranted by the recital itself in the position that at the time of the alleged con-

version the plaintiff below was the owner of the land. In his answer to the second point of the defendants he referred to his general charge, and in that he had instructed the jury that the patent recited substantially, *inter alia*, that Robert McNair was dead, and Robert M. McNair was his executor, with power to sell, but there was not a word in the recital about any power to sell. It recites merely a conveyance by Robert M. McNair, executor of Robert McNair, deceased. It requires no authority to show that an executor has no authority as such to convey land. He must have power by the will, or by an order of the Orphans' Court. Such a power surely is not to be inferred by the mere fact of a conveyance by the executor. There was error therefore in the answer that the plaintiff had shown sufficient title to enable him to recover.

But we are of opinion that the rule in regard to recitals in patents from the Commonwealth, as we have just stated, had no application in this case. It was an action of trover for timber trees, cut and taken off by the defendants' intestate, Joseph Green, from land which the plaintiff claimed to own. It was undoubtedly necessary that the plaintiff should show that he was the owner of the land at the time of the conversion, which was when the trees were cut and taken off in the winter of 1867–8: Act of 29th 1824, 8 Smith 288. That was prior to the date of the patent to plaintiff. The liability of the defendants' intestate was fixed at the time of the conversion to the then owner. If at that time the plaintiff had tried his action, he must have produced the title from the warrantees. The patent was not then in existence. If Joseph Green had then a right originating by warrant or settlement at that time, it is agreed that the recital in the subsequent patent would not be admissible in evidence against him to prove the warrant or its devolution to the patentees: Penrose *v.* Griffith, 4 Binn. 221; Gingrich *v.* Foltz, 7 Harris 40. If then a right arising prior to a patent cannot be affected by a recital in such patent, surely it is a logical consequence that neither can a liability. When the controversy relates either to a right or a liability, which are in their nature correlative, we must adjudge it by evidence then existing, not by evidence subsequently created; unless, indeed, it be the judgment of a competent court. Brennesholtz certainly could not subsequently make evidence for himself; neither were the officers of the land-office a competent tribunal to pronounce judgment upon his title, so as to affect the liability of Green to an action for trespasses prior in date to the patent. If the heirs or devisees of Robert McNair had brought an action, claiming to have been owners of the land at the time of the conversion, Green certainly could not have availed himself of the recital in the patent to show that their title had passed to Brennesholtz, neither ought Brennesholtz to be allowed to do so.

Judgment reversed, and a *venire facias de novo* awarded.

73 427
31 SC 301

Bower *versus* McCormick.

1. When a plaintiff's claim before a justice is reduced below $100 by payments or dealings which are actual payments, the justice has jurisdiction; but jurisdiction cannot be given by merely remitting a part.
2. Interest being an incident, may be waived, but no part of the principal can be thrown away in order to give jurisdiction.
3. Where, as in trover, the value of goods has no fixed standard, but depends on circumstances and opinion, *it seems*, a plaintiff, in an action before a justice, may fix the value on his own belief.
4. Plaintiff before a justice claimed the value of logs, "measuring 20,310 feet at $6 per thousand, from which he deducts $22, leaving a balance now claimed of $99.86. *Held*, that this did not give the justice jurisdiction.
5. Collins *v.* Collins, 1 Wright 387; Evans *v.* Hall, 9 Id. 235, approved.

March 26th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Lycoming county:* No. 47, to January Term 1872.

This case commenced before a justice of the peace. It was an action of trover and conversion by Seth T. McCormick against John Bower; the summons was issued April 28th 1856, returnable May 3d 1856.

The transcript of the justice is as follows: "May 3d 1856, plaintiff appears, defendant does not appear. Plaintiff claims the value of 107 saw logs, measuring 20,310 feet board measure, at $6 per thousand, from which he deducts $22—leaving a balance now claimed of $99.86. Cause continued to May 9th 1856. * * * And now, to wit, May 9th 1856, plaintiff appears and produces proof of ownership in logs, and that they came into possession of defendant. Defendant does not appear. Judgment by default for $99.86 and costs. May 25th 1856, defendant appeals."

The cause was tried September 5th 1871, before Gamble, P. J. The plaintiff gave evidence to show his ownership of the logs, and testified, "they were worth more than I claimed before the justice." There was other evidence also as to the ownership of the logs, and to other questions arising in the court below. The only question considered by the Supreme Court was that of the justice's jurisdiction.

The following are points of the defendant, with their answers:—

1. The claim of the plaintiff, as appears by the transcript filed, exceeded one hundred dollars before the justice, no reduction could be made by plaintiff to give jurisdiction.

Answer: "Whilst the items comprising the plaintiff's claim, as stated in the transcript of the justice, would, by calculation, exceed one hundred dollars, yet the actual sum demanded, which is the test of jurisdiction, is under one hundred dollars. I decline, therefore, to instruct you positively that the claim of the plaintiff,

as appears by the transcript filed, exceeded one hundred dollars before the justice. But say to you, that no reduction of the claim could be made, by the plaintiff, merely for the purpose of giving the justice jurisdiction."

3. If the jury believe, from the evidence, that the plaintiff's demand exceeds one hundred dollars, or that the property claimed for in this suit is worth more than one hundred dollars, and no reason is given in evidence for reducing the claim, the verdict should be for the defendant.

Answer: "Upon this question of jurisdiction, I refer the jury to the general charge and to the answer just given to defendant's first point, as a substantial answer to this point."

The court also charged: * * *

"The transcript of the justice is the primary evidence of the character and extent of the plaintiff's claim. That represents the claim to have been for 107 logs, measuring 20,310 feet, board measure, at $6 per thousand, from which the plaintiff deducts $22, leaving a balance now claimed of $99.86. The plaintiff's original claim as stated here would, by calculation, exceed the jurisdiction of the justice, but the actual sum demanded was within the jurisdiction. Which is to govern and determine the question of jurisdiction? If the deduction were made merely for the purpose of giving the justice jurisdiction, without any other consideration, it would be illegal and defeat the plaintiff's right to recover. But if made in good faith, on account of a payment or a credit due to the defendant, arising out of the transaction, leaving the balance, then claimed, $99.86, it was within the jurisdiction of the justice, and we can proceed to determine the rights of the parties, under the evidence. [The sum demanded is generally the test of jurisdiction; but when the transcript shows that the original claim was greater and exceeded the jurisdiction, I know of no other way than to leave it to the jury to determine, from the transcript of the justice, the declaration filed and the evidence in the cause, whether it was reduced in good faith, or merely as a device to give the justice jurisdiction. If the jury should believe that the original claim, as stated by the justice, was given by the plaintiff, merely as an approximate estimate of the quality and value of the lumber, and the $22 were deducted from that approximate valuation, on account of uncertainty or difference in the estimate or judgment of witnesses who were to be called to testify, and the actual demand was thus reduced and limited, at the institution of the suit, upon the docket of the justice, to the sum of $99.86, as the actual demand of the plaintiff, we do not think that should be regarded as a device to bring the claim within the jurisdiction. But we leave it as a fact for your determination whether the reduction was made in good faith, on account of pay-

ments or otherwise, or made solely for the purpose of giving the justice jurisdiction.] If the latter, the plaintiff cannot recover. * * * "As to the value of the logs you will ascertain that from the evidence. You cannot allow the plaintiff more than one hundred dollars, but you may add interest from the date of the judgment by the justice." * * *

The verdict was for the plaintiff for $191.65.

The defendant took a writ of error, and assigned for error, the answers to the points and the charge of the court.

J. J. Metzgar and *S. L. Youngman*, for plaintiff in error.—When plaintiff's demand exceeds the statutory limit, a justice of the peace has not jurisdiction: Collins *v.* Collins, 1 Wright 387; Stroh *v.* Uhrich, 1 W. & S. 59. It should appear on the face of the justice's proceedings that he acted within his jurisdiction: Jones *v.* Jones, 2 Jones 355.

H. C. McCormick and *H. W. Watson*, for defendant in error.—A party may omit to press an item of his claim: Evans *v.* Hall, 9 Wright 237. It should *appear* that the sum demanded exceeded $100: Funk *v.* Ely, 2 P. F. Smith 443.

The opinion of the court was delivered, May 17th 1873, by

AGNEW, J.—The cases upon the subject of the jurisdiction of justices of the peace, under the Act of 1810, when the demand of the plaintiff is reduced by his own abatement below $100, are not wholly free from inconsistency. It seems to be taken for granted in the earlier cases, that a plaintiff can remit a part of his claim, and thereby confer jurisdiction. In Darragh *v.* Warnock, 1 Penna. R. 21, where a verdict was rendered for $114.99, within six months after the judgment by the justice, this court said: "A plaintiff may, undoubtedly, remit a part of his demand to bring the residue within the jurisdiction of a justice." The counsel, on hearing the opinion, remitted the excess of the verdict at bar, and the court affirmed the judgment. In Cleaden *v.* Yeates, 5 Wharton 94, it was said *per curiam:* "It never has been doubted that a plaintiff may reduce his demand to the standard of a limited jurisdiction by lopping off the excess." A stronger case, perhaps, is Hoffman *v.* Dawson, 1 Jones 280. The plaintiff's book account was for $410, on which there were credits to the sum of $310.50, and the demand before the justice was $99.50. This court supported the jurisdiction, on the ground that the actual demand was under $100.

On the other hand, in Stroh *v.* Uhrich, 1 W. & S. 57, it was decided in very strong terms, that a party cannot confer jurisdiction by giving a credit of $170, of which $100 was on a note or

counter-claim. To the same effect is Collins *v.* Collins, 1 Wright 387. Woodward, J., there remarked: "If it appear that the plaintiff's demand really exceeded $100, and that he involved the justice in litigation beyond his jurisdiction, by remitting the excess, it is of importance to declare against the jurisdiction, else the defendant's rights may be sacrificed before he is aware of it, as was shown by Judge Rogers, in Stroh *v.* Uhrich." Perhaps the best statement of the result of the authorities is that made by Justice Woodward in that case, that when the plaintiff's claim is reduced below $100, by direct payments, or dealings, which amount to or are admitted to be actual payments, the justice has jurisdiction, but where the claim is not thus reduced by payment, jurisdiction cannot be given by merely remitting a part. And in Evans *v.* Hall, 9 Wright 235, Justice Thompson, while holding that interest may be waived, because it is a mere incident, states that no part of the principal can be thrown away, in order to give jurisdiction.

Reliance was placed upon these cases in the argument, yet while some analogies may be drawn from them, it is not very clear that they are conclusive as precedents for the case now before us. Here the action was trover for logs claimed by the plaintiff. The Act of 1814, giving jurisdiction to justices in trespass and trover, confers it "in all cases where the value of the property claimed, or the damages alleged to be sustained, shall not exceed $100." As the value of goods is a thing having no fixed standard, and depending on circumstances and opinion, it is not easy to see why a plaintiff may not generally fix the value upon his own belief, and ask to recover thereby. If he claim less than others would say is the value, no one is injured but himself. He does not thereby involve the justice in the settlement of demands beyond his jurisdiction, as in Collins *v.* Collins. Had the plaintiff in this case stated his claim absolutely at the sum of $99.86, without a deduction, it would be difficult to convict the learned judge of error in leaving it to the jury to say whether the plaintiff's demand was made in good faith, and not merely to give jurisdiction. Though the value might seem to be greater, yet an absolute demand without deduction, for less than $100, may be really in good faith, allowing for the state of the property, the attending circumstances, and the difference of opinions, or other causes influencing the question of value. But in this case the demand was stated on the docket of the justice in these words: "Plaintiff claims the value of one hundred and seven saw logs, measuring twenty thousand three hundred and ten feet, board measure, at $6 per thousand, from which he deducts $22, leaving a balance now claimed of $99.86." Certainly on its face this wears the appearance of a premeditated remission to give jurisdiction. It is not an actual credit, but a mere deduction, without a reason given at

the time, or on the trial, why the deduction was made. So far as the evidence discloses, it was a mere throwing off of a part of the value. The logs, at the rate stated by the plaintiff, would have brought $121.86. What makes the case stronger against the plaintiff is, that he testified at the trial that the logs were worth more than he claimed before the justice. In a question of value depending on good faith, we might hesitate to reverse, after a finding of the jury of a sum within the justice's jurisdiction. But we are precluded from even this concession to good faith by the binding instruction of the judge to the jury, that they could not allow more than $100. This left the jury in uncertainty. They could not find a sum over $100, for the instruction not to do so was absolute and unqualified; and they could not find for the defendant, if the evidence showed that the plaintiff was entitled to recover. Their only escape was a special verdict, had their ingenuity taught them to perceive it, in which they should find the plaintiff's demand over $100; but for that reason they find for the defendant, on the ground of a want of jurisdiction. In view of the statement of the demand in the transcript and of the evidence in the case, it seems to us the plaintiff's true demand, as measured by the value of the logs, exceeded $100, and, therefore, that the court erred in submitting the question of jurisdiction in the manner it was submitted to the jury. The verdict itself, shows plainly that the jury, to escape a finding according to actual value, and to keep within the jurisdiction, found precisely the $99.86 stated in the transcript, with interest to the time of the verdict.

Judgment reversed.

Haffey *et ux. versus* Carey *et al.*

73 431
178 306

1. A wife may mortgage her estate to secure future as well as present indebtedness of her husband.

3. The provision of the Married Woman's Act (April 11th 1848), that her property shall not be sold, &c., by her husband without her written consent acknowledged before a judge, &c., does not apply where the husband and wife unite in the sale, &c.; the law as to that is as before the Act of 1848.

3. Moore v. Cornell, 18 P. F. Smith 320, explained.

March 27th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *McKean county:* No. 265, to January Term 1872.

This was a scire facias sur mortgage, issued January 18th 1871, by Richard L. Carey and Theodore H. Whittlesey against John K. Haffey and Diantha E. his wife.

On the 31st of March 1869, John K. Haffey and Diantha E. his wife, the defendants, executed a mortgage to the plaintiffs on

land mentioned in the mortgage in the sum of $1000, conditioned "that if the parties of the first part shall and will well and truly pay all demands and indebtedness contracted, or that may hereafter be contracted for goods and merchandise to be sold by the said Haffey, as agent of the De Golier store and grist-mill, in Bradford township, at De Golier post-office and railroad station, and merchandise furnished by the parties of the second part, or guarantied by them, then these presents shall become void," &c.

The mortgage was duly acknowledged by husband and wife, with a separate examination of the wife, &c. On the trial, December 19th 1871, before Williams, P. J., the plaintiffs gave the mortgage in evidence and rested.

The defendant, Mrs. Haffey, offered in evidence a deed to herself for the land described in the mortgage, for the purpose of showing that the land was hers, alleging that she could not encumber her separate real estate to secure a future liability of her husband.

The evidence was objected to by the plaintiffs, rejected by the court and a bill of exceptions sealed for the defendant.

The verdict was for the plaintiffs for $998.09.

The defendants took a writ of error and assigned for error the rejection of the offer of their evidence.

The only question in the case was, the power of a married woman to bind her real estate by a mortgage executed jointly with her husband for a contemplated future liability by him.

J. C. Backus and *R. Brown*, for plaintiffs in error, cited Wright *v.* Brown, 8 Wright 224; Wilson *v.* Shoenberger, 7 Casey 295; Magaw *v.* Stevenson, 1 Grant 402; also, Married Woman's Act, April 11th 1848, sect. 6, Pamph. L. 536, 2 Br. Purd. 1005, pl. 13.

R. D. Hamlin, for defendants in error, cited Ter-Hoven *v.* Kerns, 2 Barr 96; Stewart *v.* Stocker, 1 Watts 140; Moroney's Appeal, 12 Harris 372; Lytle's Appeal, 12 Casey 121; Black *v.* Galaway, 12 Harris 19; Miner *v.* Graham, Id. 491; Shinn *v.* Holmes, 1 Casey 142; Woodward *v.* Wilson, 18 P. F. Smith 208.

The opinion of the court was delivered, May 17th 1873, by

SHARSWOOD, J.—It is well settled that a married woman may mortgage her estate for her husband's benefit, or to secure the payment of his debts: Hoover *v.* The Samaritan Society, 4 Whart. 445; Black *v.* Galaway, 12 Harris 19; Miner *v.* Graham, Id. 491; Lytle's Appeal, 12 Casey 131. This being so, there is no reason why she may not do so to secure future as well as existing indebtedness: Lyle *v.* Ducomb, 5 Binn. 585. Indeed, in point of policy, there are considerations in favor of the latter which cannot be

urged for the former. The wife's property being thus pledged to secure credit for her husband may enable him to engage in business, and by his enterprise and industry make a good living both for him and her and their family. Nor is it necessary that the provision of the Act of April 11th 1848, Pamph. L. 533, as to the acknowledgment of the mortgage should be observed. An acknowledgment in conformity to the law, before that, to enable a married woman to pass her estate, is sufficient, as has been more than once decided, and confirmed by the Act of Assembly of April 9th 1849, Pamph. L. 526; April 18th 1853, Id. 573; April 11th 1856, Id. 315; Miner *v.* Graham, 12 Harris 491; Shinn *v.* Holmes, 1 Casey 142; Stoops *v.* Blackford, 3 Id. 213. It was not intended in Moore *v.* Cornell, 18 P. F. Smith 320, to depart in the least from these authorities, or to hold that in an assignment of a wife's mortgage, by husband and wife, it was necessary that the acknowledgment should be in any other form or before any other officer than is required in any other case where the contract of a married woman in realty is to be bound or transferred. The Act of April 11th 1848 provides that the property of a married woman shall not be sold, conveyed, mortgaged, transferred, or in any other manner encumbered by *her husband*, without her written consent first had and obtained, and duly acknowledged before one of the judges of the Court of Common Pleas of this Commonwealth that such consent was not the result of coercion on the part of her said husband, but that the same was voluntarily given and of her own free will. This provision has no application, whether in the transfer of real and personal estate of the wife, when the husband and wife unite in the execution of the transfer, but the law remains as it stood before the passage of the Act of 1848.

Judgment affirmed.

73 433
19 SC 643

Warren Borough *versus* Daum.

1. A borough council resolved to levy tax sufficient to pay each person who should enlist, a bounty not exceeding $300. This was not an offer to pay a bounty to volunteers.
2. The resolution gave no right to any one to enlist and demand the bounty.
3. The plaintiff enlisted in Virginia in 1864 as a veteran; on the muster-roll his place of residence was stated to be "Warren, &c." *Held*, that the Act of May 1st 1866, enacting that the place of residence named in the muster-rolls shall be considered the place of credit, did not create an obligation against Warren, if one did not exist before.
4. The re-enlistment of itself was not notice to the defendant.
5. To establish a contract by acceptance of a proposition, it must appear that the one making it was notified of the acceptance.

[Warren Borough *v.* Daum.]

March 26th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Warren county:* Of January Term 1872, No. 208.

This was an action of assumpsit, brought January 24th 1871, by Andy Daum to the use of C. L. Douglass, against the borough of Warren.

The claim of the plaintiff was for the bounty of $300, offered by the borough of Warren for veterans enlisting in the United States service in the war of the rebellion, and credited to that borough.

The cause was tried December 12th 1871, before Vincent, J.

The plaintiff gave in evidence a resolution of the borough council, passed February 11th 1864, to levy a tax sufficient to pay "a bounty not exceeding $300" to each person who should enlist to the credit of the borough of Warren:

Also, Resolution of February 13th, that the borough issue her bonds for $10,000 if necessary, subject to the condition that they should be a valid obligation against the borough upon the passage of an act of the legislature, authorizing the borough to provide for their redemption and repayment.

Also, certified copy of muster and descriptive roll of re-enlistments from the Adjutant General's Office at Harrisburg, viz.:

"Muster-in, bounty, advance-pay, and descriptive roll of a detachment of United States veteran volunteers, re-enlisted by Captain Nathaniel Payne, company "K," for the 12th Regiment of Pennsylvania cavalry volunteers, stationed at Martinsburg, Va., re-enlisted pursuant to general order 191, &c.

"Name, Andy Daum, rank, private, born Clarion county, Pennsylvania, age 21 years, occupation farmer, enlisted February 29th 1864, at Martinsburg, Va., by Captain George W. Henrie for three years,* * * mustered into service February 29th 1864, at Martinsburg, Va. * * *

"Date of first muster March 1st 1862. Residence, Warren, Warren county, Pennsylvania, Nineteenth district of Pennsylvania.

"Re-mustered as veteran volunteers under general orders 191, &c."

D. Titus testified: "I was major of the 12th cavalry during the rebellion, and commanded the regiment. In February 1864, I wrote to Judge Annett, burgess of Warren, asking whether the borough was paying bounties; the judge informed me the borough was paying $300 bounty; there was a strife for volunteers for various localities; I wanted the Warren borough men to be credited to the borough; I encouraged our men to enlist; bounties were to be paid in bonds; the fact that the borough was paying bounties was communicated to all the men; my son also worked with the soldiers for same purpose; I don't recollect talking with

[Warren Borough v. Daum.]

Daum particularly; he once lived in Warren; he was in company K; the soldiers in that company were mostly from Warren county."

For the defendant, the clerk of the borough council in 1864, testified that he had the whole charge of the enlistment matters of the councils; the evidence of enlistment and re-enlistment was furnished him; he never had any evidence of Daum's enlistment for the benefit of the borough; the quota was filled without him; he was never credited to the borough to the knowledge of witness; no personal application was ever made by Daum; witness had receipts from the provost marshal for all credits for the borough; no credit for a man named Daum.

The court charged:—

"The right of the plaintiff in this case to recover depends entirely upon whether or not a valid contract exists between him and the defendant.

"It is not denied that enlistment as a volunteer for a particular locality in consideration of a promise to pay bounty by that locality, raises an obligation to pay the bounty, if the volunteer was duly credited; but it is contended by the defendant that it ought not to pay, and is not obliged to pay, unless the volunteer was duly credited to it upon its quota, even if the re-enlistment was made upon its promise to pay. * * *

"[This evidence clearly shows that the defendant as early as February 11th 1864, offered a bounty to volunteers to fill its quota under the calls of the government for men.] The terms of payment of this bounty were not finally settled until the 22d of February 1864."

The judge, after recapitulating the evidence, proceeded:—

"[If you believe that Daum re-enlisted to the credit of the defendant, under the belief and in the consideration that if he did so he would receive a bounty of $300 from it, and that the re-enlistment was so made as to entitle the defendant to that credit, and that it failed to get that credit, if it did fail, by no neglect of Daum, but by that of the officers of the United States charged with such duties, we think the failure ought not to prevent the plaintiff's recovering in this suit.]

"After having re-enlisted, as the evidence shows he did, he could not change it without the consent of the military authorities of the United States, and having thus put it out of his power to get a bounty from another place, he ought not to be deprived of his bounty from the district for which he did re-enlist if the enlistment was on a legal consideration, such as we have stated, because somebody whose duty it was failed to give the proper credit for it.

"[There is nothing before us to show that it was the duty of Daum to give the defendant notice and procure the proper credit. So far as we know, notice from him would have been an entire

nullity, and the defendant would not have been obliged to give it any attention.]

"It is in evidence that other localities were seeking volunteers to fill their quotas and paying bounties in cash, and you may infer from Major Titus's evidence that the fact was known in his regiment. [In the absence of any proof that Daum re-enlisted for any other place, taken with that of his having enlisted to credit of defendant, if you so believe, we may fairly infer that he had some motive in so doing, and judging of his human nature by that of other human beings, we may infer that he did so for a bounty to be paid for by some locality.] In fact, the law of 1866 says he must be so understood, fairly construed, but his intention on this subject must have a direct connection with the offer of the bounty to enable him to recover in this suit."

The verdict was for the plaintiff for $440.15.

The defendant took out a writ of error and assigned the parts of the charge in brackets for error.

Brown & Stone, for plaintiff in error.—There was no contract between plaintiff and defendant; this was necessary for a recovery: Washington Co. *v.* Berwick, 6 P. F. Smith 466; Breckrock Sch. Dist. *v.* Frankhouser, 8 Id. 380. There must be reciprocal assent to a definite proposition: Story on Contracts 373. The resolution of February 11th 1864, was but preparation for an offer: Foulke *v.* West Bethlehem, 3 P. F. Smith 223. The party making a proposition must be notified of acceptance: Emerson *v.* Graff, 5 Casey 358; 2 Parsons on Contracts 669. The voluntary compliance with the terms offered does not bind the person offering: Story on Contracts 384; Johnston *v.* Fessler, 7 Watts 48. Daum should have informed the borough of his enlistment: Vyse *v.* Wakefield, 6 M. & W. 452; Blodgett *v.* Springfield, 43 Vermont 626.

