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N.B -

R E P O R T S
OF
C A S E S
ADJUDGED IN
THE SUPREME COURT
OF
PENNSYLVANIA.

FREDERICK WATTS AND HENRY J. SERGEANT

VOL. VIII.

**CONTAINING THE CASES DECIDED IN PART OF SEPTEMBER TERM, AND IN
DECEMBER TERM 1844. AND IN MARCH TERM 1845.**

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JUDGES
OF THE
SUPREME COURT OF PENNSYLVANIA,
DURING THE PERIOD OF THESE REPORTS.

JOHN BANNISTER GIBSON, Esq., Chief Justice.

CHARLES HUSTON, Esq.,	}	Justices.
JOHN KENNEDY, Esq.,		
THOMAS SERGEANT, Esq.,		
MOLTON C. ROGERS, Esq.,		
*THOMAS BURNSIDE, Esq.,)	

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

* Appointed January 25th, 1845, in the room of Charles Huston, Esq., whose
time expired.

TABLE OF CASES.

Aechternacht v. Watmough...	162	Defraunce v. Brooks	67
American Fire Insurance Co., Pairo v	374	Detweiler, Mertz v.....	376
Armstrong, Bentz v.....	40	Drum, Nesmith v.....	9
		Duffield v. Morris.....	346
		Duffy v. The Insurance Co...	413
Balliet, Northampton Bank v...	311	Dulles, Charnley v.....	453
Beaver, Lehr v.....	102		
Beaver, Robb v.....	107	Ebenhardt's Appeal	327
Bentz v. Armstrong.....	40	Elliott v. Pearsoll.....	86
Bias, Reed v.....	189	English, Connellogue v	11
Blackstone, Over v.....	71	Erie Bank, Frazier v.....	18
Bosler v. Kuhn.....	183	Everly, Clark v.....	226
Bowes v. Seeger.....	222		
Brady, Quin v	139	Farmers' & Mechanics' Bank v. Little.....	207
Brooks, Defraunce v	67	Felton v. Commonwealth.....	267
Butler v. Morgan	53	Field, Lehigh Co. v.....	232
		Fitler v. Patton.....	455
Caldcleugh v. Hollingsworth..	302	Flavell's Case.....	197
Calhoun v. Hays	127	Foreman v. Schricon.....	43
Cavett's Appeal	21	Foster v. Commonwealth.....	77
Chadwick v. Moore	49	Franklin Fire Insurance Co. v. West.....	350
Chadwick, Parke v.....	96	Frazier v. The Erie Bank	18
Chamberlain v. M'Clurg.....	31		
Charnley v. Dulles.....	353	Gilkeson v. Snyder.....	200
Chew's Case.....	375	Girard Bank v. Schuylkill Bank	242
Christy v. Crawford.....	99	Gorman, Mechanics' Bank v..	304
Clark v. Everly	226	Graham, Hay v.....	27
Cochran v. M'Teague	272		
Cochran v. Perry.....	262	Haley v. Prosser	133
Coleman, Johnston v	69	Hamot, Spires v.....	17
Commonwealth v. Crommie...	339	Hay v. Graham.....	27
Commonwealth, Felton v.....	267	Hays, Calhoun v.....	127
Commonwealth v. Foster v.....	77	Hazleton Coal Co., Megargell v.	342
Commonwealth v. Pike Bene- ficial Society	247	Henry v. The Pittsburg and Allegheny Bridge Co.....	85
Commonwealth v. Zephon....	382	Hollingsworth, Caldcleugh v..	302
Connellogue v. English	11	Horbach v. Knox.....	30
Cox, Livingston v.....	61	Huston v. Davidson.....	181
Crane, Whitesell v.....	369	Hutchinson, M'Coy v.....	66
Crawford, Christy v.....	99		
Crommie, Commonwealth v....	339	Insurance Co., Duffy v.....	413
Davidson, Huston v.....	181		

TABLE OF CASES.

Irwin v. Shoemaker.....	75	Morris, Duffield v.....	349
James v. Letzler	192	Murphy's Appeal	165
Janney, Jones v.....	436	Murphy, Jones v.....	275
Johnston v. Coleman	69	Nesmith v. Drum.....	9
Jones's Appeal	143	Northampton Bank v. Balliet..	311
Jones v. Janney	436	Northampton Bank, Selfridge v.	320
Jones v. Lewis	14	Northampton County, Lehigh	
Jones v. Murphy.....	275	Coal and Navigation Co. v..	334
Keck, Kuester v.....	16	Over v. Blackstone.....	71
Keever, Moddewel v.....	63	Pairo v. American Fire Insur-	
Klinger, Rose v	178	ance Co.....	374
Knox, Horbach v.....	30	Pancoast's Appeal	381
Kraemer, Unangst v.....	391	Parke v. Chadwick	96
Kramer v. M'Dowell	138	Parker's Appeal.....	449
Kuester v. Keck.....	16	Patton, Fittler v.....	455
Kuhn, Bosler v.....	183	Pawling, Penrose v.....	379
Landman, Williams v.....	55	Pearsoll, Elliott v.....	38
Lehigh Coal and Navigation		Penrose v. Pawling.....	379
Co. v. Northampton County	334	Perry, Cochran v.....	262
Lehigh Co. v. Field.....	232	Philadelphia, Germantown and	
Lehr v. Beaver.....	102	Norristown Railroad Co.,	
Leidich v. Leidich	363	Whitemarsh Township v...	365
Letzler, James v.....	192	Philadelphia, Germantown and	
Levering v. The Philadelphia,		Norristown Railroad Co.,	
Germantown and Norristown		Levering v.....	459
Railroad Co.....	459	Philadelphia, Mayor, Aldermen	
Lewis, Jones v.....	14	and Citizens' Appeal	449
Lilley v. Torbet.....	89	Pike Beneficial Society, Com-	
Little, Farmers' & Mechanics'		monwealth v.....	247
Bank v.....	207	Pitt Township Road Case	74
Livingston v. Cox	61	Pittsburg and Allegheny Bridge	
Lowber & Wilmer's Appeal ..	387	Co., Henry v.....	85
Markley v. Swartzlander.....	172	Poor, Directors of, v. Wallace.	94
Martin v. Schoenberger.....	367	Prosser, Haley v.....	138
M'Clurg, Chamberlain v.....	31	Quin v. Brady	139
M'Coy v. Hutchinson.....	66	Reed v. Bias.....	189
M'Dermotts' Appeal.....	251	Reynolds, Tate v.....	91
M'Dowell, Kramer v	138	Richey, Vantries v.....	87
M'Teague, Cochran v.....	272	Robb v. Beaver	107
Mechanics' Bank v. Gorman..	304	Roberts v. Wilcock	464
Megargell v. Hazleton Coal Co.	342	Roland v. Tiernan	193
Merrick's Estate.....	402	Rose v. Klinger ..	178
Mertz's Case.....	374	Russel v. Shuster.....	308
Mertz v. Detweiler.....	376	Russel, Whitesides v.....	44
Miles v. Miles.....	135	Schoenberger, Martin v.....	367
Moddewel v. Kever.....	63	Schricon, Foreman v.....	43
Moore, Chadwick v.....	49		
Morgan, Butler v.....	53		

TABLE OF CASES.

vii

Schuylkill Bank, Girard Bank v.	242	Vandever's Appeal	405
Seeger, Bowes v.	222	Vantries v. Richey	67
Selfridge v. The Northampton Bank	320	Wallace, Directors of Poor v. . .	94
Shelly v. Shelly	153	Watmough, Aechternacht v. . .	162
Shoemaker, Irwin v.	75	Welsh v. Speakman	257
Shuster, Russell v.	308	West, Franklin Fire Insurance Co. v.	350
Snyder, Gilkeson v.	200	Whitemarsh Township v. The Philadelphia, Germantown and Norristown Railroad Co. . .	365
Speakman, Welsh v.	257	Whitesell v. Crane	369
Spires v. Hamot	17	Whitesides v. Russell	44
Spring Garden Commissioners' Appeal	444	Wilcock, Roberts v.	464
Stephens's Appeal	186	Wiley's Appeal	244
Stofflit v. Troxell	340	Williams v. Landman	55
Swartzlander, Markley v.	172	Wilson, Jones & Co.'s Appeal. .	387
Tate v. Reynolds	91	Yerkes's Appeal	224
Tiernan, Roland v.	193	Zephon, Commonwealth v. . . .	382
Torbet, Lilley v.	89		
Troxell, Stofflit v.	340		
Unangst v. Kraemer	391		

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

WESTERN DISTRICT—SEPTEMBER TERM 1844—CONTINUED.

Nesmith *against* Drum.

A draft upon a particular fund in the hands of an attorney for collection is an equitable assignment of it, and although not accepted by the attorney, yet it is not afterwards subject to be attached for the debt of the drawer.

ERROR to the District Court of *Mercer* county.

Thomas Nesmith having obtained a judgment against Jacob Drum, Henry Drum and James Collins, issued a *fiery facias* with a clause of attachment and *scire facias* against John Hawkins as garnishee, which was issued and served 14th June 1842. Upon interrogatories filed by the plaintiff, the garnishee answered that he owed a debt to Jacob Drum, Henry Drum and James Collins, of \$297.27, for which they had obtained a judgment against him. Upon which the plaintiff asked for judgment against the garnishee. Whereupon William Wheelen by his attorney appeared in court, and claimed the fund upon the following order :

VIII.—2

(9)

[Nesmith v. Drum.]

"H. H. Budd, Esq., please pay over to William Wheelen or order the amount of the note on John Hawkins when collected, as the note is to be applied to the payment on a note in the Warren Bank; or if said Drums and Collins should pay off said note, this order to be lifted. By so doing, you will oblige

JACOB DRUM,
HENRY DRUM,
JAMES COLLINS.

Feb. 14, 1842."

The following is endorsed on the back of the above writing:

"Accept the within order, and agree to pay over the same when collected, reserving my fees and per centage.

H. H. BUDD.

Feb. 14, 1842."

The court below (THOMPSON, President) rendered a judgment for the defendant.

Stephenson, for plaintiff in error.

Pearson, for defendant in error.

PER CURIAM.—An equitable assignment is an agreement in the nature of a declaration of trust, which a chancellor, though deaf to the prayer of a volunteer, never hesitates to execute when it has been made on valuable, or even good consideration. Could there be a more explicit declaration than the order before us? Drum and Collins draw on their lawyer for the proceeds of an action against Hawkins, which they declare in the order to have been appropriated to payment of their note in the Warren Bank, on which Wheelen, the payee, was one of their sureties. If this appropriation was a condition of the contract of suretyship, it rested on a valuable consideration; if it was not, it rested on a good one, which is equally available. Drum and Collins were bound to secure Wheelen by putting funds into his hands to take up the paper at maturity, if they should not; and in giving this order they yielded to a moral obligation, which is a consideration for an express contract. The appropriation, then, being complete as an assignment of the fund by the agreement of the parties, even without the acceptance of the drawee, could not be revoked.

Judgment affirmed.

Connellogue *against* English.

In an action of ejectment, when the title of the parties depends upon written evidence, it is error in the court to submit it to the determination of a jury.

ERROR to the Common Pleas of *Allegheny* county.

John English and others against Owen Connellogue. Ejectment for part of a lot of ground in Pittsburgh. The facts are fully stated in the opinion of the court.

Metcalf, for plaintiff in error.

Woods, for defendant in error.

The opinion of the Court was delivered by

HUSTON, J.—This case was presented to the court below in such manner as was calculated for any other purpose than to produce a clear understanding of the facts. I shall state the facts so as to present them in their order. John Scull in his lifetime owned a large lot of ground in Pittsburgh, bounded on Cherry Alley, and on Sixth Street; he, by articles of agreement dated 16th June 1827, agreed to sell to Oliver English a part of said lot described as follows: bounded by English's own lot 55 feet, thence parallel with Cherry Alley 30 feet, thence to Cherry Alley 55 feet, thence along Cherry Alley 30 feet to the place of beginning; to execute a deed clear of encumbrances as soon as the purchase money was paid; to deliver possession on the 1st of April then next. English to pay \$400, viz.: \$200 1st July 1828, and \$200 1st July 1829, both with interest from the date of the article. This was duly executed in presence of two witnesses, but never recorded. At the bottom of the articles was written, "Only 55 feet back, and payments to be made in April 1829 and April following." This was said to be in the handwriting of John Scull; on the back of the articles were receipts for payments made to John Scull and to his executors. The payments continued to be made, in sums of \$50 or less, down till in November 1829. When the article of agreement was read, neither the line at the foot of it nor receipts were read; nor did the plaintiff read his deed for this lot, though they had a deed and it was recorded. A witness was called, who testified that English went into possession and fenced his lot, that before his purchase the whole was a garden; again he said English took possession immediately after his purchase; and again he thought English entered within six months.

On the 19th of June 1827, just three days after the above articles were made, John Scull conveyed the rest of his lot by

[Connellogue v. English.]

courses and distances to Alexander Miller; by this deed, in selling the rest of the lot, he left only 53 feet from Cherry Alley for English. This deed to Miller was recorded 28th February 1828. On 19th June 1833 Miller and wife conveyed to Jeremiah Ivory; this deed was recorded 10th July 1833. The witnesses and the counsel throughout spoke of a sale by Ivory to Mitchel, but it is only in the statement of the title by the judge that we find that Ivory conveyed to Mitchel on 10th July 1833; that Mitchel built a house, and Connellogue is his tenant. All these deeds of the defendant come to a point *fifty-three* feet from Cherry Alley. Defendants now offered to read from the records of the county a deed from Mary Scull, executrix and sole devisee of John Scull, to Oliver English, dated 12th of November 1829, and acknowledged the same day, though not recorded until 5th of June 1834. On this offer plaintiffs produced the original deed, which was read, and which conveys to English only *fifty-three* feet from Cherry Alley.

This ejectment was brought to recover from Mitchel or his tenant the ground between the line 53 feet from Cherry Alley and a line at the distance of 55 feet from that alley. There is endorsed on the deed from Mary Scull to Oliver English as follows:

“In addition to the within named 53 feet of ground sold to Oliver English, I hereby further grant and sell to him his heirs and assigns two feet of ground (or the whole balance of this lot, be the same more or less) which said lot may contain, and which cannot be certainly ascertained, the consideration mentioned in this indenture being in full thereof; as witness my hand and seal this third of May 1830.

[Two witnesses.]

MARY SCULL.”

Although the deed was recorded as above stated, this covenant was not recorded. It was easy to have it acknowledged or proved; but this was never done; probably because it was worthless and useless. Ever since *Crotzer v. Russel* (9 *Serg. & Rawle* 78-80), followed by numerous cases, it has been settled that the deed being the last and most solemn act in the transfer of lands, corrects and controls the prior articles of agreement, and to this I know of no exceptions except mistake or fraud. The line written at the foot of that copy of the article which was in the possession of English, shows that he was early apprised that the deed would be as it is; and from the charge of the judge we learn that according to that, the interest of one year on the purchase money was thrown off on the settlement; this is pretty near conclusive proof that there was neither mistake nor fraud, but a change of quantity and lines for a consideration agreed on.

English never recorded his articles nor his deed until after Scull had sold the two feet to Miller, and Miller to Ivory, and Ivory to Mitchel by deeds all of which were recorded. But there was

[Connellogue v. English.]

something like an attempt to prove immediate possession, which totally failed. The deed to Miller was only three days after the agreement with English, who was not to obtain possession for nine months, and no proof that he did go into possession sooner. The recording of Miller's deed gave the legal right to him and to all who came under him; and if Mrs. Scull had conveyed the two feet in dispute instead of the unmeaning covenant above cited, it would not have devested the right of Miller or those claiming through him. It is plain that Mr. Scull made a mistake in selling two feet to two different persons, and honestly went to English and stated this, and the mode of rectifying this was agreed on, and this agreement has been carried into effect in a manner which the law had and does sanction. The testimony of the lawyer to whom English showed this, and who advised him that he might insist on 55 feet, makes the matter stronger. English did not reject and return the deed, but kept it, probably because of his agreement to take 53 feet on abatement of interest.

Some dozen of bills of exceptions were taken during the trial to the admission or rejection of testimony; no error is assigned on these. It is alleged as error that the court left the effect of these writings or some of them to the jury, and it was error; for the reasons above given the court ought to have instructed the jury that on the face of the writings, and the effect of the Recording Acts, the legal title was in the defendants. And it is not easy to see anything in the parol evidence, taken altogether, going to impair this title.

Our laws and our Recording Acts require titles to be written and recorded; and when so done, courts and juries cannot do worse than to depart from these, and unsettle rights and disturb property and possessions on vague remembrance, or total want of recollection as to facts which transpired long ago, or on witnesses supposing or thinking that such and such thing happened, or happened in a certain way.

There is evidence to show that even at 53 feet defendants for 5 or 6 feet are over the line between 3 and 6 inches at a back corner. If the parties think it worth while to go to the trouble and expense of another trial, this may be ascertained.

Judgment reversed, and *venire de novo* awarded.

VIII. — B

Jones *against* Lewis.

Notice directed to an endorser may be deposited in the post-office at which he receives his letters and newspapers, if he do not live in the post-town or at any other place as convenient to the holder.

ERROR to the District Court of *Allegheny* county.

This action was brought by E. Jones & Co., endorsers of a promissory note drawn by F. R. Smith, on the 2d of July 1842, for \$143, payable to the order of A. Kirk Lewis, the defendant, at six months, and endorsed by him to the plaintiffs, who deposited it in bank for collection. Being unpaid at maturity, it was put into the hands of a notary for protest, and protested by him, after demand of payment from the drawer, notice of which was deposited by him in the post-office at Pittsburgh, directed to the defendant, who lived beyond the Monongahela river, contiguous to, but out of the city limits, but who kept a box and received his letters and newspapers at the city post-office, which happened to be the nearest one to his residence. The court before whom the cause was tried directed: "That putting a notice of protest into the post-office where it is not to be conveyed by mail to the town or place where the endorser resides, but when, as in the present case, the endorser resides within a mile of the notary, and in sight of the town or city where the post-office is situated, is not of itself sufficient evidence to fix the endorser."

Washington, for plaintiff in error, relied on 1 *Peters* 33, 578; 9 *Wheaton* 581; 11 *Wheaton* 438.

Robb, for defendant in error, relied on 11 *Johns.* 187, 231; 20 *Johns.* 382.

The opinion of the Court was delivered by

GIBSON, C. J.—The rule is, that notice must be served on the person, or left at his dwelling or place of business: the exception to it is that it may be transmitted through the post-office when there is a violent probability that it will reach him in the regular course of the mail. But this exception is insufficient to admit of a deposit in the post-office of notice to an endorser who lives in the post-town, or the town inhabited by the holder. The post-office is an interdicted medium of communication with such an endorser, not because it is essentially an active agent of transmission, but because the use of it is permitted not only when it is sure in its results, but also a convenience to the holder. It is per

[Jones v. Lewis.]

mitted, not as a medium of notice provided by the government, but as an indulgence consisting with safety to all parties: it is interdicted when there is nothing to be gained by indulgence, and where it is just as convenient and safe for the holder to leave the notice at the endorser's dwelling or counting-house. When it is said, as it was by Mr Justice Martin in *Laporte v. Landry* (5 *Louisiana Rep. N. S.* 359), that the post-office is not a legal place of deposit for notices, it is to be intended that the party to be affected lives in the same town. Had this endorser resided in Pittsburgh, it is certain that notice through the post-office would not have affected him unless it had been shown to have come to hand in due season; but he resided in the country, and the Pittsburgh office was not only the nearest one to his residence, but the one from which he received his letters and newspapers, and he was consequently within the reason of the exception. Constructive notice is founded on a violent probability of actual notice; and the presumption that a letter will come to hand, is, to say the least, as violent when it has been deposited in the nearest post-office as when it has been mailed in the most remote part of the United States. In the first case it is sure not to miscarry in the transit, for there is to be none; and there is less danger that it will find its way as a dead letter into the catacombs of the general post-office. Yet had this notice miscarried in a transit by mail, whether from the distant city of New Orleans or the conterminous city of Allegheny, it would equally have been constructive notice, which, like the registry of a deed, is not merely *primâ facie* evidence, but conclusive; and it seems to me that to affect the endorser with it by a transit and not by a deposit, would be an arbitrary regulation and a distinction without a difference. A notice dropped into the post-office nearest his residence would be almost sure to reach him; and when he lives out of town, the case would seem to fall within the reason for transmission by mail. True it is, that as a postmaster is not entitled to demand postage on a deposit, it is not his duty to deliver it; but it is not the less certain that he will deliver it, though the artificial presumption in favour of duty, it must be admitted, is not so strong. The commercial law, founded as it is on usage, and dealing with realities instead of suppositions, is eminently practical; and it is notorious that postmasters deliver deposited letters as regularly as they do the contents of the mails. Such is the actual course of the post-office. The letter-carriers are regularly charged with the delivery of them, or they are delivered to those who call; and though the postmaster's services in respect to them are gratuitous, they are not the less regularly rendered. No judge has said that the post-office is not a legal place of deposit where the endorser lives in the country, or at such a distance as would make the employment of a special messenger burthensome. *Ransom v. Mack* (2 *Hill's R.* 190), was the case of a notice sent, by the active

[Jones v. Lewis.]

agency of the mail, from one post-office to another; and it was held to have been mis-sent only because it was not directed to the post-office nearest to the residence. That was a different case in every particular. On the other hand, the very point was ruled to the contrary, but only in a single case. In *The Bank of Columbia v. Lawrence* (1 Peters R. 580), a notice put into the post-office at Georgetown and addressed to the endorser at that place, was held to affect him because that post-office was the nearest one to his residence in the country, and that at which he received communications by mail, though he had a place of business at Washington to which it might have been sent. We have authority as well as reason, therefore, for saying that the evidence of notice in this instance was sufficient.

Judgment reversed and *venire de novo* awarded.

Kuester *against* Keck.

A *terre-tenant* is incompetent to testify on the trial of an issue which may affect the estate which he occupies.

ERROR to the District Court of *Mercer* county.

John Keck against J. M. Kuester. This case is distinctly stated in the opinion of the Court.

Stewart and *Dunlop*, for plaintiff in error.

Holstein, for defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—This was a *scire facias* sued out by Keck upon a judgment against Kuester, for the purpose of continuing its lien upon the real estate bound by it. On the trial, the defendant offered Thomas Stevenson as a witness, to whom the plaintiff objected on the ground of interest, and, in order to show the interest of the witness, read in evidence to the court a deed of conveyance whereby there was granted to him the use and occupation of a certain house and lot of ground, with its appurtenances, which the plaintiff claimed to charge with the amount of his judgment, until the youngest child of the witness, though it might as yet be unborn, should attain full age. The court considered the witness as having an interest in direct opposition to the plaintiff's claim and accordingly rejected him. It has been contended that the interest of the witness in the house and lot might never be affected

[Kuester v. Keck.]

by the plaintiff's recovery, as the defendant might have other property out of which the plaintiff might levy the amount of his recovery, or the defendant in the judgment might pay it out of means within his own power, and not permit the plaintiff to proceed by execution against the house and lot in the occupation of the witness. The interest of the witness, therefore, as it is alleged, is contingent, and too remote to preclude him. But all this might be said of a surety, sued jointly on a bond with his principal; yet I apprehend it would scarcely be said that the surety's interest in such case was so remote or contingent as not to render him an incompetent witness for his principal. It is plain in this case that the witness occupies pretty much the situation of a *terre-tenant*, in regard to the house and lot; his interest, at least, is equally great; he is to have the full use and enjoyment of the same, rent free, until the youngest child which he may have at any time shall attain full age. Now, we have no instance, that I know of, of a *terre-tenant* being ruled a competent witness to discharge the land occupied by him from the lien of a judgment binding it, in a writ of *scire facias* seeking to make it liable. We think the court below, therefore, acted correctly in rejecting the witness.

Judgment affirmed.

Spires *against* Hamot.

If an unconditional payment be made upon a bond bearing interest, which is not yet due, it must be applied first to the extinguishment of the interest up to the time when the payment is made; then to the principal, *pro tanto*.

ERROR to the District Court of *Erie* county.

John Spires against P. S. V. Hamot. This was an action of debt upon a bond dated the 26th February 1836, in the penalty of \$28,000, conditioned for the payment of \$14,500 "on or before the 26th February 1846, with the lawful interest, the first interest payment becoming due on the 26th February next." In this suit the plaintiff claimed to recover the interest which became due on the 26th February 1841, and the 26th February 1842. It appeared that the interest had been paid annually up to the 26th February 1840, and on the 3d July 1840 the defendant paid \$4854.37 "on account of principal and interest in this bond."

The court below was of opinion, and so instructed the jury, that the payment of \$4854.37 was not to be applied to the debt, which only became payable in 1846; but that it was to bear interest in favour of the defendant, and the aggregate to be applied to the

[Spires v. Hamot.]

extinguishment of the interest upon the bond as it annually became payable, and so *toties quoties* until the sum paid, with its interest, is credited; and directed a verdict for the defendants.

Walker, for plaintiff in error, cited 1 *Dall.* 124.

Galbreath, for defendant in error.

PER CURIAM.—*Tracy v. Wicoff* has long since ceased to be authority. It has been directly overruled in *Primrose v. Hart*, (1 *Dall.* 378); *The Commonwealth v. Miller*, (8 *Serg. & Rawle* 458); and *Smith v. Shaw*, (2 *Wash. C. C. R.* 167), in accordance with all the English decisions since *Chase v. Box*, (2 *Freem.* 261), which was the first of them, and decided in 1702.

The truth is, *Tracy v. Wicoff* is as unfounded in principle as it is in authority; for, calculating interest on payments, the debt would, in course of time, be discharged, both principal and interest, by payment of interest only. The rule established by all other decisions is that a partial payment is to be applied to the interest, in the first place, and in the second to the principal. The reason is that, though interest may be reserved to be paid yearly, half-yearly or quarterly, it accrues from day to day, and not like rent from year to year. A creditor may refuse to receive the principal before it is due, or a part of it when due, except on his own terms; and were he to receive it as a payment bearing interest, it would, in effect, be a loan. But if he receive it unconditionally, the residue applied to the principal, after payment of the interest, stops interest on the principal *pro tanto*. The last of the endorsements on this bond purports that the payment was received "on account of principal and interest," which is no more than the law would imply. The jury, therefore, were directed to adopt an erroneous rule of computation.

Judgment reversed, and *venire de novo* awarded.

Frazier *against* The Erie Bank.

If an agent procure the note of his principal to be discounted, and deposit the proceeds in bank to his own credit, the principal may maintain an action therefor against the bank in his own name, notwithstanding the bank, after notice, had paid the money on the check of the agent.

ERROR to the Common Pleas of *Erie* county.

John L. Frazier against The Erie Bank. This was an action

[Frazier v. The Erie Bank.]

on the case, the facts of which are fully stated in the opinion of the Court.

Marshall, for plaintiff in error.

Babbitt, for defendant in error.

The opinion of the Court was delivered by

ROGERS, J.—Prentice and Struthers drew two drafts, one for \$600, the other \$1000, on John Mitchell, Esq., superintendent on the Erie Canal, payable to the order of James Struthers. The drafts were accepted by Mitchell, payable when State funds were received. James Struthers, the payee, being largely indebted to the plaintiff, either in payment of the debt, or as a collateral security, handed over the two drafts to him. James Struthers was the holder of other notes of a similar description. The Erie Bank was in the practice, when in funds, of cashing these notes in relief paper; and, aware of this, Frazier advised Struthers, for what reason does not appear, to place the drafts in the hands of R. H. Rees for collection and negotiation with the Bank. Struthers endorsed the notes, handed them over to Frazier, and he gave them to Rees. Rees, on his return from the Bank, represented that, for reasons which he stated, he could not draw the money for two or three days; advised Struthers and Frazier to go home, and that he would receive the money and would bring it to them. It subsequently appeared that Rees received \$600 on the draft, and also a draft on a Mr Newton, of Warren county, for \$784. This draft he handed to Frazier, who received the same in par funds. The money remaining due on the drafts was passed to the credit of Rees on the books of the Bank. A few days afterwards, Struthers being informed that Rees had failed, called, in company with Mr Abell, who was the agent of Frazier, on the cashier of the Bank, who informed them of the above stated facts. They then told the cashier distinctly that the drafts did not belong to Rees, but to Frazier; that Rees was but the agent for the collection of them; and at the same time Abell presented an order from Frazier for the drafts. Mr M'Sparen, the cashier, refusing to deliver the drafts to Abell, he requested him not to pay the money over to Rees, but to hold it for Frazier; and he agreed to do so. The cashier further told Mr Abell that if Frazier would get Mr Rees's check, they would pay him the balance. This Frazier afterwards procured, and presented it for payment, when he was informed that Kellog & Clark had attached the money as the property of Rees, and that the Bank could not pay it until the attachment was disposed of. The attachment was afterwards discontinued; but, before it was discontinued, in utter disregard of the promise to Abell, they settled with Rees, and refused to pay Frazier, who again presented the check. Rees, when he presented the drafts represented them as his own property.

[Frazier v. The Erie Bank.]

If the above be a true representation of the evidence, it appears that Frazier was the owner of the drafts, and of course entitled to the proceeds. Rees stands in the situation of a fraudulent agent, guilty of a gross breach of trust. Of this state of facts, the Bank had full and ample notice. It must be remarked that there is no reason to believe that, at the time, the cashier or any officer of the Bank were aware of the real nature of the transaction. There is nothing to implicate them in the fraud. No exception, therefore, can be taken to the payment of \$600, or to a credit for the proceeds of the draft as received by Frazier. To that amount, therefore, the defendant is entitled to a credit. For what remains, after making this deduction, this suit can only be maintained; and whether the plaintiff can recover that, was the difficulty made in the District Court. The view of the learned Judge is not very obvious; but he seems to have been of the opinion, and has so instructed the jury, that as the balance of the drafts was placed to the credit of Rees, no person but he can receive it; that this suit against the Bank, who are depositaries of the money, can only be sustained in his name. To this direction I totally dissent. This suit is properly brought in the name of the owner of the money; and to whom does it belong but to Frazier, who was the owner of the drafts? Rees was but an agent for a special purpose, and he acquires no property in the drafts or their proceeds as against his principal, and certainly he can acquire none through the medium of a fraud; and why it should be necessary to use the name of a fraudulent agent, who has no claim or pretence of claim to the money, I cannot imagine. It is a suit by the owner to recover money in the hands of a third person, who holds it, after notice, for his use. A merchant sends his clerk to deposit money in bank, and instead of depositing it in the name of his employer, he deposits it in his own name: would a payment to the clerk, after having notice of the fraud, protect the bank from the suit of the principal? Would it be necessary to bring suit in the name of the clerk? This will not be pretended; for to whom does the money belong? Surely not to the clerk, but to the principal; and as soon as the bank are informed of the fraud, they become stakeholders, and must pay the money to the person entitled to it.

Again: A merchant sends his clerk with a check to draw money out of bank for the ordinary purposes of his business. The clerk draws the money and deposits it in his own name. Of this, the bank in due time has notice. To whom are they bound to pay the money? to the fraudulent clerk or the owner? Can it be that by the fraudulent transfer of the funds to himself, he acquires such a property as that he only can receive it, and that it can be only received in his name? It is true that until the bank has notice, they may consider the agent as the owner of the funds; but when they are informed the money belongs to the principal, they are, as in justice they should be, placed in a different situation. They

[Frazier v. The Erie Bank.]

are stakeholders for the owner, and must at their peril pay it to him; and to protect themselves, they may require an indemnity. If, therefore, on another trial, the jury should believe that the drafts were transferred by Struthers to Frazier, that Rees was an agent for the collection, and that the bank had notice of it before payment, the suit is properly brought, and the plaintiff is entitled to receive the money which remains, after deducting the \$600 and the proceeds of the draft on Newton.

We also think that the court erred in the answer to the fifth point. Unless there was a special agreement to that effect, the defendants are not entitled to a credit for the difference between the par value of the draft on Newton, and relief State funds. The presumption is, that it was received as a payment for the amount expressed on the face of the draft, and no more. If it be otherwise, the special agreement must be proved by the Bank; the onus is thrown upon them.

Judgment reversed, and *venire de novo* awarded.

Cavett's Appeal.

It is essential to the probate of a will, to which the alleged testator did not sign his name but made his mark, that it should be proved by two witnesses that he was so infirm as to be unable to write his name: it is not sufficient that it should have been testified by one witness that he was unable to write, and by the two subscribing witnesses that he acknowledged the instrument to be his last will and testament after he had put his mark to it.

APPEAL from the decree of the Register's Court of *Westmoreland* county admitting to probate and granting letters testamentary upon a paper purporting to be the last will and testament of Robert McKean deceased. The will and the name Robert McKean signed to it were written by Benjamin Byerly, and the alleged testator made his mark at the name. Upon a hearing of the case before the Register's Court, Adam Ludwick and Benjamin Miller, who were the subscribing witnesses to the paper, testified as follows:

Adam Ludwick sworn.—This is my handwriting (the will was here exhibited to the witness). I did not see Mr McKean sign this will. When I went there Mr McKean was sitting in his arm-chair, near the table where the will was on; he told me he had been making some alterations in his will, and told me to sign it as a witness; before I signed it Benjamin Byerly asked him if he acknowledged that to be his last will and testament; he said yes,

[Cavett's Appeal.]

and requested me the second time to sign it; I signed it, and this is my name to that paper. His mark was to it when I signed it; that is the paper, it was as it is now, this paper was before him; I saw nothing the matter with his mind at the time I signed the will; I believe he was of sound mind at the time; he told Mr Byerly in my presence to destroy the former will.

Cross-examined.—I did not then retire, but stayed until after the other witness had signed it; he was not in at the time I signed it. The alleged testator did not take the paper in his hand. I do not recollect whether there were other papers on the table at the time; there might have been, part of the will was covered over. The paper remained in the same situation as when I came in; it lay on the table. The deceased was not more than 3 or 4 feet from the table; I cannot tell who wrote the will, I did not see it wrote. I did not see the old will. When Mr Miller came in I heard the old man say he had made some alterations, but whether he said *will*, I cannot say. Thomas McKean, a brother of deceased, requested me to come there that day; this paper was not read to him while I was there. I saw no writing except a few lines of the will itself, at the bottom of it.

Benjamin Miller sworn.—(Will exhibited)—This is my name; Mr Black came up for me: I went down with him; went into the room where the testator was, and bid him the time of day. He told me he was better than he had been, he had been unwell a day and a night before, and that he was much better. When I went in he said, "I took a notion to alter my will, and I have to bother my neighbours again;" the next was, we began talking about other matter, his health, &c. Mr Byerly said the will was ready for signing; I got up then, and asked the old man if it was his wish that these alterations were making, or made, he said it was; I then thought he would say something more. I paused; there was nothing said; then I went and signed it. Before that Mr Byerly said the evening was drawing to a close, and then I went and signed it. Mr McKean was probably six feet from the will when I signed it; Adam Ludwick's name was to the paper when I signed it. Any person could have seen the paper from Mr McKean's position; I can't say whether he saw it or not; there was no person betwixt me and him. I think there were other papers under it, one covered over it in part. Mr Byerly was a little bit from the table at the time he said the will was ready for signing. After I had signed it I had no consideration about the will; I had seen no change in the man at the time; I think he was of sound mind at the time. Mr McKean died in November 1841. He was blind of one eye; he told me himself he had lost one eye; he wore two pair of spectacles when he was reading—but whether his eyes were weak I cannot tell; this was before the date of the will he told me this; I am not able to say positively whether he had these spectacles on when I went into the room; it runs in my

[Cavett's Appeal.]

mind he had: I did not hear the will read to him; I did not hear him tell anybody to sign his name to the paper, or make his mark; the mark was on the paper when I first saw it, and his name written; I did not see any writing on the other papers that were on the table; Mr McKean was sitting with his side towards the table—there were a few lines at the lower end of the paper that were not covered.

Rev. Alexander M'Candless sworn.—I called frequently with Mr McKean between May and November 1841. I heard Mr McKean say he intended to leave very considerable to the Foreign Missionary board; it is all I heard him say on that subject; I heard him repeat it.

Dr Benjamin R. Marchand sworn.—Some two or three years before Mr McKean's death he complained to me of his eye-sight becoming defective; I examined his eyes and found him blind in one eye from the cataract; I had then some apprehension from the appearance of the other eye; but from that time till the time of his death, I heard no complaint about his eye-sight from him—he was always able to recognize me by sight when I visited him; he was hard of hearing; he required from me a loud and distinct tone of voice to be understood; persons whose voices he was familiar with he could hear with less exertion.

Cross-examined.—I was called on very frequently to visit him in relation to the complicated diseases with which he was afflicted; in the subsequent visits he never asked me to examine his eye-sight; I heard no complaint from him afterwards in regard to his eyes; I presume he could recognize any person at the distance of 8 or 10 feet, or half the distance of the room; generally when I visited him the room was dark, by the blinds being down; after being in the room a while, I could see distinctly; I don't know the reason why the room was kept dark; on some occasions I had to repeat very loud to make him understand me; his niece Agnes George, could get him to understand by speaking to him in a lower tone of voice.

Miss Agnes George sworn.—He was blind of one eye, and the other was very dim; it had been the case for a couple of years; he received a letter about two years before he died, and tried to read it to me, but could not do it; about the time, or before he made his will, the doctor had sent him directions with medicine, and I wished him to read it, he said he could not see; I said I would fetch him his spectacles, he said he could not see; he was so deaf that I could hardly get him to understand towards the last; his hearing at the time he made his will was as usual; sometimes he was worse than at others; when he would get cold.

Cross-examined.—I would not say whether the letter was well or badly written; I believe the blinds were down when the instructions came from the doctor; I have seen him with a book in his hand before and after he received the letter.

[Cavett's Appeal.]

The cause coming up upon this evidence, the Supreme Court appointed a commissioner to take further testimony upon the subject, who made a return of the following evidence :

Charles Harkless sworn.—I was acquainted with Robert McKean for fifteen years before he died; he could write. When I first knew him he wrote a plain hand; the last time I saw him writing anybody could read it; it was a will; saw him write his name to three wills. Can't exactly recollect the time; about six years ago; perhaps not so long ago as six years, since I saw him sign the last will. He was always a sensible man when I knew him. In his last sickness I thought he was not right at himself; he asked me why I had been so long away, that I had not been there for six months, although I had been to see him the week before. Mr McKean was near seventy years of age when he died. I expect he had suffered a good deal of sickness from the time I saw him sign the will until the time he died. He was about a year sick, as near as I can recollect, before he died. The first will I saw him sign he was in pretty good health; when I saw him sign the last he was weak and delicate. For two years after I saw him sign the last will that he signed in my presence he was healthy; for a year before he died he was sickly.

Benjamin Byerly sworn.—William Black came for me to write the will of Robert McKean. When I came to his house, Robert McKean stated to me that he wanted to make some alterations in his will. I did write it as he directed me. When he came to sign, he had been very unwell before, but had got better; he stated that he could not write his name, that his hand shook or trembled on account of his late sickness; he asked me if it would make any difference if he would sign it then (he was then at the table looking at the will) before the witnesses came in? I told him I thought not, if he would acknowledge it when the witnesses came in, acknowledge it to be his last will and testament. He then made his mark to it in my presence. I thought he could see unusually well that day; he recognized Robert Cavett forty or fifty yards off; he was looking at him through the window. I was present when the witnesses to the will came in; I understood him to acknowledge it in their presence and to ask them to sign it as witnesses; I did not pay particular attention to what was going on, not to all the conversation. He requested me to take the will home with me. I had a former will in my possession, which he directed me to destroy: I burnt the former will as directed; it was signed by himself.

Coulter, for appellant, cited 10 *Watts* 153; 5 *Whart.* 356; 6 *Serg. & Rawle* 489.

Foster, for appellee, cited 1 *Watts & Serg.* 396.

[Cavett's Appeal.]

The opinion of the Court was delivered by

GIBSON, C. J.—In the remarks which the commissioners to revise the civil code have appended to their second report, they say that where the party is unable to affix his proper signature to his will, by reason of infirmity or otherwise, it is provided in the statute, reported by them as it has been enacted, that it may be done by another person in his presence and by his express direction. It must be admitted that the statute makes no such provision in express terms; it requires that “every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction.” It will be perceived that if he be not thus prevented, he is left at liberty by the letter to sign it with his own hand or by the hand of another; the one being a substitute and an equivalent for the other at his election. That inability to sign with his own hand is not an *express* condition precedent to signing by the hand of another, is conclusively shown by transposing the clauses of the sentence, Every will shall be signed by the person making it, or by some person directed to do so in his presence, unless he be prevented by the extremity of his last sickness—from doing what? Affixing his proper signature or procuring some one to do it for him; and what ensues the happening of the contingency? Not a license to employ another, for it is a postulate and a branch of the contingency itself, that he is unable to do so; but the case is left to stand, as the commissioners very properly say, on the provisions of the Act of 1705; a conclusion not to be avoided but regretted, as nothing could be more distressing than the uncertainty in which the subject was involved by that statute. But it is very clear that they spoke not unadvisedly of the legal effect of the section before us in every aspect of it, when liberally interpreted, as every remedial statute ought to be; and the fact that they had not explicitly declared their whole intention in it, is one proof among a thousand of the inaptitude of language to express all the operations of the mind, even when used by the most skilful; and of the imperfect adaptation of legislative provisions to particular cases. Little would have been done to prevent forgery and fraud, had signing by an amanuensis been allowed to convenience or caprice, instead of necessity. In a question of forgery, the character of the handwriting must ever be a circumstance of the first importance; and it surely was not intended to dispense with it where it could be had. It might be impaired by tremor or infirmity; but even if it were destroyed, the uncertainty arising from it would be no greater than if the name had been written by the hand of another. The handwriting of the party himself, is certainly better evidence of authenticity than that of any one else; and it is not a supposable case that the legislature meant to subvert a wholesome principle of the law of evidence

[Cavett's Appeal.]

Then do the proofs before us show that the alleged testator was so infirm as to be unable to write his name? The subscribing witnesses testify that when they were called in, he was sitting near the table on which lay the paper with his name and mark to it; and that they subscribed their names to it in his presence and at his request. This is the substance of their testimony. His physician testified that his sight was dim, though he could readily distinguish his acquaintances; and his housekeeper testified that he had been unable to read a letter or the directions of his physician, though she had seen him reading books. Thus stood the evidence at the first argument, and it certainly falls short of proof of entire disability. The additional fact brought out by the evidence since taken by our direction, shows that defect of vision was not the difficulty. The scrivener testified that he could see unusually well at the time of signing, but complained that "he could not write his name; that his hand trembled or shook on account of his last sickness." The other witnesses say nothing about tremor, and it would be a measuring case, did the question of disability stand on common law evidence before a jury, instead of the evidence prescribed by a statute which requires the testimony of two witnesses to every part of the case. Here it stands on the credibility of the scrivener alone; and in that respect the proof is deficient. It is deficient also in the evidence necessary to show that the decedent's name was signed to the paper in his presence and by his express direction; and though that fact might possibly be inferred from the testimony of the scrivener, it rests also on the testimony of only one witness. But inferential proof of direction seems to be inadmissible, as the statute requires the direction to be express, and consequently to be affirmatively proved. Every part of the case must be distinctly made out to satisfy the jealous provisions of a statute which requires every fact that happens to be a link in the chain of evidence, to be doubly proved. The subscribing witnesses prove the decedent's subsequent acknowledgment of the paper as his will; but not that his name had been put to it in his presence and by his express direction; for which, according to *Dunlop v. Dunlop* (10 Watts 153), subsequent acknowledgment or adoption, is not an equivalent. In these respects, the proof falls decisively short of the sum required by the statute.

Decree reversed, and letters testamentary revoked.

Hay *against* Graham.

In an action on the case founded on a breach of promise of marriage, no legal inference in support of the action can arise from proof that the plaintiff was got with child by the defendant.

Quære: If in an action in case, the plaintiff declare in two counts for seduction and getting the plaintiff with child, and for a breach of promise of marriage, upon which the jury find a general verdict for the plaintiff, is it competent for the court to render a judgment upon the second count in the declaration alone?

ERROR to the District Court of *Allegheny* county.

Manate Graham against William Hay. This was an action on the case in which the plaintiff declared in two counts: first, for seducing the plaintiff and getting her with child; second, for a breach of promise of marriage: upon which the jury found a verdict for the plaintiff for \$950 damages.

The court below was of opinion that the first count in the declaration was bad, and rendered a judgment on the second count. The other points of the case appear sufficiently in the opinion of the Court.

Black, for plaintiff in error.

Judson, for defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—The declaration of the plaintiff contains two counts, the first for seducing and getting her with child, and the second for a breach of a promise of marriage alleged to have been made to her. The only plea put in by the defendant below, who is the plaintiff in error, was not guilty. On the trial of the cause, evidence was given showing that the plaintiff below had given birth to a child, and some slight evidence also tending to prove that the defendant had admitted the child to be his. This evidence, however, as was alleged on the part of the plaintiff, was not given in support of the first count, which it was said was abandoned, but given for the purpose, in connection with other circumstances, of proving a promise of marriage. And it does appear, from the charge of the court, that the jury were told the action was for a breach of promise of marriage, and that the law allowed no damages for seduction in such cases. It does not appear, however, by the record, that the count for seduction was withdrawn or abandoned; and the jury gave a general verdict for the plaintiff, assessing the damages at \$950. The court directed the verdict to be entered on the second count, and rendered judg-

[Hay v. Graham.]

ment thereon. Whether it was competent for the court to do this or not, it is unnecessary to consider and determine, as the judgment must be reversed upon another ground, and the cause remanded for a second trial, when the first count, which is certainly bad, may be withdrawn, and the cause tried on the second count alone.

The court on the trial admitted evidence of the plaintiff's having borne a child, and that when the witness, alluding to this child, said to the defendant below, "Mr Hay, we buried your child respectably and decently in our own lot," he said, "that was right." And then witness asked him, "Why don't you go up and see her?" (meaning the plaintiff below); to which he replied, "It's time enough till such time as she should get better; then he would go and make all things right." Afterwards the witness told him he "ought to go and see her, and comfort her, and not have her fretting so much about the matter;" when he replied, "there is no use in her fretting." And again, the court in charging the jury and commenting on this evidence, after stating the fair interpretation of it to be an admission that he was the father of the child, and her seducer, instructed the jury that the reasonable inference from it, if they believed it true, was, taking it in connection with the other facts of attention and courtship, that there had been a promise of marriage—that a mutual promise of this kind passed between the parties. The admission of this evidence, as also the charge of the court to the jury in regard to it, were excepted to by the counsel of the defendant below, and form the ground of complaint on the part of the plaintiff in error here. If the court were correct in their instruction to the jury, then the evidence was properly admitted, otherwise not. The correctness of the instruction given by the court to the jury, then, presents the question whether the evidence tended in any degree to prove a promise of marriage made by the defendant below to the plaintiff, or to prove facts, even when taken in connection with any other facts of which evidence was given, from which such a promise could be reasonably inferred to have been made. As to "the other facts," such as the court refer to in their instruction, "of attention and courtship," it is difficult to perceive that any evidence was given, going to show that the defendant paid her more attention than some other young men; and as to courtship, if there be any evidence of that, it pointed to a different person from the defendant, with whom it was testified that she said she had a correspondence in writing; and when asked by the witness if she was engaged to be married, she replied that he would think so if he were to see the letters. The witness, who had been paying attention to her for some seven months, was prevented by this information from continuing his visits any longer. If there was any courtship offered by the defendant below to the plaintiff, it must have been of a very cold character, to say the most of it, according to the

[Hay v. Graham.]

evidence ; for the brother of the plaintiff below, a witness for her, who lived with her in their father's family during the whole time, could not say that he saw the defendant visit his father's house, or his sister, the plaintiff, upon an average, more than once a month. Now, it is perfectly clear that no facts of attention and courtship, or of either, on the part of the defendant below to the plaintiff, appear to have been testified to, that could possibly be brought to the aid of the evidence objected to, in order to warrant the jury in finding a promise of marriage, or drawing an inference of the kind. And as to the evidence itself being sufficient to warrant such an inference or finding of the jury, that would be to imagine what does not happen or take place in one case out of twenty where bastard children are begotten and born. When the defendant below was asked by the brother-in-law of the plaintiff why he did not go up and see her, (not marry her), he replied, "It's time enough till such time as she should get better, then he would go and make things all right." That is, as the counsel for the plaintiff below would construe it, and as the court too seem to have considered it, that when she got better he would go and see her and *marry* her. Why such an interpretation can with any degree of fairness be put on all he said, I am at a loss to imagine ; for such a thing as his marrying her, or having ever promised to do so, had not been suggested or mentioned to him by any one, and in his reply he certainly does not speak of or name it. But it is said he must have meant that he would come and marry her, as that was the only thing he could do whereby he would make, as he said, "*things all right*." But his marrying her would not have made his begetting a bastard child with her, which was all that could be said to have been proved or admitted by him, all right either in a moral or legal point of view. Compensation, however, of some kind may have been meant ; and certainly the most usual and common kind of compensation made by the man charged with having begotten the child in such cases, is to pay to the mother of the child a sum of money at least sufficient to indemnify her for all the expenses attending her lying-in, the birth and support of the child. And this being the usual and ordinary mode of making *all right*, in such case as that which the evidence in some degree tended to prove against the defendant below, it would have been more rational, as well as natural, to have inferred that that was what he meant he would do. But, at all events, it was going too far to conclude from all he did say that he would marry her. In truth, I am inclined to consider all he did say as amounting to nothing on account of its uncertainty.

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

C *

Horbach *against* Knox.

It is not in the power of the Court of Common Pleas to permit an amendment after suit brought, by which the christian name of one of the plaintiffs should be changed.

ERROR to the District Court of *Allegheny* county.

This was an action of *assumpsit* by John Knox, James Boggs and John Knox, partners trading in the name of Knox, Boggs & Co., for the use of William Wilson and David Knox, their assignees, against Abraham Horbach.

Depositions were taken on behalf of the plaintiff to sustain his cause of action, by which it appeared that *James A. Knox*, instead of John Knox, was the member of the firm. The plaintiff's counsel, therefore, asked the court below to permit him to amend his pleadings by striking out John and inserting James A. The court permitted the amendment to be made, and at defendants' request sealed a bill of exception. This was the error assigned.

Dunlop, for plaintiff in error, cited 2 *Ld. Raym.* 771; 2 *Saund. Pl. & Ev.* 899; 2 *Arch. Pr.* 235; 8 *Serg. & Rawle* 53; 14 *Serg. & Rawle* 431; 5 *Watts* 373; 4 *Whart.* 344; 3 *Whart.* 419.

McCandless, for defendant in error, cited Act of 24th March 1818; 1 *Rawle* 149; 8 *Watts* 460; 16 *Serg. & Rawle* 108.

PER CURIAM.—We have been liberal in the allowance of amendments to excess, but we have not felt ourselves at liberty to go the length required. On the contrary, we refused such an amendment in *Wilson v. Wallace*, (8 *Serg. & Rawle* 53), a case of the same stamp. Perhaps courts ought to be clothed with an unlimited power to amend at discretion, to attain complete justice; but it cannot be assumed without the authority of a statute. We have no such statute for the case before us; for it was held in *Wilson v. Wallace* that the Act of the 28th of March 1818 embraces no more than suits by executors, administrators, trustees or assignees; and though the suit before us is marked for the use of certain persons, we know of no regularly constituted trust. The statute was meant to provide for cases in which the plaintiffs sue in a representative capacity; and perhaps no other parties were in view as assignees and trustees than those who represent insolvent debtors by an assignment for the benefit of creditors under the insolvent laws. The amendment, therefore, was improperly allowed.

Judgment reversed, and *venire de novo* awarded.

Chamberlain *against* M'Clurg.

A contract which is usurious cannot be confirmed so as to make it available to either party.

The settlement of an existing controversy being a good consideration for a contract, a party having a good defence to the payment of his obligation may release it upon an agreement of compromise, and if he do so, he will be thereby estopped from setting it up as a defence afterwards.

A party is not concluded, by his written agreement stipulating the terms and conditions of a loan, from showing by parol evidence that the contract was usurious.

ERROR to the District Court of *Allegheny* county.

William Chamberlain against Alexander M'Clurg. *Scire facias sur Mortgages*. Two suits tried together: the first upon a mortgage for \$15,000, the other for \$5000. These mortgages had their consideration in the following agreement between the parties:

Agreement made the 28th day of April 1837 between William Chamberlain and Alexander M'Clurg, as follows: Whereas the said William Chamberlain hath assigned to said Alexander M'Clurg William Fryer's bonds and mortgage for \$12,500, with interest; William G. Alexander's bond and mortgage for \$8666.67, with interest; a ground-rent of \$122.50 per annum; John L. Newbold's bond and mortgage for \$5000, with interest; Thomas Elmes's and others' bond and mortgage for \$5333, with interest; Hugh Tracy's bond and mortgage for \$2000, with John F. Bullick's judgment-note for \$2000, and William Ford's two notes for \$1054; for which bonds and mortgages and other securities, the said Alexander M'Clurg has assigned two bonds and mortgages of James Milliken of \$10,000 each, and given two mortgages on Pittsburgh property to said William Chamberlain, for the sum of \$20,000, the whole being a loan of \$40,000 for three years, with interest, and the said Alexander M'Clurg hath likewise given the said William Chamberlain his note of \$40,000 with James M'Clurg's endorsement for three years as a further security. Now the said William Chamberlain, in consideration of the premises, doth for himself, his executors, administrators and assigns, covenant and agree with said Alexander M'Clurg, his heirs and assigns, that in the event of the said Alexander M'Clurg not being able to collect the said notes at maturity, and after due diligence in their collection, then the said William Chamberlain or his representatives, shall and will renew said note of \$40,000 for two years, should the whole amount of mortgages not be collected, or rateably for such amount as should not be collected at maturity. It is further agreed between said parties that if the previous mortgages or

[Chamberlain v. M'Clurg.]

liens against the premises, upon which the said two mortgages of \$10,000 are secured, shall not be paid off within one year and six months from the date hereof, then, and in that case, (if the said William Chamberlain, his executors, administrators and assigns shall require the same), he, the said Alexander M'Clurg, his heirs and assigns, shall give to said William Chamberlain, his heirs and assigns, other and additional adequate securities on approved real estate.

It is further agreed between said parties that the said Alexander M'Clurg shall, at his expense, furnish all the necessary papers and vouchers for making the titles to the Pittsburgh properties and the mortgages thereon to said William Chamberlain satisfactory, together with the expenses of the other transfers and the cost of ample insurance on the Pittsburgh property, all of which, when completed, are to be handed to Samuel J. Curtis, and when so satisfactorily arranged, the assignments of said Fryer's mortgages and bonds, and William G. Alexander's mortgage and bond, shall be handed over to said Alexander M'Clurg or his representatives. The interest on all the mortgages shall be adjusted to May 1st next; and it is further agreed, that the said William Chamberlain or his representatives shall remove the liens of the said Pittsburgh mortgages, whenever requested by said Alexander M'Clurg, upon receiving other approved real security; and for the full performance of the agreements aforesaid, the said parties do hereby bind themselves and their respective representatives. Witness the hands and seals of said parties, the day and year first above written.

The note of \$40,000 given by Alexander M'Clurg to William Chamberlain, with James M'Clurg's endorsement for three years, mentioned in the aforesaid agreement, is given up, and a bond and warrant from Alexander and James M'Clurg to William Chamberlain for \$20,000 in three years; also three notes, one for \$5500, one other for \$5500, and the other for \$2500, all eighteen months from the first day of May 1837, placed in lieu thereof, judgment upon which bond is not to be entered unless the two mortgages on Pittsburgh property, mentioned in the aforesaid agreement, are not paid at maturity. William Chamberlain agrees that if Fryer's last bond for \$4166.67, and Browne, Robb & Company's note for \$5333, should not be paid within three years, he will deduct five per cent. from the amount of both, say \$9499.67, discount \$475.

WM. CHAMBERLAIN.

Witness—Samuel J. Curtis.

ALEX. M'CLURG.

Received May 6th 1837, of Mr Alexander M'Clurg, his six notes, all dated May 1st 1837, each for \$1341, one at 6 months, one at 12, one at 18 months, one at 2 years, one at 30 months, and one at 3 years; which notes, when paid, will be in full for interest on two mortgages on property corner of Arch and Broad

[Chamberlain v. M'Clurg.]

Streets, each for \$10,000, and certain mortgages on Pittsburgh property to be completed, for \$20,000, and a mortgage of James M'Clurg's house in Arch Street, for \$4700, making, in all, principal \$44,700, and the interest semi-annually \$1341.

W. M. CHAMBERLAIN.

How this agreement was executed appeared by the following account, in the handwriting of the plaintiff:

ALEXANDER M'CLURG, DR.

Fryer & Anderson's Note.....	\$24,192 24	
Interest to May 1st is 3 months.....	360 88	
Supplee's Mortgage	5,000 00	
Interest from February 9th to May 1st, 2 mos. 21 days ...	67 50	
Browne, Robb & Co.....	5,333 00	
3 mos. & 11 days Interest to May 1st.....	89 77	
Bullick.....	2,000 00	
Interest 6 mos. 4 days	61 33	
Wm. Ford, two Notes, each \$527, is.....	\$1,054 00	
Less Interest.....	40 39	1,013 61
		\$38,120 33
Morris Longstreth's Note	\$1,531 50	
Less Interest.....	25 25	1,506 25
Gill, Campbell & Co.'s Acceptance.....	\$185 06	
Less Interest.....	74	184 32
C. Robb, Note.....	\$255 54	
Less Interest	6 92	248 62
Joel Cook's Mortgage	\$2,500 00	
Interest due on 1st May.....	6 25	2,506 25
Balance due Alex. M'Clurg		12 33
		\$42,578 00

ALEXANDER M'CLURG, CR.

Two Mortgages	\$20,000	
Discount	2,235	
	\$17,765	
Pittsburgh Mortgages	20,000	
Int. on Mortgages up to May 1st, \$20,000..	113	Error
Mortgage on House in Arch Street	4,700	
	\$42,578	

It appeared in evidence on behalf of the defendant, that previously to the 27th January 1840, the defendant had failed to collect the mortgage and judgment of Tracy and Bullick for \$2000, in consequence of prior encumbrances; and this debt was lost; for William Chamberlain, the plaintiff, in reply to a communication of the defendant on that subject, said, "I did not guarantee the claim, I consider that I have no further interest in it." The parties subsequently entered into the following agreement:

This agreement, made this 9th day of March 1840, between William Chamberlain of the one part, James M'Clurg of the

[Chamberlain v. M'Clurg.]

second part, and Alexander M'Clurg of the third part, witnesseth, that for the settlement of all variances between the said parties, and for the consideration hereinafter mentioned, they have agreed and hereby do covenant and agree with each other as follows, to wit: The said William Chamberlain is to wait for the principal of the mortgages of said Alexander secured on property in Pittsburgh, for the amounts of \$15,000 and \$5000, together \$20,000, accompanied by the bonds and warrants of said James and Alexander, for three years from the first day of May next, when the same become due; *Provided*, that the interest thereon shall be paid in equal quarterly sums from said date, in the city of Philadelphia, and if not paid within thirty days after the end of any quarter, the principal to be considered due, and judgments on the warrants of attorney may forthwith be entered, otherwise not until the full expiration of said three years.

And as a further and collateral security for the payment of the said debts, the said James M'Clurg hereby assigns, transfers and sets over unto the said William Chamberlain \$5000 of the judgment of \$40,000 entered by said James against the said Alexander M'Clurg in Allegheny county, and to mark the same to said amount on the record to the use of said William Chamberlain. And the said James hereby covenants with the said William that he hath not heretofore made any assignment of the interest in said judgment hereby assigned, and if the same shall have been done, it shall authorize the said William to proceed for the recovery of the \$5000 mortgage held by him by virtue of the bond and warrant of attorney or otherwise.

And the said third and second parties hereby covenant to keep the property subject to said mortgages to William Chamberlain fully insured for the protection of said debts; and a failure to do so shall warrant a proceeding for a recovery of said mortgage debts.

And the said James and Alexander M'Clurg do hereby release and acquit the said William Chamberlain of and from all claims, demands, liabilities and offsets, for any cause whatsoever heretofore existing. In witness whereof the said parties have hereunto set their hands and seals

WM. CHAMBERLAIN,	[SEAL.]
JAMES M'CLURG,	[SEAL.]
ALEX. M'CLURG,	[SEAL.]

The defendants requested the court to charge the jury :

1. That if they believe that the transaction was intended as a loan of money, that the deduction of \$2235 by the plaintiff from the principal sum or from any portion thereof, and the taking of securities for the said principal sum of \$44,700, with interest thereon from the date of the transaction, constitutes an usurious transaction, and the said sum of \$2235 should be deducted from the plaintiff's claim as of the date of the transaction.

[Chamberlain v. M'Clurg.]

2. That if the jury believe that the transaction was a loan of money, so intended by the parties, and any of the securities, by means of which the said loan was intended to be effectuated by the plaintiff to the defendant, failed to be realized without any default of the defendant, but by reason of an original defect in the security itself, then the defendant is entitled to a deduction on the mortgage for the amount so failing to be realized and his expenses in attempting to collect the same, with interest as of the date of the transaction, and for the expenses as of their date.

3. That if the jury believe that the transaction was intended as a loan of money, and the defendant was necessarily put to any expense in collecting the money due on the securities, by which the said loan was intended to be effectuated, that the defendant is entitled to a deduction for the amount thus necessarily expended by him with interest.

4. That the agreement of 1840, or any acts or declarations of the defendant, cannot operate as a confirmation of the original usurious contract, or render the same valid, so far as relates to the aforesaid sum of \$2235, or any other various part.

5. That the said agreement of 1840 cannot operate as a waiver of any legal defence which the defendant then had to the claim of the plaintiff on the mortgages.

The court below instructed the jury in answer to the first point, that inasmuch as the transaction between the parties was partly in writing and partly in parol, it became a matter of fact for the determination of the jury, whether it was usurious or otherwise. If it were an exchange of securities of unequal value known and estimated by the parties in the execution of their agreement, it was a violation of no law and must be carried into effect. But if the parties sought in disguise and attempted to cover a loan of money under a pretence of sale or exchange of securities, then it was usurious and the jury should deduct the amount of the premium as set out in the statement.

In answer to the second point, the court said that the failure of the consideration to the amount of the mortgage and judgment of Bullick and Tracy, if due diligence had been used in its collection, was a good defence to that amount, but that the expense of collection was not available to the defendant as matter of defence.

The third point the court answered in the negative. The fourth and fifth points the court answered in the affirmative.

M'Candless and Biddle, for plaintiff in error, cited 2 *Call* 92; 4 *Hen. & Munf.* 490; 3 *Wend.* 62; 14 *Eng. Com. L.* 82; 1 *Dall.* 448; 14 *Serg. & Rawle* 291; 5 *Whart.* 446; 1 *Watts & Serg.* 153; 5 *Watts & Serg.* 436; 1 *Serg. & Rawle* 52; *Doug.* 631; 3 *Penn. Rep.* 451; 3 *Whart.* 599.

[Chamberlain v. M'Clurg.]