F. D. Reeves, for defendant in error.—A contract is to be interpreted by the circumstances under which it is made: Phila. Ins. Co. *v.* American Ins. Co., 11 Harris 65; Mifflin *v.* Learn, 3 P. F. Smith 184.

The opinion of the court was delivered, May 17th 1873, by

MERCUR, J.—The learned judge put this case upon the true ground when he said to the jury, "the right of the plaintiff to recover depends entirely upon whether or not a valid contract exists between him and the defendant." Such being the law of the case, the well recognised rules of evidence necessary to establish a contract, must be applied.

We are unable to discover in the resolution of 11th of February 1864, any evidence that the borough of Warren offered a bounty

to volunteers. It merely declared that the authorities would levy a tax sufficient for that general purpose. It was an act between the borough authorities and the tax-payers only. It was no offer to volunteers. It is true, it contemplated that the fund should subsequently be used in procuring volunteers at such prices as might be agreed upon, not exceeding three hundred dollars. It gave no one any right to say, I will enlist, and you shall pay me three hundred dollars. That the authorities so understood it, is shown by the fact that upon each, the 13th and 22d of February 1864, they passed a resolution to issue bonds for the same purpose. The passage of these resolutions was the first step towards putting the borough in a condition to justify it in offering bounties. It was providing the funds in advance of their appropriation. The making of contracts with persons to enlist, is entirely a different matter. To hold that this resolution offered a bounty to volunteers, is to extend it beyond its true scope and meaning. It did not, as was said in Foulke v. West Bethlehem Township, 3 P. F. Smith 221, *ex proprio vigore*, impose a liability upon the borough to pay any bounty. The first assignment of error is therefore sustained.

The other assignments of error may be considered together.

It appears by the muster-roll that when Daum was mustered into service on the 29th February 1864, at Martinsburg, Va., he declared his residence to be "Warren, Warren county, Pennsylvania." There is no evidence that he, at the time of his re-enlistment, said or did anything indicating an intention to enlist to help fill the quota of the defendant, or to be credited thereto. The evidence is that he first gave notice of any such claim a short time before the commencement of this suit, which was in January 1871. It is true, the second section of the Act of May 1st 1866, Pamph. L. 114, provides that "the place of residence named in the re-enlistment and muster-in rolls, shall, in the absence of other evidence, be considered the place of credit." This act, passed more than two years after his re-enlistment, throws no light upon his actual intention at the time of said re-enlistment. If the transaction, at the time, lacked the ingredients essentially necessary to create the contract relation, this subsequent Act of Assembly could not create one which would be obligatory upon the parties.

The learned judge thought the jury, judging of Daum's human nature by that of other human beings, might infer that he re-enlisted for a bounty, to be paid by some locality, and in the absence of any evidence that he re-enlisted for any other place, they might infer he enlisted to the credit of the Borough of Warren. This is carrying the doctrine of presumption too far. It is building upon a too uncertain foundation. The result is, that the superstructure is as shadowy as the base upon which it rests. With much stronger probability, it might be said, that the reason-

able and ordinary workings of the human mind would have induced him to have informed the defendant within less than six years, of some fact indicating a real or pretended claim.

The evidence shows that the borough authorities never made any contract with Daum personally; that he did not notify them that he would accept, or had accepted the general offer which they had made; they had no notice of his enlistment; they filled their quotas with other men, and never received any credit or allowance for Daum. The act of his re-enlistment, remote from the defendant below, did not carry any notice of itself. Upon general principles, when one seeks to establish a contract predicated of a general proposal made by the other party, he must show that the one making the proposal was duly notified of the acceptance thereof. Notice of this acceptance is necessary, even when a distinct proposition is made by one to another: Emerson *v.* Graff, 5 Casey 358. We see nothing in this case to take it out of the general rule: Washington County *v.* Berwick, 6 P. F. Smith 466; Brecknock School District *v.* Frankhouser, 8 Id. 380.

The errors are sustained. Judgment reversed.

73 438
225 292

Hess *versus* Herrington.

1. Assessors did not value unseated land returned by them, and the commissioners assessed a tax at a valuation of $1 per acre, which was the uniform valuation of all unseated lands in the county. *Held*, that this was at most an irregularity which was cured by the Act of 1815.
2. Unseated land may be sold for taxes on an assessment without the intervention of the assessor.
3. The curative provisions of the Act of March 13th 1815, do not apply to a sale by commissioners of unseated land bought by them at treasurer's sale.
4. The act does not require that the book to be kept by the commissioners of lands bought by them at treasurer's sale, shall be a separate book without other entries.
5. A plaintiff in ejectment must show a primâ facie title, whether his claim be by a tax sale or otherwise; or whether against an intruder or one setting up a right of possession.
6. Land surveyed as 111 acres was assessed in the warrantee name in three tracts, one of 60 acres and two 40 each; one 40 acre tract was sold for taxes and conveyed as a tract of 40 acres, giving township, &c., surveyed to J. Coleman; there was no evidence that the other two parts were seated or any evidence of distinct identification. *Held*, that there was no evidence of identity for the jury.
7. Coxe *v.* Blanden, 1 Watts 533, distinguished.

March 27th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Lycoming county:* Of January Term 1872. No. 285.

This was an action of ejectment, brought August 6th 1869, by

[Hess v. Herrington.]

James Herrington against Reuben Hess, "for 40 acres of land, part of a tract in the warrantee name of John Coleman." The writ was returned "summoned."

The case was tried November 1st 1871, before Gamble, P. J.

The plaintiff gave in evidence,—Warrant, March 25th 1794, to John Coleman, for 100 acres, and survey, March 31st 1797, for 111¼ acres and allowance.

The plaintiff, under objection and exception, gave in evidence the assessment books of Lycoming county, showing assessment of 60 acres in Clinton township, J. Coleman warrantee, no owner's name, valued at $60, with county, state, road and school taxes for 1858 and 1859; 40 acres, Clinton township, J. Coleman warrantee, no owner's name, valued at $40, same kind of taxes, and for same years; 40 acres, J. Coleman warrantee, Clinton township, no owner's name, valued at $40, same kind of taxes and for same years. The 60 acres was marked in pencil, "Seated, P. Berger." One of the 40-acre tracts was marked in pencil, "Seated, R. Hess." Also sale of unseated land for taxes, June 23d 1860, "40 acres, J. Coleman, Clinton township, sold to commissioners."

Also assessment of school directors of Clinton school district for 1859.

The clerk of the commissioners testified that the pencil-marks were not put there by the authority of the commissioners.

The plaintiff testified that they were not there for some time after January 26th 1869.

The plaintiff then gave in evidence the treasurer's deed to the commissioners, dated November 10th 1860, for the same tract sold at treasurer's sale; and deed of the commissioners to the plaintiff, dated February 17th 1869, for the same tract.

The clerk of the commissioners testified that the sales of the commissioners in 1869 were public sales to the highest bidder; he also gave evidence that the sales were advertised as required by the Act of Assembly.

The defendant gave in evidence the assessment books of Clinton township, for the purpose of showing that this land was not returned by the assessors for the years 1856, 1857, 1858, and that tract was assessed on the seated list in 1859.

The clerk of the commissioners testified that there were no other assessments in the commissioners' office for 1856, 1857, 1858 and 1859 than those in evidence:—

"There is no book kept in the commissioners' office wherein is entered the name of the person, as whose estate the land so purchased by the commissioners has been sold, the quantity of land, the amount of tax sold for, so long as the land remained unredeemed, and for five years next following such sale to them. The commissioners have not charged the taxes assessed upon

said land, as required by the Act of March 13th 1815. No such book kept. The commissioners' assessment book, already in evidence, is the book in which the unseated lands are assessed, for both the treasurer's sales and the commissioners' sales, and are charged up by the commissioners every two years. This assessment book is kept the same after a sale to the commissioners as before—the assessments are continued against the lands after the sale just as before—and there is no book keeping such account other than this. After a sale to the commissioners it is noted in this book, after the warrantee name, by the word 'Commissioners.' That entry denotes that the tract thus marked is sold to the commissioners. When application is made for the redemption of such lands, the taxes, &c., are made up from this book. The amount necessary to effect a redemption is ascertained from this book. These assessments are made upon the uniform valuation of unseated lands in the county, at $1 per acre."

The defendant requested the court to charge:—

1. That there is no such assessment as will support the treasurer's sale to the commissioners.

2. That the prerequisites to the treasurer's sale have not been complied with, and that the sale by the treasurer was unauthorized and void.

3. That the prerequisites to the sale by the commissioners to the plaintiff have not been complied with, and that the sale by them to the plaintiff was unauthorized and void.

4. There being evidence that the tract of land in warrantee name of J. Coleman has been severed, and no evidence to identify the land claimed by the plaintiff as that sold by the commissioners to the plaintiff and claimed by him in this suit, the plaintiff cannot recover.

5. That if the jury believe the evidence, the plaintiff cannot recover.

The court declined to answer the five points as requested by the defendant, and submitted the cause to the jury upon the charge.

Judge Gamble, after stating the evidence of the plaintiff, said:—

* * * "Is this evidence of a legal assessment of these several parcels of land? The commissioners are the officers authorized by law to fix the rate of taxation and assess the same upon the taxable property of the county. The assessors of the several townships are required by law to furnish a list of such taxable property with a valuation annexed to the same, to enable the commissioners to equalize taxation and make it general. This is a part of the system of taxation, and includes the unseated lands as well as the other taxable property of the respective townships. But it is not the only mode by which the county commissioners may obtain a list of the unseated lands for the purpose of taxation. They may

require the deputy or district surveyor to return such a list, and may assess them with their proper proportion of the public taxes, according to their own discretion and judgment. In this county, it is in evidence by the clerk for the commissioners, that the uniform valuation of unseated lands for the purposes of taxation is one dollar per acre.

["It does not appear to the court, therefore, to be essential to the validity of an assessment of taxes upon unseated land, that they should be returned by the assessors to the county commissioners, for the years for which they are assessed. The essential and material facts, upon which the validity of the assessment depend, are whether they are properly taxable, and whether a tax, authorized by law, has been assessed upon them by the commissioners. The return of the assessor without a valuation, or his omission to return them at all, should not exempt them from taxation, and cannot, in our judgment, render invalid a lawful tax assessed upon them by the commissioners. It is, at most, a mere irregularity which falls within the curative provisions of the Act of 1815. We say to you, therefore, that if you are satisfied from this book, that these taxes were actually assessed on these several pieces of land, by the county commissioners, and by the school directors of the Clinton school district, for the years 1858 and 1859, or either of them, and that they remained unpaid for one year, the sale by the treasurer was legal and valid, if the land sold was in fact unseated.] It was assessed and sold as unseated, there is no evidence in the cause to the contrary, excepting the pencil marks found on the commissioners' assessment book, and the circumstance that 40 acres in the same warrantee name, and probably a part of the same tract, are assessed to the defendant, as seated land for the year 1859. If you should be satisfied that these 40 acres are the same part of the survey, sold to the plaintiff, it could have little or no bearing upon the question of whether it was unseated in 1858. As to the pencil marks it is not known when, nor by whom they were made, and the plaintiff swears that they were not there for some weeks after the commissioners' deed was made to him, which would be more than eight years after the treasurer's sale. If this tract of land were in fact seated either by residence or cultivation in 1858, when taxed as unseated, it must have been known in the neighborhood, and was therefore susceptible of positive proof, none such having been produced, the inference is very strong that no such fact existed and there is therefore but little importance to be attached to these pencil entries.

["If you are satisfied from the evidence that these taxes were assessed by the county commissioners, that the land was unseated, and that one or more of the taxes assessed remained unpaid for one year, then the land was subject to sale, and the treasurer's

deed vested the title in the county commissioners, in trust for the county.]

["We will next consider the regularity of the sale by the commissioners; and as the curative provisions of the Act of 1815, are applicable only to sales by the treasurer, a substantial compliance with all the prerequisites of a sale by the commissioners must be shown. The Act of 1815 requires the commissioners to hold the title for a period of five years, unless sooner redeemed by the original owner; and to provide a book wherein shall be entered the name of the person as whose estate the land was sold, the amount of taxes for which it was sold, and the amount of taxes charged against it for each succeeding year whilst the title remains in the county; and at the expiration of five years, to sell the land at public sale, provided the full amount of these charges, interest and costs were bid. The Act of 1824 modified this regulation, by requiring the land to be advertised in all the newspapers published in the county, at least thirty days preceding the sale, and then authorizing a sale for the best price that can be obtained for the same. This is still further modified by a special act relating to such sales of lands in this county, approved the 6th of March 1868, by which the advertisement is limited to two or more newspapers having the largest circulation in the county."] * * *

The judge then stated the evidence of the clerk as to the manner of keeping the commissioners' books, the advertisements, sale, &c., and proceeded:

"The evidence is for you, and if you are satisfied from all the evidence in the cause that there was thirty days notice of the sale, published in two of the newspapers having the largest circulation in the county, that the sale was public, and to the highest bidder, and that an account of the taxes for which the land was sold, and those afterward assessed against it were charged to the tract designated by the warrantee name in the commissioners' assessment book, then we think the prerequisites of a sale have been substantially complied with.

"Although the provisions of the Act of 1815, requiring this account to be kept in a book provided for the purpose is not repealed by the Act of 1824, yet it is manifest that at least one of the reasons for it is removed by repealing the restriction of the sale, unless a sum equal to these charges were bidden, and authorizing a sale for whatever sum might be bidden without regard to these charges. And perhaps the only remaining reason for keeping such an account at all, was to enable the original owner to redeem his land by paying these charges, with interest, within five years. The original owner did not offer to redeem within that period, nor does it appear that he is here now to complain. Nevertheless we think the account, if kept, as testified to

[Hess v. Harrington.]

by the clerk of the commissioners, was substantially as required by law.

["The only remaining point to which we will call your attention, is the question of identity. Are the forty acres of land sold by the commissioners to the plaintiff part of the warrant and survey in the name of John Coleman, given in evidence, and the same described in the plaintiff's writ? This is a question of fact for you to determine from the evidence.] Unseated lands are generally identified and distinguished by the warrant. The owner is often unknown even in the vicinity where land lies. * * *

"An assessment of three pieces of land in the warrantee name of J. Coleman, in Clinton township; one containing sixty acres and two containing forty acres each. A deed from the treasurer to the commissioners, and from the commissioners to the plaintiff for forty acres, part of J. Coleman, situate in Clinton township. There is no other evidence of any division of this survey, nor is there any evidence of any other survey in the same name in Clinton township.

["Under this title the plaintiff seeks to recover the possession of forty acres of land, part of the survey in the name of John Coleman, situate in Clinton township, and described by particular boundaries. The defendant, by his appearance and plea, admits that he is in possession of the land described in the writ. He has not shown any title in himself, nor that this land was seated, or the taxes paid, and therefore, not subject to sale. Under such circumstances, we think, the plaintiff would be entitled to recover the possession of any forty acres, part of John Coleman, in Clinton township, which was unseated, and upon which the taxes were unpaid for either of the years for which it was sold.]

"But the question of the identity of the land described, in the plaintiff's writ, with that assessed, sold and conveyed to the plaintiff, we leave, as a fact for you to determine from the evidence in the cause." * * *

The verdict was for the plaintiff.

The defendant took out a writ of error.

He assigned twelve errors:—

1, 2, were as to the rulings on the admission of evidence.

3–7. Declining to answer the defendant's points.

8–12. The parts of the charge in brackets.

S. Lynn (with whom were *J. J. Metzgar* and *W. H. Armstrong*), for plaintiff in error.—The authority given to the assessor to place a valuation on lands cannot be usurped by the commissioners, save in the excepted cases provided by statute: Bratton *v.* Mitchell, 1 W. & S. 310; Hubley *v.* Keyser, 2 Penna. Rep. 501; Laird *v.* Hiester, 12 Harris 463; McCall *v.* Lorimer, 4 Watts 355. The presumption of regularity may be rebutted: Morton *v.*

Harris, 9 Watts 324. They cited also Heft *v.* Gephart, 15 P. F. Smith 510; Wheeler *v.* Winn, 3 Id. 131; Troutman *v.* May, 9 Casey 455.

The curative provisions of the Act of 1815 do not apply to a sale by commissioners after a purchase by them at treasurer's sale: Jenks *v.* Wright, 11 P. F. Smith 410.

The plaintiff had not the right to elect, and the burden of proof is upon him to show that he bought the land for which he has brought suit. Evidence of identification must be given for the purpose of rendering the assessment valid, and of showing the territory covered by the sale: Philadelphia *v.* Miller, 13 Wright 440; Lyman *v.* Philadelphia, 6 P. F. Smith 499; Russel *v.* Werntz, 12 Harris 337. The plaintiff must recover on the strength of his own title, and the burden is on him to show the identity of the land claimed in the writ with that conveyed by the treasurer's deed: Hoffman *v.* Danner, 2 Harris 28; Scott *v.* Sheakly, 3 Watts 50; Hyskill *v.* Givin, 7 S. & R. 369; Spang *v.* Schneider, 10 Barr 193; Buchanan v. Moore, 10 S. & R. 280; 1 Greenleaf on Ev., sect. 74; Fisk *v.* Fisk, 12 Cush. 150; St. Clair *v.* Shale, 8 Harris 105; Miller *v.* Smith, 9 Casey 391.

J. M. Gamble and *R. P. Allen*, for defendant in error.—There is nothing to which the maxim, *omnia præsumuntur rite esse acta*, applies with so much force as a tax title: Heft *v.* Gephart, 15 P. F. Smith 510. The assessment is good whether or not it be shown that the assessors returned the valuation: Hubley *v.* Keyser, 2 Penna. R. 501; Devinney *v.* Reynolds, 1 W. & S. 333; Crum *v.* Burke, 1 Casey 377.

Identity is a question for the jury: Woodside *v.* Wilson, 8 Casey 54; Stewart *v.* Shoenfelt, 13 S. & R. 360; Strauch *v.* Shoemaker, 1 W. & S. 174; Burns *v.* Lyon, 4 Watts 363; Thompson *v.* Fisher, 6 W. & S. 520; Dunden *v.* Snodgrass, 6 Harris 151; Russel *v.* Werntz, 12 Id. 337; Miller *v.* Hale, 2 Casey 436.

All that is requisite for a plaintiff in ejectment, in the first instance, after showing title out of the Commonwealth, where the land is sold for taxes, is to exhibit the deed from the commissioner or treasurer. This is such a primâ facie title as is sufficient to put the defendant on proof of a better title: Foster *v.* McDivit, 9 Watts 344; Shearer *v.* Woodburn, 10 Barr 511; Dikeman *v.* Parrish, 6 Id. 210; Troutman *v.* May, 9 Casey 455; Foust *v.* Ross, 1 W. & S. 501; Wheeler *v.* Winn, 3 P. F. Smith 122.

The opinion of the court was delivered, May 17th 1873, by

Sharswood, J.—The twelve assignments of error may be disposed of by the consideration of three questions.

The first relates to the assessment of the tax upon which the land

alleged to be that described in the writ, was sold by the treasurer to the county commissioners and conveyed by deed dated November 10th 1860. The plaintiff in error contends that valuation is essential to an assessment; and that the only officers competent by law to make a valuation are the assessors. It appearing that the tract in question was not returned by the assessors for the year, for the taxes for which it was sold, the commissioners, it is said, had no right to put a valuation upon it, and that, as a consequence, there was in law no assessment, and the sale by the treasurer was invalid. It seems that there is a usage of long standing in Lycoming county, to put a uniform valuation of one dollar per acre upon all unseated lands, in consequence of which the assessors have fallen into the practice of making no return of valuation in such cases. It is certainly *malus usus et abolendus*. How the assessors can reconcile it with the terms of their official oaths, it is not easy to comprehend. But because they have failed in the performance of their duties, it does not follow that the land was not subject to taxation, and the title of the commissioners, by the treasurer's sale, a perfectly good one. The learned judge below instructed the jury that "the return of the assessor without a valuation, or his omission to return them at all, should not exempt the lands from taxation, and cannot, in our judgment, render invalid a lawful tax assessed upon them by the commissioners. It is, at most, a mere irregularity, which falls within the curative provisions of the Act of 1815." In this instruction we think that he was entirely right.

There was evidence by a record from the office of the county commissioners that the taxes in question were assessed by them. The twenty-first section of the Act of April 12th 1842, Pamph. L. 266, enacts that "all records of the county commissioners charging lands as unseated with arrears of taxes, shall be evidence of an assessment." By the fourth section of the Act of March 13th 1815, 6 Smith 301, it is declared that "no alleged irregularity in the assessment, or in the process, or otherwise, shall be construed or taken to affect the title of the purchaser; but the same shall be declared to be good and legal." The Act of 1842 makes the record of the county commissioners evidence of an assessment in fact, and the Act of 1815, to support the title of the purchaser, cures all irregularities in it. The county commissioners were the officers competent to assess the tax. That no valuation was made or returned, was a mere irregularity. The county commissioners are the board of revision, with power to revise, correct and equalize the valuation of all property taxable by law: Act of July 27th 1842, Pamph. L. 445; Act of April 29th 1844, Pamph. L. 501. It would be no violent presumption if it were necessary to resort to it, that the valuation upon which the assessment was made, was settled by them in their capacity as a board

of revision. But it is not necessary. In Hubley *v.* Keyser, 2 Penna. Rep. 502, Mr. Justice Huston, speaking of the Act of 1815, says: "The object was to make the sale and deed confer a title without proof of any one prerequisite, except that the land was unseated, and that a tax was charged by the commissioners, regularly or irregularly; that this tax was unpaid, and the land sold and not redeemed within two years." In that case, the objection to the sale was, that there was proof that the assessors had not valued or returned the land as unseated for assessment. It was argued there, as here, that the valuation by the commissioners was unauthorized, and the assessment a nullity; but it was held otherwise by the court. Indeed, in citing this case afterwards, in Fager *v.* Campbell, 5 Watts 288, Chief Justice Gibson said: "The tax-book was an official document, and according to Hubley *v.* Keyser, it was both competent and sufficient to show that the land had been assessed." Both these cases were prior to the Act of 1842. It was, indeed expressly decided in Devinney *v.* Reynolds, 1 W. & S. 328, that a tract of unseated land may be sold by the treasurer for the non-payment of taxes upon an assessment made by the commissioners, without the intervention of the assessors. "The assessors," said Mr. Justice Rogers, "*value* the lands, but the commissioners make the assessment; from which it follows that you cannot avoid a sale for taxes, merely because you are unable to prove that the *assessors* had performed this ministerial duty."

The second question is, as to the validity of the commissioners' sale. It has been decided that the curative provision of the Act of 1815, does not apply to these sales: Jenks *v.* Wright, 11 P. F. Smith 410. It is objected to the validity of the commissioners' sale in this case, that they did not follow the provisions of the fifth section of the Act of March 13th 1815, 6 Smith 301, which declares that "it shall be the duty of the commissioners to provide a book wherein shall be entered the name of the person as whose estate the same shall have been sold, the quantity of land, and the amount of taxes it was sold for, and every such tract of land, shall not thereafter, so long as the same shall remain the property of the county, be charged in the duplicate of the proper collector; but for five years next following such sale, if it shall so long remain unredeemed, the commissioners shall in separate columns in the same book, charge every such tract of land with reasonable county and road tax, according to the quality of the said land, not exceeding in any case the sum of six dollars for every hundred acres." Without stopping to inquire whether a failure on the part of the commissioners to observe these directions ought to invalidate the sale, as it forms no part of the process, but is a mere direction as to book-keeping, we are of opinion with the learned judge below, that "the account, if kept as testified by the clerk of the commissioners, was substantially as required by law." The clerk

stated: "This assessment book is kept the same after a sale to the commissioners as before, the assessments are continued against the lands after the sale just as before, and there is no book for keeping such account other than this. After a sale to the commissioners, it is noted in this book after the warrantee's name, by the word 'commissioners,' that the tract thus marked, is sold to the commissioners." The act does not in terms require that the book shall be a separate book, containing no other entries. It is enough if there is a record of the entries, as required by the act, made in some book.

The remaining question is, whether the case was properly submitted to the jury as to the identity of the tract assessed and sold with that described in the writ of ejectment. The plaintiff in ejectment must show at least a primâ facie title—by prior possession or papers—in himself, for the land described in the writ, whether the claim be a tax sale or otherwise; whether against a mere intruder, or one setting up some right of possession. No man can be lawfully ejected from lands by less than this. In this case, on the assessment books of the commissioners of unseated lands, there were three separate tracts assessed in the warrantee name of J. Coleman: one of sixty, and two of forty acres each. One of these tracts of forty acres was that assessed and sold and conveyed in the treasurer's deed by the general and vague description, "a tract of land containing forty acres, situate in the township of Clinton, in the county of Lycoming, surveyed to J. Coleman." The title from the Commonwealth produced by the plaintiff, showed a warrant to John Coleman, for one hundred acres, and a return of survey for one hundred and eleven and three-quarter acres and allowance. We may assume that the three assessed tracts made up this survey, though they overrun it in quantity. How the whole tract came to be divided into three parcels did not appear. There were, indeed, some pencil marks on the assessment that two of the tracts were seated, by whom or when made was unknown, except that they were not there at the time of the commissioners' sale. They were therefore properly disregarded. Had there been evidence that the other two tracts were seated at the time of the sale, it would certainly have been sufficient to have identified the remaining one as the subject of the sale. There was no evidence whatever to show which of the two tracts was the one assessed and sold, nor of their relative position, nor any other fact which could possibly lead to identification. The learned judge then left the question of identity to the jury without evidence, which, we think, was an error. He accompanied it, however, with an instruction which throws light upon the ground upon which he made this submission. "Under such circumstances, we think the plaintiff would be entitled to recover the possession of any forty acres, part of John Coleman, in Clinton

township, which was unseated, and upon which the taxes were unpaid for either of the years for which it was sold."

It is contended that this instruction of the learned judge may be sustained by the ruling of this court in Coxe *v.* Blanden, 1 Watts 533, in which it was held that a treasurer's sale for taxes of part of a tract, and a conveyance of that part designating the quantity but not the locality, is good; and an unrestricted choice of locality to the purchaser is a necessary incident of the sale and the consequence of a reasonable interpretation of the statute. But in that case there was an assessment upon an entire tract of four hundred and thirty-seven acres, and a sale of three hundred and eighteen acres of it for a sum sufficient to pay the taxes and costs on the whole. It is clearly distinguishable from this case. There was no doubt there that the assessment upon which the sale was made, fastened upon every part of the tract, and a foundation for the sale of every part existed. But not so here, where the parts were severally assessed. The cases abundantly show that there must be evidence to identify the tract assessed with that sold and described in the writ: Russell *v.* Werntz, 12 Harris 337; City of Philadelphia *v.* Miller, 13 Wright 440; Lyman *v.* City of Philadelphia, 6 P. F. Smith 488; Glass *v.* Gilbert, 8 Ibid. 266; Brotherline *v.* Hammond, 19 Ibid. 128.

Judgment reversed, and *venire facias de novo* awarded.

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Butler's Appeal.

1. An Act of Assembly must violate some prohibition of the State or Federal Constitution, expressed or clearly implied, before it can be declared unconstitutional.

2. The legislative power of taxation may be delegated to a municipal corporation, to be exercised within its corporate limits.

3. The legislature may exempt classes of property as well as classes of persons from taxation.

4. The Act of April 2d 1872, supplement to the charter of Wilkesbarre, is constitutional.

5. An act authorized the councils of Wilkesbarre to impose a tax for police purposes "on bowling alleys, and billiard tables, * * * and also auctioneers or other vendors of merchandise or articles by outcry, * * * and all other places of business or amusement conducted for profit." This did not authorize a tax on merchants, bankers, brewers, &c.

6. "Other places of business or amusement," should be of the character of those specifically designated.

7. The ordinance of councils enacted that after notice and failure to pay in ten days, the party should "upon conviction pay a fine not exceeding $100, or imprisonment not exceeding thirty days or both at the discretion of the mayor." This being without authority in the act could not be enforced.

March — 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

[Butler's Appeal.]

Appeal from the decree of the Court of Common Pleas of *Luzerne county*: In Equity: No. 261, to January Term 1873.

An Act of Assembly was passed April 2d 1872 (Pamph. L. 740) entitled "A supplement to an Act to incorporate the city of Wilkesbarre."

By the second section it was enacted, that "in addition to the corporate powers heretofore granted, the council of said city shall be authorized:— * * *

"3. To require by ordinance or other general regulation that the owners or lessees of cars, carts, drays, wagons, carriages, omnibuses, coaches, sleighs, sleds, or other vehicles of burden or pleasure let for hire, or employed or used in carrying articles or persons for pay; and also the owners, occupants, or lessees of bowling-alleys and billiard-tables for the use of which pay is demanded; and also auctioneers or other venders of merchandise or articles by outcry or bidding; and also all other places of business or amusement conducted for profit, shall be annually registered and licensed, and required to pay into the city treasury, for police purposes, such sums respectively for such licenses, as may be established in the ordinance or any other general regulation."

On the 2d of September 1872, the councils of Wilksbarre, for the purpose of exercising the powers conferred by the act, passed the following ordinance:—

"Sec. 1. The owners or lessees of cars, let for hire or employed or used in carrying articles or persons for pay, and also the owners, occupants or lessees of bowling-alleys and billiard-tables, for the use of which pay is demanded; and also auctioneers or other vendors of merchandise or articles by outcry or bidding, and also the owners or occupants of all other places of business or amusement conducted for profit, shall be annually licensed and shall be required to pay into the city treasury for police purposes, such sums respectively, as follows to wit:"—

The ordinance then enumerates:—auctioneers; billiard-table keepers; bowling-alley keepers; banks, bankers and brokers; book and stationery store-keepers; brewers and distillers; butchers; coal dealers; daguerrean galleries; drug store-keepers; express companies; gift enterprise store-keepers; hotel-keepers; insurance agents; jewellery store-keepers; livery-stable keepers; liquor dealers; lumber dealers; merchants and dealers in merchandise; millinery store-keepers; real-estate agents or brokers; saloon keepers; street-car companies; sewing-machine dealers; stands for sales of drink or eatables, sample dealers; telegraph companies; and all other places of amusement for profit, not herein enumerated.

After providing for the determining who are required to take out license, giving notice by the mayor, issuing duplicates, &c., the ordinance provides:—

"Sec. 6. All persons liable to pay any of the annual license fees aforesaid, who shall fail or neglect for the period of ten days after notice by the mayor of the amount of the license fee required to be paid, to pay the proper fee and procure the proper license, shall, upon conviction thereof, pay a fine not exceeding $100, or undergo imprisonment not exceeding thirty days, or either or both, at the discretion of the mayor.

"Sec. 7. All persons liable to pay any of the license fees aforesaid, other than annual, who shall fail or neglect upon demand from the mayor to pay the proper fee and procure the proper license, shall upon conviction be liable to the same penalties as imposed in preceding section."

At January Term 1873 of the Court of Common Pleas of Luzerne county, C. E. Butler and a large number of others filed a bill against the city of Wilkesbarre; it set out:—

1. They were citizens and tax-payers of Wilkesbarre, many of them merchants or venders of merchandise, all business men and owners of places of business in that city.

2. They had paid for and procured according to law the proper licenses for carrying on their business.

3, 4, 5. The councils of Wilkesbarre had passed the ordinance above set forth, claiming the right to enact it under the above said Act of Assembly, and a notice had been served on them to pay the tax within ten days.

6, 7. They believed the Act of Assembly to be unconstitutional, and the ordinance not in accordance with the act.

The prayers were for an injunction restraining the city from proceeding to enforce the payment of license tax assessed upon them, and for further relief.

A preliminary injunction was granted November 25th 1872.

The defendants answered that the act was constitutional and that the ordinance was legal, &c.

After argument on bill and answer, the court (Dana, J.) being of opinion that the Act of Assembly was constitutional, and that the ordinance was in accordance with the act, dissolved the injunction and dismissed the bill.

The plaintiffs appealed to the Supreme Court, and assigned for error the dismissal of their bill.

S. Woodward (with whom was *E. S. Osborne*), for appellants.—The court has power to set aside unequal and unjust legislation: Philadelphia Association *v.* Wood, 3 Wright 73; Durach's Appeal, 12 P. F. Smith 493; Hammett *v.* Philadelphia, 15 Id. 146.

H. M. Hoyt (with whom was *E. H. Chase*), for appellee.—The tax is not a local tax for general purposes. In the legitimate exercise of the power of taxation persons and things always have

[Butler's Appeal.]

been and may constitutionally be classified: Durach's Appeal, *supra;* Speer *v.* School Directors, 14 Wright 161; Kirby *v.* Shaw, 7 Harris 258. 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: Schenley *v.* Allegheny City, 1 Casey 130; Sharpless *v.* The Mayor, &c., 9 Harris 164.

The opinion of the court was delivered, May 17th 1873, by

MERCUR, J.—We cannot review the wisdom or the expediency of legislative enactments. They must violate some prohibition, expressly declared or clearly implied, of the constitution of this state or of the United States, before we can pronounce them to be unconstitutional.

Whatever power of taxation the legislature possesses, it may delegate to a municipal government, to be legitimately exercised within its corporate limits.

The right of the legislature to exempt certain classes of property, as well as classes of persons from taxation, has always been recognised in this state. Thus, churches, meeting-houses, burial-grounds, universities, colleges, academies, school-houses, court-houses and jails, have been exempted "from all and every county, road, city, borough, poor and school tax:" Act of 16th April 1838, Purd. Dig. 1368, pl. 77. So all lands granted to officers and soldiers of this state for services in the armies of the Revolution, were exempted during the lifetime and ownership of the grantee: Act of 1st March 1780, 1 Sm. Laws 479. So, during the late war for the suppression of the rebellion, volunteers who were in service or who had been honorably discharged therefrom, were in many cases excepted from taxes laid to pay bounties to volunteers: Act of 14th April 1863, Pamph. L. 443, § 4; also from a per capita tax, Act of 25th August 1864, Pamph. L. 987. In the exercise of the power of taxation, persons and things may be classified. Some classes may be taxed, other classes may be exempted. Thus, the Act of April 29th 1844, Pamph. L. 497, imposed a state tax upon "all professions, trades and occupations, except the occupation of farmers." Again some species of property may be taxed for one purpose and not for another. If the taxation is upon all of a class, either of persons or things, said Justice Sharswood in Durach's Appeal, 12 P. F. Smith 494, "it matters not whether those included in it be one or many." We are unable to see anything in the Act of 2d April 1872, which conflicts with the prohibitory clauses in the constitution, and the learned judge was correct in so holding.

The remaining question is, does the Act of 2d April 1872, sup-

port the ordinance of September 2d 1872? We think it does not for two reasons.

First. The act authorizes the city authorities to require the payment, by ordinance or other general regulation, of license fees, for police purposes, from the owner or lessees of certain vehicles of burden or pleasure, let for hire or used in carrying goods or persons for pay: also, from auctioneers or other vendors of merchandise, or articles by outcry or bidding; also, from the owners, occupants or lessess of bowling-alleys and billiard tables, for the use of which pay is demanded; and also of all other places of business or amusement conducted for profit. We have changed the relative position of some of the paragraphs in order to present more clearly the different classes of persons and things, subject to the payment of licenses. It will be seen they are: 1st. Persons using vehicles for certain purposes: 2d. Persons pursuing their occupations in a particular manner: 3d. Persons keeping for pay, certain places of amusement; the act specifically designating "bowling-alleys and billiard-tables," only. Then follows the clause: "also, all other places of business or amusement conducted for profit." Under this, the ordinance in question, has imposed license fees or taxes upon merchants, bankers, brewers, druggists, hotel keepers and upon persons engaged in many other branches of industry, some of whom have filed this bill. We do not think the act is broad enough to cover these classes. They are not within its scope and object. If the design of the law had been to impose this tax upon every person engaged in carrying on any branch of industry in the city, more certain and specific language would have been used. The fair import of the words used, taken in connection with the kind of property specifically designated and charged is, that "the other places of business or amusement" should be of purpose and character, similar to bowling-alleys and billiard-tables.

The ordinance therefore should have been so limited—such, we conceive, being the true intent and meaning of the act, the ordinance has no basis upon which to rest, and is necessarily invalid.

Secondly. The penalties imposed by section six of said ordinance, for a failure to pay the license fee, cannot be sustained by authority, nor by sound reason. The ordinance makes no provision for the collection thereof, either by the recovery of a judgment, and execution thereon, nor by warrant of distress. It gives no authority to levy upon, seize, or sell the property of the delinquent for its collection. In case of a failure or neglect to pay, and to procure the proper license, within ten days after notice from the mayor, of the amount of the license fee required, it provides only for the imposition of a fine not exceeding one hundred dollars, and of imprisonment not exceeding thirty days, or either, at the discretion of the mayor. Thus, not only without any effort to collect the license fee out of the property of the delinquent; but

also, without the issuing of any process to collect the fine imposed, he may be incarcerated in prison. If the unfortunate citizen has permitted the ten days to run past without paying his license, the ordinance closes upon him; no alternative writ issues against him; his offence has been consummated; no payment will save him from prison.

There is nothing in the Act of Assembly authorizing the imposition of such a sentence, without an indictment and without a trial by jury. No authority was cited, no precedent has been found to warrant such action, or to sustain such a proceeding, under any similar grant of power. Except for contempt, a trial by jury should precede a sentence to imprisonment.

Holding then, that the ordinance is unwarranted by the statute, its enforcement should be enjoined; the decree must be reversed, and the relief asked for in the bill be granted.

And now, to wit: May 17th 1873, this cause having come up by appeal from the decree of the Court of Common Pleas of Luzerne county, dissolving the injunction which it had previously granted, and dismissing the appellant's bill, and having been argued by counsel at Philadelphia; after due consideration thereof, it was ordered, adjudged and decreed as follows, to wit: that the said decree of the Common Pleas be reversed and set aside; and that the said defendant be restrained from proceeding to enforce the payment of the sums of money claimed to have been assessed upon said plaintiffs respectively, as a special tax or license fee to enable them to prosecute their business in the city of Wilkesbarre; and it is further ordered, that the appellees pay the costs.

Boynton *versus* Housler.

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1. Where a parol contract for purchase of lands has been carried on *malâ fide*, there is a resulting trust and equity will decree a conveyance.
2. Equity will not permit one to hold a benefit which he has obtained by fraud, either of himself or another.
3. A decedent's estate was to be sold on execution, the widow having an interest to the extent of her exemption; her friends agreed to purchase the land for her; the execution-creditor agreed with her that if they would not bid against him he would convey a portion to her; they refrained from bidding and he bought the property at an undervalue. *Held*, that he was a trustee *ex maleficio* for the widow.
4. The widow having an interest in the land under the exemption laws, the agreement was not void as to the creditors of the decedent.
5. Beegle *v.* Wentz, 5 P. F. Smith 369; Seichrist's Appeal, 16 Id. 237, approved; Slingluff *v.* Eckel, 12 Harris 472, distinguished.

[Boynton *v.* Housler.]

March 28th 1873. Before READ, C. J., AGNEW, SHARSWOOD, and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Cameron county:* Of January Term 1872, No. 308.

This was an action of ejectment for 200 acres of land in Shippen township; it was brought December 22d 1870, by A. H. Boynton against Elizabeth Housler and others.

Merrick Housler died seised of the real estate mentioned in the writ; it was sold after his death under executions against his administrators, his widow Elizabeth Housler (defendant) and children; and was sold by the sheriff to W. A. Simpson, the plaintiff, for $110, and by him sold to Boynton, the plaintiff in this ejectment.

Mrs. Housler resisted a recovery, alleging that some of her friends proposed to buy the tract for her, and that Simpson agreed that if they would not bid against him he would buy the property and convey to her the "homestead," a part of it containing about 18 acres; this he afterwards refused to do.

The cause was tried January 24th 1872, before Wilson, J.

Under objection of defendant and exception, the plaintiff testified: "I saw Simpson the day before the sale. I spoke to him about it, and wanted to know if I had not better get some one to bid it up. This was before Mr. Boynton's store door. I asked him if he could do anything to save me a home. I spoke about getting some one to bid and run the property up. He said he thought it was not best. He thought it had best be sold as privately as it could be, and he would get some one to bid it off and deed me the homestead. He said he would get Mr. Newton to bid it off for him. He said he would have it sold as low as it could be sold. My friends were there to bid it up; they said they would bid it up as high as $1200. I don't recollect of anything more being said between him and me. He said it was best for me not to get any bidders. On that agreement I did not get any bidders. I had a contract for the land from Aden Housler. The first conversation I had with Simpson was the day before the sale, before Boynton's store. I went in and called him out. He sent for me to come down and meet him at Mr. Newton's office. I told him I had come to see him; I had made arrangements with Aden Housler for some one to bid on the property. They (my friends) said they would attend the sale and see that the property did not go for nothing. I don't recollect that I saw my friends after this conversation and told them not to bid."

Aden Housler testified: "Mrs. Housler employed me to see Mr. Simpson about the sheriff's sale. I went down to see him in June 1868. I asked him what he would do about it. I told him I had bought it, and found he had some little judgments on it, and I did not know it at the time I bought. He said he had two or three judgments against Housler. He agreed for me to go back

and tell Mrs. Housler that she should have the homestead, and that he would press his claims far enough to give her a homestead. He said he had learned I had bought it, and I told him I had. He asked me what I intended to do. I said I had bought it with an understanding with her, and I had given her a contract, that if I held it on that I should give her a deed. He said he would give her a deed, and if I would, it would be all right. The message he sent her was for me and her not to interfere, and have it bid off as low as possible, and that she should have the homestead, and not to get any bidders, that he would get some one to bid it off, and that would be better than for her to bid it off. He said, let it be sold as low as it could. If she could not make this arrangement I was to bid off all the property, and she should have the homestead. I would have bid $1250 for the property. I saw Mrs. Housler the day before the sale, or day of the sale, and she told me not to bid. I did not bid. I forbid the sale at Simpson's request, he saying if I showed my deed the sale would go low. About the time I heard Mr. Boynton was going to buy it I had a talk with him, and I told him that by an arrangement with the widow, and Simpson, she was to have the little homestead. Her title was not to interfere with the mill property. Simpson knew the situation of the homestead. * * * I spoke to him about a deed I had got of S. P. Davis. When I got my deed I was told the judgments of Simpson were not a lien. I was not employed to see Simpson but the once, until after the sale. At the sale I gave notice that I owned the property under the Davis title. Mr. Simpson was not here on the day of sale, and was not at the court-house that I know of. I had a conversation with Boynton before he purchased of Simpson, he said he would not buy unless he could arrange with the widow."

Joseph Housler testified: "I was at Lock Haven with my brother; was at Simpson's office. My brother spoke to him about his own title; Simpson asked him if he wanted to take any advantage of the widow. My brother replied, that he had made a contract with the widow for the homestead. He sent word to Mrs. Housler that she should give herself no uneasiness, that she should have the homestead. I think I heard him say he had made arrangements for Mr. Newton to bid it off."

The homestead lot contained about 18 acres; there was evidence as to its boundaries.

H. H. Boynton, defendant, testified: "I had a conversation with Aden Housler; I never had any knowledge that Mrs. Housler had any claim to this property until to-day. I told Aden Housler that I did not want to buy the property if any of the Houslers wanted to buy it. I never heard that Simpson agreed to convey to Mrs. Housler till this day. I supposed Mrs. Housler lived on the pro-

perty. Mr. Housler never talked of her claim to me before I bought."

It was agreed that Merrick Housler died insolvent.

The plaintiff submitted these points:—

1. If the jury believe that the plaintiff, A. H. Boynton, received the conveyance of the land in dispute from W. A. Simpson, without any notice of the alleged agreement between Simpson and Elizabeth Housler, he is entitled to recover.

2. The fact that Elizabeth Housler and the children of Merrick Housler, deceased, continued in possession of the land in dispute after the death of Merrick Housler, and up to the time of the sale of the land by Simpson to Boynton, does not amount to constructive notice to Boynton of any equities, or equitable trust that Elizabeth Housler might have in the land.

3. Even if the jury believe, that W. A. Simpson did agree with Elizabeth Housler, before the sheriff's sale of the land in dispute to him, that in case she would not procure bidders for said land at the sheriff's sale, he would bid it in and convey the homestead to her, that such contract is without consideration, in fraud of creditors of the estate of Merrick Housler, and therefore void, and the plaintiff is entitled to recover.

4. Under all the evidence in the case the plaintiff is entitled to recover.

The court affirmed the first two points of the plaintiff, negatived the third, and affirmed the fourth, except as to the eighteen acres; saying, this "is to be disposed of by the jury under the general charge."

The defendants' point was:

"The possession of the defendant at the time when Boynton purchased of Simpson, was notice to Boynton of the extent of her right, and he finding her in possession, was bound to make inquiries of her under what right she claimed possession."

The point was negatived.

The court, in the charge, after giving a synopsis of the evidence, and referring to the alleged agreement between Mrs. Housler and Simpson, said: * * *

"The evidence to sustain the agreement is contained in her own testimony, and the testimony of Aden Housler. If the jury are satisfied that they have testified truly in relation to the agreement alleged to have been made by Elizabeth Housler with W. A. Simpson, and that Elizabeth Housler had in good faith carried out her part of the agreement, then we instruct you that under the ruling of the Supreme Court in the case of Beegle *v.* Wentz, 5 P. F. Smith 369, and Seichrist's Appeal, 16 Id. 237, Elizabeth Housler is in position to have that contract enforced as between herself and W. A. Simpson, and the present plaintiff stands in no better position, provided the evidence satisfies the jury that A. H.

[Boynton v. Housler.]

Boynton had notice prior to his purchase of the claim of Elizabeth Housler, or such notice as would put an ordinarily prudent man upon inquiry." * * *

The verdict was for the plaintiff "for the land described in the writ, with the exception of that part known as the 'Homestead,' containing 18 or 20 acres."

The plaintiff took out a writ of error; he assigned for error:

1. Admitting the evidence objected to.

2, 3. Not affirming the plaintiff's third and fourth points.

R. P. Allen (with whom was *J. B. Newton*), for plaintiff in error.—Agreements by bidders to prevent competition cannot be enforced: 1 Story's Eq. J., sect. 293; Slingluff *v.* Eckel, 12 Harris 472. No money having been paid by Mrs. Housler, the contract cannot be enforced: Barnet *v.* Dougherty, 8 Casey 371.

C. B. Curtis, for defendant in error, cited Beegle *v.* Wentz, 5 P. F. Smith 369; Seichrist's Appeal, 16 Id. 237.

The opinion of the court was delivered, May 17th 1873, by

MERCUR, J.—The plaintiff claims to recover this land under title acquired at a sheriff's sale, when it was sold as the property of the estate of Merrick Housler, deceased. The defendant, who is the widow of Housler, made defence to a portion of land called "The Homestead," containing about eighteen acres. Prior to, and at the time of, the sheriff's sale, the defendant and her minor children were in the actual possession of the whole property. She had entered into a contract to purchase it from Aden Housler, who held a deed for it subject to the payment of the judgments. While thus holding whatever interest passed to her under this contract, as well as her right of dower, she made the arrangement with Simpson, under which he purchased at sheriff's sale.

The evidence given by the defendants, which the jury found to be true, was substantially this, to wit: Prior to the sheriff's sale the defendant had agreed with Aden Housler to bid off the whole land, provided it was not run up higher than $1200 or $1250, which was the value of the property, and if he became the purchaser he was to deed "The Homestead" to her. Upon the day next preceding the sale Simpson, who was the plaintiff in the execution, was informed of this arrangement between Aden Housler and the defendant. He then said to them if they would not interfere or bid at the sale, and have it bid off as low as possible, that she should have the homestead; she should not get any bidders, and he would get some one to bid it off; that would be better than for her to bid it off. The defendant and Aden agreed to this proposition. Relying upon it they did not interfere nor bid at the

sale; nor did she get any other person to bid for her. Simpson bid it off for $110. The plaintiff bought of him with full knowledge of this arrangement.

Under these facts the court below held that a trust *ex maleficio* arose in favor of the defendant as to the homestead.

All the errors assigned are substantially to this conclusion.