Lowry, for defendant in error, cited 3 *Watts & Serg.* 261, 266; 8 *Cow.* 398, 691; 4 *Serg. & Rawle* 487; *Com. on Usury* 165.

The opinion of the Court was delivered by

ROGERS, J.—Whether the contract was usurious is a question of fact that was properly referred to the jury under instruction from the court, to which no exception can with justice be taken. Considering, therefore, as we must do after the verdict of the jury, that the original agreement is usurious, it becomes necessary to examine the effect of the agreement of the 9th March 1840. The principal grounds of defence consist of two distinct items, viz: \$2235, the amount alleged to be usurious, and a bond and mortgage of Bullick and Tracy for \$2000, which formed part of the consideration of the mortgage on which the suit is brought. The defendant alleges he never received the money due on that mortgage, nor any part of it, although he used due diligence to recover it. To avoid error the points of defence must be kept separate and distinct.

As to the first, we think it very clear that the agreement cannot operate as a confirmation of the original contract so as to estop the defendant from availing himself of any defence he may have arising out of the statute against usury. The principle which applies to this part of the case is ruled in *Duncan v. M'Cullough, Adm. of Findley*, (4 *Serg. & Rawle* 486). When there has been actual and positive fraud, or the adverse party has acted *mala fide*, there can be no such thing as a confirmation; what was once a fraud will be always so. The reason is, that a contract infected with fraud is not merely voidable but void, and confirmation, without a new consideration, would be *nudum pactum*. So of usurious contracts, all the authorities concur that no subsequent confirmation will be available. Is, then, the agreement of the 9th April 1840 a simple confirmation of the original contract, or is it a new contract on new terms and conditions and upon a good and sufficient consideration? The point is not without difficulty; but I have come to the conclusion that it is nothing more (so far as respects the usurious consideration) than a confirmation of the original contract, with an extension of time for the payment of the money. The suit is on the first contract, no new security having been given or contract made. If a new bond and mortgage had been executed upon a new consideration, it would have presented a different aspect, unless it could have been shown that the transaction was a colourable shift to evade the statute against usury, devised when the money was originally lent and the bonds and mortgages given. There is nothing to prevent parties to an usurious contract from entering into a new agreement on a new consideration, if done under circumstances which negative the idea of imposition or undue advantage. If, therefore, on another trial, the jury should find that the contract is tainted with usury

[Chamberlain v. M'Clurg.]

nothing has been subsequently done which can avail the defendant.

And now for the second point. The Bullick and Tracy mortgage was part of the original consideration, it being one of the securities assigned by Chamberlain to M'Clurg. The defence (so far as respects this item) is simply a failure of consideration *pro tanto*. It is neither fraudulent nor usurious, and consequently it may be the subject of confirmation or of compromise, as cannot be doubted. From the evidence it would seem that Chamberlain, while he admitted that M'Clurg had used diligence in attempting to recover the amount due on the mortgage, denied he was to suffer the loss, inasmuch as he had not guaranteed the recovery of the money. On the latter point it would appear that the parties were at issue. In a letter, dated the 27th January 1840, from Chamberlain to M'Clurg, which appears to have been in answer to a letter from the latter to the former, he uses this language: "I have made inquiry about the Bullick and Tracy affair, and find that everything has been done that is possible in the business. As I did not guarantee the claim, I consider that I have no further interest in it." Not quite three months afterwards the last agreement is made, which purports to be as well for the settlement of all variances as for the consideration afterwards mentioned, viz: the extending of the time for the payment of the money lent by Chamberlain to M'Clurg. In the agreement, Alexander and James M'Clurg expressly release and acquit Chamberlain from all claims, demands, liabilities and offsets, for any cause whatsoever, heretofore existing. If, therefore, the Tracy mortgage was one of the differences in the contemplation of the parties, there is an end of this part of the defence, for the settlement of existing controversies is a good consideration of a new contract; and if the jury believe this to be the case, the defendant will be estopped from setting up a defence which otherwise might have availed him. There is nothing in the bills of exception, for a party is not concluded or estopped by an usurious deed or security from showing external circumstances which prove the contract to be corrupt. A contrary doctrine would be a virtual repeal of the statute against usury. A party is permitted to prove circumstances and conversations, before and after a written agreement, for the purpose of showing the transaction was usurious. And on the contrary, if the agreement appears *primâ facie* to be usurious, the party is not concluded from showing that the true agreement was that only legal interest should be paid.

Judgment reversed, and *venire de novo* awarded.

Elliott *against* Pearsoll.

A devise of land to A. "to be enjoyed during his life, and at his death to be enjoyed by his heirs, so on in tail for ever," creates an estate tail.

A sheriff's sale of the estate of a tenant in tail does not so divest him of the inheritance that he may not afterwards execute a deed, in pursuance of the Act of Assembly, for the purpose of barring the issue in tail.

ERROR to the Common Pleas of *Fayette* county.

Elizabeth Elliott and others, children of John Elliott deceased, against William Pearsoll and Isabella M'Cormick. This was an action of ejectment to recover a tract of 286 acres of land. The questions arose upon the following facts:

Edward Elliott by his last will and testament, dated 13th March 1811, and proved 22d September 1813, devised the tract of land in dispute as follows:

"I give, devise and bequeath unto my son, John Elliott, all the remainder of lands, to be by him enjoyed during his life, and at his death to be enjoyed by his heirs, so on in tail for ever; providing he shall nevertheless, pay unto my two grandsons, Edward Elliott and Thomas Elliott, the orphan sons of my son Felix Elliott, the sum of \$250, to be equally divided between the two when they shall arrive at the age of 21 years, or to the survivor of them, in case either of them should die."

John Elliott entered into possession of the land upon the death of his father.

The Union Bank of Pennsylvania obtained a judgment against John Elliott, upon which a *feri facias* was issued, the land in dispute levied, condemned, and on a writ of *venditioni exponas* sold by the sheriff to Dennis Springer for \$1500. The next spring after the sale John Elliott left the land, viz., in 1820, and Springer took possession under his deed from the sheriff, dated 6th December 1819. It was proved that Springer paid the grandsons of the testator, Edward and Thomas Elliott, their legacy of \$250 according to the will.

A deed was given in evidence from John Elliott (who was then married) to Dennis Springer, to bar the entail of this land, dated 11th September 1829, in consideration of \$50, which had been presented in the Court of Common Pleas, and ordered to be entered of record as sheriffs' deeds are, November 24th 1829. This deed was not signed by the wife of John Elliott, who is still living. John Elliott was not in possession of the land at the time of the acknowledgment of the deed to bar the entail, nor had he been in possession for nearly nine years preceding.

[Elliott v. Pearsoll.]

Dennis Springer and wife then conveyed the land, April 1st 1834, to James M. Wykoff, who conveyed to Eli Cope, from whom the land was conveyed through several persons until it was purchased by the present defendants, William Pearsoll and Isabella M'Cormick.

It was proved that John Elliott died 4th November 1841, and that the present plaintiffs were his children, living at the time of his decease; that Edward Elliott's widow, and Thomas Elliott, eldest son of Edward Elliott, the testator, were dead.

EWING (President) instructed the jury that John Elliott took an estate tail under the will of Edward Elliott, and that the estate was well barred by the deed executed for that purpose, and entered upon the records of that court.

Blacklege and Wells, for plaintiff in error, cited *Fearne on Rem.* 188; 1 *Co. Rep.* 88; 1 *Co. Lit.* 103; 2 *Burr.* 1106; 1 *Serg. & Rawle* 157; 1 *East* 268; 3 *Binn.* 162, 139; *Willes Rep.* 149; 2 *Watts & Serg.* 434.

Dawson and Howell, contra, cited 2 *Black. Rep.* 1229; 1 *Co. Rep.* 104; 2 *Black. Rep.* 698; 5 *Watts* 105; 5 *Rawle* 1-12; 2 *Bro. Ch.* 206; *Fearne on Rem.* 28; *Har. Law Tracts* 555; 1 *Black. Rep.* 672; *Doug.* 323; 4 *Maule & Selw.* 362; 1 *Burr* 38-51; 1 *P. Wms.* 605; 1 *Dall.* 47; 10 *Serg. & Rawle* 229; 1 *East* 229; 3 *Rawle* 59; 6 *Watts* 605.

The opinion of the Court was delivered by

GIBSON, C. J.—It is a postulate of the plaintiffs' case that their father, John Elliott, took no more than an estate for life by the will of their grandfather, David Elliott, and that they took in remainder as purchasers; but he took clearly a fee-tail. The land was devised "to be enjoyed by him during his life, and at his death to be enjoyed by his heirs, and so on in tail for ever." What heirs? Not his children merely, but such as should be capable of inheriting from him as issue, and consequently as heirs of his body. The deviser probably knew not the exact nature of a fee-tail, and consequently meant not to use the words "in tail" in their technical sense. If he meant to give them a technical effect, there is an end of the question; but he certainly intended that the estate should not go over to the general heirs till there should be a failure of the issue of the first devisee, else why attempt to make the estate inalienable in the hands of John's heirs, as well as in John's own? In *Robinson v. Robinson*, (1 *Burr.* 52), an express estate for life in the first taker was enlarged to an estate tail by implication, to give effect to such a general intent at the expense of particular and inconsistent intentions. There are many other instances of the enlargement of an estate for life by implication. This testator evidently meant that those who should take at the

[Elliott v. Pearsoll.]

death of John should inherit, else why did he designate them by the word heirs as not specially applicable to them in their father's lifetime? It is always a word of limitation where there is no particular circumstance or thing in the will to show that the testator used it as a word of purchase; and there is nothing of the sort here. He meant to give John a restricted estate of inheritance, in other words a fee-tail; and the question is whether it was barred by John's conveyance to the sheriff's vendee, acknowledged and recorded in court pursuant to the statute.

Tenant in tail is seised of an estate of inheritance which cannot be divested by any conveyance under the Statute of Uses, or by a sheriff's deed, which passes no more than he could legally convey himself. He may part with the enjoyment of the land during his life by a deed of bargain and sale, or the sheriff may sell it on an execution; still he continues to be seised of the inheritance; and it is he, not the purchaser, who transmits it to the issue claiming through him, *per formam doni*, at his death. Why then can he not do any act to bar it, after his immediate interest has been sold, which he could have done before it? A conveyance by sheriff's deed, which, unlike a feoffment, passes no more than the debtor could legally pass, works no discontinuance of the estate; and the tenant in tail, still being seised of the inheritance, may bar the issue either by a common recovery, as was done in *Sharp v. Pettit*, (4 Yeates 45), or as effectually by a deed acknowledged in court. The policy of the country requires lands to be subjected to payment of debts, and it is our duty to lean, where we can, towards giving it effect. But no leaning is necessary in the case before us. John Elliott, though deprived of the enjoyment of the estate, was still tenant in tail within the letter and meaning of the statute; and his conveyance pursuant to it had the force of a common recovery.

Judgment affirmed.

Bentz *against* Armstrong.

Where several persons unite in the purchase of a piece of ground, and divide the same into smaller lots, upon each of which a house is built, and then partition is made between them, each must so regulate and grade his own lot as that the water that falls or accumulates upon it shall not run upon the lot of his neighbour.

ERROR to the District Court of Allegheny county.

Robert Armstrong against William Bentz. John Wilkinson being the owner of a lot 50 feet in front on Quarry street, in Pitts-

[Bentz v. Armstrong.]

burgh, agreed that his two partners in the plastering business, Bentz and Crawford, should be equally interested with him, and he conveyed to them accordingly; after which they divided the same into two lots of fifteen feet each, one of sixteen feet, and an alley of four feet between them for the accommodation of all, and they built three houses upon them. Upon the dissolution of their partnership, each took one of the houses and lots. Upon the lot of Crawford a spring of water rose. Crawford sold to Armstrong, the plaintiff. The water from the spring and from the house and lot of Armstrong, in consequence of a natural descent in the ground, ran over the lot of Bentz, who at his own lot placed an impediment in its way, which stopped it, and it ran back into Armstrong's cellar; and for the injury done thereby, this action was brought.

Robinson, for plaintiff in error.

Lourey, for defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—The principal error in this case is an exception to the charge of the court upon a point on which it was thought the plaintiff's right to recover mainly depended. The plaintiff below claimed a right to turn the water which fell upon his lot from rain, as also that which arose from a spring on it, upon the adjoining lot of the defendant below. This claim of the plaintiff below was resisted by the defendant, who placed an obstruction on his own lot, so as to prevent the water running on it from the plaintiff's lot; but the consequence seems to have been that the obstruction caused the water to run down on the plaintiff's lot, so as to produce some inconvenience, at least, if not injury to him. For this cause he brought this action, and the court, in their charge to the jury, instructed them, in regard to this matter, that if they believed the facts testified to, the plaintiff had established his right to an easement; that is, a right to turn the water off his own lot upon that of the defendant, so as to get clear of it, and prevent his being incommoded by it in the occupation and enjoyment of his buildings. This was, in effect, deciding the cause in favour of the plaintiff below; for the only remaining fact upon which the plaintiff's right to recover rested, was that of the defendant's having obstructed and prevented the water from running over his own lot from that of the plaintiff's, which was not contested. Being desirous at all times to sustain the charge of the court to the jury, when it can be done fairly and truly, all the facts testified have been carefully examined and looked into with that view, and it does not appear to us that any facts have been testified to, going in the slightest degree to establish the plaintiff's right to an easement, such as he claims in this case. We therefore

[Bentz v. Armstrong.]

think that the court erred in their instruction to the jury on this point.

In the argument, something was said about the natural formation of the surface of the ground of the two lots, and that, according to it, the water as it fell in rain was naturally inclined to run off from the lot of the plaintiff on to that of the defendant below, and the latter was therefore bound to submit to it. This, however, I take to be a *non sequitur*; for in the purchase of lots of ground laid out and sold for the purpose of building up towns or cities thereon, it has ever been understood, and such has been the practice and usage too, that the natural formation of the surface will, and indeed must, necessarily undergo a change in the construction of the buildings and other improvements that are designed and intended to be made. In doing this, it would seem to be right that the common benefit and convenience of the respective owners of adjoining lots should be consulted and attended to; but certainly no one ought to be restrained from improving his lot in such a manner as to make it answer the purpose for which it was laid out, sold and purchased, if practicable without overreaching upon his neighbour's lot. He ought to be permitted to form and regulate the surface of it as he pleases, either by excavation or filling up, as may be requisite to the convenient enjoyment of it; taking care, however, not to produce any detriment or injury to his neighbour in the occupation or enjoyment of his adjoining lot. It is of great importance that the water upon each lot, arising from rain or other cause, should be conducted by the owner or occupier thereof, if he wishes to have it removed, directly from it to a sewer or other place appropriated for the receipt and discharge of the same, and not be turned or led on to an adjoining lot, without the consent of the owner; and it appears to me to be the duty of the owner of each lot, if he improves it, to do it in such way, if practicable, as to lead and conduct the water that happens to fall or be on it, off in the way just mentioned, without regard to the original formation of the surface of his lot. If the rear of his lot should be elevated so much above the front that he cannot conduct the water to the rear, so as to discharge it into a sewer or other appropriate place, then he ought to bring it to the front of his lot, where he must of necessity have some place to discharge it, without throwing it upon his neighbour's ground. This he ought to do, even if he should be compelled to carry it under or through his house or buildings. As to the exceptions to evidence, we cannot say that they ought to be sustained; for if what the witnesses were called to testify to occurred before the commencement of this suit, it is not denied that it would be admissible; but to render it inadmissible, it ought to appear distinctly that it occurred after the suit was commenced, which is not the case. Whether it occurred before or after was, therefore, a question to be referred

[Bentz v. Armstrong.]

to the jury, with a direction from the court, if they should be satisfied that what the witnesses testified they saw was before the commencement of the suit, then it was evidence for their consideration: otherwise, not. The judgment, however, must be reversed on the first ground mentioned, and a *venire facias de novo* awarded.

Foreman *against* Schricon.

To entitle a party to judgment by default under the Act of the 13th June 1836, he must have his declaration filed at the time prescribed by the Act.

ERROR to the District Court of *Allegheny* county.

This was an action of debt founded upon an insolvent bond, by Henry Schricon against Hugh Bean and George D. Foreman, brought to January term 1842, and the writ duly served upon the defendants. The defendants did not appear. On the 27th August 1842, the plaintiff's attorney filed a declaration and signed judgment for want of appearance, which the court below refused to set aside.

McClure and *McCandless*, for plaintiffs in error, cited Act of 13th June 1836, secs. 33, 34; 6 *Binn.* 88; 8 *Serg. & Rawle* 157.

Dunlop, contra, cited 6 *Serg. & Rawle* 554.

PER CURIAM.—A judgment like the present was sustained in *Morrison v. Wetherel*, (8 *Serg. & Rawle* 502), though it had been signed palpably in violation of the Act of 1724–5. The justification of that decision is to be found in the universality of the practice, and the great number of judgments that would have been overturned by disturbing it. The fact is, the statute had been effectively repealed by the indolence of the profession. But nearly the same provision has been repeated in the existing statute, and the Legislature certainly intended that it should be executed. To accomplish this, and prevent injustice from surprise, the declaration must be filed at the time presented. It is evident the defendant was surprised in this instance. He was not bound to appear without a declaration had been filed; and when none had been filed at the appointed time, he had reason to think he would not be required to appear. The plaintiff let the matter rest for eight months, then filed his declaration, and instantly signed judgment for want of an appearance. That was springing a mine on the defend-

[Foreman v. Schriccon.]

ant with a vengeance. Haply we have it in our power to prevent this practice for the future, without disturbing judgments signed under the former statute, by giving its legitimate force to the statute now in force.

Judgment reversed.

Whitesides *against* Russell.

If a steamboat on the Ohio river run upon a stone and knock a hole in her bottom, the carrier will not be discharged from liability by virtue of the clause in his bill of lading, "The dangers of the river only excepted:" but in order to relieve himself from responsibility it is incumbent on him to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable.

The privilege of transshipment reserved to a common-carrier in his bill of lading does not discharge him from any liability which is incident to his contract until the goods be delivered at the destined port.

An agreed case in the nature of a special verdict is to be considered as a special verdict found by a jury, and if it be defective in substance, the judgment rendered upon it will be reversed and a *venire de novo* awarded.

ERROR to the District Court of *Allegheny* county.

Samuel Russell against Whitesides and others, owners of the steamboat "Norfolk." This was an action on the case in which the plaintiff declared on the contract of the defendants to deliver for the plaintiff at Pittsburgh 7918 pounds of rice, and that they did not deliver the same; but the declaration did not, in any part of it, state the value of the rice. The second count was for \$1000, for money laid out, expended and paid by the plaintiff for the defendants, and concluded "to the damage of the plaintiff one thousand dollars, &c." The parties subsequently agreed to the following facts in the nature of a special verdict:

That twelve tierces of rice were shipped on the fourth of June 1840 for the plaintiff, at New Orleans, in Louisiana, by Lauve Brothers, a commercial house in said city, on board the steamboat Norfolk, owned by the defendants, to be delivered at Pittsburgh, with liberty of reshipping on good boats, agreeably to the terms and responsibilities of the following bill of lading of the said goods, viz:

"Shipped, in good order and well-conditioned, by Lauve Brothers, on board the steamboat called the Norfolk, whereof ——— is master, now lying in the port of New Orleans and bound for Pittsburgh—to say, twelve tierces of rice—7918 lbs.,—being marked and numbered as in the margin,—and are to be delivered in the like good order and condition, at the port of Pittsburgh

[Whitesides v. Russell.]

(the dangers of the river only excepted), unto Mr S. Russell, or to his assigns; he or they paying freight for the same, with the privilege of reshipping on good boats.

"In witness whereof, the master or clerk of the said boat hath affirmed to two bills of lading, all of this tenor and date, one of which being accomplished, the other to stand void.

"Dated in New Orleans the 4th day of June 1840.

(Signed)

C. S. M'Coy, Clerk "

Which twelve tierces of rice, weighing 7918 pounds, were re-shipped by the master of the Norfolk, at Cincinnati, on the 16th day of June, on board the steamboat Levi Welsh, and that said steamboat Levi Welsh was a good boat. That at Blannerhassett's island the said Levi Welsh, with said rice on board, struck a stone in the Ohio river and knocked a hole in her bottom, by which the said rice was damaged and lost.

If, on the above facts, the court should be of opinion that the defendants are responsible, they shall enter judgment in favour of the plaintiff, for the sum of ——. If the court should be of opinion that the defendants are not responsible, they will enter judgment for the defendants, with leave to either party to take a writ of error.

After argument, the court below rendered a "judgment for the plaintiff." The amount for which the judgment should have been entered not having been agreed upon by the parties, the plaintiff took out a writ of inquiry and had the damages assessed at \$419.65, for which he issued an execution, which on motion the court set aside, on the ground that the judgment was not interlocutory but final. The plaintiff then issued an execution on the judgment for \$1000, the amount of damages laid in the declaration, with direction to the sheriff to collect only \$419.65, the alleged value of the rice. This the court below refused to set aside, when this writ of error was sued out.

M'Clure and *M'Candless*, for plaintiff in error, on the subject of the liability of carriers, cited 8 *Serg. & Rawle* 533; 9 *Watts* 88; 4 *Whart.* 204; *Sto. on Bl.* 366 *pl.* 573; 7 *Cowen* 500; 3 *Taunt.* 164; 1 *Con. Rep.* 487; 11 *Eng. Com. L.* 244; 15 *Eng. Com. L.* 422. On the subject of the defectiveness of the case stated, cited 3 *Chit. Pr.* 678; 2 *Pain. & Duer. Pr.* 285; *Rob. Pr.* 374.

Dunlop, for defendant in error, on the first point, cited 5 *Watts* 424; 6 & 7 *Ohio Rep.* 143; 2 *Scammond Ill. Rep.* 288; 2 *Hill* 623; 5 *Rawle* 189; 25 *Wend.* 660; 7 *Yerger* 340; 6 *Martin* 680; 2 *Stark Ev.* 287; 4 *Yerger* 48; 3 *Munf.* 239. On the second point, cited 10 *Coke* 118; *Cro. Eliz.* 214; 2 *Arch. Pr.* 22; *Cro. Car.* 143; 4 *Watts* 413; 7 *Watts* 466; 1 *Sel. Pr.* 474; 2 *Wilson* 374; 2 *Whart.* 210; *Cowp.* 843; 1 *Arch. Pr.* 225; 1 *Watts* 374

[Whitesides v. Russell.]

The opinion of the Court was delivered by

ROGERS, J.—This was an action to recover the value of twelve tierces of rice, shipped at New Orleans on board the steamer Norfolk, then lying at New Orleans, bound for Pittsburgh. The defendants agreed to deliver the goods, in good order, at the port of Pittsburgh, (the dangers of the navigation excepted), reserving the privilege of reshipping the same in good boats. The rice was reshipped at Cincinnati on board the steamer Levi Welsh, which it is agreed was a good boat. At Blannerhassett's island the Levi Welsh struck upon a stone in the Ohio river and knocked a hole in her bottom, by which the rice was damaged and lost. The declaration contains two counts, one on the special agreement, in which the pleader omits to state the value of the rice; the other is a common count for one thousand dollars money laid out and expended for the defendants at their instance and request. The cause was submitted to the court on certain facts agreed upon by the counsel in the nature (as it is expressed) of a special verdict. After stating the facts they proceed to say: If, on the above facts, the court should be of opinion that the defendants are responsible, they shall enter judgment in favour of the plaintiff for the sum of ——. If the court should be of opinion that the defendants are not responsible, they will enter judgment for the defendants, with leave to either party to take out a writ of error. After argument, the court entered judgment for the plaintiff generally; this was a judgment for no certain sum or amount, as no sum is ascertained and inserted in the case stated. On the judgment so entered, a writ of inquiry was awarded, and the inquest assessed the damages at \$419.65; but, on motion of the defendants, the writ was set aside.

Why the court made the rule absolute does not appear, but Judge Grier supposes it was set aside because it was thought to be a final and not an interlocutory judgment. That the judgment was not interlocutory admits not of doubt, and the only difficulty is, whether it is either final or interlocutory, or, in other words, whether the case is not so defectively stated as that the court could not render a judgment, there being nothing in the case to render judgment upon. The inquiry, which lies at the root of the case, I take to be this. Is the case so stated as that a valid judgment can be entered upon it? And this question will depend upon whether an agreed case, in the nature of a special verdict, is to be assimilated to a special verdict, or is it to be governed by the rules applicable to demurrers to evidence, judgments by default, *nil dicit*, or by confession? That it is to be likened to the former, and not the latter, appears to be plain, as well on authority as the reason of the thing. When the facts are agreed upon, as in the nature of a special verdict, something more is intended than to enable the parties to take a writ of error, as has been erroneously supposed. The parties agree that the facts shall be considered as

[Whitesides v. Russell.]

if found by special verdict. A case stated is a substitute for a special verdict, adopted for convenience to save the labour and expense of finding the same facts by the jury in the form of a special verdict. It is, therefore, but a reasonable construction of the agreement that it shall be attended with the same effects, and liable to the same incidents. This is the obvious and plain import of the word. And this is supported by authority, for that the same particularity is required in an agreed case as in a special verdict, appears from several adjudged cases. Thus, if the case stated or referred to in the verdict of the jury be too imperfect for the court to determine the question of law arising upon it, the same course will be pursued as upon a special verdict which is defective; that is to say, the verdict will be set aside and a *venire de novo* awarded. *Pegran v. Isabell*, 1 *Hen. & Mun.* 388. And in *Brewer and wife v. Opie*, 1 *Call.* 212, it is said: As the jury may find, so the parties may agree to all the facts belonging to the case, and refer to the court the law arising therefrom. Such a case agreed should be as full and certain as a special verdict. If the case agreed be too uncertain for a judgment to be given thereon it will be set aside and further proceedings directed. So in *Jones v. M'Williams*, 6 *Munf.* 301, it is ruled that when a verdict has been found subject to the opinion of the court, or a case agreed is defective, having omitted some important fact, a *venire de novo* is awarded. In *Robinson's Practice* 374, it is stated, and in this we entirely concur, that whether there be a special verdict subject to the opinion of the court on specific points, or a case agreed by the parties, the jury should always find, or the parties should agree, for what the judgment shall be rendered in case the law be determined to be in favour of the plaintiff. Sometimes, it is true, according to our loose practice, for a supposed convenience the case stated contains a stipulation that the amount shall afterwards be ascertained by the parties; but such an agreement cannot be inferred when the clause is omitted. When the parties neglect to ascertain the sum for which judgment is to be rendered in the event of an opinion favourable to the plaintiff, it is the duty of the court peremptorily to refuse to proceed to the argument until the case stated is perfected; and where the parties refuse to amend, as they may, to award a *venire de novo*. A little attention in this particular, as in many other cases which have come under the notice of the court, would have avoided great perplexity and no inconsiderable delay. If, then, a case stated, or a case stated in the nature of a special verdict, is governed by the same rules as a special verdict, the point is ruled in *Miller v. Hare*, 2 *Rawle* 52, where it is decided that where a jury omitted to assess the amount, even in an action of debt, it was a mistrial. A verdict in debt finding no specific sum is void. Mr Justice HUSKINSON observes: It is useless to talk about judgments for default of a plea, or by *nil dicu*, &c. There a writ of inquiry will ascer-

[Whitesides v. Russell.]

tain the sum, or it may be done by the officers of the court; but who ever heard of a writ of inquiry of damages, or the sum being ordered to be ascertained by a prothonotary, after a jury being sworn at the bar, trying the cause and giving a general verdict? And the same, with equal truth, may be said of an agreed case, or a case stated in the nature of a special verdict. But for what amount is the judgment to be given, and by whom is it to be ascertained? The plaintiff cannot have a writ of inquiry, for it is a final and not an interlocutory judgment, nor are there any data on which a calculation can be made by the officers of the court. It would be manifestly unjust to give judgment for nominal damages, and equally so for the amount laid in the declaration; for although there are two counts, and one a money count, yet we cannot shut our eyes to the fact that the value of the goods lost is the *gravamen* of this action. If the value of the rice had been stated, or appeared in any way on the record, as unfortunately it did not, then the case in 2 *Serg. & Rawle* 152 might perhaps be an authority for the course pursued here. In that case it is said that when judgments are confessed, if the plaintiff's demand is in the nature of a debt, which may be *ascertained by calculation* whether it arise on a note or other writing, or on an account, it is sufficient to enter the judgment generally. The judgment is supposed to be for the amount laid in the declaration, and the execution issues accordingly. But how widely different is that case from this! Here there is neither note or other writing, nor an account; nothing certain on which a calculation can be made, independently of the finding of the inquest, to which resort cannot, without danger of injustice, be had, as that proceeding was unauthorized and *ex parte*.

The case stated raises two points on which, as the cause goes back for another trial, (to avoid trouble), we think proper to express an opinion. We concur with Judge SHALER on both points, and for the reasons given by him. The privilege of reshipment reserved in the bill of lading, is intended for the benefit of the carrier, but was not designed to limit his responsibility; he continues liable, notwithstanding this clause, by the express terms of the contract to deliver the goods safe and in good order at Pittsburgh; but he is at liberty to do this either in his own boat or in any other good boat which the carrier may select. This point has been ruled the same way in two of our sister States, Ohio and Illinois, 6 & 7 *Ohio Rep.* 143; *M'Gregor v. Kilgore*, 2 *Scammond* 288. A stipulation in a bill of lading that the shipper, in case of low water, may reship in other craft, does not vary his obligation to deliver safely. Such stipulation is for his benefit, and continues his liability if resorted to. It was but a privilege, say the court, to the carrier on the executing of his contract to convey and deliver, inserted for his own benefit, to secure him the advantage of as great a portion of the freight as he could earn and to throw upon

[Whitesides v. Russell.]

the owner any increase of expense. The relation of carrier continues from the shipment of the goods until the arrival at the destined point of delivery.

We agree with the judge as to the first point. The carrier claims the benefit of an exemption arising from the loss being occasioned by a peril of the navigation, and surely it is incumbent on him to bring himself within the terms of it. It is not unreasonable to require him to prove the loss and manner of it, and further, that the usual care and diligence had been used to avoid it. This is peculiarly within his knowledge and in the knowledge of those who are in his employment and under his control. And this is the principle which may be collected from 1 *Con. Rep.* 189; 11 *Wend.* 25; 5 *Rawle* 189; 6 *Watts & Serg.* 408.

In the last case it is decided that where, on the facts presented, the defendant is liable for a loss occasioned by his negligence as a factor, the *onus* of proving what the actual loss was lies upon him and not on his principal, and in the absence of such proof the full value of the goods, or at least of the money produced by the sale, is the measure of damages.

Judgment reversed, and *procedendo* awarded.

Chadwick *against* Moore.

A local statute which suspends, for a reasonable time, execution of a judgment on a previous contract, is not prohibited by the tenth section of the first article in the constitution of the United States.

Therefore the statute enacted by the Legislature of Pennsylvania in 1842, and suspending for a year a sale on execution for less than two-thirds of the appraised value, is not unconstitutional in respect of its retrospective operation.

ERROR to the District Court of *Allegheny* county.

In April 1844, William Moore obtained a judgment against James Chadwick on a *scire facias* to have execution of premises mortgaged in July 1838, and sued out a *levari facias* to July term 1844, on which the sheriff sold for less than two-thirds of the appraised value. The statute of 1842 directs that lands taken in execution shall be valued by an inquest, and that "when the same cannot be sold at public vendue or outcry for two-thirds or more of such valuation or appraisement, the sheriff shall not make sale of the premises, but shall make return accordingly to the court from which the execution issued, and thereupon all proceedings shall be stayed for a year from the return day." The question which arose out of these facts on a case stated was, whether this

[Chadwick v. Moore.]

statute is prohibited by the constitution of the United States, so far as regards retrospective operation; and it was argued in this court, on a writ of error to the District Court in which the statute had been adjudged unconstitutional, by

Eyster and Kline, for plaintiff in error. Cited, 1 *Howard's R.* 320; 2 *Howard's R.* 312.

Mellon, for defendant in error.

The opinion of the Court was delivered by

GIBSON, C. J.—In this instance we are to take the law of the case from the Supreme Court of the United States, the constitutional expositor of federal legislation, whether ordinary or fundamental; and haply the reports of its decisions furnish us with principles which go far to rule the point in contest. We are to determine whether our Act of 1842, which prohibits for a time sheriffs' sales of property for less than two-thirds of the appraised value, impinges on the tenth section of the first article in the federal constitution, so far as it modifies the remedy to enforce contracts which existed when it was enacted. The statute of Illinois, which was the subject of discussion in *M'Cracken v. Hayward*, (2 *Howard's R.* 608), differed from it in the cardinal feature that its prohibition of execution was perpetual; and if such were the provision before us, we would not hesitate to pronounce it void. Its duration, however, is limited. The Act directs land taken in execution to be appraised, and it ordains that if it be not bid to two-thirds of the appraised value, the execution shall be stayed for a year, at the expiration of which the creditor may proceed with it as if it had not been suspended. The statute of Illinois had no such limitation. Its denial of execution was perpetual, except on terms not originally contemplated; and it not merely impeded the remedy, but changed the conditions of the right. The statute of Pennsylvania suspends the remedy only; still, it may be asked, if it can constitutionally do so for a year, why not for a thousand years, or any other period, amounting in effect to perpetuity? It has been shown by Chief Justice TANEY, in *Bronson v. Kinsie*, (1 *Howard's R.* 317), that the remedy is parcel of the right, and that the obligation of a contract may not be impaired by acting on the remedy more than it may by acting directly on the contract itself. He adopted, at the same time, the language of Mr Justice STORY in *Green v. Biddle*, (8 *Wheat.* 17), affirming that acts of State legislation, which, while professing to regulate the remedy, and not to modify the right, "so change the nature and extent of existing remedies as *materially* to impair the rights and interests of the owner, are as much a violation of the compact as if they directly overturned his rights and interests." It would be impossible to find a rule precisely adapted to every case, and

[Chadwick v. Moore.]

the Chief Justice illustrated his principle by examples which show that he held no more than the essentials of the contract to be inviolable. He admitted that to exempt articles of the first necessity from execution, or to accelerate the bar of the Statute of Limitations, is not to modify the remedy so as to impair the obligation of the contract. Yet, as such modifications cramp the creditor's freedom of action, and decrease the fund from which he is to obtain satisfaction, they act on the contract to at least an inconsiderable extent. He seems to put the question on the degree of their action, though Mr Justice STORY had said in *Green v. Biddle* that some strong cases put by him for purposes of illustration, differed from the one before him only in the degree; whence it might be inferred that he went for the absolute integrity of the constitutional principle. So far as I am at liberty to choose, I prefer the doctrine of the Chief Justice as better suited to a federative system like ours, whose complexity is such that the bodies which revolve in it would not perform their functions if they were straitened in their orbits. If regulation of the remedy were prohibited whenever it might affect the fruition of the right in any imaginable degree, much wholesome legislation would be shut out, and even the instances put by the Chief Justice would not be licensed. But perhaps there is no real discrepance in the opinions of the Judges. In *Jackson v. Lamphire*, (3 Peters's R. 290), Mr Justice BALDWIN, speaking for the whole court, said that it is within the undoubted power of State Legislatures to pass recording Acts by which a grant in existence at the time of the enactment may be postponed, or Acts of Limitations restrictive of the remedy. "Reasons of sound policy," he said, "had led to the adoption of general laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on these subjects may be so unreasonable as to amount to a denial of right, and call for the interposition of the court; but the present is not one." This doctrine, pregnant with good sense, is the only one which will enable the State and federal governments to perform their functions without collision; yet a recording Act which postpones a conveyance in default of performance of a superadded condition, impairs the obligation of the contract as much as does a law to stay for a time the execution of it. But, taking the principle as we are able to collect it, rather from dicta of the judges than from points decided by them, we are to decide whether the temporary restraint of a remedy necessarily impairs the right in an unreasonable degree. I lay out of the case those considerations arising from the form of the security, which seem to have weighed with the court in *Bron-*

[Chadwick v. Moore.]

son v. Kinsie. Did the statute cut the mortgagee off from recovering on his legal title in ejectment, it would doubtless be unconstitutional in that particular aspect; but proceeding by *scire facias* to recover his debt by execution of the land, he stands as would any other judgment creditor. Though unlimited in its duration, this statute was evidently produced by the emergency which arose from collapse of the credit system; and taking from it the right to sell for two-thirds the value, reserved for the benefit of the creditor, it becomes an unconditional law to suspend the enforcement of the contract for a year. Is such an exercise of the sound discretion spoken of, so unreasonable as materially to impair the remedy, and amount to a denial of the right? To hold that a State Legislature is incompetent to relieve the public from the pressure of sudden distress by arresting a general sacrifice of property by the machinery of the law, would invalidate many statutes whose constitutionality has hitherto been unsuspected. An indefinite prohibition of execution in default of compliance with new and arbitrary terms, would be a denial of the remedy contemplated in the contract, not a regulation of it; but there are laws for a temporary suspension which have not been thought so. Such is our statute to stay for three weeks execution of a judgment on demurrer, special verdict or case stated, in order to give the unsuccessful party a *supersedeas* by writ of error. True it is that a statute which gives time for something to be done in respect to the determination of the right, is more decisively superior to exception than one which gives time for the sake of procrastination merely; but we have stay laws enacted in 1836, and operating in actions on contract for periods graduated to the amount of the debt, whose validity has not been contested; and they certainly modify the remedy no further than does a statute of limitations which contingently cuts off all remedy whatever, or one which narrows the creditor's recourse to the debtor's property. I believe, too, that laws imposing military service on apprentices, or dissolving the contract of marriage for causes not declared at the time of its solemnization, have not been resisted; and practical cotemporaneous usage goes far to settle a question of construction. Suspensions of execution for a reasonable time have not been unfrequent in some of our sister States, and creditors have submitted to them as regulations depending, in the language of Mr Justice BALDWIN, "on the sound discretion of the Legislature, according to the emergency which led to their enactment." I have found no trace of a question raised on their validity in the reported decisions of the tribunal of the last resort. On the whole, therefore, the Act before us appears not to be so unreasonable as to call for judicial interposition. Yet the case is by no means a clear one; and as the decision of it involves the validity of other Acts of the same stamp, it is worthy of being brought before the Supreme Court of the nation. To put the case in train for that, it would be ne-

[Chadwick v. Moore.]

cessary for us to sustain the statute at all events; for the appellate jurisdiction of that court extends no further than to cases in which the judgment is in favour of the legislation or authority to which the federal constitution, or an Act of Congress, is supposed to be repugnant; in other words, it extends no further than is necessary to maintain the supremacy of federal legislation. As an erroneous judgment adverse to the authority of the State Legislature would be irremediable, we have deemed it our duty, in cases of difficulty or doubt, to put the judgment in such a shape as would make it the subject of a writ of error. In this instance, however, the judgment falls in with the current of our opinion; and if it is erroneous, it will give us pleasure to have it corrected by the constitutional guardian of federal authority.

Judgment reversed, and rule absolute.

Butler *against* Morgan.

After a petition has been presented for the benefit of the Bankrupt Law, and before the applicant has been declared a bankrupt, his goods found upon demised premises may be distrained and sold by his landlord for the payment of his rent.

ERROR to the District Court of *Allegheny* county.

Abiah Butler against John Morgan and John N. Johnston. This was an action of replevin for certain property described in the writ. The defendant Johnston made cognizance under the defendant Morgan, who avowed for rent in arrear; and the plaintiff replied, no rent in arrear. On the trial, it was admitted the plaintiff was tenant to the defendant Morgan of certain premises in Findley township, and that two years' rent, amounting to \$170, remained due and unpaid since the 1st of April 1842; that the defendant Morgan issued his landlord's warrant, by virtue of which the property in dispute was distrained on the 6th of February 1843 on the demised premises, and removed by the defendants. On the 13th February this replevin issued, and the property was delivered to the plaintiff.

The plaintiff gave in evidence, that on the 25th of January 1843 he made application for the benefit of the Bankrupt Act; that on the 27th of February 1843 he was declared a bankrupt, and Samuel W. Black, Esq., appointed his assignee; that on the 20th of July 1843 the plaintiff was discharged as a bankrupt; and that on the 26th of April 1843, Samuel W. Black, the assignee, gave a certificate of allowance to the plaintiff, by which he was allowed to

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[*Butler v. Morgan.*]

retain all the property returned, being the same included in the writ of replevin.

GRIER (President) was of opinion that the plaintiff was not entitled to recover, and directed a judgment for the defendants.

M'Clure and *M'Candless* for plaintiff in error.

Metcalf, for defendant in error, cited 34 *Law Lib.* 235; 1 *Atk.* 103; 2 *Term Rep.* 600.

The opinion of the court was delivered by

KENNEDY, J.—The only question presented for consideration in this case is whether a landlord could, during the operation of the late Bankrupt Act of Congress, distrain on the goods of his tenant found on the leased premises, for rent due and in arrear, after the latter had petitioned for the benefit of the Bankrupt Act, and before he had been declared a bankrupt. Now, it is a general rule of the common law that all goods found upon the premises demised to a tenant are held liable to be distrained by his landlord for rent, whether such goods belong to the tenant or to other persons. *Com. Dig. tit. Distress, b. 1*; *Bradley on Distr.* 106. And if the Bankrupt Act made no change in the law in this respect, it is clear that the landlord, in this case, had a right to distrain as he did. But the Bankrupt Act is silent on the subject of rent being due and in arrear by the bankrupt, and does not contain a single word in relation thereto; so that the landlord's remedy by distress for rent due to him remains as it was at the common law, whereby he is entitled in general to distrain upon all goods found upon the premises demised, whether they belong to the bankrupt tenant or not. And he may distrain for the whole rent due, whatever its amount may be, even after the tenant has been declared a bankrupt, or after an assignment made of the goods, though in the possession of the assignees, if they still continue on the demised premises; for the assignment only changes the property in the goods, which does not in the least exempt them from distress for the rent due as long as they remain on the leased premises; and unless removed, they may be distrained even after a sale made of them by the assignees. *Cullen B. L.* 123-4; *Cooke's D.* 213-21; *Bradley on Distr.* 121-2; 1 *Atk.* 103. The issuing of the commission and the messenger's taking possession of the goods, according to the course pursued in England, has never been considered such a *custodia legis* as to preclude a distress of the goods by the landlord for rent due. In regard to his remedy by distress, he is considered as standing upon higher ground, and entitled to more favour in law, than a common creditor. *Woodfall's Landl. and Ten.* 365; 1 *Atk.* 105. And hence the right of distress is given to him over and above the other remedies which he has in common with ordinary creditors, and is rather regarded as a remedy upon the land than on the

[Butler v. Morgan.]

person of the tenant; and the right thereto was ever held unaffected by all the original bankrupt laws passed in England. *Buckley v. Taylor*, (2 T. R. 600); *Bradley on Distr.* 122. But if the landlord distrain and the tenant replevy the goods, and they are sold afterwards by the assignees, the landlord cannot, upon his recovery of a judgment for a return, retake the goods in the hands of the vendee, for he has no lien on them, and his only remedy, therefore, is on the replevin bond. *Cooke* 218-20; *Bradley on Distr.* 122-3. It has, however, been argued that the rent for which the distress was made in this case became extinct, if not satisfied, by the operation of the Bankrupt Act, and therefore the right to distrain could not exist. But this argument does not appear to be sustained by either the terms of the Act, or any meaning that can be fairly drawn from it. The debts of a bankrupt, though he obtain his discharge under the bankrupt laws of England, have never been regarded as thereby absolutely paid or extinguished; or otherwise it would seem to be difficult, if not impossible, to hold, as has ever been the case, that a subsequent promise made by the bankrupt to pay them, would be valid and binding. *Cowp.* 290.

Judgment affirmed.

Williams *against* Landman.

Upon a parol sale of land which is in the actual possession of a tenant under a parol lease, and the agreement of the vendor that the rent should be paid to the vendee and the attornment of the tenant to him; this is such a delivery of possession to the vendee as, with proof of the payment of the purchase money, will enable him to maintain ejectment upon his title.

ERROR to the Common Pleas of *Fayette* county.

This was an action of ejectment by William Williams against William Shipley and Adam Landman for a tract of land in Henry Clay township, containing 61 acres. The whole case and points put to the court are so fully stated in the opinion of this court that no other statement is deemed necessary.

Deford, for the plaintiff in error.

Veech, for the defendant in error.

The opinion of the Court was delivered by

HUSTON, J.—Both parties admitted that the title to the land in question had been in Christian Landman. The defendant, Adam Landman, was his son. The plaintiff, Williams, a son-in-law

[Williams v. Landman.]

claimed under a contract with old Mr Landman, an old German clergyman, who had become too old to preach; he had a tract of land on or among the ridges of the Allegheny mountain, claimed by settlement without any office or paper title.

The facts were as follows: The old gentleman had made a written contract with another son-in-law named Chitister, by which he had agreed to convey his title to the land to Chitister, who was to support him and his wife during their lives and bury them. The old people went to Chitister's, but in no long time became dissatisfied, and according to Chitister's statement he and his wife were also dissatisfied. The old gentleman went to Williams and proposed the same terms to him, to which he agreed, and went with him to Chitister's and sent a wagon to remove the goods; when there Chitister refused to give up his contract or to let the goods go until he was satisfied for some moneys he had expended and was paid for the boarding. All this was settled, and Williams gave his note for the amount of the claim, \$100; and Chitister agreed that the articles of agreement should be taken up from Mitchel, who held them, and cancelled. Chitister had a tenant on the land, and he agreed that the rent should be paid to Williams; and he told the tenant to pay to Williams; that he, Chitister, was now done with it. The contract with Williams was fully proved. The agreement left with Mitchel was agreed to have been given up, and it was proved and admitted by Chitister that he had been paid the \$100, by assignment of a note or notes on another man, which he had collected. Three witnesses examined on a commission to Ohio, swore that old Mr Landman had given possession to Williams; but neither stated the time exactly; and three or four examined in court swore that old Mr Landman said he had given the land to Williams and had given him possession, and that Williams was to support him and his wife during life and bury them decently. The removal was the last of March or beginning of April, and the old gentleman died the next harvest or soon after, and his widow the following year. I may venture to conjecture that this occasioned all the dispute; if the old people, or one of them, had lived 7 or 10 years, there would have been no doubt.

So far there was perhaps no dispute as to facts; but some discrepancy as to this. Gilmore, the tenant, swore that it was agreed between Williams and him that the tenant was to omit putting in any winter grain, so as to leave the whole land open for cultivation next spring, and for his doing so Williams was to abate \$20 of the rent; but other persons said Williams gave the tenant \$20 to give him possession. If the tenant was honest, he certainly knew best what was the bargain. After the old man's death, Chitister went to warn the son, and he at the next Orphans' Court petitioned for a partition or valuation of the whole trust. The

[Williams v. Landman.]

inquest divided the tract, and immediately on the return of the inquisition, Adam elected to take 61 acres (the part now in dispute) as his share. Williams had appeared before the sheriff and inquest and protested against their proceedings, as he asserted the whole tract was his, and not Christian Landman's at his death. No further proceedings were had in the Orphans' Court. Immediately after this, Adam Landman brought an ejectment against Williams and his tenant; the suit was tried in 1834, and decided in favour of Williams, who then moved on to the land, cleared up some 20 or 30 acres, and erected valuable buildings, (but not on the 61 acres claimed by Adam). In 1839, Adam again brought an ejectment, which was tried in 1842, and verdict and judgment in his favour; as soon as he entered, Williams brought this suit in 1842.

Chitister had been examined as a witness at a former trial, and the notes of his testimony, proved by the counsel who took the notes, were offered in evidence and objected to because the witness was still alive in Virginia, only a few miles from the place of trial. The court overruled the objection. Where a witness is out of the State and beyond the jurisdiction of the court, his deposition or notes of his testimony are to be read as if he were dead. How Chitister could be a witness is not easily seen. Adam brought his case before the Orphans' Court on the idea that his father had never sold to Williams; and stating that Adam and Mrs Williams and Mrs Chitister were his children and heirs. Williams defends as a purchaser, and Chitister and wife are as much interested as Williams or Adam. Our paper book does not show anything of it, but the counsel of Adam said Chitister had released. For more than 20 years after *Steele v. Phoenix Insurance Co.*, a party in interest, or even on the record, releasing, was admitted as a witness. This was to throw light on the transaction. The late chief justice more than once regretted the adoption of this practice; and at length every judge on this bench, and I believe in the State, and all respectable lawyers, jurors and laymen, became satisfied that it produced most palpable injustice. An honest and honourable man would not do it; no defendant could become a witness, and defendants were at the mercy of plaintiffs according to their want of honour or honesty. I do not know what form of release he gave; if there is any right in any one but Williams, it is in Chitister's wife, and he cannot release that. Such releases were so publicly torn and thrown away as soon as the trial was over, that were I a juror I would pay no attention to such witness.

The proceedings, so far as they went in the Orphans' Court, were offered in evidence and admitted: "The court overrule the objection, for although it may not conclude the plaintiff, yet the defendant has a right to show it, *to rebut the plaintiff's claim and establish his own title to the land*:" these are the words of the

[Williams v. Landman.]

judge on the record. Exception was taken and sealed. I would be, as I have been, unwilling to overrule a decision on the inaccuracy of expressions used during the hurry of a trial. That a party can make title to himself by filing a petition in court any more than by writing a letter, is so absurd that I cannot suppose such an idea ever was for a moment entertained by the judge. I suppose the land in dispute was that part which Adam had proposed to take as his share; now he could have filed a diagram of that and taken defence for that only; and it might have been stated to the jury that if they disbelieved all the plaintiff's testimony, he could not recover that part from Adam. It was no evidence to rebut the plaintiff's claim or to establish Adam's title; and there is error in this as it is written. If the possession is adverse to the title of the heirs, the Orphans' Court ought not to receive a petition to divide or value. If after the inquest it is found the possession is adverse, all proceedings ought to cease until the right is tried in the Common Pleas. This I have known done more than once. The Orphans' Court cannot try the title, and have no jurisdiction where the intestate did not die seised.

The defendants offered to prove by parol that on the first and second trials Williams claimed as a purchaser from Chitister, and not on a contract with old Mr Landman; this was objected to, admitted, and another bill of exceptions. In point of fact the proof only went to the last trial; and the witness, after stating the witnesses who testified pretty much as now, (there had been previously to the present trial a commission to Ohio, and much clear and distinct testimony obtained from three witnesses), said, "I recollect no testimony of a purchase from C. Landman in his lifetime."

A person who has lost a verdict in ejectment may bring a new ejectment, and if he has purchased a different title, show that; or he may obtain more full proof as to the title he had before, or he may rebut some of the testimony of his adversary; or the points of law arising on the facts may be more fully considered; or the cause, on further testimony and more consideration of the law, assume a different aspect; and the court and jury are to decide on the case made out before them. In England equitable circumstances go into chancery, and the jury decide on the credibility of witnesses and on the facts; after long acquiescence in a verdict, and then a new ejectment, the finding of a jury on testimony given while the witnesses spoke of recent facts, ought to weigh much with a jury; but when new facts are adduced, or other points of law made, the testimony then offered is at best useless and a waste of time. And in this case the senior counsel was absent in the Legislature when the last trial was had; and what his colleague said or did might be the misfortune of his client, but ought not to have weighed in this case. The case in 1 *Watts & Serg.* 445, fully considered, does not apply to this case.

[Williams v. Landman.]

Certain points were proposed to the court.

1. If the contract between Christian Landman and Chitister was rescinded, and the plaintiff, Williams, agreed with the old man to take the land and keep him and the old lady and pay \$100 to Chitister, which agreement was carried into effect by the delivery of the land to the plaintiff and the payment of the \$100 and keeping the old people, the plaintiff has a good title and is entitled to recover.

2. If the old man delivered the possession to the plaintiff, and Chitister's tenant attorned to him by Chitister's directions, agreed to pay him the rent, it is a sufficient delivery of possession under the contract to enable the plaintiff to recover.

The court agreed in terms to the first, but added, "The facts must be clearly proved by the plaintiff; if left in doubt by the proof, the plaintiff must fail." I never liked the expression "clearly proved;" proof which satisfies a jury of the fact or facts is all that the law requires. If those present or parties to a transaction all state it in one way, talk of other people or their understanding goes for nothing; if this were not the case, nothing would ever be said to be clearly or fully proved.

To the second the court also said, "It is substantially true," but added, "the delivery must be an *actual, visible* delivery, and not a mere declaration by C. Landman that he delivered possession, unaccompanied by any entry of the plaintiff; and it may be proper to remember that Chitister was in possession by his tenant Gilmore, and that Gilmore continued in possession until the spring of 1831; and that there is no evidence of any actual delivery of possession except the mere declarations of C. Landman. These are evidence, but declarations do not amount to a delivery. The jury should be well satisfied when Chitister first authorized the tenant to pay the rent to the plaintiff, and if this was after the death of old C. Landman, it is not easily seen how Williams had possession before the death of C. Landman."

This embraces the main point in the cause. To begin with the last sentence; Chitister's testimony or admissions were not intended to favour Williams, but he says distinctly that he, on the day Williams took away the old man, threw up his bargain with the old man, and told him he might lift the rent towards his support; he also thinks he had no written lease to his tenant. Now, he never saw old C. Landman afterwards: but admit this, and it was quite immaterial when he says Gilmore the tenant knew what he told him. A parol lease can be transferred by parol with the property leased. There were three persons concerned and two contracts completed that day; old Mr Landman and Chitister agreed to rescind their written contract and to part from each other; this was on Chitister being paid \$100. Williams agreed to pay this, and has paid it. Chitister then gave up all claim and

[Williams v. Landman.]

the rent to the old gentleman; of all this there is no dispute. Old Mr Landman then agreed to give the land to Williams for supporting himself and his wife and burying them. This, as far as the testimony of those present and the admissions of C. Landman can prove anything, is also fully proved; the credit of the witnesses is for the jury. The only points then are, did Williams receive possession, and what is such possession as will avail? In *Pugh v. Good*, (3 *Watts & Serg.* 56), the last case on parol sales, the purchaser, at the time of the purchase, agreed to lease a lot, part of the property purchased, to the vendor for one year to crop; and this was held to be such delivery of possession to the purchaser as made the sale valid. And this court is of opinion that when Chitister rescinded his contract and told old Mr Landman to draw the rent, and Mr Landman transferred all his right to the land and rent to Williams, and this was made known to the tenant, who agreed to it and agreed to be the tenant of Williams, this was such delivery of possession as to avail the plaintiff. The old fashion of livery of seisin by twig and turf, or the carrying the fire out of doors and bringing it back, although well enough as impressing the fact on the memory of witnesses, are neither of them essential. If a landlord sells land which is under lease, and tells the purchaser the rent is to be his, and this is told to the tenant, who agrees to it, the purchaser is seised of the land, and the possession of the tenant becomes his possession so far as to pass the title to him. This was the great point in the cause, and we all agreed on the law as stated here. It would be useless to enter on the discussion of the nature of possession in a tenant, and how it is different from the possession of his landlord; for the purpose of affecting and supporting and preserving the landlord's title they are the same; the possession of the tenant is the possession of the landlord, and delivering possession to the tenant is delivering possession to the landlord; and Chitister's tenant, in pursuance of his agreement, attorning to old Mr Landman or his vendee Williams, was putting Williams in possession.

The third point related to the effect of improvements made by Williams after his first recovery, and the lapse of time before Adam renewed the suit. There was also a bill of exceptions as to evidence on this subject.* Williams claimed the whole tract. After the recovery in 1831 of the whole, he cleared land and erected "valuable buildings," in the words of the offer. When the inquest came to the ground on Adam's petition, and divided the farm, they allotted the part in dispute more immediately in this case as part A; this Adam chose. Every witness says it was the best, and some say worth all the rest, &c. &c.; but the house built is not on part of though near to it. The grubbing, fencing, &c., was principally or entirely on the part A. The court permitted in this trial evidence of the work and clearing done on

[Williams v. Landman.]

part A; but would hear no evidence as to the buildings not on that part, though near it, and probably erected with a view to the occupation and ownership of it more particularly than any other part of the land. We think there was error in rejecting this evidence; to be sure the value of the buildings may be the same whether on the 61 acres or not; but they may be so situated as to this part, and as to the rest of the farm, that they would be convenient with this and very inconvenient as to the other land, if this is lost. The jury must judge of this. I have remarked on the nature of a second trial in ejectment in a former part of this opinion, and shown that the weight of a former verdict and judgment ought to depend much on the case and nature of the dispute. If the error was in matter of law, why the decision now ought to be on the law as correctly laid down; if on matter of fact, and the same witnesses state facts differently, unless they are supposed to have been unduly biassed, the presumption is they remembered more accurately while the transactions were recent, than after many years; if other witnesses make out a different case, the jury are to decide on the case before them.

Judgment reversed, and *venire de novo* awarded.

Livingston against Cox.

Notes of evidence, taken by the judge in the course of a trial, are no part of the record, and they cannot be received, in a subsequent trial of the cause, as evidence of what an absent witness then testified, unless their accuracy be established by other proof.

In an action against an attorney at law, for negligence in conducting and prosecuting the claim of his client, the opinion of a witness as to the discretion exercised by the defendant cannot be given in evidence.

ERROR to the District Court of *Allegheny* county.

Thomas Cox against Thomas Livingston's Administrators. This was an action on the case against the defendant's intestate, who was an attorney at law, for negligence in the prosecution of a claim put into his hands for collection, whereby it was alleged to have been lost. The cause had been once tried before, when Martin Dubbs (who was now absent, no one knew where) was examined as a witness. Now the plaintiff offered in evidence the notes of the testimony given by Martin Dubbs on the former trial, as taken by the judge who tried the cause, after calling a witness who said "I believe Judge Dallas' notes contain substantially what he said on the trial." The defendants objected to the evi

VIII. — F

[Livingston v. Cox.]

dence, but the court overruled the objection and signed an exception.

The defendant on the trial proposed to ask a witness, who was intimately acquainted with the circumstances which attended what was alleged to be the negligence of the defendant's intestate, whether "it was his opinion that Mr Livingston exercised a sound discretion in reference to Mr Cox's claim." This was objected to by the plaintiff and overruled by the court, who sealed another bill of exception at request of defendant. These exceptions were the subjects of the errors assigned.

Williams, for plaintiff in error, cited, as to the first error, 4 *Binn.* 108; 7 *Serg. & Rawle* 163. As to the second error, 3 *Yeates* 527; *Greenl. Ev.* 488, 490; 3 *Stark Ev.* 1736.

Dunlop, contra, first error, 4 *Serg. & Rawle* 203; 17 *Serg. & Rawle* 409; 5 *Whart.* 156.

PER CURIAM.—Notes of evidence, taken by the judge in the course of a trial, are like the notes of counsel—memoranda for private use. They are no part of the record, except where they are incorporated in a bill of exceptions; and then only for purposes of review. It is no part of the judge's duty to take down the testimony accurately, or at all; and his notes, therefore, have not the sanction of his official oath. But testimony is to be received only when it comes under the sanction of a judicial oath, which is dispensed with only in very special cases. Without this, these notes would not have been received in the judge's lifetime; and by what rule of analogy can they become competent at his death? In the estimation of the law, the credibility which is vouched by a sacrifice of interest to truth, stands next to that which is vouched by an oath; consequently memoranda which were to the disadvantage of the party when they were made, are of necessity competent at his death, when nothing better remains; and this is one of the few exceptions to the preceding rule. There was no such voucher here. And such evidence would be extremely dangerous. The accuracy of a note-taker depends on his habit, patience, perseverance, and power to concentrate his attention on the point immediately before his eyes; but a judge who thinks he can discern the turning point at an early stage of the cause, will be apt to confine his care to those parts of the testimony which seem to bear more directly on it, and it would be unsafe to take his sketch of a part for even an outline of the whole. It is the habit, moreover, of some note-takers to write down testimony as it drops from the witnesses, word for word; while others, considering that their notes are taken not to perpetuate the evidence, but merely to serve for the occasion, content themselves with the substance. There is great difference in this

[Livingston v. Cox.]

respect; and notes of testimony ought to come to us fortified with the recollection, or at least with some account of the habitual accuracy, of the note-taker. Mr Dunlop testified that he believed the notes of Judge Dallas contained substantially what was said by the witness; but he did not undertake to testify positively, nor was he competent to do so.

Neither was Mr Mahon's belief that Mr Livingston had judiciously exercised the professional discretion necessarily vested in him, in pursuit of the plaintiff's demand against Dubbs. The proper exercise of such discretion depends not on technical skill, and it is therefore not a subject for the opinion of an expert.

Judgment reversed.

Moddewell *against* Keever.

One of several partners, who are plaintiffs in an action, if he be willing to testify, is a competent witness for the defendant.

A general assignment for the benefit of creditors by one who is a member of a partnership, gives to his assignee no control over the partnership funds or claims, so as to enable him to receive or release them.

ERROR to the Common Pleas of *Clarion* county.

This was an action of debt, by Wm. F. Keever & Co., against A. P. Moddewell, which originated before a justice of the peace and came into the Common Pleas by appeal. After the plaintiff had established his cause of action, the defendant proved that George B. Hamilton and James Humes were members of the firm of Wm. F. Keever & Co., plaintiffs, and then offered the assignment of George B. Hamilton and wife, and James Humes and wife, dated 4th June 1840, for the purpose of proving that George B. Hamilton and James Humes had no interest in this suit, and that John F. Steinman was the assignee of James Humes and George B. Hamilton; and offered to pay into court all the costs that had accrued or might accrue in this case, for the purpose of making a witness of George B. Hamilton. The plaintiffs objected: the court sustained the objection and sealed a bill of exception.

The defendant then offered the above assignment, together with a receipt of John F. Steinman to the defendant for the full amount of the claim made in this suit. This, upon objection by the plaintiff, was rejected by the court, who sealed another bill of exception.

Gilmore, for plaintiff in error

How, for defendant in error.

[Moddewell v. Keever.]

The opinion of the Court was delivered by

GIBSON, C. J.—The exclusion of the general assignment by Hamilton and Humes, which was offered to make way for Hamilton as a witness for the defendant, by showing that he had parted with his interest in the matter in contest as a plaintiff, was virtually a decision that he was incompetent to testify, even voluntarily, against himself and his co-plaintiffs. Such, however, is not the principle which governed this court in *Purviance v. Dryden*, (3 Serg. & Raule 402), in which a partner, sued but not summoned, would have been deemed competent, had he not been produced to cast on his co-partner the moiety of a burthen which would otherwise have rested on himself. As a party plaintiff, Hamilton was competent to testify against his fellows and himself; as anything else he was competent to testify against all the world; and, either way, the release or the deposit to answer costs was unnecessary.