Where a parol contract for the purchase of land has been carried on malâ fide, there is a resulting trust implied by law, and equity will decree a conveyance according to the terms of the contract: McCulloch *v.* Cowher, 5 W. & S. 427. Equity will not permit one to hold a benefit which he has derived through the fraud even of another, and much less will it do so if he has acquired it by means of his own fraud: Sheriff *v.* Neal, 6 Watts 540. In Morey *v.* Herrick, 6 Harris 128, Justice Bell said, "It is equally well settled that if one be induced to confide in the promise of another, that he will hold in trust, or that he will so purchase for one or both, and is thus led to do what otherwise he would have forborne, or to forbear what he contemplated to do, in the acquisition of an estate, whereby the promissor becomes the holder of the legal title; an attempted denial of the confidence is such a fraud as will operate to convert the purchaser into a trustee *ex maleficio.*" Where one holding an article of agreement for one hundred and sixteen acres of land, upon which he had paid five dollars only, and was liable to be turned off, surrendered his title under a parol contract that ten acres thereof should be conveyed to him so soon as the person for whose benefit he gave up his title acquired a deed for the legal title, it was held to create a trust *ex maleficio* in his favor as to the ten acres: Plumer & Crary *v.* Reed, 2 Wright 46. Nor does it make any difference that the title was acquired by Simpson through a judicial sale: Beegle *v.* Wentz, 5 P. F. Smith 369, and cases there cited. The case of Beegle *v.* Wentz was one in which a debtor was induced to relinquish his claim to the $300 exemption, and consented that the whole of his land be sold, under an agreement that the plaintiff was to take a sheriff's deed for the same and make to the debtor a deed for the part agreed upon. It was held that if the debtor was induced to surrender his right on the false assurance that the part should be left to him, the plaintiff refusing, was a trustee *ex maleficio.* This was since the Act of April 22d 1856, and was held to be such a trust or confidence as was not affected by that act. The same principle is affirmed in Seichrist's Appeal, 16 P. F. Smith 237.

It is contended, however, that inasmuch as the agreement between the defendant and Simpson was that she and her agent and friends should not bid at the sale, it was contrary to public policy, and therefore void. In support of this principle the case of Slingluff *v.* Eckel, 12 Harris 472, is cited. We assent to the

correctness of the law there declared, as applied to the facts in that case. That was an agreement between two persons, neither of whom had any possession of or interest in the land. The court there said: "What we do decree is, that one bidder cannot legally buy off another with money, or the promise of money."

The distinction in this case is, that the defendant had an interest in the land in reference to which the contract was made, and she was to retain a portion of that land. This is a distinction clearly taken and recognised in Beagle *v.* Wentz, and in Seichrist's Appeal, *supra*.

Judgment affirmed.

Frow, Jacobs & Co.'s Estate.

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131 503

1. Foresman sold out his interest in a firm to the remaining members, who covenanted jointly and severally to pay the debts, and indemnify him against them; the remaining members continued in the same business as a partnership, took all the first firm's assets and took upon themselves the debts, without any division of Foresman's interest. Foresman paid debts of the first firm, the second firm afterwards assigned for the benefit of creditors. *Held*, that Foresman was entitled to come in as a creditor.
2. The distribution of firm assets is governed by the equities of the partners not the rights of creditors.
3. In insolvency the firm assets go to discharge the firm creditors before the individual property of the members can be taken.
4. The other partner, having bought Foresman out and indemnified him, he became their surety, and having paid debts was subrogated to the rights of the creditors.
5. Cottrell's Appeal, 11 Harris 294; Kyner *v.* Kyner, 6 Watts 221; McCormick *v.* Irwin, 11 Casey 111; Snodgrass's Appeal, 1 Harris 471, followed.

March 28th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Appeal from the Court of Common Pleas of *Lycoming county*: Of January Term 1872, No. 288.

In the distribution of the estate of Frow, Jacobs & Co., under a voluntary assignment for the benefit of creditors.

On the 17th of December 1868, Thomas J. Frow, F. S. Jacobs, T. U. Parker and Seth T. Foresman, by articles of agreement of that date entered into partnership in "a general planing-mill business" in Williamsport, under the firm name of Frow, Foresman & Co.; the land on which the mill was erected to be owned by them in equal fourth parts as tenants in common; the capital to be furnished by the partners in equal proportions of one-fourth each, and the profits and losses to be shared in the same proportions; if either of the partners should at any time desire to sell his interest in the partnership, the remaining partners to have the first privilege of purchasing.

[Frow, Jacobs & Co.'s Estate.]

By articles of agreement of August 20th 1869, between Thomas J. Frow, F. S. Jacobs and Thomas U. Parker of the first part, and Seth T. Foresman of the second part, Foresman sold all his interest in the "planing-mill," and "all his interest in the partnership of Frow, Foresman & Co., in the manufacture and sale of lumber and general planing-mill business heretofore lately subsisting and this day dissolved; the interest of said Foresman in all debts due said firm being hereby transferred to the party of the first part, as well as anything else pertaining to or held by said Foresman, and the said Foresman hereby relinquishes all claim to participate in the same in any way. In consideration whereof said Frow, Jacobs and Parker, parties of the first part, hereby agree jointly and severally to pay to said Foresman the sum of $4126.96" (for which notes were to be given), * * * "the party of first part shall assign to said Foresman their policy of insurance on said planing-mill to an amount covering their liabilities to said Foresman, to be held by him as collateral security on the notes above-mentioned until the same are paid."

The party of the first part also relinquished "their right to and they do hereby transfer and assign to said Foresman the account of Frow, Foresman & Co., against Charles Lord of Pottsville, amounting to $1835.61, * * * to be held as additional collateral security on the notes of the party of the first part. Witness our hands and seals, &c.,

THOMAS J. FROW, [SEAL.]
F. S. JACOBS, [SEAL.]
THOMAS U. PARKER, [SEAL.]
S. T. FORESMAN, [SEAL.]"

Attached to this agreement was a "supplement," which H. T. McCormick, Esq., who drew the paper, testified, was an inadvertent omission of his and was "afterwards added at the same time." This supplement was :—

"It is further stipulated by the party of the first part and made a part of the above agreement, and of the consideration of the above transfer, that we do jointly and severally covenant and agree that the existing debts of Frow, Foresman & Co., shall be liquidated by the party of the first part, and that the said Seth T. Foresman shall be indemnified by us for any payment of same or any part thereof that may be enforced against him. Witness our hands and seals, &c.,

THOMAS J. FROW, [SEAL.]
F. S. JACOBS, [SEAL.]
THOMAS U. PARKER, [SEAL.]"

On the 20th of January 1870, by articles of agreement between F. S. Jacobs of the first part and Thomas J. Frow and Thomas U. Parker of second part, Jacobs agreed to sell and transfer to Frow and Parker his interest "being one-third" in the planing-

mill, "including the land appertenant and adjacent thereto, and belonging to and part of said mill property, * * * and all his interest in the personal property in and about said mill or elsewhere, belonging to the late firm of Frow, Jacobs & Co., and all his interest in the accounts, notes, &c., of that firm; the consideration was $4000 in money and their notes," said Frow and Parker agreeing to pay all the outstanding indebtedness of Frow, Foresman & Co., and Frow, Jacobs & Co., of which said firms said Jacobs was a member, and for ever keep clear and harmless the said Jacobs for any sums he may be compelled to pay for or on account of said indebtedness. The partnership of Frow, Jacobs & Co., being this day dissolved by force and virtue of the terms of this agreement," &c.

This agreement was signed by the parties *individually* with their seals.

On the same day an agreement was entered into between Thomas J. Frow and Thomas U. Parker of the first part and Seth T. Foresman of the second part, by which Frow and Parker agreed to sell to Foresman "the undivided one-fourth interest in the planing-mill, * * * and when the deed is made for said property, it shall be made to the parties hereto as tenants in common and not as copartners, the undivided three-fourths to be held by the party of the first part, and the remaining one-fourth by said Foresman." The sale to include not only the interest in the land but also an undivided one-fourth of the personal property of Frow, Jacobs & Co. In consideration Foresman agreed to deliver to the party of the first part all the unpaid notes in his possession, of which Frow and Parker and F. S. Jacobs are the makers, and which were given to him by them on the 20th of August then last past, for his interest in the mill then sold to them and by him now purchased; Foresman to pay Piper & Lyon $1676.75, one of two notes held by them against the late firm of Frow, Foresman & Co., which Frow and Parker had theretofore in writing bound themselves to pay; Foresman not to be liable for any indebtedness of the firms of either Frow, Jacobs & Co., or Frow, Foresman & Co., except as before excepted, and except further, a note of Tompkins, &c., for $480.65, which the firm of S. T. Foresman & Co. agree to pay, and against the payment of any such indebtedness, "Frow and Parker jointly and severally agree to indemnify the said Foresman." The parties further agreed to associate themselves as partners in the planing-mill business under the firm name of S. T. Foresman & Co., the parties to furnish capital in the proportion of three-fourths by Frow and Parker and one-fourth by Foresman, and the gains and losses to be shared in the same proportions.

The firm of S. T. Foresman & Co. continued in business until March 15th 1870, when T. J. Frow and T. U. Parker, two of the firm, and previously members of the firm of Frow, Jacobs & Co.,

made an assignment to H. C. McCormick, Esq., of all their property for the benefit of the creditors of Frow, Jacobs & Co.

On the 1st of May 1871, the account of the assignee was confirmed; it showed a balance of $9891.44 in his hands; it was referred to Herbert T. Ames, Esq., for distribution.

The principal question in the distribution was, whether Seth T. Foresman was entitled to a dividend of the assigned estate, under the articles of dissolution of August 20th 1869, of the firm of Frow, Foresman & Co., or whether the contract for indemnity in those articles bound Frow, Jacobs and Parker only as individuals.

Parker testified that at the time Frow, Jacobs & Co. bought the interest of Foresman, that firm assumed the liabilities of Frow, Foresman & Co. Frow, Jacobs & Co., received all the assets of Frow, Foresman & Co.; Frow, Jacobs & Co., paid nearly all the indebtedness of Frow, Foresman & Co., between the time Foresman sold his interest and the time he again purchased. Foresman was to assume some accounts, one was Piper & Lyon, which he paid; this account was against Frow, Foresman & Co.

There was other evidence of the payment by Frow, Jacobs & Co., of the liabilities of Frow, Foresman & Co., and also of payments by Foresman of liabilities of the latter firm.

H. W. Watson, Esq., testified that Piper & Lyon, after the dissolution of Frow, Foresman & Co., placed in his hands for collection two notes amounting to about $3300. After suit was brought, Piper & Lyon, Foresman and Frow came to his office; one of the notes was taken up by a note of Frow, Jacobs & Co., to the order of Foresman for about $1600, the other was disposed of by giving two notes "payable down country," amounting to $900, the balance by note of Frow and Parker, endorsed by Foresman; he paid the costs. Piper took one of the notes and Lyon the other. Witness advised Piper and Lyon that if they wished the notes to be endorsed by Foresman, they should be made payable to him; the notes were drawn in accordance with that advice; the consideration of these notes was the indebtedness of Frow, Foresman & Co. Piper & Lyon had taken notes of Frow, Jacobs & Co., and held the original notes of Frow, Foresman & Co. as collateral; and when the notes of Frow, Jacobs & Co. went to protest, the suit was brought on the original notes. "The notes of Frow and Parker endorsed by Foresman, cancelled the original notes of Frow, Foresman & Co., they were taken in payment."

Piper, of the firm of Piper & Lyon, testified, that through Mr. Watson they had sued out the two notes of Frow, Foresman & Co., and that Foresman paid one of them $1600.

Foresman testified that the notes to Piper & Lyon were given for the original indebtedness of Frow, Foresman & Co., he afterwards paid it to Piper. He was notified to pay it, "Mr. Piper called my attention to it and of course I had to pay it;" he was com-

pelled to pay a debt of Frow, Foresman & Co., to Young, Finley & Co. Foresman objected to endorsing the notes as long as he could, and finally endorsed them; at the time Foresman sold his interest to Frow, Jacobs & Parker, they purchased with a view to continue the partnership, to consist of Frow, Jacobs and Parker.

Mr. McCormick testified that at the time of the agreement of August 20th 1869, by which Foresman sold out his interest to his partners, the whole business was talked over by the partners; as consideration they agreed to repay him the amount of his investment in the concern at 10 per cent. interest: it was also agreed that Frow, Jacobs & Parker would form a new firm, take all the assets of Frow, Foresman & Co., and pay all their indebtedness; the new firm to be composed of Frow, Jacobs and Parker was not then formed; they did form a partnership afterward, and called it Frow, Jacobs & Co., and carried on the planing-mill business the same as the old firm.

There was evidence also, that the books of the firm of "Frow, Jacobs & Co." were opened the same day of the agreement, and the notes given to Foresman were appropriately entered on them.

The auditor found the facts substantially as stated in the foregoing testimony, he also found that $831.84, the balance of the $900 notes, was arranged by Frow & Parker giving their note payable to Foresman, endorsed by him; and afterward paid him; and that this note was part of the original indebtedness of Frow, Foresman & Co. to Piper & Lyon.

Foresman submitted to the auditor the following propositions:—

1. If the auditor finds as a fact, that the firm of Frow, Jacobs & Co. agreed, for a valuable consideration, to indemnify Foresman against the payment of the indebtedness of the firm of Frow, Foresman & Co., and if the firm of Frow, Jacobs & Co. received that consideration, and Foresman was afterwards compelled to pay any part of said indebtedness, Foresman is to that extent a creditor of the firm of Frow, Jacobs & Co., and entitled to participate in this distribution.

2. If the auditor finds as a fact, that Frow, Jacobs & Parker or either of them agreed, for a valuable consideration, to indemnify Foresman against the payment of the debts of Frow, Foresman & Co., and if the firm of Frow, Jacobs & Co. received said consideration, Foresman then becomes a creditor of Frow, Jacobs & Co. to the extent of whatever amount of said indebtedness he was compelled to pay.

3. If the auditor finds as a fact, that Foresman was compelled to pay, as endorser, a note of any individual member of the firm of Frow, Jacobs & Co., he is a creditor of said firm to that extent, if said note was given for an original indebtedness of Frow, Foresman & Co.

4. If the auditor finds as a fact, that the note of Frow, Jacobs

& Parker to Piper & Lyon, and Foresman, as endorser, was compelled to pay it, he is a creditor of the firm of Frow, Jacobs & Co., to that extent, whether it was originally a debt of Frow, Foresman & Co., or not.

The auditor reported his opinion as follows: * * *

"The primary question to be settled, is whether there was an assumption by the firm of Frow, Jacobs & Co., or was it an individual assumption by Frow, Jacobs and Parker. If it was the intention of the parties when they gave that bond of indemnity to bind the firm of Frow, Jacobs & Co., and if that firm was then in existence, then notwithstanding its form, they would be bound by it, and Seth T. Foresman would be entitled to claim as creditor of the firm of Frow, Jacobs & Co., and entitled to participate in this distribution. * * *

After discussing the evidence and the law at some length, the auditor says:

* * * "Believing Foresman to be an individual creditor, he has his remedy upon the separate funds of Frow, Jacobs and Parker, and a preference in that to which the partnership creditors are not entitled."

* * * "There is one other feature of this case which should receive some consideration, and that is the note given by Frow & Parker to Piper & Lyon. There is no question but that Foresman is liable on his endorsement, the note being payable to his order, and endorsed by him. But the learned counsel for the claimant insists that the original indebtedness being that of Frow, Foresman & Co., and the consideration being that indebtedness, that they have a right to participate in the distribution. But I cannot accede to this proposition, for the evidence is clear that Piper & Lyon took this note of Frow & Parker in payment of their indebtedness."

The auditor decided that Foresman was not entitled to participate in the distribution of the estate of Frow, Jacobs & Co., and accordingly reported a distribution excluding his claim.

Foresman filed exceptions to the report, that the auditor erred in thus excluding him.

The court sustained the exception, and referred the matter again to the same auditor, with instructions to allow the claim of Foresman.

The auditor made a second report, awarding a dividend to Foresman on his claims.

C. F. Ranstead, and other creditors of Frow, Jacobs & Co., filed exceptions to the report, viz.:

1. Allowing the claim of S. T. Foresman.

2. Allowing that part of his claim composed of the note of Frow & Parker, endorsed by him, and received by Piper & Lyon in payment of the indebtedness of Frow, Foresman & Co.

[Frow, Jacobs & Co.'s Estate.]

The court overruled the exceptions and confirmed the second report of the auditor.

The excepting creditors appealed to the Supreme Court, and assigned the confirmation of the auditor's report for error.

Maynard, Eutermarks & Parker; Armstrong & Linn and *H. C. Parsons*, for appellants.—The creditors of Frow, Foresman & Co. were not creditors of Frow, Jacobs & Co.: Ex parte Ruffin, 6 Ves. 119; Ex parte Fell, 10 Id. 347; Collyer on Partnership 807, 89; Story on Partnership, sec. 146; Baker's Appeal, 9 Harris 76; Parsons on Partnership 421.

J. J. Metzgar and *S. T. McCormick*, for appellees.—Taking a joint and several bond from members of a firm, does not discharge the liability of the firm: Wallace *v.* Fairman, 4 Watts 379; Bowers *v.* Still, 13 Wright 72; Schollenberger *v.* Seldonridge, Id. 83.

The opinion of the court was delivered, May 17th 1873, by

AGNEW, J.—Thomas J. Frow and Thos. U. Parker, who had been partners in the firm of Frow, Jacobs & Co., having made a voluntary assignment for the benefit of the creditors of Frow, Jacobs & Co.; the true question is, whether the debts claimed by Seth T. Foresman are debts of the firm of Frow, Jacobs & Co. If they are, they fall within the terms of the assignment, and must be paid out of the fund. If the answer to the question depended solely on the covenant of Frow, Jacobs & Parker, contained in the agreement of August 20th 1869, to indemnify S. T. Foresman, the conclusion of the learned auditor would have been correct, as that covenant created only a joint and several obligation. But Frow, Jacobs and Parker were already liable for these debts as partners in the firm of Foresman & Co., which they took upon themselves when Foresman retired from the firm, and they continued the business. The evidence is clear, that, when Foresman sold out his interest to his partners and retired, they proposed to continue the business, and did so. When he went out they took all the assets of the firm into the business and took upon themselves all the debts. There was no separation of Foresman's interest or share in either assets or debts. These assets became the capital of the new firm, and the debts, already partnership, as it regards them, became its debts. In short, it was but a dropping out of Foresman, leaving the others partners in all respects.

Clearly Frow, Jacobs and Parker did not intend, as among themselves, that the debts which they thus assumed, should change their character, and become claims against themselves as individuals, and not to follow the partnership assets. The effect of such

an intention would be to throw the burthen, in case of insolvency of one or more, upon them or him who remained, and to let the partnership assets go free. Such an intent is inferable from no facts in the case, and is disproved by their subsequent acts in paying off debts of Frow, Foresman & Co., out of the means of Frow, Jacobs & Co., by entries in their books, and by the express testimony of Parker, one of the last firms, and of H. C. McCormick, Esq. Parker swears that the firm of Frow, Jacobs & Co. assumed these debts, and McCormick states that at the time of writing the agreement between Foresman & Frow, Jacobs and Parker, "they talked over the indebtedness of Frow, Foresman & Co., and they agreed that they, Frow, Jacobs and Parker, would form a new firm, take all the assets of Frow, Foresman & Co., and pay all the indebtedness of the old firm." That these debts were assumed by the new firm is manifest from the nature of the business, the attending circumstances, the declared intention of the parties, their subsequent acts, and their interests.

It is the equity among the parties themselves which governs, in the distribution of partnership assets, and not the mere rights of creditors: Snodgrass's Appeal, 1 Harris 471. "This equity, (says Judge Bell), springing from their community of interests in the capital stock and assets of the partnership, is to have the avails of these applied in discharge of their mutual liabilities, before any individual of the number is permitted to apply joint property to his private use." And I may add, the same equity, in the case of the insolvency of the partnership, requires its effects to go in discharge of the firm debts, as far as they will reach, before the individual property of any one of the partners shall be taken to pay the excess.

The equity of these debts to participate in the fund being established, Foresman's right to receive the money follows. When the other partners bought him out and assumed payment of the debts in consideration of his interest in the firm property he stood in the attitude of a surety to his former partners, who undertook to indemnify him against payment. When he paid any of the debts he became entitled to be substituted in equity to the rights of the creditors: Kyner *v.* Kyner, 6 Watts 221; Cottrell's Appeal, 11 Harris 294. "The doctrine (says Judge Strong) does not depend upon privity, nor is it confined to cases of strict suretyship. It is a mode which equity adopts to compel the ultimate discharge of the debt by him, who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay. To effect this the latter is allowed to take the place of the creditor and make use of all the creditor's securities, as if they were his own: McCormick's Administrator *v.* Irwin, 11 Casey 111.

It is contended that, at all events, Foresman is not entitled to be paid the sum of $831.84, the residue of a note held by Piper

[Frow, Jacobs & Co.'s Estate.]

& Lyon against Frow, Jacobs & Co., on the ground that by a settlement between Frow & Parker, and Lyon, the holder of the note, the latter took a new note of Frow & Parker in payment, and cancelled the note by Frow, Jacobs & Co., and thenceforth that debt was gone. But this is not a full statement of the facts. The note of Frow, Jacobs & Co. was taken for a debt of Frow, Foresman & Co., one of the debts assumed by Frow, Jacobs & Co., and at the time of taking it Piper and Lyon retained the note of Frow, Foresman & Co., as collateral security for the payment of the debt; and they still retained it when Frow & Parker gave their note for the balance of $831.84. Therefore, when Foresman, who was compelled against his wish to endorse this note of Frow & Parker, for $831.84, because of his continued liability on the original note of Frow, Foresman & Co., to Piper & Lyon, paid the note as endorser, he became entitled to stand in the room of Piper and Lyon, and to a cession of their security, viz., the original note of Frow, Foresman & Co., and according to the principles already stated he became entitled to come in upon the fund in place of Piper and Lyon. We think the learned judge below was right in his conclusion, and the decree is affirmed with costs to be paid by the appellant.

Reading *et al. versus* Finney *et al.*

1. Unseated land is the debtor for taxes and may be sold no matter who may be the owner or in whose name assessed.
2. If the owner be not in default in the payment of taxes demanded of him his title cannot be divested.
3. Payment of the tax, whether by the owner or any one else, will avoid the sale.
4. Neither assessors nor a stranger can by the division of an entire tract without the knowledge of the owner affect his title.
5. The unseated land acts contemplate taxation by single tracts following the title of the owner.
6. Where an entire tract is divided and returned without the consent of the owner, and both parcels are taxed, it is a double assessment.
7. A mis-statement of the number of acres in a tract will not vitiate a sale of the whole.
8. A warrant was originally assessed as 990 acres, afterwards it was assessed in two parcels as 559 and 150 acres; it was sold to the commissioners as 559 acres. *Held*, that by this sale the commissioners acquired title to the whole warrant.
9. An intruder had the 150 acres marked off without the consent of the owner; it was assessed as such and sold for taxes. *Held*, that the purchaser acquired no title.
10. Biddle and Noble, 18 P. F. Smith 279, distinguished; Brown *v.* Hays, 16 Id. 235, followed.

March 28th 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

[Reading *v.* Finney.]

Error to the Court of Common Pleas of *Elk county*: Of January Term 1873, No. 22.

This was an action of ejectment, brought December 17th 1870, by John G. Reading and Charles Bartles against A. C. Finney and others, for a tract of land in Jay township, containing 154 acres more or less.

The tract is part of warrant No. 4896 to Wilhelm Willink, surveyed July 18th 1794, as 990 acres, in Clearfield county. The survey was interfered with by other warrants surveyed in 1785, known as the "Creek Surveys," so that warrant and survey No. 4896 could hold but 790 acres. The plaintiffs claimed the 154 acres under one Joel Woodworth, who they alleged had marked off from the east side of the 790 acres and occupied this tract which he estimated to contain 150 acres; it was sold for taxes in 1852, in Elk county, in which it then was; Elk county having been erected in 1844 and this part of Clearfield county included in it, the plaintiffs claimed under that sale.

Warrant No. 4896 had been assessed as 559 acres in Clearfield county, sold for taxes in 1832, bought by the commissioners of that county; in 1838 the commissioners sold it to Josiah W. Smith, by metes and bounds, describing the *whole* of warrant No. 4896, except that part covered by the "Creek Surveys." The defendants claimed the 150 acres as part of warrant No. 4896, and as included in the tax sale to the commissioners, and the sale of the commissioners to Mr. Smith.

The question was whether the 150 acres were so separated from the rest of the survey, as to exclude them from the operation of the tax sale of the warrant as 559 acres in 1832.

The case was tried August 6th 1872, before Vincent, J.

The plaintiffs gave in evidence the warrant and survey to Willink, of No. 4896; assessment in Clearfield county for 1826, No. 4896; 150 acres to Joel Woodworth and for 1829, same. They gave evidence that this 150 acre tract was sold for taxes for the years 1845 and 1846 in the name of Peter Clark, and treasurer's deed to Selah Morey, acknowledged September 25th 1847. Deed, November 22d 1847, Selah Morey to Erasmus Morey; assessment 1846, 1847, in the name of Peter Clark, 150 acres, No. 4896; taxes paid by Erasmus Morey. Assessment 1850, 1851, Erasmus Morey 150 acres, No. 4896, sold for taxes June 14th 1852, and treasurer's deed October 8th 1852, made to William P. Luce; assignment May 6th 1854, Luce to Charles W. Blake. Deed, December 29th 1854, Blake to John Gibson, all for the same 150 acres. Will of Gibson proved March 21st 1865, authorizing his executors to sell his land in Elk county. Deed, July 11th 1866, executors of Gibson to plaintiffs for same land.

The assessments given in evidence in Clearfield county of No. 4896, were as follows:—

[Reading v. Finney.]

1813.	No. 4896	990 acres	Owner unknown.	Val. $125.
1821.	"	"	Wilhelm Willink.	" 249.
1823.	"	"	" "	" 742.
1826.	"	159	Joel Woodworth.	" 119.
	"	559	Gilliam Demorest.	" 137.
1829.	"	150	Joel Woodworth.	" 54.
	"	559	Alexander Boyd.	" 205.
1832.	"	150	(No name.)	" 37.
1833.	"	150	Joel Woodworth.	" 37.
1838.	"	150	Peter Clark.	" 38.
1841.	"	559	Wilhelm Willink.	" 278.
1842.	"	150	Peter Clark.	" 150.
1843.	"	"	"	" 150.
	"	"	"	" 150.

Plaintiffs gave evidence further, by the deposition of Oliver Gardner that Woodward claimed to own the 150 acres about 1820; a man named Gellatt claimed to own afterwards and sold to Clark. Erasmus Morey's testimony was about the same; he testified also that he did not know from whom Woodworth bought.

Charles Webb testified that between 1823 and 1831, he met Woodworth, who said he was going to make an improvement in the north-east part of No. 4896; witness had not heard of his claiming the land before that time.

Plaintiffs gave evidence that Woodworth whilst he claimed to own the land said it had been surveyed off. They gave evidence also, of a survey counting from 1822, which contained 157 acres strict measure.

The defendants gave in evidence, assessment 1813 of No. 4896, in Clearfield county, "owner unknown" 990 acres. Deed, Alexander Boyd to Gilliam Demorest, of No. 4896, 1050 acres. Assessment in 1821, 1823 in the name of Willink, 990 acres, 1826, No. 4896, 559 acres; "Demorest," 1829, No. 4896, 559 acres, "Alexander Boyd." From treasurer's unseated land book from 1822 to 1832 inclusive: "1830 Alexander Boyd, No. 4896, 559 acres, Gilliam Demorest." Sold to county commissioners at sales of 1832, Gilliam Demorest, No. 4896, 559 acres and conveyed to them by treasurer's deed, acknowledged January 2d 1833.

Deed, commissioners of Clearfield county dated February 3d 1838, to Josiah W. Smith; the boundaries in the deed include all No. 4896, except the part cut off by the "Creek surveys"; the recital was, "being part of a larger tract of land which was surveyed 18th of July 1794, in pursuance of a warrant dated February 3d 1784, granted to William Willink and known by No. 4896, containing 990 acres, &c.

Assessment,	1838.	No. 4896	559 acres	Willink.
"	1841, 1842, 1843.	"	"	J. W. Smith.

Taxes paid by J. W. Smith March 19th 1844. No. 4896, 1841, 1842, 1843—"Willink." "Taxes paid by J. W. Smith, 559 acres."

Elk county, 1844, No. 4896, 559 acres "paid in full March 9th 1848, by J. W. Smith."

Smith conveyed to William Woodman, June 14th 1847, all the tract No. 4896 as described in the deed from the county commissioners to him. The title of Smith was admitted to be in the defendants.

The defendants gave in evidence also surveys of the whole of No. 4896, as claimed by them.

The plaintiffs, in rebuttal, gave evidence by O. Gardner, that he had lived near the property since 1828; the first owner of the 150 acres of whom he had knowledge was Potter Goff; he conveyed to Joel Woodworth; he to Richard Gellatt; he sold to Clark, and the land for several years was called Clark's land; witness did not recollect any survey of the 150 acres; had no personal knowledge of the boundaries; Woodworth exercised acts of ownership over the 150 acres and paid taxes on it.

The following are points of the parties with their answers:—

Plaintiffs': "5. If the jury believe that the hemlock, and line running south therefrom of 1822 (or 1823) were marked for the western boundary of the 150 acres, assessed successively to Woodworth, Clark and Morey, the plaintiffs are entitled to recover all the land east of said boundary."

Answer: "This is correct, if you believe that Woodworth had any title from the original warrantees, or that he could assert against them, and that Smith did not acquire by deed from the commissioners their title to the whole, as we have explained in our general charge."

"6. If the jury believe that Joel Woodworth's claim to 150 acres, was designated by marks on the ground severing it from the remainder of the warrant, leaving 559 acres and upwards remaining, and that the assessment of warrant 4896, in two parts, of 150 acres and 559 acres respectively, prior to 1852, as well as since, had reference to such a division, then defendants have no title to the land in controversy, and the plaintiffs must recover."

Answer: "It does not follow that plaintiffs can recover even if you find the facts as stated. It may be that defendants have no title to this 150 acres, but it does not follow that plaintiffs have; and in such a case, the defendants being in possession, have the best position, as we have explained in our general charge."

Defendants': "2. The deed from the commissioners to Josiah W. Smith gave to him and to those holding under him, such a title as entitled them to be treated by the assessors and commissioners, as owners of said lands within said boundaries, and entitled them, so far as respected taxation of said land, to all the rights of owners, and especially so as against the present plaintiffs, whose title originated by tax sale long after the Smith title had been acquired and put on record."

[Reading v. Finney.]

Answer: "This is correct, unless the plaintiffs have a title good as against original warrantee, as we have explained to you."

"4. The assessors and commissioners of Elk county, could not under the circumstances in evidence, lawfully make a separate assessment and sale of 150 acres out of the piece which was assessed as 559 acres, without the knowledge and consent of the owners of that piece, and such assessment and sale, if made, conferred no title."

Answer: "This is correct, but we leave to you as a fact who was the owner of the 150 acres as explained in our general charge."

In charging the jury the court said: * * *

"The whole title held by Smith to the land in dispute, by virtue of his deed from the commissioners of Clearfield county, is now vested in the present defendants, and it is a good primâ facie title against anybody, except, perhaps, the original warrantees, or their heirs or grantees. * * *

"The plaintiffs must recover on the strength of their own title, and not on the weakness of the defendants', and until they show such a title in Woodworth as could be asserted against the real owner of the land, they cannot recover."

The verdict was for the defendants.

On the removal of the record to the Supreme Court, the plaintiffs assigned for error the answers to the points and the foregoing portions of the charge.

J. G. Hall, for plaintiffs in error.—Sale of unseated land for taxes passes the title to the purchaser in whose name soever taxed: Strauch *v.* Shoemaker, 1 W. & S. 166. It was the duty of the owner to return the correct amount of his land, and he cannot complain that the part omitted is taxed separately and sold: Williston *v.* Colkett, 9 Barr 38. There was an actual separation of the 150 acres; it could therefore be taxed and sold by itself: Biddle *v.* Noble, 18 P. F. Smith 279.

J. H. Orvis and *J. Linn* (with whom was *J. B. McEnally*), for defendants in error.—Woodworth was an intruder and could not question the validity of the treasurer's or commissioners' sale: Troutman *v.* May, 9 Casey 455; Dikeman *v.* Parish, 6 Barr 210; Shearer *v.* Woodburn, 10 Id. 512. The severance must be by the owner of the tract: Brown *v.* Hays, 16 P. F. Smith 229.

The opinion of the court was delivered, May 17th 1873, by

SHARSWOOD, J.—It is certainly true, that under the Acts of the General Assembly, providing for the sales of unseated lands for taxes, the land is the debtor, and is subject to sale without

regard to the ownership; no matter in whose name it may be assessed: Strauch *v.* Shoemaker, 1 W. & S. 166. But it is also true that these acts, and the decisions of this court in the construction of them, have not neglected to look to the protection of the rights of the owner, so that if he is not in default in the payment of the taxes on the land demanded of him, his title cannot be divested. Hence, proof of the actual payment of the tax avoids the sale. Nay, if the tax be paid, though not by him, it will avail him; for if two men have surveys which interfere with each other, and he whose warrant and survey are junior, pays the tax on all the land included in his survey, and he who has the senior warrant and survey, does not, and the land surveyed to him is sold for taxes, such sale will pass no title to the interference on which the tax has been paid by the other: Hunter *v.* Cochran, 3 Barr 105. Hence, also, it is not in the power of the assessors—much less of a mere stranger or trespasser—by the division of an entire tract without his knowledge and consent, to jeopard his title. "The acts relating to the assessment of lands," says Mr. Justice Agnew, "are plain, and require the assessor to assess and return the lands in his township in single tracts, according to their ownership. He may follow the sale or division of the tract by the owner; but he has no power himself to cut up the property of a single owner and return it in parcels. The acts on the subject are collated by Huston, J., in Morton *v.* Harris, 9 Watts 326, showing conclusively that the entire process of assessment, from the beginning to the end, contemplates taxation and sale by single tracts, following the title of the owner:" Brown *v.* Hays, 16 P. F. Smith 235. Where an entire tract is divided and returned without the act or consent of the proprietor, and both parcels are charged with taxes, either by the number of the warrant or the name of the original warrantee or subsequent owner, it is a case of double assessment; for nothing is better settled than that a misstatement of the number of acres contained in a tract will not vitiate a sale of the whole. In Williston *v.* Colkett, 9 Barr 38, a tract was originally assessed in the name of the warrantee for nine hundred and ninety-nine acres. During subsequent years the amount was reduced as sales were made. It was finally assessed as two hundred acres, when in fact it contained six hundred. A treasurer's sale, made under such an assessment, was held to pass the title to the whole six hundred. Brown *v.* Hays, already cited, is a remarkable illustration of the same doctrine. There was an assessment of a tract of one thousand and twenty-six acres by the original number of the warrant, and the name of the warrantee in Polk township, Jefferson county. By the division of the township, a part of it was thrown into a new township, named Heath, and there separately assessed as three hundred acres. The taxes on the entire tract in Polk township, though assessed as only seven hun-

dred and twenty-six acres, were paid by the owner. It was held that the purchaser, at a tax sale of the three hundred acres assessed in Heath township, took no title. "The number of acres," says Mr. Justice Agnew, "is simply descriptive, and would not overturn the number of the tract, the name of the warrantee, and the duty of the assessor." It seems to follow logically from these premises, that the return and assessment of warrant No. 4896, in this case, without the knowledge and consent of the owner to such division, was wholly without warrant of law. The tract was assessed at first in the name of Wilhelm Willink, for nine hundred and ninety acres. From 1826, it appears on the book in two parcels; one of one hundred and fifty acres, in the name of Joel Woodworth, and the other of five hundred and fifty-nine, in the name of Gilliam Demorest. Demorest paid the taxes for 1826–7–8. In 1829 and 1830, it was assessed in the name of Alexander Boyd. In 1832 the treasurer sold it to the commissioners of the county for unpaid taxes of 1830 and 1831, and a deed was duly made to to them for the said tract as five hundred and fifty-nine acres. The entire tract, including both parcels, was omitted from the assessment list from 1832 until 1838, that is, during the period of time that the title was in the county. The cases cited, I think, show that the commissioners, by the treasurer's deed, acquired title to the whole tract No. 4896. They so considered, and when in 1838 they sold to Josiah W. Smith, they conveyed to him by metes and bounds the entire tract, as it was claimed by the owner. It was less, indeed, than the amount returned in the original survey, because there were older warrants and surveys, which cut off a part of it by interference. Hence, the deed to Josiah W. Smith, after describing the land by metes and bounds, recites it as "being part of a larger tract of land which was surveyed July 18th 1794, in pursuance of a warrant dated 3d February 1794, granted to Wilhelm Willink and others, and known by No. 4896, containing nine hundred and ninety acres." There is certainly nothing in this recital which limits the previous description of the land. Subsequent to 1838, Smith and his assigns paid the taxes on the whole tract as five hundred and fifty-nine acres, including the taxes of 1850 and 1851, for non-payment of which the parcel assessed as one hundred and fifty acres was sold to Luce, under whom the plaintiff below claimed. Upon this evidence, the instruction of the learned judge to the jury was right. "If you believe that Woodworth had the boundaries of his claim of one hundred and fifty acres actually marked on the ground, and returned to the assessor as his land, with the knowledge of the real owner, a sale of it for taxes would give the purchaser a good title. But an intruder, such as Woodworth appears to have been, cannot by such separate claim and assessment acquire a title against the real owner who does not assent to such division, and who pays taxes

on the whole tract." We think the plaintiff in error has no right to complain of the charge of the learned judge.

It has been strongly urged, however, that an actual line run on the ground by any claimant, with or without title, was sufficient authority to the assessor to return such survey as a separate tract. The assessor, it is said, has nothing to do with the title. He returns the tracts as he finds them on the ground. Perilous, indeed, would be the condition of the owner if such were the law. The assessor finds a line marked by trees in the wilderness, and is told that somebody claims that part of what he knows to be one entire tract, under an original survey. He returns it as a separate tract for taxation. The owner, ignorant of this transaction, pays all that he is charged with for the tract he holds. He assumes the number of acres described in his deed to be the true content of his survey. He sleeps in security, but wakes up to find that, perhaps, the most valuable part of his property has been swept from him, without his default. It is supposed that Biddle *v.* Noble, 18 P. F. Smith 279, supports the contention, that all that is required to sever a tract of unseated land for taxation, is a line actually marked on the ground. But this is a misapprehension of that case. The entire tract there was seated, in consequence of a settlement upon part. The owner sold to the settler, two hundred acres where the improvement was, so as not to interfere with the claim of any other settler. It was held that in the absence of a line on the ground, made with notice to the vendor, there was no severance, and that a sale of the remainder of the tract as unseated was void. Judgment affirmed.

Dundas's Appeal. Lippincott's Appeal.

73 474
19 SC 574

73 474
28 SC 146

73 474
215 61

1. The Orphans' Court alone has authority to ascertain the amount of a decedent's property and order its distribution.

2. The Orphans' Court in the distribution of an estate amongst legatees, next of kin and heirs has power to inquire into and determine all questions standing directly in the way of distribution.

3. The Orphans' Court has jurisdiction for the recovery of a legacy although not charged on land.

4. A residuary legatee before the amount of his share was ascertained, assigned it to the wife of an executor for a sum much less than was ascertained to be its value. He petitioned the Orphans' Court for a decree against the executors to pay him his legacy, setting out the assignment and alleging that it was obtained by fraud. *Held*, that the Orphans' Court had jurisdiction.

5. In the distribution of an estate in the Orphans' Court, each must be heard in support of his claim and in opposition to every claimant interfering with it; the power to decide all questions essential to distribution follows the power to distribute.

6. Kittera's Estate, 5 Harris 416; Whiteside *v.* Whiteside, 8 Harris 473, followed.

[Dundas's Estate.]

March 31st 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Appeals from the decree of the Orphans' Court of *Philadelphia:* No. 164, to July Term 1871, and No. 218, to January Term 1872. In the estate of James Dundas, deceased.

This proceeding commenced April 15th 1871, by the petition of William Oswald Dundas, a legatee under the will of James Dundas, the decedent.

The petition set out, that the decedent died about July 4th 1865, having made his will which was proved July 10th 1865, and letters testamentary granted to Joshua Lippincott, James Dundas Lippincott and Richard Smethurst, the executors named in it; that the petitioner was one of the residuary legatees under the will, and that his share would be about one thirty-second of said estate; the executors filed an inventory of the personal estate, amounting to $366,455.08, and an inventory for collateral inheritance tax purposes, of both real and personal estate, in which the real estate was appraised at $655,871.28, the whole amount of the valuation after allowing for debts, expenses, &c., amounted to $886,814.15, exclusive of an interest which the decedent had in the estate of Henry Pratt, deceased; that about the 6th of July 1866, the petitioner having then received about $5000 of his legacy, was informed by Joshua Lippincott, one of the executors, that it would be many years before he could receive any material benefit from the estate, by reason amongst other things of embarrassments in working the coal-mines belonging to the estate, &c., and that it would take a great while before any accurate valuation of the estate could be made; that the petitioner at the time was in very necessitous circumstances, and in great want of money, and influenced by these discouraging representations by the executor, he wrote to him on the subject of purchasing his (the petitioner's) interest in the residue of the decedent's estate; that the executor replied in writing to him that as executor he could not make the purchase, but that the owners of the other portion of the residue might purchase the interests of the petitioner and his sisters, who each had an interest equal to his own; the executor invited a further correspondence; the owners of the other portion of the residue were the wife of the executor and his son and daughter; the sisters of the petitioner declined to sell their interests; the executor wrote again to the petitioner saying, that he had the papers prepared for the conveyance of petitioner's interest to Mrs. Lippincott, and the petitioner's necessities continuing, he again opened negotiations with the same executor for the sale of his interest; that the executor represented to him that the executors had made an estimate of his share in the estate of the decedent; that it would be $13,842.57, and after deducting what had already been paid to him, would leave a balance

of $8870.30 still due him; that the executors represented that the valuation mentioned was a full, just and equitable valuation, but that Mrs. Lippincott, from regard to petitioner's wife, had agreed to make the sum $10,000; the petitioner relying wholly on the executors' representations, agreed to accept $10,000 for his interest, and on the 17th of November 1866, delivered a deed, assigning his interest to Mrs. Lippincott; he averred that he was entirely ignorant of the value of the estate and had no means of obtaining information except from the executors, and charged that the executors withheld the settlement of the estate for the purpose of inducing the petitioner and his sisters to sell their interests for less than their value; that the $10,000 paid to him was paid from the proper moneys of the estate of the decedent; that Smethurst, one of the executors, afterwards died, and the surviving executors afterwards filed an administration account on the 27th of April 1867; that before the auditor appointed by the Orphans' Court on that account, the petitioner gave notice that he designed to contest the validity of his conveyance to Mrs. Lippincott, and the representations as to the value of his interest were repeated both by the executors and Mrs. Lippincott; that the executors purchased the shares of the sisters of the petitioner for $20,000 each, in addition to $8203.02 previously paid each of them on account of their shares; that the auditor refused to entertain the petitioner's claim for the balance of his share in the estate; that he offered to pay Mrs. Lippincott "the principal, interest and expenses of the conveyance," if she would reconvey to him his interest in the decedent's estate; by his petition he continued the offer of repayment with any expense attendant upon the reconveyance.

The petitioner averred that the conveyance was void by reason of its having been made to the wife of an executor; because the consideration was greatly below the value of the interest sold, and because the petitioner had been induced to execute it "through misrepresentations, concealments and impositions practised upon him in regard to the value of his interest," and because the money paid him for the conveyance was the money of the estate of the decedent.

He further charged that the conveyance, if not void, could be treated only as an acknowledgment of the receipt of $10,000 on account of the petitioner's share of the decedent's estate, or as a security for the return of the money advanced to him.

The prayer of the petition was that the court would set aside the deed of assignment to Mrs. Lippincott and order it to be given up to be cancelled, and that she be decreed a trustee of the interest of the petitioner, and that she and her husband, the executor, be directed to reconvey the interest to the petitioner, he repaying her the sum of $10,000, expenses, &c., and that the executors pay to

the petitioner his full share of the estate, he allowing any sums which have been paid to him; and that the auditor be directed to suspend the settlement of the account until, &c.; and also a prayer for a citation to Mrs. Lippincott, Joshua Lippincott, her husband, and the surviving executors of James Dundas, deceased, to show cause, &c.

The respondents demurred to the petition on the ground that the court had no jurisdiction of the matters set out in the petition.

The Orphans' Court sustained the demurrer, Paxson, J., saying in the conclusion of his opinion:—

"While we do not think we have jurisdiction to entertain the present application, and to grant the relief prayed for, we are not entirely powerless in the premises. We can reach the substantial justice of this case by impounding the share of Mr. Dundas's estate in controversy, and directing the executors to hold it, properly invested, until the petitioner can be heard in a court of equity. Having our grasp upon the fund, we will hold it until the questions now raised can be decided in the appropriate tribunal.

"With this qualification we sustain the demurrer, and dismiss the petition."

The decree was as follows:—

"June 24th 1871. Demurrer sustained, executors however directed to hold the shares of the estate in controversy and keep the same properly invested until the further order of the court."

The petitioner and Mrs. Lippincott each appealed to the Supreme Court.

The petitioner assigned for error that the court sustained the demurrer and dismissed the petition.

Mrs. Lippincott assigned for error that the court directed the executors to hold the shares until the further order of the court.

A. M. Burton and *Black*, for petitioner.—The power of the Orphans' Court to distribute involves a power to decide all questions necessary to a proper distribution: Kittera's Estate, 5 Harris 416; 1 Story's Eq. Jur., sect. 547; Whiteside *v.* Whiteside, 8 Harris 473; Ashford *v.* Ewing, 1 Casey 214. A deed may be impeached and shown to be a nullity in any court where it is pleaded or set up, or in any proceeding where it is sought to be established as a ground of recovery: Jackson *v.* Summerville, 1 Harris 359; Bixler *v.* Kunkle, 17 S. & R. 298; Rankin *v.* Porter, 7 Watts 387; Dean *v.* Fuller, 4 Wright 474; Delamater's Estate, 1 Wharton 362; Mechling's Appeal, 2 Grant's Cases 157; Parshall's Appeal, 15 P. F. Smith, 224. The acknowledgment of a deed for the wife's land may be shown by evidence to have been obtained by fraud and duress of the wife, and thus avoided: Louden *v.* Blythe, 3 Casey 22; McCandless *v.* Engle, 1 P. F. Smith 313; Schrader *v.* Decker, 9 Barr 14. Within its orbit the

jurisdiction of the Orphans' Court is exclusive, and, therefore, as extensive as the demands of justice: Shollenberger's Appeal, 9 Harris 337; Witman & Geisinger's Appeal, 4 Casey 376. In giving general jurisdiction of a particular subject, the legislature impliedly gives every ancillary power necessary to the exercise of it: Barklay's Estate, 10 Barr 387; Loomis *v.* Loomis, 3 Casey 233; Shollenberger's Appeal, 9 Harris 337; Will's Appeal, 9 Barr 103; Hickman's Appeal, 7 Id. 464; Anshutz's Appeal, 10 Casey 375; Brinker *v.* Brinker, 7 Barr 53; Downer *v.* Downer, 9 Watts 62; Mohler's Appeal, 8 Barr 26; Sheaffer's Appeal, Id. 38; Wallace *v.* Keyser, 1 P. F. Smith 493; Hughes's Appeal, 7 Id. 181.

This is a trust under the Wills Act of 14th of June 1836, sect. 15, Pamph. L. 632, 2 Br. Purd. 1417, pl. 15; Saeger *v.* Wilson, 4 W. & S. 501; Lukens's Appeal, 7 W. & S. 48; Hunt *v.* Moore, 2 Barr 105; Miller's and Wilhelm's Appeal, 6 Casey 478, 491; Shuman's Appeal, 3 Casey 64; Heager's Ex'rs, 15 S. & R. 65; Barton *v.* Hassard, 3 Drury & Warren 461; Fox *v.* Mackreth, 2 Brown's C. C. 400; Devoue *v.* Fanning, 2 Johnson Ch. 252. The conveyance or assignment to the wife of one of the executors can have no greater effect than that of a release directly given to the executors, the validity of which is clearly within the jurisdiction of the Orphans' Court: Dundas's Appeal, 14 P. F. Smith 325. Where an estate is purchased in the name of one, but the purchase-money is actually at the time paid by another, a trust results in favor of him who paid the purchase-money: Beck *v.* Uhrich, 1 Harris 636. If there be any evidence to impeach the bona fides of an assignment under seal the assignee may be required to give full proof of consideration: Hancock's Appeal, 10 Casey 155. A release obtained by executors from the cestui que trust, by payment of about half the money due, is fraudulent and void: Bixler *v.* Kunkle, 17 S. & R. 298; Pearsoll *v.* Chapin, 8 Wright 9, 13–16. This is a case where the transfer is effected through an agent who was a trustee, and the fraudulent acts and declarations of the trustee in procuring the transfer are binding upon the transferee: Ex parte Bennett, 10 Vesey 381; Randall *v.* Errington, Id. 423; Hill on Trustees, pp. 158, 159, 537. A decree for a reconveyance may be obtained in the Orphans' Court: Lewis *v.* Lewis, 1 Harris 82. The Orphans' Court has the superintendence of the property of decedents in almost every respect and may make all persons accountable in that court into whose hands such property came: Wimmer's Appeal, 1 Whart. 104; Musselman *v.* Bell, 15 P. F. Smith 480.