But the acquittance given by the attorney of Steinman, the general assignee of Hamilton and Humes, was properly rejected. What had passed by it? Certainly no right to manage or control the partnership effects, or any interest in them except the assignor's share of the stock and profits after payment of the joint creditors. There was, consequently, no incidental delegation of power to receive or receipt for the debts due to the firm. A partner himself has no more than a resulting interest in the stock, to be ascertained by a settlement of the partnership account, and he can transfer no more. So far is the principle carried in equity that solvent partners are entitled to an injunction to stay execution of the joint effects, for a separate debt, till the accounts are taken; and if it turn out that the debtor has nothing in the stock, the injunction will be made perpetual, as it was in *Taylor v. Fields*, (4 Vez. 396), and *Barker v. Goodair*, (11 Vez. 85). And the common law courts act on the same principle, though it is not so easy for them to carry it out. It seems to be settled, that a purchaser of an interest in the joint effects under a separate execution, is a tenant in common with the other partners, and subject to their equities against the partner whose interest he has acquired. The decision of Lord Holt in *Heydon v. Heydon*, (1 Salk. 392), went not so far as to make him a partner. If, then, he is neither a partner, nor the owner of the thing, of what avail is his acquittance or release of a partnership chose in action? It has been said in *Deckert v. Case*, (5 Watts 22), that a partner may assign the whole joint effects. Perhaps he may; but only as the agent of the firm and by an act done in its name: not by his separate act or by suffering them to be sold for his separate debt. It was strongly doubted in *Pierpont v. Graham*, (4 Wash. 232), whether one partner has power to assign for the benefit even of the joint creditors; and the doubt has not been solved by *Deckert v. Filbert*, (3 Watts

[Moddewell v. Keever.]

454), in which the power was denied to exist after dissolution of the partnership. Certainly, it has not been supposed that he could use it under any circumstances for the benefit of his separate creditors. If, as was held in *Noble v. McClintock*, (2 *Watts & Serg.* 142), a partner has not power to bind the firm for his separate debts without the assent of his co-partners, he has no greater power to apply the property of the firm to payment of them. These general assignments usually contain a clause empowering the assignee to collect the debts; but it is to be construed according to the subject matter of the assignment to which it relates; and if the assignment does not pass the joint effects, the power does not extend to them. Nor was the assignor competent to delegate it more widely. Though a partner's general assignment works a dissolution of the partnership, yet the partner having the possibility of an interest after payment of all his debts, either retains the power of a partner, to act in closing the concern, or his capacities as a partner are extinguished. But they certainly cannot be transferred. The relation of partnership being contracted in reciprocal reliance on the personal qualities of the partners, is a confidential one; and one of them cannot introduce a stranger into the firm without the consent of the rest, or delegate his power to a person on whose qualities no such reliance has been placed. In *Marquand v. The New York Company*, (17 *Johns.* 528), it was said by Chancellor KENT, with the assent of Mr Justice WOODWORTH, in delivering the unanimous opinion of the court of errors, that a general assignment by a partner is a dissolution of the partnership; for that, as his interest in the capital stock is liable to his separate debts, his creditors are entitled to it without being involved in the risks and responsibilities of a partnership. And the converse is equally true. Their trustee cannot involve the solvent members of the firm in a partnership with him without their consent. Every partner is the accredited agent of all the rest; and therefore it is, that the act of a single partner for purposes within the scope of the business, is the act of the firm. Were it not for the decision of this court in *Tillier v. Whitehead*, (1 *Dall.* 269), in which it held that the deputy of a partner might sign or endorse notes, or accept bills, in the name of the firm, I would say that though each partner is the separate agent of the firm, he cannot delegate his power to perform a joint act, not only because a deputy cannot depute without special license, but because such a delegation would change the conditions of the association. It was said in *Tillier v. Whitehead* that each partner is a principal. He is doubtless so as regards his personal interest in the concern; but an agent as regards the interests of his associates. He would scarce seem, therefore, to be warranted by principles drawn from analogy in committing the stewardship of their property to a stranger. But, without pronouncing on the

[Moddewell v. Keever.]

authority of that case as a precedent, it is enough to say that the acquittance of the assignee which was offered in evidence in the case before us, was properly rejected.

Judgment reversed, and *venure de novo* awarded.

M'Coy *against* Hutchinson.

The compromise of a doubtful right is a sufficient consideration to establish the boundary line between conflicting titles, and although in making such compromise the parties act in good faith, but in a mutual mistake of the law, yet will it bind them.

ERROR to the Common Pleas of *Washington* county.

Thomas Hutchinson against Catharine M'Coy and Thomas M'Coy. The plaintiff claimed under a patent from the State of Virginia to Richard Yates, from whom the title passed regularly to the plaintiff. The defendants claimed under a patent from the State of Pennsylvania to Thomas Shields, who conveyed to George M'Donald, from whom the title passed regularly to the defendants.

D. M'Donald, sworn. I am acquainted with the land in dispute. Was not present when there was any agreement, but was present when Cedar Point was divided between A. M'Coy and Wm. and Geo. M'Donald. When we came to the disputed land, Mr Leet (artist) waited until Hutchinson came. Hutchinson and Geo. M'Donald related over the agreement that Shields agreed to let Hutchinson fill his Pennsylvania patent, if he would give him no more trouble about the Virginia entry or survey, as Shields said it was not good, and Mr Leet concurred. It was agreed between the parties then that the line should be run according to the Pennsylvania patent. It was so done and I blazed the line. They said they were glad it had been compromised; this was in May 1801. Mr Hutchinson stated that R. Yeates advised him to get a Pennsylvania patent. They certainly agreed at the time as above stated, as to the line, and still expressed their gratification at the agreement as made.

On this subject the court below thus instructed the jury:—

“It is alleged by the defendants that James Hutchinson and Thomas Shields, who then owned the lands now held by the defendants, agreed that the line of Hutchinson's Pennsylvania survey should be the line between them. This is denied, but if true, would not divest the plaintiff's title, and much less, if it was induced by the representations of Shields that the Virginia title was not worth a straw. Title perfected by patent cannot be

[M'Coy v. Hutchinson.]

divested and conveyed by parol. If, therefore, there was such agreement as stated by John M'Donald, it would not divest the title of the plaintiff."

Shaler, for plaintiff in error.

M'Kennan, for defendant in error.

The opinion of the Court was delivered by

ROGERS, J.—Without undertaking to decide whether the plaintiff's title under the State of Virginia is good, a point which does not appear to have been seriously contested on the trial, or whether taking out a patent in this State, excluding the land in dispute, be an abandonment of that title, yet such reasonable doubt exists as to both these questions as to make them fair subjects of compromise. This was an important question in the cause. One of the witnesses says he was present when the land was divided between A. M'Coy and George M'Donald. That an agreement between Shields, who formerly owned the land, and Hutchinson, was related over in his presence, by which it was agreed to let Hutchinson fill his Pennsylvania patent if he would give Shields no more trouble about the Virginia entry or survey, which Shields contended was not good, whereupon it was agreed between them that the line should be run according to the Pennsylvania patent. That it was so done, and he blazed the line. Notwithstanding this testimony, however, the court instructed the jury, that even admitting there was such an agreement, it would not divest the plaintiff's title under the Virginia entry. In this instruction we think the court was in error, for a compromise of a doubted or doubtful right is a sufficient consideration to establish the boundaries between conflicting claims. So it has been decided in a recent case, not yet reported, that the court will not relieve from the consequences of a mutual mistake of the law, when the parties have acted in good faith.

Judgment reversed, and *venire de novo* awarded.

Defraunce *against* Brooks.

The rule which requires an express limitation to heirs in a fee simple conveyance of a legal estate, is not to be applied to an executory agreement, which is a conveyance only in equity.

ERROR to the District Court of *Mercer* county.

This was an action of ejectment by Robert A. Defraunce and

[Defraunce v. Brooks.]

others against William Brooks and Charles Woods. The plaintiffs, who claimed as the heirs of James Defraunce deceased, offered in evidence the following article of agreement, the execution whereof was duly proved :

May 27th, 1823.

Article of agreement made and agreed upon between Jacob Stricker of the one part, and James Defraunce of the other part ; Witnesseth that the said Jacob Stricker doth agree to give to the said James Defraunce 125 acres and the allowance, out of the south-east corner of lot No. 96, in the fifth district of donation and, for the improvement that said James Defraunce has made on said lot ; and said Jacob Stricker is to make said James Defraunce a good deed for said parcel of land ; and in consideration of the same we hereunto subscribe our hands and seals.

JACOB STRICKER, [Seal.]

JAMES DEFRAUNCE, [Seal.]

The court below was of opinion that this agreement gave but a life estate to the plaintiffs' ancestor, and therefore they were not entitled to recover in this action ; and directed a verdict for the defendants.

Stewart, for plaintiff in error, cited 4 *Watts & Serg.* 17 ; 5 *Johns. Ch.* 184, 222 ; 1 *Dall.* 139 ; 11 *Serg. & Rawle* 329 ; 1 *Yeates* 393 ; 4 *Kent* 7 ; 1 *Sto. Eq.* 175 ; *Pl.* 159, 166, 168, 169, 172 ; 10 *Johns.* 495.

Maxwell, contra, cited 10 *Watts* 259 ; 3 *Watts & Serg.* 563 ; 1 *Whart.* 316.

PER CURIAM.—The Judge made a palpable error in applying the rule which requires an express limitation to heirs in a fee-simple conveyance of the legal estate to an executory agreement, which is a conveyance only in equity. This rule, purely technical as it is, and founded in a policy which has disappeared with the feudal system, from which it sprung, is relaxed in many cases even at law. In executory contracts, equity supplies words of inheritance, and implies a fee where the consideration evinces that not less than a fee was intended. These contracts, like a will, are interpreted so as to give effect to the intention. In *Dearth v. Williamson*, (2 *Serg. & Rawle* 498), a covenant to make a lawful deed of conveyance was understood, from the nature of the transaction, to be a covenant to make a good title. On the same principle, a covenant to divide a tract by giving one of the parties a portion of it in recompense of an improvement, must be deemed a covenant to give it out and out. Improvement is a permanent benefit, and compensation of it follows its nature. What is the value of an estate for life in wild land ? Next to nothing. Agree-

[Defraunce v. Brooks.]

ments of compromise, for the sake of repose, are necessarily perpetual where their duration is not limited expressly or by implication. The owner of this title agreed to give a part of the land; and he agreed to give it as he would a chattel; of course he agreed to give it in fee-simple.

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

Johnston *against* Coleman.

If one who is exempt from arrest by reason of his having taken the benefit of the Insolvent Law suffers himself to be sued, judgment to be entered, and execution to issue against him, upon which he is arrested and gives a bond to take the benefit of the Insolvent Law, and the condition of the bond is broken by his failure to make an application for that purpose, he cannot, in an action brought on that bond, avail himself of the fact that his arrest was illegal.

If one illegally arrested give bond with surety, conditioned for his appearance to take the benefit of the Insolvent Law, instead of suing out a *habeas corpus*, the surety will be bound by his obligation.

ERROR to the Common Pleas of *Allegheny* county.

John Johnston against George Coleman and James Co.eman. Appeal from the judgment of a justice of the peace. The plaintiff gave in evidence an insolvent bond, dated 6th October 1841, in the penalty of \$71.00, amount of debt \$35.48, and called the clerk of the court, who testified that George Coleman had not applied for the benefit of the Insolvent Law, according to the condition of his bond.

The defendant gave in evidence the transcript of a judgment, entered 9th April 1838, for \$31, of *John Litchfield v. George Coleman*, upon which an execution issued and the defendant was arrested and gave bond, and was discharged as an insolvent on the 23d November 1839. On the 5th April 1839, this judgment was assigned, on the justice's docket, to John Johnston, the plaintiff in this suit.

The defendants requested the court to charge the jury on the following points:

1. That the discharge of George Coleman as an insolvent debtor by the Common Pleas of Allegheny county, under the Insolvent Laws of Pennsylvania, made on the 23d November 1839, operated as a full and complete discharge of the person of the said Coleman from arrest on or by virtue of any debts for which he was then liable.

2. That any arrest of the person of George Coleman made after

[Johnston v. Coleman.]

his discharge as an insolvent upon any debt contracted before his discharge, was illegal.

3. And if the jury believe the arrest of George Coleman was illegal, and that he could not have been held in custody on that arrest, and that, in ignorance of his rights, he entered into the bond now in evidence with James Coleman for his security, conditioned for his appearance to take the benefit of the Insolvent Laws, that the said bond was voidable, and that no subsequent proceedings on said bond could make the surety in it liable.

The court below answered these points in the affirmative, and directed a verdict and judgment for the defendants.

T. Hamilton, for plaintiff in error, cited *Cro. Jas.* 187; 3 *Cain's Rep.* 168; 12 *Johns.* 88.

Eyster, for defendant in error, cited 15 *Johns.* 256.

The opinion of the Court was delivered by

ROGERS, J.—An arrest, after discharge of an insolvent, is illegal, for the discharge operates as an exemption of the person from arrest, for a debt previously contracted. And this it was incumbent on the defendant to prove; but of the material fact involved in the above proposition, to wit, that the debt was incurred before the discharge, I see no evidence. The judgment under which the execution was issued was rendered, by confession, after the defendant took the benefit of the Act, and if there is nothing more, of course he was liable to arrest as under a new contract. It was in evidence that one John Litchfield obtained a judgment against George Coleman, which was assigned to the plaintiff on the 5th April 1839, before Coleman's discharge; but the defendant failed to prove, although he asserted it to be so, that this was the consideration of the judgment afterwards confessed by him to the plaintiff. The fact that the judgments are for about the same sum proves but little. Besides, it is difficult to understand why another judgment was deemed necessary, unless upon the ground of a new contract, of which the former was the consideration. But this position would not help the defendant, as he would then be liable, without doubt, in his person as well as his goods.

It must be remarked that it does not appear on the face of the proceedings when the debt was contracted; but if before the discharge, the defendant was bound to show it. The judgment is confessed generally, and as the exemption from an arrest is a personal privilege, it may be waived, and we deem the confession of the judgment, without reservation, tantamount to an express waiver. Ignorance of the law is no excuse to the defendant; for granting that it is for the same debt, and that it was incurred before the discharge, the defendant has precluded himself from the benefit of this defence: for the judgment must have the same

[Johnston v. Coleman.]

incident of every other judgment, among which is the unquestionable right to take the person of the debtor in satisfaction of the debt. We cannot go out of the record and examine into the facts which are the groundwork of the defence, of whether the debt was contracted before or after the discharge. Besides, it seems that the defendant submitted to the arrest, and gave the bond in suit, with James Coleman as security. If dissatisfied with the arrest he might have been discharged on *habeas corpus*, but having refused to resort to this mode of redress, he cannot afterwards avail himself of this defence against his bond.

This is a joint suit against the principal and surety, on a joint and several bond, and it is questionable whether the surety can avoid the bond by reason of the duress of his principal. This point is decided in *Huscomb v. Harding*, (Cro. Jas. 187). The case was debt, upon an obligation of £40, conditioned that Richard Street should pay £20 on such a day, &c.

The defendants pleaded that the said Street was imprisoned by one Everly, Steward of the Stanneries, and the plaintiffs of covin with him, and, without any reasonable cause, detained the said Street in prison, against law and to the great peril of his life, until the said Street should pay to the plaintiff £24, or become bound with a surety for the payment thereof; whereupon, to enlarge the said Street and to avoid the danger of his life, he and the defendant as his surety entered into that bond.

It was therefore demurred, and, without argument, adjudged that it was not any plea for the surety, although it had been a good plea for the said Street; for none shall avoid his own bond for the imprisonment or danger of another than of himself only; and although the bond be avoidable as to one, yet it is good as to the other; whereupon it was adjudged for the plaintiff.

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

Over *against* Blackstone.

In an action of trespass against two or more defendants, if there be no evidence given against one of them, the court may direct a verdict to be rendered for him, and he may be sworn as a witness for the other defendants.

When, in an action of trespass which involves a question as to the right to personal property, a witness testified that when he had sold and delivered the property to the plaintiffs he had told them that he had previously made a sale of the same property to the defendant, it is error to refuse to permit the plaintiffs to ask the witness whether he had not at the same time told them that the previous sale was but a conditional one, and the condition had been complied with.

[Over v. Blackstone.]

ERROR to the Common Pleas of *Clarion* county.

This was an action of trespass *de bonis asportatis* by Joseph Over and George Packer against Henry Blackstone, Wm. Freeman, and James Freeman, in which the right of property to a team of horses was the subject in dispute.

It appeared that Job Packer had been the owner of the team, and in 1840, being indebted to Long & Blackstone, he sold the team to them and received a credit for the price on their books: they remained in the possession of Job Parker, however, until 1842, when he sold it to the plaintiffs, who are his son-in-law and son. When in their possession, it was taken from them by the defendant Blackstone. The defendants alleged that the sale of 1840 to Long & Blackstone was an absolute unqualified sale to them; Job Packer was examined as a witness on behalf of the plaintiffs, and on his cross-examination testified that when he sold and delivered the team to the plaintiffs he told them that he had made a previous sale to Long & Blackstone. The plaintiffs then proposed to ask the witness whether he had not at the same time told them that the condition of the sale to Long & Blackstone had been complied with by him. The defendant objected to the question, and the court overruled it and sealed an exception.

After the evidence on the part of the plaintiff was given, there did not appear to be any act of trespass proved against James Freeman, one of the defendants, and, on motion of the defendant, the court directed a verdict to be rendered for him by the jury and he was examined as a witness for his co-defendants: this was also the subject of exception, and the assignment of error.

Gilmore, for plaintiff in error.

How and *Purviance*, contra.

The opinion of the court was delivered by

KENNEDY, J.—This was an action of trespass brought in the court below by the plaintiffs in error, to recover compensation for two horses taken by the defendants Henry Blackstone and William Freeman. The only controversy between the parties before the court and jury, was as to the right of property in the horses, which was claimed by the plaintiffs on the one side, and by Henry Blackstone, one of the defendants, and a certain D. B. Long, as his partner, on the other. Both parties claimed the horses by purchase from Job Packer, who was admitted to have been the owner of them at a former period. Job Packer was adduced and sworn as a witness on the part of the plaintiffs, and, among other things, testified that previously to his selling the horses to the plaintiffs he had sold them to Long & Blackstone for \$175, with the privilege of redeeming them by carrying metal (iron) to Pittsburgh for them; that he never gave up the possession of the horses to them, but continued to use them as he had done before

[Over v. Blackstone.]

and that when he sold the horses afterwards to the plaintiffs he informed them of the prior sale to Long and Blackstone. The plaintiffs then proposed to ask the witness if, at the same time he told them of the previous sale to Long & Blackstone, he told them also that he had run or carried the metal to Pittsburgh, whereby the horses were redeemed. To this the defendant's counsel objected, and the court overruled the question, whereupon the plaintiffs' counsel excepted to the opinion of the court. This has been assigned for error, and we consider it the only one that the court committed in the trial of the cause. It was all-important for the plaintiffs either to show that they had become purchasers of the horses for a valuable consideration, without notice of any kind of the prior sale to Long & Blackstone, or, if apprized of it, that they were also apprized at the same time, from the same source or through the same channel, that the prior sale was defeated and annulled by the performance, by the vendor, of the condition annexed thereto, in the nature of a defeasance. I do not mean that it was incumbent on them to prove the negative, that they had no notice of the prior sale, for upon their proving that they were purchasers for a valuable consideration without any evidence being given, by either side, tending to show that they had notice when they purchased, or were advised, or had knowledge of such circumstances as ought to have induced a prudent man to have inquired into the truth of them first before he purchased; and when such inquiry would, in all probability, have led to a knowledge of the first sale and that it was still in force, it ought and would have been presumed by the court and jury that they had purchased without notice of any kind, either actual or constructive. But as the witness had testified that he told the plaintiffs of the prior sale, the question then presents itself, was it not competent for them to show that they were advised in the same breath, and by the same witness too, that that sale had become annulled and of no validity whatever? The prior sale took place in the autumn of 1840, and the sale to the plaintiffs in April 1842, during all which interim the horses remained and continued in the possession of the vendor, as they had done before, from the time he first became the owner of them; and again, considering that the vendor was the father of one of the plaintiffs and the father-in-law of the other, and that he told them, as it was proposed to be proved, that the prior sale was annulled, was it not sufficient in reason to induce them to believe that he was again the owner of the horses, and as such had a right to sell them? unless, indeed, they had, from a knowledge obtained otherwise, of the fact or circumstances connected with it, good grounds to distrust the truth of what he said in that respect. The fact that the vendor disclosed the prior sale to the plaintiffs, if he at the same time told them it was annulled by his having performed the condition annexed to it, was not sufficient, without other information had been given them of a

[Over v. Blackstone.]

contrary tendency, to prevent their buying and holding the horses. If Job Packer had not been in the actual possession of the horses when the plaintiffs bought of him, but they had been in the possession of any one who would probably have told them, if inquired at, that they were the property of Long & Blackstone, the plaintiffs would have purchased at their peril, notwithstanding Job Packer might have told them that the first sale was avoided and that he was the owner of the horses. But seeing he was in the actual possession of the horses at the time, and if it be that he told the plaintiffs that the prior sale was avoided, it cannot be imputed to them that they were guilty of negligence in not going further to inquire of Long & Blackstone whether they had any claim under the sale made to them before they purchased, unless it be shown on the part of the defendants, by other evidence, that the plaintiffs, when they bought, were apprized that Long & Blackstone then claimed a right to the horses. This perhaps they may do on another trial of the cause.

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

The Pitt Township Road Case.

That portion of Pitt township which adjoins the city of Pittsburgh, and which by Act of Assembly is created a city district, is subject to the general road laws until it is admitted into the city according to the provisions of the 11th section of the Act of 16th June 1836.

CERTIORARI to the Quarter Sessions of *Allegheny* county.

The question which arose in this case was whether that part of Pitt township, Allegheny county, which was created into a city district by the Act of the 16th June 1836, was subject to the general road laws under the jurisdiction of the Court of Quarter Sessions.

The court below was of opinion that they had no jurisdiction of the subject, and set aside the report of viewers locating a road.

Williamson and *Woods*, for plaintiff in error, cited 4 *Gill*. & *Johns*. 152; 2 *Whart*. 114; 4 *Serg.* & *Rawle* 106.

Hamilton, for defendant in error.

PER CURIAM.—The principle of this case was determined in the case of *Fitzwater Road*, which resembles the present in all respects except that it is not so strong. The twelfth section of the Act for

[The Pitt Township Road Case.]

laying out the city district, orders that until the sections shall respectively have been admitted as parts of the city, they shall "be deemed and taken as parts of the district and township to which the same belong." Why then shall they not be subject to the general road law, in the mean time, like any other part of the township? The city district comprises a tract of several square miles; and half a century may pass before it shall have been brought entirely within the corporate limits of the city. Shall not the inhabitants be accommodated with roads and highways till then? If these should be found to mar the symmetry of the general plan, they can readily be vacated at the proper time by a report of viewers under the existing law, or by an Act of the Legislature; but the inhabitants are not to be debarred of the present use of them.

Order to quash reversed, and *procedendo* awarded.

Irwin *against* Shoemaker.

If bonds and a mortgage be given by a vendee to secure the payment of the purchase money of the land sold, it is competent, in an action upon the bond, for the vendee to prove that it was a part of the contract of sale that the vendor was to look alone to the property sold as a security for the payment of the purchase money. This proof, when made, constitutes no defence to the recovery of a judgment upon the bond, but the court will so control the execution of it, that it shall not be levied upon any other estate or property of the vendee.

ERROR to the Common Pleas of *Beaver* county.

William Irwin against Peter Shoemaker and others. This was an action of debt upon three bonds. The plaintiff sold to the defendants a piece of land, and took from them the three bonds upon which this suit is brought, conditioned for the payment of \$325 each, on the 1st August 1838-39 and '40, for the balance of the purchase money, and at the same time took a mortgage upon the land sold. The defence was, that at the time of the contract of sale the parties agreed that the land conveyed to the defendants should alone be liable for the security and payment of the balance of the purchase money. The scrivener testified that at the time the contract was entered into, the plaintiff wanted the defendants to give a judgment for the purchase money; but they refused, saying that they had other property which they did not wish should be bound for it, and then Mr Irwin agreed to take the mortgage; and that he had no further recollection about it. An other witness, who was one of the obligors in the bonds, but who had been discharged under the Bankrupt Law, testified: "that

[Irwin v. Shoemaker.]

the bonds and mortgage were given for the balance of the purchase money, and that the agreement was, that the money was to come out of no other property but the one sold: Mr Irwin then agreed to take the mortgage; and why the bonds were given, I cannot tell."

The plaintiff requested the court to instruct the jury: "that there is not sufficient evidence in this cause to set aside the bonds, and that their verdict should be for the plaintiff." But the court replied, that if the jury believed that the agreement spoken of by the witnesses was made between the parties at the time the contract was entered into, the plaintiff was not entitled to recover.

Agnew, for plaintiff in error, cited 1 *Watts* 35; 1 *Watts & Serg.* 195.

Washington, for defendant in error.

The opinion of the Court was delivered by

ROGERS, J.—An instrument of writing may be reformed, by proof of circumstances which occurred at the time of its execution, showing either fraud or mistake; but to set aside a solemn agreement between parties and convert it into an obligation of a different import, the evidence of fraud or mistake ought to be of what occurred at the execution, and should be clear, precise and indubitable. It would be error, as is held in *Stine v. Sherk*, (1 *Watts & Serg.* 195), to submit a question of fraud or mistake to the jury upon slight, trivial, parol evidence. These are the well-established principles of law, which must be applied to each case as it arises. The evidence on which this defence rests seems to have been given without objection: at least none appears on the record. The plaintiff, however, contends that it was of such a nature, so uncertain and unsatisfactory, that the jury could not undertake to reform the bond, and that the court ought so to have instructed them. If the case depended on the evidence of the scrivener, there would be great force in the objection, for his testimony merely proves that the dispute was as to the mode and manner of securing the purchase money; the vendor insisting upon a judgment, the vendee contending that it should be secured by a mortgage on the purchased premises. The testimony of Porter however, one of the obligors in the bond, gives the transaction a different complexion. He proves, as the court say, that the bonds and mortgage were given for the balance of the purchase money and that the agreement was, that the money was to come out of no other property but the property sold. Now, however irreconcilable this evidence may be with the fact of the execution of bonds accompanying the mortgage, whose legal operation is so different, the omission of the scrivener to insert so important a provision in the agreement, and the marked difference between his

[Irwin v. Shoemaker.]

testimony and the testimony of Porter, the obligor, yet we think there is nothing in the case which would justify the court in withdrawing it from the jury, and undertaking to instruct them, as a matter of law, that the defendant had failed in his defence. The case depends on the degree of credit to be attached to the testimony of the two witnesses; for, if Porter is believed, it is the case of a mistake of the scrivener in omitting to put this essential part of the agreement in writing, which has always been held a ground of equitable relief. But supposing all the testimony to be true, what its legal effect may be is another question. It is necessary to inquire whether it is a defence to the action, or, in other words, whether the bond is a nullity or an agreement merely that none but the mortgaged premises shall be answerable for the debt. And we think the latter to be the true construction of the contract, giving the testimony all the force to which it is justly entitled. Why may not the plaintiff have two securities, one on his mortgage, and another and a better one on the bond, the judgment and execution to be controlled by the court, so as to prevent a levy on other than the mortgaged premises? Indeed, it may be doubted whether, on any other principle, the evidence would be admissible, as there is a great difference between the destruction and the reform of an instrument of writing. It may be remarked that there is a substantial difference between the remedy on the bond and the mortgage. The latter cannot be sued out until a year after the last instalment is payable, whereas suit may be brought on the former when it becomes due.

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

Foster *against* The Commonwealth.

For an act which happens to be both a public and a private wrong, the public and the party aggrieved each has a distinct concurrent remedy, the former by indictment, and the latter by an action suited to the particular circumstances of his case: the 26th and 27th sections of the Act of 16th June 1836, which provides the remedy and punishment for publications respecting the conduct of Judges of the court, do not alter this principle with regard to offences of that kind.

Upon an indictment for a misdemeanor, and a demurrer by the Commonwealth to a plea in bar of the defendant, which contains no confession of facts which constitute guilt, a judgment against the defendant is that of *quod respondeat oster*.

ERROR to the Court of Quarter Sessions of *Allegheny* county.

This was an indictment found against James Heron Foster for having composed and published a libel upon the Hon. Robert C.

[Foster v. The Commonwealth.]

Grier, President Judge of the District Court of Allegheny county To this indictment the defendant put in the following special plea:—

And the said James Heron Foster, by T. J. Fox Alden, his attorney, comes and defends the wrong and injury when, &c., and says that the said Commonwealth ought not to have and maintain the indictment aforesaid against him the said J. Heron Foster, because he says that the whole of the libellous matter charged in the indictment aforesaid refers to the proceedings aforesaid had in a certain indictment, entitled *The Commonwealth v. William Flinn and Hiram Kaine*, prosecuted at the March Session, A. D. 1844, held in and for the county of Allegheny, and during the pendency of the same in judgment; and that the defendants above named, William Flinn and Hiram Kaine, on a plea of not guilty by them pleaded to the said indictment, and issue joined by the said Commonwealth, were tried and convicted before a jury duly empanelled and sworn in said court on the 9th day of April, A. D. 1844, and that the said issue was pending before the Hon. Benjamin Patton and his Associates, duly commissioned as Justices of said Court of Quarter Sessions in and for said county, in judgment, until the 24th day of April, A. D. 1844, and on said 24th day of April, A. D. 1844, the said court pronounced sentence on the aforesaid William Flinn and Hiram Kaine, (*pro ut patet per recordum*.) and the said J. Heron Foster further saith, that the private prosecutor, Hon. R. C. Grier, in the indictment now pending in the aforesaid Court of Quarter Sessions, in and for the county of Allegheny, entitled *Commonwealth v. James Heron Foster*, (see Indict.) has heretofore, to wit on the 24th day of April A. D. 1844, by his attorney, James Dunlop, Esq., brought his action at law in the District Court of Allegheny county, in this Commonwealth, against the said James Heron Foster, entitled No. 28, July Term, 1844, claiming damages in the sum of five thousand dollars. of and from the said J. Heron Foster, all of which appears of record, being of and concerning a libellous publication by the said J. Heron Foster, aforesaid printed and published in a newspaper in the city of Pittsburgh, of and concerning the aforesaid Hon. Robert C. Grier, being of and concerning the same subject matter charged in the indictment aforesaid, entitled *Commonwealth v. James Heron Foster*, June Sessions, Allegheny county, Pa., as by reference to the record of said District Court and said process and indictment, *Commonwealth v. James Heron Foster* Allegheny Sessions, June Term, 1844, will more fully at large appear; and this the said James Heron Foster is ready to verify Wherefore he prays judgment if the said Commonwealth ought to have and maintain the said indictment against him.

To this plea there was a general demurrer and joinder.

The court below (PATTEN President) rendered a judgment against the defendant of *quod respondeat ouster*.

[*Foster v. The Commonwealth.*]

The question now presented was whether the prosecutor, having made his election of a civil remedy, was not barred by the provisions of the Act of 16th June 1836, sec. 27, from prosecuting this indictment.

Alden, for plaintiff in error, cited 1 *Chit. Crim. Law* 389, 696; 2 *Burr.* 719; Sec. 23, 26, 27 of the Act of 16th June 1836.

Dunlop, contra, cited 1 *Dall.* 319; 14 *Serg. & Rawle* 429; 2 *Serg. & Rawle* 114; 3 *Yeates* 116; 7 *Watts* 179; 4 *Serg. & Rawle* 73; 8 *Serg. & Rawle* 130; 3 *Penn. Rep.* 49; 10 *Eng. Com. Law* 166.

The opinion of the Court was delivered by

GIBSON, C. J.—The plea before us is bad in every view of it. It is written on the hornbook of the law, that the public and a party particularly aggrieved, may each have a distinct but concurrent remedy for an act which happens to be both a public and a private wrong. Thus a person beaten may prosecute an action for the battery, while the Commonwealth prosecutes an indictment for the breach of the peace; or a nuisance may be visited by indictment as a public wrong, while it is visited by action as a private injury; and, for reasons equally good, a libeller may be punished as a disturber of the peace, while he is made to respond in damages by the person libelled, as a defamer of his character. True it is, that the King's Bench will not grant an information at the instance of one who is proceeding by action; and that, as was said by Lord MANSFIELD, the Attorney General would grant a *nolle prosequi* in the case of an indictment found; but neither Lord MANSFIELD, nor any other Judge, has said that this is not of grace, or that any matter can be pleaded which is not of right. If it were the latter, why apply to the Attorney General or the court? Before the Act of 1819, a *nolle prosequi* might have been had in like circumstances; for it is new to me that the Attorney General had not power to grant it. Except for the interference of the crown officers in England, no one will affirm that an action and an indictment for a libel might not be sustained there; and why not here?

It is said the provisions of the 26th and 27th sections of the Act of 1836 preclude it. They ordain that "no publication out of court respecting the conduct of the Judges, officers of the court, jurors, witnesses, and parties, or any of them, on a question depending before such court," shall be a CONTEMPT punishable by ATTACHMENT; "but that the party aggrieved by it may proceed against the author, printer, and publisher, or either of them, by indictment; or he may bring an action at law and recover such damages as a jury may think fit to award." The argument is that the word 'or,' in the last clause, was used disjunctively with

[Foster v. The Commonwealth.]

design to restrain the party to a choice of the remedies, and to preclude a recourse to both; and it would be a plausible one were libel a private injury only, for the party would not be entitled to a double satisfaction. But the public has a separate and substantial interest in the suppression of those publications which often produce violence, and sometimes bloodshed. Surely the Legislature did not design to leave libels on the ministers of the law more than libels on any one else, to the exclusive correction of private prosecution; or to establish a difference between publication before, and publication after the determination of the cause in respect to which the minister's conduct has been aspersed. Why give an indictment under any circumstances, if the private wrong were alone to be redressed? or why subject the act to double prosecution for matter published after the determination of the cause, which would have no influence on the event of it, and not for matter published before it, which might have a pernicious one? It follows neither necessarily nor naturally, from the use of this disjunctive conjunction, that the Attorney General and the party injured must settle between themselves their pretensions to the right of exclusive prosecution, or that an entry into the field by the one is an ouster of the other; and it is not a little singular, that what is supposed to give colour to the notion is a studious, but over-cautious saving of the rights of both. But their rights are essentially consistent, and it certainly has not been expressly said that the exercise of them shall not be concurrent. Every statute is to be brought as near as may be to the common law, which is to be displaced no further than is necessary to make room for the remedy, and not to be repealed by anything less than express enactment or unavoidable implication. Neither of these is found in the Statute before us; and its meaning is consequently to be gathered from the context rather than from the use or omission of particular words. Legislation is necessarily too rapid to allow much time for the discussion of motions to amend, or for the allowment of precision in the application of terms; and verbal criticism in the interpretation of statutes is consequently of little account. To show the absurdity of it requires no more than to point out the grammatical effect of the copulative 'and,' in another clause of the same section. It is enacted that the party may proceed against "the author, printer, and publisher," which means, in strictness, a single person whom the three characters are combined; but that the Legislature spoke of them as existing in distinct persons, is apparent from the additional words, "or either of them." Here, then, is an undoubted copulative accidentally used in a disjunctive sense; and why may not the disjunctive word 'or' have been accidentally put for a copulative in the same sentence? Had the word 'and' been put in its place, as it would had the Legislature been hypercritical would it have followed that there could be no indictment without

[Foster v. The Commonwealth.]

an action, or no action without an indictment? Yet the argument for it would have been as legitimate as the one that has been attempted. To say no more of that, why should it be thought the Legislature intended to put libel on a more favoured footing than any other misdemeanor? or to favour a libel on the ministers of the law more than on any one else? or to trammel the prosecution of such a libel still more, when it might corrupt the streams of justice, than when it could have no such effect? There could be no motive for it but to make this particular sort of libel a privileged offence; and to impute it to the legislature, would be itself a libel. It is said the liberty of the press is to be taken into consideration. It is best protected, however, when the citizen is free from antecedent restraint in the use of it, but open to the severest animadversion of the law, for public as well as private injuries from the abuse of it. In some of our sister States, where the laws are feebly executed, an editor enjoys no more freedom of publication than he can maintain with the pistol or the knife. Is that a wholesome state of the press? Yet it must inevitably come to that, wherever its power is a despotism tempered only by assassination; and that assassination will be resorted to in default of redress by the law, has been shown by more instances than one. No freeman would bear a self-constituted censor's contumely and scorn, without an attempt to requite it; and such is the infirmity of our nature, that a sensitive man, stung to madness by being turned away from the tribunals without redress for an outrage to the feelings of his wife or daughter, would compass revenge by the most desperate and wicked means. What is the worth of an action against a man who has nothing to lose, and whose person may be freed from confinement, by the Insolvent Laws, at the end of sixty days? For good or for evil, the press is omnipotent; and there is no slavery more galling, or condition more deplorable, than that of a man who is exposed to its attacks in the hands of profligate and irresponsible men, destitute perhaps of even common humanity. Such a state of things, it certainly was not the purpose of the legislature to encourage. The truth is, the framers of the Statute thought they were not dealing with the Law of Libel or the liberty of the press at all; for there is not a word in it about either. The end in view was to abolish the obnoxious process of attachment for contempt, in all but a few specified cases; not to narrow a libeller's liability to punishment, by interdicting any procedure which allows him the benefit of trial by jury. There are but few members of the profession who either do not remember or have not heard of *Passmore's Case*, by which the Legislature were stimulated to action. The public mind had been roused, by what was thought at the time to be an arbitrary and unconstitutional conviction of that person, though he had certainly incurred the common law punishment due to a contempt of the court, by placarding a gentleman of great respectability, for his

[Foster v. The Commonwealth.]

defence of a cause depending in this court, to which he was a party. The complainant had laid his griefs before the House of Representatives; the power of the courts to inflict summary punishment for contempt had been canvassed in the Legislature, in the press, and in the assemblies of the people; the Judges had been impeached, tried, and acquitted: and the Legislature, having waited till the ferment had subsided, removed the cause of offence by enacting the original Statute, whose substance, including the words under consideration, we have before us, without a thought of mitigating the Law of Libel, or securing the liberty of the press. Not a word had been said, during the period of agitation, about either. The entire scope of the revised act shows that purpose was no more than to regulate the trial and punishment of contempts; and, looking to the old law, the mischief, and the remedy, we entertain not a doubt that the common law has been altered in relation to nothing else.

But the desired interpretation would not help the plea; for a libel would not be protected by the Statute unless it were not only a reflection on a minister of justice, but also a contempt of court in a pending cause. Other libels are indisputably left to their former measure of prosecution and punishment. It was, as I have said, to abolish the process of attachment for contempts, and not to restrain the prosecution of libels by indictment and action, that the legislature interposed. The subject is introduced in the twenty-third section of the revised Act with the emphatic declaration that "The power of the several courts of this Commonwealth to issue *attachments* for *contempts*, shall be restricted to the following cases, to wit:—" then follows a specification of the excepted cases, which is succeeded by the sections under consideration. Now, neither of these speaks of publications as libels, or pretends to regulate the prosecution or punishment of them as such. Indeed the word is not to be found in any part of the Act; nor was it necessary to introduce it, for a publication may be a contempt without being a libel, and an act may be a contempt without being a publication. The twenty-sixth section provides that no publication respecting the officers, parties, or witnesses, or respecting a cause pending, shall be punished as a contempt by attachment. The twenty-seventh provides that if such publication "improperly tend to *BIAS* the minds of the public, or of the court, the officers, jurors, or witnesses, or any of them, on a question *before the court*," it shall be lawful for the injured party to proceed by indictment or action as already stated. Now the defendant is charged, in the indictment before us, not with a publication tending to create an improper bias in regard to a pending cause, but to defame the prosecutor as the Judge of a court in which the cause was not pending. On that ground alone his cause would be decisively out of the protection of the Statute; for the plea would not answer the indictment.

[Foster v. The Commonwealth.]

Again. Though every contempt is not a libel, every libel which would be within the benefit of the attempted interpretation, ought to be a contempt; but how a libel on the President of the District Court could be a contempt of the Quarter Sessions, cannot be conceived. The publication laid in this indictment, was certainly a libel on the President of the Quarter Sessions; and had the defendant been prosecuted for it by indictment and action, the question whether the Commonwealth could proceed, might have been raised. A libel on the person who is the President of the District Court, touching his acts as a witness or prosecutor in the Quarter Sessions, would doubtless have been a contempt of the latter within the meaning of the Statute. But though he may have been, and probably was a witness or prosecutor in the case of the *Commonwealth v. Flinn*, to which the publication referred, the fact is not averred in the plea; and on a demurrer to it, we can look at nothing else. It contains an averment that he prosecutes the indictment before us, but not that he prosecuted the indictment mentioned in the publication. He who claims the benefit of an exception, must bring himself within it by proper averments; and the defendant has not done so.

But though the plea is bad, the judgment on the demurrer may be inappropriate; and if final judgment ought to have been pronounced on him in the court below, we ought to pronounce on him here. The ruling principle of this part of the case was settled in *Barge v. The Commonwealth*, (3 Penn. Rep. 262), in which the proper judgment on an insufficient plea of *autre fois acquit*, in a case of misdemeanor, was held to be *respondeat ouster*. There, as here, the plea was not in abatement but in bar. The point had shortly before been ruled differently in *The King v. Taylor*, (3 B. & C. 502), but we find nothing in the reasons for the decision sufficiently cogent to draw us from our principle. Chief Justice ABBOT put the opinion of the court on the common law rule, which prohibits, where life is not jeopardized, the use of more pleas in bar than one. True it is, that the 4 and 5 Anne c. 16, which enables a plaintiff to plead as many pleas as he has grounds of defence, is expressly confined to civil cases; yet the Judges have abolished the rule in felony and treason, without the authority of a statute, so far as to allow the prisoner to plead over after an insufficient plea in bar. And it seems the exception extends to cases in which, though the judgment is capital, the felony is clerigiable. According to Mr. CHITTY, (*Crim. L. vol. 1, p. 434*), though it does not extend to misdemeanors as matter of right, yet it is in the discretion of the court to allow him still to plead not guilty; and this, he says, will be done where the punishment is severe. Listening to the voice not of humanity but justice, we have carried this discretion a single step further, by applying it to all cases, without regard to the punishment, in which the plea contains no confession of facts which constitute guilt. The judgment,

[Foster v. The Commonwealth.]

therefore, is right; but as the indictment is still pending, the writ of error issued improvidently. On receiving the record from us, the Judges of the Quarter Sessions will proceed on it as if it had not been removed.

HUSTON, J., *dissenting*.—In 2 *Burrows* 720, on an application to show cause against an information which had been moved, Lord MANSFIELD says, “If the prosecutor had proceeded in the method which he had a strict and legal right to proceed in, namely, by way of indictment, and if such indictment had been actually found, yet the Attorney General would (on application made to him) have granted a *nolle prosequi* upon such indictment in case it appeared to him that the prosecution was determined to carry on a civil suit at the same time.” In *Chitty's Criminal Law* we find the practice to be for the Attorney General, on application to him, to cite the parties before him, and to compel the prosecutor (except in very atrocious cases) to make his election. We have no such practice. I am not aware that any Attorney General has ever acted under such authority, nor that he could do so. This was well known to those who drew our Act of Assembly of the 16th June 1836, sections 26 and 27, which left this discretion with no one.

The reason for the established practice is given in the case cited 2 *Burrows* 720, that the criminal proceeding will oblige the defendant to discover the matter of his defence and evidence, which would be giving the prosecutor an unfair and unreasonable advantage over the defendant in the civil action. The Legislature (and the Law was drawn by gentlemen of great legal ability and personal respectability), provided in plain and perspicuous terms that in this State no prosecutor shall proceed in a criminal and civil proceeding, for any offence described in this Act, and this for the reason above given, as well as many others which will occur to every one who reflects on the subject. I am not for granting impunity to libellers or printers, but as the law has forbidden their punishment in any other than one of two modes, and leaves to the person aggrieved his choice of the modes, I consider myself bound by the law; and that no person can proceed in this State in both a criminal and civil court for the offence specified in the Act cited. Of course I would say, as the civil suit was commenced in April and the indictment sent to the Grand Jury at the Sessions of the following June, that the defendant was not bound to plead to it otherwise than he did, and that he cannot be tried or sentenced on this indictment, unless the civil suit be discontinued.

Something was said about the word “or” being construed to mean “and” in certain cases. It has been properly so construed when found in a will:—a devise to one and his heirs or issue, but if he die “under age or without issue,” then a devise over. Here the devisee may have lawful issue and yet die under age, and to

[*Foster v. The Commonwealth.*]

effect the plain intention of the testator to provide for the issue, it must mean "under age *and* without issue;" but no case was cited where a devise in the alternative of one thing or another gave both. But in a penal law no liberty of construction is allowed; no authority for so doing was cited, nor can any be found, as I believe.

Writ of error quashed and record remitted.

Henry *against* The Pittsburgh and Allegheny Bridge Company.

Neither the State nor a person, artificial or natural, acting by its authority, under a law which the Legislature is competent to make, is answerable for consequential damages, occasioned by the construction of a highway, further than is specially provided by the law itself.

ERROR to the District Court of *Allegheny* county.

This was an action on the case by Helena Henry and others, heirs-at-law of David Henry, deceased, by their guardian, Robert H. Patterson, against the President and Managers of the Pittsburgh and Allegheny Bridge Company, in which the plaintiffs declared for an injury done to the value of their freehold by reason of the filling up of a certain street in the city of Pittsburgh, which was occasioned by the construction of a bridge by the defendants across the Allegheny River: the plaintiffs also declared for an injury done to their freehold by the wilful negligence of the defendants in conducting their work in the erection of the said bridge.

On the 16th June 1836 an Act of Assembly was passed, incorporating the defendants for the purpose of erecting a bridge across the Allegheny river, from the end of Hand street. On the 5th September 1837, an ordinance of the city of Pittsburgh was passed directing the location of the abutments of the bridge, and to accommodate the street to the use of the bridge. In pursuance of this authority, the Bridge Company altered the street by filling it up to the height and grade thus fixed, and in consequence thereof the street was raised twelve feet higher, and so as to be entirely above the level of the doors of the plaintiffs' houses.

On the trial in the court below, two points were raised. Are the defendants liable at all for an incidental injury to the plaintiffs' property, occasioned by the just exercise of the powers and rights conferred upon them by their Act of incorporation? Are

VIII. — H

[*Henry v. The Pittsburgh and Allegheny Bridge Company.*]

they liable for an injury to the plaintiffs' property, occasioned by negligence or want of proper care and caution during the progress of their work, whereby the water was turned upon the plaintiffs' houses without any proper provision for its escape into the river?

GRIER, President, reserving these points, instructed the jury that if they believed the plaintiffs had sustained damage to their estate, they should ascertain and fix the amount, distinguishing between the permanent injury done and that which was but incidental.

The jury found a verdict for the plaintiffs for \$224 damages, \$50 of which was occasioned by the negligence of the defendants.

After argument of the reserved points, the court below was of opinion that the plaintiffs were not entitled to recover upon the first count of their declaration, and therefore entered a judgment for the plaintiffs for \$50.

Shaler and McCandless, for plaintiff in error, after referring to the several Acts of Assembly, cited 9 *Watts* 382; 25 *Wend.* 462; 3 *Hill* 567; 1 *Binn.* 352, 450.

Hamilton and Dunlop, contra, cited 1 *Pick.* 417; 6 *Wheat.* 593; 7 *Watts* 460; 8 *Watts* 218; 4 *Term Rep.* 794; 2 *Watts* 327; 6 *Whart.* 44; 7 *Pick.* 344; 17 *John.* 98; 19 *Johns.* 181, 226.

PER CURIAM.—The principle of this case was settled in the *Monongahela Navigation Company v. Coons*, (6 *Watts & Serg.* 101), in which it was held that neither the State nor a person, artificial or natural, acting by its authority or command, under a law which the legislature is competent to make, is answerable for consequential damages occasioned by the construction of a highway, further than happens to be specially provided. This bridge is as much a highway as a rail-road or a turnpike road is a highway; and the Company acted, in constructing it, strictly within the bounds of the public franchise delegated to it by its charter. The bridge was thrown across a navigable stream, from the terminus of one highway to that of another, without encroaching on the plaintiffs' soil, or invading their dominion. Not a shovel-full of earth was taken from it, or thrown upon it. There stands their property, within its proper limits, as it stood before; and the substance of the thing complained of, would, if done without authority, be a nuisance and the substance of an action on the case. The plaintiffs counted, that the defendants "placed large quantities of sand, clay, gravel, dirt, rubbish, stones, logs, and sticks, upon said street," by which the plaintiffs were hindered in passing to and from their messuages and lot, and the facts are conceded; but no more was done than to raise the surface of the street to a level with the floor of the bridge, without which the work could

[Henry v. The Pittsburgh and Allegheny Bridge Company.]

not have been accomplished, and the defendants, therefore, had the authority of the State for it by necessary and irresistible implication. It is useless to inquire how far it derived authority from the ordinances or permission of the City Councils. According to the Case of the *Philadelphia and Trenton Rail-road Company*, (6 *Whart.* 43), in which it was held that the State, or a company authorized by charter, may take the property of a street without compensation to the corporate government of the town or individuals residing in it. The plaintiffs recovered, doubtless rightfully, for turning the water on their ground; for the authority of the State cannot be implied for negligence or a gratuitous injury; but for unavoidable damage in the accomplishment of the object, the defendants are not liable.

Judgment affirmed.

Vantries *against* Richey.

If the books of a factor exhibit a balance due to his principal, and this be communicated to him, it is conclusive upon the factor, and he cannot afterwards alter or in any way impair it. But if the state of the account be not communicated to the principal, so that he may have acted upon the supposition that such balance was in his favour, he may afterwards show that the entries were made by fraud or mistake.

ERROR to the District Court of *Allegheny* county.

Vantries and Ross against Richey, Ewalt & Co. Debt on book account.

The plaintiff gave in evidence an account furnished by the defendants, showing the state of accounts between the parties, and then called William Ewalt, one of the defendants (but no longer a member of the firm, having sold out his interest to his co-partners, who were to pay the debts), who testified that the plaintiffs' iron had been sold by the defendants for about a cent a pound higher than appeared in the account tendered; that the defendants' books had been altered, and that some of the iron had been paid for when it was sold.

At the plaintiff's request, the defendants produced their books, and the account showed the entries as they originally stood, and as they were now in their altered state.

The defendants then called witnesses to prove that the original entries in their books did not exhibit the true account of the transaction; that, in fact, the iron had not been sold at all, and that a great deal of it still remained on hand; that the prices credited by the defendants were the full value of the iron, and that it could

[*Vantries v. Richey.*]

not have been sold for the prices entered by Ewalt; for the purpose of showing that Ewalt had acted in fraud of his co-partners, and that they had a right to make the correction.

To this offer the plaintiffs objected, and the court sustained the objection and sealed a bill of exception.

Lowrie and McCandles, for plaintiff in error, cited 21 *Eng. Com. L.* 460; 4 *Cow.* 282; 9 *Eng. Com. L.* 25; 17 *Peters* 252.

Hampton, contra.

The opinion of the Court was delivered by

ROGERS, J.—If the original entry in the books of the partnership had been communicated to the plaintiffs, and they had acted on the supposition that they had such a credit or amount in the hands of the factors, it would have been conclusive on the firm, and it would not have been competent for the defendants at any subsequent time to alter or any way impair it. But this was not done, and in *Simpson v. Ingham*, (2 *B. & C.* 65), cited and relied on in *Hume v. Ballard*, (21 *Eng. Com. L. R.* 462), it is ruled that parties are not bound by their uncommunicated entries. It appears by the testimony of Ewalt, one of the partners, examined as a witness by plaintiffs, that the entry was made by him, after sale of the iron; but this the defendants deny, and allege that it was made by mistake or in fraud of their rights, and this they offer to prove; but the court, being of the opinion that the act of Ewalt estopped the defendants, rejected the evidence. In this the court was in error for two reasons: 1st, Because the technical doctrine of estoppel applies, in general, only to deeds and records, and not to simple contracts. Secondly, because Ewalt, being plaintiff's witness, stands in the situation of any other witness, and his credit may be impeached. Ewalt testifies that the iron was sold at five cents per pound; and the defendants offered to prove that this was not true, that the iron, so far from being sold at that time, has not yet been sold, but that part of it is now on hand. Notwithstanding the entry does not conclude the defendant from showing the truth, yet the original entry, having been made by a party in interest, is powerful presumptive proof against the defendants, which cannot be overthrown except by the most clear and unquestionable testimony: for it is difficult to imagine any motive to induce him to charge himself in favour of a third person. A transaction such as is presented here, must be scrutinized very narrowly; for if a commission-merchant, without any actual sale, credit his principal, in expectation of a rise in the market, with a certain price as for goods sold, he ought not to be permitted to alter the price, if it should turn out he had been deceived in his calculation. A contrary practice would put the principal completely in the power of a fraudulent agent. The principal may

[Vantries v. Richey.]

consider it as a sale to his factor. When, however, the entry has been the result of fraud or mistake, by one of two or more partners, we know of no principle which will prevent the other from showing it. A statement of an account is not conclusive, but only presumptive evidence against the party admitting the balance to be against him. He is allowed to show a gross error or mistake in the account, if he can adduce evidence to that effect. So also it is ruled that a receipt is not conclusive evidence, 1 *Chitty* 6, and the authorities there cited.

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

Lilley *against* Torbet.

One who has been arrested for debt prior to the passage of the Act of 12th July 1842, and given bond and filed his petition for the benefit of the Insolvent Laws, is not relieved from his obligation to appear and prosecute his application at the time appointed by the Court, by the passage of that Act before that time arrived; and upon his failure to appear, he and his surety are liable upon their insolvent bond.

ERROR to the District Court of *Crawford* county.

This was an action of debt brought by Torbet and M'Fadden against Jonathan Lilley and John C. Humes, upon a bond dated 23d May 1842, with condition reciting that "whereas the said Jonathan Lilley has been arrested in execution at the suit of the said Torbet and M'Fadden for the debt of \$91.29, and 72½ cents costs, Now the condition of this bond is such, that if the said Jonathan Lilley shall appear at the next term of the Court of Common Pleas of the said county, and then and there present his petition for the benefit of the insolvent laws of this Commonwealth, and comply with all the requisitions of said laws, and abide all the orders of said Court in that behalf; or in default thereof, and if he fail in obtaining his discharge as an insolvent debtor, that he shall surrender himself to the jail of said county, then this obligation to be void, otherwise to remain in full force and virtue;" which was given in evidence in this cause.

The defendants then gave in evidence the petition of Jonathan Lilley for the benefit of the insolvent laws, presented to the Court of Common Pleas on the 11th August 1842, it being the Thursday after the second Monday of August, during the sitting of the Court at the August term, the next succeeding term after the date of the said bond. Whereupon the Court made the following order, endorsed on said petition: "Aug. 11. 1842: second Monday of

[Lilley v. Torbet.]

November next for hearing. Notice in a paper printed in Crawford county three times, the last fifteen days before hearing, and personal notice on creditors in Erie county."

The court charged the jury as follows :

" The bond on which this suit is brought, dated the 23d May 1842, provided for the presentation, &c., at August term, of a petition by Jonathan Lilley to take the benefit of the insolvent laws of this Commonwealth. Previous to this period, and on the 12th July 1842, the non-imprisonment law passed. What effect has this law on our case ? We think it decisive of it in favour of the defendant. We think the process to be observed in taking the benefit of the insolvent laws of the Commonwealth is but a continuance of the original arrest—mitigated, to be sure—a temporary relaxation of the arrest ; and that the original process continues throughout to operate. The Act of July nullifies the original process, so far as the effect of the arrest goes ; it is cut off and ended by it. We think the principal, after the passage of this Act, was not bound in discharge of his bail to proceed to take the benefit of the Act ; and that although he did not proceed to take the benefit of the Act, or surrender himself, the plaintiff is not entitled to recover."

Error assigned :

In deciding that after the passage of the Act of July 1842, the principal was not bound in discharge of his bail to proceed to take the benefit of the insolvent law ; and that although he did not do it or surrender himself, the plaintiff is not entitled to recover.

Pearson, for the plaintiff in error, cited 17th sec. Act 12th July 1842 ; 1 *Watts & Serg.* 379 ; 1 *P. R.* 267 ; 1 *Ashm.* 102 ; 4 *Watts* 69 ; 6 *Watts* 508.

Derrickson, contra.

The opinion of the Court was delivered by

SERGEANT, J.—It is not easy to perceive how this case can be brought within the purview of the 17th section of the Act of the 12th July 1842. That section provides only for those persons who should be in prison at the time the Act should take effect. The insolvent here was not in prison at that time, and therefore does not come within the words of the Act. Nor does it seem to me that any construction can be given to the Act which should embrace him. The bond had been given before the passage of the Act, and the creditor had acquired a vested right in it. And the case should be a strong one which would justify us in supposing that the Legislature meant to act retrospectively as to past transactions. Besides, it does not seem to be substantially the same case as that of a person then in prison. The Judge of the court is not empowered to issue a habeas corpus under the 17th section

[Lilley v. Torbet.]

for any person not in custody, nor, under the 3d section, to receive an affidavit of the plaintiff to obtain a warrant of arrest, nor grant a hearing, nor grant a warrant of arrest, should any of the cases exist which are provided for in the 3d section. So that it would operate to give the debtor a discharge under all circumstances, when a person actually under arrest at the passage of the law is still liable to the continuance of that arrest, unless he complies with some of the various provisions for securing the debt, or not removing or assigning his property, or for taking the benefit of the Insolvent Act. I see no reason to believe that the Legislature intended to provide for cases of this kind. I rather think they intended to leave all that was past and done on the footing it then stood upon. If they had intended to provide for a case of this description, they would have made a special provision in respect of it.

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

Tate *against* Reynolds.

In an action of ejectment wherein the defendant sets up an outstanding lease by the plaintiff to a tenant as a defence, it is competent for the plaintiff to explain by parol evidence what land was embraced in the terms of the lease, or to show a parol surrender of the lease so far as it embraced the land in dispute, by the tenant before the action was brought.

SAMUEL TATE against George Reynolds and Thomas Ferguson. This was an action of ejectment brought to November Term 1842. The plaintiff having established his title, the defendant gave in evidence the two following leases:—

“Articles of agreement made this 29th day of December 1836, between Samuel Tate of the one part, and William H. Gillespie of the other part, Witnesseth, said Tate doth lease the tract called the Henry tract, for the term of four years, commencing the 1st of April 1837, and ending the 1st of April 1841, for the rent after following, &c. Said Gillespie is prohibited from cutting or selling any timber off said Tate’s land, &c. Said Gillespie is to get all the timber for the repairs off said Tate’s land, where said Tate may direct, &c. Said Gillespie is bound to pay all taxes during said lease. Said Gillespie is bound to give up quiet and peaceable possession of the premises in good order, and good lawful fences, at or before the 1st of April 1841,” &c.

“Articles of agreement made and concluded this 30th day of March 1841, between Samuel Tate of the one part, and Carson Gillespie of the other part, Witnesseth, said Tate doth lease the

[Tate v. Reynolds.]

tract of land called the 'Henry tract' for the term of one year, commencing the 1st day of April 1841, and ending the 1st day of April 1842, for the rent hereafter following, &c. Said Gillespie is prohibited from selling or disposing of his lease in any manner, but to occupy it himself. Said Gillespie is bound to pay all the taxes during his lease," &c.

The plaintiff then offered to prove that it was not the whole tract which was leased, and that the part leased did not embrace the land in dispute. This was objected to on the ground that this could not be done by parol. But the court admitted the evidence and sealed a bill of exception.

The plaintiff's witness then testified as follows: "After the first article was made, Gillespie spoke and said he was paying taxes for the whole tract, and had only possession of part. Tate said he would be out next spring and give possession of the whole of it. There was an agreement made to place the fences according to the 'Findley survey,' and did not calculate to have any more." Another witness stated: "At the time, I told him I was paying taxes for the whole and had only possession to the south line. He did not come out till the spring of 1841. I never had any possession but up to the first line: it did not embrace the land in dispute. I never got possession further than the south line."

The defendants requested the court to charge the jury;

1. That by the terms of the lease the whole "Henry tract" is embraced; and the plaintiff having given general possession of the tract under the lease, the plaintiff cannot recover while the time stands out unexpired.

2. If Tate leased the land in 1836 by its terms embracing the land in dispute, and promised to be out the next spring and have a survey made, and deliver actual possession to that line, and in 1841 came out and surveyed the tract and land embracing the land in dispute, and the next day made a lease embracing in its terms the entire tract under which Carson Gillespie took possession, and there being no evidence to show this land was excepted, the plaintiff cannot recover.

In answer to which the court charged as follows:

To these points I answer, that if the testimony admitted shows that no possession was given further than the north line by the lease of 1836, and that in fact it was to this line the lease extended, and you believe the lease of 1841 was only a continuance, and, as the witness says, to lengthen out the term for a year, then it is a lease of the same territory as in the first lease, and this notwithstanding the circumstance in this case of a survey made the day before, and that the lease was for the "Henry tract" by name, without giving the boundaries. If it was lengthened out for a year, as the witness says, to enable the lessees to comply with the requirements of the former lease, it will only cover the land held by the former lease, without you find other and more

[Tate v. Reynolds.]

land was included. If it was merely the land included in the first lease, and if that did not go south of the first line, then the possession under the last lease is the same as under the prior one. All the Henry tract would be included by the terms in the lease, without the explanation of the witness. Does he satisfy you that the land embraced in the last lease is the same as the former, and that the former did not cover the land in dispute? If you should think that the testimony is not to be relied on, or does not show that the land in dispute was not included in the lease spoken of, the plaintiff cannot recover; because if his lease covers it, he is not entitled to the possession of it when he brought suit; and if this is so, your verdict should be for defendants.

2. To this point I say to you, if the whole tract was leased and possession taken of it all, the law is as stated. The question is as to whether this was so or not from the testimony given: it is for you.

Stewart, for the plaintiff in error, cited 1 *Whart* 314; 5 *Serg. & Rawle* 421, 107; 3 *Stark. Ev.* 1067, 1051.

Maxwell and *Holstein*, contra, cited 2 *Serg. & Rawle* 84; 4 *Rawle* 130; 3 *Bin.* 587.

The opinion of the Court was delivered by

KENNEDY, J.—If the testimony given by the two Gillespies and objected to by the counsel of the defendants below was properly admitted by the court, the plaintiffs here have no ground to complain. The testimony was not received for the purpose of showing that the lease from Tate to Carson Gillespie was different from or contradicted that which was reduced to writing between them. The lease was but for the term of one year, and the testimony was admitted to show the extent of the possession taken under it. But admitting that, as reduced to writing, it included the whole of the Henry tract of land, the parol evidence objected to only went to show that the parties by their conduct subsequently and a verbal understanding between them, modified the occupation under the lease so as to exclude that part of the Henry tract in dispute, and for the reason too that the defendants had tortiously taken possession of it, and would not give it up until forced to do so by legal process. As the lease was only for a year, it was competent for the lessees to make a verbal surrender of it at any time during its continuance, or to surrender a part thereof, and hold the residue by the consent of the lessor, or they might have made a verbal assignment of it to a third person, without interfering with the Act of Assembly against frauds and perjuries, which requires it to be in writing only where the interest intended to be passed or transferred in lands exceeds the term of three years. I concur entirely with what is said by the Chief Justice on this point in

[Tate v. Reynolds.]

McKinney v. Reader (7. *Watts*, 123-4). The testimony of the Gillespies shows that they gave up all interest which they might have claimed in the land in question under their lease as reduced to writing, could they have got the possession of it. The lessor, the plaintiff below, it seems was willing that they should have had the possession of the whole tract, and would have delivered it, but was prevented by the plaintiffs in error, who had wrongfully taken the possession of the part sued for in this action, and refused to give it up. Hence the plaintiff below, in order to possess himself of his right, was compelled to sue them. They having thus prevented the lease, so far as it may have embraced the land in dispute, from being carried into effect, so as to vest in the lessees the right and interest intended, are the last in the world that ought to be permitted to set it up as an outstanding title against the plaintiff below, in order to defeat his recovery of land that otherwise he is justly entitled to. It would in fact be permitting them to take advantage of their own wrong. But the evidence objected to showed that the lessees did not claim to hold, at any time, the land in dispute under the lease which they had taken, as the defendants held the possession of it and would not give it up. Any interest which the lessees might have claimed under the lease, being only for one year, was such as they could give up to their lessor verbally, notwithstanding the lease was in writing, and under the seals of the parties; and having done so, the plaintiffs in error could not claim to defeat the recovery of the defendant in error by means of it as an outstanding title.

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

Directors of Poor *against* Wallace.

Directors of the Poor are authorized and required to pay the funeral expenses of a destitute person upon the order of two justices granted after the death and burial of such person.

ERROR to the Common Pleas of *Washington* county.

This was an action of assumpsit by Oliver Wallace against the Directors of the Poor of Washington county, to recover the price of coffins furnished for the burial of poor and destitute persons, who were carried off by an epidemic which prevailed in Taylors-town some years since. In one of the cases an order of relief was made whilst the pauper lay on his death-bed, and a few days before his death, but was not presented to the directors until after his death and burial. In the other cases no order was previously

[Directors of Poor v. Wallace.]

made; but subsequently to the death of the paupers, a certificate in the nature of an order of relief was granted by two justices, stating the utter destitution of the deceased; that they had nothing to bury them, and approving the expenditures by the plaintiff.

EWING (President), instructed the jury that although there was no express provision for such cases contained in the Act of Assembly, yet the spirit of the law, when taken as a system, was in accordance with that principle of humanity which required the directors to make provision for these cases of emergency which so frequently happened; and that in this case the order of the justices was a legal authority for the directors to pay; they were therefore bound to do it, and the plaintiff was entitled to recover.

M'Kennan, Jun. and M'Kennan, for plaintiffs in error, cited 2 *East* 505.

Gow, for defendant in error, referred to the 6th and 23d sections of the Poor Laws; 12 *Serg. & Rawle*, 296; 10 *Johns.* 249; 3 *Bos. & Pul.* 247.

The opinion of the Court was delivered by

HUSTON, J. — The Act relating to the support and employment of the poor passed the 13th of June 1836, though most of its provisions relate to them while alive, yet in several sections have relation to the funeral expenses. See sections 14, 23, which seem to put the funeral expenses on precisely the same footing as the maintenance of a pauper while alive; and the 33d section gives the overseers the same rights to recover any property belonging to a pauper, and apply it as well to pay the expenses of their funeral and burial as of their maintenance while alive. The 1st section directs the overseers to provide for every poor person; and the following sections point to the mode in different cases. The 5th section provides for such poor as have no settlement; or, I suppose, such as having a settlement, require immediate relief. The 6th section says: "No person shall be entered on the poor-book of any district, or receive relief from any overseers, before an order shall have been procured from two magistrates of the county for the same; and in case any overseer enter in the proper book, or relieve such poor person without such order, he shall forfeit a sum equal to the amount or value given, *unless such entry or relief shall be approved by two magistrates*, as aforesaid;" that is, if his act is approved by the same authority which could have given an order. This was a wise and humane provision for cases of sudden emergency. Now, as funeral expenses are put on the same footing as relief to the living, the subsequent approval will have the same effect as to them as to relief given; and if the deceased left any property, the overseers have the same right to indemnify them.

[Directors of Poor v. Wallace.]

selves out of it. The 42d section subjects the overseers to indictment if they neglect to perform any duty prescribed by the Act.

It is not necessary in this case to enter into the distinction between moral obligations and legal responsibilities. Perhaps, I might safely say, the obligation on the overseers created by the Act, renders them responsible in law. Certain relatives are by the Act made liable to support paupers, if of sufficient ability so to do; and a mode is pointed out of levying on their property, if they neglect so to do. When the Act subjects the overseers to indictment for neglecting their duty, it makes those duties legal duties, or it would not punish the neglect of them.

Judgment affirmed.

Parke *against* Chadwick.

In an action founded upon a covenant of warranty of title in a deed of conveyance, it is competent for the defendant to prove that the deed, though absolute on its face, was executed and delivered as collateral security for the payment of a debt to a third person, and that the plaintiff had no real interest in the title. The fact of his having obtained the title without the payment of the purchase money is sufficient to put the plaintiff upon inquiry as to the circumstances under which the deed was made to him.

ERROR to the District Court of *Allegheny* county.

John E. Parke against James Chadwick. This was an action of covenant founded upon a warranty of title contained in deed of conveyance by the defendant to the plaintiff. It appeared that Solomon Schoyer, from whom James Chadwick had purchased the property, had previously given a mortgage upon it to William M'Fadden, by whom it was sued, judgment obtained, and the property sold by the sheriff. This was the plaintiff's case. The matters of defence are fully stated in the opinion of the court.

Miller, for plaintiff in error, cited 1 *Beam's Rep.* 518.

Biddle and Dunlop, contra, cited 8 *Watts*, 363; 19 *Johns.* 69; 2 *Serg. & Rawle*, 526; 2 *Watts*, 324; 5 *Watts*, 30; 3 *Bin.* 305; 3 *Watts & Serg.* 384; 6 *Watts*, 126; 7 *Watts*, 167. 267; 15 *Peters*, 94; 2 *Vern.* 384; 5 *Watts*, 308; 4 *Bin.* 140; 2 *Penn. Rep.* 92; 10 *Watts*, 67; 2 *Vern.* 609; 10 *Peters*, 211; 12 *Vern.* 11; 7 *Watts*, 296.

[Parke v. Chadwick.]

The opinion of the Court was delivered by

HUSTON, J.—The testimony presented the following facts. James Church was a creditor of R. N. Havens by sundry transactions and liabilities to a large amount. To satisfy these, Havens gave to Church two bills on George Johnson for \$1000 each, and a note of said Johnson for \$3600. An article of agreement was executed on 27th Sept. 1839, between Church and Havens, by which it was stated that James Chadwick had that day conveyed to John E. Parke, at the instance of Church, a lot of ground in Allegheny city (describing it)—“The object of said conveyance to Parke being to secure me (Church) in the collection of certain bills of exchange for \$1000 each, and a note for \$3600, all drawn on George Johnson, and which have been or are to be conveyed to me by R. N. Havens; and for the security of which, said Havens is to procure to me a mortgage from said Johnson on his interest in Caroline Furnace, &c. Know all men, that I, the said Church, do engage to use all diligent and lawful means for the present collection of said bills and notes; and if I shall succeed in obtaining from the said Johnson, either peaceably or by legal means, the amount thereof, I will then cause an immediate re-transfer of the property so conveyed to me by said Chadwick, to him, his heirs and assigns. And if I collect any part of said bills and note of said Johnson from him, then on payment (by the said Chadwick) of the balance which I may be unable to collect, I will cause an immediate re-transfer of the property as aforesaid. In witness, &c.”

It was then proved that Parke was not present, and knew nothing of the transaction; that Havens' offer to give the note and bills was not accepted unless he would give collateral security in this county, in case the money could not be collected, and Chadwick was offered as such security; that Church requested that the deed should not be made to him, as he was somewhat involved, and judgments might be had against him, so that he might not be able to re-transfer clear of liens, and named his brother-in-law Parke as a safe person to whom the deed should be made, and who could and would return it unencumbered; that Chadwick had no dealings or transactions with Parke than as above stated.

The plaintiff offered and was permitted to prove that Church was at that time indebted to Parke, and contracted a further debt on the same 27th Sept. 1839. The deed from Chadwick to Parke was in the common form; the consideration stated in it was \$5000 in hand paid by John E. Parke. The admission of the articles of 27th Sept. 1839, and the proof of what passed and was stated at the time they were entered into and the deed given were objected to, and cases cited to prove that a deed cannot be contradicted, &c. &c., and that no fraud was alleged.

The objection to the evidence and to the effect of it is the same thing; for whatever will amount to a good defence to the plaintiff's

[Parke v. Chadwick.]

claim may always be given in evidence. The objection to the effect of this evidence will then be considered in the cause as settling the question of its admissibility.

The court were requested to charge on fifteen points, the whole of which amounted to but these; can the whole of the contracts, whether in one or more papers, be received in evidence to reach the justice of the case? is it necessary that the word *fraud* or *fraudulently* should appear in the pleadings, if the facts set out show a gross fraud in the transaction, or in the use made of writings, which are attempted to be used contrary to what was the agreement of the parties? and was the court right in submitting it to the jury, whether a deed brought to Parke, stating that he had paid \$5000, when he had paid nothing, and that deed from a man with whom he had no previous dealings, was sufficient to put him on inquiry?

There was no error in the admission of the evidence, nor in the charge of the court. A man has notice of all facts of which his agent has notice. Parke had nothing to do with the procurement of this deed to him. Church procured it. When Parke accepted it, he adopted the acts of him who procured it; he treated it as if Church had been his agent through the whole transaction. In another point of view; a deed is brought to him for a valuable property containing a receipt for \$5000, paid by him to a stranger; every lawyer and layman would say at once, this was so novel a matter as to put him on inquiry to know how this happened, and his inquiry must go further than to ask of Church.

It is not worth while to inquire whether this fraud was intended when Church proposed to have the deed made to Parke; it is as much a fraud to obtain a paper for one purpose, and use it for a different and unfair purpose, as to obtain it by fraudulent statements. This is the familiar case of lending money and taking an absolute deed as security, and then denying that it was a security, and claiming it to be an absolute deed. The principle is the same; this deed was obtained on the one side and given on the other for a particular purpose, and to be followed by a re-transfer on certain events; those events were to be obtained by the acts of Church; he does nothing; does not attempt to do anything; originally, or afterwards, he intends to do an act of gross injustice, and to shelter himself and his brother-in-law, by what he supposes to be rules of evidence and of law; which rules are only applicable to fair transactions, and to protect men from perjury and falsehood, but would be sadly misapplied to screen iniquity and imposition. Parke can in no point of view be considered a purchaser without notice. It would be misspent time to cite cases or to go into reasoning to prove that there was enough to put him on inquiry, or that what is sufficient to put him on inquiry, is equivalent to actual notice. I mean to confine this to the immediate papers and transaction. I do not say he was bound to follow and

[Parke v. Chadwick.]

inquire of the title through several prior owners, which is only necessary where the deed which he receives on its face suggests such inquiry; here the deed to himself called for such inquiry and for how and why Chadwick made a deed to him, containing a receipt for \$5000; he knew this had not been paid; he took the deed as the act of Church for his use, and is bound, as Church would have been, if the deed had been made to him and was still his.

Judgment affirmed.

Christy *against* Crawford.

The amount of an award of arbitrators appealed from by the defendant, is a lien upon his land, but not the costs which subsequently accrue upon the trial of the cause.

ERROR to the Common Pleas of *Mercer* county.

James Christy against William Crawford. This was a *scire facias* upon a mortgage, in which the parties agreed to the following special verdict:

The mortgage in this case, dated the 25th February 1839, and recorded 30th March 1839, was given to secure the payment of \$2040, according to the condition of a bond bearing same date therewith, and referred to in said mortgage. The land embraced in said mortgage was conveyed to defendant by deed bearing same date of the mortgage, under whom terre-tenants claim title. Certain payments were made on said bond and on incumbrances, which are admitted to be proper credits in liquidation of the amount. The bond accompanying the mortgage contains the following condition, to wit: "Provided nevertheless that the said Christy in the mean time remove every incumbrance from a certain piece of land purchased by the said Crawford from the said Christy, being part of lot No. 74 in the 4th district of donation land, to secure the purchase money of which the above bond is given, so as wholly to secure the said Crawford from any incumbrances now existing on said premises in any manner; and if the said Christy fails to do so, then the said Crawford to retain out of said payment sufficient to satisfy any and all of said incumbrances as necessity may require."

On the 25th January 1839, Robert Campbell recovered an award of arbitrators against said Christy in the Common Pleas of *Mercer* county for \$294.10, from which the defendant appealed and paid all the costs which had accrued thereon; and on the 27th June 1840 the cause was tried by a jury, and a verdict and judg-

[Christy v. Crawford.]

ment were recovered in favour of the plaintiff for \$332.25. The plaintiff's bill of costs, accruing subsequently to the award of arbitrators, amounts to \$113.94; the difference between the award and interest and the verdict is \$13.94, which last-mentioned sums the defendants claim to have deducted from the balance due on the mortgage. The award and interest, and the costs which accrued on the writs of execution issued on the judgment, have been paid. If the court should be of the opinion that these items are a lien on said land in the hands of the purchasers (who are terre-tenants), and that they are entitled to resist a recovery for so much in this case, then judgment to be entered, and the amount of the said items to be deducted; otherwise, judgment to be entered, amount to be liquidated excluding said items. The court will also decide whether incumbrances existing against the land at the date of said mortgage, can be retained out of said mortgage before payment of the same.

The court below was of opinion that the amount recovered by the verdict of the jury, except \$13.94, together with the accruing costs, should be deducted from the amount of the bond, and that the amount of the incumbrance should be retained by the terre-tenants.

Stewart, for plaintiff in error.

Holstein, for defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—The question for determination in this case arises out of the 24th section of the Act of Assembly of the 16th June 1836, relating to reference and arbitration. This section is applicable only to awards entered by the prothonotary in the proper docket, under a compulsory arbitration, as it is called in the Act. The words of the section are, "Every award so entered (that is, entered by the prothonotary in the proper docket forthwith upon being transmitted to him by the arbitrators, as directed in the three preceding sections of the Act) shall have the effect of a judgment with respect to the party against whom it is made, from the time of the entry thereof, and shall be a *lien* upon his real estate, until reversed upon appeal, or satisfied according to law." The award was entered by the prothonotary upon the 25th January 1839, against James Christy, the plaintiff, who was the defendant in the action wherein the award was made, for \$294.10. Christy paid all the costs which had accrued in the action, including the entering of the award; but being dissatisfied with the amount of it, appealed from it, and afterwards, upon trial in the Court of Common Pleas of Mercer county, to which he appealed, a verdict and judgment were given against him on the 27th of June 1840, in favour of the plaintiff, for \$332.25 damages, beside the costs which accrued on the appeal, amounting to \$113.94. The amount of the

[Christy v. Crawford.]

damages thus recovered exceeded the amount of the award and interest thereon \$13.94, which, added to the costs of the appeal, form an aggregate sum of \$127.88. A month after the entry of the award in the proper docket by the prothonotary, the defendant, on the 25th February 1839, purchased of Christy his real estate, upon which the award was a lien by the terms of the 24th section recited above, and the appeal therefrom still depending untried. On the same day, the defendant received a deed of conveyance from Christy for the estate, and thereupon gave a mortgage upon the same to Christy, securing the payment of the purchase money. It was agreed also between the parties, at the same time, that if Christy did not pay off the liens or incumbrances then existing upon the estate, Crawford, the defendant here, should retain the amount of such as remained unpaid by Christy, out of the purchase money secured to be paid by the mortgage. The question then is, can the \$127.88 above-mentioned be considered as an incumbrance existing against the estate when the defendant purchased, so as to entitle him to deduct or retain the same out of the money secured by the mortgage?

The court below decided that it was an incumbrance, and accordingly allowed the defendant to deduct and retain it out of the money otherwise due upon the mortgage. It is not easy to discover upon what principle the court founded their decision. The 24th section of the Act of 1836, making the award a lien upon the real estate of the party against whom it is made, from the time of the entry thereof by the prothonotary in the proper docket, is too plain to admit of any but one construction. It makes the *award* a lien, which can only be construed to mean the amount of the money thereby adjudged to be paid, together with the costs which shall have accrued thereon. No additional or further sum of money can be considered as forming any part of, or as being embraced in the award. It is the *award* that is made a lien, and it is inconceivable how the lien of it can be extended to that which formed no part of it at the time, and could not be said even to have had an existence. If the lien of the award were held to cover any additional sum that should be recovered on the appeal and the costs thereof, beyond the amount of the award, with the interest thereon, it might render it very unsafe in many instances for any one to purchase of a person his real estate, which was bound by an award against him for the payment of money, however valuable the estate and small the sum of money mentioned in the award might be, if appealed from, as long as the appeal should be depending. For, in actions of slander, or cases of trespass, where exemplary or vindictive damages are recoverable, the award might not exceed \$100 against the defendant: and yet the jury afterwards, on an appeal from it, might give some thousands. The award is made a lien upon the real estate of the party against whom it is made, in like manner as a judgment.

[Christy v. Crawford.]

until it shall be reversed upon appeal, or satisfied according to law. But certainly it has never entered into the mind of any one to hold that a judgment can be considered a lien upon the real estate of the person against whom it exists beyond the amount of money mentioned in it. In short, it would be an anomaly, if not worse, to say that a thing which is not in being, and wholly incapable of being ascertained in its amount, is a lien upon the real estate of any one. Such a theory does not and cannot exist. Being clearly then of opinion, that that which was claimed by the defendant to be an incumbrance upon the estate purchased by him was not so, it is therefore unnecessary to pass upon the second question made in the case, whether he could, under the agreement between him and the plaintiff, claim to have it deducted from the mortgage money without paying it to Campbell.

The judgment of the court below is reversed, and judgment for the plaintiff, including the \$127.88, or whatever the real difference may be, between the amount of the award with interest thereon from the time it was entered, and the amount of the verdict and judgment given on the appeal, including the costs of the same.

Judgment reversed.

Lehr against Beaver.

Upon the sale by a husband and wife of the wife's lands, and a subsequent separation, an agreement between them that one half of the unpaid purchase money shall be paid to the attorney of the wife for her sole use and maintenance, upon her giving security to indemnify the husband against any debts which she might contract, is binding between the parties; and upon the money having been paid by the purchaser to the attorney of the wife, the husband cannot maintain *assumpsit* for money had and received against him, although the wife had not given the indemnity against her debts, which the agreement required: he could only sue and declare specially upon the agreement, setting out a breach, and the damages then recoverable would be measured by the amount of debts of the wife which the husband had been obliged to pay.

ERROR to the District Court of *Allegheny* county.

Samuel Lehr against John F. Beaver. This was an action on the case, in which the plaintiff declared in *assumpsit* for money had and received, laid out and expended, paid and advanced, &c.

The facts presented this case. In 1834 Mary Lehr, the wife of the plaintiff, having derived a tract of land by descent from her father, joined her husband in a sale and conveyance of it. In 1841 the husband and wife having separated, entered into a written agreement by the terms of which the deferred payments

[Lehr v. Beaver.]

for the land, amounting to \$1200, were to be divided between them; one half thereof to be paid to John F. Beaver, Esq., the attorney of the wife, for her sole and separate use, upon her giving security to indemnify the husband against any debts which she might contract. The money was thus paid to John F. Beaver, Esq., who gave notice of it to the wife, who was unable or neglected to give the security required by the agreement, when this action was brought to January Term 1843 by the husband, to recover the money.

Justice SHALER directed a verdict for the plaintiff, subject to his opinion upon the points reserved. He subsequently delivered an opinion setting aside the verdict and rendering a judgment for the defendant, on the grounds that the contract was binding between the parties, and that the action in its present form could not be supported, but only upon a special declaration upon the agreement, and a breach of it. This opinion was the subject of review upon the writ of error.

Woods, for plaintiff in error, argued that the agreement between the husband and wife was absolutely void, and cited 6 *Whart.* 576; 4 *Whart.* 25.

Beaver, for defendant in error.

At the common law, agreements *post nuptial* between husband and wife were utterly void; but in equity such contracts are not only valid, but enforced against the husband; 2 *Story's Eq.* 601; and settlements resting upon such agreements, as against the husband himself, are held good. *Atherly on Mar. Set.* 161. Nor have these cases been supported without grave examination. See *Lady Arundell v. Phipps*, (10 *Ves.* 148). Lord Eldon said, in that case, "that husband and wife, after marriage, could contract for a *bonâ fide* and valuable consideration, for a transfer of property from the husband to the wife; and that it was so both in law and equity." So in *Nottleship v. Clerk*, (2 *Lev.* 149). The same point was determined in *Livingston v. Livingston*, (2 *Johns. Chan. Rep.* 539.) See 1 *Fonb. Eq.*, B. 1, Ch. 2, s. 101, 102, &c. That she may make a valid agreement with her husband, see 3 *P. Wms.* 339, 335; 15 *Serg. & Rawle* 84; 1 *Vesey* 538; *Finch's Rep.* 56. But it is urged that *M'Kennan v. Phillips*, (6 *Whart.* 571), is in point. The principle of this case is founded on the most substantial basis. The court has no right to decree perpetual separation; and neither the wife nor the husband shall be allowed to establish a claim on a violation of conjugal rights. 3 *Johns. Ch.* 521. Therefore it has been long since settled that chancery will not enforce an agreement to live separate and apart; *Dick.* 791; 3 *Vesey* 352; except in the single instance where the personal safety of the wife requires such a decree. *Elworthy v. Bird*, (*Sim. & Stuart* 372).

[Lehr v. Beaver.]

The case of *M'Kennan v. Phillips* is nothing more than a refusal to assist the party in a violation of conjugal rights.

In the case now before the court on the point reserved, there is no agreement to live separate, and the contract is an allowance to the wife out of her own separate estate. She was in possession of the mortgage and bonds, and a Court of Chancery would have compelled a settlement before Lehr could have recovered the balance of the money. Although the mortgage and bonds were in the plaintiff's own name, yet as he could not recover the money without suit, the court would have compelled him to make provision for the wife, before he would have been allowed to take the residue of her property, when he was not living with, or supporting her.

Where the separation had taken place previous to the agreement, as in this case, it was held that an agreement between husband and wife was valid. *Carson v. Murray*, (3 Paige 483); 1 Dow. & Clark, 519.

The plaintiff having renounced his marital right to this money, he should not be allowed to resume that right and recover it against conscience; and the contract or agreement being supportable in equity, a reasonable time will be given to give the security stipulated for, on such terms and at such times as by an equitable decree under all the circumstances the *cestui que trust* should do.

The opinion of the Court was delivered by

KENNEDY, J.—The first question presented by this case is, whether the agreement reduced to writing and signed by the plaintiff, be void or not. It is contended on behalf of the plaintiff that the agreement being made with his wife was void, and therefore could have no effect whatever upon his right to demand and receive the money in question. It is no doubt true, that in England, according to the common law, as Littleton says, section 168, "A man may not grant, nor give his tenements to his wife, during the coverture, for that his wife and he be but one person in the law;" upon which my Lord Coke observes, 1 *Inst.* 112, "This opinion is clear; for by no conveyance, at the common law, a man could, during coverture, either in possession, reversion or remainder, limit an estate to his wife." And again, in page 3, *a*, of 1 *Inst.*, he says, "A *feme covert* cannot take anything of the gift of her husband." See also *Moyse v. Gyles* (2 *Vern.* 385); *Beard v. Beard* (3 *Atk.* 72), where the same principle is recognized and laid down. But this doctrine is not universally true, and must be understood with various limitations; for though a husband cannot, at law, in England, convey to the wife *immediately*, yet he may give to a trustee for her benefit, and the gift will be good. 1 *Inst.* 112, *a*; *Bunting v. Lepingwel* (4 *Co.* 29, *b.*) He may give to his wife by *last will*; because such gift cannot take effect till his death, when the coverture is determined. Littleton, sect. 168; and in *Lawson*

[Lehr v. Beaver.]

v. *Lawson* (1 P. Wms. 441), Lord Chancellor PARKER seems to have thought that a *donatio causâ mortis* by the husband to the wife would be good, as it might be considered in the nature of a legacy. In *Seeling v. Crawley* (2 Vern. 386), a quarrel having taken place between the husband and wife, they agreed to separate, and the husband gave his note to the father of his wife for the payment of £160 to him on demand, being the portion the father had given with his daughter; the father agreeing at the same time to save the husband harmless from any debts his wife might contract, and against all demands for her maintenance. The wife with her child thereupon went and lived with her father, who supported and maintained her. The father offering to perform the agreement on his part, filed his bill against the husband to compel payment of the £160; and notwithstanding the husband offered to take his wife home and maintain her and the child, and to satisfy the father for the time past, yet the court decreed the husband to pay the £160 to the father upon his giving security to indemnify the husband against the debts and maintenance of the wife and child. See the cases also there referred to by Mr Raithby in his note, showing clearly, as a general doctrine, that equity will, in cases similar to that case, and even where there are no trustees, decree and carry into effect an agreement for a separate maintenance for the wife; though it may be that it will not establish an agreement in all cases between a man and his wife to live separate. *Wilkes v. Wilkes*, (2 Dick. 791). Yet it has been done in many cases. See *Guth v. Guth* (3 Bro. Chan. Rep. 614), and the cases there cited; and also *Elworthy v. Bird* (2 Simons & Stuart, 372).

But by the agreement of the plaintiff in the case under consideration, Mr Beaver, the defendant, is named by the plaintiff as the attorney of his wife; and he thereby agrees that one half, to-wit, \$600.22½ of the instalments due and remaining unpaid of the purchase money, under the sale made by the plaintiff and his wife, of his wife's land, be considered the money of his wife absolutely for her sole and separate use; she to give him security, such as shall be agreed on by Mr Robert Woods, and the defendant Mr Beaver, to indemnify the plaintiff against any debts or other claims for her maintenance during the time that he and she should live separate. And he also thereby further agrees that "the money of the said Mary (meaning his wife), being the half of the said payments (before stated to be \$1200.45) so due, be paid into the hands of John F. Beaver, attorney for the said Mary; to be paid to her on the bond of indemnity aforesaid being delivered to the said R. Woods, Esq." Although the defendant is spoken of in the agreement as being the attorney of the plaintiff's wife, yet he is in fact thereby made her trustee, with full power to collect and receive for her separate use the one-half of the \$1200.45, still outstanding and unpaid in the hands of the purchasers of her land. Thus the

[Lehr v. Beaver.]

intervention or interposition of Mr Beaver the defendant as a trustee is sufficient according to the principles even of the common law of England to render the agreement valid and binding upon the plaintiff. But if it were not so, it is perfectly clear, that it would be good and binding upon him according to the principles which prevail in and govern the courts of equity there in regard to agreements made between husband and wife. Gifts from the husband to the wife may be supported, as her separate property, if they be not prejudicial to creditors, without the intervention of trustees. Vide the *Countess Cowper*, before Sir JOSEPH JEKYLL, cited in 1 *Atk.* 271; 3 *Ibid.* 393; *Slanning v. Style*, (3 *P. Wms.* 334); *Moore v. Freeman*, (*Bunb.* 205); *Lucas v. Lucas*, (1 *Atk.* 270, cited 3 *Ibid.* 393; *Brinkman v. Brinkman*, cited 3 *Atk.* 394; *Graham v. Londonderry*, 3 *Atk.* 393); *Fenner v. Taylor*, (1 *Simon's Rep.* 169.) The claim of the wife here, to the money in dispute, as it arose from the sale of her real estate, is powerful at least, if not irresistible, in an equitable point of view, independent of the agreement to give it to her. The husband could never have had any right or claim to it, if his wife had not at his solicitation, which may have been very importunate, and such possibly as could not have been resisted, except at the expense of her peace, consented to and joined him in making a sale of the estate. He, in completing the sale, took the securities for the payment of such portion of the purchase money as remained unpaid at the consummation thereof, in his own name; and having thus made himself the absolute, or at least legal owner, of the proceeds of her real estate, he cannot live with her afterwards as he did before, and she is obliged to separate herself from him. In this state of things he agrees to divide equally with her the residuary portion of the proceeds of her estate. Why not give her the whole of it, if she kept him indemnified against all claims for and on account of her support and maintenance, as he required she should for allowing to her only one-half of it? It does appear to me that he would have given her the whole of it, if he had been moved by a conscientious feeling. The circumstances of the case imposed upon him a moral obligation to do at least all he agreed to, and more, and were clearly sufficient to make his agreement binding upon him, upon mere principles of equity, as they are distinguished in England from those of the common law. This being the case, the agreement in Pennsylvania will be considered as binding at law; for equity has ever been regarded as part of the law in it. *Pollard v. Shaeffer*, (1 *Dal.* 211, 213, 214); *Wikoff et al. v. Cox* et al., (1 *Yeates*, 358). And hence courts therein will allow a defendant to put in a plea founded purely upon equity alone. *Jordan v. Cooper*, (3 *Serg. & Rawle*, 578); *Murray v. Williamson*, (3 *Binn.* 135). And upon the same ground, an action for a partnership debt may be supported in Pennsylvania against the executor of a de

[Lehr v. Beaver.]

ceased partner, although another be living, where the survivor is insolvent or bankrupt. *Lang v. Keppeler*, (1 Binn 123).

Seeing, then, that the agreement was not void, but binding and still in full force, and executory also, as respects all that was to be done on the part or behalf of the wife, the plaintiff, if it has been broken on her part, can only entitle himself to recover by declaring specially on the agreement, showing what were the terms and conditions thereof, as also the breaches of the same. From which the inevitable conclusion is, that he cannot recover here in a general *indebitatus assumpsit* upon any of the common money counts, which are all that his declaration contains. In a special action, founded upon a breach of the agreement, he would, upon proving the breach, be entitled to recover damages, in amount equal to the value of the loss or injury sustained by reason thereof. But it does not appear from the evidence given on the trial of the cause below, that he has ever been called on to pay, much less paid, any debts or claims created by his wife for her support or maintenance; nor did it even appear that any such existed. It would therefore seem that he has sustained no *actual* damage. It may therefore be, even in a proper form of action, that he would only be entitled at most to recover nominal damages, because security for indemnity had not been given in due time. But a tender of such security to the plaintiff at any time before a proper suit is brought by him, if no actual damage or loss shall have been sustained by reason of the conduct of his wife in violation of the agreement, would certainly defeat a recovery.

Judgment affirmed.

Robb *against* Beaver.

A husband and wife seised, in right of the wife of an estate of inheritance, "granted, demised, leased, set and to farm let the same unto A. B., to have and to hold to the said A. B., his heirs and assigns, from the day of the date hereof, for and during the existence of the world, he yielding and paying therefrom and thereout yearly and every year hereafter to the said grantors, their heirs and assigns, the yearly rent of \$100;" and in the same deed the grantees covenanted to erect a house upon the premises of the value of \$400; and upon their failure so to do, a right to the grantors to re-enter was reserved: *Held*, that upon the death of the wife the husband was seised of the whole estate, created by the deed in fee, and that it was subject to a levy and sale for the payment of his debts.

ERROR to the District Court of *Allegheny* county.

John F. Beaver, Esquire, against Robert Robb. This was an

[Robb v. Beaver.]

amicable action in which the parties agreed to a special verdict, the substance of which may be thus stated :

William Pentland and Mary his wife were seised in right of the wife of certain lots in the city of Pittsburgh, which they disposed of to various purchasers by deeds of perpetual lease, as they are usually styled, reserving certain rents to the grantors jointly. William Pentland surviving his wife, judgments were obtained against him, and these rents were levied on as his property. John Harper the plaintiff in the first execution assuming that the interest of William Pentland in the rents was but a life estate, petitioned the court to appoint a sequestrator; and the defendant in this case, Robert Robb, Esq., was thereupon duly appointed by the court, and continued for some time to receive the rents. Afterwards the same rents with other property of Pentland were levied on at the suit of the Merchants & Manufacturers' bank, and assuming that the title of Pentland was a fee-simple, the sheriff proceeded to sell them, and made a deed to John F. Beaver, Esq. the plaintiff in this issue, for all the ground-rents which had been previously sequestered and in the hands of the defendant.

Afterwards a rule was obtained in the case of *Harper v. Pentland*, on Robert Robb, Esq. the sequestrator, to show cause why the writ of sequestration should not be set aside. On argument of this rule, the court ordered an issue to be tried for the purpose of ascertaining "the quantity of estate William Pentland as survivor of his wife (late Mary Watson) had in the premises set forth in the schedule and levy."

The plaintiff contended that William Pentland was seised in fee of the rent in question; the defendant that he had but a life estate in his own right, the remainder in fee being in the children of Mary Pentland. The deeds made by Pentland and wife on which the rents in question were reserved, were all in the same form, and contained the same covenants, the material words of which were as follows :

"William Pentland and Mary his wife have granted, demised, leased, set, and to farm letten, and by these presents do grant, demise, lease, set, and to farm let unto A. B. all that lot, &c. To have and to hold to the said A. B., his heirs and assigns, from the day of the date hereof, for and during the existence of the world, yielding and paying therefrom and thereout yearly and every year hereafter to the said William Pentland and Mary his wife, their heirs and assigns, the yearly rent, &c." Beside the usual covenants to pay the rent, the grantee also covenanted to build "a good and substantial building of the value of \$400," on the property demised. The grantors to have a right to enter and distrain for rent in arrear; and if two years' rent remained unpaid, might enter and without hindrance, hire, rent or demise to any other tenant for the best rent that could be obtained, and for such term of time as should be sufficient to pay all arrears, &c. "And the

[Robb v. Beaver.]

said A. B. (grantee), his heirs and assigns do further covenant that if they the said, &c. do neglect and fail to erect and complete the buildings hereby stipulated to be erected on the said demised premises within the time specified for that purpose, then it shall and may be lawful for the said William Pentland and Mary his wife, their heirs and assigns, to enter on the said demised premises, and to expel and put out any and every person found thereon, and to let, lease and demise the same at his or their pleasure for any term not exceeding five years from such re-entry, and in case of the neglect or refusal of the said A. B. (grantee), his heirs or assigns, to give good satisfactory security within the said five years, for the faithful performance of his covenants in relation to the completing of the said buildings, then at the termination of five years from such re-entry, the estate of the said William Pentland and Mary his wife, their heirs and assigns, shall become absolute in the premises, at law and in equity, to all intents and purposes, as if this indenture had never been made; and in like manner, if after a re-entry upon the said premises for two years' rent being in arrears, if the said A. B., his heirs or assigns shall for five years after such re-entry neglect or fail to pay and discharge the rents in arrears, and the rents accruing with interest and costs, and if the same be not fully paid at the end of five years from the time of the re-entry as aforesaid, then the estate of the said William Pentland and Mary his wife, their heirs or assigns, shall become absolute in the said demised premises at law and in equity to all intents and purposes as if this indenture had never been made."

Upon argument, the following opinion was delivered by

GRIER (President).—The question for our decision is, what estate did William Pentland take in the rents thus reserved.

1. It needs neither argument nor authority to show that the grantees in these deeds take an estate in fee-simple in the land demised. Nor is this the less true, because the estate granted is on condition. A condition annexed to an estate given, is a divided clause from the grant; therefore cannot frustrate the grant precedent. *Hob. 170; 2 Cruise 2.*

2. It is equally plain that the rent reserved, whether we call it a fee farm rent (as we with propriety may in this State, where the statute *quia emptores* is not in force) or a rent-charge, is an estate of inheritance, and governed by the same rules as to quantity of estate as other estates of inheritance.

3. It cannot be denied that a feme covert in conjunction with her husband may alien her lands in fee-simple, or for any less estate, by deed acknowledged in due form, as effectually as by a fine or recovery; and that this alienation may be for such consideration as she and her husband may choose to accept; and that if the consideration be a sum of money, such money when re-

[Robb v. Beaver.]

ceived vests absolutely in her husband; and further that the alienee may, on return of the consideration money, make a valid conveyance of the same property to the husband and his heirs: nor would any court, either of law or equity, trust the husband in such a case as a trustee for his wife. Nor do I believe any decision can be found in the books that establishes the doctrine, "that if husband and wife sell wife's land, and for bonds made payable to the husband, and husband die, his administrators shall not have the bonds." In England, where the estate of the wife can be conveyed only by fine and recovery, it has been decided that "as a married woman is allowed to join with her husband in levying a fine and suffering a recovery, she is also allowed to join with him in declaring the uses of them; and although the wife should be an infant, yet her declaration of the uses of a fine or recovery, if she be allowed to levy or suffer one, shall bind her; 4 *Cruise* 140; 2 *Roll. Abr.* 798; and if a husband alone declares the use of a fine levied by him and his wife of the wife's estate, it shall bind the wife unless her dissent appears; for when she joined her husband in the fine, it must be presumed that she consented to the declaration of the uses of it. 4 *Cruise* 141; 5 *Rep.* 57; *Swanton v. Raven*, (3 *Atk.* 105). It follows as a corollary, that if the husband and wife join in the declaration of the uses of a fine in which the estate is declared to be for the use of husband and wife and their heirs, this would be valid and binding on the wife and her heirs; nor can any case be found in which a court of chancery would declare the surviving husband to have but a curtesy estate, or that he is trustee for the heirs of his wife, as to the inheritance.

Now, what distinction can be produced in law or equity on the difference between holding a woman bound by her declaration of the uses of a fine, and not bound by the reservation of a rent to herself and husband on the sale of her estate? If she may sell for money, why not for a ground-rent? If she is competent to dispose of her land, why not of the consideration? If she is estopped by her deed from denying the estate conveyed to the grantee, why not as to the person entitled to the reserved rent? The indenture creates two estates, one on the land, the other in the rents; why should the words of the deed be construed to have their legal effect as to the one, and not to the other also? See *Pratt v. Lewis*, (4 *Whart.* 24). The husband and wife have each contributed their interest in the land, he his freehold and she her fee, to purchase a fee farm rent, or a rent-charge on the same land. The estate thus purchased is a joint one to them and their heirs. What right have the court to put any other construction upon this deed than that given by the law to the plain words of the reservation? For the rule of law is, that where the lease is by indenture of sundry persons, they are estopped to claim the rent in any other manner than it is reserved in the deed, because the indenture

[Robb v. Beaver.]

is the deed of each party, and no man shall be allowed to recede from his own solemn act. 2 *Roll. Abr.* 447; *Co. Litt.* 47

Nor can the rule that the rent follows the reversion affect this case, because it is a feoffment in fee to the grantee and his heirs, and there is no reversion in the heirs of the wife. For if a man seised of lands of the part of his mother makes a lease for life, or gift in tail, reserving rent to him and his heirs, this rent shall go with the reversion to the heirs of the part of the mother, because the nature of the contract is such that the retribution should go to those that lose the profit of the lands during the lease or gift. *Co. Litt.* 12 b. But if he had made a feoffment in fee, reserving rent to him and his heirs, this rent shall go to the heir of the part of the father, because here is an entire disposition of the lands and the rent in the nature of a new purchase, coming into the family from the grant of the feoffee, and therefore the blood of the father shall be preferred. *Co. Litt.* 426; *Gilbert on Rents* 72 (marg.).

4. It is well settled, that if a husband and wife take to themselves an estate jointly during their marriage, they have not several estates, nor are they tenants in common, nor yet joint tenants in the proper or legal sense of the word; but in consequence of the union of their persons by marriage, each has the whole estate in the parcels granted, entirely as one person, so that on the death of either of them the whole estate belongs to the survivor. 8 *Coke* 71 b; 2 *Vern.* 120; 2 *Cruise* 441. Our Act of Assembly of 31st March 1812, concerning joint tenancy, which abolishes the right of survivorship between joint tenants, has never been construed to affect the joint estate of husband and wife, for the very sufficient reason that in law they are not joint tenants.

It would seem to follow, therefore, as a necessary conclusion from these premises, that William Pentland having survived his wife, has an estate in fee in the rents in question. But it will be proper to notice some of the objections which have been so well urged by the counsel for defendant. He contends that there is a rent service, and not a rent charge; that it is reserved out of the estate, and is not a new grant; that it is a creature of the lessor and not of the lessee. That the wife by her acknowledgment of the deed, conveyed the land only to the grantee; and this is no conveyance of the reservation to her husband, or evidence of an intention in her that her estate in the rent should differ from her former estate in the land; and this is argued farther from the words of the condition in the deed, that in case of re-entry for covenant broken, and forfeiture of the estate, "then in that case the estate of the said William Pentland and Mary his wife shall become absolute in the premises, to all intents and purposes as if this indenture had never been made." But to this I think it is well answered, that the rent is the creature (or the creation) of the deed, and that all the parties claiming anything under that deed are estopped from claiming any other estate than that con

[Robb v. Beaver.]

veyed by the deed. That the covenants and conditions in the deed are for the purpose of compelling the performance of it by the grantee of the land, and pass by an assignment of the rent, so that if by legal forfeiture the estate be again revested in the grantors, they would be trustees for the assignee of the rent; therefore these words in the condition cannot be construed to set aside the fair legal effect of the reservation, the words of which are alone to direct us in our inquiry as to the quantum of estate which any party to the indenture can claim in the rent created by it. *Scott v. Lunt*, (7 Peters 604).

But the case of *Weeks v. Haas*, (3 Watts & Sergeant 520), is relied upon as establishing the doctrine, "that as the consideration has passed from the wife, the husband took the legal estate as trustee for her, and the law will imply such a trustee estate when her land has been conveyed in payment, and the object is not to part with the value of it but to reserve or take back an equivalent." The correctness of the arguments and doctrine asserted by the learned Chief Justice in that case cannot be doubted, when applied to the case before him. But to extract a sentence or two out of an opinion, without reference to the circumstances of the case to which they refer, is a sure road to error. No judge can speak oracles in every sentence, or write maxims of universal application to all cases. That was a case of partition; the object of the deed was partition, not conversion. There was no evidence whatever that the wife intended to make a gift to her husband. She acknowledged no deed or instrument of writing exhibiting any intention to convey her interest in the land or any portion of it to him. The releases to the husband were by the other coparceners; why then should not the implication of law be in her favour, when she had executed no instrument of writing showing an intention of divesting herself of any portion of her estate in favour of her husband or any other person, her release being only for the purpose of partition? And of the same nature are the cases referred to by the learned court in their opinion, where the wife's estate has been mortgaged, and her only object in becoming a party to the transaction was to permit a security to the mortgage, not to part with her equity of redemption to her husband; and even in such cases Chancellor KENT says, "if it be the true construction of the mortgage deed that the equity of redemption was intended by the wife to be reserved to the husband alone, it seems that he may take it. See *Demarest v. Wynkoop*, (3 Johns. Chan. Rep. 147).

But in the present case there is no room for implication. The rent is created by the deed, and the quantum of estate or title to it can be found only in the deed. *Broad v. Broad*, (2 Chan. Ca. 98, 161); *Ruscombe v. Hare*, (6 Dow's Parl. Cas.); 1 Vern. 213; 2 Vern. 437. The wife is party to the indenture, and is as much estopped by it as any other party who signed it. The deed shows on its face a plain intention of the wife to dispose of the fee in the

Robb v. Beaver.]

land, and accept in lieu thereof a rent charge vested in herself and husband, and their heirs. She had power by law to vest the whole estate in her husband, for no consideration in fact save love and affection. She could have transferred her whole estate for a sum of money paid to her husband. Why shall not her deed bind her, when she has made a much better bargain for herself? Now although I am willing to go every length in the way of fair construction to protect the property of the wife from the rapacity of the husband, and fully concur with the declaration of the chief justice in *Ferree v. Elliott*, "that I will never consent to give effect to a claim by the husband, or those in his stead, to what was at any time the wife's real estate, when it is possible to defeat it by any construction, however forced," yet I believe a different construction than that which I have put on this deed, would be sheer legislation, and amount to a denial of the wife's power to convey her own estate in the mode pointed out by our statutes. It would be equivalent to annulling a joint declaration of uses made by husband and wife, on a fine levied by them; a power which no Court of Chancery in England ever assumed. 8 *Serg. & Rawle* 315.

Let judgment be entered for the plaintiffs.

This opinion was assigned for error.

Hamilton, for the plaintiff in error. The principal question is, what change was effected in Mary Pentland's estate, in the parts demised on perpetual lease, by joining with her husband, and reserving a rent payable to "the said William Pentland and Mary his wife, their heirs and assigns for ever." On the correct view of this question will depend the justness of the decision. What estate passes to the lessee on a lease such as those executed by Pentland and wife? Not an absolute fee, certainly; for the grant is clogged with the payment of rent, and the possibility of a re-entry. It must not be lost sight of that, at the date of the several leases, Mary Pentland was seised of the real estate subsequently demised in her own right. Her husband had no right therein greater than an estate by curtesy. What did she do, then, to divest herself of her estate? She made conditional grants of the several lots demised conjointly with her husband, which, had she been discovert, she could have made alone. But the argument on the other side is, that having united with his wife in the leases, and the rent reserved having been made payable to him and his wife, therefore he has a new estate—one as large as she had. That the reservation is a new grant—a new estate; and, being to husband and wife, they hold by entirety, *per tout*, and not *per my*.

Now, if this was a grant to husband and wife of a new estate which neither owned before, the doctrine of holding by entirety might be applicable, unless in construing the Act of March 31st, 1812, entitled "An Act concerning joint tenancy," the court should

[Robb v. Beaver.]

be of opinion that the intention of the Legislature was to abolish the *jus accrescendi* in such case; and with all due deference to the opinion of Judge KENT, I think it was evidently the design of the Legislature to abolish this right of survivorship, even in case of husband and wife; for the most general terms are used, "of whatever kind the estate holden or possessed be;" "the part of those who die first shall not accrue to the survivor, but shall descend and be subject to debts, curtesy," &c. Now, there is no doubt that husband and wife are joint tenants of an estate acquired during coverture in some sense. Their estate has the four properties of joint tenancy—the unity of interest, title, time and possession; and every one concedes that it is incident to the *jus accrescendi*, which it was the manifest intention of the Legislature to destroy, unless altered by the Act of 1812. Our Act is a literal transcript of the Act of Virginia upon the same subject: and Judge TUCKER, in his notes on *Blackstone*, inclines to the opinion that the *jus accrescendi* is abolished in the case of a joint estate held by husband and wife. Vide 3 *Tucker's Blackstone* 181, n.

But I deny that the rent reserved in the leases referred to was a new grant. It is the creature of the lessor, not of the lessee. It is the consideration on which the lease is made, and without which it would not have been made. It is the terms upon which the lease must be accepted, or not at all. They are dictated by the lessors, and the grant accepted subject to them, which grant would be inoperative without them.

The fundamental error of the plaintiff is in supposing that William Pentland and Mary his wife granted an absolute fee-simple in the premises demised to the lessees, and that they in turn granted to the lessors a fee-simple in the rent. It is so in a limited sense, and not otherwise; or perhaps it is more correct to say it is not so except in a qualified sense; that is to say, each of the parties may be said to have a fee-simple, the one in the land, the other in the rent, so long, and so long only as they severally enjoy the one the land and the other the rent; *Plowden* 557; 1 *Cruise*, tit. 1, sect. 80; but the moment the land becomes forfeited to the lessors by a failure on the part of the lessees to perform the covenants and stipulations in the lease, the fee in the land is gone as to them; 1 *Cruise*, tit. 13, Ch. 2, sect. 37; and the fee in the rent is gone as to the lessors. The former is gone by agreement of the parties, and the latter is merged by operation of law in the fee-simple of the land re-invested in the lessors. Vide title I., sects. 45, 46, 1st vol. *Cruise on Real Property*, and note; 2 *Cowen* 246; 1 *Cruise*, title 13, ch. 2, sects. 50, 51. It is manifest, therefore, that the estate granted to the lessees by Pentland and wife was not a fee-simple absolute, but only a conditional, qualified, or defeasible one. But the very language of the leases demonstrates this. The words "grant, bargain, sell, alien, enfeof, release, and confirm," are not made use of: but words that clearly

[Robb v. Beaver.]

show the nature of the estate intended to be conveyed, viz: "grant, demise, lease, set, and to farm-let;" besides, in a deed intended to convey a fee-simple absolute are contained the words, "the reversions and remainders, rents, issues, and profits thereof," &c.; but in these deeds of lease no such words are contained. Of course it is clear that the lessors granted, and the lessees took a conditional or defeasible estate.

But, it may be asked, what has this to do with the question at issue, viz, "the quantum of estate vested in William Pentland by force of the reservation in the lease?" I think it has a great deal to do with it. It serves as a guide to the intention of the parties interested; and it answers the question, "do these deeds of lease increase the estate of William Pentland, or lessen that of his wife?" The leases contain a provision that if the said lessees shall not within five years after the re-entry of the lessors for condition or covenant broken, comply therewith, then and in that case "the estate of the said William Pentland and Mary his wife shall become absolute in the premises, to all intents and purposes as if these indentures had never been made." But if the indenture had never been made, the fee-simple, subject to curtesy, was in Mary Pentland and her heirs, and not in her husband: she was seised in her own right, and her husband was seised in her right. 1 *Saund. Rep.* 253, note 4; 1 *Douglass* 329; 2 *Saund.* 283, n. 1; 2 *Lutw.* 1421.

If the estate became forfeited, what estate would become absolute? Not the rent, for that the lessors had a right to without a forfeiture. It must be the estate as it was prior to the date of the leases; the interest of the lessees reinvested in the original owner, but Mary Pentland was the original owner; therefore the estate would reinvest in her, subject, as originally, to the curtesy of the husband. That is, Mary Pentland would be in as of her former estate. But does there not another consequence follow from this? It is clear, to me, there does. It is inevitable, that if Mary Pentland was in, that is, seised of her former estate, William Pentland was in as of his former estate, too. The estate of William Pentland was not enlarged, nor that of his wife diminished. By the common law of Pennsylvania a feme covert might, by joining in a deed with her husband and undergoing a separate examination, convey her real estate. 1 *Dall.* 11, 17; 1 *Peters's C. C. Rep.* 188; *Preamble to the Act of 24th Feb. 1770.* This she could not do in that manner by the common law of England. 1 *Black. Com.* 444. Since the Act of 24th Feb. 1770, which is in affirmance of the common law of Pennsylvania, a feme covert can alien her real estate only in the mode pointed out by that Act; 8 *S. & R.* 303, 304; and I ask, what is there on the face of these deeds of lease, to show an intention on the part of Mary Pentland to grant any estate to him? She did grant an estate to the lessees; and it is not denied that she might have granted her estate to her husband, if she had

[Robb v. Beaver.]

so willed, but did she do this? Certainly not. It is true she (or perhaps it might be more properly said that he), reserved the rents payable "to William Pentland and Mary his wife;" (for he wrote the leases with his own hand). No argument can be drawn from this; because in no other way could she have sold or leased her real estate, than by uniting with her husband in the deed; 8 *Serg. & Rawle* 303, 304; the Act of Assembly authorized her to do it in this way only; and it was right and proper that he should be a party to the leases, as it is a general rule that he must join; and that it might appear on the face of the deed that he was present to protect her from imposition. 2 *Kent's Com.* 152-154.

But it may be said there was no legal necessity to make the rents payable to William Pentland. That is very true; and if a disinterested hand had penned the leases, unless expressly instructed otherwise, the rent would have been made payable to Mary Pentland and her heirs. But it by no means follows that making the rents payable to William Pentland and Mary his wife, makes him the owner of these rents absolutely, even surviving her; for if Mary Pentland had a fee in these rents, she could not divest herself of that fee in any mode other than that directed by the Act of Assembly; but this she never did, as to the rents, and of course they could not vest in her husband other than as tenant by the curtesy. The mere reservation in the lease could not have that effect; for here was no new grant by the lessee; the rent reserved is a rent service, not a rent charge, which it would have been if the lessees had had the fee-simple in the lands, and had granted a rent to Pentland and wife and their heirs, and charged their lands for its payment with a clause of distress. See *Ingersoll v. Sergeant*, (1 *Whart.* 337). There was no new independent estate created by these leases. I deny that the rent reserved was a new grant. It was the creature of the lessor, not of the lessee. It is the consideration on which the lease is made, and without which it would not have been made. It is the terms upon which the lease must be accepted, or not at all. They are dictated by the lessors, and the grant accepted subject to them. It was that annual return, which, if reserved, although not made payable to any one, the law would distribute to the owner prior to the demise, or his heirs; 3 *Saund. R.* 370, note 5; *Whitlock's Case*, (8 *Rep.* 138), for the land demised.

But the land, prior to the leases, was Mary Pentland's, and therefore the rents must be her's too, unless she did something to divest herself of them. There is nothing tending to show that she did anything with that view, but the reservation of the rent payable to William Pentland and Mary his wife. Now this proves too much; for if she had designed to make a gift of the rents and her estate in the land to her husband, she would have made the rents payable to him alone, and clothed him with the exclusive right of re-entry for condition broken. And even if she had done

[Robb v. Beaver.]

that, it would have required clear evidence of her intention to divest herself and her heirs of her estate before this would be so construed. 1 *Vern.* 213; *Ambl.* 687; 2 *Ibid.* 407; 2 *Chanc. Cas.* 98, 161; 1 *Bligh* 104. But this intent is negated by the terms of the lease; for the right of re-entry and to receive the rent are reserved to William Pentland and Mary his wife; which is the same as if they had been reserved to Mary Pentland and her husband; and if this phraseology had been adopted, it would have been clear that the reservation to him or the use of his name at all, went upon the supposition that as he is viewed as her legal guardian, it was necessary to use his name as well as her's, for conformity.

But if any portion of her former estate can re-invest in Mary Pentland by virtue of her re-entry, this, it strikes me, is conclusive that she has never parted with such portion, nor indeed with any portion of her former estate, and that she never intended to part with it. By the very terms of the lease she had reserved to herself the right of re-entry; and if after such re-entry the lessees failed for a certain time to comply with the covenants, &c. of the lease, her estate in the premises became absolute, to all intents and purposes as if she never had demised the premises. Of course, if she could by a contingency that might happen, be re-seised of her former estate, she could not have designed to deprive herself or her heirs of her estate in the lands, and therefore she never granted any portion of them (except by the marriage) to her husband. He consequently can have no greater estate in these rents or the lands demised than such as he is entitled to as tenant by the curtesy of her other lands. The lands may become absolutely forfeited. *Coke Littleton*, section 325; 5 *Serg. & Raule* 375; 3 *P. R.* 464; and the benefit of the forfeiture can enure only to the donor, lessor, &c. 2 *Cruise*, title 13. "Estates on condition," Ch. I. sec. 15, and not to a stranger. *Ibid.*

I may add to this deduction from the language of the leases, a matter of fact which I consider conclusive as to the understanding of Pentland himself in regard to the extent of his estate in these rents. On the 17th November 1841, he presented a petition to the Orphans' Court, which is No. 36 of October Term 1841, praying for the appointment of a guardian for his son, in which he recites "that the said Mary Pentland, wife of the petitioner, died leaving issue a child Andrew Watson Pentland, to whom by the laws of this Commonwealth the title to the said real estate descended, subject to the life estate therein of this petitioner." On the same day William Pentland presented another petition to the Orphans' Court for the appointment of auditors to ascertain the amount of his liabilities and the quantum of his estate, &c., in which he makes the same recitals as above, and in which he enumerates the very ground-rents in question, and swears to the petition; that is, he swears that "the title to these ground-rents

[Robb v. Beaver.]

(inter alia) vests in his son, subject to the life estate of William Pentland." Besides, the auditors in their report say expressly, that "the interest of the petitioner William Pentland in the premises is a tenancy by the curtesy." On the 13th December 1841, William Pentland presented his petition to the Orphans' Court for leave to sell a portion of his wife's estate, in which he recites that "the interest of your petitioner in the said premises is a tenancy by the curtesy; and the interest of the said minor is a reversion expectant upon the determination of the life estate of this petitioner." He swears to this petition too. And if these recitals do not amount to a declaration of trust, I am at a loss to see what would amount to such declaration. Now, if the leases negative the idea of any act of the wife manifesting an intention to increase the estate of her husband in her lands, surely these recitals and oaths manifest clearly that no such intention ever entered the head of either husband or wife till it was found convenient for certain purposes to swell the life estate of the husband into an absolute fee-simple, the direct tendency of which too would be to shut out for ever the most remote hope of payment of a large number of meritorious creditors.

But it will be said on the other side that the plaintiff is an innocent purchaser without notice. How can he pretend this? The property was in the possession of the sequestrator at the time. This was a matter of record; besides, unequivocal possession has been always deemed notice; and there is nothing in this case to exempt the purchaser at sheriff's sale from the usual consequences of such notice. In addition to this, it is a matter of record that the purchaser himself conducted the levy and sale, procured the defendant to waive inquisition, and to consent to a sale on a *fiere facias* to July Term 1843. How, then, can he pretend want of notice?

The courts in Pennsylvania have gone great lengths to prevent the alienation of the wife's real estate. The Legislature too seem to incline the same way. The Act of February 1770, had in view the restraining the power of the married woman over her own property (real) to the one mode of alienation; and the 48th section &c. of the Act of 29th March 1832, title partition in the Orphans' Court, seems to have the same object. The courts, seconding these views, have decided that a *feme covert* shall be deemed to have no power of alienation or to encumber other than what is expressly given or reserved in the instrument that creates the trust. 1 *Rawle* 147; 2 *Whart.* 11; 3 *Whart.* 309; and cases cited. Executors have no right to pay a debt of the husband with a legacy left to the wife, without the order or consent of the husband. 3 *Whart.* 415. Even personalty secured for the separate use of the wife is not liable to be levied on for the debts of the husband. 5 *Whart.* 117 *Ibid.* 44. If the trustees of a married woman's estate die, so that the estate falls to herself, the husband will not be permitted to

[Robb v. Beaver.]

touch the fund until he secures it as it was in the hands of the trustees. 11 *Serg. & Rawle* 255. Chief Justice TILGHMAN, in *Huston v. Hamilton*, (2 *Binn.* 393), says, "If the husband takes but an estate for life, the remainder goes where, unless there is a clear intent to the contrary, it ought to go, to the heirs of the wife, where it belonged." Chief Justice GIBSON, in the case of *Ferree v. The Commonwealth*, (8 *Serg. & Rawle* 315), uses still stronger language. See also *Stoolfoos v. Jenkins*, (*Ibid.* 167), "It never was an object with the Legislature to transfer the real estate of the wife to the husband. For myself, I shall never consent to give effect to a claim by the husband, or those in his stead, to what was at any time the wife's real estate, where it is possible to defeat it by any construction, however forced." 5 *Watts & Serg.* 501.

As to equity of redemption of the wife's lands, see 1 *Vern.* 213; *Ambl.* 687; also *Weeks v. Haas*, (3 *Watts & Serg.* 520), where the Chief Justice puts it on its true ground, upon the consideration. Also *Demarest v. Wynkoop*, (3 *Johns. Ch.* 129), and 2 *Pick.* 517.

The courts have gone far on the subject of trusts. As to resulting trusts, see 10 *Ves. Jun.* 360; 1 *Ves.* 375; 15 *Ves.* 43; 1 *P. Will.* 321; 1 *Equit. Cas. Ab.* 380; 2 *Ibid.* 744; 1 *Atk.* 60; 2 *Atk.* 150; *Cox v. Grant*, (1 *Yeates* 164); *Fogler v. Goback*, (2 *Ibid.* 119); *Gregory v. Setter*, (1 *Dal.* 193); *Thompson v. White*, (*Ibid.* 424); 3 *Binn.* 302. I have consulted *Chew's Case*, (5 *Rawle* 160); 1 *P. R.* 389; 1 *Watts* 309; 2 *Rawle* 136; 16 *Serg. & Rawle* 60; 5 *Watts* 205; 17 *Serg. & Rawle* 361; 8 *Watts* 519; 4 *Whart.* 22; 1 *Rawle* 455.

The court will see that the law for which the gentleman on the other side contends may be conceded to be the law where there is a direct grant to husband and wife of something which they or either of them never enjoyed before; but it must be a case where the grant is clear and unequivocal; where there is no room left to doubt as to the intended bounty of the donor. But suppose that some striking undoubted fact negatived the intention to grant to husband and wife; would the law, whatever its deductions under other circumstances might be, disregard this intention? Certainly not.

M'Candless, for defendant in error.

Before the statute *Quia Emptores*, (18 *Ed.* 1, *A. D.* 1290), where a man had made a feoffment in fee-simple, by deed or without deed, yielding to him and his heirs a certain rent, this was a rent service. See *Litt.* 216. The estate of the feoffee was a fee farm, and that of the feoffor was a rent service. The tenant in fee farm was not bound to pay relief, or do any other thing that was not contained in the feoffment but fealty. *Terms de la Ley, Voce, Fee Farm*, p. 220; *Adams on the Law of Distress* 22; *Co. Litt.* 142. In England this fee farm or rent service is converted into a

[Robb v. Beaver.]

rent charge by force of the *Stat. Quia Emptores*, which prevented subinfeudation in fee, unless by the chief lord, and since, Blackstone says, (2 *Bl.* 43), a fee farm rent is a rent charge issuing out of an estate in fee, and is only letting lands to farm in fee-simple instead of the usual methods of for life or years.

But as that statute is not, and never was, in force in Pennsylvania, a feoffment in fee reserving rent, remains a rent service. *Ingersoll v. Sergeant*, (1 *Wharton* 337). And upon a feoffment in fee, the entire estate vests in the feoffee, and he holds from the Commonwealth as the feoffor held, subject to fealty only, with the right of escheat in default of heirs or kindred to inherit. I say in the Commonwealth, because by the devesting Act of 27th November 1779, the fealty due, and all possibility of reversion in the proprietary's family was vested in the Commonwealth. The inheritance in the lands passes by the feoffment to the feoffee, and a new estate of inheritance is created by the reservation; and this point is determined in *Scott v. Lunt*, (7 *Peters* 596), where it is held law that a fee farm rent is an estate of inheritance. That our ground-rents in fee are estates of inheritance, see *Ingersoll v. Sergeant*, (1 *Whart.* 359, 360). It is said that without a reversion in the feoffor there cannot be a rent service created. This, in reference to the operation of the statute *Quia Emptores*, is true; but as that statute does not operate on our estates, every feoffment in fee reserving a rent certain is a rent service in Pennsylvania.

The tenant is seised of an estate in fee-simple upon condition at common law, and the reverter or bare possibility of the feoffor to have again his estate, is not, by the operation of the *Stat. de Donis*, A. D. 1285, changed into an estate in reversion, inasmuch as the reverter or bare possibility is vested in the Commonwealth, to whom the land will escheat when the inheritable blood of the tenant expires. The statute *De Donis* was passed purposely to overreach fee-simples conditional, and prevent the person seised of such an estate from alienating it, when he had performed the condition. *Litt., sect. 13; Co. Litt. 19; 2 Bl. 112.* But the fruits of the statute were opposed to our landed institutions; and by Act of Assembly the donor's ultimate estate expectant is docked by an ordinary conveyance when entered on record on motion in court, thus showing that the law abhors perpetuities, so much so, that by an open and avowed act done in open court, the intention of the donor and his perpetual estate may both be defeated: and there is no difference, in the principle, whether this supposed reversion remains in the feoffor after having given away an estate of inheritance, or in the donor; they both tend to create perpetuities, if the mind should give equal support to them.