S. S. Hollingsworth and *G. W. Biddle*, for Mrs. Lippincott.—As to the jurisdiction of the Orphans' Court, cited Act of 16th June 1836, § 19, Pamph. L. 792, 2 Br. Purd. 1104, pl. 8. While the Orphans' Court has the powers of a court of equity in the

orbit of its statutory jurisdiction, it has not general equity powers: Brinker *v.* Brinker, 2 Barr 53; Shollenberger's Appeal, 9 Harris 337; Willard's Appeal, 15 P. F. Smith 265.

The jurisdiction to distribute the assets and surplusage of the estates of decedents among creditors and others interested does not embrace the present case, because a distribution of the estate of the decedent is not asked for: Acts of April 13th 1810, sect. 1, Pamph. L. 319; 29th March 1832, sect. 19, Pamph. L. 194; 1 Br. Purd. 445, 446, pl. 198, 200; Boyer's Estate, 5 Watts 50; Kittera's Estate, 5 Harris 416; Ashford *v.* Ewing, 1 Casey 213; Dundas's Appeal, 14 P. F. Smith 332.

The Orphans' Court has no jurisdiction "where trustees may be possessed of or are in any way accountable for any real or personal estate of a decedent," except in cases where the trust is created and exists under and by virtue of a will, or appointment by the Register or Orphans' Court: Wimmer's Appeal, 1 Wharton 103; Act of 14th June 1836, sect. 15, Pamph. L. 632, 2 Br. Purd. 1417, pl. 15; Wheatly *v.* Badger, 7 Barr 459; Brown's Appeal, 2 Jones 333; Fretz's Appeal, 4 W. & S. 433.

The alleged trust in the present case does not arise under or by virtue of a will, or by appointment of the Register or Orphans' Court, but if there be one it is by implication of law: Hill on Trustees, pp. 144, 158, 159, and note 2; Id. 536, 537; Chesterfield *v.* Janssen, 2 Ves. Sen. 125.

The alleged trust in a manner affects the estate of the decedent: Hill on Trustees 536 and notes, 537; Beeson *v.* Beeson, 9 Barr 279; Coles *v.* Trecothick, 9 Vesey 247; Delamater's Estate, 1 Wharton 362; Armor *v.* Cochrane, 16 P. F. Smith 310; Fox *v.* Mackreth, 1 L. C. in Eq. 107.

If the sale be treated as a sale from one distributee to another, then the Orphans' Court has no jurisdiction: Wickersham's Appeal, 14 P. F. Smith 67.

The opinion of the court in each appeal was delivered, May 17th 1873, by AGNEW, J.

DUNDAS'S APPEAL.

The decision of the Orphans' Court in this case was against its own jurisdiction, and in this there was error. It was said by Black, C. J., in Whiteside *v.* Whiteside, 8 Harris 473, "if there be 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." The exclusiveness of this jurisdiction is sustained by numerous modern decisions, to a few of which I may refer: Shollenberger's Appeal, 9 Harris 341; Ashford *v.* Ewing, 1 Casey 213; Black's Executor *v.* Black's Executor, 10 Casey 354; Musselman's Appeal, 15 P. F. Smith 480. The contest

between the courts and the legislature spoken of by Lewis, C. J., in Bull's Appeal, 12 Harris 286, as to the extent of this jurisdiction, was settled by the Act of 13th of April 1840, Brightly's Purdon 300, pl. 167. That act authorized the Orphans' Court to appoint auditors on the application of the creditors, as well as of executors and administrators, and on the application of legatees, heirs or other persons interested, to make distribution of the estate in the hands of executors and administrators, to and among the persons entitled to the same. In Kittera's Estate, 5 Harris 416, it was said this embraced creditors, next of kin, and legatees. "The right of each (says Judge Lewis) to be heard in support of his claim, and in opposition to every claimant who interferes with it, is necessarily involved in the right to demand payment." Further on he says: "The power to decide all questions necessary to a proper distribution of the fund follows the power of distribution and vests in the Orphans' Court as a necessary incident to the jurisdiction. That court is as competent as the Common Pleas, to determine all questions of *law*, as the judges of both courts are the same, and the Orphans' Court has ample authority to send an issue to the Common Pleas for the trial of facts by the jury:" Sect. 45, Act 29th March, 1832, Bright. Purdon, p. 768, pl. 55. This language is repeated with emphasis in Bull's Appeal, *supra*, and in Black's Executor *v.* Black's Executor, *supra*. Thompson, J., repeats the remark of Woodward, J., in Shollenberger's Appeal, *supra*, that the jurisdiction of the Orphans' Court, "within its appointed orbit, is exclusive, and therefore necessarily as co-extensive as the demands of justice." It is very clear, therefore, that the Orphans' Court, in a proceeding to distribute an estate among legatees, next of kin and heirs, has ample power to inquire into and determine all questions standing directly in the way of a distribution to these parties.

The specific remedy given to a legatee to recover his legacy comes in here to strengthen the general jurisdiction and puts an end to all question. It is said, in a very excellent treatise on the Intestate System of Pennsylvania, by E. G. Scott, Esq., p. 450, that the Orphans' Court has no jurisdiction for the recovery of a legacy, unless the same is charged upon or is payable out of real estate. But the learned author probably meant no *exclusive* jurisdiction. The 47th section of the Act of 24th February 1834, relating to executors and administrators, provides, that "executors, after one year has elapsed from the granting of administration of the estate, upon the requisition of any legatee, or any other person interested, shall pay and deliver *under the direction of the Orphans' Court* having jurisdiction of their accounts, all such legacies as are due and payable by them, &c., &c., and if there shall be a residue, distributable under the intestate laws of this Commonwealth, they shall also distribute the same, and the proceedings, in any such case, shall in all respects, whether of

[Dundas's Estate.]

security or otherwise, be the same as hereinbefore provided in the cases of distribution by administrators of the estates of decedents intestate, so far as the nature of the case will admit:" Vide sections 39, 40, 41, Act of 24th February 1834, Purdon by Brightly 302, pl. 176, 177, 178. This act is followed by the Act of 16th of June 1836, relating to the jurisdictions and powers of the courts, which, in the 7th clause of the 19th section, confers upon the Orphans' Court express jurisdiction, in "Proceedings for the recovery of legacies;" Brightly's Purd. p. 765. The jurisdiction being thus beyond doubt, the manner of proceeding is equally clear, and is specifically set forth in the 37th section of the Act of 29th of March 1832, Bright. Purd. 766, pl. 17, 18, *et seq.* This is by the petition of any *person interested*, whether such interest be immediate or remote, setting forth facts, necessary to give the *court jurisdiction*, the specific cause of complaint, and the relief desired, and supported by oath or affirmation. The acts cited were reported by the commissioners to revise the laws, and are to be viewed together, as constituting an harmonious system for the settlement of estates of decedents, and the government of the Orphans' Court.

Thus it is very clear, that every legatee has a personal remedy in the Orphans' Court, for the recovery of his own legacy, and the Act of 29th of March 1832, also furnishes ample means of reaping the fruit of a recovery by execution, attachment and sequestration. Upon this petition, if necessary, the Orphans' Court would be bound to appoint one or more auditors under the Act of 13th April 1840, *supra*, to make distribution, or if a proceeding is already in progress, a decree upon the incoming petition of the legatee would await the report. Each legatee or distributee is entitled to proceed for the recovery of his own legacy or share. It is true, that legatees have an additional remedy by action of debt, detinue, account render, or on the case, against executors having sufficient assets to pay the debts and legacies: Act of 24th February 1834, § 50. But the common-law form of action is inconvenient and carries the remedy into a court having no jurisdiction to settle the executor's account, and hence the act provides, that on a plea of a want of assets the action must be suspended until an account is settled in the Orphans' Court, and the amount of the legacy, or its *pro rata*, ascertained: Sect. 53, Purd. by Brightly 3103, pl. 188.

It remains now to inquire, whether this petition conforms to the 57th section of the Act of 29th March 1832, by setting forth facts necessary to give the Orphans' Court jurisdiction. It plainly does. It sets forth the will of the late James Dundas, duly proved and registered, the bequest to the children of William H. Dundas, in equal shares, their number, and that the petitioner is one of them, and his proportional share, the issuing of letters testamen-

tary to the executors, the filing of an inventory and settlement of two accounts showing large assets, to a share of which the petitioner is entitled, and prays that the surviving executors shall pay over to the petitioner the full amount of his share and interest in the estate, as soon as the same shall be ascertained, after allowing for, and deducting all sums of money that the petitioner has received. These facts give jurisdiction to the Orphans' Court, to compel distribution by the executors, and payment of the petitioner's share to him. Had the petition set forth nothing more the consequence would have been plain. The executors, to protect themselves, would have set forth the assignment in their answer, and cited the assignee to defend *pro interesse suo*. This would have brought from the petitioner a replication of fraud and deceit, in procuring the assignment. The paper thus standing in the way of distribution, there being two claimants to the same legacy or share of it, the jurisdiction of the Orphans' Court necessarily attaches, in order to remove the barrier to the payment of the legacy. The language of Judge Lewis, in Kittera's Estate, directly applies, that each one must be heard in support of his claim, and in opposition to every claimant who interferes with it, and that the power to decide all questions essential to distribution follows the power to distribute.

The Orphans' Court having power to determine whether the petitioner or his alleged assignee is entitled to payment of the legacy, it is evident the court is not deprived of its jurisdiction, by the setting forth of the alleged fraudulent assignment in the first instance, followed by appropriate prayers to have it set aside, and for a citation to the assignee.

Indeed, the proceeding in this form, is better adapted to decide the controversy at once preliminary to final distribution. The parties are all brought in at once, and the decree will finally dispose of the whole controversy, leaving the executors free from doubt as to the person to receive payment. Nor are we wanting in authority as to the power of a court in a distribution proceeding to determine the title of contesting claimants to the same fund as an incident of the distribution. In Souder's Appeal, 7 P. F. Smith 498, it was held, that the auditor making distribution of money arising from a sheriff's sale, had power to determine the ownership of a judgment between contesting claimants, and that the defeated claimant under the Act of 1836, relative to executions, was entitled to demand an issue: See the cases cited therein. The petition in this case is unnecessarily prolix, and sets forth matters of evidence merely. But substantial facts are set forth, sufficient to give the court jurisdiction to determine the ownership of the legacy and decree payment to the plaintiff, if he be entitled to receive it.

The decree of the Orphans' Court sustaining the demurrer is therefore reversed, the demurrer overruled, and a *procedendo*

[Dundas's Estate.]

awarded, and the defendants are ordered to pay the costs of this appeal, the costs below to abide the event of the proceeding.

LIPPINCOTT'S APPEAL.

The decision in Dundas's Appeal, just rendered, makes it unnecessary to discuss this case. The petition of William O. Dundas, being reinstated and a *procedendo* awarded, the retention of the shares of the estate in controversy in the power of the Orphans' Court, until the further order of the court, is necessary, to answer the claim of the successful party, when the litigation is ended. So much of the decree of the court is therefore affirmed, with costs to be paid by the appellant.

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31 SC 653

Seventh National Bank *versus* Cook.

1. A check was drawn to Cook, Barnes endorsed Cook's name without his authority and received the money; the bank deducted the check from the drawer's account and settled with him on that basis. *Held*, that Cook could recover the amount of the check from the bank.
2. The conduct of the bank was an acceptance and bound it as a certified check would.

April 1st 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Error to the District Court of *Philadelphia:* No. 166½, to July Term 1871.

This was an action of assumpsit brought March 16th 1871, by David Cook against the Seventh National Bank; the suit was brought on the following check which the bank refused to pay the plaintiff under the circumstances detailed in the evidence:—

"Philadelphia, August 12th 1869.

SEVENTH NATIONAL BANK.

Pay to the order of D. Cook, one hundred and seventy-four $\frac{50}{100}$ dollars.

$174\frac{50}{100}$ JAMES GREENWOOD.

(Endorsed) D. COOKE.
J. C. BARNES."

The case was tried April 13th 1871, before Stroud, J.

James Greenwood, the drawer of the check, testified that he had bought oil from plaintiff through his agent J. C. Barnes; he gave the check in suit to Barnes for a bill of oil; witness received his check back again when his account at the bank was balanced; the bank had paid the check. Witness generally gave checks for oil to Barnes; witness always had sufficient funds in the bank to meet the check.

[Seventh National Bank *v.* Cook.]

The deposition of the plaintiff was read. He testified that he had got the check from Greenwood after it had been cancelled at the bank and returned to Greenwood; he presented it twice at the bank and demanded payment, which was refused; the cashier of the bank knew at the same time that his name as endorser was not written by himself; plaintiff did not know of the check until about a week after it had been given, when he called on Greenwood for payment for the oil sold; the check was not endorsed by plaintiff or by his authority. He gave other evidence that the endorsement was not his signature.

For the defendant Barnes testified, that he had been employed by plaintiff to sell oil; that he also kept the plaintiff's books; sometimes when plaintiff was out of town witness received checks and endorsed them for him; plaintiff had told witness to do it; witness received the check from Greenwood, put the endorsements on it, drew the money, credited it on plaintiff's books to Greenwood and charged himself with it on the book; next day he told the plaintiff that he had done so and demanded a settlement; the plaintiff owed him more money than that; plaintiff had told witness to collect this sum from Greenwood, and if it was paid by a check to endorse it.

There were a number of points submitted by the defendant, which the opinion of the Supreme Court makes it unnecessary to note.

The court charged: * * *

"The only question is whether Barnes had authority to endorse the check for Cook, the plaintiff, and upon that I leave the case with you.

"The check is drawn payable to the order of David Cook, but that is the same as if it were payable to David Cook; the plaintiff is the only one who can maintain an action upon it.

"The defendant says the check was paid under the endorsement upon it. If the plaintiff had authorized Barnes to endorse it for him, that would be a good defence, and the only appropriate one. * * * If the jury find from the evidence that J. C. Barnes had either a general authority to endorse the checks which he received in the course of his collections for the plaintiff; or, that the plaintiff afterwards assented to the endorsement of the check now sued on, he is not entitled to recover in this suit."

The verdict was for the plaintiff for $174.50.

The defendant took a writ of error and amongst other things assigned the charge for error.

W. S. Price, for plaintiff in error, cited Bank of Republic *v.* Millard, 10 Wallace 152.

There was no argument or paper-book for defendant in error.

[Seventh National Bank *v.* Cook.]

The opinion of the court was delivered, May 17th 1873, by READ, C. J.—James Greenwood was indebted to David Cook for oil sold, and in payment gave a check on the defendants, The Seventh National Bank, for $174.50, to J. C. Barnes, a clerk of the plaintiff, payable to the order of D. Cook. Mr. Barnes endorsed it with the name of D. Cook, and his own name, drew the money, and appropriated it to pay an amount due him by his employer, and made the proper entries on the books of D. Cook. The plaintiff refused to recognise the acts of his clerk, and obtained the cancelled check from Greenwood, presented it to the bank, was refused payment, and then commenced this suit. The court charged the jury that "the only question is, whether Barnes had authority to endorse the check for Cook, and upon that I leave the case with you," and the jury found a verdict for the plaintiff Cook, for the amount of the check. Upon the argument the counsel for the bank cited but one case, Bank of Republic *v.* Millard, 10 Wallace 152, and contended the holder of the check could not recover against the bank. It was in evidence that the bank had paid the check when presented by Barnes, and that upon settlement of Greenwood's bank-book, the check was returned with other checks, cancelled, and of course charged against the depositor. This brings it within the exception stated by the Supreme Court of the United States towards the close of their opinion in 10 Wallace: "*It may be* if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable, as the bank, having assented to the order, and communicated its assent to the paymaster (the drawer), would be considered as holding the money thus appropriated for the plaintiff's use, and, therefore, under an implied promise to him to pay it on demand."

On the merits, therefore, the case was for the plaintiff.

It is, in fact, an acceptance, and binds the bank as a certified check does. "It is tantamount to an acceptance of the draft."

There is nothing in the other assignments of error.

Judgment affirmed.

Riesz's Appeal.

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1. Specific performance of an agreement to sell real estate will not be decreed against a vendor, a married man, whose wife refuses to join in the conveyance, unless the vendee is willing to pay the full purchase-money and accept the deed without the wife; if not, he must resort to his action at law for damages.

2. No abatement which can be made in the price on the ground of the wife's right of dower, will be just to both parties without making a new contract for them.

3. Bitner *v.* Brough, 1 Jones 127, referred to as to damages.

[Riesz's Appeal.]

April 1st 1873. Before READ, C. J., AGNEW, SHARSWOOD and MERCUR, JJ. WILLIAMS, J., at Nisi Prius.

Appeal from the decree of the Court of Common Pleas of *Philadelphia:* In Equity, of July Term 1871, No. 218.

On the 2d of June 1869, Samuel Saller filed a bill against John Riesz and Margaret Riesz, his wife.

The bill set out:—

1, 2. On the 29th of May 1867, Riesz, with the consent and concurrence of his wife, the other defendant, entered into an agreement with the plaintiff to sell him a messuage and lot of ground on Girard street, Philadelphia, for $2125, subject to a ground-rent of $112.50, to be paid when the title should be examined and the deed prepared, and on the same day the plaintiff paid Riesz $50 as part of the purchase-money.

3, 4. On the same day Riesz and wife delivered to the plaintiff possession of the premises, and the plaintiff then executed to Riesz a lease of the same for three years from May 29th 1867, and Riesz accepted it and entered into possession of the premises and still held the possession under the lease.

5, 6. As soon as the title was examined and the deed prepared, the plaintiff tendered it to the defendant in accordance with the agreement, and also tendered him $2075, the balance of the purchase-money, but the defendants positively refused to receive the purchase-money and execute the deed; plaintiff has ever since been willing to pay the balance of the purchase-money and receive the deed; he still tendered the purchase-money and was willing to pay it into court.

One of the prayers of the bill was that the defendants be directed to execute and deliver to plaintiffs a deed of the premises in accordance with the agreement, upon payment of the purchase-money, &c.

The answer admitted that Riesz consented to sell the premises as set out in the agreement; that his wife never concurred in the sale, but on hearing that it had been made, expressed her determination not to become a party; that Riesz at the time of the agreement was temporarily of unsound mind, as soon as he got well he tendered the plaintiff the $50, and offered to pay all expenses incurred by the plaintiff, but the plaintiff refused the offer. They denied having delivered possession of the premises to the plaintiff; they admitted that they refused to execute the deed and receive the purchase-money.

The matter was referred to Thomas K. Finletter, Esq., as examiner and master.

As master he reported the material facts substantially as set out in the bill and answer; that the defendants peremptorily refused to accept the purchase-money and execute and deliver a deed for the premises to the plaintiff; there was no evidence that the wife was consulted about the contract of sale, but with knowledge of it had

not expressed opposition to it. The price agreed on was not alleged to be unfair or inadequate.

The report of the master as to the facts, having, after exceptions, been confirmed by the court, the matter was referred to Joseph A. Clay, Esq., as master, with instructions to report what amount of the purchase-money should be retained by the plaintiff on mortgage as compensation for any claim that the wife might make against the premises for dower as widow.

He reported: * * *

"The position of the plaintiff is analogous to that of a vendee claiming specific performance in equity, but willing to accept a part performance, from the inability of the vendor to perform the contract in full. In such a case the vendee has a right to demand a performance *pro tanto* with a compensation for the deficiency by an abatement of the purchase-money: Ervin *v.* Myers, 10 Wright 96; notes to Seaton *v.* Slade, 3 Wh. & Tud. Lead. Cas. in Eq. *460, 461, 489; Story Eq. sect. 779, &c. The only difference between cases of this description and that now before the master is, that here, the defect in title, though actual, and rendering it unmarketable, is nevertheless contingent, and such as cannot result in actual loss to the vendee, unless the wife of the vendor shall survive him. The deduction from the purchase-money must therefore be contingent, and also the sum retained must be received in such a manner as may insure its payment to the vendor, if he shall survive his wife, or its absolute retention by the vendee, if the wife shall become entitled to her dower and shall recover it. A mortgage of the premises themselves with proper conditions will fulfil these requirements, and it only remains to fix the amount.

"The claim of Mrs. Riesz, if it ever accrues, will be for one-third of the property for her life. Such a claim is very far from being equal in value to the fee of one-third. On the other hand, the plaintiff, if he takes title, will be unable to sell or dispose of the property in any way, except at a sacrifice; while, if the premises appreciate in value in the future, the amount of the claim for dower may be greatly increased.

"Upon consideration of these contingencies, the master reports that the plaintiff, on receiving from the defendant, John Riesz, alone, a conveyance in fee of the premises described in the bill, shall pay to the defendant sixty per cent. of the purchase-money stipulated in the agreement of sale, first deducting the par of the ground-rent of $112.50, and shall execute a bond and mortgage of the premises to the defendant for the remaining forty per cent., conditioned for the payment of the principal to the said John Riesz, upon and immediately after the death of his wife Margaretta, if he shall survive her: otherwise, and if the said Margaretta shall survive her said husband, and shall claim, and receive or recover her dower in the premises, then the said bond shall be cancelled and the mortgage satisfied of record, and the

sum secured thereby shall belong to the plaintiff, and shall no longer be demandable of him. If the said Margaretta shall survive her husband and release or relinquish her claim of dower, then the said principal sum shall be paid to the legal representatives of the said John Riesz. The interest in the meanwhile is to be paid to the said John Riesz during his lifetime, or until he shall become entitled to the principal by the death of his wife in the said lifetime; but if the said Margaretta shall survive him, then all payment of interest shall cease at his death." * * *

After exceptions, the court (Allison, P. J.) confirmed this report and decreed:

1. That the defendant, John Riesz, alone, do, within thirty days from the date of this decree, execute and deliver a deed of the premises mentioned in the agreement set forth in the pleadings, dated the 29th day of May, A. D. 1867, to the plaintiff, his heirs and assigns, in fee simple.

2. That the plaintiff upon receiving from said defendant alone such conveyance in fee of said premises, do pay to said defendant sixty per cent. of the purchase-money stipulated in said agreemens, first deducting, &c., * * * and execute a bond and mortgage of said premises to said defendant for the remaining forty per cent., conditioned for the payment of the principal to said defendant upon and immediately after the death of his wife Margaretta, if he shall survive her; and if the said Margaretta shall survive said defendant, and shall recover her dower in said premises, then said bond to be cancelled and said mortgage satisfied of record, &c.; * * * the interest to be paid to said defendant during his lifetime, or until he shall become entitled to the principal by the death of his wife in his said lifetime. * * *

6. That the bill as to defendant, Margaretta Riesz, be dismissed without costs and without prejudice to her as to any claim she may hereafter have against said premises for dower or thirds, as the widow of defendant, John Riesz.

The defendant, John Riesz, appealed to the Supreme Court, and assigned the decree for error.

H. S. Hagert and *G. W. Dedrick*, for the appellants.—Chancery will not aid in any shape to enforce a contract to which the wife's assent is necessary, but will turn the plaintiff to an action at law for damages: Morton *v.* Mitchell, 2 Jac. & W. 425; Emery *v.* Wase, 8 Vesey 515; Frederick *v.* Coxwell, 3 Y. & J. 514; In the matter of Jane Hunter, Edwards's Ch. Rep. 6; Clark *v.* Seirer, 7 Watts 107; Riddlesberger *v.* Mintzer, 7 Watts 142; Shurtz *v.* Thomas, 8 Barr 363; Bitner *v.* Brough, 1 Jones 128; Hanna *v.* Phillips, 1 Grant 253; Weller *v.* Weyland, 2 Id. 104. The court will not enforce specific performance by the husband, with compensation to the vendee, for the wife's interest: Clark *v.* Seirer, *supra*. For a contingent liability with another, the proper com-

pensation is not abatement but indemnity: Milligan *v.* Cooke, 16 Vesey 12; 2 Story's Eq. Jur., sect. 779; Calverley *v.* Williams, 1 Vesey 210; Calcraft *v.* Roebuck, Id. 221; Thomas *v.* Dering, 1 Keene 746; Halsey *v.* Grant, 13 Ves. 78. Equity gives no compensation for a defect which was obvious to the senses, or one of which the vendee was in fact apprised: Clark *v.* Seirer, *supra;* Mortlock *v.* Buller, 10 Vesey 316; Waters *v.* Travis, 9 Johns. 450; Howell *v.* George, 1 Madd. Ch. 1; Fordyce *v.* Ford, 4 Bro. C. C. 494; Burnell *v.* Brown, 1 Jac. & W. 168; Dyer *v.* Hargrave, 10 Vesey 506; James *v.* Litchfield, 9 Eq. C. 51; Vigers *v.* Pike, 8 C. & F. 65; Castle *v.* Wilkinson, Law Rep. 5 Ch. App. 534; Harnet *v.* Yielding, 2 Sch. & Lef. 553.

Specific performance with compensation cannot be decreed when the amount of compensation cannot be satisfactorily ascertained and adjusted: Thomas *v.* Deering, 1 Keene 747; Thompson *v.* Morrow, 5 S. & R. 289.

The decree that vendor shall make a title on the payment of but 60 per cent. of the purchase-money, and to take security for the balance, is to vary the contract: Halsey *v.* Grant, 13 Vesey 73; Horniblow *v.* Shirley, Id. 81; Clowes *v.* Higginson, 1 V. & B. 526; Phila. & R. R. Co. *v.* Lehigh Coal & Nav. Co., 12 Casey 204.

To decree specific performance with *indemnity* would be to inquire, not whether a good title could be made, but how to provide against a bad one: Denne *v.* Cooper, 1 Vesey Jr. 567, note; *unless with consent of both parties:* Aylett *v.* Ashton, 1 Mylne & Craige 114; Ridgway *v.* Gray, 1 Mac. & G. 109; Balmanno *v.* Lumley, 1 V. & B. 224; Paton *v.* Bretner, 1 Bligh 66.

T. E. McElroy and *E. C. Quinn*, for appellee.—If Saller has a right to a decree for specific performance in the absence of a wife, he has the right to it, notwithstanding her existence, if he chooses to waive her signature to the deed, and this he has done: Corson *v.* Mulvany, 13 Wright 88; Riddlesberger *v.* Mintzer, 7 Watts 143; Shurtz *v.* Thomas, 8 Barr 359; Findlay *v.* Keim, 12 P. F. Smith 112. In analogy to this rule, that although equity will not compel a husband to procure the wife's signature, yet it will compel him to execute a deed alone, if the vendee chooses to accept it: Fisher *v.* Worrall, 5 W. & S. 478; Fry on Specific Performance, §§ 286, 289. Saller has a right to a decree for a deed from appellant alone, coupled with an indemnity against the wife's dower: Fry on Specific Performance, §§ 289–306. When the inability of the defendant to fulfil the contract is set up as a bar to the relief sought by complainant, the latter is entitled to have the contract fulfilled as far as practicable, and to obtain compensation or indemnity on those points which do not admit of fulfilment: 2 Story Eq. Juris., sects. 779 and n. 1, 796; Seton *v.* Slade, 3 L. Cas. in Eq. 71–2, 89 note; Fry on Specific Performance,

sect. 299; Adams's Equity 89; Mortlock *v.* Buller, 10 Vesey 315; Mestaer *v.* Gillespie, 11 Vesey 661; Paton *v.* Rogers, 1 Vesey & Beames 351; Todd *v.* Gee, 17 Vesey 273; Hill *v.* Buckley, Id. 394, 401; Wood *v.* Griffith, 1 Swans. *43, *55; Welthorpe *v.* Holgate, 1 Collyer's Ch. Reports 203; Milligan *v.* Cooke, 16 Vesey 1; Erwin *v.* Myers, 10 Wright 96; Napier *v.* Darlington, 20 P. F. Smith 64; 2 Story Eq. Juris., sects. 794, 799; Graham *v.* Oliver, 3 Beav. 124; Fry on Specific Performance, sect. 810; Parsons on Contracts 414 and note (c); Wollam *v.* Hearn, 2 L. Cas. in Eq. 700; Seton *v.* Slade, 3 Id. 89; Wilson *v.* Williams, 3 Jur. N. S. 810; Springle *v.* Shields, 17 Alabama 295; Clark *v.* Reins, 12 Grattan (Va.) 98; Young *v.* Paul, 2 Stockton's (N. J.) Ch. Rep. 401.

The opinion of the court was delivered, May 17th 1873, by

SHARSWOOD, J.—It is not proposed to enter upon an examination and review of the cases which have been decided in England and our sister states upon the question presented upon this appeal. Great industry and ability have been exhibited by the learned counsel on both sides, in their printed and oral arguments, and it is but just to say that no suggestion or authority appears to have escaped them. But we consider the point as definitely settled in this state in the opinion of Chief Justice Gibson, in Clarke *v.* Seirer, 7 Watts 107, recognised and affirmed as it has been in many subsequent cases: Riddlesberger *v.* Mintzer, 7 Watts 143; Shurtz *v.* Thomas, 8 Barr 363; Bitner *v.* Brough, 1 Jones 138; Hanna *v.* Phillips, 1 Grant 256; Weller *v.* Weyand, 2 Id. 102. These cases settle, if any amount of authority can settle anything, that in Pennsylvania, specific performance of an agreement to sell real estate will not be decreed against a vendor who is a married man, and whose wife refuses to join in the conveyance so as to bar her dower, unless, indeed, the vendee is willing to pay the full purchase-money, and accept the deed of the vendor without his wife joining. The policy of these decisions is very manifest. The wife is not to be wrought upon by her love for her husband, and sympathy in his situation, to do that which her judgment disapproves as contrary to her interest; nor is he to be tempted to use undue means to procure her consent. The vendor must be left in such cases to his action at law to recover damages. The principles upon which damages are recovered, and the measure of them, under different circumstances in such an action, are well explained in Bitner *v.* Brough, 1 Jones 127.

The same sound policy which forbids a decree for the execution of a deed by the husband—to be enforced by his imprisonment if he cannot obey—prevents any decree looking to compensation, abatement or indemnity. The case does not fall within the principle of those decisions, where the vendor who cannot make title to all he has contracted to convey, is held to be not thereby relieved

from specific performance as far as in his power; but shall be compelled to execute his contract with a reasonable abatement in the price. The right of dower of the widow is of such a contingent nature, depending as it does as well upon her surviving her husband, as on her continuance in life after his death, that no abatement in the price can be made which will be just to both parties, without in effect making a new contract for them; a contract which, perhaps in the first instance, neither party would have come into, certainly not the vendor. Receipt of the purchase-money in full may have been the main object of the sale to enable him to pay debts or carry out other plans. If he is to be subjected to serious pecuniary loss by his wife's refusal to join, it will operate almost as powerfully as the peril of his imprisonment, as a moral coercion and compulsion upon her to yield her consent, instead of that free will and accord which the law jealously requires her to declare by an acknowledgment upon an examination before a magistrate, separate and apart from her husband. The learned master, Mr. Clay, to whom it was referred to report what amount of the purchase-money should be retained by the vendee upon mortgage, as a compensation for him for any claim the wife might thereafter make against the premises for dower, reported that in his opinion not less than forty per cent. of the price should be left in his hands for that purpose; a result no doubt just as to him, but how as to the vendor, who was personally in no default? No stronger argument could be adduced to show the impolicy of making any decree. Specific performance is a matter of grace, and these are considerations which address themselves powerfully to the conscience of the chancellor.

Decree reversed. And now it is ordered and decreed that the bill be dismissed without prejudice; the costs in the court below and in this court to be paid by the complainant.

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1. The Act of May 15th 1857, for the sale of the public works, required that "*immediately*" after the purchaser should take possession, he should "thereafter keep up in good repair and operating condition the line of said railroad and canal," &c., the same to "be and remain for ever a public highway and kept open and in repair by the purchaser, * * * for all parties desiring to use and enjoy the same." By Act of May 3d 1864, it was declared that by the Act of 1857, the Commonwealth required the purchasers of the main line to keep the canals "in a condition of repair, &c., which shall be equal to the condition of repair, &c., in which the same were at the time the Commonwealth delivered the same into the purchasers' possession." *Held*, that under these acts the purchasers were bound to keep the canals in good repair and operating condition, although they may not have been in such repair when delivered to them.

2. The duty was immediate on taking possession as respects its obligation

but not as to the time of its performance; the purchasers were entitled to a reasonable time commensurate with the magnitude of the works to make repairs.

3. If the purchasers did not commence the repair in a reasonable time and pursue it with diligence, they were liable for negligence to the owner of canal-boats for such injury as he thereby sustained.

4. The purchasers were not responsible for unavoidable accidents by sudden storms or floods, if the canals were repaired as soon as reasonably practicable.

5. The rule as to the measure of damage stated in this case.

January 20th 1873. Before READ, C. J., AGNEW, WILLIAMS and MERCUR, JJ. SHARSWOOD, J., at Nisi Prius.

Certificate from Nisi Prius.

This was an action on the case, commenced August 9th 1866, by Adolphus Patterson against the Pennsylvania Railroad Company. The action was against the company as owners of the canal between Hollidaysburg and Columbia, formerly a part of the "Main Line" of the Public Works of the Commonwealth.

The declaration averred that the plaintiff "was the owner of certain boats which he had employed for many years during canal navigation upon the canals from Columbia to the junction at Duncan's Island, and from thence to Hollidaysburg. That the canals were purchased by the defendants under an Act of Assembly entitled an 'Act for the sale of the main line of the public works,' approved May 16th 1857. That by the provisions of that act it became their duty, as purchasers, to keep the canals in good order and repair and operating condition, and to provide that the same should remain a public highway and be kept open and in repair for the use of parties desiring to enjoy the same. That the defendants, not regarding their duty, did not keep the canals in proper repair; in consequence of which, in the spring of 1860 and subsequently, between that period and the close of the boating season of 1865, three boats belonging to the plaintiff, viz., the 'Effort,' 'Regulator,' and 'Neptune' were necessarily detained; were obliged to carry smaller loads than their capacity, and were often damaged by various accidents, to which, on account of the bad condition of the canals, they were subjected."

By the Act of May 16th 1857, for the sale of the public works (Pamph. L. 519), it was provided in the fifth section, "That immediately after the said purchaser * * * shall take possession of the same, the said purchaser shall be bound ever thereafter to keep up in good repair and operating condition the line of said railroad and canal, extending from Hollidaysburg to Philadelphia * * * with the necessary toll-houses, water-stations, locks, buildings and other appertenances; and the said railroad and canal shall be and remain for ever a public highway * * * it being the true intent and meaning of this act, that the said sections of canal and railroad, and every part thereof, except as is herein provided," * * * "shall be and remain a public highway, and kept open and in re-

pair by the purchaser * * * for the use and enjoyment of all parties desiring to use and enjoy the same."

By the Act of May 3d 1864, it was enacted: "That it is the true intent and meaning of the fifth section of the act, entitled 'An Act for the sale of the main line of the public works,' approved May 16th 1857, and the Commonwealth by said section does require the purchasers of the main line to keep the canals referred to in said section in a condition of repair and fitness for use which shall at all times during seasons of navigation be equal to and not inferior to the condition of repair and fitness for use in which the same were, at the time the Commonwealth delivered the same into the purchasers' possession."

The case was tried at Nisi Prius, January 10th 1872, before Mr. Justice Williams.

The facts in the case sufficiently appear in the charge of Judge Williams, the principal question being the construction of the Act of 1864, in connection with the Act of 1857.

Judge Williams charged the jury:

"This is an action brought by the plaintiff to recover damages alleged to have been occasioned by the negligence of The Pennsylvania Railroad Company in not keeping in good repair and operating condition, the Juniata division of the canal extending from Hollidaysburg to the junction at Duncan's Island, near Harrisburg, from the year 1860 to the year 1865, inclusive.

"The plaintiff alleges that he was engaged in transporting freight on this portion of the canal, from the opening of navigation in the spring of 1860, to the close of navigation in the fall of 1865; a portion of the time (the first year or two), with three boats, namely: the Effort, the Regulator and the Neptune; and a part of the time (the last two or three years), with two of the boats, the Effort and Regulator. And that he sustained damages to a large amount each year, from detentions at different points, loss of freight from inability to carry more than half a load on some portions of the canal, and injury to the boats occasioned by the want of repair and bad condition of the canal; for all which items of damage he claims that the company is responsible, in consequence of its neglect to keep the canal in good order and proper repair.

"The Pennsylvania Railroad Company became the purchaser of the main line of the public works, of which the portion of the canal in question is part, under the Act of 15th of May 1857. By the fifth section of that act, it was provided that 'immediately,'" &c., * * * (as above stated).

"The language of this section is plain and intelligible, and it would seem that there could be no doubt as to its meaning. It declares in express terms that 'the said railroad and canal shall be and remain for ever a public highway, for the use and enjoyment of all parties desiring to use and enjoy the same,' and that 'the

said purchaser shall be bound ever thereafter to keep up in good repair and operating condition, the line of said railroad and canal.' Can there be any doubt as to the meaning of this language? Is it not plain to the comprehension and understanding of men of ordinary capacity and intelligence? Was it not intended to make it the duty of the purchaser to keep the railroad and canal open as a highway, in good repair and operating condition, for the use and enjoyment of all parties whatsoever 'desiring to use and enjoy the same?' Can there be the least shadow of doubt as to the meaning of the legislature in declaring that said railroad and canal shall be and remain for ever 'a public highway,' and that the same shall be kept up in good repair and operating condition, for the use and enjoyment of all parties desiring to use and enjoy the same? Does it need an Act of Assembly to teach us what these words mean, and what the legislature intended by their use? One would hardly think so; and yet, for some reason or other, the legislature of 1864 seems to have thought that there might have been some doubt as to their true intent and meaning; and in order to remove the doubt, to make their true intent and meaning plain, they passed an act entitled, 'An Act relating to certain canals,' approved May 3d 1864." The judge here quoted the act.

"Now, what is the meaning of this explanatory act, this 'Act relating to certain canals?' Does it mean to declare that it was not 'the true intent and meaning of the fifth section of the Act of 1857,' that the purchaser shall be bound to keep up in good repair and operating condition, the line of said railroad and canal, for the use and enjoyment of all parties desiring to use and enjoy the same, or that it should not be and remain a public highway, as provided in the original act? It does not in terms so declare. Does it mean, as contended, that the purchaser is only bound to keep the canal in the same condition as the company received it at the time of its sale and transfer by the state? If at that time the canal was, in point of fact, in the condition in which it has been described by the defendant's counsel, that is to say, 'in a bad, dilapidated condition—dilapidated to the last degree,' does it mean that the purchaser was only bound to keep it in that condition? [If the canal was wholly out of repair in some portions, and totally unfit for navigation, did the legislature of 1864 intend to declare that the whole duty of the purchaser, under the Act of 1857, would be performed and discharged by keeping the canal in the same dilapidated and ruinous condition, and that their whole and only duty was to prevent it from falling into further ruin and decay? Whatever may have been the purpose and intent of the framer of this explanatory act, I cannot think that it was the intent of the legislature in passing it, or that this is its meaning.] We cannot impute to the legislature any such absurdity as to suppose that they intended that if any portion of the canal was out of repair and unfit for use at the time of its sale and transfer to

the company, the purchaser, although expressly required to keep it open as a highway for the use of all persons desiring to use it, might allow it to remain in that unfit and ruined condition for ever. What then is the meaning of this explanatory act? Was it intended to lower the standard of duty imposed by the original act, or was it intended to define the duty with more precision and with greater certainty, without lowering the standard? [It seems to me that if the legislature had intended to lower the standard, and to relieve the company from the duty imposed on it by the original act, they would have said so in plain and express terms, leaving no room for doubt as to their meaning. It would have been easy for the legislature, if they had so intended, to declare that the purchaser shall not be bound to keep the canal or any part of it in a better condition than it was at the time of its sale and transfer by the state. But the legislature did not so declare.] Nor did they declare that the purchaser shall not be bound to keep the canal in good repair and operating condition. If, then, the legislature did not intend to relieve the company from the duty imposed by the original act, of keeping the canal in good repair and operating condition, they must have intended to define more specifically the duties imposed by that act. Whether they have succeeded in making the meaning of the provision more plain and palpable to our understanding and apprehension, or whether they "have darkened counsel by words without knowledge,' may perhaps admit of doubt; but as we have seen, the legislature of 1864 does say that the Commonwealth (by the fifth section of the Act of May 16th 1857), 'does require the purchasers of the main line to keep the canals referred to in said section in a condition of repair and fitness for use which shall, at all times during seasons of navigation, be equal to, and not inferior to, the condition of repair and fitness for use in which the same were at the time the Commonwealth delivered the same into the purchasers' possession.' This is a declaratory act, and taking it in connection with the original, the meaning of the whole would seem to be that it shall be the duty of the purchaser to keep up the canal in good repair and operating condition: that 'the condition of repair and fitness for use,' shall, 'at all times during seasons of navigation, be equal to, and not inferior to, the condition of repair and fitness for use in which the same was at the time the Commonwealth delivered it into the purchasers' possession.' But 'the said canal shall be and remain a public highway, and be kept open and in repair by the purchaser, for the use and enjoyment of all parties desiring to use and enjoy the same.'

"It was then the duty of the company to keep the canal in good repair and operating condition; and if any portion of it was out of repair and unfit for use, at the time of its transfer by the state, it was the duty of the company to put it in a proper condition of

repair, so as to render it navigable and fit for use. And this duty attached to the company and became binding on it as soon as it received possession of the canal. The duty was immediate as it respects the obligation, though it was not as it respects the time of its performance. If the mechanical structures of the canal, the dams, locks and gates were in the state of decay and ruin described by some of the witnesses, and if the pools and levels were obstructed with mud, gravel and debris, brought down by the flood, it is manifest that the canal could not be put in good repair immediately and at once. A work of such magnitude and difficulty, would require time for its completion; but it was the duty of the company to begin the work as soon as it was reasonably practicable, and prosecute it with diligence and vigor until it was finished. It was their right and duty to employ skilful and competent engineers to examine the canal, in order to ascertain its condition, and, if found to be out of repair and unfit for use, to report the nature and character of the repairs necessary in order to render the canal navigable and fit for use. The company would then be entitled to a reasonable time in which to make the necessary repairs, and it would be their right and duty so to perform the work as to cause as little interruption to the navigation as possible, consistent with reasonable and proper diligence in the prosecution of the work. If, then, the company commenced making the repairs as soon as it was reasonably practicable, if it prosecuted the work with diligence, and completed it within a reasonable time considering its magnitude, the difficulty of procuring the necessary workmen and materials, and the exigencies of the navigation, then the company was not guilty of negligence, but performed the whole duty imposed upon it by the law, and is not responsible for the loss sustained by the plaintiff in consequence of the bad condition of the canal. The gist of the plaintiff's action is the alleged negligence of the company in not keeping the canal in good repair and operating condition; and if the company was guilty of no negligence, it is not to be visited with the plaintiff's losses, though occasioned by the want of repair and bad condition of the canal. Nor is the company responsible for the consequences of unavoidable accidents to the canal, caused by sudden storms and floods (unless they might have been prevented by the exercise of reasonable skill and diligence in keeping the works in proper repair), if they were repaired as soon as it was reasonably practicable. But if the company did not commence the work of repair within a reasonable and proper time, considering all the circumstances of the case, or if they did not prosecute it with reasonable and proper skill and diligence, and if the plaintiff sustained loss and damage by reason of the defendant's default and negligence in this respect, then he is entitled to recover such damages as he may have sustained.

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"These instructions embrace the main points presented by the counsel on both sides in this case, and *all* the points will now be read and specifically answered.

"The plaintiff's 1st and 2d points are:

"'That it was the duty of the Pennsylvania Railroad to keep up the canal purchased from the Commonwealth in good repair and operating condition for the use and enjoyment of all parties desiring to use and enjoy the same.

"'That if the jury believe that the company failed to perform said duty, the plaintiff is entitled to recover compensation for such damages as he has actually sustained by reason of such default.'

"We have already instructed the jury substantially as requested in these points, and they are affirmed.

"The defendants' 1st point is as follows:—

"'That the defendants, as the purchasers of the canal between Hollidaysburg and Columbia, were not bound immediately to bring into good operating condition the dilapidated and decayed canal, which had been transferred to them by the Commonwealth under and by virtue of the Act approved May 16th 1857.'

"This point is affirmed. The court have already so instructed the jury in the general charge; which the jury will bear in mind.

"'2d and 3d points: That the defendants were only bound to keep up the canal in as good repair and operating condition as it was at the time it was received by them from the Commonwealth.'

"'That the Act of Assembly "relating to certain canals," approved May 3d 1864, is an act declaratory of the duties of the parties to the contract at the time it was entered into by the defendants; and the standard of their duties is fixed by the state of the repair and fitness for use in which the canal was at the time the Commonwealth delivered possession of the same to the defendants.'

"I have refused so to charge the jury in the general charge: And those points are both declined.

"'The 4th point: That the defendants are not liable for any interruption to navigation in consequence of injuries done by the floods of November 1861, or of March 1865, or of any freshets or accidents causing breaks to the canal or to any of the mechanical works or structures thereof.'

"This point is affirmed, with the qualifications stated in the charge, namely, that these injuries could not have been prevented by the use of proper skill and diligence on the part of the company, and that the breaches were repaired in a reasonable and proper time.

"'5th. That if the jury believe that the defendants consulted their engineers, and, acting under their advice, made such repairs

to the canal and works as in their judgment were from time to time necessary to keep the same in good repair and operating condition, the defendants are not liable for any injury which the plaintiff may have sustained.'

"This point is affirmed, if the jury find that the work was done with reasonable care, diligence and skill, and within a reasonable time: which you will determine from all the evidence in the case.

"'6th. That the obligation imposed upon the defendants by the Act of 1857, did not require them to alter, enlarge, deepen or otherwise improve the canal.'

"This point is affirmed. The act only required the purchaser to keep up the canal as originally constructed, in good repair and operating condition.

"'7th. That the defendants are not liable for any interruption to navigation caused either by drought or other unavoidable cause.'

"This point is affirmed unless the consequences of the drought could have been prevented by the exercise of proper care and skill on the part of the company.

"'8th. That the defendants are not liable to compensate the plaintiff for any additional tonnage which his boats, under any circumstances, might have carried; but only for such tonnage as the evidence shows was offered to him, and which was refused by him in consequence of the neglect of the defendants to keep a sufficient supply of water in the canal.'

"That point I affirm.

"'9th. That the defendants are not liable for the suspension of navigation if and whenever it became necessary for making repairs either to the canal or to any of the mechanical structures thereon.'

"This point is also affirmed.

"It will be the duty of the jury to apply the law, as laid down by the court in the charge and in answer to the points submitted by the counsel on both sides, to the facts of the case as you shall find them from all the evidence. If you find that the company commenced the work of repairing the canal as soon as it was reasonably practicable, considering all the circumstances of the case, and that it prosecuted the work with proper diligence and skill, and was guilty of no default or negligence in this behalf, then it will be your duty to find for the defendant, without reference to the loss sustained by the plaintiff, in consequence of the bad and unnavigable condition of the canal. But if the jury find that the company was guilty of negligence in not making the proper repairs, and that it improperly and wrongfully suffered the canal to be out of repair for an unreasonable time and for a longer period than necessary, and if the plaintiff suffered loss and damage in consequence thereof, then he is entitled to recover such damages

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as will compensate him for his loss and make him whole. And this would include interest on his losses from the time they were sustained.

"Upon the question of damages, the court has been requested to charge the jury as in plaintiff's third point:

"'On the measure of damages, if the plaintiff is entitled to recover, the learned judge is requested to charge; 1st. In cases of detention, the loss suffered by the expense of hands, horses, provisions consumed, and loss of the use of the boats during the period of detention, would properly be allowed. 2d. In case of damage to the boats and tackle caused by defective locks, shallow water or other defect, producing unusual wear and tear, the damages thus sustained would be properly allowed. 3d. In cases of injuries caused by difficult and delayed navigation owing to the negligence of defendant, the loss of ability to carry freight, if offered, and extra lengths of voyages, would be the subject of just compensation. 4th. If by such detentions a trip which could, in a proper state of repair, be made in a certain time should be prolonged for some days, the expense of the boats, horses, hands and provisions for this extra time would be properly allowed.

"'5th. If, in consequence of this difficulty of navigation, caused by defendant's negligence, a boat was compelled to forego a full load, it had offered to it, or certainly could have had, and to take so much less, the net amount of the freight thus lost would be a proper allowance.

"'6th. If, for the same reason, the plaintiff was compelled to take two boats, to carry a load which otherwise he would have carried in one boat, the expense of the extra boat, horses, hands and provisions, would be properly allowed.