The feoffment by Pentland and wife, however, creates an estate, although conditional at common law. Yet as the estate must be defeated, if at all, by forfeiture, it is submitted whether forfeiture in such case exists in Pennsylvania. The re-entry given to the

[Robb v. Beaver.]

lessees, their heirs or assigns, is not for the purpose of defeating the lessee's estate, but by way of distress for satisfaction for this rent in arrear. And upon payment of the rent in arrear and costs, the tenant is entitled to be restored to his possession; and although it is stipulated that if the arrears be not paid in five years then the possession of the lessor who enters shall become absolute, as if the indenture never had been made, yet as courts relieve against mortgagees who enter upon clauses as positive as this, they will also relieve the tenant under such conditions as are purely for payment of money. It has been adjudged that the lessor entering upon the premises of his tenant under such a condition where it is only to compel the payment of rent, gains no freehold by such entry; and that when the yearly sum due upon such a feoffment is assigned by the feoffor, such assignment carries with it the right of entry also. See *Co. Litt.* 203, note 5, and the cases there cited. But if the condition be such that the re-entry defeats the estate, the case is very different; but still even in that case, as the law abhors forfeiture, and the tenant having complied with the principal condition, which was to build and complete buildings rendering the tenement productive and valuable, the courts, in the exercise of just and equitable powers, would restore the tenant on payment of what was justly due.

It seems, then, that this would have been an estate of inheritance at common law; and the argument that the lessors retain a reversionary interest is not supported even by the old cases. And it seems clear, too, that the tenure by which the people of Pennsylvania held from the Proprietors was free socage, to which fealty only was incident; the same that is already termed fee farm; and that all the tenant could acquire from them was an estate of inheritance: and when such tenant granted away such an estate, no part of the original estate or its incidents could remain in him. Pentland and wife being then seised of the rent by entireties, the survivor takes the whole. *Co. Litt.* 187; *Free-stone v. Parratt*, (5 T. R. 652); *Back v. Andrews*, (2 Vern. 120); *Green v. King*, (2 Blac. R. 1211; 4 B. & Adol. 303; *Prec. in Chan.* 1; 2 *Preston on Abstracts* 39).

The law is the same whether it be in remainder, reversion, or possession. 2 *Levinz* 39; *Co. Litt.* 187; *Litt. sec.* 673; 1 *Dana's Ky. Rep.* 37; 3 *Randolph's Rep.* 183-4-5; 3 *Rep.* 5; 1 *Dana's Ky. Rep.* 243; 4 *Kent's Com.* 362; 2 *Bl. Com.* 182; *Jackson v. Stevens*, (16 Johns. Rep. 110); *Rogers v. Benson*, (5 Johns. Chan. Ca. 437); *Shaw v. Harsey*, (5 Mass. 521); *Den v. Hardenbergh*, (5 Halst. 42); *Terms de la Ley* 271; 3 *Keb.* 11; 2 *Saunders* 380; 1 *Levinz* 11, 135; *Allen v. M'Masters*, (3 Watts 181); *Pratt v. Lewis*, (4 Whart. 22); *Gibson v. Todd*, (1 Rawle 455).

That a party is estopped by his own deed from denying the facts contained in or alleging a claim inconsistent with it. 2 *Roll*

[Robb v. Beaver.]

Ab. 447; *Co. Litt.* 47; 1 *Wharton* 356; *Bell v. Brown*, (1 *Howard* 169); *Law Journal*, Vol. 3, No. 2, p. 48, 49; 6 *Binn.* 418; 1 *Shep. T. S.* 77; 2 *Ibid.* 246. Sealed writings explain themselves; and it is the province of the court to declare the intention of the parties and their motives from the writing, unless impeached for fraud.

1. By the common or ancient law husband and wife could convey the inheritance in lands of which the husband was seised in her right, by two modes of common assurance. 1. By a common recovery. 1 *Preston Con.* 254 to 257; *Co. Litt.* 122. 2. By acknowledgment of a feoffment of record. *Co. Litt.* 50. This latter mode is called a "fine," because it is founded on an actual suit, and the acknowledgment on record puts an end to all controversies between the same parties for the same land. Its several parts; 1. Writ of covenant; 2. License to agree; 3. The concord of agreement; 4. Record; 5. Foot or indenture of the fine; 6. Proclamations. Common recovery was much more complicated, and therefore disused.

2. If tenant by the curtesy became seised of the freehold by the birth of a son who could inherit the land, yet the father could lawfully alien this land and defeat the entry of the son after the father's death by binding him to warranty. This was remedied by 6 Ed. 1, cap. 3, A. D. 1278, by making void the warranty unless assets of equal value descended to him from his father. So that the warranty of the tenant by the curtesy with assets, is a good plea in bar of the heir of the mother. *Rob. Dig., stat.* 208-9. By fine levied in the King's Court the heir was barred. This mode of warranty was excepted by the statute, and

3. This gave rise to the 32 Henry 8, cap. 28, A. D. 1540, prohibiting the husband and wife from creating long leases or disposing of the wife's inheritance longer than during the coverture, &c., (without it be by fine levied by husband and wife). From this statute, however, feoffments of record by husband and wife are excepted. See 6 *Rob. Dig.* 221. Therefore I presume there was nothing to prevent husband and wife from conveying the lands of the wife for "a fee farm rent, rent charge, or other rent," not inconsistent with the rights of the lord of the fee.

By the laws agreed upon in England, it was provided that all grants of lands should be in a certain form; that to avoid complex conveyances a short form was annexed to the law; three estates could be created, and the grant must determine which—inheritance for life or for years—to be acknowledged in court and enrolled; A. D. 1682; laws agreed on, sect. 78, *Prov. Laws Penn.*; Act of 24th Feb. 1770, *Stroud's Purd.* 275-6, an Act for the better confirmation of estates of persons holding or claiming under feme coverts, and for establishing a mode by which husband and wife may hereafter convey their estates. "Whereas it has heretofore been the custom and usage, ever since the settlement

[Robb v. Beaver.]

of this province, in transferring the estates of feme coverts, in many cases for the husband and wife to execute the deed in presence of witnesses only; and in other cases after such execution to acknowledge the same before a justice of the peace, &c., &c." Sect. 1 confirms all bargain and sales, lease and releases, feoffments and other deeds of assurance whatsoever, *bonâ fide* made, &c. "Sect. 2. Be it enacted that where any husband and wife shall hereafter incline to dispose of and convey the estate of the wife, or her right of, in, or to any lands, tenements, or hereditaments whatsoever, it shall be lawful to and for the said husband and wife to make, seal and deliver any grant, bargain and sale, lease, release, feoffment, deed, conveyance or assurance in the law whatsoever, &c." Acknowledgment before one of the Judges of the Supreme Court, or a justice of the County Court, Court of Common Pleas; the Judge taking such acknowledgment to examine the feme separate and apart from her husband, and read or otherwise make known to her the contents; and if upon such separate examination she declares that she did voluntarily, and of her own free will and accord, seal, and as her act and deed deliver the said deed of conveyance without any coercion or compulsion of her husband, such deed shall be as good, to all intents and purposes, as if she had been feme sole, and not covert, any law, usage, &c.

If a man seised of lands of the part of his mother makes a lease for life or gift in tail, reserving rent to him and his heirs, this rent shall go with the reversion to the heirs of the part of the mother; because the nature of the contract is such, that the retribution should go to those that lose the profit of the lands during the lease or gift. *Co. Litt. 12b*. But if he had made a feoffment in fee reserving rent to him and his heirs, this rent shall go to the heir of the part of the father; because here is an entire disposition of the lands, and the rent is in the nature of a new purchase, coming into the family from the grant of the feoffee; and therefore the blood of the father shall be preferred, *Co. Litt. 12b*; *Gilbert on Rents* 72 (*marg.*). And where the lease is by deed indented by sundry lessors, they are estopped to claim the rent in any other manner than it is reserved in the deed, because the indenture is the deed of each party, and no man shall be allowed to recede from his own solemn act. *2 Roll. Ab. 447*; *Co. Litt. 47*.

A rent charge or rent service which is reserved on a grant in fee, is a fee farm rent. The name is founded on the perpetuity of the rent or service, and not on the quantum. *Harg., n. 5*; *Co. Litt. 144*; *Doug. 605*. And it seems that a rent service is inseparable from the reversion; so that granting lands at this day, reserving a rent in fee, would be a rent charge. *3 Bl. Com. 43*; *Woodfall L. & T. 108*. A rent charge is where the owner of the rent has no future interest expectant in the land or reversion; as where a man maketh over by deed his whole estate in fee-simple with a certain rent payable thereout, and adds to the deed a cove-

[Robb v. Beaver.]

nant or clause of distress that if the rent be in arrear or behind it shall be lawful to distrain for the same; in this case the land is not liable to distress of common right, but by virtue of the clause in the deed. *Woodfall* 108; *Gilbert on Rents* 15, 16, 20; *Co. Litt.* 217 *a*, 218; *Gilbert* 28; *Co. Litt.* 139; *Cro. El.* 595; 2 *Co.* 54. By the statute *De Donis, Westm.* 2, the feudal right of reverter was turned into a reversion in the feoffor, the law for the former reasons obliged the tenant in tail to do the same services to the donor which he was obliged to by his superior lord: because this was an estate of inheritance, and might possibly last for ever. *Gilbert on Rents* 12; *Co. Litt.* 23 *a*, sec. 19.

Reservation is a clause in a deed whereby the feoffor, grantor, or lessor, reserves some new thing to himself out of that which he granted before. Reservation differs from an exception: the latter is ever part of the thing granted, and of a thing *in esse* at the time; while the former is of a thing newly created or reserved out of the thing demised that was not *in esse* before. In every good reservation four essentials must be observed. 1. Reservation must be by apt words, as yielding, paying, reserving, &c. 2. It must be something issuing out of the thing granted or demised, and not part of the thing itself. 3. It must be out of such thing whereon the grantor can resort to distrain. 4. It must be made to the grantor, and not to a stranger; so that by a *reddendum* the reversion or inheritance cannot be reserved, as such a reservation in a feoffment in fee would be repugnant to the grant. *Plow.* 132; *Co. Litt.* 47; *Plow.* 13; 8 *Co.* 78. See particularly *Sheppard's T.* 163.

In an exception, six essentials must occur. 1. Apt words to make it one. 2. It must be part of the thing granted, and not any other. 3. It must be part only, and not all of anything granted. 4. It must be a particular thing out of a general thing, and not *vice versâ*. 5. It must be such as he may have as doth properly belong to him. 6. It must be of such a thing as is severable from the thing granted. *Sheppard's T.* 77, 78, 79; *Co. Litt.* 47.

1. A. B. covenants to pay the rent yearly for ever, the taxes and assessments during the term. 2. Distress reserved and re-entry when two years' rent are in arrear, subject to the tenant's right to pay such arrears and what may accrue, and costs, within the term of five years. 3. Also subject to re-entry by the lessors, if tenants fail to complete the buildings on the premises, to hold until the tenant shall give satisfactory security that the covenant will be complied with if that be done within five years after re-entry; "in such case the title of the said William Pentland and Mary his wife, their heirs and assigns, to become absolute in the premises in law and equity, to all intents and purposes as if this indenture had never been made."

Estates upon condition are of two sorts. *Co. Litt.*, sect. 325, p. 201. 1. Condition in law is where the law annexes a condition

[Robb v. Beaver.]

to the contract of the parties without words used to express the same: 2. Condition in deed; as where a man by deed indented enfeofs another in fee-simple, reserving to himself and his heirs a yearly certain rent, payable at one or divers days, per annum: and if the rent be behind, it shall be lawful for the feoffor and his heirs to enter into the lands and tenements, or if the rent be behind a week, month or year, that then the feoffor and his heirs may enter. In these cases, if the rent be not paid, the feoffor may enter and hold as of his former estate and interest thereof. This is an estate upon condition, because the estate of the feoffor is defeasible if the condition be not performed. If the feoffor assigns to another the annual sum, the right of entry and perception of the rents, issues and profits of the land charged with the payment, passes to the assignee. *Co. Litt., sect. 327, Harg., note 3.* If two years' rent be in arrear, the feoffors, their heirs and assigns may re-enter; and the estate of the assignees is also to become absolute in the premises, &c.

It is barely possible that the rents, issues and profits of the premises will not always more than pay the ground-rent and taxes, so that it is altogether impossible that a re-entry was even dreamed of, defeating the feoffment after the buildings were put on the lot; but in case the tenant failed in the covenant to build, then the restoration of the seisin might have been contemplated by the feoffors. But the right of entry, if exercised, would not restore the seisin; for the feoffors, their heirs or assigns, must hold for the tenant for five years, and then if the arrears be not paid, the estate becomes absolute.

The inheritance under these leases vested immediately in the lessees, because the grant is to S. W., his heirs and assigns for ever, in consideration of a rent covenanted to be paid to the feoffors, their heirs and assigns for ever. The rule in *Shelly's Case* settles the point that the estate for life and the inheritance at once coalesce when limited to the same person, although there are intermediate remainders or conditions. *Co. Litt. 376 b, note 1.* And the word "term" not only signifies "interest," but "time." 8 *Co. 95*; 1 *Burr. 282*; 2 *Bl. Com. 144*; 1 *Rep. 153.*

In *Weeks v. Haas*, (3 *Watts & Serg. 520*), Henry Repley died seised of a tract of land, leaving issue three children. Partition was made, and Gilger intermarried with Elizabeth, and John Repley released to Jesse Weeks, who married Mary Repley. Weeks and wife released to Gilger and Repley respectively for their third part each. They released to Weeks, and he paid them \$91, the difference for owelty. Mary Weeks never executed any conveyance for her own share of the estate. The sheriff sold the interest of Jesse Weeks, and the purchaser had notice that Weeks had only a life estate. The court decided that Mrs Weeks might have conveyed if she chose; but as she did not, and the object of the parties was partition and not conversion, a purchaser with notice was

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[Robb v. Beaver.]

bound. But if he had not notice he would hold the fee. The statute (say the court) gives the wife power over her own property, and she could have contracted on her own terms. There is no evidence whatever that she intended to make a gift of it to her husband. The only intention that appears was to reserve her interest, release the others, and take back an equivalent. This is shown by the deeds, which are all *in pari materia*, and constitute one agreement. This is not a new principle. *Kean v. Ridgway*, (16 *Serg. & Rawle* 60.) In *Davey v. Turner*, (1 *Dall.* 11), husband and wife conveyed the lands of the wife to trustees, in trust for themselves during their joint lives, and to the survivor in fee, and the deed was acknowledged in the usual way. *Held*, that the deed was valid. *M'Glinsey's Appeal*, (14 *Serg. & Rawle* 64), is a case where, from the circumstances, the intention of the wife to make a gift to her husband of the profits of her separate estate was presumed. Pentland's case is infinitely stronger. In *Dallam v. Wampole*, (1 *P. C. C.* 116), the wife by writing directed the profits of her separate estate to be paid by her trustee to her husband. *Hamersley v. Smith*, (4 *Whart.* 126), was a trust for the wife, but ceased on her becoming discoverd, and then making an assignment with her second husband. The trustees were held entitled to recover it from the executors. In *Pratt v. Lewis*, (4 *Whart.* 22), husband and wife sold the estate of the wife to one of their children, took a bond, and stipulated for maintenance, &c. After the decease of the husband, the wife cancelled the first bond, and recited that she was then a married woman, and incapable of contracting, &c. *Held*, the bond could not be cancelled by her. Where a husband takes a joint obligation to himself and wife for a debt due to herself alone, it is a gift to the wife, who takes as a joint purchaser, and by survivorship, and in her own right, unless the proceeds should be wanted on a deficiency of assets, for payment of debts or perhaps legatees. *Gibson v. Todd*, (1 *Rawle* 455.)

The opinion of the Court was delivered by

SERGEANT, J. — The opinion of the court below seems to us to be founded on the settled principles of our law with regard to the transfer and tenure of real estate and the power of the husband and wife by deed acknowledged to part with the wife's estate. The execution of this deed was a transfer of the whole right, interest, and property of both husband and wife in the land. It passed to the purchaser a fee-simple which Lord COKE says is the fullest and most absolute estate which a person can have in lands. The annexing to it a condition of re-entry for non-payment of rent or failure to build, did not diminish the quantity of the estate; it only rendered it liable to be defeated in case the condition were broken and due advantage were taken of the forfeiture. There was no reversion or residue of estate remaining in the grantors. There was fealty due in consequence of the tenure of land in Penn-

[Robb v. Beaver.]

sylvania not being subject to the operation of the statute *Quia Emptores Terrarum*. This was sufficient to make the rent technically a rent-service; but a rent in fee-simple, whether created at the time of the grant of the land and by the same deed, or by another conveyance, is a new estate distinct from the land, and a total change of the property. This was so held in *Skerrett v. Burd*, (1 *Whart.* 246), where a person seised of lands in fee-simple made his will devising those lands, and afterwards sold and conveyed a portion of those lands in fee-simple upon ground-rents; and it was held these ground-rents did not pass under the devise, but the conveyance on ground-rent was a revocation of the will *pro tanto*. The nature of such a transaction was fully examined in that case, and it was deemed to be a total alienation of the prior estate in the land, and the acquisition of a new estate in the rents.

The case is then the same as if the fee-simple in this rent had been conveyed by a third person to the husband and wife and their heirs. It would be in them an estate by entireties, and on the death of either, would go to the survivor in fee.

Judgment affirmed.

Calhoun *against* Hays.

If a deposition be taken by one party, it is competent for the other to read such parts of it as tend to prove his case, leaving to the other party the right to read the other parts if they be legal evidence for him.

In an action of ejectment between two of several tenants-in-common between whom, as alleged by the defendant, there had been an amicable partition, it is competent for him to give in evidence a release of the other parties to the partition in order to establish the fact in issue.

A parol partition of lands between tenants-in-common who derive their title by descent, when fair and equal, and followed by a due execution of it, is binding upon all, whether they be females-covert, their husbands joining them, or minors, with the assent of their guardians or not.

ERROR to the District Court of *Allegheny* county.

This was an action of ejectment by John K. Calhoun and Mary his wife against Robert Hays, David Hays, and William Lynch, for the undivided eighth part of a tract of land, in which both parties claimed title under Robert Hays, their common ancestor. In answer to the claim of the plaintiffs, the defendants alleged that by a family arrangement made between all the heirs of Robert Hays, deceased, in 1826, for the purpose of dividing their property and making a final settlement, the plaintiffs agreed to accept their

[Calhoun v. Hays.]

share in money: that they accepted the defendants' note for their interest, released their claim to the estate and had been fully paid, and had therefore no right to recover in this suit. To this the plaintiffs responded that they were not legally estopped by the writings signed on that occasion, and that they did not assent to it or receive the money.

It appeared that one of the sons had petitioned the Orphans' Court for a writ of partition and valuation of the estate, and that a jury had been summoned, who met and could not agree upon a valuation of the land: whereupon the heirs, being of full age, agreed themselves in writing that the land should be assumed as valued by the Orphans' Court at \$10.50 an acre. The proceeding in the Orphans' Court was not pursued further, but the heirs agreed to have a meeting and settlement of the whole estate, as well the lands which were the subject of the proceeding in the Orphans' Court, as lands in other counties, some out of the State and the personal property of their father. It appeared that a statement was drawn up by a justice of the peace in the shape of an administration account, charging the administrators with all the land at the value agreed upon, as also the account of the personal estate. One of the sons who had been advanced by his father in his lifetime, brought his tract into hotchpot; each of the heirs was charged with such of the personalty as they had severally received, and the share of each valued at \$769. It appeared also that David and Robert agreed to take the tract in dispute; that the other brothers took the property in Ohio and Kittaning: that notes were given by those who received land to those who preferred taking their shares in money; that releases were signed by all the heirs to those that received the lands, except by John K. Calhoun, by whom it was alleged by the defendants a release had also been executed, but that it was lost: this was denied by the plaintiffs, and was referred as a fact to be determined by the jury.

On the trial of the cause several questions arose as to the admission of evidence, in which exceptions were taken to the opinion of the court, and were the subjects of the assignment of error. Points were also put by the plaintiffs upon which the court were requested to instruct the jury; all of which sufficiently appear in the opinion of the court. A verdict was rendered for the defendants.

Woods and M'Candless, for plaintiffs in error.
Hampton, for defendants in error.

The opinion of the Court was delivered by

KENNEDY J.—The first error assigned is an exception to the court's admitting the deposition of William Hays to be read in evidence. 1. Because his deposition was not regularly taken. 2.

[Calhoun v. Hays.]

Because he was interested in the result of the trial of the cause, and therefore not a competent witness. 3. Because the matters testified to by him were not admissible. The objection to the mode of taking the deposition is without even the shadow or colour of ground to support it. It was duly taken under a commission awarded for that purpose by the special order of the court, with interrogatories thereto annexed by the defendants, in proper form and not leading, as alleged by the plaintiffs, as, also, cross-interrogatories on the part of the plaintiffs. The plaintiffs, likewise, joined therein, by naming a commissioner, who attended and joined in executing it. The objection to the competency of the witness was, that he, as one of the heirs of his father, Robert Hays, deceased, had joined with some of his brothers and sisters, other heirs of the same, in executing a release of all their interest and estate in the land in dispute, which descended to them from their father, and to the two defendants, Robert Hays and David Hays, two other heirs and sons of the same father. It is unnecessary here to decide whether, upon a recovery had in this case by the plaintiffs, the witness would have been bound by his covenant of warranty, contained in the deed of release, to have made good, or to have contributed to the loss of the defendants. For it might be a question, perhaps, whether the release ought to be construed so as to extend beyond the occasion for giving it, and what might naturally be supposed to have been the design and intention of the parties at the time: which may be, that each of the releasors should release his own individual interest in the land, and be responsible for it alone. If the covenant contained in the release bound him no further than this, it is plain that a recovery by the plaintiff, in right of his wife, as one of the heirs of the said Robert Hays, deceased, would not render the witness liable for any loss which the defendants might thereby sustain. The decision, however, of this question is rendered wholly unnecessary, as the defendants, Robert Hays and David Hays, executed and delivered a deed of release to the witness before he gave his testimony under the commission, releasing him from all liability to them, by reason of anything contained in the release which he, with some of the other heirs of Robert Hays, deceased, executed in their favour. The first error is, therefore, not sustained.

The second error is an exception to the admission of a receipt given by the plaintiffs for money which they received of the defendants, Robert and David Hays; and a note which the latter gave to the wife of the plaintiff for the balance coming to her, in full of her interest in the real and personal estate of her father, as was alleged. We can perceive no valid objection to this testimony. Testimony was given tending to establish an agreement between the widow of Robert Hays, deceased, and his heirs, for the partition of his real estate amongst them; and testimony, in connection with the receipt and the note, was also given, going

[*Calhoun v. Hays.*]

to show they were given in carrying the agreement for the partition into effect. And, whether the agreement for the partition was verbal or written, the testimony objected to was admissible, because a verbal agreement for the partition of real estate is good and binding on the parties, if carried into execution. Therefore, the testimony being to show that the agreement for the partition of the estate was carried into effect, and particularly by the plaintiffs who were claiming to have it divided again, and thereby get a double portion of it, was clearly admissible.

The third error is an exception to the admission of the testimony of Jane Kline, which was objected to for the same reasons as that of William Hays, which has been shown to have been properly received.

The fourth error is an exception to the reading, by the defendants, of certain parts of the deposition of Agnes H. Martin, without reading the whole of it, which deposition had been taken by the plaintiffs. Supposing the parts omitted to be read by the defendants to be admissible, it was certainly competent for the plaintiffs to read them, and thus to have all the benefit to be derived therefrom, the same as if they had been read by the defendants. If the deposition contained anything favourable to the plaintiffs, it was, perhaps, rather favourable than otherwise to them that the defendants first read certain portions of it in evidence, as it tended, in some degree, to show that they considered her not altogether destitute of credibility. There was no error, therefore, committed by the court in permitting the defendants to read such portions of the testimony taken by the plaintiffs as best suited their purpose, leaving the plaintiffs, if they chose, to read the residue.

The fifth error is an exception to the admission of a release, dated the 2d of June 1827, executed and acknowledged by other heirs of Robert Hays deceased, to Robert Hays and David Hays, two of the defendants, but not executed by the plaintiffs. We think that it was properly received and read in evidence to the jury, because it showed that the agreement for partition of the real estate of the deceased Robert Hays, of which evidence was given, was by means of the release carried into execution so far as it went; and also because it showed the tenor of a release testified to have been executed by the plaintiffs for the same purpose, drawn by the same scrivener, and most likely of the same tenor with that excepted to, which was lost or could not be found.

The sixth error is an exception to the court's admitting the same release as that mentioned in the fifth error to be read in evidence in connection with the answer of William Hays to the seventeenth interrogatory in chief propounded to him, and annexed to the commission under which his testimony was taken. That it was admissible has been already shown in our answer to the fifth exception. For it being testified that a release, drawn prior to it,

[Calhoun v. Hays.]

by the *same* scrivener, who had since *died*, for the *same* purpose, had been *executed by the plaintiffs*, as also others of the heirs of the said Robert Hays deceased, but was *lost*; the release offered to be read and objected to, taken in connection with the answer of William Hays to the seventeenth interrogatory in chief, was some evidence at least to establish the *object, design* and *purport* of the lost release, which, if it could have been procured, would have been clearly evidence against the claim of the plaintiffs of a very decisive character.

The seventh error is an exception to the answers given by the court to the second, third, fourth and fifth points submitted by the counsel of the plaintiffs. By these points the court was requested to instruct the jury, that the release signed by the wife of the plaintiff, not being acknowledged according to law, could not bar the recovery of the plaintiffs; and should the jury believe there was a parol sale of the wife's interest in the land, still, unless followed by a possession taken in pursuance of the contract and the payment of the purchase money, the case came within the statute of frauds, and therefore no interest passed to the defendants. That the plaintiffs having shown a legal title in them, could not be divested of it, except by clear and conclusive proof of a parol sale, and possession taken in pursuance of the contract: and that the husband's verbal assent to the execution of the release would not render it valid unless acknowledged in the manner prescribed by law. These points, in our opinion, were answered by the court as favourably at least as the plaintiffs had any right to claim. The court instructed the jury, although the release signed by the wife of the plaintiff was not acknowledged in the manner the law requires, yet taken in connection with other facts, of which testimony had been given, it would be sufficient to bar the recovery of the plaintiffs. That as a general principle, it was true that the wife's interest in land could not be disposed of by a parol sale thereof, unless followed by possession taken in pursuance of the contract and payment of the purchase money, as otherwise it would come within the statute of frauds. But still there were other ways by which a person's title to land might be divested, that had come to him or her by descent. The Orphans' Court could divest the title of a married woman without her assent, and convert it into personalty; and, in 1826, could have ordered it to be paid to her husband, who might have consented that it should be paid to his wife, and the receipt of either for the money, in such case, would be a complete discharge of all right on the part of either or both, afterwards, to either the money or the land. That a minor or a married woman might make partition, even without deed, and divest their title to lands which came to them by descent. That it was true, in general, that a deed signed by the wife alone, whether *properly* or *improperly acknowledged*, would not, *per se*, convey the title of either the husband or herself; but

[Calhoun v. Hays.]

there was testimony in the case before them, taken in connection with the husband's verbal assent to the execution of the release by his wife, which, if believed, would in equity bar the plaintiffs' recovery.

Taking all the instruction thus given by the court to the jury, we are decidedly of opinion that the plaintiffs have no reason to complain of it. The right which the plaintiffs had to the land in question having been acquired by descent, in conjunction with the other children of Robert Hays, deceased, including the two defendants, Robert Hays and David Hays, it was in the power of these defendants, at any time, by an application to the Orphans' Court, to have compelled the plaintiffs to make a partition of it; and therefore, being compellable by law to do so, they might well do it without process of law; and, if made equally between them, it would for ever afterwards be binding on both husband and wife. And the partition, if equal at the time it was made, would be good, however unequal it might become afterwards by subsequent events. *Co. Litt.* 171 *a*; *Fitz. N. B.* 62, *F.* Neither is it essentially requisite that a voluntary partition should be by deed, in order to make it binding; as between parceners, at least, it is good if made by parol without deed. *Litt., sec.* 250. And it is so between tenants in common, where they execute the same in severalty by livery. 1 *Inst.* 139 *a*; *Docton v. Priest*, (*Cro. Eliz.* 95); *Ebert v. Wood*, (1 *Binn.* 216). In this last case a partition between tenants in common, made by parol, and possession taken by each of his respective property, was holden by this court to be good. In making partition of an intestate's real estate among the heirs, it is not necessary that a certain portion or allotment thereof in kind should be given to each heir. This, under process from the Orphans' Court, is only done when the estate will admit of such a division without injuring or spoiling the whole; and if to divide it even into two parts would produce such injury, the whole must be valued; and then the partition is made by giving the estate to some one or more of the heirs, if any one or more of them will agree to take it at the valuation so made thereof, upon his or their paying, or securing to be paid, to the other heirs their respective proportions of the valuation money. But if none of the heirs will take it at the valuation, the court, at the request of any one of them, will direct it to be sold, and the money arising therefrom to be distributed among them. Seeing, therefore, that any one of the heirs may compel a partition of the estate thus to be made by legal process, it follows from the established doctrine laid down above, that if it be done by the agreement of the parties, without legal process, and be fair and equal, it will be good and binding upon all, whether femes covert or not, if their husbands join, or minors, if with the consent of their guardians. That the partition, as claimed to have been made by the defendants in this case, was equal at the time it was made, does not

[Calhoun v. Hays.]

appear to have been denied or controverted; and that there was abundant testimony given on the trial, going to show that a parol agreement for a partition of the estate was made, in which all the parties joined, and going to show, also, that it was afterwards carried into execution, cannot well be doubted. It would also appear from the evidence, and so the jury must have found, that the plaintiffs received their full purpart of the estate; or, if they had not, it is not probable that they would have acquiesced so long in the defendants' enjoyment of the land in question, seeing them improving it, too, as their own, by a large expenditure of money and labour laid out and bestowed upon it. To permit the plaintiffs to recover under such circumstances would be allowing to them a double portion of the estate, beside giving them a full portion of all the labour and money done and expended by the defendants in improving it. This would be the very height of injustice, and contrary to every principle of equity.

There is nothing in the remaining errors assigned.

Judgment affirmed.

Haley *against* Prosser.

Where there is a special contract between a mechanic and the owner or builder of a house for the work which the former is to do in constructing the house, he must look to his contract alone for his security, and cannot resort to the remedy which the mechanics' lien law provides.

ERROR to the District Court of *Allegheny* county.

David Prosser against Frederick Haley. *Scire facias* sur mechanics' lien. The plaintiff's claim was filed under the mechanics' lien law for the carpenter-work done by him for the defendant in building a house, to the amount of \$226.45. The defendant pleaded to the *scire facias* "that the plaintiff did the work claimed for in this case under a special contract with the defendant, and that he is not entitled to a lien under the Act of Assembly, &c." The plaintiff replied, denying the defendant's plea.

The plaintiff having proved the amount of work done, the defendant gave him notice to produce a contract entered into between them for the work. The plaintiff refused to produce it. The defendant then proved its existence in the hands of the plaintiff, and offered in evidence a copy of it, by the terms of which the work to be done was stipulated, and that the plaintiff was to be paid partly in bricks, to be delivered to him by the defendant. It was also proved that before the suit brought the parties had

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[Haley v. Prosser.]

had a settlement of the amount of work done, and that it amounted to \$163.65. The defendant requested the court to charge the jury that if there was a special contract between the parties, under which the work was done, the amount due to the plaintiff was not the subject of a mechanic's lien, and that no *scire facias* could be maintained upon it. But the court below was of a different opinion, and directed the jury that the plaintiff was entitled to recover. Verdict and judgment for \$179.94.

Hamilton, for plaintiff in error, whom the court declined to hear.

M'Clure and *M'Candless*, contra, cited 4 *Watts & Serg.* 257; 4 *Serg. & Rawle* 32; 5 *Watts & Serg.* 537.

PER CURIAM. — We have heretofore ruled that where there is a special contract with the owner, the party who deals with him must provide for his own security; but that where there is no agreement in which the terms of the bargain are particularly stated, he is supposed to contract on the basis of the law. Indeed the specification, required by the statute, of "the nature or kind of the work done, or the kind and amount of materials furnished, and the time when the materials were furnished or the work was done," is inapplicable to a lumping case, in which the party has contracted for a round sum, or, as in this case, for a given number of bricks. The object originally, in the contemplation of the Legislature, was to secure those who furnish labour or materials to a mere builder, without knowing the owner, or having an opportunity to secure themselves; but the words of the law are certainly applicable to cases in which the owner is his own builder. Where, however, the rights and responsibilities are defined by a bargain, neither is at liberty to claim anything beyond the terms of it.

Judgment reversed.

Miles *against* Miles.

In an action of ejectment when either party claims by virtue of the Act of Limitations, it is competent for him to give in evidence his own declarations made at the time he went into possession, in order to show that his entry was adverse.

An estoppel can only be asserted or pleaded by one who was affected by the act which constitutes the estoppel.

It is not essential to the efficacy of a parol exchange of land that each party should take immediate possession of the property exchanged.

ERROR to the District Court of *Erie* county.

This was an action of ejectment by the heirs of Thomas Miles, deceased, against William Miles, in which a statement of the case is made by his Honour who delivered the opinion of the court.

Riddle, for plaintiff in error.

Galbreath, for defendant in error,

The opinion of the Court was delivered by

Husron, J. — The defendants here were plaintiffs below, and brought this ejectment against William P. Finch and others, tenants of William Miles, who was admitted as landlord and defended. He is the uncle of the plaintiffs below. Many witnesses were examined and much testimony given; only a synopsis of which is given. It presented the following facts. About 1798 Thomas Miles settled on a tract of land (not the one in dispute); lived there four years, and had a house and ten or eleven acres in cultivation: a survey; and, in short, a title clear of dispute against all but the Commonwealth; for he was holding as an actual settler under the Act of 1792. William Miles owned several tracts of land, and among others one on Elk creek, near the mouth, for which he had a warrant and survey, and patent from the State in 1799.

In or about 1802 an exchange was agreed on: Thomas to give his tract for the one in question on Elk creek. No writings were drawn, but Thomas gave up the possession of his tract to William, who still holds it, and has laid out the village or town of Wattsburg on it, and sold the lots, or some of them. Thomas moved to a tract belonging to William adjoining the one in question. A man named M'Laughlin lived then on the tract in dispute, and before 1807 had cleared about 40 acres. In 1807 he moved from it, and Thomas Miles went on. M'Laughlin proved that in 1806 he let Thomas Miles work and clear land on it, and gave up to him the whole tract in 1807. Other witnesses say this was in 1808 or '9. It is not stated in our paper-book whether M'Laugh-

[Miles v. Miles.]

lin was in as a tenant of William Miles under an unexpired lease, or held adversely to him. Thomas Miles continued in possession (with the exception of one year) till his death in December 1841; and his tenants, as was alleged, till April 1842. He cleared 150 acres; had a saw-mill; two houses, one of which was valuable; two barns; an orchard, &c. But about 1820 Thomas Miles and his wife separated, and she claimed alimony; and it was proved that to reduce the alimony he said in court that he did not own the property on which he lived. The offices and records were burnt since that time, and the date could not be fixed except by parol. A witness proved that *about* 1820 or 1821 he lived on this land about one year, under a lease from William Miles. Chase was his partner in the lease: he left Chase on the land. That Thomas Miles and his children lived on the land and in the house with him. The plaintiffs below gave some evidence that William Miles was the active person in the dispute between Thomas and his wife; and, as they alleged, suggested this lease. William Miles, as I understand it, alleged that Thomas was to have the tract in question only during his life: and as the family of Thomas had all become of age and left him, and he lived with a tenant, the tenants somehow took and held under William after the death of Thomas.

As there was evidence on both sides, the court left the facts to the jury. There was a bill of exceptions to testimony. M'Laughlin was offered to prove that when Thomas came and entered he claimed it as his own; and he and other witnesses proved that at all times while living and clearing and building, he spoke of it as his own. There was no error in admitting this: it was not offered to prove what he said after transactions were passed. The declarations of a man at the time an act is done have always been received, both in civil and criminal trials. How else could adverse possession be proved? It has been, and will always be held that possession by one always claiming as his own, is adverse to all others.

In the year 1832 William Miles wished to take out a warrant for the tract of land which he had got from Thomas; and it being necessary to prove when it was first settled on, and by whom, he took the affidavit of Thomas Miles, who proved the date and extent of his improvement, and it was made for the use of William Miles; and this was alleged to be an estoppel to the present claim by his heirs. To this it was answered, that as William Miles purchased the improvement by giving another farm for it, whether in fee or for the life of Thomas, this was a mode of getting a title to William direct from the State, instead of a warrant to Thomas and a deed from him to William; and that as William paid him by giving another tract, the affidavit was not in the way of recovery in this suit, if the jury believed the exchange was made:

[Miles v. Miles.]

and so the court told the jury ; and there is no error in this. That related to a different tract : it might be evidence, but no estoppel in this case. Another point resembling this was Thomas saying, when his wife was claiming alimony, that he did not own the farm on which he lived, but that it belonged to William Miles. The Judge said this was not an estoppel in this case. A declaration to one person, or in one case, is not an estoppel as to another person or in another suit with a different party. Besides, there was some evidence that this allegation was made at the suggestion of the person who now wishes to take advantage of it.

Another point of the defendant below was that a parol exchange was invalid unless each party *immediately* took possession of the part given to him. To this the Judge very properly replied that if William Miles had gotten and held his part, it would not do to let him hold both parts, because he had not or could not immediately give possession to Thomas of the land in question.

The next point in the charge alleged as error is as to the Statute of Limitations ; and certainly the opinion of the court was as favourable to the defendant below as he could ask. The Judge assumed that the tenancy under William Miles, about 1820 or 1821, was fair and *bonâ fide* ; but it was not positively stated by any one witness whether it was in 1820 or 1821. If in the former the statute might be clearly a bar ; if not, it was otherwise. Now there was nothing to justify the court in taking this from the jury ; and to them it was finally left.

As to not arresting the judgment, there is nothing in it. The parties, plaintiff below, could recover according to their interest ; and if they took possession of more, the court on motion would set this right. There is no execution or proceedings on it before us. Besides, it was asserted by the counsel of the plaintiff below, and not denied by the other side, that before the motion in arrest of judgment was argued, or during the argument, the entry of judgment was made specific for those heirs who were named on the record, and for no others.

Judgment affirmed.

Kramer against M'Dowell.

A notice of the protest of a bill of exchange to be given by one to another who resides in the same city, must be served personally or by leaving it at his house or place of business: depositing it in the post-office directed to him, is not sufficient.

ERROR to the District Court of *Allegheny* county.

Allen Kramer against A. N. M'Dowell. This was an action to recover the amount of a bill of exchange drawn at Pittsburgh by William Seely on Benjamin Naglee of Philadelphia, for \$250, payable to the order of the defendant, A. N. M'Dowell, forty days after date, who endorsed the same to the plaintiff. The bill was duly protested at Philadelphia for non-payment, and notice thereof to the drawer and endorsers forwarded by mail to the drawer at Pittsburgh, who enclosed the notice for the endorser, A. N. M'Dowell, and deposited it in the post-office at Pittsburgh, directed to him at that place, where he resided. The question was whether this was sufficient notice. The court below (SHALER, President) decided that it was not.

Dunlop, for the plaintiff in error, cited 1 *Hill* 263.

The court declined to hear the counsel on the other side.

The opinion of the Court was delivered by

HUSTON, J.—The reports are full of cases as to what is or is not notice of the protest of a note or bill; and would seem to have gone as far as public convenience or private individual justice to the parties would require. These rules were made for mercantile or business men, who are in the habit of drawing notes or bills, and receiving letters by mail; and to apply them to a farmer, who never endorsed a note before, and does not receive a letter by mail once in three months, is hard enough, if not more than enough; but we are asked to go one step beyond all former cases. All of them say if the parties live in the same town the notice must be served on the person to be affected, personally or left at his house or place of business. The next step would be to let the notary put all notices to persons in the same city in the post-office, even where the person to be notified lived next door to him. We leave the rule as we found it; that in the same town or city, at least, unless when they become larger than Pittsburgh, the notice to be given by one inhabitant to another must be served personally or by leaving it at the house or place of business of the person to be notified.

Judgment affirmed.

Quin *against* Brady.

In an action of ejectment, where the question arises upon the validity of the original title of the parties, and not upon the extent of the claim or the Act of Limitations, the payment of taxes for the land by one party or the other cannot affect the title, and is therefore illegal evidence.

If a warrant for vacant land be put into the hands of the deputy-surveyor, and the land is bounded by older surveys made, marked upon the ground and returned, the deputy may execute such warrant by adopting the old lines and returning the survey accordingly without actually going upon the ground.

There is no law to prevent a deputy-surveyor from becoming interested in the location and appropriation of vacant lands, or for a consideration pointing them out to another for appropriation, provided he acts with good faith towards all others in his official conduct respecting the same.

ERROR to the Common Pleas of *Westmoreland* county.

Hugh Y. Brady against James Quin. This was an action of ejectment. The points made in the court below and the opinion of his Honour Judge **WHITE**, who tried the cause, are fully stated in the opinion of this court.

Foster, for the plaintiff in error.

Beaver, for the defendant in error.

The opinion of the Court was delivered by

HUSTON, J.—H. Y. Brady, the plaintiff below, gave in evidence a patent to himself, dated 22d October 1823, for the land in question, about 30 acres; a warrant to himself, dated 12th September 1823; and a survey thereon of the 6th October 1823, by Isaac Moore, deputy-surveyor. The defendant, Quin, gave in evidence a warrant for 400 acres to George Clark, dated the 8th February 1785, “including his improvement interest from 1st March 1779,” on which a survey had been made on the 2d June 1787, of 429 acres, by John Moore, deputy-surveyor. It appeared in the cause that in making this survey, the surveyor had included 458 acres; but this being more than 10 per cent. above the quantity called for, he cut off a part by dotting a line across, and returned 429 as above; and it appeared that Clark had patented his land as of this latter quantity.

On the 12th August 1790, he sold off 308 acres to Alexander Lemmon, which would include the part not returned, and which part is now in dispute. This deed was not recorded until 1842. The title of Lemmon was deduced to the defendant.

Several witnesses were called and proved, what was not disputed, that Clark, and then Lemmon, and next Quin, had occupied

[Quin v. Brady.]

the 308 acres, from before the date of the survey; and two witnesses proved that about 1823, Quin cleared across the dotted line on the part in dispute, and included that and a part in the returned survey in one field, and had since cleared more of the part in dispute. Brady had not attended to his land, and did not, it would seem, know its exact location or lines until 1842, when he went with a surveyor, and they called on Quin for information; he showed his title, and among other papers an old draft of the George Clark survey, and on it the part in question cut off by a dotted line. On the 26th March 1842, Quin took out a warrant for 29 acres, to pay interest from 1st March 1823; and on the 12th April 1842, a survey was made on it of 30 acres 19 perches, by J. Meckling, deputy-surveyor. Meckling was examined, and swore that in making this survey he examined carefully and found marked lines of old surveys, but no marks of the date of Brady's survey; the lines of this and Brady's survey were the same.

An instance of what useless evidence will be thrust before a court and jury occurred here. The neighbours, none of whom, however, lived in sight of the lines, were called and proved that none of them saw Isaac Moore run the survey of Brady. Now I suppose nobody now alive saw George Clark's survey made; and probably there are not three surveys in the township made thirty or twenty years ago, which would be good if you must produce persons who were present and saw the lines run and marked.

The defendant then offered to prove that the land in dispute had been assessed as Quin's, and he had paid the taxes; the court, on objection, overruled the evidence, and an exception was taken.

The judge was no doubt weary of having useless testimony, and he rightly rejected the evidence. The defendant had already proved that he had cleared and cultivated a part of the land. Paying taxes does not give title; it may show a claim, but this is not necessary where he who paid is in possession; such evidence is sometimes given to show how much an improver, who has no survey, claims; but I repeat, it does not give title. If he in possession pays taxes twenty-one years, and no suit is brought against him, he will hold the land; this is not by paying taxes, but by the Statute of Limitations. It was proved that Brady had said, that in the days of Isaac Moore, he, Moore, had come to the store of Brady's father, and said if he would give him a coat or suit of clothes, he would inform him where a piece of vacant land lay, and thus he got the warrant; and it was patented when his father, James Brady, was Secretary of the Land Office.

The court were requested to charge the jury on two points.

1. If the court believe from the evidence that Isaac Moore was interested and had contracted to sell the land to H. Y. Brady for a coat or suit of clothes, in such circumstances the survey would be void. The court answered in the words of the point, only concluding that it would not be void. A judge once said some

[Quin v. Brady.]

thing about a survey made by a deputy-surveyor for himself being void, but only one judge. If land was clear of other claims, there never was any law or regulation of the Land Office forbidding a deputy-surveyor to take it, or point it out to another.

2d point. The survey of Isaac Moore, deputy-surveyor, and return thereof, is *primâ facie* evidence of the making of such survey; but that such evidence may be contradicted and overcome by direct testimony, or circumstantial evidence; and that if the jury believe Isaac Moore was not on the ground as deputy-surveyor, but made the draft in his chamber and returned it, in such case it is null and void. The court say, "In answer to the second point, we instruct you that the return by the deputy-surveyor is *primâ facie* evidence of the making such survey, because he is a sworn officer, and the presumption always is that the officer does his duty; but that any one affected by it will be allowed to impeach the deputy-surveyor's return within 21 years, either by direct or circumstantial testimony that the surveyor never was on the ground and that in point of fact there is no such survey; and that as a general rule the law is as stated in the last clause of the proposition. But, like all general rules, there are exceptions, and if the three sides of this survey were the boundaries of the adjoiners, as returned in the official surveys, and these boundaries actually marked on the ground, Isaac Moore might adopt these lines, and might draft his survey from them, and return it to the Surveyor-General's Office without going on the land, and it would be a good and valid appropriation of the land in dispute.

The court delivered to the jury an elaborate and learned charge in accordance with what is said in answer to the second point above, only they added that George Clark having taken out his patent on his survey as returned, was bound by that, and could not claim land not in it.

The counsel here assigned four errors. .

1. The first is as to rejecting evidence as to payment of taxes, which is answered already. 2, 4. The 2d and 4th are the same in substance, and will be answered together. 3. The 3d is to that part of the charge of the court relating to Clark and the defendant being bound by his patent. I thought that a survey returned and filed, and much more, a patent taken out on it, were considered by our law as record evidence of title, and that all might not depend on parol; and that this had been so often settled as not to be doubted or to have been debateable for the last thirty years. Even where a survey is returned, no change can be made except on an order of the board of property. After a return and patent on that, and an acquiescence for many years, it must be a singular case in which any board of property will throw all this open again. That board cannot do it, if in the mean time a title to the land included in the return and patent has been acquired by any other person. The remaining assignment of errors I shall answer by

[Quin v. Brady.]

citing two or three cases, in which all the points in this cause were settled by our predecessors.

In 6 *Binn.* 39, we find the case of *Werdman v. Felmly*, which is this case in all particulars, only stronger. William Mackey, in 1774, had on the same day made a survey for himself in the name of Janet Sharon, and one for General Potter in the name of Robert Mackey. They were not returned until 1783, and in the returns of survey, Mackey and Sharon called for each other; but Mackey, on calculating Janet Sharon, found the lines contained 411 acres on a warrant for 300; he therefore cut off, by protraction 100 acres, and still he returned Janet Sharon as adjoining Mackey. As soon as the office opened in 1784, he took in his own name a warrant for the 100 acres. The return of survey was made without re-marking the lines, and probably without going on the ground. The late Judge DUNCAN and I were counsel for Werdman. Our courts, in that part of the State, had been much engaged for many years in trying titles to land, and this had so often been settled, that it was not, in the Supreme Court at least, made an objection; nor was it objected that the deputy-surveyor who made the surveys and threw out a part of one, had himself taken a warrant for the part thrown out, unless his conduct was fraudulent. The law was laid down as it was in this case by the court below.

In *Lambourn v. Hartswick*, (13 *Serg. & Rawle* 113), the other point as to a survey called for being returned, and also the necessity of re-marking old lines, was decided. That was a second trial; Hartswick had settled under Lambourn, and Miles had recovered; and he had leased under Miles. The property was valuable; the cause was elaborately tried and fully considered, and the law settled as in this case; and we could not do anything more injurious to the country than open again to controversy, points relating to land titles which have been long since decided and acted on.

Judgment affirmed.

CASES
THE SUPREME COURT
PENNSYLVANIA.

EASTERN DISTRICT—DECEMBER TERM 1844.

Jones's Appeal.

It is not universally or even generally true that money which has come to the hands of a trustee by the act or consent of his colleague, without positive negligence on the part of the latter, is chargeable indifferently to either.

The diligence required of a trustee in the care of the trust estate is precisely the diligence which a man of ordinary prudence would practise in the care of his own.

Held, therefore, that where joint guardians in affluent circumstances and in good repute apportion the custody and management of the property to suit the peculiar capacity and qualifications of each, but without surrendering the right of either to intermeddle with the whole, each is chargeable with no more than he received, unless he stood supinely by while his colleague was manifestly impairing the estate.

THIS was an appeal by Paul Jones, one of the guardians of the three minor children of John H. Levering, deceased. In March 1826 Paul Jones and John Levering were appointed guardians. Paul Jones was cited in the Orphans' Court of Philadelphia county to settle his account. He filed an account stating the sum of \$78.92 principal and interest of money received by him of Abraham Levering, the administrator of John H. Levering, deceased, on the 22d January 1838, accompanied with an answer on affirmation stating that "the principal management of the concerns of

(143)

[Jones's Appeal.]

said children was conducted by John Levering. That your respondent herewith files an account of his guardianship, showing the only transactions which he has had as guardian. That the said account is just and true in the charge and discharge thereof, to the best of his knowledge and belief, and that no other money, property or estate belonging to his wards, other than that stated in his said account, ever came into his hands, possession or power; and that he has no other account or settlement of his guardianship to make; whereupon he requests he may be discharged from the further answer to said citation."

No objection was made by the complainants to the items of this account, but they sought to charge him with moneys received by his co-guardian, amounting, according to the auditor's report, to upwards of \$900, and lost in consequence of his insolvency. The auditor, on the authority of *Bone v. Cook*, (*M'Clelland* 168); *Oliver v. Court*, (8 *Price* 127); *Brice v. Stokes*, (11 *Vez.* 319), and *Walker v. Symonds*, (3 *Swans.* 61), thought that the appellant was chargeable with the whole; and his report was confirmed by the court below.

The following was the evidence given in the case as reported by the auditor.

Paul Jones affirmed.—Abraham Levering gave me notice. It (the guardianship) was offered me, and I agreed to assist John in taking care of the property, with a clear understanding with Abraham that I shouldn't have anything to do with the money; these were the conditions on which I agreed to accept it. Never was asked for security. Was a neighbour of John Levering's; lived in sight of him. I received what money I have returned here. I took the money I have returned because Abraham pressed me to take it. I was unwilling because I had declared off in the first start. Abraham gave me a reason; the reason he gave was a wish of the family, and his wish; and that they couldn't get the money from John Levering's hands.

Abraham Levering affirmed.—I think in two days after his appointment I informed Paul Jones of it. All the children were small. Jonathan was the oldest, and was then about eleven. There was no contract made by me with Mr Jones before the appointment; he agreed to serve with John Levering. Soon after the appointment he wished me to pay the money to John; he thought him most competent to do the business; it was at his suggestion I paid it to John. I never made any agreement with Jones that he was not to be liable in his trust as guardian. Mr John Levering has failed, and made an assignment. I should have paid the money to either, as most convenient to myself, but for Mr Jones's suggestion. We thought them both responsible.

Cross-examined.—I don't recollect, when I asked him to be guardian, that he objected to have the money. I know that he at first refused. I do not recollect that he refused to have anything

[Jones's Appeal.]

to do with the money affairs; when the money was paid to him, he refused to receive it, as John had received the rest, and I told him the family wished him to receive it.

Levering recalled.—There are about \$19,000 of incumbrances on my estate—one mortgage \$11,000, date something like 1833 or 1834—the others are judgments obtained within the last two or three years.

Jones recalled.—I valued the estate of Levering within the last year, and valued it at \$26,000. We thought four years ago it was worth more.

Margaret Levering affirmed on part of exceptants.—Six or seven years ago Paul Jones was at my house, before my son Jonathan was of age; he is now twenty-seven. Jones said he didn't know what to think of John Levering, some one or other would always be calling him of one side; that he expected they were after money. Jones said he would receive money from Abraham Levering; that he was sorry he hadn't received more of it. Jones acted as guardian.

Isaac W. Roberts affirmed on part of P. Jones.—I have known John Levering and Paul Jones since we were boys. I shall be fifty-three next spring. I considered John Levering one of the wealthiest men we had in our neighbourhood, till twelve or fourteen years ago; he then met with a considerable loss that deranged his business. I had then no doubt about his solvency. Up to the time he made his assignment, and some months after, I thought he would have more than enough to pay. On the 18th May last (1841), his assignment was made. I loaned him money less than a year before his assignment, \$50. I should have made no difficulty in paying him money as guardian. Until Levering met with this loss, I should have thought him richer than Jones.

Cross-examined.—I have no hopes that his estate will pay his debts. If it had been sold a year ago, I think it would.

Joseph Trasel affirmed.—Known Levering a number of years; always considered him in good circumstances until the time referred to by Mr Roberts; at that time he sustained a loss; but always thought him a solvent man up to the time he made his assignment. I knew or heard that he was pushed for money a few months or a year before his assignment.

George F. Culin affirmed.—I have heard of John Levering many years ago. The first I heard of his pecuniary difficulties was in reference to taxes. He was always esteemed and spoken of as a solvent man. Two or three years ago Reverend Mr Jones told me he was pushed.

Peter C. Erben sworn.—I have known John Levering only six or seven years intimately; always thought his property sufficient to pay his debts.

John Levering affirmed on behalf of Jones.—I was born in Lower Merion township, Montgomery county, opposite Manayunk. 1

[Jones's Appeal.]

have lived there all my life. I inherited real estate there from my father. I was a miller—had a saw-mill, a grist-mill—and afterwards was a woollen manufacturer. I have been on several occasions administrator, executor, guardian, trustee. Two or three years before I made my assignment, I was appointed a guardian. That appointment, I think, was in 1838 or 1839. The heavy loss that I sustained, that is mentioned in the auditor's report, happened in 1831, in consequence of the failure of Gillingham, Mitchell & Co. They failed in the latter part of that year. They were my factors. In the early part of the same year I sustained a heavy loss by a freshet. I could not see that my general character and standing were affected by these losses. I don't think that I could see any material difference until within two or three years of my assignment. I borrowed a sum of money in April 1839 of Mr Grant, on bond and warrant of attorney. It has not been entered in the office. After I sustained my heavy losses I was able to meet my engagements with punctuality, and to borrow money for my current purposes. I could do so as well as most men in business at that time, I believe. My final failure took place in May 1841. So far as I could judge, that failure was unexpected by others. It was after 1833, I can't tell the year or day, Paul Jones asked me if the funds of the children of John H. Levering were invested. I told him they were out on bond and mortgage. A part in fact were out on bond and mortgage; the part that was out was the same \$700 that was handed over to my successor in the guardianship. The rest of the money was not in fact invested; it was in my own hands. I don't know that I let Mr Jones know that fact.

Question for Paul Jones. — As far as you know or believe, did anything occur to induce Mr Jones to believe that any part of the money was uninvested? Objected to. Witness answers. — No; he appeared to be satisfied with what I told him. I can't remember the precise words of Mr Jones; he generally made inquiries if the moneys were out at interest. My answer was a general one. I can't say how many times this occurred, but two I have a distinct recollection of. I think the last one was within two years of my assignment; the first was after 1833, I can't tell how long. On each occasion Mr Jones appeared to be satisfied.

Cross-examined. — I think I did not show Mr Jones any bonds or mortgages on the occasion referred to. I did not show him any; he did not ask to see them. I do not recollect that he asked me the name or names of the borrowers, but I think I told him the name, Young; there was no other name. I can't say whether I told him the amount Young had. I think he did not ask me the amount. I think I told him on what real estate the money was loaned. I don't know that I was so particular as to tell him the county. He knew the place as well as I did; that it was in Manayunk. I don't know that he personally knew Young. I never

[Jones's Appeal.]

exhibited to him the state of my accounts, the balance in my hands. He never, to my recollection, asked me. I never told him the amount of money in my hands. He never asked me. I can't say positively that I did or not tell him the amount invested. I can't say whether he asked me. I don't know that I ever exhibited to him any papers connected with my trust. To my recollection he never asked me. At the time of my failure I owed; the whole gross amount was \$24 or \$25,000. I can't say what amount was on bond and mortgage, without taking some time to add them together. I can't tell what amount on notes or other contracts, unless I had a list to separate them. I can't tell whether my estate will pay this trust fund. I thought my estate would pay all. The present prospect is not flattering. From present appearances, my estate will not pay this trust fund. My failure was not expected by me one day before my failure. I did not pay all demands on me promptly up to my failure. I did till pretty nearly the time. Till about a year before. Since the failure of Gillingham, Mitchell & Company, I have met with losses; none heavy, but all taken together were heavy.

Re-examined.—In 1834, when Abraham Levering paid me \$100, it was paid as other moneys had been. Nothing passed between us, except that the money was just paid and received. I think my answers to Mr Jones' questions were in a kind of a general way, that the moneys were invested in bond and mortgage.

Cadwalader, for the appellant, referred to 13 *Price* 332; 6 *Watts* 189; 11 *Vez.* 327; 1 *P. Wms.* 244.

Hirst, contra, cited 2 *P. R.* 420; 1 *Watts* 367; 2 *Ashm.* 470.

The opinion of the Court was delivered by

GIBSON, C. J.—Parents, guardians, executors, receivers, and all who manage the estates of infants, are responsible as trustees, and held to the same diligence; but for participation in the acts of their colleagues, the liability of executors is peculiar. In *Sadler v. Hobbs*, (2 *Bro. Ch. R.* 117), Lord THURLOW admitted the rule to have been confirmed in *Leigh v. Barry*, (3 *Atk.* 584), that an executor, joining with his colleague in the signature of a receipt or conveyance, makes it his own; and he questioned the soundness of *Westley v. Clarke*, (1 *P. Wms.* 83), in which Lord NORTHINGTON had held a different opinion; but the master of the rolls subsequently professed, in *Scurfield v. Howes*, (3 *Bro. Ch. R.* 94), to find no fault with it. The distinction between executors and trustees, in this respect, is important; for it might be shown that the instances in which a mere trustee has been charged with the defaults of his colleague are comparatively rare. In the *Treatise of Equity*, (Fonb., B. 2, Ch. 7, § 5), as well as in the opinion of the Lord Keeper, in *Fellowes v. Mitchell*, (1 *P. Wms.* 83), the charging

[Jones's Appeal.]

of an executor for having signed his colleague's receipt is put on the foot of necessity, and likened to confusion of goods, though it is obvious that the same uncertainty in ascertaining how much had been received by each is produced by the joint receipt of trustees. The true reason seems to be, that it is unnecessary for executors to join; and that where they gratuitously assume the character of joint receivers, they agree to trust each other, and become joint accountants, while no such conclusion is to be drawn from the receipt of trustees who cannot choose but join.

In this instance, the question touches the liability of trustees for each other's receipts, without joinder. The appellant was charged with his colleague's defaults on the principle (*Fonb.* 185), that where money gets into the hands of a trustee by any *act or agreement* of his colleague, both are chargeable with it; and that if they agree that each shall have the management of a particular part of the estate, each shall be chargeable with the whole. There is certainly a *dictum* to that effect of Lord THURLOW, in *Sadler v. Hobbs*; but *Gill v. The Attorney-General*, (*Hardr.* 314) on which he relied, does not bear him out. That was the case of commissioners severally bound with sureties to perform all the articles and rules of the excise; and they were held not to be answerable for each other. That was the point decided; and it turned on the interpretation of the bond. But it was said in illustration, that though an executor is chargeable for no more than comes to his hands, yet if executors agree among themselves that "one be to receive and meddle with such a part of the estate, and another with such a part, each of them will be chargeable with the whole, because the receipts of each are pursuant to the agreement made betwixt both." This is the only thing even in the shape of a *dictum* that amounts to a judicial recognition of the principle; and it was not predicated of trustees, but of executors, who have separate power to intermeddle and receive without any agreement whatever. *Scurfield v. Howes* was also the case of executors who had joined in a receipt; and *Westley v. Clarke* impugned the doctrine, as we have seen, even as to them. But in *Fellowes v. Mitchell*, Lord COWPER, speaking of the responsibilities of trustees, said: "it seems to be substantial injustice to decree a man to answer for money which he did not receive, at the same time that the charge on him by joining in receipts, is but *notional*." Other cases are much stronger against the principle, as Mr Fonblanque has asserted it. In *The Attorney-General v. Randall*, (21 *Vin., Trust, N. a, pl. 9*), one of three trustees to build an almshouse, called on the executors of the founder for the money; and payment being refused, except on the joint receipt of all, he procured the signature of the others, received the money, and failed at the end of four years. The Lord Chancellor said, "it could not be expected that all should meet together to receive; but if they had, either one must have had the custody of the whole, or it must have

[Jones's Appeal.]

been divided into shares. And if they *entrust one of themselves for convenience or necessity, when all are solvent*, which is no more than making him their banker, shall equity punish where there is no default? And this is the case of *Churchill v. Hopson*; and to charge trustees in such a case would make the case of trustees very perilous, which are very necessary for the common good and convenience of families. And he said that he saw no reason why trustees may not make one of themselves their cashier when there is no fraud; that this was a *reasonable* thing at the time, as R. (the receiver), was the only trustee who lived in London where the money was paid: and as to an objection made to letting the money be so long in R.'s hands, he said the case of R. differs from the case of a common banker, where the money may be drawn out at pleasure; but here R. had as good a right to the keeping it as the others; and all paid out till about one-third; and he was entrusted by the testator as well as the others." Now the joint receipt was signed, in that case, for the very purpose of enabling R. to get the money; and it consequently "got into his hands by act and agreement" of his colleagues, of a nature as absolute as an order would have been. Every joint receipt is such; and less negative in its essence than a refusal to receive. I have extracted the opinion of the Chancellor entire, not only because it embodies the good sense of all that has been said on the subject, but because every part of it may be applied to some feature of the case before us; and I shall add no more than that *Townley v. Chalenor*, (Cro. Car. 312); *Murrell v. Pitt*, (2 Vern. 570); *Leigh v. Barry*, (3 Atk. 584); *Churchill v. Hobson*, (1 P. Wms. 241); and *Applyn v. Brewer*, (Prec. in Chan. 173), powerfully support it. In declining to receive the money of the estate, the appellant did no more than every trustee does who signs a joint receipt for the purpose of putting it into the hands of his colleague; and in limiting his active agency to that part of the business for which alone he was qualified, he acted with extraordinary zeal and discretion. Who will say that the arrangement did not promise fairer for the wards than any other that could have been adopted? and if it was executed in good faith, why should it be made a ground of charge? The appellant was peculiarly fitted by experience for the management of real estate, but not conversant with pecuniary transactions; while his colleague, on the other hand, had experience in the business of investment and in accounts, having often been an executor, an administrator, or a trustee. Guardians are sometimes chosen for diversity of qualification, so that each may take charge of those parts of the trust for which his pursuits have fitted him. A lawyer might beneficially leave the management of his ward's furnace or forge to a colleague bred an iron master, while he himself attended to matters more congenial to his profession. Still it must be admitted that a guardian commits a breach of trust when he parts irrevoc-

[Jones's Appeal.]

cably, even for a time, with his *right* of joint control, so as to preclude him from exercising it when necessary; as in *Keble v. Thompson*, (3 Bro Ch. R. 111), where the one trustee lent the funds to the other. The appellant, therefore, is not chargeable merely for having declined to meddle with the moneys in the first instance; and the next inquiry is, whether he ought to have interposed before he began to doubt his colleague's solidity; or whether he ought to have been satisfied with the explanation given when he called on him for information about the state of the property.