"'7th. If, for the same reason, the plaintiff was compelled to hire extra teams of horses, and hands on his boats, to enable them to make their trips, he is entitled to his actual expenses and losses, and all other losses which he has proved were the legal, natural and immediate consequences of the neglect of the defendant.

"'8th. The plaintiff is entitled to interest from the date of each loss which he has sustained, up to this date.'"

"That point is affirmed. The jury will take all the matters suggested here into consideration, if they find that the plaintiff is entitled to recover. The jury will find their verdict on the evidence in the case, giving to the testimony of each witness its proper weight and value, and also the proper weight or value to the other evidence in the cause.

"It is the duty of the jury to find their verdict on the evidence, and on the evidence alone, in conformity with the principles of law applicable thereto, as laid down by the court, without fear, favor or affection."

"These are all the instructions that the court have to give you

on this case. It will be your duty to apply them to the evidence and to the facts as you shall find them. And I do not deem it necessary to recapitulate the evidence. This trial has lasted so long, and been so thorough, you have had so long a time to reflect upon the evidence, that it undoubtedly has made its proper impression upon your minds.

"You know the complaint here. You will first ascertain what was the condition of the canal when it passed into the possession of this company. Was it or was it not out of repair? Was it in a dilapidated condition? If it was, it was the duty of the company to repair it. But if it was greatly out of repair along the whole length of its line, it was not a work which could be performed in a day or in a week or in a month, and the company had a right to a reasonable time within which to have it first inspected along its whole line by competent engineers, in order to form an estimate of what was necessary to be done; and before they did anything, it was very proper for them to send engineers along the line to examine the state of the canal, and to report its condition, and see exactly what was necessary to be done in order to put it into proper order. Now, did the company do that? And after the engineers had had sufficient time to ascertain that, to a reasonable time within which to begin the work. Did they commence within a reasonable time afterwards to do the work, considering the difficulty of procuring materials, of procuring workmen, and the state of the season, and all that. Did they commence within a reasonable time to do this work? And did they prosecute it with reasonable diligence and skill? If they did, then they did all that the law required of them.

"It is for you to determine that fact under all the evidence. If you find that the company did prosecute this work with reasonable diligence and skill, why then they did their duty; and, although the plaintiff may have suffered in consequence of losses by reason of the bad state of the canal, it is not a loss which the law will visit on the defendant. He must bear it himself; because, as I have already instructed you, the gist of this action is the defendants' negligence, the company's negligence. And if they were not negligent, then the plaintiff has no right to recover against them. But if you find, looking at the whole of the evidence, that the company did not commence this work as soon as they ought to have done, considering all the circumstances of the case, and that they did not prosecute it with vigor, and that the plaintiff sustained losses in consequence of it, then you will assess those losses according to the evidence as given before you. It is your duty to weigh this case and deliberate well, and to find such a verdict as you think the evidence will justify."

The verdict was for the plaintiff for $16,976.19.

The defendants had the case certified to the court in banc, and assigned for error:—

[Pennsylvania Railroad Co. *v.* Patterson.]

1, 2. The refusal of the judge at Nisi Prius to affirm defendants' 2d and 3d points, and in charging as in the portions of the charge in brackets.

3. The qualification to the answer to defendants' 7th point.

C. Biddle and *T. Cuyler*, for plaintiffs in error.—The Act of 1864 is to be taken in its natural construction, Dwarris on Stat. 703, which is that the canals, &c., were to be kept in a condition equal to that in which the defendants found them when they purchased them: Notley *v.* Buck, 8 B. & C. 164; Horton *v.* Mobile School Comm'rs., 43 Ala. 598. The intent is to be discovered from the language used: Woodbury *v.* Berry, 18 Ohio R. 456; Bennett *v.* Boggs, 1 Baldwin 74. They cited also, Philadelphia *v.* Gray's Ferry Railway, 2 P. F. Smith 177; Dequindre *v.* Williams, 31 Ind. 444. Even if retroactive the Act of 1864 does not violate a contract; it is therefore not unconstitutional: Gault's Appeal, 9 Casey 94; Schenley *v.* Commonwealth, 12 Id. 29; Kenyon *v.* Stewart, 8 Wright 191. The contract created by the Act of 1857 was between the Commonwealth and the Railroad Company exclusively: Mott *v.* Penna. R. R., 6 Casey 34; Commonwealth *v.* Penna. Can. Co., 16 P. F. Smith 55.

J. Thomas and *W. L. Hirst*, for defendants in error.—1. In the Act of 1857, the legislature took care to stipulate for the preservation of the rights of the public, to the use of the canal, &c., as a public highway.

2. It was the common-law duty of the defendants, who owned this canal, and took tolls from boats, to a navigable canal for the passage of boats: Borland *v.* Nichols, 2 Jones 42.

In the construction of statutes granting privileges to individuals, where there is ambiguity or inconsistency in the language of the grant, if one construction bear against the public trade and public convenience, and another abridges the grant, that must be adopted which favors the public convenience and trade: Stormfeltz *v.* Manor Turnpike Co., 1 Harris 560.

Unless in case of strong repugnancy, one Act of Assembly will not be construed to repeal another: Street *v.* Com., 6 W. & S. 209. The legislature could not direct the courts how to interpret the Act of 1857: Pennsylvania Railroad Co. *v.* Canal Commissioners, 9 Harris 21; Reiser *v.* William T. M. S. F. Association, 3 Wright 143; O'Conner *v.* Warner, 4 W. & S. 227; Haley *v.* Phila., 18 P. F. Smith 47; Lambertson *v.* Hogan, 2 Barr 25; Greenough *v.* Greenough, 1 Jones 495.

Judgment was entered in the Supreme Court, January 27th 1873.

Per Curiam.—Judgment affirmed on the charge of the judge at Nisi Prius.

Hosie *versus* Gray.

Same *versus* Same.

1. Where recognisance of bail in error is defectively taken in the court below, the prothonotary of the Supreme Court may correct it by taking a new recognisance in the form prescribed by the Act of Assembly.
2. Where the proceedings were by scire facias on a mortgage, the amount of bail need not be in double the amount of the verdict, but in a sum sufficient to cover the costs.

Error to the Court of Common Pleas of *Schuylkill county:* No. 290, to January Term 1871.

This was a question under a recognisance of bail in error in the case of Hosie *v.* Gray, reported in 21 P. F. Smith 198. It was heard, February 21st 1871, before J. Ross Snowden, LL.D., the prothonotary of the Supreme Court for the Eastern District, upon exceptions to the recognisances, and is here reported at the request of members of the bar as deciding an interesting question of practice.

The report has been prepared by Mr. Snowden.

G. E. Farquhar, for plaintiffs in error, cited Wickersham *v.* Fetrow, 5 Barr 260.

G. De B. Keim, for defendants in error.

The Prothonotary filed the following opinion:—

The exceptions in these cases are of a twofold character. 1st, As to the form of the recognisances which are alleged to be defective; 2d, As to the sum named in the recognisances which exceptants contend should be in double the amounts of the verdicts and judgments in the court below.

1. On an examination of the recognisances taken by the prothonotary of the court below, I find that they are not in the precise form prescribed by the Act of Assembly; but as the plaintiffs in error propose to correct the mistake by entering into new recognisances before me in the form prescribed by law, I will allow the same to be done.

2. The proceedings in the court below were founded on mortgages, and were commenced by writs of scire facias. The proceedings are *in rem* and not *in personam*. Moreover, in the mortgages there is an express agreement between the parties that there shall be no personal liability on the part of the mortgagors, and that "the lien and collection of the purchase-money shall be limited and restricted to the property covered by and included in the mortgages." The property therein mentioned must be responsive to the judgments. I am therefore of opinion that the recog-

nisances need not be in sums double the amount of the money judgments, but only in sums sufficient to pay the costs which may accrue, or be adjudged as accruing in these cases; and for this responsibility I deem the sum of $200 amply sufficient. I have therefore permitted recognisances in the form prescribed by law (sect. 7, Act of June 16th 1836, Pamph. L. 762), to be entered into, with sureties who have *justified* before me in each case in the sum above named.

February 21st 1871. On motion of *L. Hakes* and *G. De B. Keim*, Esqs., for defendants in error, a rule was granted on plaintiff in error to show cause why the bail in the recognisances in these cases, should not be increased so as to conform to the Act of Assembly and the rules of the Supreme Court, or in default thereof that the said defendants in error may issue an alias levari facias. Rule returnable March 11th 1871.

March 11th 1871. Before THOMPSON, C. J., READ, AGNEW and SHARSWOOD, JJ. WILLIAMS, J., at Nisi Prius.

Sur motion to increase bail in error, argued by *L. Hakes* and Hon. *G. W. Woodward*, for the rule; and by *Geo. E. Farquhar* and Hon. *F. W. Hughes*, contrà.

PER CURIAM.—The motion is refused, and the decision of the prothonotary sustained.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

MIDDLE DISTRICT—HARRISBURG, 1873.

Pennsylvania Railroad Co. *versus* Beale.

1. The approach by a public road crossing a railroad was particularly dangerous, because the railroad from natural and other obstructions could not be seen nor the whistle heard. The deceased in approaching the railroad did not stop to listen, &c.; in crossing the railroad he was killed by the locomotive. *Held*, that the deceased was guilty of negligence and his family could not recover damages for his death.

2. The duty of the traveller to stop is more obligatory when an approaching train cannot be seen, &c., than when it can.

3. If the traveller cannot see the track by *looking* out from his carriage, he should get out and lead his horse.

4. The failure to stop immediately before crossing a railroad track is negligence *per se*, and this is for the court. The rule is unbending.

5. Hanover R. R. *v.* Coyle, 5 P. F. Smith 396; N. Penna. R. R. *v.* Heileman, 13 Wright 60, approved.

May 24th 1873. Before READ, C. J., AGNEW, SHARSWOOD, WILLIAMS and MERCUR, JJ.

Error to the Court of Common Pleas of *Juniata county:* No. 22, to May Term 1873.

This was an action on the case brought to December Term 1871, by Elizabeth Beale, widow and others, children of Thomas Beale, deceased. It was to recover damages for the death of Thomas Beale, occasioned as the plaintiffs alleged, by the negligence of the defendants.

The cause was tried September 3d 1872, before Bucher, P. J., of the Twentieth District.

On the 2d of September 1871, the deceased was driving with

his son in a "spring wagon," near the borough of Patterson, in Juniata county; the road on which he was travelling crossed the Pennsylvania Railroad at right angles at the east end of the borough; in passing over the railroad, the carriage of the deceased was struck by the locomotive engine of the fast line going east, and he was killed.

The single question considered in the Supreme Court, was as to the concurrent negligence of the deceased.

James Beale, son of the deceased, testified: "We left home early, in a spring-wagon. I drove. We came down the hill on a very slow walk, so that we could hear if any trains were coming. When we came to opposite the cave we stopped almost a dead stop. We both listened, and we could hear no train. Father told me to go on. We went on, and could see nothing until we got on to the track that the train was to go down on. Just as we got on the track we both looked up and saw the train. He told me to hit the horse a cut quick and go on. Just as I raised the whip the train struck the wagon, and that is the last I remember. Could not see up the road on account of the trains and the fog. There is a turn just above the cave. The hill is just above the cave. I did not measure from the cave to railroad. We did not stop entirely. Neither of us got out and went to the railroad. I was driving. The hill obstructs the view from the cave, so we could not see the railroad except right straight before us. The first time after we left the cave and looked up the track, was right when we were on the track and train was coming. Then I was alarmed and did not see much else. We did not drive from cave to the track on a trot. When he saw the cars he told me to give the horse a cut. I did so, and the horse jumped forward on the track. Just then the train struck, and that is all I know. Could not see up the track till I got on it."

George W. Jacobs testified: "Am acquainted with the crossing. In approaching it from the west we first come in sight of it seventy yards from south siding. From this point can see only a few steps up the road above crossing—that is, when the track is clear. At thirty-five yards from rail on south siding can see about seven yards above crossing, except through a small opening between the high bank extending along railroad and the watch-box. Through this can see fifteen yards above crossing. At sixteen yards from same track can see ten yards above crossing, past south end of watch-box, and twenty yards up through the opening before mentioned. At ten yards from south crossing can see up the track eighteen yards on down track, and about eighteen yards to the small aperture at watch-box. At seven yards from same crossing can see above crossing twenty-eight yards on east track. At three yards from same track cannot see up to the curve at upper end of Patterson on account of wood-shed covering the view. Wood-shed now re-

moved. Can't say how far I could see up from three yards point. From the crossing on railroad I could see up to curve—about five hundred yards. If cars are on south siding you would have to pass it to see up the track. I have tested that. I measured distance from crossing to tool-house; it is fourteen hundred feet. Standing in the road near the cave, nothing can be seen but the hill. There is a space of about ten feet from foot of bluff between it and watch-box. I could not see up through that space west along the track if there was a train on the south siding, unless I could see between the cars. I am not prepared to say whether, if sitting in open wagon on this open space and looking west towards the Patterson House, I could see stack of locomotive coming east. I don't think I ever did stand on level ground between track and bluff and look west to see cars coming."

There was evidence in the case bearing on the questions of negligence by the deceased and by the defendants; what has been given, with the charge of the court below and the opinion of the Supreme Court, will sufficiently present the case.

The plaintiffs' second point which was affirmed, was:—

"It is not the duty of one lawfully attempting to cross a railroad to stop and look both ways and listen for approaching trains, where, by reason of the nature of the ground and permanent or temporary obstructions and noises by the railroad company, the approach of trains to the crossing could not be discovered in time to avoid danger by stopping, looking and listening."

The defendants' points which were denied, were:—

1. Before there can be a recovery in this case, the plaintiffs must show that Thomas Beale stopped before he reached the track and looked along the same and saw no approaching train; and, as there is no evidence whatever to sustain a finding that he so stopped, it is in law negligence on his part, and the verdict must be for the defendant.

2. As the uncontradicted evidence in the case shows that Beale did not stop before driving on the track, the verdict must be for the defendant.

3. Beale was bound, as every man crossing a railroad, in ordinary prudence, is bound, to look in all directions in which trains may approach, and to pause until he found he could cross with safety; and, as the evidence here shows he did not do so, there can be no recovery, and the court is requested to give binding instruction to that effect to the jury.

4. Upon the whole evidence of this cause the law of the case is with the defendant, and the plaintiffs cannot recover.

Judge Bucher having spoken of the evidence and law as bearing upon the question of the defendants' negligence, said:—

"The second question, then, is, was the deceased guilty of any negligence or carelessness that in any manner contributed to his

death? If he was, there is an end of the case, and the plaintiffs cannot recover; for then he was not injured by the defendant, but the accident would be laid to the door of the deceased, and would be his own misfortune or fault. The duty of a traveller, in passing along a public road or highway where the same crosses or intersects a railroad, has been declared by the Supreme Court in numerous decisions. It has been held that it is the duty of one lawfully attempting to cross a railroad, to stop and look both ways, and listen for approaching trains, before he ventures upon the track, and that the omission to do this is negligence. Did the deceased do that in this case? The only evidence in the cause bearing upon this point, as to how the deceased approached the crossing, that I remember of, is the evidence of James Beale, the boy who was with the deceased at the time of the accident. He testified as follows:— * * *

"From this evidence it is manifest, that deceased did not come to a full or complete stop, and, although he listened for the approach of cars whilst he was slowly going in the direction of the crossing, yet he did not look for any approaching train, save immediately in front and in the direction he was travelling. You will remember, the proof is, there was a high bluff or hill that intercepted or shut out the view of the cars in approaching the crossing from the west, at the cave, the point where the deceased slackened the pace of his horse and listened. This point was about seventy-five feet from the track. It is manifest, that if deceased had looked from this point for a train approaching the crossing, that it would have done him no good, for the bluff or hill obscured it from view. Whilst the law is fixed and settled, that it is the duty of the traveller, in crossing a railroad along a highway, to stop, look and listen before he goes upon the track, yet we do not understand the rule to be of such universal application as to control a case where stopping, listening and looking would have been in vain. The law does not demand vain and impossible things. Cases of this kind must necessarily rest upon the peculiar facts and circumstances. If you are satisfied, from the evidence, that there was any point along the public road upon which deceased was travelling, before he struck the railroad, from which he could have seen or heard the approach of this train, if he had stopped, looked and listened, we instruct you that it was his imperative duty to do so, and if he did not so stop, look and listen, there can be no recovery. On this branch of the case, then, to wit, the negligence of the deceased, we submit to you this question: Was there any point along the highway, upon which deceased was travelling, from which, if he had stopped, looked and listened, he might have heard or seen the approach of the train. If there was, there is an end of the case, and plaintiffs cannot recover; for it was the manifest duty of the deceased to stop, look and listen

before he went upon the track, if the ground and situation of the place allowed him to do so. The evidence is uncontradicted, that there was a level space of ground, about ten feet wide, between the hill or bluff and the first track or siding, on the approach to the track from the valley, upon which deceased was travelling. It was the plain duty of the deceased to have stopped there, and to have looked and listened for the approach of the train, if you find, from the evidence, that the approach of the train might have been seen or heard from there. Now, how is this? Plaintiffs contend that deceased could not have seen or heard the train from this point, if he had stopped, looked and listened. This the defendant denies. The plaintiffs have called witnesses who have described the situation on the morning of the accident, and who state that the train could not have been seen or heard from this point, and the defendant has called witnesses to prove the opposite. You will bear in mind all the evidence upon this point upon the one side and the other—that of Mr. Jacobs and others for plaintiffs, and Mr. Black and others for defendant. Are you satisfied, from all the evidence in the cause, that the deceased, in approaching the crossing, acted as a prudent and careful man would have done under all the circumstances? It is conceded that the crossing was a dangerous one. The effect of this was to *quicken* the diligence of both parties to avoid doing injury to each other. If you find that deceased did all a prudent, careful man could do, under all the circumstances, to inform himself of the whereabouts of the train before going upon the track, then he would not be guilty of negligence in going upon the same, and your verdict should be for the plaintiffs, provided you find the defendant was guilty of negligence." * * *

The verdict was for the plaintiffs for $1000.

The defendants sued out a writ of error. They assigned for error the denial of their points, the affirmance of the plaintiffs' second point and the charge of the court.

L. W. Hall (with whom was *E. J. Doty*), for plaintiffs in error.—A traveller crossing a railroad must stop and look up and down, because the presumption is that a train may be approaching: Penna. Canal Co. *v.* Bentley, 16 P. F. Smith 30. Where, as in this case, the negligence of the deceased is clear, the court should so determine as matter of law: Pittsburg & C. R. R. *v.* McClurg, 6 P. F. Smith 294; West Chester & Ph. R. R. *v.* McElwee, 17 Id. 311; Catawissa R. R. *v.* Armstrong, 2 Id. 286; Pennsa. R. R. *v.* Ogier, 11 Casey 71. Not looking for a train is an entire failure of performance of duty: Penna. R. R. *v.* Heileman, 13 Wright 64; Hanover R. R. *v.* Coyle, 5 P. F. Smith 396; Reeves *v.* Del., L. & W. R. R., 6 Casey 464.

[Pennsylvania Railroad Co. *v.* Beale.]

J. W. Parker and *E. D. Parker*, for defendants in error.—The obstructions to vision and hearing being such as that the stopping of the deceased would have been of no avail, there was no obligation on him to do so; the question of negligence was for the jury: Philada. & Trenton R. R. Co. *v.* Hagan, 11 Wright 244; Hanover R. R. Co. *v.* Coyle, 5 P. F. Smith 396; Pa. R. R. Co. *v.* Goodman, 12 Id. 329; West Chester & Philada. R. R. Co. *v.* McElwee, 17 Id. 311.

The opinion of the court was delivered, July 2d 1873, by

SHARSWOOD, J.—The evidence of the plaintiffs below showed a clear case of contributory negligence in the deceased. The crossing at which he met with the injury which resulted in his death, was a dangerous one, and as he was well acquainted with it, there was the greater reason that he should exercise the utmost care and caution, by stopping at the railroad before undertaking to pass over. It is very clear that if he had done so but for a few minutes the accident would not have happened. "This evidence," said the learned judge in his charge, "is uncontradicted, that there was a level piece of ground, about ten feet wide, between the hill or bluff and the first track or siding on the approach to the track from the valley upon which the deceased was travelling." It was his plain duty to have stopped at that place, and so the learned judge instructed the jury, but he qualified this instruction by adding, "if you find from the evidence that the approach of the train might have been seen or heard from there." This in fact left the question of negligence to the jury, upon a point not material. Indeed, the duty of stopping is more manifest when an approaching train cannot be seen or heard than where it can. If the view of a track is unobstructed, and no train is near or heard approaching, it might, perhaps, be asked, why stop? In such a case there is no danger of collision—none takes place—and the sooner the traveller is across the track the better. But the fact of collision shows the necessity there was of stopping; and therefore in every case of collision the rule must be an unbending one. If the traveller cannot see the track by looking out, whether from fog or other cause, he should get out, and if necessary lead his horse and wagon. A prudent and careful man would always do this at such a place. In The Hanover Railroad Co. *v.* Coyle, 5 P. F. Smith 396, the plaintiff, a pedlar, in the depth of winter, was driving inside of his covered wagon, with his head muffled up in a thick overcoat, and it appeared that a traveller passing in the direction he was going could not see up and down the track until within sixteen feet of it. Yet these circumstances were not allowed to form any excuse for his negligence in omitting to stop. There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad

track, is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court: North Pennsylvania Railroad Co. *v.* Heileman, 13 Wright 60. It was important not so much to railroad companies as to the travelling public. Collisions of this character have often resulted in the loss of hundreds of valuable lives, of passengers on trains, and they will do so again, if travellers crossing railroads are not taught their simple duty, not to themselves only but to others. The error of submitting the question to the jury whether if the deceased had stopped, he could have seen or heard the approaching train, runs through the entire charge and answers of the learned judge below. He should upon the uncontradicted evidence have directed a verdict for the defendants.

Judgment reversed.

WILLIAMS and MERCUR, JJ., dissented.

INDEX.

CASES CONSIDERED.

DISCRETION.

1. A devise was, "I leave my house in G. in charge of S. A. and E. W., for the benefit of my brother, to be used principal and interest if needed, and if any remains after his death, it is to become the property of E. and S. *Held*, that the brother had not an absolute power of disposition; the land being unchanged at his death passed to E. and S. in fee. *Dillin* v. *Wright*, 177.

2. The discretion as to its disposition was in S. A. and E. W. as trustees; not in the brother. *Id.*

3. A testator devised his whole estate (after some legacies) to his executor, in trust to select and purchase a lot in Philadelphia, thereon to erect a building for the Philadelphia Library Company; and as soon as the building should be completed to convey the lot to the company; he afterwards purchased a lot himself; a few days before his death he directed that the building should be erected on that lot; and at his request the executor verbally promised the testator that he would erect the building there; after the testator's death he selected it. He answered to a bill to declare him disqualified to act as a trustee by reason of having trammelled his discretion by his promise, that he had selected the lot not only in accordance with the testator's wishes but with his own judgment, after a careful deliberation. *Held*, that his discretion was not so controlled as to disqualify him. *Williams's Appeal*, 249.

4. Such trust could not be taken from the donee except on the clearest evidence of his incapacity, or that he was acting in fraud of his powers. *Id.*

5. The verbal direction of the testator and promise of the executor, were not a fraud on the power in the will, and the trustee was bound to perform the promise. *Id.*

6. A chancellor will so control a trustee that he shall not disappoint the intent of the donor, as gathered from the instrument containing the power. *Id.*

7. An innocent motive will not save the exercise of the power if it violate the true purpose of the trust. *Id.*

8. When a testator, to fulfil his own purpose, confers an absolute discretion, it is his right to have the power executed by his own trustee, and a court cannot displace the trustee without clear and adequate cause. *Id.*

DISTRIBUTION.

In the distribution of an estate in the Orphans' Court, each must be heard in support of his claim and in opposition to every claimant interfering with it; the power to decide all questions essential to distribution follows the power to distribute. *Dundas's Appeal*, 474.

Orphans' Court, 1–5. Partnership, 1–4.

"DIVINE SERVICE."

1. A German Reformed congregation and a Lutheran congregation built a church together, in which by their articles of association "Divine Service" only was to be held; for many years there were no meetings in it except for public worship: *Held*, under the facts in this case, Sabbath Schools were not included in "Divine Service." *Gass's Appeal*, 39.

2. The meaning of "Divine Service," like a word of art, is to be determined by the sense in which it was used by the parties. *Id.*

3. Two congregations built a church for their joint use in Divine Service; against the protest of one and their articles of association the other

END OF VOL. XXIII.

Ex. L. a. a.