The result will depend very much on what is the proper degree of a trustee's vigilance. In *Pybus v. Smith*, (1 Ves. Jun. 193); *Palmer v. Jones*, (1 Vern. 144); *Man v. Ballet*, (*Ibid.* 44); and *Harnard v. Webster*, (*Select Ca. in Ch.* 53), it is said that he is to be charged only for his own receipts, or for supine negligence, and when the proof of it is strong. Sir WILLIAM JONES (*Law of Bailm.* 22) says that no more is required of the holder of another's property, under a contract beneficial only to the owner, than good faith; that he is answerable for gross negligence only; but that in regard to a commission or mandate by which an affair is committed to another to be managed gratis (and a guardianship is such), good faith itself requires that he use a degree of diligence adequate to the performance of the work. And this degree, it seems, was required, by the Roman law, to be greater than perhaps he might think proper to bestow on his own affairs, (*Ibid.* note 5); not, however, I presume, if he were a man of ordinary prudence. By this I mean that one who undertakes the business of another as an unpaid agent, engages to exercise in it the degree of vigilance that a man of ordinary diligence and skill would exercise in his own. Now, though guardians receive a sort of compensation from the liberality of the court, they are of right entitled to nothing; and they stand with us in the same degree of responsibility as they do in England, where their services are gratuitous. But a guardian is allowed, at all, only for services, not for risks; and as the law has no higher aim than to place the property of an infant on the same footing of security as the property of an adult, the appellant was bound to deal with the estate of his wards only as it may be supposed they themselves would have done, had they been of age.

But, in addition to the charge of having refused to become a receiver, he is accused of negligence in regard to the receipts and investments of his colleague. His appointment seems to have been procured by the administrator, and probably the family, with a view to his services in managing the real estate, for which he was peculiarly qualified. There is no positive proof of the fact. but it may be inferred from the circumstances, that the appellant was appointed without his knowledge, and that his acceptance was procured by the administrator, himself one of the family, on an express understanding that the business of the guardianship

[Jones's Appeal.]

should be apportioned. Under the civil law, the family council was a legal institution, whose influence in domestic concerns was decisive; and family arrangements are still so far regarded by courts of equity as to be ground for sustaining agreements between parent and child, or between brothers, which would else fail for want of consideration. I pretend not that a stipulation of the administrator, with the assent of the family, would bind the minor children; but it is not too much to say, that the family approbation of the appellant's course may legitimately weigh in a question of negligence. But, without aid from that quarter, it seems, from the nature of the case, that he acted with extreme caution and singular discretion in leaving the management of the moneys to one who was better qualified for it, and whose wealth afforded greater security against loss from insolvency.

Negligence is still further imputed to him, for omitting to call his colleague to account, when fears of his insolvency were actually excited in him. But the ground of these fears was very slight, and less might therefore justify him in dismissing them. Both then and afterwards no one stood higher in public opinion than his colleague, as a man of integrity, business, and wealth; and that the appellant had no stronger reason to suspect him than having sometimes seen him called aside on private affairs by those who may have been duns, argues a very great degree of vigilant observation. By these trifles, however, his suspicions were aroused, and they impelled him to do what a cautious man might be expected to do. He inquired into the disposition made of the money, and was told by his colleague, whose truth had never been doubted, that the whole was invested in bonds, secured by a mortgage on a landed estate, which was pointed out. To require him to have dealt with his colleague as a rogue, by calling for the securities, would require of him the highest and most exact vigilance; a degree of it that would ruin every guardian. No rate of commission would compensate the risk incurred from such a trust, and no man of prudence would accept it. Responsible guardians would not be had, and infants would be injured instead of benefiting by it.

It is urged that the appellant was bound to call his colleague to account as soon as he was so far satisfied of the insecurity of the funds in his hands as to consent himself to become the receiver. These guardians were appointed in 1826; the prosperity of him who has since become insolvent received its death-wound in 1831; the catastrophe was not expected by any one but himself before 1838—two years before his assignment—insomuch that he borrowed money in 1839, on bond and warrant, which has not been entered up; and he borrowed another sum, on his personal security, in 1841, a short time before his failure. It is true that the appellant consented, in 1838, to receive the residue of the money, at the administrator's suggestion, for which no reason

[Jones's Appeal.]

was assigned; and there was consequently little in the suggestion to shake his confidence in his colleague's stability. It is true, also, that the mother testified to the appellant's admission, made six or seven years before 1841, that he did not know what to think of his colleague, and that he would himself consent to become the receiver; but her testimony is unworthy of confidence, inasmuch as it goes back to a period decisively anterior to 1838, the time material to the question.

Again, it is insisted, on the authority of *Brice v. Stokes*, (11 Vez. 319), and *Walker v. Symonds*, that laches was chargeable to the appellant in suffering the money to lie in his colleague's hands for fourteen years; especially as the statute of 1821, since repealed, made it the duty of guardians to render triennial accounts without being cited. That statute, like the one which requires an executor to file an inventory within a month from the date of the letters, imposed no penalty for a disregard of it—certainly none applicable to a case like the present—and it was, consequently, no more than directory. Independent of that, however, the two cases referred to would go far to sustain the present charge; but it is also true that there has, at all times, been more inconsistency of English decision on this head than on any other, and more than is to be found in our own books on all heads together. Perfect consistency is not attainable, and the decisions of our own courts are not free from discrepance in matters of less importance than rules of property; but the aberrations of no American court will bear comparison with the sweeping alterations of the common law by the English judges. On the subject before us their decisions have been habitually loose; and we feel ourselves so far unfettered by foreign precedent as to be at liberty to adapt the rule of a guardian's vigilance to the business habits and transactions of our own people. The principle of accountability for the omission of every measure of imaginary precaution which human sagacity might have foreseen, would be impracticable in a country where counsel cannot be consulted at every step without incurring an expense that would often swallow up the estate. Where the property is small, plain country farmers, unversed in legal niceties, are generally prevailed on by the friends to take charge of it; and from these justice requires no more than a reasonable degree of vigilance, exercised in good faith. It certainly does not require that the office of a guardian should be a trap for the simple. Here there was reasonable vigilance and good faith, and we direct the appellant to be charged with no more than his receipts.

Account reformed accordingly.

Shelly *against* Shelly.

A. bought land from an heir who took it at the appraisement, subject to one-third to the widow, to be paid on the death of the widow. Under the 41st section of the act of 29th March, 1832, the heir may recover his portion of this after the widow's death, in *assumpsit* against A.

The suit, if against the heir taking the land at the appraisement, must be on the recognizance.

When an heir takes land at an appraisement, his own share of the price is merged in his fee.

Qu. How it would be if his wife were the heir?

But even if this were so in that case, yet his vendee may agree with him otherwise; and if such vendee give a bond for his wife's share, payable on the death of the widow, and sell the land to another subject to that bond, the obligee, or his administrator, if dead, may recover in *assumpsit* against such vendee.

ERROR to the Common Pleas of *Bucks* county.

This was an action on the case brought by Abraham Shelly, defendant in error, against Henry Shelly, plaintiff in error, to recover the sum of \$176.73, with interest from the death of Ann Yeakle, the widow of David Yeakle, deceased, alleged to be due to the heirs of David Yeakle, deceased, out of the land in possession of the defendant. On the trial the court directed the jury to bring in their verdict for the plaintiff (without prejudice), and entertained a motion for a new trial, and gave the defendant a bill of exceptions. The death of the plaintiff was afterwards suggested, and Joel Shelly, his administrator, substituted.

The following case was stated for the opinion of the court:—

David Yeakle, late of Milford township, in the county of Bucks, died in 1820, intestate, lawfully seised in his demesne as of fee, of and in two tracts of land, situate partly in the county of Bucks and partly in the county of Lehigh, leaving a widow, Ann, and nine children, to wit: Jacob, George, Daniel, Ephraim, Salome who intermarried with Abraham Shelly, Maria, Susan intermarried with Charles Yeakle, Nancy and Rosanna. On the 29th August, 1820, Jacob Yeakle, the eldest son, presented a petition to the Orphans' Court of Bucks county, praying said court to award an inquest to make partition or valuation of the premises to and among the said parties, agreeably to law. Whereupon said inquest was awarded; and made return on the 27th November, 1820, after having found "that the same lands and tenements, with their appurtenances, could not be parted and divided to and among the widow and all the children of the said deceased, without prejudice to or spoiling the whole; but that the said lands and tenements as aforesaid would accommodate two of the children of the said deceased." Said inquisition was confirmed on the

[*Shelly v. Shelly.*]

27th February, 1821, and the rule upon the heirs to show cause why they should not appear and accept or refuse returned duly served. Whereupon Jacob Yeakle, the eldest son of said deceased, appeared in open court and accepted No. 1 and 1; and Abraham Shelly, by virtue of the following power of attorney, to wit:

“ Know all men by these presents, that whereas David Yeakle, of the township of Milford, in the county of Bucks, and state of Pennsylvania, died intestate, leaving real estate as lands and tenements, part of which in Bucks county and part of the same in Lehigh county, through which the county line runs; and whereas, upon petition, and by order of the Orphans’ Court, inquisition has been held, partition and valuation made of the aforesaid real estate by a jury of twelve men, according to law; and whereupon Jacob Yeakle, the eldest son of the said deceased, is by law entitled to the preference before the rest of the heirs, of electing and taking one part of the said divided estate; and whereas I, George Yeakle, brother to the said Jacob, and second son of the said David Yeakle, deceased, am entitled by law to accept and take the second part of the said divided estate at the valuation thereof. Now know ye, that I, the said George Yeakle, have made, ordained, constituted and appointed, and by these presents do make, ordain, constitute and appoint Abraham Shelly, of the township and county aforesaid, practitioner of physic, my true and lawful attorney, irrevocable in my name, but for the sole use and benefit of him the said Abraham Shelly, practitioner of physic, his heirs and assigns, to ask, demand, recover and receive all my claim, right, title, liberty and benefit, respecting my preference of accepting, electing and taking of the aforesaid divided estate, which I am or may be entitled to, giving, and by these presents granting to my said attorney my full power and authority in my name, place and stead, for the recovery of all my claim, right, and all whatsoever legally might be granted to me respecting my preference and right in electing and taking of the said divided real estate, ratifying and confirming, and by these presents allowing whatsoever my said attorney shall, in my name, lawfully do or cause to be done in and about the premises, by virtue of these presents. In witness whereof I have hereunto set my hand and seal, the 9th October, 1820.

“ GEORGE YEAKLE. [SEAL]

“ Sealed and delivered in the presence of

“ SOLOMON HETRICK, }
 “ MICHAEL BRESCH. } Acknowledged and recorded, &c.

appeared in open court and accepted No. 2 and 2. Whereupon the court ordered and awarded the aforesaid premises, with the appurtenances, unto Jacob Yeakle and Abraham Shelly, (each the respective share of their election), their heirs and assigns for ever, to have and to hold said land and premises, with the appurtenances, in as full, free and ample manner as the intestate in his

[Shelly v. Shelly.]

lifetime held and enjoyed the same, (after entering into bonds with their sureties, and themselves into recognizances, to secure to the other children their respective shares).

Said estate was valued as follows, to wit :

Valuation of Jacob Yeagle's part,	- - - -	\$3082.05
“ Abraham Shelly's “	- - - -	1689.90

Whole valuation,	- - - - -	\$4771.95
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Each child's share,	- - - - -	\$530.21
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One-third of this sum to be paid at widow's death, \$176.73

Whereupon Jacob Yeagle gave the following Orphans' Court Bonds :

To George Yeagle,	- - - - -	\$530.21
“ David “	- - - - -	530.21
“ Ephraim “	- - - - -	530.21
“ Maria “	- - - - -	530.21
“ Susan “	- - - - -	430.99

And Abraham Shelly gave the following Orphans' Court bonds :

Nancy,	- - - - -	\$530.21
Rosanna,	- - - - -	530.21
Susan,	- - - - -	99.27

Abraham Shelly and one Christian Stauffer subsequently entered into the following article of agreement for the sale and purchase of that portion of said real estate taken by Abraham Shelly in right of George Yeagle, to wit :

“ Articles of agreement made and concluded this 3d day of March, in the year of our Lord 1821, between Abraham Shelly, of Milford township, in the county of Bucks, and State of Pennsylvania, practitioner of physic, of the one part, and Christian Stauffer, of the same place, yeoman, of the other part, witnesseth that the said Abraham Shelly, for and in consideration hereinafter mentioned, hath granted, bargained, sold and confirmed, and by these presents doth grant, bargain, sell and confirm, unto the said Christian Stauffer, to his heirs and assigns, that certain tract or tracts of land being the part called No. 2 of the plantation of David Yeagle, late of Milford township, in the county of Bucks, deceased, which plantation by a jury of twelve men, upon an order of the Orphans' Court, has been divided into two parts according to law, and denominated part No. 1 and part No. 2, which said part No. 2, situate lying and being partly in the said Milford township, in the county of Bucks, and partly in the township of Upper Milford, in the county of Lehigh, containing 70 acres and 66 perches, has been granted by the Orphans' Court (February Term, in the year aforesaid), to the said Abraham Shelly, assignee of George Yeagle, the second son of the said David Yeagle, deceased, which said part, No. 2, except an acre of woodland of

[*Shelly v. Shelly.*]

timber of the said part, No. 2, to be excepted and preserved for the said Abraham Shelly, his heirs and assigns, which said acre of woodland to be along the line of the woodland No. 1, from end to end of said line, or from Mathias Deterer's field through the woods to Jacob Snyder's field, and in breadth as broad as will suffice for an acre, which acre is hereby and will always be excepted and preserved for the said Abraham Shelly, his heirs and assigns, and the remainder of the said part, No. 2, which will be entirely 76 acres and 66 perches, with all and singular the improvements, ways, woods, water, water-courses, meadows, with the rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging or in anywise appertaining, and the reversions, issues, and profits, interest, use, possession, property, claim and demand whatsoever of him the said Abraham Shelly, of, in and to the hereby granted, or mentioned to be granted premises. To have and to hold the said piece of land, hereditaments and premises hereby granted, or mentioned to be granted, unto the said Christian Stauffer, his heirs and assigns, to the only and proper use and behoof of the said Christian Stauffer, his heirs and assigns for ever; and the said Abraham Shelly doth hereby promise for himself, his heirs, executors, administrators or assigns, to sign, seal, execute and deliver to the said Christian Stauffer, or to his heirs and assigns, a lawful deed for the said premises at any convenient time, or when demanded after the space of twenty days from the date hereof; and the said Christian Stauffer doth hereby promise and agree for himself, his heirs, executors, administrators or assigns, to be under and subject to the payment of all and singular whatever the said Abraham Shelly is owing upon the said premises, or part of land No. 2, containing 70 acres and 66 perches, unto the heirs of the said David Yeakle, including the said Abraham Shelly's hereditary portion, and to fulfil and perform all and singular in whatever the said Abraham Shelly stands at present bound to the heirs of the said David Yeakle, deceased, for the said premises, or part of land No. 2, containing 70 acres and 66 perches; and the said Christian Stauffer doth hereby promise and agree for himself, his heirs, executors, administrators and assigns, to pay the further sum of £91, lawful money, to the said Abraham Shelly, his heirs or assigns, and to execute and deliver a bond of the said sum of £91, payable to the said Abraham Shelly, and at the time of the delivery of the deed of the said part of land No. 2; and the said Christian Stauffer doth hereby promise and agree for himself, his heirs, executors, administrators and assigns, that he shall and will, well and truly pay to the heirs of the said David Yeakle, all and singular, whatever the said Abraham Shelly stands bound to pay to the said heirs at the time which it is due, or will become due, for the said premises or part of land No. 2, and by reason or means of the non-performance of the said payments to the said heirs, shall and will at all times, well and suffi-

[Shelly v. Shelly.]

ciently save, defend, keep harmless and indemnified, the said Abraham Shelly and his sureties, for the said payments, and shall and will execute and deliver such a bond to the said Abraham Shelly and his sureties, at the time when he, the said Christian Stauffer, will receive the deed for the said premises; and for the true performance of all and every of the above said covenants and agreements, they, both parties, bind themselves firmly unto each other in the penal sum of £1000, lawful money, to be paid by the transgressor thereof unto the party that shall find themselves offended thereby.

"In witness and confirmation whereof, both the parties have, &c. hereunto set their hands and seals on the day and year above said.

"ABRAHAM SHELLEY, [SEAL.]
"CHRISTIAN STAUFFER, [SEAL.]

"In presence of MORGAN CUSTARD,
GEORGE BRESCH."

On the 19th March 1821, Abraham Shelly, and Salome his wife, by indenture, conveyed the said real estate in fee-simple to Christian Stauffer, giving a clear title upon the face of it. And thereupon Christian Stauffer executed and delivered the following instrument of writing:

"Know all men by these presents, that I, Christian Stauffer, of Milford township, in the county of Bucks, and State of Pennsylvania, yeoman, am held and firmly bound unto Abraham Shelly, physician, Christian Huber, Jacob Shelly, and Abraham Overholtzer, all of the township, county and State aforesaid, in the sum of £1260 8s. 6d. of good and lawful money of Pennsylvania, to be paid to the said Abraham Shelly, Christian Huber, Jacob Shelly, and Abraham Overholtzer, or their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents. Sealed with my seal dated the 19th March 1821.

"The condition of this obligation is such, that whereas, on the 27th February 1821, one portion of the real estate of David Yeakle, late of Milford township, in the county of Bucks, deceased, was adjudged and confirmed unto the abovenamed Abraham Shelly, by the Orphans' Court at Doylestown, in the county of Bucks. And whereas, the said Abraham Shelly, with the abovenamed Christian Huber, Jacob Shelly, and Abraham Overholtzer, as his sureties, stand bound to Nancy Yeakle, Rosanna Yeakle, and Susannah wife of Charles Yeakle, children and heirs of the said David Yeakle, deceased, to pay the said heirs and the widow of the said David Yeakle, the sum of £434 17s. 8d. lawful money in manner following, viz: to the said Nancy Yeakle and Rosanna Yeakle, each £132 11s. on the 27th day of February 1822, with

VIII. — O

[Shelly v. Shelly.]

one year's interest for the same; and the further sum of £66 5s. 6d. to each of the said two heirs, Nancy and Rosanna, after the death of the said widow; and to the said Susannah, wife of Charles Yeakle, the sum of £24 16s. 4½d. on the 27th February 1822, with one year's interest for the same; and the further sum of £12 8s. 2d. after the death of the said widow. And to the said widow the sum of £12 13s. 6d. lawful money, on the 27th February 1822, and in future (the like sum) of every year on the 27th February, as long as she lives, as her yearly interest, which is to come to her. And whereas, the said Abraham Shelly hath conveyed and sold part of the aforesaid portion of the said real estate to the said Christian Stauffer. Now the condition of the above obligation is such, that if the said Christian Stauffer, his heirs, executors, administrators or assigns, do and shall well and truly pay, or cause to be paid, unto the aforesaid heirs and widow, their heirs, executors, administrators or assigns, or legal representatives, the aforesaid sum of £434 17s. 8d. in the same manner aforesaid, and in all respects fulfil the same concerning or respecting the aforesaid payments, as the said Abraham Shelly, with his sureties, stands bound to the said heirs and widow. And that if the said Christian Stauffer, his heirs, executors or administrators, do and shall well and truly pay, or cause to be paid to the said Abraham Shelly (who is one of the heirs of the said David Yeakle, deceased), his heirs, executors, administrators or assigns, the sum of £132 11s. lawful money, on the 27th February 1822, with one year's interest for the same, and the further sum of £66 5s. 6d. after the death of the said widow, all without defalcation; and that if the said Christian Stauffer, his heirs, executors, administrators or assigns, do and shall defend, keep safe, harmless, and indemnify the said Abraham Shelly, Christian Huber, Jacob Shelly, and Abraham Overholtzer, their heirs and assigns, in and about the aforesaid payments to the aforesaid heirs and widow, then the above obligation to be void, otherwise to be and remain in full force and virtue.

"CHRISTIAN STAUFFER, [SEAL.]

"Sealed and delivered in presence of }

"JACOB DIETZ,

"CHRISTIAN OITT.

} Recorded, &c."

Subsequently on the 25th March 1824, Henry Stauffer and Ann his wife, and said Henry Stauffer, as attorney in fact of Jacob Stauffer and Mary his wife, and David Stauffer and Barbara his wife, by indenture under their respective hands and seals, and duly recorded, &c., conveyed all their right, title and interest in said property to Henry Shelly, in consideration of the sum of \$1056.67, "subject to the payment of the sum of \$33.80 to Ann Yeakle, the widow of David Yeakle (the elder), deceased, or her order on the 1st March in each and every year during her natural

[Shelly v. Shelly.]

life, as her lawful dower arising out of the hereby granted premises, and also subject to the payment of the sum of \$563.33 at the decease of said Ann, to the heirs of the said David Yeakle, deceased, or their legal representatives, as the principal sum or fund of the aforesaid annual dower."

It is admitted that Ann, the widow of David Yeakle, deceased, died on the 13th February 1841, and that Salome, the wife of Abraham Shelly, died previously to the institution of this suit, and before the death of the widow (Ann Yeakle), leaving eight children, seven of whom are minors. All the deeds and records referred to are to be considered as part of this case.

It is agreed that no part of the payment due at the death of the widow has been made, either to Abraham Shelly in right of his wife or as assignee of George Yeakle. It is also agreed that it be considered that the plaintiff has filed a declaration upon his special case.

If the court shall be of opinion that the plaintiff is entitled to recover, either as assignee or on the part of his wife, then judgment for plaintiff, amount to be settled by the prothonotary; but if not, then judgment to be entered for defendant.

The above case to be considered in the nature of a special verdict, and subject to a writ of error.

The court below charged the jury as follows:

The case of *Pidcock v. Bye* determined that an action of *assumpsit* may be maintained against the assignee of land subject to the charge of a widow's thirds, to recover the principal of such charge by those entitled to it after her death, without an express promise to pay it on the part of the assignee, but the judgment to be entered so as to make the land only liable, and not the defendant personally. Abraham Shelly either has a right to claim the amount due on No. 2 and 2 in his own right, or as trustee for those who are entitled to the money. He having died since this case stated, and his administrator having been substituted, Joel Shelly will hold the money when it is recovered, as trustee; but we think the action can be maintained in his name. Henry Shelly took the land subject to the promise to pay to Abraham Shelly; and it is only carrying out the principle decided in *Pidcock v. Bye*. The defendant admits he has not paid, and is willing to pay to the proper person.

It is the general rule of the English courts of law to take notice only of legal rights, leaving the consideration of equitable interests to the courts of equity. But even then, if A by bond bind himself to pay money to B, for the use of C, B is the party to sue because the legal interest is in him, C having only an equitable right in the money. 2 *Inst.* 673; 7 *East* 148; 3 *Lev.* 139; *Brown on Actions at Law* 100; 45 *Law Lib.* 97. And the covenant or obligation need not be expressly either to the plaintiffs to enable them to sue. The charge is on the land in pursuance of

[Shelly v. Shelly.]

legislative enactment, and no form of action could be devised where the objection would not be equally strong. If we had a Court of Chancery, the remedy would be there; as we have none, this court will extend the remedy at law to meet the justice of the case. So far then as the lien is on No. 2 and 2 in right of Salome the wife of Abraham Shelly, the plaintiff is entitled to judgment *de terris*. The amount to be ascertained by the attorneys.

Error assigned :

The court erred in decreeing judgment *de terris* in favour of the plaintiff.

Michener, for the plaintiff in error, referred to 8 *Serg. & Rawle* 167 ; 2 *Whart.* 425 ; 6 *Watts* 183.

Fox, contra, relied on *Pidcock v. Bye*, (3 *Rawle* 183).

The opinion of the Court was delivered by

HUSTON, J. — In the case of the estate of Gen. William Alexander, the clerk of the Orphans' Court made out some two hundred and fifty recognizances, for the several sums due to each of a great number of heirs presently, as well as for the sums which would be due thereafter. On an appeal, the court did not allow his bill of fees. The usual form of a recognizance to pay to the heirs the sums which should be due to each was said to be of long standing, and fully sufficient for the security of all and every one. In such case each could sue, though not named. Our Act of Assembly would seem to settle this dispute. See 41st section of the act of 29th March, 1832: — "Should the widow of the decedent be living at the time of the partition, she shall not be entitled to the sum at which her purpart or share of the estate shall be valued, but the same, together with interest thereon, shall be and remain charged upon the premises, if the whole be taken by one child or other descendant of the deceased, or upon the respective shares, if divided as hereinbefore mentioned; and the legal interest thereof shall be annually and regularly paid by the persons to whom such real estate shall be adjudged, *their heirs or assigns holding the same*, according to their respective portions, to the said widow during her natural life, in lieu and full satisfaction of her dower at common law, and the same may be recovered by the widow, by distress or otherwise, as rents in this commonwealth are recoverable. On the death of the widow the said principal sum shall be paid by the children or other descendants, to whom the same shall have been adjudged, *their heirs or assigns holding the same*, to the persons thereto legally entitled."

This last provision of the act puts entirely aside one of the objections to the plaintiff's recovery. The Legislature first secured to the widow, by cumulative remedies, while she lived; and aware that the person to whom the land had been awarded may

[Shelly v. Shelly.]

die or remove to a distance before the death of the widow, they provided expressly that the principal sum charged should be paid to those entitled *by the person holding the land*, whether he was heir or vendee of the person to whom the land had been allotted in the case by the Orphans' Court: and this evidently intended to save the heirs respectively their interest directly out of the land, without following him to whom it had been awarded, and who might be insolvent if found. If the person to whom it was awarded had been sued, no doubt the suit must have been on his recognizance. The law made the shares of the heirs a lien until their money became due, and then made the person owning the land liable to a suit and judgment *de terris*. We have decided that a recovery may be had by *assumpsit* stating the facts. On the facts the law would imply a promise to pay; but the act removes all doubt, and makes him who holds the land as terre-tenant liable.

Another objection was made, which, if the facts of this case had been like those in the cases cited, might have availed, viz., that when Abraham Shelly took the land at the valuation, his right to his wife's share of the valuation being due to him, was merged in the fee vested in him, as he could not be both debtor and creditor. I am not sure this was true as to the share of his wife, though it would generally be true if the share had descended to himself. I say generally true; but when Abraham Shelly sold, he and his vendee might agree otherwise: and they did agree otherwise. The articles of agreement are express, that Stauffer shall pay the sums due to the heirs of D. Yeakle, including the said Abraham Shelly's hereditary portion; but, to remove all doubt, he gave to Abraham Shelly, one of the heirs of D. Yeakle, a bond for £132 11s. one year after the land had been allotted to Shelly, and also £66 5s. 6d. on the death of the widow. Now, unless the contract is forbidden by a positive enactment, or by the general law, as being contrary to morality or general welfare, every contract is binding; and this was binding. When Stauffer sold to Henry Shelly, the first sum of £132 11s. had been paid, and the land was conveyed to H. Shelly, "subject to the payment of \$33.80 to Ann Yeakle, widow of David Yeakle (the elder), deceased, or her order, on the first of March in every year during her life, as her lawful dower arising out of the hereby granted premises," and also "subject to the payment of \$563.33, at the decease of the said Ann, to the heirs of the said David Yeakle, or their legal representatives, as the principal sum or fund of the aforesaid annual dower."

This suit is brought for the proportion of that sum which, by the case stated, belonged to Abraham Shelly or his wife. The wife is dead and the widow is dead. After the case was stated and argued, Abraham Shelly died, and his administrator, Joel Shelly, was substituted. The decision is right, both that the sum is recoverable in this suit, and that Joel could be substituted

[*Shelly v. Shelly.*]

Whether he will hold in trust for himself and his brothers and sisters as heirs of his mother, or as heirs of his father, was mentioned, but not discussed, and, if there is any doubt, may be settled hereafter; but, if his father did not die insolvent, may be perfectly immaterial.

Judgment affirmed.

Aechternacht against Watmough.

The fee-bill is a penal statute. The dictum in 3 *P. R.* 523, that it is a remedial statute, corrected.

Amendments of the fee-bill suggested to prevent extortion.

To recover the penalty in the fee-bill, the narr. should state the particular service for which the officer took an illegal fee.

On a narr. charging generally that the defendant, for services done in his office of sheriff, on a writ of *feri facias*, took other and greater fees than were allowed by Act of Assembly, the judgment was arrested.

ERROR to the Common Pleas of *Philadelphia* County.

This was an action of debt to recover a penalty, brought by Frederick A. Aechternacht against John G. Watmough, sheriff. The declaration averred that, on the 31st day of August, 1838, within six months next preceding the commencement of this suit, the said defendant then being high sheriff aforesaid, as such did demand and take from the said plaintiff a certain sum, to wit, the sum of five dollars, as fees for services done by the said defendant in his said office of sheriff, under and by virtue of a certain writ of *feri facias*, which was issued out of the District Court for the city and county of Philadelphia, on the 16th day of August, 1838, and was numbered 116 of the Term of September, 1838, and which was issued, upon the suit of the Philadelphia Loan Company, against the said Frederick A. Aechternacht; which said sum, so demanded and taken by the said defendant, was other and greater fees than are, and at that time were, expressed and limited by the Act of the General Assembly of this commonwealth in such case provided for the services so done by the defendant in his said office; by which said demanding and taking the plaintiff was injured, and thereby an action has arisen by law to the said plaintiff, to recover fifty dollars from the said defendant; yet the defendant, though requested, hath not paid the same, but unjustly detains it.

And also for that on the said 31st day of August 1838, the said defendant then being sheriff as aforesaid, did as such demand and take from the said plaintiff a certain sum, to wit, the sum of \$6.87 as fees for services done and rendered by the said defendant in his

[Aechternacht v. Watmough.]

said office of sheriff in and about a certain other suit, instituted in the District Court of the city and county of Philadelphia, and numbered 706, of the Term of September 1837, in which the Philadelphia Loan Company was plaintiff, and the said Frederick A. Aechternacht defendant, which said sum so demanded and taken was other and greater fees than were at that time expressed and limited by the Act of General Assembly of this Commonwealth for the services so done and rendered by the said John G. Watmough in his said office; by which said wrongful demanding and taking the said Frederick A. Aechternacht was injured, and thereby an action has arisen by law to the said Frederick A. Aechternacht to recover another sum or penalty of \$50 from the said John G. Watmough, who, though requested, hath not paid, but unjustly detains the same: and therefore the plaintiff sues.

The defendant pleaded *nil debet*, and a verdict was rendered in favour of the plaintiff.

The defendant made a motion in the court below in arrest of judgment for the following reasons:

1. Because the narr. shows no cause of action.
2. Because the narr. does not specify the illegal fees for which the penalty was claimed.
3. Because the narr. does not set out the services for which the alleged illegal fees were taken or demanded.
4. Because the narr. does not set out the particulars of either the fees or services aforesaid.
5. Because said narr. was not at issue.

The judgment was arrested and motion by the plaintiff for a *venire facias de novo* refused.

Errors assigned:

1. The court below erred in arresting the judgment, inasmuch as the declaration was sufficient, after trial, to sustain the verdict.
2. In refusing to grant a *venire facias de novo*.

Earle, for the plaintiff in error

Williams, contra.

The opinion of the Court was delivered by

ROGERS, J.—If, as has been contended, the sheriff incurs a penalty by taking from a suitor a sum which in the aggregate is greater in amount than he is entitled to exact for the services performed, the court was wrong in arresting the judgment; otherwise the judgment must be affirmed. The pleader seems to have been under the impression that all that is necessary for the plaintiff to prove was, that the sum paid exceeded the fees allowed by the fee-bill for all the services performed by the officer in the execution of his duty. It was under this construction the narr. was framed. The declaration is very general, charging the offence to be in taking from the plaintiff, as fees for services done by the defend-

[Aechternacht v. Watmough.]

ant in his office of sheriff on a writ of *feri facias*, other and greater fees than are allowed by the Act of Assembly. The plaintiff wholly omits to specify in his count the particular service for which the illegal fee was exacted. But that this form of declaration is erroneous, there can be no doubt; for the rule is, where a statute gives a remedy, the party seeking the remedy should under his plaint or information allege all the facts necessary to bring him within the statute. *Drum v. Simpson*, (2 Mass. 444). And where a penal statute gives no form of declaring, the plaintiff must set out specially the facts which constitute the offence. *Bigelow v. Johnson*, (13 Johns. 428).

The declaration sets out an offence, we think, not warranted by the Act. The sheriff is bound, in the execution of the duties of his office, to perform various services, for each of which he is entitled to a distinct fee; and the Act prescribes that no officer shall take greater or other fees than is expressed and limited for *any service* (in the singular number) to be done by him in his office. In order, therefore, to convict for the penalty, it is necessary to aver in the narr. the particular service out of the many enumerated in the Act, for which he took a greater fee than is allowed by the fee-bill. And this construction is required for the security of the officer; for otherwise he may incur a penalty for error in the addition of his bill of costs; for it must be remembered that taking an illegal fee constitutes the offence, without regard to the *quo animo*, or the inquiry whether it was exacted from error or design. Nor have the suitors much cause of complaint, as they may, if they choose, protect themselves from imposition by refusing to pay fees, where the officer, when required, refuses to make out a bill of particulars as prescribed by the Act, signed by him, and also a receipt or discharge for the fees paid. When this precaution is taken, an illegal fee cannot be exacted without furnishing the party at the same time, with the evidence competent to convict the offender of the penalty prescribed in the Act. It is, therefore, in the power of every suitor to protect himself from the payment of illegal fees, or if exacted to point to the item for which the illegal fee is taken. And this section of the Act also furnishes an argument of no inconsiderable force against the construction put upon it by the plaintiff's counsel. Whether the law, as it now stands, will prevent those extortions of which such frequent and just complaints are made, is not for us to say. The remedy, if any is required, is with the Legislature. I may, however, be permitted to remark, that as long as the officer is allowed a fee for each of the numerous services he is bound to perform, so long will abuses continue to exist. And the only efficient remedy which occurs to my mind is to simplify the fee-bill in such a manner that it may be easily understood by suitors, making the items to consist of as few particulars as possible, and allowing a gross sum for all services included in some general classification.

[Aechternacht v. Walmough.]

As long as it consists of such a variety of items, we must expect to hear of different rates of charge in different counties, and of palpable extortions, which it is next to impossible for those who are necessarily ignorant of the fees to prevent. It is impracticable for men to protect rights which they do not understand, and which it is difficult for them to comprehend. And perhaps also it might prove some restraint upon officers to compel them, under a penalty, to give a bill of particulars in all cases, whether required or not. It is said in *Jackson v. Purdue*, (3 P. R. 523), speaking in reference to the penalty under the fee-bill, that the Act of Assembly, although it inflicts a penalty, is a remedial Act, and as such should receive such a construction as to carry into effect the intention of the Legislature, provided it may be done without violence to the words of the Act. It is a mistake, which I have no hesitation to acknowledge, to call it a remedial Act; for it is in truth a penal statute, and as such must be strictly construed. But although unfortunately expressed, all that was intended in that case was, that where it comes within the words of the Act, the intention of the Legislature, as in other cases, is the governing rule of construction. As this is a case of a defect of title, and not a title defectively stated, the error in the narr. is not cured by verdict.

Judgment affirmed.

Murphy's Appeal.

A creditor of an intestate does not release the real estate of the decedent from liability by suing and obtaining judgment against the administrator alone, without joining the widow and heirs under the 34th section of the Act of 24th February 1834, where the sale of the real estate for the payment of debts takes place by order of the Orphans' Court on the application of the administrator.

The 34th section of that Act means that the judgment obtained shall not be paid by force of an execution issued thereon.

After judgment obtained against the executor or administrator, the plaintiff may issue a *scire facias* thereon against such executor or administrator, and the heirs or devisees to recover the same out of the real estate, and such heirs or devisees may make the same defence which they could have made if originally joined in the suit.

But where such judgment is obtained against the administrator alone, and a sale is about being ordered by the Orphans' Court, that court ought to allow the heirs to show, if they can, that the creditors' claim is unfounded as fully as they could in an action in which they were joined as parties.

THIS was an appeal by Margaret Murphy and others, heirs of Patrick Murphy, deceased, from a decree of the Orphans' Court of the county of *Philadelphia*, ordering the sale of the real estate

[Murphy's Appeal.]

of the said deceased for the payment of debts alleged to be owing by him at the time of his death. The case was argued by

Hirst, for the appellant; and by
Drayton and *T. I. Wharton*, contra.

The facts are fully stated in the opinion of the court.

The opinion of the Court was delivered by

KENNEDY, J. — Theresa Murphy, the administratrix of the deceased, being satisfied that the personal estate of the decedent was insufficient to pay all his just debts and the expenses of administration, applied first, on the 12th January 1842, as directed by the 20th section of the Act of 24th February 1834, to the Orphans' Court of the county of Philadelphia for an order to sell the real estate of the decedent, consisting of four lots of ground, numbered 1, 2, 3 and 4, as described in her petition or application, to raise money to supply the deficiency in the personal estate to pay the debts. An order of the court was accordingly granted, under which the administratrix sold the lots Nos. 1 and 2; but the purchaser of No. 1 failing to pay the purchase money, the sale of it was not carried into effect. On the 2d December 1842, George Alexander, in a suit brought by him against the administratrix as such for a debt due to him by the decedent at the time of his death, obtained a verdict and judgment for \$802.50, besides the costs of suit. And on the 10th of the same month the administratrix renewed her application by petition for an order of the court authorizing her to sell the three remaining lots to meet the claims therein set forth against the estate, amounting to upwards of \$1200, when she had \$620.99 of the estate in her hands. In the debts of \$1200 and upwards were included the debt for which George Alexander obtained judgment, and a debt of \$300 due to James Enue, for which he had brought a suit and afterwards obtained a judgment; also a third owing to John M'Guire of about \$100. There being no personal estate in the hands of the administratrix to satisfy the judgment obtained by Alexander, who issued an execution thereon to December Term 1842, of the District Court of the city and county of Philadelphia, in which it had been obtained, nor a sufficient sum remaining of the money raised from the sale of lot No. 2, the District Court, upon the application of the attorney of Alexander, made an order on the 27th December 1842, directing the administratrix to apply to the Orphans' Court of the city and county of Philadelphia for an order to sell the real estate of the decedent or as much of it as should be necessary to satisfy and pay the said judgment. The administratrix accordingly, on the same 27th December, presented a third petition to the same Orphans' Court, praying an order for the sale of the decedent's real estate. The court, however, before making

[Murphy's Appeal.]

an order of sale, appointed an auditor to inquire into the necessity and expediency of making a sale, having regard to the moneys in the hands of the administratrix. The auditor, after examining the matter, as he conceived, that was submitted to him under the authority of his appointment, reported in favour of the necessity as also the expediency of either selling or mortgaging the real estate of the decedent or so much thereof as the court should think necessary for the payment of the debts remaining unpaid, which he stated to be \$1346.50.

Margaret Murphy, one of the appellants, excepted to the report of the auditor, because he refused to permit her to examine into the justice and correctness of the debts alleged to be due to Alexander, Enue and others, who had commenced suits against the administratrix alone, without including the heirs of the decedent, and obtained judgments therefor against her. Also because the auditor erred in reporting in favour of mortgaging or selling the real estate late of the decedent, and then of his heirs for alleged debts which they had no legal opportunity afforded them of contesting. The court, however, approved and confirmed the report of the auditor, and on the 1st April 1843 made an order authorizing the administratrix to sell so much of the real estate as should be sufficient, with the balance of personal estate (meaning the money, I presume, remaining from the sale of lot No. 2) in her hands, to pay and satisfy the debts due by the intestate as stated in her petition, and that the costs and expenses of the audit be paid by the administratrix out of the assets in her hands. From this order and proceeding of the Orphans' Court the appellants appealed, and assigned the following errors:

1. That the court erred in making the order and decree of sale of the 1st April 1843.

2. In confirming the auditor's report, and in excluding the evidence offered to show that the alleged debts were not due.

The errors assigned present two questions: 1. Did Alexander, Enue and M'Guire, by suing the administratrix alone without joining or making the heirs of the decedent parties to the suits so brought, thereby release the real estate of the decedent from the liens of their respective debts or claims, if they had any? 2. If they did not thereby release the real estate from the payment of their just claims against the decedent at the time of his death, did the auditor and the Orphans' Court err in refusing to let the heirs contest and disprove the existence of those claims after judgments had been obtained for them against the administratrix?

In regard to the first question, it has been argued that the plaintiffs in the judgments obtained against the administratrix, if they intended to charge the real estate of the decedent with the payment of their respective debts, ought to have made the heirs parties thereto in the first instance, according to the express directions of the 34th section of the Act of 24th February, 1834.

[Murphy's Appeal.]

By this section it is enacted that "in all actions against the executors or administrators of a decedent who shall have left real estate, where the plaintiff intends to charge such real estate with the payment of his debt, the widow and heirs or devisees, and the guardians of such as are minors, shall be made parties thereto; and in case such widow and heirs or devisees, and their guardians, reside out of the county, it shall be competent for the court to direct notice of the writ issued therein to be served, by publication or otherwise, as such court may determine by rule of court; and if notice of such writ shall not be served on such widow and heirs or devisees, and their guardians, the judgment obtained in such action shall not be levied or paid out of the real estate of such widow, heirs or devisees as shall not have been served with notice of such writ." And because the heirs were not made parties by serving the original writs issued against the administratrix upon them, the judgments obtained shall not be levied or *paid* out of the real estate of the heirs, meaning out of the real estate which descended to them from the decedent or debtor. It is evident that the meaning of the Legislature is not expressed with much precision in this section of the act; for it cannot be supposed for a moment that they could have intended, if the heirs were made parties to the suit in the manner prescribed thereby, that their real estate generally, including such as had never been derived from the debtor or decedent, should be made liable to pay the judgment in any event; yet such would seem to be the natural inference of the closing clause of the section, which declares that if the writ shall not be served in the manner thereby prescribed on the heirs, the judgment obtained shall not be levied or paid out of the *real estate of such heirs* as shall not have been served with notice of such writ; thus embracing all their real estate, from whatever source derived, and leaving the inference to be drawn that, if the writ shall have been so served on them, then the judgment may be levied or paid out of it. But the section must receive a reasonable construction, and be interpreted according to the subject matter of it, instead of adhering to the letter. The subject matter mentioned in the commencement of the section is the real estate which shall have been left by the decedent, and that is the estate which must be considered as referred to throughout the section. And it must also be construed with reference to other sections thereof, containing provisions in relation to the same matter. From which it will appear that the real estate of a deceased debtor, in the hands of his heirs, may be taken and sold for the purpose of paying his debts, without any suit being brought either against the administrator or the heirs, or to which the latter are required to be made parties. As, by the 20th section, it is enacted that "whenever it shall satisfactorily *appear* to the *executor* or *administrator* that the personal *estate* of the decedent is insufficient to pay all just debts, and the

[Murphy's Appeal.]

expenses of the administration, he shall proceed, without delay, in the manner provided by law, to sell, under the direction of the Orphans' Court having jurisdiction of his accounts, so much of the real estate as shall be necessary to supply the deficiency: and such real estate, so sold, shall not be liable, in the hands of the purchaser, for the debts of the decedent." The words "in the manner provided by law," in this section, have reference to the 31st, 32d, 33d and 34th sections of the act of 29th March, 1832, which authorize the Orphans' Court, on the application of the *executor* or *administrator*, setting forth that the personal estate of the decedent is insufficient for the payment of the debts, to grant an order authorizing such executor or administrator to sell the real estate of the decedent, or so much thereof as shall be necessary to supply the deficiency. And an order to this effect may be granted, it would seem, without giving any particular or special notice to the heirs or devisees of the intestate or testator, and certainly without any suit being brought for the recovery of the debts on account whereof the real estate shall be directed by the Orphans' Court to be sold by the executor or administrator. All that is required is that the executor shall have exhibited to the court a true and perfect inventory and conscionable appraisement of all the personal estate of the decedent, together with a correct and full statement of all the real estate of the same which has come to his knowledge; as, also, a just and true account, upon oath or affirmation, of all the debts of the decedent which have come to his knowledge. And the court may, if it has any difficulty or doubt as to the expediency of granting the application, appoint suitable persons to investigate the facts of the case, and to report upon the expediency of granting the application, and the amount to be raised by such sale: and, upon such report being made, the court may decree accordingly. So, by the 55th section of the same act, the Orphans' Court may send an issue to the Court of Common Pleas of the same county for the trial of facts by a jury, whenever they shall deem it expedient to do so.

Seeing then that the real estate of a deceased debtor may be sold by his executors or administrators for the payment of his debts, under the authority of the Orphans' Court, without making the heirs or devisees of such decedent parties to the proceeding for that purpose, by serving process of any kind upon them, or giving them any special notice thereof, it is only making the expediency and reason so much the stronger, if a judgment has been obtained against them; and it would be giving a very harsh and severe construction to the 34th section of the Act of 24th February, 1834, recited above, to say the least of it, to hold, if the creditor sued the executors or administrators for the recovery of his debt, when unjustly withheld from him, without having the writ whereby the suit is commenced served upon the heirs or devisees as well as upon the executors or administrators, in the manner prescribed

[Murphy's Appeal.]

by the section, that he thereby relinquishes the lien which he has on the real estate of the decedent for the payment of his debt. For in many instances it may be the only security which the creditor has for the payment of his debt; and to give the section the construction contended for, would be making it work a forfeiture in effect to the creditor of his debt, which could not have been intended by the legislature, in opposition to what would seem to be the plain meaning of the 24th section, which limits the lien of the debts of the decedent to five years on his real estate from the time of his death, "unless an action for the recovery thereof be commenced and duly prosecuted against his heirs, executors *or* administrators." Showing thus plainly that the lien shall be continued by the commencement and due prosecution of a suit, either against the heirs *or* the executors *or* the administrators, as the case may be, within the period of five years after the decease of the debtor. For had the legislature intended that the heirs or devisees should be joined in or made parties to the suit with the executors or administrators, they would have said so by connecting the heirs or devisees with the executors or administrators in the section by the conjunction "and;" as, for instance, "unless an action for the recovery thereof be commenced and duly prosecuted against his heirs or devisees *and* the executors or administrators," &c. But *devisees* are not even named in the section, which shows to demonstration that the commencement and due prosecution of a suit against the executors or administrators alone would be sufficient to continue the lien of the debt as to them, or against their right and interest in the real estate of the decedent. But it is equally clear from the language of the section taken in connection with other sections of the Act, that it never entered into the mind of the Legislature to conceive or make the omission to serve the original process or writ on the heirs or devisees, if served on the executors or administrators, amount to a release or relinquishment of the plaintiff's lien on the real estate of the decedent for the payment of his debt. It is expressly secured to him for a period of five years at least after the decease of the debtor, and ought not to be taken away by implication, unless clear and necessary, or by a doubtful construction. To take it away would be equivalent to a forfeiture, which is not favoured in law; and hence the section ought not to receive a construction that would produce that effect, if it be susceptible of a different one which will do injury to no one. It is clear that the only reason for making the heirs or devisees of the decedent parties to the suit with the executors or administrators, was that they might have an opportunity of defending against the claim of the plaintiff as well as the executors or administrators, so that the estate which they derived from the decedent should not be taken in execution for a debt, unless it were such as they could not defend against after a full opportunity afforded them of doing so. And when the 34th section says the

[Murphy's Appeal.]

judgment obtained by the plaintiff "shall not be *levied* or *paid* out of the real estate," unless such opportunity of defending against the claim for which the judgment shall have been obtained be afforded, it must be taken to mean that the judgment so obtained shall not be *paid by force of an execution* issued thereon. That such is the true and fair meaning of the section is made still more manifest by the 33d section, immediately preceding, which declares that "no execution for the levy or sale of any real or personal estate of any decedent shall be issued upon any judgment obtained against him in his lifetime, unless his *personal representatives* have been first warned by a writ of *scire facias* to show cause against the issuing thereof." And having thus provided by this 33d section against the payment of a judgment obtained against the decedent in his lifetime, out of either his personal or real estate, by means of an *execution* issued thereon, without first warning the *personal* representatives, that is, the executors or administrators, by a writ of *scire facias* to show cause, if any they have, against issuing of the same, the 34th section proceeds to provide for the collecting and enforcing the payment of debts out of the real estate of the decedent by means of a judgment and *execution*, where no judgment has been obtained against the decedent therefor in his lifetime. But if a creditor who has no judgment against the debtor at or before his decease, shall proceed by suit, as the appellants have done in this case, and recover a judgment against the executors or administrators of his debtor, without making the heirs or devisees of the deceased debtor parties thereto in the first instance, there is nothing in the spirit or meaning of the 34th section or of any other part of the Act, which would seem to restrain him from suing out a writ of *scire facias* upon his judgment obtained against the executors or administrators of the decedent, warning them and the heirs or devisees to appear and show cause, if any they have, why the judgment shall not be levied or paid out of the real estate of the decedent, permitting the heirs or devisees at the same time to go behind the judgment and make any defence which it would have been competent for them to have set up in the original suit, if they had been made parties to it. Permitting them to do this would seem to be giving them all that the Legislature could have intended by the 34th section of the Act, as it leaves them without even the shadow of ground of complaint. And besides, it is giving them a much more certain opportunity of showing, if they can, that the claim of the plaintiff is unjust or does not exist, than if the executor or administrator were to proceed in the Orphans' Court, and under an authority from it have the real estate sold for want of personal assets, and out of the money arising therefrom pay the plaintiff's claim, without suffering any suit or action to be brought for the recovery of it. That this latter course may be pursued by an executor or administrator is clear, as has been shown, from the Acts of Assembly already referred to, and cer

[Murphy's Appeal.]

tainly cannot be questioned. Indeed it was adopted and pursued by the administratrix in this very case, in regard to the debts first exhibited to her against the estate of her intestate; and under the authority of the Orphans' Court, for the purpose of paying those debts, sold that part of the decedent's real estate No. 2, which is held by the purchaser without any objection being made, that we hear of, to his right to do so.

We have, therefore, upon a full and mature consideration of the Acts of Assembly on this subject, come to the conclusion that the appellants ought to have been permitted, before the auditor, as also before the Orphans' Court afterwards, upon his report being made to the Court, to have shown if they could that the claims for the payment of which a sale of the real estate was desired, were unjust or not well founded; in short, to have made any defence against the payment of them out of the estate of the decedent that they might have made in the actions brought against the administratrix for the recovery of them, had they been made parties thereto in the manner pointed out by the 34th section of the Act of 24th February 1834.

The report of the auditor and the approval thereof by the court, as also the order of the court made on the 1st April 1843, authorizing the administratrix to sell as much of the real estate of the decedent as should be necessary for the payment of the debts referred to in her petition, is reversed, and the record remanded to the Orphans' Court, that it may proceed therein and permit the appellants to show, if they can, that the claims or debts, for the payment of which a sale of the real estate of the decedent is asked, are not just or ought not to be paid out of the estate; and for the purpose of determining this point, to send an issue, if requested by either of the parties, to the Court of Common Pleas of Philadelphia county.

Markley *against* Swartzlander.

An erased deed is not such a deed as a vendor ought to furnish to a vendee in compliance with his engagement to make a title.

In an action of ejectment brought to enforce the payment of the purchase money, where the plaintiff retains the legal title, it is not requisite that the plaintiff should have tendered a deed before suit brought, where he claims a conditional verdict; it is sufficient if done on the trial.

If the deed filed be erased, a court of error will allow the plaintiff to execute a new one in its stead.

A party may cross-examine as to the *res gestæ* given in evidence, though it be new matter.

The subscribing witnesses to an instrument are required to enable the opposite party to inquire into the circumstances attending the sealing and delivery.

[Markley v. Swartzlander.]

ERROR to the Common Pleas of *Bucks* county.

This was an ejectment by David Swartzlander against Jacob Markley, to compel the payment of the residue of the purchase money due on a tract of land of 97 acres, sold by the plaintiff to the defendant. The plaintiff, David Swartzlander, had purchased this tract from Joseph Swartzlander in 1820, and the deed (which was recorded in April 1821) contained a reservation to Joseph of "a free and uninterrupted right and privilege at all times of passing and repassing with wagons, carts, or in any other way that may be necessary, along the race and dam on the hereby conveyed premises, with the free liberty of clearing out, enlarging and repairing the said mill-race and dam, as he or they from time to time may find necessary for the use and benefit of the grist-mill on the premises now held by the said Joseph Swartzlander, and conveying the water along the said race for the use of the same or any other water-works that may hereafter be erected on the said premises; provided the same be done without any unnecessary injury to the said David Swartzlander, his heirs and assigns." By an agreement dated 13th September 1841, the plaintiff agreed to sell the farm to the defendant, and to give him a good and sufficient title on the 1st April following, and deliver possession on the same day; and the defendant agreed to pay \$6000 therefor in gold or silver coin on taking possession and receiving a title. The defendant paid a considerable portion of the purchase money before the 1st April 1842, and possession was delivered to him by the plaintiff; but at a meeting between the parties to complete the business on the 1st April 1842, the defendant objected to paying any more money unless the plaintiff would give him a warranty in his deed against the claim of Joseph Swartzlander.

The plaintiff gave evidence of what passed at the making of the agreement, and to show that the defendant had previously examined the premises, and was fully aware of the claim of Joseph Swartzlander under the reservation in his deed of 1820. It was further in evidence that when the parties met on the 1st April 1842, the defendant brought with him a deed to the defendant for the premises, which had been prepared by his counsel to be executed by the plaintiff and his wife. This deed contained the usual clause of special warranty against the grantors and their heirs and all persons claiming under them; and also a warranty against the claim of Joseph Swartzlander. To this the plaintiff's counsel objected and erased this latter warranty from the deed, but the defendant would not accept it. There was also some exception made by the plaintiff to the kind of money tendered by the defendant at that time.

A bill of exception to evidence was taken by the defendant on the trial. The defendant offered in evidence the article of agreement of the 30th September 1841, between the plaintiff and defendant, and called a subscribing witness, Joseph Swartzlander,

[Markley v. Swartzlander.]

who testified to his handwriting as a witness to the execution of it. The plaintiff then asked the witness what was said by the parties at the time of the execution of the instrument. The defendant objected, but the court admitted the testimony and sealed a bill of exceptions.

The court charged the jury as follows :

If you find the defendant had notice and knew the right of Joseph Swartzlander to this race, and he prevented the plaintiff from giving the deed containing that right, but declared himself satisfied, he has no defence on that ground : and if there is no other ground of defence, the plaintiff will be entitled to your verdict, to be released on the payment of the balance of the purchase money in reasonable time to be fixed by you. If you find, on the other hand, that Markley had not reasonable notice of the extent of the water-right, and did not dispense with the production of the deed showing the extent of the water-right, then the court instruct, that the contract has been so far executed by the delivery of possession and payment of more than one-half of the purchase money, that it ought not to be rescinded, but the defendant ought to have a deduction.

The defendant has requested us to instruct you :

1. That under the facts proved in this case, the plaintiff was bound to show that he had tendered a deed to the defendant conveying a good and sufficient title before the institution of the suit, or that the defendant had waived the necessity of such tender.

2. That the deed given in evidence by the plaintiff was not such a deed as the defendant was bound to accept.

5. That under the evidence in this case, this action cannot be maintained.

We shall consider these points together. They involve the occurrences at Tucker's on the 1st April, and the deed there acknowledged and presented there and now brought into court. You have heard this evidence ; how the deed was produced by the defendant's attorney ; how it contained a warranty against the rights of Joseph Swartzlander ; how the plaintiff's counsel took the deed and scratched out this covenant. Then the deed was acknowledged, brought down and handed to the counsel of the defendant, who refused to accept it. Now when a tender is necessary, it should be done in a regular manner ; but the law is, that is not necessary, if the other party by his conduct dispense with a regular tender, by a previous refusal to accept the deed. Is not the evidence clear, that when the deed was handed to the defendant's counsel, he declared we will not accept this deed. If this was so, a formal tender was not necessary. Was this such a deed as the defendant was bound to accept ? If you find, as we have before stated, that Markley purchased with knowledge of this right of Joseph Swartzlander, as proved by him and Delp, it was such a deed as we think he was bound to accept, under the

[Markley v. Swartzlander.]

article. It would have been better if the erasure had been noted. But was the objection on that ground? Is it not fully proved the erasure was made before the execution of the deed? If so, the deed was good. This in connection with the general charge and the answers to the subsequent points, we think a sufficient answer to these points. We refuse to instruct you as required.

The 3d point is, that before the plaintiff can recover in this suit, he was bound to prove that he had repaid or offered to repay to the defendant the amount of money advanced on account of the purchase; and as no such evidence has been given, the verdict of the jury should be given for the defendant. We cannot instruct you as required on this point.

4. That the water privileges reserved of Joseph Swartzlander constitute such a defect in the title of David Swartzlander as discharges Markley from his performance of the contract, or entitles him to a deduction from the consideration agreed upon, unless the whole extent of these privileges were known to him at the time of the agreement being entered into, and also, unless he agreed to take the property subject to them, and that the burthen of proof lies upon the plaintiff.

We have already instructed you on the subject of this point, and we will add, this contract has been so far executed, it is idle to talk about rescinding it. We have instructed you on what grounds the plaintiff is entitled to recover the whole amount, and the grounds on which the defendant will be entitled to an abatement. We think on the whole evidence the plaintiff is entitled to recover, as we presume in any way the cause may be considered, there is more money due than the defendant would be entitled to have deducted, (but the amount of that deduction, if you think on the evidence and the principles stated by the court, is your province). The deed will be in court for the use of the defendant, and will be ordered to him, when the court think he is legally entitled to receive it. Much has been said about the tender of the money on the 1st April 1842. It is settled a mere offer to pay money is not in legal strictness a tender; and of a legal tender the defendant is not entitled to take advantage unless he pleads it and brings the money into court. To give the defendant an equity as to interest or costs, under the evidence in this case, he ought to have brought his money into court, especially if you find the defendant bought with knowledge of the incumbrance and subject to it.

The defendant excepted to the charge. The jury found a verdict on the 14th February 1844 for the plaintiff to be released on the payment of \$2808.81, on or before the 1st April following.

J. Fox, for the plaintiff in error
Chapman, contra.

[Markley v. Swartzlander.]

The opinion of the Court was delivered by

SERGEANT, J.—It is plain, from the evidence in this case, that the real ground of dispute between the parties was whether the plaintiff was bound to give a warranty against the claim of Joseph Swartzlander, under the reservation in his deed to the plaintiff; and that all the other matters as to the tender of a deed, on the one side, and of the money on the other, would have been disposed of, could this have been concurred in. But the defendant insisted then, and on the trial, that he was to have a clear title for the premises, freed from all incumbrances, as well this as any other. The plaintiff alleged that the defendant was perfectly aware of this reservation in the deed before signing the agreement, and entered into the agreement with a full understanding of the nature and extent of the claim. The parol evidence of what passed at the execution of the agreement, as well as other circumstances, settled this question in the minds of the jury in favour of the plaintiff, and the objections to this evidence have been waived here. The point chiefly dwelt upon by the plaintiff in error is, that the plaintiff was bound to tender a deed before bringing his action and that he had failed to do so; that the deed tendered and filed in court, and annexed to the record, was one in which the plaintiff had made an erasure, which was not noted before the delivery, and was objected to at the meeting, and the defendant had therefore a right to refuse it. If the plaintiff was bound to file a deed before suit brought, there would, perhaps, be weight in this objection; for though an erasure does not necessarily avoid the deed, if it be afterwards regularly delivered, yet it affords ground of suspicion to a subsequent purchaser, renders the title less marketable, and exposes him to the expense and trouble of obtaining proof of the facts, and even to the risk of loss of that proof, and therefore is not such a deed as the plaintiff ought to furnish the defendant. But this is not a case in which the plaintiff is bound to show a tender before suit brought. It is an action of ejectment, brought to enforce the payment of the purchase money, and the plaintiff has the legal title. This was so held in *Devling v. Williamson*, (9 Watts 311), where it is decided that in an action of ejectment founded on a legal title, where the defendant rests his defence on an agreement of purchase, it is not essential to the plaintiff's right to recover a conditional verdict, that he should have tendered to the defendant before suit brought. It is sufficient that the plaintiff tenders or files the deed in court on the trial, where he is entitled to recover a conditional verdict on the defendant's default in complying with his contract. The defendant is considered as coming into a Court of Chancery on his equitable title, and there the condition of the parties at the time of the decree is regarded, rather than at the commencement of the suit; and the verdict is in the nature of a special decree. The deed here was tendered on the trial, and filed in court. The only ob-

[Markley v. Swartzlander.]

jection to it was the erasure, and the plaintiff ought to have objected that by drafting and executing another free from objection. As it is still in the power of the plaintiff to do this without injury to the defendant, we think it our duty to give him the opportunity, rather than put the parties to the expense and trouble of another trial.

The other error relied on is that contained in the bill of exceptions, and we think the court below was right in admitting the cross-examination. If it was in one sense new matter, yet, in another point of view, it was but developing a part of the *res gestæ* at the execution of the instrument, and this the plaintiff had a right to inquire into by cross-examination. One of the grounds on which a party producing an instrument attested by a witness is bound to produce the witness, if it is in his power, is that the opposite party may have an opportunity to examine him as to the circumstances that occurred at the attestation and delivery. And these circumstances may relate to various matters besides the mere mode of execution of the instrument, that go to invalidate or modify the effect of the instrument. Under our decisions, parol evidence of what passed at the time of executing an instrument is admissible in evidence to vary or control it, and is considered as part of the contract. The case of *Perit v. Cohen*, (4 Whart. 81), is quite as strong as the present, if not more so. There it was decided that, in an action on an award under a parol submission, one of the arbitrators, after being called by the plaintiff and proving the submission and award, might be cross-examined by the defendant to show that he and the other arbitrators had previously decided they could make no award, and informed the parties of that decision.

Judgment affirmed, provided the plaintiff, before the 1st April, 1845, files in the court below a good and sufficient deed like that on record, but free from erasure, to be at the disposal of the defendant on complying with the verdict; otherwise to be reversed, and *venire facias de novo* awarded.

Rose *against* Klinger.

The proceedings in a suit before the Board of Property between R. and B., are not evidence in an ejectment by K. against R.

Facts stated by the Board of Property are not even *prima facie* evidence of their truth, in the trial of an ejectment.

K., by connecting his warrant with R.'s improvement, when it otherwise would have been void, got a warrant and survey and patent for 350 acres of land. *Held*, that it was error to instruct the jury that R. could not hold against K. without paying his proportion of the expenses of the warrant, survey and patent, when there was evidence that R., by K.'s agreement at the time, was to get 50 acres, clear of all expenses, and R. held possession and paid the taxes for that portion.

This case, which was a writ of error to the Common Pleas of *Schuylkill* county, was argued here by

Bannan, for the plaintiff in error, and
Hieskill, contra.

The opinion of the Court was delivered by

BURNSIDE, J.—Jeremiah Klinger, the plaintiff below, claimed the 10 acres of land in question by virtue of his warrant for 400 acres, bearing date 29th November 1824, interest from April 1799; a survey on the 26th February 1825 of 400 acres 42 perches, on which the deputy-surveyor returned: "Improvements, small log-house and stable and eight acres of cleared land commenced about three years ago by Doctor John Rose, the son-in-law of Jeremiah Klinger, who requested that his improvements should be included in his father-in-law's survey." There was evidence that John Rose, Jun., moved on the place for which this ejectment was brought, in 1819, that he had commenced his improvement the year before, and continued in possession except a short period, and is still in possession. There is no evidence in the paper-book that Jeremiah Klinger ever had an actual settlement and improvement within the bounds of his survey. He perfected his title on the improvement of Rose. An improvement was necessary to support his warrant and survey, as the warrant was taken out in 1824 and called for interest from April 1799. On the 20th April 1829 Klinger obtained a patent.

Rose gave evidence that he had a wife and children on the land before the survey was made. He had therefore an actual resident settlement. He further proved by Lawrence Shamber that the witness got acquainted with Klinger about nine years ago. Klinger said he had a quarrel with Rose, and said Rose wanted a right

[Rose v. Klinger.]

from him for the land. He said he would not give him one. Witness asked him about it. Klinger said Rose had made an improvement, and after some years there were a couple of others who wanted to slip in and take it from Rose, and he was poor and came to him (Klinger), and he told him he was so, and they would go to Harrisburg and get it all fixed; and "you let me into the improvement, I will give you 50 acres out of it;" and he said if he was to give him a right, it would do him no good; it would be sold from him: *he was to give him 50 acres out of the patent clear of all costs.* Witness did not know how the 50 acres were to be laid off. Another witness proved that Klinger told him he and his son-in-law had pretty near fell out. He said Rose was determined to have the right to the land which he had given him. He said he would not give it to Rose. To another Klinger said Rose was to have that, either him or his family. Rose's wife is dead. There was other evidence, but none to controvert the fact that Rose was to have 50 acres with his improvement. After the defendant closed his evidence, the plaintiff, Klinger, gave in evidence a *caveat* entered by Rose against a John Bechtel on the 4th September 1824, against the issuing of a patent to said Bechtel or any person claiming under him, for a tract of land situate in Upper Mahantango township, Schuylkill county, containing 100 acres, more or less, surveyed in pursuance of a warrant to said John Bechtel, dated the 24th October 1823, alleging he had a better title to said land by virtue of an actual settlement and improvement and a long uninterrupted possession by himself and of those under whom he claimed. The plaintiff further showed that Bechtel and Rose came to trial before the Board of Property on the 3d April 1826. The board decided that "in this case it appeared from the evidence before the board that Jeremiah Klinger claimed a large tract of land as part of the property of his father, John Klinger, deceased, and which descended to the said Jeremiah Klinger by law; that he made some improvements and exercised rights of ownership of the land for twenty years past; that in the year 1819 *he permitted his son-in-law, John Rose, to make an improvement on part of the land.* Rose cleared some land, raised grain, built a house, and resided thereon for about two years, and then removed from the land; that after Rose removed from the land Jeremiah Klinger permitted one Jacob Merwine to reside in the house. After Merwine was in possession of the house, he sold or made a conditional bargain with John Bechtel for the sale of some land, recognising the claim of Rose. After this pretended purchase Bechtel applied for and obtained a warrant for vacant and unimproved land; on which warrant he procured a survey to be made and returned of 140 acres 40 perches, leaving out the house built and the land cleared by Rose. Jeremiah Klinger, on the 29th November 1824, applied for and obtained a warrant

[Rose v. Klinger.]

founded on his improvement and actual settlement made in the year 1799, on which warrant he procured a survey to be made and returned, including the improvement made by Rose and all the land within the bounds of his original claim." The board decided in favour of Klinger's survey, and ordered the survey on Bechtel's warrant to be rejected.

On this evidence the Court of Common Pleas instructed the jury that from the allegations of Rose the land in question was rented by the plaintiff to a man by the name of Merwine, *as stated by the record of the proceedings before the Board of Property*; and this is the first error assigned. In this case the proceedings of the Board of Property were not evidence against Rose. That was a contest between Rose and Bechtel. The law is well settled that facts stated by the Board of Property as proved before them, are not even *primâ facie* evidence of their truth. The law on this subject, correctly stated, will be found in the opinion of GIBSON, J., in *Curothers v. Dunning*, (3 Serg. & Rawle 373). When a survey has been made which is supposed to be injurious to another claimant, he ought to file his *caveat*. *Drinker v. Holliday*, (2 Smith 255). In this case the *caveat* against Bechtel by Rose was proper; that *caveat* was filed before the survey made on Klinger's warrant. There is nothing in that *caveat* inconsistent with the then title of Rose as it appeared on the trial. If the defendant Rose had read that *caveat*, the plaintiff might have read the decision of the Board of Property to show how it was disposed of; but even then the recital of facts proved before the board would not have been evidence to affect Rose, unless those facts were proved in court on the trial.

It is further assigned for error that the court below instructed the jury that if Rose went on the land in question in his own right, intending to take it up as vacant and made his improvement, still he could not withhold the possession from Klinger without tendering to him the expenses of patenting the land; and in refusing to submit the fact to the jury whether Rose was to pay any part of the patenting fees. In this instruction, I think, there was error. The learned Judge forgot that unless there was an improvement the plaintiff's warrant was void. By connecting his warrant with his son-in-law's improvement, Klinger got 350 acres of land; and there is some evidence in the cause which ought to have been submitted to the jury that Rose was to get 50 acres clear of all expenses and costs. The jury would have understood this, as the practice of the interior of the State from 1795 down to a late period, was for men who discovered vacant land to place a settler upon it, and each to have a portion of the land so secured. Rose paid taxes for several years for 50 acres. This, although not evidence of title, was some evidence of the extent of his claim. In the case before the court the direction was wrong that the defendant could

[Rose v. Klinger.]

not hold the land without paying his proportion of the expenses of the warrant, survey, and patent. All that is essential in the case is embraced in this opinion of the court on these two material points.

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

Huston *against* Davidson.

Articles of agreement to let land on a certain ground-rent for ever, with covenant for its payment free of taxes, the grantor to execute a deed or deeds when the ground is improved by buildings. The land not being improved, nor the rent paid, the grantor obtains judgment against the grantee in an action of covenant, and sells the ground on an execution, and becomes the purchaser. *Held*, that the grantee was discharged from his covenant.

ERROR to the District Court of the City and County of *Philadelphia*, to set aside an execution issued on a judgment in that court, in which Nathan Davidson was plaintiff and Robert M. Huston defendant.

The plaintiff, Davidson, brought his action of covenant against the defendant, Huston, and obtained judgment; and after execution had issued, a case was stated for the opinion of the court below, subject to a writ of error, as follows:—

N. Davidson and Dr R. M. Huston, on the 14th March 1835, executed the annexed agreement (prout agreement). Huston, soon after his purchase, sold the lot to E. B. Guarrigues, who paid the ground-rent up to October 1841. No improvements were erected on the lot, nor were any ground-rent deeds to third persons made by Davidson under the provisions of this agreement. Upon the failure of Guarrigues to pay the rent after October 1st, 1841, Davidson called upon Huston for it, and upon his pleading inability, commenced a suit in covenant against him (D. Ct. Sept. 1842—1458), and on the 26th November 1842, judgment was obtained against Huston for want of an affidavit of defence, and damages were subsequently assessed at \$413.09, for the arrears and interest due at the commencement of the action. Under this judgment the lot was sold by the sheriff [subject to the ground-rent], and produced \$70, Davidson being the purchaser to whom the deed was made. Huston afterwards refused to take the lot subject to the ground-rent, and pay the amount it brought at the sale. Upon obtaining the title, it was found that the lot was subject to \$43.16 taxes, for the year 1842, and to a lien for paving done by the district of Spring Garden, amounting to \$515.68, with interest, of which \$28.10 were paid from the proceeds of

VIII. — Q

[Huston v. Davidson.]

sheriff's sale, and the balance, \$487.58, afterwards paid by Davidson. A *fiery facias* has been issued on the judgment against Huston to Sept. Term, 1843, and the question is, whether the plaintiff is entitled to collect the balance of his judgment under this writ.

The following are the articles of agreement above referred to:—

“Articles of agreement made and concluded upon this 14th day of March, 1835, between Nathan Davidson, of the district of Spring Garden, in the county of Philadelphia, of the one part, and Robert M. Huston, M. D., of the city of Philadelphia, of the other part, witnesseth, that the said Nathan Davidson agrees to let on ground-rent for ever, to the said R. M. Huston, a certain lot or piece of ground situate in the district of Spring Garden aforesaid, beginning at the south-east corner of Broad and Coates streets, and extending, &c., for and in consideration of the ground-rent and taxes, and on the terms and conditions hereinafter mentioned, that is to say: The said R. M. Huston agrees to pay to the said Nathan Davidson, his heirs or assigns, the yearly rent or sum of \$405, in equal half yearly payments, on the first days of April and October in each and every year for ever, or until the principal sum, computed at the rate of sixteen years and two-thirds purchase, is paid, without any deduction for taxes on the said premises; the first half-yearly payment to be made on the first day of April, 1836. And it is further agreed between the said parties, that for such part or parts of the said lot as may be let out by the said R. M. Huston, whenever the same shall be improved by brick buildings, or the ground-rents guaranteed to the satisfaction of said N. Davidson (said ground-rents not to be less than the rateable proportion of the ground-rent on the whole lot), he the said Nathan Davidson will give a deed or deeds therefor, at the request, in writing, of the said R. M. Huston, said ground-rent deed or deeds to contain the usual covenant and claims, and a provision for the extinguishment of the ground-rents thereby reserved, at any time within ten years from the date of said deeds respectively. And whenever the said ground-rents on the lots so let out and improved or guaranteed as aforesaid shall amount to the aforesaid yearly rent or sum of \$405, free of all taxes or assessment whatsoever, then and in such case, if any part of the said large lot remains to the said R. M. Huston, a deed in fee-simple to the said R. M. Huston, his heirs and assigns, shall be made for the same by the said Nathan Davidson: and it is further understood and agreed that the deeds for the above lots shall be made and executed to R. M. Huston, or to such person or persons as he may in writing direct, as aforesaid, on or before the 1st day of January 1838. And the said R. M. Huston, for himself, his heirs, executors and administrators, doth hereby covenant and agree to and with the said Nathan Davidson, his heirs and assigns, y these presents, that he will well and truly pay the rent afore-

[*Huston v. Davidson.*]

said, or so much thereof as may not be secured under ground-rent deeds, as aforesaid, unto the said N. Davidson, his heirs and assigns, without any deduction, defalcation or abatement for any taxes, charges or assessment whatsoever. And for the just and true performance and observance of their respective covenants and agreements aforesaid, the said parties hereto do mutually bind themselves, their respective heirs, executors and administrators, each unto the other firmly by these presents. In witness whereof," &c.

The court below decided in favour of the plaintiff, and this was now assigned for error.

Price, for plaintiff in error.

Williams contra.

PER CURIAM. — This case is not to be distinguished in principle from *Chew v. Mather*, in which it was held that a vendor's purchase of the vendee's equity is a virtual dissolution of the contract. Here the purchase back of the equitable estate of the ground tenant made it impossible for the ground landlord to execute the contract, and consequently deprived him of his right to enforce the covenant which was the consideration of it. The court, therefore, ought to have restrained him from proceeding on his judgment.

Execution set aside.

Bosler against Kuhn.

A ground-rent coming due after the discharge of the debtor as a bankrupt is not extinguished by his certificate.

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

This was an action of covenant brought by Kuhn and another against John Bosler and three others for arrears of ground-rent due October 1st, 1843, on a ground-rent deed from the plaintiffs to the defendants, executed 25th March 1836, conveying a large lot of land in the county of Philadelphia in fee, subject to a ground-rent with the usual conditions and covenants.

Bosler, one of the defendants, filed the following affidavit of defence.

John Bosler, one of the defendants, being affirmed, saith that his defence to the whole of plaintiff's claim is this; that on the 1st day of April 1842 he filed his petition in the District Court of the

[Bosler v. Kuhn.]

United States for this district, praying for the benefit of the bankrupt laws; that on the 29th day of April 1842 he was by the court decreed a bankrupt, and that on proper proceedings he subsequently, to wit, on the 30th day of August 1842, was by said court decreed a final discharge and certificate according to the Act of Congress in such case made and provided; which certificate he has ready and offers to exhibit. And he further saith that the ground-rent deed on which this suit was brought was executed by him before he filed his petition above-mentioned.

The court below gave judgment for the plaintiffs for want of a sufficient affidavit of defence.

Errors assigned:

1. The court below erred in giving judgment by default against defendant, Bosler, who had filed a sufficient affidavit of defence.

2. Because said court thereby decided that said Bosler's discharge and certificate in bankruptcy did not prevent them from entering judgment against him personally.

3. Because said court thereby decided that notwithstanding said discharge and certificate, said Bosler was personally liable on said ground-rent deed made and executed before he commenced any proceedings in bankruptcy.

Meredith, for the plaintiff in error.

Phillips, contra.

The opinion of the Court was delivered by

GIBSON, C. J.—The fifth section of the late American Bankrupt Law, which designated the classes of provable debts, contained no provision for a ground-rent covenant in terms. It was said that creditors whose debts were payable at a future day, annuitants, holders of bottomry and respondentia bonds, and of policies of insurance, sureties, endorsers, bail, or persons having contingent demands against the bankrupts, might prove such debts and have them allowed when they became absolute; and that annuitants and holders of debts payable *in futuri*, might have the present value ascertained and allowed as debts *in presenti*: whence an argument that a ground-rent covenant was provable as an annuity, or at least as a future debt; to the one or the other of which it certainly bears more resemblance than to any other class in the catalogue. Previous to the 49 Geo. 3, c. 121, since merged in the 6 Geo. 4, c. 16, from which this specific provision of the American statute was taken, even an annuity was not provable when not secured by a forfeited annuity bond, which enabled the courts to let the annuitant in to prove as a creditor for the penalty taken by a legal subtlety to be the debt at law. An annuitant, however, is now let in by force of the special provision there, as he was here; and unless a ground-rent covenant were treated as an annuity, the landlord could not have proved and the tenant cannot

[Bosler v. Kuhn.]

now be discharged from it by his certificate. Its apparent resemblance to an annuity arises from its apparent resemblance to a rent charge, which bears itself no actual resemblance to an annuity. It is true, that a rent charge, which subjects the person to payment as well as the land, as the grant usually does, is commonly called an annuity; and it may be actually so at the election of the grantee. But a rent charge pure, subjecting only the land, as it necessarily does, has no spice of annuity in its composition. Even an impure annuity, subjecting both the person and the lands, cannot long remain so; for the grantee determines his election by distraining and avowing in a court of record, and thus making the duty thenceforth a pure rent charge on the one hand; or by counting for it in a writ of annuity, and thus making it a pure annuity, on the other. By the one or the other of these he turns the charge exclusively on the person or on the land, and his subsequent recourse is to the one or the other of them, as he may have made his election. *Co. Litt.* 144-5. It is seen, therefore, that there is no point of resemblance between an annuity and even a rent charge; and that though they may for a time exist together in the same deed, they are incapable of being blended. But our ground-rent bears even less resemblance to either. It is not granted like an annuity or rent charge, but reserved out of a conveyance of the land in fee; and, were the statute of *quia emptores* in force here, would be a rent seck, charging neither the person nor the land. Even where the reservation is attended by a clause of distress, the land is exclusively the debtor. It was settled in *Ingersoll v. Sergeant*, (1 *Whart. R.* 337); *Franciscus v. Reigart*, (4 *Watts* 98); and *Kenege v. Elliott*, (9 *Watts* 262), that our ground-rent is an ordinary rent service; and it is well understood that no writ of annuity lies for it, because, like rent granted for owelty of partition, or in lieu of dower, it partakes of the realty and has no touch of personal responsibility in its complexion. *Co. Litt.* 144 *a*. It is plain, therefore, that such a rent, not being an annuity in substance or in form, is not within the purview of the statute; and can a covenant to pay it be more so?

An annuity is discharged by the death of the grantor; a ground-rent covenant is perpetual. By the statute, an annuity might have been valued and the annuitant let in to prove as a creditor to the extent of the valuation, as he may by the 6 Geo. 4; but to value such a covenant, which is perpetual, as an annuity which expires with the grantor, would wrong the ground landlord, who has a fee-simple in the rent, and consequently a perpetual interest in the covenant to secure it. It would be impossible to treat such a covenant consistently as an annuity in substance and a covenant in form. It might be practicable to value it at so many years' purchase; but it would be valued as a rent, and not as an annuity. The statute seems to have contemplated nothing of the sort; for the covenant is but an accessory, the rent being the principal

[Bosler v. Kuhn.]

Nor could the landlord prove for the coming rent as the holder of a debt payable *in futuri*. A rent service is not a debt; and a covenant to pay it is not a covenant to pay a debt: it is a security for the performance of a collateral act. The annual payments spring into existence and for the first time become debts when they are demandable; for while they are growing due the landlord has no property in anything distinct from the corpus of the rent, or the realty of which they are the produce; and the fruit must be severed from the tree which bears it, before it can become personal property and a chose in action. A debt is an entire thing, though it be payable by instalments; and to admit it to be proved, when thus constituted, would require the instalment to be combined by a penalty, such as formerly was called in aid of an annuitant; or else to be consolidated by the contract. There is no penalty in the deed before us to bind the tenant to performance of his covenant; and as each payment would constitute a separate debt, the number of them would be infinite. But what is decisive of the legislative intent, is, that if such a covenant were meant to be provable as a future debt, there would have been no need of special provision for an annuity. The affidavit of defence, therefore, was insufficient.

Judgment affirmed.

Stephens's Appeal.

On the 21st November 1835, A. purchased at auction the land of B. Both signed conditions of sale stipulating that one-third of the purchase money was to be paid on the 1st April 1836, when title would be executed and possession given. On the 8th April 1836, C. obtained a judgment against A. On the next day a deed was executed in pursuance of the conditions of sale, and the first instalment was paid. On the 10th April 1837, D. obtained a judgment against A. The land was afterwards sold by the sheriff as the property of A. *Held*, that C.'s judgment was entitled to the proceeds in preference to that of D.

APPEAL from the decree of the Common Pleas of *Bucks* county.

On the 21st November 1835, Emanuel Whitham purchased certain real estate at auction for \$140. The conditions of sale, which were signed by both parties on that day, stipulated that one-third of the purchase money was to be paid on the 1st April 1836, when title was to be executed and possession given, one-third on the 1st April 1837, and the remaining third at the death of the widow of one of the grantors. On the 9th April 1836, the first instalment was paid, and a deed dated 1st April was executed under the conditions of sale by all the parties but one, who was

[Stephens's Appeal.]

not then of age, but who since executed it on the 21st November 1836. The deed was to be retained by the scrivener until this party became of age. It did not appear when possession was taken. There was no formal delivery of possession. The second payment with interest was made on the 11th April 1837. The deed was delivered after that date.

On the 8th April 1836, William Stokes obtained a judgment against Whitham. On the 10th April 1837, David J. Stephens also obtained a judgment against Whitham. These judgments were duly revived. The estate in question having been sold at sheriff's sale as the property of Whitham, the court below discharged a rule to show cause why Stephens should not take the amount of his judgment out of the proceeds. From this decision Stephens appealed.

Dubois, for the appellant, referred to 8 *Serg. & Rawle* 425; 2 *P. R.* 101; 9 *Serg. & Rawle* 397; 16 *Ibid.* 431; 2 *Watts* 16; *Ibid.* 373; 8 *Ibid.* 423; 2 *P. R.* 223; 7 *Watts* 437.

Roberts, contra, was stopped by the court.

The opinion of the Court was delivered by

HUSTON, J.—This was an issue to try who was entitled to some money raised by the sale of a lot of ground as the property of E. Whitham. The question arose on the following facts. On the 21st November 1835, certain lots were sold at auction by a person having authority to sell. At this sale Whitham purchased a lot which was afterwards sold as his at sheriff's sale, and this suit was about the proceeds brought into court. On the 21st November, written terms of sale were made; one-third of the purchase money to be paid on the 1st April 1836, when a deed was to be made and possession given; one-third to be paid on the 1st April 1837; and the remaining third on the death of a widow, who was to receive the interest thereof annually. Whitham and the vendor each signed the conditions of sale, whereby the one became bound to convey the lot in question, and the other to accept the deed and pay for it according to the conditions of sale. From some cause not explained, the deed, though dated 1st April 1836, was not executed and acknowledged until the 9th April. Then it was by consent of parties left with the scrivener a short time till one of the parties to a power to the agent who sold should come of age; but the first payment was made. On the day previous, viz., 8th April 1836, Stokes entered a judgment against Whitham. On the 10th April 1837, Stephens entered a judgment against Whitham. Whitham paid the second instalment on 11th April 1837. The third, reserved till the widow's death, remains still in the land.

Whitham being indebted, this lot and other property of his wa

[Stephens's Appeal.]

sold, and the proceeds brought into court. Stokes and Stephens are contending for these proceeds. It was observed this was not the case of the vendor contending against the purchaser of the vendee's interest. The purchaser at sheriff's sale has bought and paid for Whitham's interest; he also has nothing to do with this question. The case of *Colhoun v. Snider*, (6 Binn. 147), in which it was decided that a judgment did not bind after purchased lands, gives rise to this question. I shall not go into the grounds and reasons of that decision, nor enter into the question whether a practice adopted and practised on above thirty years ought to be changed, because we have not the first direct decision on the subject, or even if we believe the first decision ought to have been otherwise, so far as that decision goes, we have adhered to it; that is, if A. has a judgment against B., who afterwards contracts for and pays for lands, the judgment is not a lien on those lands in the hands of the purchaser from B., unless an execution on A.'s judgment had been levied on said lands before B. sold them.

This is not that case. Here the execution was levied while Whitham still held the lands, and they were sold as his; and Whitham had bought the lot before the judgment was entered, and has paid all the instalments as they fell due. That the deed was not made and money paid on the 1st April makes no difference as to third persons; both were bound by the conditions of sale and the signature of the purchaser. If a house on the premises had been burned, it is conceded the loss would have fallen on Whitham. If Whitham had built houses worth \$10,000 after this judgment, the lien would have extended to them. If there had been a mortgage or prior judgment binding this property, and Whitham had paid them off, this judgment had the benefit of such payments. A judgment does not bind the interest of another judgment creditor or mortgagee, because such is not a right to the land, but to the proceeds of it; but it binds any and every interest in the land itself, whether legal or equitable; for this we have the cases cited and many others. It is common to buy land to be paid for by instalments, and it would make sad confusion if a judgment bound only the interest covered by the payments made, and the vendee could sell or mortgage the proportion not yet paid for. We have not gone so far, and I hope will not. The judgment bound the interest of him against whom it was entered, and whether that interest is increased by payments or improvements or lessened by floods or fires, it still binds his interest, his right to the land. The case of *Morrison v. Swartz* (7 Watts 437), is express that a judgment binds the right of a bidder at sheriff's sale before any deed is made to him; and yet before the deed, the writ or the levy or sale may be set aside. The case of such purchaser certainly cannot be greater than that of one by articles signed by vendor and vendee.

Judgment affirmed.

Reed *against* Bias.

In an action of trespass for pulling down a building, evidence that the building was peaceably taken down and its materials preserved in conformity with the directions of the commissioners of the township during a period of great public excitement and disorder, with a view of saving the neighbourhood from threatened violence, is admissible in mitigation of damages.

In such action evidence that the commissioners had by law the power to abate and remove nuisances, and that a grand jury after instructions by a competent court presented the building as a public nuisance and recommended its abatement, is not admissible in mitigation of damages.

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

This was an action of trespass *vi et armis*, brought by James J. G. Bias and others against Samuel F. Reed and others for pulling down "the Coloured Temperance Hall of Moyamensing." The defendants pleaded not guilty.

On the trial, after the plaintiffs had proved the destruction of the building by the defendants, the defendants offered to prove, in mitigation of damages, as follows:

1. That the taking down of the Temperance Hall at the time mentioned, was the act of the municipal corporation of Moyamensing township, by their agents duly authorized.

2. That the act was done deliberately by the said municipal corporation at a period of great public excitement and disorder, with a view to save the neighbourhood from threatened violence.

3. That this said municipal corporation had by law the power to abate and remove nuisances, and that a grand jury, after instructions by a competent court, presented the said building or Temperance Hall as a public nuisance, and recommended its abatement.

4. And that the said building was peaceably taken down and its materials preserved in conformity with the direction of the said municipal corporation.

The court rejected the evidence and sealed an exception. This rejection was assigned for error.

S. F. Reed and *Dallas*, for the plaintiffs in error.

The property was threatened and fired twice, so that the adjoining property was in danger. The grand jury visited it at the request of the county commissioners, and presented it as a nuisance, and the board of commissioners requested it to be taken down. We admit the board are liable, but not individuals acting under them. But at all events the evidence offered was admissible

[Reed v. Bias.]

to repel vindictive damages, which on the plaintiffs' evidence might possibly be given by the jury. 1 *Binn.* 90; 2 *Stark. Ev.* 641.

C. Gilpin and Earle, contra.

Malice is not the gist of this action: it is only the illegality of the acts done; and the evidence offered did not repel that. If offered in mitigation, it does not tend to that to show that the acts were done by the defendants at the instigation of others. On the contrary, this is an aggravation. If in justification, it should have been so pleaded; and is not admissible under the general issue. 1 *Stark. Ev.* 1121.

The opinion of the Court was delivered by

BURNSIDE, J.—The plaintiffs below brought an action of trespass against the defendants for pulling down the “Temperance Hall of Moyamensing.” The hall had been erected under the patronage of the “Moral Reform Society of Philadelphia,” by contribution. The building was pulled down in pursuance of orders from the corporation of Moyamensing. There was a riot in progress, and the destruction of this building was believed to be one object of the rioters. Some of the defendants were officers of the corporation, and the defendants offered to prove, *in mitigation of damages*, after the plaintiffs had proved the destruction of the building by the defendants, that the building was peaceably taken down and its materials preserved in conformity with the directions of the municipal corporation of Moyamensing, during a period of great public excitement, with a view of saving the neighbourhood from fire and threatened violence. This offer the court rejected; and this is assigned for error. This court do not approve of the course pursued by this corporation in quelling mobs; yet they think the evidence ought to have been received for the purpose for which it was offered, in mitigation of damages, but not as a defence to the action. It is true, the defendants could not have pleaded the instruction of the corporation in bar to the action; but it was a circumstance to go to the jury in mitigation, which tended to reduce the damages to the actual loss and injury which the plaintiffs sustained. 2 *Stark. Ev.* 1120. We have an Act of Assembly against *wilfully* firing the woods, making it a criminal offence. It sometimes happens in the mountainous region of Pennsylvania, that there is no other way of arresting the progress of the flames and saving property, but by firing against the fire: although those who fire against the fire are liable for the actual damage they do to the property of others, they certainly might, either on an indictment for a criminal offence or in mitigation of damages, show that the act was not wilful, but induced by the necessity of their situation to protect their property and that of their neighbours from inevitable destruction. Houses are frequently pulled down in towns and cities to arrest the progress of

[Reed v. Bias.]

so terrible an element as fire; and it seems to me, that in an action for the destruction of the building the cause and occasion may be shown in mitigation of damages.

There was another question raised by the counsel of the plaintiffs in error, that the municipal corporation of Moyamensing had a power by law to abate nuisances, and that a grand jury, after instructions by a competent court, presented the said building or Temperance Hall to be a public nuisance. In rejecting this offer the District Court were clearly right. It is due to the court to say that such charge is denied; but this does not change the nature of the offer. In considering the question of evidence, this court must take it for granted the learned counsel could prove their offer. If a grand jury were so lost to themselves as to present a building as a nuisance because a lawless mob contemplated its destruction, and this could be received in evidence even in mitigation of the injury, then miserable would be our situation. We could not imagine whose turn would come next. The mob was the nuisance; not the building. It was the duty of the grand jury to present the mob; and the duty of the sheriff and the civil authority to suppress it. *Dalton* informs us that the sheriff, as his name purports him to be, is the keeper or governor of the county. He is to keep the peace, and hath power to levy *posse comitatus*, so many men as he shall think meet to go with him to apprehend traitors, felons, rioters, and the like offenders against the peace. *Dalton* 4; *Co. Litt.* 168. The sheriff is the keeper of the Commonwealth's peace within his bailiwick, by the common law. He may apprehend and commit to prison all persons who break the peace or attempt to break it. He may, and is bound *ex officio*, to pursue and take all traitors and rioters, as well as felons and murderers; and for this purpose, as well as for taking rioters and other breakers of the peace, he may command all the people of his county to attend him, under pain of fine and imprisonment. 2 *Hen.* 5, c. 8; *Sewall on Sheriffs* 31.

The sheriff, to prevent personal damage to himself and his ordinary assistants from a mob assembled in extraordinary numbers, and with a show of force to overawe the civil power, may call in the assistance of the military. He has the right, and it is his duty to use the proper and necessary force to suppress all mobs and disturbers of the peace. Without this power our liberty would be but a name, and our lives and property insecure.

Judgment reversed, and a *venire de novo* awarded

James *against* Letzler.

Recitals of title in a deed more than 30 years old, where possession accompanied the deed, are *prima facie* evidence against persons claiming by title under the grantor previous to such deed.

EJECTMENT in this court for a house and lot at the corner of Race and Front streets, in the city of Philadelphia, by William James and Sarah Ann his wife, in right of the said Sarah Ann, against Henry Letzler and John Leavitt, tried before Mr Justice KENNEDY at Nisi Prius, in February 1843, and a verdict rendered for the defendants.

The plaintiffs claimed under James Parrock, by title existing in him prior to the year 1778. The defendants claimed under a conveyance from the Supreme Executive Council of Pennsylvania, as the property of Parrock, an attainted traitor. The only question was raised on the bill of exceptions, whether a deed of the 3d May 1785, from the University of Pennsylvania to Jacob Cauffman, reciting the proceedings for the attainder of Parrock under the Act of 6th March 1778, viz: the proclamation under the great seal of the Commonwealth dated 21st May 1778, his not rendering himself for trial according to it and his attainder in pursuance thereof, by which his estate became forfeited, was evidence. The learned Judge admitted it, and the plaintiff excepted.

The case was argued by

Hirst and *Dallas*, for the plaintiffs; and by
Kennedy, contra.

The opinion of the Court was delivered by

SERGEANT, J. — The general rule is that a recital of a fact or conveyance in a deed is evidence against the grantor and all persons claiming by title derived from him subsequently, but is not evidence against a stranger or other person who claims by title derived from the grantor before the deed containing such recital. *Penrose v. Griffith*, (4 Binn. 231); *Garwood v. Dennis*, (4 Binn. 327); *Morris v. Vanderen*, (1 Dall. 67). This rule applies, however, only to recent conveyances, for there is an exception to it in the case of an ancient deed containing a recital, where the possession has accompanied such deed. And this is analogous to the rule which prevails in other cases; as, for instance, that a deed more than thirty years old, accompanied by possession, proves itself; for by a lapse of time not only are the ordinary modes of proof decayed and gone, but the circumstance of accompanying posses

[James v. Letzler.]

sion under the deed raises the presumption that it was valid and effectual, and the title good, or it would in all human probability have been contested. Thus in *Doe v. Phelps*, (9 Johns. 169); and *Doe v. Campbell*, (10 Johns. 475), an ancient deed, with which the possession corresponded, contained a recital of a power of attorney, which was necessary to give the deed validity; it was held that the due execution of the power of attorney must be presumed. In deeds there are often recitals of marriages, births, or deaths without issue, and other facts incident to the conveyance, which on the same principle would, after a length of time, be evidence as against third persons not claiming by or through the grantor. In the case before us the deed from the trustees of the University of Pennsylvania of the 3d May 1785 recites a proclamation by the constituted authorities requiring Parrock to render himself and abide his trial, and that he did neither; all of which are matters *in pais* as much as a power of attorney; for a proclamation is matter *in pais*, and proved by the gazette. 1 Stark. Ev. 413. It also appears that possession had been held by the defendants claiming under this deed for more than fifty years. Under these circumstances the rule of law is that the recital becomes evidence *prima facie* against third persons. There was, therefore, no error in the court in admitting the evidence.

Judgment affirmed.

Roland *against* Tiernan.

Where, by articles of agreement for the purchase of land, part of the money is to be paid when the agreement is executed, and the articles are executed, but instead of money, the vendor takes the promissory note of the vendee for such sum, the vendee cannot object to its payment on the ground of incumbrances on the title then existing.

His remedy is in such case by action of covenant to recover damages.

ERROR to the District Court for the city and county of *Philadelphia* to March Term 1841.

Case brought on a promissory note by Francis Tiernan against Henry Roland and Thomas Blackstone, executors and trustees of Catharine Yohe deceased.

The plaintiff showed an agreement dated 18th September 1839, by which he agreed to purchase from the trustees of Dr Blackwell deceased a property situate at the four corners of Broad and Federal streets, containing 11 acres more or less, for \$40,000; \$1000 payable in cash, \$9000 on or before the 15th November next; the balance, \$30,000, to be secured upon the premises by bond and mortgage payable within eight years with interest; interest to

[Roland v. Tiernan.]

commence on the whole on the 1st October, allowing the purchasers interest on the sum of \$1000 from the time of payment till the 1st October, which sum was to be paid as security for the contract. If the interest on the \$30,000 remained unpaid after it was due, the principal sum was recoverable without delay.

The plaintiff further showed an agreement of the 9th December 1839, between Dr Peter Schoenberger and Francis Tiernan of the first part and Mrs Catharine Yohe of the other, by which they agreed to convey to her a portion of this property situate at the northwest corner of Broad and Federal streets, 108 feet on Broad and 220 feet deep, and she agreed to pay therefor \$7200, viz., \$500 when the agreement was executed and delivered, and the balance, with interest semi-annually, to be secured by bond and mortgage, and payable on the 9th December 1845, or previous if preferred. The deed and bond and mortgage to be executed and delivered on the 9th day of ———. A receipt was attached for a note at 60 days for the \$500 stipulated, dated 10th December 1839.

The plaintiff further showed a promissory note at 60 days of the 10th December 1839, made by Catharine Yohe in favour of Francis Tiernan or order, for \$500, without defalcation for value received.

The plaintiff then gave in evidence a deed dated February 4th 1840, from James S. Smith and H. Hollingsworth, executors and devisees of the Rev. Dr Blackwell, to Francis Tiernan and Dr Peter Schoenberger, for all that tract of land in Moyamensing on both sides of Federal and Broad Streets, at the intersection thereof, containing 15 acres 1 rood 30½ perches, consideration money \$40,000.

The defendants then gave in evidence a bond and mortgage, 4th February 1840, Francis Tiernan and Dr Schoenberger to James S. Smith and H. Hollingsworth, executors, &c., of the same property, for \$60,000, conditioned to pay \$30,000 on or before the 1st October 1847, recorded, &c. It was then admitted that the note was given in lieu of the cash payment required in the agreement of December 9th 1839, and also that the premises therein mentioned were part of the premises included in said mortgage.

The defendants then produced a notice to the plaintiff to produce on the trial the title-papers of the property for which the note was given, and to show the plaintiff's title.

The plaintiff then offered in evidence a release dated the 6th and recorded the 9th March 1843, by James S. Smith and H. Hollingsworth to Tiernan and Schoenberger, by which, in consideration of \$4550 paid, they released to them that part of the premises in the mortgage by the same description as conveyed to Mrs Yohe, from the lien of their mortgage and interest, recorded, &c. To this evidence the defendants objected; but the court admitted it and sealed a bill of exceptions.

[Roland v. Tiernan.]

John R. Vogdes, a witness for the plaintiff, stated that he called on the 6th February 1840 at the residence of Mrs Yohe, to tender her a deed and mortgage of this date, but she was not at home. A day or two after, he found her too sick to be seen, and in two or three days she died. He was ready, as the plaintiff's agent, to tender them to the defendants, on their executing the bond and mortgage.

It was admitted that no notice of the release other than recording it had been given to the defendants. The plaintiff then tendered the deed dated 6th February 1840, on condition the defendants would execute the bond and mortgage of that date.

The court, in answer to the defendants' request, charged that he plaintiff was entitled to recover the principal of the note with interest from the time of executing the release: to which the defendants excepted,

I. Because the court admitted in evidence a release from James S. Smith and H. Hollingsworth, executors of Dr R. Blackwell, to Francis Tiernan and Peter Schoenberger, dated the 6th March 1843, executed since the commencement of this suit, and the date of the last trial.

II. The court erred, in saying the plaintiff had a right to recover, because,

1. At the time the contract for the purchase was made, and the note given in part payment, the vendors had no sufficient title to the premises in question, nor had they any until long after the death of C. Yohe and the commencement of this suit, viz., 6th March 1843.

2. Because there was a recorded unsatisfied incumbrance on the premises, to the amount of \$40,000 and upwards.

3. Because there was no tender of the deed made to C. Yohe in her lifetime.

4. Because the tender to the executors of C. Yohe, since her death, was inoperative and unavailable.

Randall, for the plaintiffs in error, argued that no title free from incumbrance existed in the plaintiff when the suit was brought or the deed tendered, nor till long afterwards. No time was given to examine the deed or securities exhibited. 3 *Watts* 367; 10 *Watts* 442; 6 *Vez.* 610; 3 *Johns. Ch. Cas.* 312; 7 *Watts* 141; 3 *Rawle* 333.

H. M. Watts and *Meredith*, contra, insisted that the defendants were precluded by the note, which was the same as cash and to be paid at all events. *Lighty v. Shorb*, 3 *P. R.* 447; 10 *Watts* 298; 11 *Serg. & Rawle* 450; 5 *Watts* 421; 8 *Serg. & Rawle* 312; 4 *Watts & Serg.* 27, 320, 414.

The opinion of the court was delivered by

GIBSON, C. J.—*Lighty v. Shorb* contains the expression of a prin-

[Roland v. Tiernan.]

ciple which rules the case before us. It was said that where nothing but prompt payment would stand with the contemporaneous understanding of the parties, the purchase money is not to be detained as a security for defects in the title subsequently discovered; and that their intention is to be ascertained by the nature of the transaction and the character of the security. The principle is a wholesome one, and consonant to the intention from which their responsibilities proceed. By the terms of the sale in the present case, the money in contest was not to be detained for any reason whatever. It was agreed that these \$500 should be paid at the execution of the articles which bear date the 9th of the month, but which were probably not executed till the next day, when Mrs Yohe, the purchaser, gave her promissory note for the exact sum without defalcation at 60 days, on which suit has been brought. For her exclusive accommodation, it was received as so much cash; and so far as she or her representatives are concerned, it must be treated as such. Payment of this part of the purchase money was not to depend on the quality of the title, for it was to be received before its quality was to be inspected. It was in fact paid in the purchaser's note taken as money. The transaction was in effect payment of so much received by one of the vendors, and lent by him to the vendee on separate account. The parties did not indeed go through the form of paying with the one hand and taking back with the other; but the operation was not the less a loan, nor would the plaintiff be the less answerable to his co-vendor for so much received by him to their joint use. Why then should not the note be paid? If the vendors have since broken their covenant for title, they are answerable for damages in an action on it; but not as cross-demand in an action by one of them, or as failure of consideration in a separate transaction. Nor shall the vendee's executors turn a favour done to their testatrix to the disadvantage of him who conferred it. For this reason, which is conclusive as regards the right to recover, it is unnecessary to consider the bill of exceptions to evidence.

Judgment affirmed.

Flavell's Case.

The governor may annex to a pardon any condition, whether precedent or subsequent, not forbidden by law, and it lies on the grantee to perform it.

If he does not, in case of a condition precedent, the pardon does not take effect—in case of a condition subsequent, the pardon becomes null; and if the condition is not performed, the original sentence remains in full force, and may be carried into effect.

HABEAS CORPUS to bring up the body of Wesley Flavell, who was in prison under sentence of the Court of Oyer and Terminer of the city and county of Philadelphia on conviction of murder in the second degree. The prisoner claimed his discharge under the following pardon:

Pennsylvania, ss.

In the name and by the authority of the Commonwealth of Pennsylvania—

DAVID R. PORTER. **DAVID R. PORTER**, Governor of the said Commonwealth—



To all to whom these presents shall come,
sends greeting:—

Whereas at a Court of Oyer and Terminer, held in and for the city and county of Philadelphia at September Sessions 1844, a certain Wesley Flavell was indicted and convicted of murder in the second degree, and was thereupon on the 28th day of December 1844, sentenced by the said court to pay a fine of \$1 to the Commonwealth, undergo an imprisonment in separate or solitary confinement at labour in the State Penitentiary for the Eastern District of Pennsylvania for the term of 12 years, and be fed, clothed, and in all respects treated as the law directs; that he pay the costs of prosecution, stand committed, &c.

And whereas it is made manifest to me that the said Wesley Flavell was deprived of his reason at the time, and wholly unconscious of having committed the act, and his friends offering to take him home to Ireland immediately, there to remain until his reason shall have been fully restored.

I do therefore in consideration of the premises, hereby *pardon* the said Wesley Flavell, on the express condition that he be taken direct from the penitentiary on board the vessel which is to convey him out of the country, there to remain until the vessel put to sea, and he is hereby fully pardoned accordingly.

R *

[Flavell's Case.]

Given under my hand and the great seal of the State at Harrisburgh, this 20th day of January 1845, and of the Commonwealth the 69th.

By the Governor,

THOMAS L. WILSON,
Deputy Secretary of the Commonwealth.

The case was argued by *D. P. Brown*, for the relator.
F. Wharton and *Kelly*, contra.

The opinion of the Court was delivered by

SERGEANT, J. — The charter to William Penn gave power to him and his heirs and their deputies and lieutenants to remit, release, pardon and abolish (whether before judgment or after) all crimes and offences whatsoever committed against the laws, treason and wilful and malicious murder only excepted, and in those cases to grant reprieves until the king's pleasure might be known therein. The Constitution of 1776 imitated this modification of the Executive power, substituting the Legislature for the Crown. The power there given was to grant pardons and remit fines in all cases whatsoever, except in cases of impeachment; and in cases of treason and murder to grant reprieves until the end of the next sessions of the Assembly. Under this Constitution it was made lawful for the Executive Council, by the Act of 8th March 1780, upon the prayer of any person under sentence of death for treason or felony, to grant to such person a pardon, so far as respected his life, consonant with the limitations of the constitution, on condition that such person should, within a limited time, depart from this State to foreign parts beyond sea, and that he should not return into this State or any of the United States of America, and on not departing or returning into the United States, the pardon to be void, and he should suffer death according to the sentence pronounced against him. 1 *Smith's Laws* 498. This Act shows that conditional pardons are by no means strange to the jurisprudence of Pennsylvania, even though the condition amounted to banishment or expatriation.

When, however, the constitution of 1790 came to be formed, restrictions and limitations on the power of pardon by the executive were laid aside, and it was given fully, absolutely, and in its most comprehensive extent. By article 2, section 9, it was declared that the governor shall have power to remit fines and forfeitures, and grant reprieves and pardons, except in cases of impeachment. And by our present constitution of 1838, though several propositions were made in the convention to limit and control the exercise of the power of pardon by the executive, they were overruled, and the provision left as it stood. Now no principle is better settled than that for the definition of legal terms and construction of legal powers mentioned in our constitution and laws, we must resort to the common law, where no Act of

[Flavell's Case.]

Assembly, or judicial interpretation or settled usage has altered their meaning. The Act of 28th January 1777, the second Act passed by our Assembly after the revolution, expressly enacts, that the common law and such of the statute laws of England as had theretofore been in force, except those particularly excepted, should continue to be in force. By the common law there are some acts of such a nature that a condition subsequent cannot be attached to them from its repugnancy to the act done: there are others to which any condition may be annexed which the party chooses, and amongst the latter are pardons. The distinction is clearly laid down by Lord COKE, *Co. Lit.* 274 *b*, who says an express manumission of a villein cannot be on condition, for once free in that case and ever free. Also an attornment to a grantee upon condition, the condition is void because the grant is once settled. But this is to be understood of a condition subsequent and not of a condition precedent, for in both these cases the condition precedent is good. But letters patent of denization made to an alien may be either upon condition subsequent or precedent. And so may the king make a charter of pardon to a man of his life upon condition, as is above said. To the same effect are Hawkins, Blackstone, Chitty, and other writers on criminal law. A pardon, therefore, being an act of such a nature as that by the common law it may be upon any condition, it has the same nature and operation in Pennsylvania, and it follows that the governor may annex to a pardon any condition whether precedent or subsequent not forbidden by law, and it lies upon the grantee to perform the condition. If he does not, in case of a condition precedent, the pardon does not take effect; in case of a condition subsequent, such as this before us, the pardon becomes null; and if the condition is not performed, the original sentence remains in full vigour, and may be carried into effect. The propriety or wisdom of granting such pardons, or of the terms and conditions annexed, must rest with the executive, to whom the constitution entrusts this authority.

Prisoner discharged.

Gilkeson *against* Snyder.

If one purchase land of which the title fails, yet if a third person advance money to the vendor in part payment, on the representation of the purchaser that he would be safe in so doing, and the purchaser gives a bond to such third person for the amount, he cannot, in a suit on the bond, bar a recovery on the ground of defect of title.

Where one owns both land and the money due upon it, there is no lien on it for the money.

Representations by counsel in the presence of his client, on the faith of which one has advanced money, are the representations of the client.

ERROR to the Common Pleas of *Montgomery* county, in which this issue was tried to determine whether the plaintiff, Joseph Gilkeson, was entitled to be paid two judgments in his favour of 30th May 1837, against Snyder & Hutton, out of moneys raised on a sheriff's sale of real estate of Snyder & Hutton, viz: a messuage and lot of $11\frac{1}{4}$ acres, in *Montgomery* county. The right to pay was contested by William Acuff, a subsequent judgment creditor.

The consideration for these two judgments, one for \$240, the other for \$333.33, appeared to be as follows. Samuel Gilkeson, the brother of the plaintiff, was the owner of real estate devised to him by his father in 1813, subject to certain charges. Andrew Gilkeson, another brother, obtained a judgment on *scire facias* against Samuel Gilkeson, on the 13th November 1832, for \$4000. This judgment was given to secure Andrew for debts due him, and for becoming bail, but was for more than was due to him on every account. Samuel became insolvent, and William Jagers was appointed his assignee. Jagers agreed to sell the estate to Snyder & Hutton for \$3500; and a meeting took place at the office of Mr Fallon, in Philadelphia, to settle the incumbrances existing on it: and it was agreed that certain of the incumbrances should remain, and for the others Snyder & Hutton should give their bonds to the creditors. The following paper, made out at the time, purported to show the incumbrances, and what was then due to Andrew:—

To Jane Fitzwater, - - - - -	\$300.00	} to remain.
To Harriet Meredith, - - - - -	300.00	
To Elias Gilkeson, - - - - -	166.67	
<hr/>		
Amounting to - - -	\$766.67	

[Gilkeson v. Snyder.]

To be paid to Joseph Gilkeson,
which is secured to him by Judgt.

Bond given by Snyder & Hutton,	\$333.33	} to do, if it can be secured so that the executors cannot be, at some future time, charged therewith.
	<hr/> \$1100.00	
Legacy to Jane Fitzwater,	400.00	

\$1500.00

Bonds given by Snyder & Hutton,

" One to Joseph Gilkeson, for	\$240.00
" One to Andrew Gilkeson, for	480.00
" One to " " for	1136.00
" One to " " for	104.00

\$3460.00

Interest due Jane Fitzwater on le-
gacy for \$400, from August 1st,
1835, to April 1, 1837; 1 yr. 8 mo.
and remains unpaid - - - -

40.00

\$3500.00

Of the above, \$1500 consisted of legacies under the will, and there was a dower to the mother, \$333.33 of which, it was admitted, belonged to Samuel after her death. Mr Fallon, who, it was alleged, acted as counsel for the defendants alone, said, at this meeting, if the property were sold at sheriff's sale, the purchaser would get this sum; if at private sale, Samuel Gilkeson might have it. The will was silent as to the devise over, and he said it would go to Samuel on her death, with the consent of the heirs. They were willing Samuel should have it. Mr Fallon said Joseph Gilkeson would be safe in buying this claim, and taking the bond of Snyder & Hutton for it; which they were willing to give. Joseph thereupon gave Samuel \$200 in cash, and gave a bond or note for \$133.33. A receipt was given, at the same time, by Samuel to Joseph for this sum. Then Snyder & Hutton gave their bond to Joseph Gilkeson for the \$333.33.

The \$240 bond was given by Snyder & Hutton to the plaintiff for ten years' interest on the \$400 bond to Mrs Fitzwater, which he had paid, and for which, he stated, he had delivered them her receipt. On receipt of the bonds, Andrew Gilkeson engaged to enter satisfaction on the \$4000 judgment.

Jaggers made a deed to Snyder & Hutton, but it conveyed no title, because it was a private, and not a public sale. Andrew Gilkeson thereupon revived his judgment for \$4000, took out execution against Samuel Gilkeson, and sold the estate by the sheriff for \$1300.

[Gilkeson v. Snyder.]

The court charged the jury as follows:—

Joseph Gilkeson, the plaintiff, claims from the defendants, of the funds in the sheriff's hands of the proceeds of the sale of the real estate of the defendants conveyed to them by the executors of Casper Schlater, in the issue trying, the amount of two judgment bonds, which have been read to you, respectively bearing date the 8th of March 1837. These judgments were entered in this court to May Term 1837, and so remained until the year 1839, when the judgments were opened so far as to let the defendants into a trial on the merits. The defendants have pleaded payment with leave to give the special matters in evidence. It will be your duty to give separate verdicts—that is, a verdict in each case.

Under the plea of payment with leave to give the special matters in evidence, in Pennsylvania, in a case like the present, the defendant may give in evidence fraud, mistake, want of consideration, or anything which will show that in equity and good conscience the plaintiff ought not to recover. In other words, when money ought not to be paid under the plea of payment, the defendant has a right to show it, and in law it will be considered as paid, when it ought not to be paid. This brings us to consider the case and the evidence. You will recollect its history. Andrew Gilkeson, the elder, made his last will and testament in June 1813, which was proved and approved in the register's office of Montgomery county in November the year following. By his will he devised his mansion-house, with some land, to his son Samuel, and charged that property with certain legacies. The material devises which come under consideration in this case, are the devise to his daughter, Jane Fitzwater, and the devise to his widow of certain interest during life. Samuel went into possession, and in 1832 became indebted to his brother Andrew, who was bail for him, &c. To secure Andrew, Samuel gave him a judgment, which has been given in evidence, for \$4000. This judgment was for more than was due by the defendant in the judgment, including all the money for which Andrew had gone bail. Samuel was driven to insolvency, and one Jagers was appointed his assignee. He sold the estate to Snyder & Hutton for \$3500. At this time there were incumbrances open on the records of Montgomery county, of a much larger sum than \$3500. To ascertain the actual amount of these incumbrances was certainly one object of the meeting of the parties at the office of Mr Fallon in March 1837. There is a paper made at that time which shows the incumbrances and what was then due to Andrew.

It would seem that the whole purchase money was subject to the incumbrances, and that no money was to be paid to Jagers for the use of the general creditors. Snyder and Hutton paid no money to any one except \$25, which went to the counsel of Jagers. We have said—and its truth is submitted to you—that one great object of the meeting at Fallon's was to fix and ascertain the

[Gilkeson v. Snyder.]

hens; and we return to that and call your attention to the evidence of what took place at that meeting.

The amount for which Snyder and Hutton gave their bonds was—

To Joseph Gilkeson, the bond for	- -	\$333.33	
Do.	bond for	- -	240.00
			<hr/>
			\$573.33
To Andrew Gilkeson, 1 bond	- -	\$480	
	1 do.	- -	1136
	1 do.	- -	104
			<hr/>
			1670
			<hr/>
			\$2243.33

On the receipt of these bonds Andrew Gilkeson engaged to enter satisfaction on the \$4000 judgment. You have heard from Mr Fallon how the judgment was revived, and the reason for it; that it was discovered that Snyder and Hutton had no title; that the sale by Jaggars was a private sale, and that by the Act of Assembly it should have been a public one, and that Snyder and Hutton got no title to which these judgments would attach. The \$4000 judgment was revived on the 23d of May 1837. Before this time it was discovered they got no title. If Fallon is believed, Joseph Gilkeson knew this as well as Andrew. Counsel was consulted, and Andrew Gilkeson proceeded to sell the land. A *feri facias* issued to May Term 1838, and a *venditioni* to August Term following. There were two pieces of land. On the 1st October 1838 the sheriff made a deed for part to David Acuff, and for another part to Andrew Gilkeson. It is conceded that Snyder and Hutton got no title by the sale by Jaggars—that the property was taken from them on the judgment of Andrew Gilkeson. Now, has not the consideration failed? What is the law? In *Steinhauer v. Witman*, and in many cases, the law is well settled that a distinction has been established between purchasers who have paid and who have not paid the purchase money. Those who have paid have no relief. But those who have not paid are relieved in the case of eviction or manifest failure of title. Is not the evidence clear that here was an absolute failure of title? Is it not equally clear that the bonds given by Snyder and Hutton were given for the land, and that it was given for prior liens on this land, which had a right to be paid, so far as they were due, out of the sheriff's sale? Is it not clear that Joseph Gilkeson had full notice of this? It is even admitted that the \$333.33 judgment is still a lien on this land. Then why should the plaintiff recover in that case against men who have received no consideration?

Then as to the \$240 judgment that was given for money advanced by Joseph Gilkeson to his sister, Mrs Fitzwater. He had advanced that money on the faith of the lien. Had he notice that

[Gilkeson v. Snyder.]

the title had failed, before the sheriff's sale? This is proved by Fallon, of whose credit you are the judges. If he had notice, then he ought to have come in and claimed the money out of the sheriff's sale. When the land was sold on the \$4000 judgment, the money arising from the sale was a fund to discharge all prior liens then due and unpaid. That was the legal and legitimate fund for payment, and if he omitted to claim the money, he ought not to come on a person whose bond he holds without consideration. If the consideration has failed for which the bonds were given, and the plaintiff not put in a worse situation by the giving of these bonds why should there be a recovery? It is always a good defence to a bond when the consideration clearly failed, unless the party giving the bond has misled the holder and induced him to advance his money.

Upon the whole, if you find the consideration failed (which is proved by Andrew Gilkeson himself) for which the bonds were given, the defendants are entitled to your verdict, unless you find Joseph Gilkeson, the plaintiff, is put in a worse situation by the giving of the bonds.

The plaintiff excepted to the charge. A verdict was rendered for the defendants.

Immediately after the conclusion of the charge, and while the jury were still in the box, the plaintiff, before excepting to the charge, requested the court to charge the jury—"That if they believe Joseph Gilkeson paid Samuel Gilkeson \$200 in cash, with the knowledge of Snyder and Hutton, and upon the representation of their counsel, made in their presence, that he would be safe in buying Samuel Gilkeson's interest in the principal sum, yielding the widow her annual interest, then the defect of Snyder and Hutton's title will constitute no legal bar to a recovery on the judgment of \$333.33." The court refused to give this instruction, on the ground that they would not establish such a practice against the rules of the court; and the plaintiff excepted.

Errors assigned:

1. The court erred in overruling the objection to the testimony of Mr. Fallon, who had been the counsel of the plaintiff, and under whose advice the plaintiff acted in the matter about which he testified.

2. In charging the jury that the *whole* purchase money which Snyder and Hutton were to pay for the premises purchased of William Jagers, was subjected to incumbrances on the property.

3. In instructing the jury that Joseph Gilkeson had advanced the \$240 on the faith of the lien.

4. In charging that the \$240 for which the bond read in evidence was given was a lien on the land, and was to be paid out of the proceeds of the sheriff's sale; when by the testimony in the cause the plaintiff had paid this sum for Samuel Gilkeson, and at his request, to Jane Fitzwater, on account of interest due from

[Gilkeson v. Snyder.]

him to her under her father's will; and upon such payment, such interest ceased to be a lien on the premises and became a personal debt due to the plaintiff from Samuel Gilkeson.

5. In charging that if Joseph Gilkeson had notice of the failure of Snyder and Hutton's title, he ought to have come in and claimed the money out of the proceeds of the sheriff's sale; that that was the legitimate fund for the payment of his bond for \$240, and if he omitted to claim the money he ought not to recover.

6. In charging that notice to Joseph Gilkeson of the failure of Snyder and Hutton's title affected the plaintiff's recovery on the bond for \$240, the plaintiff not having been a party to the sale or to the release read in evidence.

7. In charging that the plaintiff held the bonds without consideration.

8. In instructing the jury that if Snyder and Hutton's title failed, the consideration of the bonds failed, and the defendants were entitled to their verdict, although the said bonds were given and taken as stated in the next error.

9. In instructing the jury that the failure of Snyder and Hutton's title was a good defence to the bonds given by them to the plaintiff:

Because the plaintiff was no party to the sale nor to the release read in evidence, and because the bond for \$240 was taken by the plaintiff at the request of the defendants, in lieu of that sum which they were to pay, to discharge the debt of that amount due from Samuel Gilkeson for interest paid to Jane Fitzwater for him and at his request; and the other bond for \$333.33 was taken for that sum which the defendants were to pay to Samuel Gilkeson at the decease of Edith Gilkeson, and which the plaintiff purchased and paid for with the assent of the defendants, and upon the representation of their counsel, in their presence, that the plaintiff would be safe in buying it and taking Snyder and Hutton's bonds for the same.

10. In not instructing the jury as requested in the last bill of exceptions.

11. The court ought to have instructed the jury, that as the defendants, at the time of executing the bonds and warrants of attorney given in evidence, consented that the plaintiff should enter the judgments when he pleased, and the bonds and warrants had been taken as mentioned in the ninth error, the matters given in evidence constituted no defence against the plaintiff's claim.

12. The court ought to have instructed the jury, that from the testimony of Mr Fallon and Andrew Gilkeson, Mr Fallon was an incompetent witness, and his testimony was not to be taken into consideration in making up their verdict.

13. The defendants having made no defence, and William Acuff having no right to make any defence against the plaintiff's reco-

[Gilkeson v. Snyder.]

very, the verdict and judgment should have been in favour of the plaintiff for the amount of his bond in each case.

14. A separate verdict was not rendered on each bond. The verdict is a joint one, and no execution can issue thereon.

Sterigere and *Ross*, for the plaintiff in error.

G. R. Fox and *J. Fox*, contra.

The opinion of the Court was delivered by

ROGERS, J.—Two actions were brought on two several bonds one for \$240, the other for \$333.33. The causes were tried by the same jury, and under a charge embracing both cases.

The general facts, which appertain to both cases, are well stated by the court, and as to the \$240 bond, the cause is placed on correct principles. It is the common case of a bond given in part payment of a tract of land, the title to which has proved defective. Inasmuch, therefore, as the consideration has failed, on the principles settled in *Steinhauer v. Witman* the defendants have a complete defence. But conceding the defect of title, another question arises depending on other and distinct considerations arising out of the testimony of Andrew and Samuel Gilkeson. If they are worthy of credit, the case was this. The defendants purchased of Samuel Gilkeson a tract of land, the title to which was defective. It was encumbered with a judgment in favour of Andrew Gilkeson for \$4000, also with legacies under the will of Andrew Gilkeson, the father, for about \$1500, and a dower to the mother, \$333 of which, as is admitted by the parties, belonged to Samuel after her death. For the purpose of adjusting their respective claims the parties met at Mr Fallon's office, who, it is alleged, acted as the counsel of the defendants alone. The \$333.33, as Andrew says, was part of the dower fund payable at the death of his mother; \$300 of the principal was to go to Jane Fitzwater; \$300 to Harriet Meredith; \$166.67 to Elias Gilkeson. There was then a balance of \$333.33. Mr Fallon said, if sold at sheriff's sale, the purchaser would get it; if sold at private sale, Samuel Gilkeson might have it. The will is silent as to a devise over; and he said it would go to Samuel, on her death, with the consent of the heirs. They were willing Samuel should have it. Mr Fallon said Joseph Gilkeson would be safe in buying this and taking Snyder and Hutton's bond for it; which they were willing to give. Joseph bought it and gave Samuel \$200 in cash, and gave a bond or note for the other \$133.33. A receipt at the same time was given for the \$200.

If this be a true account of the case, of which the jury must judge on the representation of Mr Fallon, who was the attorney of the defendants, and in their presence the plaintiff has been induced to advance his money, his act is their act, and they must

[Gilkeson v. Snyder.]

be answerable for the consequences. The court say if the jury find the consideration failed, the defendants are entitled to verdict, unless Joseph Gilkeson is put in a worse situation by giving the bonds. And this is correct, as far as it goes; but we think the court should have instructed the jury further, that if they believed Joseph Gilkeson paid Samuel Gilkeson \$200 in cash with the knowledge of Snyder and Hutton, and upon the representation of their counsel, made in their presence, that he would be safe in buying Samuel Gilkeson's interest, the defect of Snyder and Hutton's title will constitute no legal bar to a recovery to the amount paid with interest. If a person about to take an assignment of a bond calls on the obligor and informs him of his intention, who acknowledges it is unpaid, and that he has no defence and that he will pay it, he cannot afterwards be permitted to gainsay his own act. He is the cause of the loss, and cannot be allowed to deny his obligation to pay. For the like reason the defendants are estopped to deny their liability. It may be proper to remark that we cannot perceive that there was any lien on the land for this sum. Samuel was the owner of the land and the money both. The ownership of the land is an extinguishment of the lien, unless under very special circumstances.

It is enough to observe that we see no valid objection to the admission of Mr Fallon as a witness.

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

Farmers' and Mechanics' Bank *against* Little.

In foreign attachment against a corporation as defendant, the civil death of the corporation before judgment against it, produced by the decree of forfeiture of its charter by a judicial tribunal, dissolves the attachment.

The garnishee may take advantage of this by pleading it, notwithstanding judgment had been entered against the defendant for default of appearance.

Such decree of a court forfeiting a charter, made before judgment signed in the foreign attachment, appealed from by a devolutive appeal, which had not the effect by the law of the State to suspend proceedings, afterwards reversed by the appellate tribunal because the reasons given by the court below were erroneous, but making a like decree, does not restore the corporation as to intermediate acts done in pursuance of the prior forfeiture, so as to render the judgment by default in foreign attachment valid.

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

The plaintiff below, Jacob Little, a citizen of the State of New

[Farmers' and Mechanics' Bank v. Little.]

York, issued a foreign attachment in the court below on the 23d March 1842, against the Atchafalaya Railroad and Banking Company as defendant (a corporation in New Orleans incorporated by the laws of Louisiana), which was served the same day on the Farmers' and Mechanics' Bank of Philadelphia, as garnishees, who then had funds to the amount of \$11,411.30 in their possession, the property of the defendant in the attachment. According to the practice of the court the plaintiff obtained judgment on the 10th December 1842 against the Atchafalaya Railroad and Banking Co. as defendant in the attachment, and had their damages assessed at \$10,485.19. To March Term 1843 the plaintiff issued a *scire facias* against the Farmers' and Mechanics' Bank as garnishees, who appeared and answered interrogatories and pleaded, and the cause was tried by a jury. The Farmers' and Mechanics' Bank declined paying over to the plaintiff the amount of his debt at the instance of other claimants, who came in and alleged that these funds were not when attached the property of the Atchafalaya Railroad and Banking Company. The first claimant was Thomas P. Stanton, who held a check drawn by the cashier of the Atchafalaya Railroad and Banking Co., on the Farmers' and Mechanics' Bank, in his favour, dated March 8th, 1842, and presented at the bank on the 22d March 1842, but payment was refused until indemnity was obtained. It was, however, contended, and evidence given to show, that Thomas P. Stanton was the mere agent of the Atchafalaya Railroad and Banking Company; and if so, the court instructed the jury it would not defeat the attachment.

But there was another claim on the part of certain commissioners appointed by the State of Louisiana, who alleged that these funds passed to them or were in their charge prior to the 23d March 1842, in trust for certain persons under the laws of that State. It was shown that on the 9th March 1842 the Attorney-General of Louisiana, acting under the 15th section of an Act of Assembly of 7th March 1842, presented a petition to the District Court for the first judicial district of the State of Louisiana, alleging "that in the month of March, A. D. 1835, the Legislature of the State of Louisiana passed a law to incorporate the Atchafalaya Railroad and Banking Company, with a capital of two millions of dollars, divided into shares of one hundred dollars each; that in virtue of said Act of incorporation the said stock was subscribed and the said Company commenced banking operations; that the charter of said corporation was granted on the express and implied condition that said company shall not at any time suspend or refuse payment in lawful money of the United States, of any of its own notes, bills, obligations, or any money received upon deposit by said bank; and that if any such suspension or refusal of payment shall continue for more than ninety days, the said charter shall be

[Farmers' and Mechanics' Bank v. Little.]

pro facto forfeited and void. That the obligation to pay and redeem its notes, obligations and deposits in specie or constitutional currency, is not only expressly imposed by the Act of incorporation of said company, but results likewise from the very nature of every charter granted by the State to a banking institution. Now your petitioner avers that the said Atchafalaya Railroad and Banking Company did, in violation of its charter, on or about the 13th day of May 1837, suspend and refuse payment in lawful money of the United States of its own notes, bills, obligations, and of money received upon deposit by said bank, which suspension and refusal to pay as aforesaid, continued until the 26th day of December 1838: that afterwards, to wit, in March 1839, the Legislature passed an Act to relieve the banks of the State from the forfeiture incurred by them by the suspension of specie payment aforesaid; that by the third section of said law it was made the duty of the banks of the city of New Orleans, and among others of the Atchafalaya Railroad and Banking Company, to settle and pay the balances due by it to any of the other banks of the city of New Orleans every Monday morning, in gold or silver; and to publish on the first Monday of each month, in at least one of the newspapers of the city of New Orleans, a statement showing the gross amount of its circulation, deposits, and the amount of specie in its vaults; that the remission of the forfeiture incurred by the suspension and refusal of specie payment aforesaid was granted by the State on the express condition that said bank should comply with the obligations imposed by the 2d and 3d sections of the law just referred to, and that said bank should not in future suspend and refuse specie payment; that in violation of the obligations thus imposed, and in open violation of its charter, the said Atchafalaya Railroad and Banking Company did not settle and pay the balances due by it to the other banks of the city of New Orleans every Monday morning, in gold or silver, and did not publish, as it was bound to do, a correct and faithful statement on the first Monday of each month, showing the gross amount of its circulation, deposits, and the amount of specie in its vaults, and said Atchafalaya Railroad and Banking Company did, in violation of its charter, on or about the 19th October 1839, a second time suspend and refuse payment in lawful money of the United States, of its own notes, bills, obligations, and money received upon deposit by said bank; which suspension and refusal to pay as aforesaid, continues and is persisted in by said company up to the present time; that the affairs of said Atchafalaya Railroad and Banking Company have been mismanaged so as to reduce said corporation to a state of insolvency; that the aforesaid illegal and tortious acts and doings on the part of said Atchafalaya Railroad and Banking Company constitute a gross abuse of its corporate privileges, and a violation of the conditions and obligations

[*Farmers' and Mechanics' Bank v. Little.*]

imposed by its charter, to the great injury and damage of the good people of this State; that by reason and in consequence of the premises the said Atchafalaya Railroad and Banking Company has forfeited its charter; and your petitioner has a right to have said forfeiture decreed by this honourable court against said corporation; that on account of the insolvent circumstances of said bank, and the mismanagement of its affairs, it is necessary for the protection of the creditors of said corporation that its assets and property should be sequestered and placed in the possession of the Board of Currency, according to the 15th section of an Act entitled "an Act to amend an Act entitled an Act to revive the charters of the several banks located in the city of New Orleans, and for other purposes; approved February 5th, 1842."

Wherefore, your petitioner respectfully prays that the Atchafalaya Railroad and Banking Company may be cited to appear and answer this petition, and show cause, within ten days from the service of this petition, why a decree should not be rendered by this honourable court declaring the charter of said company forfeited, and said corporation extinct; and that after due proceedings had, judgment be rendered against said Atchafalaya Railroad and Banking Company, decreeing its charter forfeited and said corporation extinct: that a writ of sequestration issue, commanding the sheriff to sequester all the property and assets of said company, and to place the said assets and property into the possession of the Board of Currency, in conformity to the provisions of the 15th section of an Act to amend an Act entitled "an Act to revive the charters of the several banks located in the city of New Orleans, and for other purposes," approved February 5th, 1842. And your petitioner prays for all such orders as may be required by the laws providing for the liquidation of banks, the charters of which have been forfeited; and your petitioner prays for all such other and further aid, relief and remedy, as the nature of the case may require and the law will permit, and your petitioner will ever pray, &c.

The court thereupon on the same day made the following

ORDER.

The court being satisfied from the evidence adduced that the interest of the State of Louisiana and of the creditors of the Atchafalaya Railroad and Banking Company requires that all the property and assets of said institution should be sequestered; it is therefore ordered, that a writ of sequestration issue, as prayed for and according to law, commanding the sheriff of the District Court of the first district, to sequester all the property and assets of said company, and to place the said assets and property in the possession of the Board of Currency, according to law.

[Farmers' and Mechanics' Bank v. Little.]

A writ of sequestration immediately issued, and return was made thereon as follows :

FIRST JUDICIAL DISTRICT COURT.

State of Louisiana,	}	The State of Louisiana to the Sheriff of the District Court of the 1st District—Greeting.
v.		
Atchafalaya Railroad and Banking Company.		

You are hereby commanded, in the name of the State of Louisiana, and of the first Judicial District Court of said State, to sequester and deliver over to the board of currency, in conformity with the 15th section of an Act of the Legislature of this State, entitled, an Act to amend an Act entitled "An Act to revive the charters of the several banks located in the city of New Orleans, and for other purposes," approved February 5th, 1842, all the bank, and all the assets and property of the Atchafalaya Railroad and Banking Company, and what you do on the premises, you make return thereof, together with this writ, to our said court, on or before the 4th Monday of April next. Witness the honourable A. M. Buchanan, judge of our said court, this 9th March 1842, &c.

RETURN.

Received 9th March 1842. And on the same day sequestered and took into my possession the bank, and all the assets and property of the Atchafalaya Railroad and Banking Company; and owing to the nature of said assets, it was impossible to make a detailed inventory thereof at the time, and in order to make everything secure and safe, I immediately placed all said assets under seal, in the presence of the board of currency, who at the same time affixed their seal thereon, with the exception, however, of such notes and bills as were near, which were handed over to the Board of Currency, with a detailed list thereof; and when the commissioners were appointed, I attended from day to day, together with the Board of Currency, to the inventory taken by William Christy, Esq., Notary Public, and delivered over from time to time to said Notary, through the said Board of Currency, the whole of said assets, and saw them regularly inventoried. I also assisted at the registry and cancelling of all the notes of the said Atchafalaya Railroad and Banking Company, found in the banking-house, as well as to the destruction of the plates. I annex hereto a schedule of said assets, containing also the amount and denomination of the bank notes cancelled and destroyed. Returned June 18th, 1842.

[Signed]

S. BLOSSMAN, *Deputy Sheriff.*

On the 11th March 1842, the Atchafalaya Railroad and Banking Company filed the following answer to the petition :

[*Farmers' and Mechanics' Bank v. Little.*]

To the Honourable the Judge of the District Court in and for the
First District of the State of Louisiana.

The answer of the Atchafalaya Railroad and Banking Company to the petition of the State of Louisiana, respectfully shows, That without admitting or denying the facts averred in said petition, or the legal consequences charged as resulting therefrom, they say, that by the act of incorporation of said company they were invested with all the rights and powers necessary for the construction, &c., of a certain railroad, described in the 8th section of said act of incorporation, which said section provides, that if the said road shall not be commenced within two years, and shall not be finished in seven years from the passage of said act, then the same shall be null and void. These respondents confess and admit that said railroad has not been completed, and that the period allowed for completing the same has expired since the filing of the said petition. That your respondents finding themselves unable to complete said railroad, have deemed it advisable to elect the alternative provided for by said Act of incorporation, of forfeiting their charter, and do consent that the same be declared null and void, as provided therein. Wherefore they pray that such further proceedings be had in the premises as may be conformable to law.

On the same day, judgment was rendered as follows :

State of Louisiana,	}
vs.	
The Atchafalaya Railroad and Banking Company.	

This cause having been this day submitted to the court, and the court considering the pleadings in the case, and it appearing that the defendants confess their charter to be forfeited by their omission to complete a railroad from the Mississippi river to Opelousas, within the time limited by the said charter; considering further, that the Act of the Legislature, which is intended to prescribe the formalities to be observed for effecting the forced liquidation of banks in this State, has not yet been promulgated in the official Gazette: It is adjudged and decreed that the charter of the Atchafalaya Railroad and Banking Company is forfeited, and that the said corporation be dissolved. And it is further decreed, that the property and assets of the said corporation remain under the administration of the Board of Currency, until the further order of the court, and that the costs of the suit be paid out of such assets.

Judgment rendered 11th March 1842.

Signed by consent, 15th March 1842.

[Signed]

A. M. BUCHANAN, Judge.

[Farmers' and Mechanics' Bank v. Little.]

In March 1842, three commissioners were appointed for the liquidation of the company under the Act of 14th March 1842. No appeal from the judgment of the District Court was entered within 10 days; but on the 1st March 1843, nearly a year after the judgment, an appeal was entered by L. J. Wilson, a creditor of the bank. The appeal was allowed, and bail given. This appeal was a *devolutive* appeal, under the law of Louisiana as distinguished from a *suspensive* appeal, which should have been under stricter forms entered within 10 days after the judgment.

The following proceedings then took place in the Supreme Court of Louisiana upon the appeal.

The State of Louisiana, <i>vs.</i> The Atchafalaya Railroad and Banking Company.	}	No. 5205. Supreme Court of Louisiana.
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Points presented by the appellant, L. J. Wilson.

1. That the time for making the railroad had not expired when the petition was filed.

2. Nothing happening, or to happen thereafter, could be taken into consideration in deciding this case.

3. The President and Directors had no power to admit and confess away the incorporated rights of stockholders; their authority is limited by the Act of incorporation to the custody and management of the funds and effects of the bank.

4. The corporators, each for himself, alone has the power to surrender his chartered privileges; no one can do it for another; it is not a matter to be decided by numbers, either in interest or by numbers.

5. An act of incorporation can only be adjudicated and forfeited on proof.

6. Omitting to perform a duty prescribed by an act of incorporation may form a good reason for restraining the exercise of the banking privileges, and not justify such a dissolution of the incorporation as to cause a change in the form of the whole proceedings for collecting the debts due the bank, and regulating its affairs, otherwise it might become necessary to insert in them all the names of each and every stockholder: for the above reasons, the judgment of forfeiture should be reversed.

State of Louisiana, <i>vs.</i> The Atchafalaya Railroad and Banking Company.	}	No. 5205. Supreme Court of Louisiana.
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The District Court for the First Judicial District decreed, on the 11th March 1842, the forfeiture of the act incorporating the defendants, on the petition of the plaintiffs, filed on the 9th of same month, (but not for any of the reasons set forth in the peti-

[*Farmers' and Mechanics' Bank v. Little.*]

tion, they not having been admitted, or inquired into), the attorney for the board of directors of said institution admitting that the time limited for making a certain railroad would soon expire, (but had not expired at the time the petition was filed), and that the road had not been made, and therefore consented to the forfeiture.

The appellant, one of the corporated parties, or stockholder in the institution, appeals from the aforesaid decree of forfeiture, insisting, that however near its termination was the period limited for the making of the road, it was not competent for the court to anticipate the fact, nor was it competent for the board of directors to confess away the rights of the stockholders, much less their counsel to have done it; the appellant contends that it was not competent for any number of stockholders to have done that; that each stockholder has vested rights which cannot be impaired or surrendered without his consent; such rights are not of a character to be controlled or sacrificed by a majority, either in interest or numbers, nor by both united, except by the observances of the statutes made and provided for that purpose.

The law points out how acts of incorporation for banking purposes may be surrendered by a fixed number of stockholders, and also how the same may be put into forced liquidation; none of the provisions of this law have been acted upon, except by the filing of the petition, which became a dead letter, so far as the judgment appealed from is concerned, as it was not made the basis of the judgment.

The appellant further insists that it was not competent for the court below to take cognizance of anything not averred in the petition. That it avails nothing to say that as the forfeiture would certainly take place at an early day, it would be the same thing to adjudicate it in anticipation, and thereby save the parties the trouble of new proceedings. As well might it be said, that because a man was sick of an incurable disease, which would terminate his life in a few days, it would be better to put him to death to save the trouble of longer nursing him.

The whole principle of our jurisprudence is based on the necessity for regular proceedings before adjudication, and if they be dispensed with in one case, there will not be any known stopping place.

The Legislature were in session, they might have granted further time for making the road, or they might have passed a relief bill; they had that very month passed a bill relieving the bank in question, and all other banks of the State, from the forfeiture which they severally had incurred; among the provisions of the law for the voluntary surrender of the bank charters, is to be found that of notice, and it is made the duty of the directors to convene a meeting of stockholders to deliberate on the question: no such notice was given, no such deliberation had, and the rapidity with

[Farmers' and Mechanics' Bank v. Little.]

which these proceedings were hurried through, forbids the idea that the parties interested knew what was going on.

The Act of incorporation prescribes the duties, and limits the power of the directors; it is to manage the affairs of the institution, not to surrender the charter, or destroy the bank, and it is not pretended that the counsel had any other authority than that derived from the directors, whose duty it was to have surrendered the trust to the stockholders, when they could not longer manage it for their benefit, in place of which they have unlawfully combined with others, to place it in the hands of strangers, who had no interest therein, and who continue to control the concerns of this bank, without allowing the stockholders any voice therein.

The appellant further contends, that none of the laws passed for the liquidation of the banks, authorize the proceedings which have been had in this case, nor was the Legislature competent to deprive the parties interested of all voice in the management of the concern.

Supreme Court of the State of Louisiana. Monday, May 29th 1843. The court met. Present, their honours, F. X. Martin, Henry A. Bullard, A. Morphy, E. Simon and Rice Garland.

The State of Louisiana v. The Atchafalaya Railroad and Banking Company. L. J. Wilson, appellant. No. 5205. Appeal from the First Judicial District Court.

In this cause, the court this day delivered their opinion in writing, in the words and figures following:

One of the stockholders is appellant from a judgment of the District Court, which declares the charter of the Atchafalaya Railroad and Banking Company forfeited, under the following circumstances: On the 9th of March 1842 the Attorney-General presented the State's petition, charging the corporation with having neglected and refused to pay its notes and other obligations in specie, for a period of more than ninety days: with so having mismanaged its affairs and abused its corporate franchises as that it had become insolvent; and, in fine, with having so violated its charter that the same was justly forfeited; and he prays that such forfeiture may be declared by a judgment of the court. Citations were issued and served on the same day, but not returned until the 12th of March. On the 11th the president and directors answered that, without admitting or denying the facts averred in the petition or the legal consequences charged as resulting therefrom, they say that by the Act of incorporation they were invested with the powers necessary for the construction of a railroad, described in the 8th section of the Act, which provides, that if the said road shall not be commenced within two years, and shall not be finished in seven years from the passage of the Act, the same shall be null and void. They confess and admit that said railroad has not been completed, and that the period allowed for completing it

[Farmers and Mechanics' Bank v. Little.]

has expired since the filing of the petition in this case; that the respondents, finding themselves unable to complete said railroad, have deemed it advisable to elect the alternative provided by the Act of incorporation, of forfeiting their charter, and do consent that the same be declared null and void, as provided therein. Upon this remarkable confession, the court pronounced judgment on the same day, declaring the charter forfeited on account of the neglect of president and directors to complete the railroad. The judgment is silent as to any other ground or cause of forfeiture. It was signed on the 15th.

We are of opinion the court erred. The president and directors were incompetent, without the consent of the stockholders, to confess a forfeiture, and thus abandon an act of incorporation, which it was their duty to administer for the interest of the stockholders. They had no authority, by a voluntary act or confession, to surrender the charter of the corporation. This confession is the more remarkable and unjustifiable, as, by an Act of the Legislature, approved on the 5th of February previous, it was provided, that if any bank had constructed and completed any public works or improvements, such bank may retain its corporate powers, and all other privileges conferred by its charter, so far only as the continuance of such powers and privileges may be necessary, to enable it to retain the property in such works and to manage and carry on the same, &c. The 7th section contains a proviso, relating expressly to the railroad in question, to wit: "That nothing in this section shall be construed to release the Atchafalaya Railroad and Banking Company from making the railroad imposed by its charter, *except so far as the State is concerned*, on condition," &c. (Acts of 1842.) By this we understand that the stockholders had still a right to require the road to be constructed, notwithstanding a forfeiture of the banking privileges of the corporation.

It is not unworthy of remark, at the same time, that there was then pending an action by a number of stockholders to compel the board of directors to proceed with the work required by the charter; in answer to which the directors admitted that they had commenced operations and expended considerable sums. This suit is now pending on appeal in this court. The judgment, based upon these unauthorized confessions and admissions, is, in our opinion, erroneous, but the defendants in their answer do not deny the allegations and grounds of forfeiture set forth in the petition. They are to be taken as true, unless denied, and they are clearly sufficient in law to authorize a judgment of forfeiture.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; and proceeding to render such judgment as ought, in our opinion, to have been given below, it is further ordered and decreed, considering the neglect and refusal of the defendants, during more than ninety consecutive days, to pay their obligations in specie, whereby their charter was

[Farmers and Mechanics' Bank v. Little.]

liable to be declared *ipso facto* forfeited, that the same be and is hereby declared to be forfeited. The costs in both courts to be paid by the defendants.

There was a petition to the Supreme Court for a rehearing, which was refused.

The Act to incorporate the Atchafalaya Railroad and Banking Company was passed on the 10th March 1835, the object of which was to make a railroad from a point on the bank of the river Mississippi, in the parish of Point Coupée, to a point at or near the court-house in the parish of St. Landry, and they were invested with banking privileges. By a clause in the 8th section it was provided that if the said railroad shall not be commenced within two years, and shall not be finished in seven years from the passage of this Act, then this Act shall be null and void. By section 22, if any suspension or refusal of payment shall continue for more than ninety days, this charter shall be *ipso facto* forfeited and void.

On the 5th February 1842 an Act was passed to revive the charters of the several banks located in the city of New Orleans, and for other purposes. This provided, among other things, for a Board of Currency with extensive supervisory power over the city banks. On the 7th March 1842 an Act to amend the Act of 5th February 1842 was passed, the 15th section of which is as follows:

"That when the Attorney-General institutes proceedings against any bank or banks, in virtue of the present Act, or the Act to which this is an amendment, and shall deem it necessary to apply for an order or writ of sequestration, or injunction, or other conservative order, the court may grant said orders or writs on the simple petition of the Attorney-General, without requiring any oath or security: *Provided*, the court before which the proceedings are pending shall be fully satisfied that the issuing of said writ is necessary for the protection of the State or the creditors of said bank; and the defendant or defendants in said suit or suits shall not be authorized or have the right to have said orders or writs set aside by giving bond and security, as in ordinary cases; and said orders and writs shall continue and remain in full force until the final decision of the case; and the property sequestered shall be placed in the possession of the Board of Currency, who shall be authorized, until a decree shall have been rendered, to preserve the property sequestered, and to execute all conservative acts in relation thereto; and all civil actions brought by the Attorney-General against any bank, under this Act, or the Act to which this is an amendment, shall be tried without the intervention of a jury, and shall have the preference to be tried before all other cases, both in the first instance and on the appeal."

On the 14th March 1842 an Act was passed to provide for the liquidation of banks. The 7th section provides "That in all cases, when an appeal shall be taken from any decree annulling the

[Farmers and Mechanics' Bank v. Little.]

charter of a corporation, said appeal shall be taken up with the least possible delay, and shall be tried by preference; but said decree shall be provisionally executed, so far as to enable the commissioners to take possession of the property and assets of the bank, and to do and perform all needful and conservatory acts."

The appointment of commissioners is provided for in the 9th section, which is as follows:

"That the commissioners shall be appointed as follows:—In case of forced liquidation, one shall be appointed by the court, one by the governor, and one by the presidents of the banks that are bound to receive the circulation; and in case of voluntary liquidation, one shall be appointed by the governor, one by the stockholders at their meeting to decide of the surrender, and one by the presidents of the banks aforesaid; that whenever banks having branches in the country shall go or be forced into liquidation, the board of directors of such branches in office at the time may represent the said commissioners in matters appertaining to the liquidation of the said branches, so far as may be necessary, but under the control and supervision of said commissioners: *Provided* that the choice of said commissioners, as far as practicable, may be selected among the stockholders of the liquidating bank."

Their powers and authorities are set out in the 12th and 13th sections, as follows:

Section 12. That the commissioners appointed under this Act shall forthwith demand and receive from the board of directors of the bank, or such officer or officers as they may delegate for that purpose, all the property and effects of every description thereunto belonging, and all books, accounts and papers thereunto pertaining; and any officer who shall refuse to deliver up such effects, or books, accounts and papers, or shall wilfully offer any obstruction in the way of said commissioners, with a view to prevent them from taking possession thereof, or shall wilfully retain or conceal any such property, effects, books, accounts or papers, shall be imprisoned by order of court until he delivers up the same, or until he shall cease to offer such obstruction; and in case of fraudulent embezzlement or destruction of any such effects, books, accounts or papers, said officer or officers shall, on conviction of such offence, be imprisoned for a term not less than three months nor more than twelve months.

Section 13. That at the time the commissioners shall take possession of the property and effects of a bank, it shall be their duty to cause an exact inventory of such property and effects to be made by a notary public, in the presence of the officers of said bank, delivering up the same. It shall also be the duty of the said notary, at the time of making the inventory of the property and effects of a bank, immediately and on the spot to cancel and destroy, under the inspection of the commissioners and of the Board of Currency, all the notes of such banks, which may be on hand at

[Farmers' and Mechanics' Bank v. Little.]

the time, even those not yet completed, if such there be, and this in the presence of two witnesses and of the officer and officers of the bank, if any be present, of all which mention shall be made in the inventory.

Several questions were discussed in the court below, in which the court charged as to the effect of the different decrees and the right acquired by the commissioners to these funds in Pennsylvania by virtue of the proceedings in Louisiana : but the court held that the claim attached did not pass to the commissioners because it had not been delivered over to them, nor was in their possession prior to the attachment, nor had previous notice of the transfer been given to the Farmers' and Mechanics' Bank : and under these circumstances the courts of Louisiana would not hold that these proceedings passed the property so as to defeat an attaching creditor, nor would the courts here. They also charged that the forfeiture of the charter would not, under the actual circumstances, operate such an extinction of the Atchafalaya Railroad and Banking Company as to defeat the attachment levied in Philadelphia.

Law and Williams, for the plaintiff in error.
H. D. Gilpin, contra.

The opinion of the Court was delivered by

GIBSON, C. J.—It is said the garnishee of a debt may plead anything against the plaintiff in the *scire facias* that he could plead against his own original creditor, except that the debt is not presently demandable; and even that may be pleaded by him in stay of execution. In no other respect does the attaching creditor stand on other ground than that of the creditor for whom he has been substituted by the attachment as a statute assignment or execution. The judgment in the attachment suit establishes no more than the existence of the debt claimed by the attaching creditor from his immediate debtor; and the garnishee may therefore plead either that he owes nothing to any one, or that the ownership of the debt demanded from him had passed from his immediate creditor by assignment when the attachment was laid, or that the attachment had been dissolved by his death before final judgment. In *Walker v. Gibbs*, (2 Dall. 211), he was allowed to plead a prior assignment; and he may for the same reason plead a prior attachment. (*Serg. on Attach.* 101, *Priv. Lond.* 254). It never has been doubted that the defendant's death before final judgment dissolves an attachment; and it was said by Mr Lewis *arguendo* without contradiction, in *Ludlow v. Bingham*, (4 Dall. 60), that the effect is not prevented by an interlocutory judgment, because there are no longer the proper parties. Indeed Mr Dallas expressed a doubt in a note appended to his report of the case, whether death is not a dissolution of the suit even after final judgment; which was not resolved till the point came up in *Fiich v.*

[Farmers' and Mechanics' Bank v. Little.]

Ross, (4 *Serg. & Rawle* 557), when it was held that it was not as the defendant's representatives may come in and disprove the debt. Now as the garnishee can pay safely only on compulsion, he is bound to contest every inch of the ground; and that he is competent, as a stranger, to take collateral advantage of irregularities in signing judgment in the attachment suit, was ruled in *Pancake v. Harris*, (10 *Serg. & Rawle* 109). But the primary intent being to procure an appearance, a foreign attachment is dissolved the instant the defendant has appeared or lost his capacity to appear, because the law exacts not impossibilities; and this shows that the attaching creditor gains no property in the thing by laying the attachment. It is security for the defendant's appearance merely; and it is released as soon as the condition has been performed or become impossible. It results that the important, perhaps the only necessary question, is whether the attachment was dissolved before final judgment in it, by the civil death of the defendant; for if the Atchafalaya Railroad and Banking Company stood dissolved by judgment of forfeiture in the court of first instance, the judgment by default in the attachment suit was erroneous; and the agreement filed in the *scire facias* suit is broad enough to let it in without pleading it as matter of defence.

Judgment in the attachment suit here was signed on the 10th December 1842; and the petition for judgment of forfeiture had been filed in the court of first instance at New Orleans, the 9th March in the same year. A citation and writ of sequestration instantly followed; and the corporation put in its answer the next day, confessing the forfeiture of its charter for failure to complete its railroad in the time limited by the act of incorporation; whereupon the court instantly adjudged that the charter be forfeited for the fact confessed; that the corporation be dissolved; and that its property be put under the administration of the Board of Currency. This judgment was pronounced ten months before judgment of default was signed in the attachment suit, and it remained intact, not only till then, but till nearly three months afterwards. On the 1st March 1843, a creditor of the corporation was allowed to appeal from it on an allegation of error, and on giving the requisite bail. By the laws of that State, it seems, a suspensive appeal which prevents the judgment from going into effect, must be taken within the space of ten days; a devolutive appeal which has no suspensive effect, may be taken at any time within a year. The judgment of the court of first instance had been pronounced on the tenth of March 1842; so that there was barely time for a devolutive appeal. It is seen therefore that when judgment was signed in the attachment suit, the defendant was defunct by the sentence of a court of competent jurisdiction, not only unsuspended, but actually unappealed from at the time; its charter was annulled; its corporate existence extinguished; and what remains is to inquire whether these were subsequently restored, and the cor-

Farmers' and Mechanics' Bank v. Little.]

poration's intermediate existence judicially established as if there had been no forfeiture, by the subsequent action of the Supreme Court.

The judgment of forfeiture was reversed for no vice in itself, but for a mental abstraction of the judge; and a common law student would be disposed to ask, why reverse because the judge thought wrong if he acted right; or for an abstract error which did no harm? or why sweep away the sequestration with the intermediate acts of the Board of Currency and its successors by unravelling the web to take up a dropt stitch which did not injure the texture? He might doubt, too, whether the simultaneous repetition of the same judgment, though based on a different abstraction, were not a substantive affirmance which left the original judgment, the writ of sequestration, and all things done by virtue of it, exactly as it found them. However that may be, it is certain the judgment of forfeiture and corporate extinction, was in force when the corporation was defaulted for want of appearance in the attachment suit; and what was the effect of its reversal on the proceeding here?

That question is determinable by the law of the forum, not of the place. The law of Louisiana might possibly restore the dead to life there, but not elsewhere; and though the reversal of a judgment of dissolution may cure the want of an intermediate capacity to sue and be sued in the courts of that State, it cannot cure the want of such a capacity in the courts here. What then is the effect of such a reversal at the common law?

The rule laid down in *Drury's Case*, (8 Rep. 142 b), is that collateral things executory stand as if the reversed judgment had never been in force; but that collateral things executed are not divested. It was consequently held that the reversal of a judgment against a debtor in execution, is no reversal of a judgment against the sheriff or gaoler for his escape. In *Appesley v. Ive*, (Cro. Jac. 645), it was held that the reversal of judgment against a principal is no reversal of judgment against his bail. The principle has been established by many decisions; and it leads to the inevitable conclusion that the reversal of the judgment which had dissolved the foreign attachment by dissolving the existence of the defendant, did not restore it to the case of an action pending by relation to the time when the defendant in the attachment was defaulted. or make the judgment against him the less a judgment against a party defunct. The attachment therefore was as effectively dissolved, at the time, by the extinction of the defendant's corporate existence, as if its civil death had been suggested on the record, for there was no party in court to suggest it, and the plaintiff himself proceeded on that ground when he signed judgment for default. The attachment was therefore at an end, and the plaintiff's hold on the property gone. This view of the case relieves us from considering how far it was vested in the Board

[Farmers' and Mechanics' Bank v. Little.]

of Currency, or its successors, the commissioners, by the proceedings in Louisiana; or how far it was privileged from attachment as being in the lap of the law. If the attachment were legal in the first instance, it ceased to be so at the termination of the defendant's civil existence; and this is all that is necessary for the decision of the cause before us.

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

Bowes *against* Seeger.

Mortgagee assigns his mortgage and accompanying bond and warrant to two trustees in trust for the use of his daughter and her children. Payment by the debtor to one of these trustees discharges the debt.

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

Scire facias on a mortgage, in which Frederick Seeger and Franklin Comly, trustees of Louisa Maria Sommer, were plaintiffs, and John Bowes defendant, and a verdict and judgment were rendered for the plaintiffs. The facts, so far as material, were these:

On the 2d April 1832, John Bowes, the defendant, mortgaged a lot in Green street to Christian Bethausen as security for the payment of \$1400 with interest in one year. On the 23d August 1832, Bethausen and wife, by indenture between himself of the one part, and Frederick Seeger and J. S. Clark of the other, assigned to Seeger and Clark several lots and pieces of ground in Lower Dublin township, Philadelphia county, which had formerly been conveyed to him, and also the above-mentioned indenture of mortgage and the premises conveyed by it and the bond and warrant to secure which it was given, stating it to be filed of record in the office of the Prothonotary of Philadelphia county, to hold to them and the survivor of them and the heirs &c. of such survivor, in trust to let the real estate and keep invested the mortgage money and pay over the income to the separate use of his daughter Louisa Maria Sommer for life, and afterwards of her children, on failure of whom in trust for the right heirs of Christian Bethausen—a portion of the rents &c. necessary, to be applied to the maintenance of his wife Mary Bethausen for life in case of demand. By an indorsement dated 23d August 1832, C. Bethausen also assigned the mortgage to Seeger and Clark. The interest was paid to Clark up to 3d April 1834. The defendant offered to show that on the 11th April 1834, Bowes paid Clark \$450 on account, and took his receipt for it. The plaintiffs objected to this

[Bowes v. Seeger.]

evidence, and the court rejected it. It was in relation to this payment the question arose.

The plaintiffs also proved Seeger's declaring his knowledge that he was trustee with Clark; that Seeger and Clark, on the 1st April 1834, leased some of the lots conveyed by the trust deed to a tenant on rent for two years; that Mrs Bethausen was dead, and that Clark was dismissed from the trust by order of court in September 1841, and Franklin Comly appointed in his place.

Various bills of exception were taken by the defendant on the trial, but the only one argued and decided here was as to the payment of the \$450 to Clark.

Brooke, for the plaintiff in error, contended that the payment to Clark was good, and was a valid discharge for the \$450. He cited 3 *T. R.* 592; 3 *Dane's Ab.* 467; 4 *Watts & Serg.* 13; *Lewin on Trusts* 21; 1 *Anst.* 86; 2 *Kent's Com.* 614; 1 *Story's Eq.* 375; 4 *Wend.* 465.

Newcomb, contra, insisted that the payment to one of the trustees was no discharge; that both should have joined in the receipt to render it valid. *Jer. Eq.* 159; 1 *P. Wms.* 81, 242; 1 *Barn. & Ald.* 566; 2 *Vern.* 515; *Lewin on Trusts* 265, 271; 11 *Vez.* 324; 4 *Vez.* 97; 19 *Vez.* 693; 3 *Atk.* 695.

PER CURIAM.—Only one of the exceptions has been pressed, but it is a fatal one. Between the mortgagor and the mortgagee, the money was not a trust fund. It was an ordinary debt for the price of the property, on which the mortgage stood as a security; and what mattered it to the mortgagor that the mortgagee assigned the mortgage in trust for a stranger? He could not change the nature of the original relation, or increase his debtor's responsibility and risk on the score of mispayment. A purchaser from trustees, knowing that he must see to the application of the purchase money, knows what he has to encounter when he makes his bargain, and he takes the responsibility accordingly. But he incurs no responsibility of which he was not apprized; for where the sale is a breach of trust, he is not affected by it if he knew not of it. There was no trust in existence when this mortgage was executed, and the assignment did no more than substitute joint creditors for a single one. It is very clear, then, that payment to a joint creditor, of which his receipt is evidence, discharges the debt.

Judgment reversed, and *venire de novo* awarded.

Yerkes's Appeal.

An award of money to a lien creditor who has no lien, cannot be questioned in a collateral proceeding depending in the same court.

G. purchased lot No. 1 on the 14th December 1835. On the 24th March 1836 B. obtained judgment against G., which was revived on the 18th May 1840. On the 21st March 1838 G. purchased lot No. 2. Y. obtained judgment against G. on the 3d December 1838. On a sheriff's sale in 1842 of No. 2, the proceeds were decreed to B.'s judgment. No. 1 was afterwards sold by the sheriff. *Held* that the equitable right of substitution did not apply so as to give Y. the amount of his judgment out of the proceeds of No. 1.

APPEAL by Edwin Yerkes from the decision of the Common Pleas of *Bucks* county. This was a case stated as follows:

James Burson, to the use of Evelina Burson, v. James Gordon, Giles Gordon, and Stephen Gordon. Vend. ex. to April Term 1843. Rule to show cause why Edwin Yerkes shall not take out of the sheriff's hands the amount of his judgment.

The property of James Gordon, one of the above defendants, sold by the sheriff on the above execution, was purchased by him the 14th December 1835. The date of the judgment on which the above execution issued is March 24th 1836, revived May 18th 1840, and is the first judgment entered after the purchase of said land. On the 21st March 1838, James Gordon purchased another property called the Thompson property. On this property there were a mortgage and several judgments, which were paid by the sheriff according to priority. After the payment of these judgments there was a balance in the sheriff's hands of \$830.33. The judgment of Edwin Yerkes was entered on the 3d December 1838, and was prior to Burson's judgment on the Thompson property. The last-mentioned property was sold on William Dilworth's execution. A rule was entered in the above case of Dilworth's execution, to show cause why James Burson should not take out of the sheriff's hands the above sum of \$830.33. The 12th August 1842, the court ordered and directed that the sum of \$830.33 be credited on the execution as having been paid on the 20th November 1841 to James Burson. The sheriff had paid, on the 20th November 1841, the above sum of \$830.33, supposing Burson's judgment to have priority. The judgment on which the first above execution issued was assigned by James Burson to Evelina Burson, the 18th of August 1842, at which time James Burson became and still is insolvent. On hearing the rule taken by Burson in Dilworth's execution, Mr M'Dowell was counsel for both Edwin Yerkes and James Burson, and believed at the time that Burson's judgment, being the first entered, was entitled to the money (\$830.33), and it was so supposed and believed by all the counsel and the court.

[Yerkes's Appeal.]

The question now submitted to the court is, whether Edwin Yerkes shall be permitted to be substituted in the place of the plaintiff in the first execution named, viz., James Burson to the use of Evelina Burson, and to take out of the proceeds of the sale on that execution, a sum sufficient to cover the amount received by Burson on the execution issued by Dilworth v. Gordon, viz., \$830.33. All records and papers touching the execution to be considered as in evidence. The case stated to be in the nature of a special verdict, either party to have a right to a writ of error or appeal, without affidavit or bail.

On argument of the case stated, the court discharged the rule. From this decision Yerkes appealed.

Wright for the appellant.

Dubois, contra.

The opinion of the Court was delivered by

GIBSON, C. J. — Whatever the truth, we must take it as a conclusion of law, that the surplus money made on Dilworth's execution by the sale of the Thompson property was legally applied to Burson's judgment, though, as regards that property, it was posterior in lien to the judgment of Yerkes, the present applicant, which was by some unaccountable oversight postponed. In *Gratz v. The Lancaster Bank* (17 Serg. & R. 278), an award of money to one as a lien creditor who had no lien at all, was held conclusive as an adjudication in another court; nor can it, for the same reason, be questioned in a collateral proceeding depending in the same court. Now, though the money made on Dilworth's execution was certainly misapplied in awarding it to Burson's judgment which was prior to that of Yerkes only so far as regards the property whose proceeds are now in contest, the misapplication was sanctioned by a decree which precludes us from compensating the error by an erroneous decree on the other side. The appellant's case is undoubtedly an unfortunate one; but the hardship of it is attributable to his own supineness. Had he asserted his right at the proper time, the money would have been awarded to him; but as it was actually awarded to another by common consent, founded in common mistake, we are bound to say that, in contemplation of law, the award was right. In *Gratz v. The Lancaster Bank* we knew the application of the money to have been wrong, without presuming to question its propriety; and though we know the award of the money to Burson's judgment to have been equally so, we are concluded by it in this collateral proceeding. Were we indeed to form an opinion on the basis of the dates assumed in the case stated, we might doubt even whether the appropriation were not proper; for it is stated that the Thompson property was purchased before Yerkes had obtained his judgment; and it does not appear to have been revived before the revival of Burson's

[Yerkes's Appeal.]

judgment against Gordon, the owner of each piece of property, and the common debtor. But as it is an admitted part of the case that the judgment of Yerkes was prior in lien to Burson's judgment as regards the Thompson property, though posterior to it as regards the property on which Burson subsequently levied his execution, we must take the fact to be so; and consequently that there is an error in the dates as they stand on our paper-books. In any event, we dare not draw into question the legality of the appropriation on Dilworth's execution, which vested in Burson such a legal right as the merely benevolent doctrine of substitution has never been allowed to disturb.

Decree affirmed.

Clark against Everly.

The Act of 3d April 1830, does not apply to the case of a landlord and tenant, where the tenant refuses to pay rent under a claim of right to the reversion, which, being a denial of the landlord's title, gives him an immediate right of entry and action at the common law.

ERROR to the Common Pleas of the county of *Philadelphia*.

This was an appeal from the judgment of two justices in a proceeding to obtain possession of premises in Fifth between Pine and Lombard streets in the city of Philadelphia, instituted by Lewis Clark against Miller N. Everly. A verdict and judgment were rendered in favour of the defendant. The facts of the case and points of law involved appear in the following charge of the court below, delivered by Judge PARSONS.

This is a proceeding which was instituted before two magistrates under the Act of April 1830, to dispossess an alleged tenant from premises said to be leased, upon the ground that the rent has not been paid nor sufficient goods upon the premises when the rent became due to pay it.

It would seem from the evidence, that in the year 1826, these premises were leased from the late Judge Morton by the defendant and one Bussier, at an alleged rent of \$100 per annum; at what time in the year is not very certain, nor is there any evidence of payment of rent to Judge Morton, but of one quarter. It appears by the admission of counsel, that Judge Morton died in 1828; that he left but one daughter, and she an only child, who was married to Clark, the plaintiff; that she died about the year 1832, leaving issue by her marriage with Clark. It does not appear by any evidence that Clark ever demanded rent from the defendant until the 21st October 1841, when a notice was served, on which this

[Clark v. Everly.]

proceeding was predicated, without specifying what rent he claimed, when it accrued, whether before or after the death of Judge Morton, or in what capacity except that of lessee. It also appears that the title to these premises is disputed by the defendant; that he alleges Judge Morton made a will by which he devised these premises to the mother of the defendant and to him, and that the plaintiff destroyed that will, and its validity and the title to these premises are about to be tested by a trial before the United States District Court for the Eastern District of Pennsylvania; and that for the last ten years or more the parties have been in controversy about this property. On this brief outline of the facts and others which will be found in reference to the testimony in the case, a number of interesting questions of law are presented for our decision.

Most, if not all, are raised by the various points that have been submitted to us by the defendant, on which he asks instruction to the jury. The first is this:

1. That the plaintiff was not the lessor of the defendant, and the heir of the lessor cannot avail himself of this remedy.

When this position was first assumed, I was inclined to think it correct, owing to the peculiar phraseology of the Act of 1830, which only provides that the "lessor" may commence these proceedings; but on reflection, I am inclined to think such is not the law, and therefore answer it in the negative; for although true it is, the Act only gives the remedy to the lessor, and does not mention the heir or assignee of the term, still from analogy to the law in relation to lessor and lessee or landlord and tenant, I think it has reference to a *legal lessor*, one who is created by operation of law, as well as to him who assigns the lease.

In every leasing there is a *reversionary* interest either expressed or implied. When the lessor in fact dies, the rent which accrues after his decease goes to the heir at law; and when the term expires, the right to repossess the property is vested in the heir. He may recover under the common law remedy by an action of ejectment, or can proceed under the provisions of the Act of 1772, by an application to two justices, and regain the possession. If then the heir is entitled to rent and to the reversionary interest, or the possession of the property, why should he not have all the means for enforcing those claims which his ancestor had? His proceeding is only a means, as I shall hereafter show, of collecting the rent or of regaining the possession in default of payment. It will not be pretended he could not maintain an action of debt or covenant for the rent, or issue his warrant of distress; and upon what principle is he authorized to assert those rights? Purely because the relation of landlord and tenant exists, or to use the language of this Act, that of lessor and lessee. Now if this relationship is created by the death of the ancestor, the lessor, and all his rights descend to the heir, most assuredly he is clothed with all the

[Clark v. Everly.]

authority which belonged to the ancestor, and consequently he may use all the remedies for enforcing those rights given by the law, which the original lessor had. The right and the remedy must attend each other.

2. That the lessor must accompany his notice to quit with a demand for the amount of rent claimed, when given to the lessee.

I think this is a fair construction of the Act of 1830. This right given to the lessor to give a notice and then commence these proceedings is only another means of enforcing the payment of the rent, and that too in a way quite more summary than by the warrant of distress, and no principle is better settled than that a distress warrant must set forth a sum certain which is due for the rent, in order that the bailiff may know what amount of goods to distrain and to inform the tenant what sum of money he must tender, in order to relieve his property from the seizure, and all the forms prescribed by the Act of 1772 are based upon the supposition that a sum certain is demanded in the warrant to the bailiff. If then this is only a means used to compel the payment of rent, should not the tenant be apprized of the sum claimed?

The latter part of the Act also provides that on the payment of the amount due, at any time before he is dispossessed, he shall be entitled to retain the possession, clearly showing that the amount of rent due is all that the lessor can demand. Now a tenant may be willing to pay all which is due, and may suppose he has paid all which has accrued, and if informed of any default would instantly discharge that sum. But if the landlord has only to give a notice to quit, he compels the lessee to become a party to a lawsuit against his will, no matter how desirous he may be to pay the rent;—and the propriety of giving this construction to the Act could not be more strongly exemplified than in this case.

Judge Morton, the lessor, died in 1828. No demand for rent is made till 1841, a period of thirteen years. A notice is then given that the rent is not paid, and unless paid within thirty days, the tenant must surrender up possession, without stating whether the plaintiff claimed the rent which accrued before or after the death of Judge Morton, without informing him for what years the rent was in arrears, or stating any specific sum demanded. Such, I think, the Legislature never intended should be the law.

3. The lessor must prove that he proceeded regularly in all respects under the Act of 1830, down to the time of appeal. This is the law, and the court answer it in the affirmative.

4. The lessor must prove there was not sufficient goods on the premises to pay the rent, and if there were two or more premises included in the lease, he must prove there was not sufficient on either of them. This point the court answer in the affirmative, it is a question for the jury to decide.

5. That the notice to quit must be served upon the individual residing on the premises.

[Clark v. Everly.]

The court decide that this is the law. It appears that for four years past Everly has rented the premises in dispute to one Sweeny, who has paid rent to him; that the present defendant did not reside upon any part of them, and the notice to quit was given to and served upon Everly, who resided in another house a number of squares off, and that this notice was given to him, and no notice was ever given to Sweeny. Such is the evidence, and is an undisputed state of the facts in the cause; hence we instruct the jury that this is fatal to the plaintiff's right to recover. He was bound to serve the notice of the non-payment of rent upon the tenant in the actual possession at the time, in order to deprive him of his estate. If he was a sub-lessee, he cannot be turned out of his possession without notice, for he may be willing to pay the rent demanded rather than to be turned with his family into the street. From analogy to all judicial proceeding for the recovery of the possession of real estate, the tenant in possession must be served with process, or he is not affected by the judgment of the tribunal that is to deprive him of his possession. Sweeny was called by the plaintiff as a witness, and he testifies that he was in possession in 1841, and is at this time, and he was never notified to quit. The agent of the plaintiff says he gave him no notice; how then can this court render a judgment that deprives this man of his house, by process of execution, without letting him have his day in court, giving him an opportunity to be heard? He has the actual possession, the *possessio pedis*, and he is to be deeply affected by the process of the court; and if so, he is entitled to be heard and have notice when we will hear him. No notice having been given him, I think the plaintiff cannot recover.

6. That it being proved that the title comes in question between the parties by the claim of a devise since the execution of the lease, the justices had no jurisdiction, and this court has only the same jurisdiction of the matter as the justices. No principle is better settled than that want of jurisdiction can be taken advantage of at any stage of the proceedings in a common law court, and it is equally clear that justices of the peace have no jurisdiction when the title to real estate is to be tried. So far has our Supreme Court gone, that they have decided that a magistrate's jurisdiction is taken away when the title to land may come in question. Now, while it is cheerfully admitted that the tenant cannot dispute the title of the landlord, his original lessor, unless there is a fraud or mistake in procuring the lease, still I think that principle cannot operate in a case like the present. Here the heir at law of the original lessor claims the possession, and the defendant claims to hold the possession of the property by virtue of a devise from the ancestor, and such is the evidence before us. Now it is clear that the justices could not try the validity of that will, or the fact whether such a devise was made or not; of course this court cannot try it on an appeal. The present defendant does not dispute the

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[*Clark v. Everly.*]

original title of the person from whom he leased; but he alleges to claim by a legal title devised from him in opposition to the heir at law. If the defendant had come into court and offered to show that Judge Morton had executed to him a deed for this property after the lease and before his death, and the plaintiff had replied or alleged that the deed was a forgery, I think it would hardly be contended the magistrates would have tried the question of its validity; and most undoubtedly this court would feel bound to decide that they had no jurisdiction, and direct a verdict in favour of the defendant, unless the plaintiff chose to discontinue his proceedings. Upon the same principle we feel compelled to decide now; we cannot, in this form of action, decide upon the validity of the alleged will, and therefore instruct the jury that on this ground the plaintiff cannot recover.

7. That the complaint originally made before the justices must state the amount due upon oath or affirmation of the lessor.

If we are right in our answer to the second point proposed by the defendant, this necessarily follows as the basis of the plaintiff's proceedings before the justices; and we answer it as that has been already answered. On the whole evidence in the cause, for the reasons above given, the court feel compelled to instruct the jury that the plaintiff cannot recover, and therefore their verdict ought to be given in favour of the defendant.

The plaintiff excepted to the charge.

Markland, for the plaintiff in error.

Phillips, contra.

The opinion of the Court was delivered by

GIBSON, C. J. — As a landlord could not, at common law, annul his tenant's lease for non-payment of rent or want of property on the premises to answer a distress, the tenant could retain the possession against him, though it were certain that not a shilling would eventually be recovered. The landlord had no choice but to await the expiration of the term, and repose, in the mean time, on his common-law remedies of distress and action, so far as they should avail him; for such was the basis of the lease. Like every other contract, it could be dissolved only by the concurrent assent of the parties which had constituted it. A lease, therefore, was not determinable by the act of only one of them; for even forfeiture, of which non-payment of rent, however, was not a cause, required an entry by the landlord to revest the possession. On the same principle was a lease determinable by surrender, express or implied. In *Savage v. Dent*, (2 *Stra.* 1064), it seems to have been considered that abandonment of the premises is an implied surrender; yet an ejectment founded on a lease sealed after entry on the vacant premises was deemed necessary to change the relation of landlord and tenant. Perhaps we went further in *M'Kin-*

[Clark v. Everly.]

Key v. Reader, (7 Watts 123), by considering flight, combined with a fraudulent removal of the tenant's family and effects, to be an implied surrender which authorized the landlord to enter, and gave him a ground of defence against the tenant's action of trespass. Still the provisions of the common law were found to be inadequate to the landlord's security in all cases; and the 11 G. 2, c. 19, as well as the 57 G. 3, c. 25, was enacted to give him at least a more efficacious remedy for desertion without leaving enough for the rent. These statutes were not extended to Pennsylvania; and it was not till 1830 that provision was made by our own Legislature. In that year was enacted the statute on which the proceeding before us is founded, and by which it was declared that neglect or refusal to pay the rent for premises destitute of chattels to answer a distress shall authorize the landlord to give notice to quit at the end of fifteen days; and on the tenant's refusal to pay or quit, to recover the premises by a summary proceeding before two justices or aldermen. Why was this remedy given? Because, for the hopeless continuance of an insolvent tenancy, the landlord would else have had no remedy at all. The grievance was not an abandonment of the lease, but a neglect or inability to make satisfaction. For abandonment, as appears in *Savage v. Dent*, he had remedy by entry and ejectment, and with us, perhaps, by entry alone; but for the tenant's insolvency there was no remedy whatever. Why, then, should the provisions of our statute be extended to a refusal to pay under a claim of right to the reversion, which, being a denial of the landlord's title, gives him an immediate right of entry and action at the common law? The statute remedy is founded on a continuance of the tenure till the moment of notice to quit, which is required not only to warn the tenant, but to dissolve the tenancy; but a previous repudiation of the lease, which equally puts an end to it, renders notice unnecessary, and gives the landlord a right to recover at the common law, unless the tenant disprove the lease. When that is done, a conflict of adverse paramount title arises, which the Legislature has never confided to the determination of a summary tribunal. A proceeding under the Landlord and Tenant Act of 1772 may be arrested by an allegation of title derived from the lessor to a third person; and the Act of 1836, which gives a similar remedy to purchasers at sheriff's sale, contains an analogous provision. On the same principle of incompetency to decide, justices are forbidden to hold jurisdiction of title to land brought collaterally into contest, in an action of trespass, trover, or debt. Now it appeared in the case before us that Judge Morton, the lessor whose title the plaintiff claims, died in 1828, leaving a daughter, his only child, who intermarried with the plaintiff, and died in 1832, leaving issue; and that the defendant, Everly, was not required to pay till 1841, when, rent being demanded of him, and payment refused on the ground of the plaintiff's supposed want of title, this pro

[Clark v. Everly.]

ceeding was instituted. And what was the cause of the procrastination? It was because the plaintiff's title had been denied by the defendant, who claimed the premises under a devise in Judge Morton's will, which, he alleged, was destroyed by the plaintiff and his wife. Now the statute gives an appeal in this proceeding, not for the trial of a collateral fact started by the defendant, as under the Act of 1772 or the Act of 1836, but for trial of the facts which have been passed on by the justices, who are incompetent to pass on the title to land. But, though adverse title cannot be set up in the Common Pleas as a defence on the merits, an assertion of it previous to the commencement of the proceeding may be set up as an insuperable objection to the jurisdiction; and where the fact of assertion is sustained by evidence, it is fatal to the proceeding, without regard to the validity of the title. I mean by this, that where the tenant has denied the landlord's title, he has waived his defence on the lease, and given a common-law action against himself, which it was not the design of the Legislature to supplant. By challenging the plaintiff's right to the reversion the defendant tendered an issue on the title which the plaintiff could not decline, in order to obtain the possession, without meeting the defendant before a jury on his own ground. It may be thought that, to make out a *prima facie* case, the plaintiff was bound to show no more than that he is the owner of the lease but to do that involved a question of contested title to the reversion, which the aldermen were incompetent to decide. As there was no jurisdiction, the other points made at the trial were not legitimately raised, and it would be improper to consider them.

Judgment affirmed.

Lehigh Company *against* Field.

Agreement between a Coal and Navigation Company and an individual for the purchase of a boat by the latter of the former, on terms expressed in the company's printed regulations, one condition of which was, that the company will furnish its carriers with boats for cash at cost or on credit with interest, but that the ownership shall remain with the company till all the instalments of the price be paid, with a clause providing for a bill of sale at the close. The company was to pay the tolls, and the contractor to take freight from no other quarter. The boat retained its place in the company's register, having its number painted in letters and figures on its stern, not distinguishable from the other boats of the company. *Held*, the boatman was merely the servant of the company till the boat was paid for, and that the delivery of possession of it during this agreement to the boatman did not make the boat his so as to be levied on by his creditors.

ERROR to the Common Pleas of Bucks county.

This was an action of trover for two canal boats, No. 228 and No. 145, Mauch Chunk register, which the defendants, William

[*Lehigh Company v. Field.*]

Field, Alexander C. Brittain, Samuel B. Brittain, and Cornelius Sellers, had seized as the property of John Callahan, by virtue of a writ of foreign attachment against Callahan in favour of A. S. Brittain & Co., and had sold in December 1836, under an order of sale granted by the court, notwithstanding notice given by the plaintiff.

These boats were built by the Lehigh Coal and Navigation Company, and delivered to Callahan in pursuance of a printed contract, such as was usual with them in the year 1833, and which was afterwards renewed. Callahan retained the possession of the boats in 1833 and 1834. On the boat No. 145 he had a credit on the books of the company on freight carried, for \$156.10, and on No. 228 a credit in 1834 of \$142.80. In June 1836 the superintendent, Abbott, declared the contracts abandoned by Callahan. The register was produced, and showed the boats entered and registered, when contracted for, with whom contracted, and price and sums retained.

The form of the printed contract signed by Callahan and the superintendent was as follows, viz. :

This agreement, made the 13th day of the ninth month 1833, between John Callahan, contractor on the one part, and Abiel Abbott, superintendent on behalf of the Lehigh Coal and Navigation Company on the other part, witnesseth :

1. That the said contractor hereby agrees to purchase from the said company, on the terms mentioned in the third regulation of the said company's printed regulations for boating coal, hereunto annexed, one scow boat, number 228, Mauch Chunk Register.

2. That the said contractor will begin to boat coal for said company, under and subject to the above-mentioned printed regulations for boating coal, from Mauch Chunk to Philadelphia and intermediate places, as directed by said company, the ensuing season, as soon as practicable after being notified to do so by said company, and find boat, boat equipage, horses, hands, provisions, tow-lines, and all things necessary for boating, at the following prices, viz. :

From Mauch Chunk to Philadelphia, one dollar twelve cents per ton.

From Mauch Chunk to Bristol, one dollar per ton.

“ ditto “ any intermediate place, in addition to eight cents per ton for unloading, one cent per ton per mile.

3. The said contractor will continue as steady and regular as practicable in boating coal throughout the season, and will not take such back freight as will cause interruptions in the regular trips. And if, in the opinion of the said superintendent, the master of said boat should wilfully neglect or unreasonably delay the navigation of said boat, the said superintendent shall have power to determine that this contract has been abandoned, and such determination shall exonerate the company from every obligation

[Lehigh Company v. Field.]

imposed on them by this contract, and they may immediately proceed to dispose of said boat in the same manner as if this contract had never been made.

4. The said superintendent, on behalf of the said company, agrees to sell the said contractor said scow boat, on the terms herein above mentioned, for the sum of \$287.50, and to pay the said contractor for all coal boated by him, at the rates mentioned in this agreement, and in the manner mentioned in the second regulation of the company's printed regulations for boating coal, hereunto annexed.

In witness whereof, the said parties have hereunto set their hands and seals, at Mauch Chunk.

his
JOHN X CALLAHAN, [L. s.
mark.

ABIEL ABBOTT, [L. s.]
Superintendent.

Witness, N. HOYT.

The following was endorsed on the above, and executed by the same parties :

It is expressly agreed that no transfer of this contract shall be allowed, without the consent of the company, and that no sale of the boat, by process against the contractor, shall authorize the purchaser to hold or keep possession of the boat, or give him or them any interest therein or title thereto. Mauch Chunk, 13th day of 9th month 1833.

his
JOHN X CALLAHAN, [L. s.]
mark.

ABIEL ABBOTT, [L. s.]

Witness, N. HOYT.

The following printed regulations accompanied and were attached to the said agreements, at the time of their execution :

Regulations for boating Coal.

Persons who contract with the Lehigh Coal and Navigation Company for boating coal will be subject to the following rules, viz. :—

1. All contracts are to be for the season, the termination of which is to be decided by the Board of Managers, and the boats, during the contracts, are to be confined exclusively to the business of the company, except for back freights.

2. One-tenth of the amount of freight to be retained by the company until the close of the season, as security for the fulfilment of the contract, &c. : if not fulfilled, or if declared to be abandoned by the company's superintendent, the said one-tenth to be forfeited.

3. The company will sell contractors the necessary boats at cost for cash, or the contractors may pay for them, cost and interest,

[Lehigh Company v. Field.]

by leaving in the hands of the company at least ten dollars for each trip to Bristol or Philadelphia, or in that proportion for shorter trips, until the amount is made up. When fully paid for, the boat will be transferred by bill of sale to the contractors, but, until then, the boat to remain the property of the company, and in case of forfeiture of contract, the amount paid on account of the boat to be forfeited also.

4. All boatmen in the service of the company are to conform to the rules and regulations which may from time to time be adopted for boats using the harbours or navigation of the company, or the harbours or navigation of the State canal.

5. The boats will be loaded in the Mauch Chunk harbour, in the order of their arrival there, provided the boatmen are ready, and attend to take their turn, otherwise the next in order will be loaded first.

6. The boatmen must bring their boats to the shute, guy them there while loading, and receive the coal as discharged from the shute.

7. As soon as the coal is delivered in the boats, it will be under the sole charge of the boatmen, and contractors shall be accountable to the company for its safe delivery and discharge at its place of destination, agreeably to the receipt or bill of lading, to be signed by the captain, containing an obligation so to deliver it.

8. At Bristol and Philadelphia, the crews of the boats will be assisted in the discharge of the coal by hands furnished by the company, so as to give the utmost despatch, and the boats will be discharged in the order of their arrival, provided the crews are ready and attend to take their turn, otherwise the next in order will be unloaded first. Coal ordered to any other place on the route than Bristol or Philadelphia, shall be discharged from the boats by the contractors.

9. The company will furnish steamboats at Bristol to tow such boats as are to discharge at Philadelphia, with as little delay as practicable, both down and up, and the boatmen are to continue the charge of the boat in tide; and in case of the sinking of the boat, the loss of the coal to be the company's, and the price of freight to be the loss of the contractor.

10. The company will pay all tolls on canal and boat, on both the Lehigh and Delaware canals. For any other freight, the contractor must pay the toll.

11. Should a breach or breaches occur in the Lehigh or Delaware canals during the boating season, the company will agree to pay three dollars per day for each boat, for all the time over one day that the boats may be detained while such breach or breaches are repairing; and as a compensation for such payments, it is understood that the boatmen are to assist in repairing such breaches, if required by the supervisor employed by the State, or the company's agent, if on the Delaware canal, and by the superintendent

[Lehigh Company v. Field.]

or agent of the company, if on the Lehigh canal; and the wages for such time as they may be employed, either by the State or the company, is to be received by the company. *Provided*, that if the boatmen refuse or neglect to assist at the repairing of breaches as before mentioned, they forfeit the payment of the three dollars per day for their detention.

12. The company will guarantee that the loads for each scow boat shall average fifty tons for the season; and should the average be more than fifty tons, the contractors to have the advantage of the increased quantity.

Nelson Hoyt, a witness for the plaintiffs, testified that Abiel Abbott was the superintendent of the company at the date of these agreements. The Lehigh Company built the boats shortly after the contracts were made. Callahan got possession by the terms of the contracts. Callahan was in the employ of the company two or three years after the date of the first agreement. The boats were used for transporting coal from Mauch Chunk to Philadelphia by the company. Mr Brittain got possession of the boats in 1834, in the fall. Witness found the defendants in the possession of the boats at that time, and gave verbal notice at the sale and to the crier that the boats belonged to the company at New Hope; that the company held exclusive possession and ownership of the boats, and they would hold the sheriff and purchasers liable for the boats, under the authority of the Lehigh Coal and Navigation Company. One of the Brittain's was there. The boats were worth \$200 apiece at that time. Sellers and Brittain held a short conversation after the notice, and then the boats were sold and bought by Brittain. They refused to give up the boats to witness.

On his cross-examination he stated he received the boats after they were built, took them off the contractor's hands, and gave credit for them. He was in the employ of the company. The boats were built in the latter part of 1832, or beginning of 1833. The sale was made in January 1837. The boats had not been under any shelter. He was on the boats and saw them, not injured further than fair wear and tear. He gave no notice after the sale. He made no demand of any one after the sale. The only demand was the notice before the sale of the boats. The boats, he thought, went to Jersey after the sale.

W. H. Sayre, a witness for the plaintiffs, testified that he was an officer of the Lehigh Coal and Navigation Company—the collector at Mauch Chunk and boating clerk—since 1828. That, on boat 145, in 1833, Callahan paid \$97.90, and, in 1834, \$58.20, making \$156.10; that he paid on boat 228, in 1833, \$41.90, and, in 1834, \$100.90, making \$142.80. These sums were retained from the amount of freight earned by Callahan; he paid no money in cash for them. On the 6th June 1836, including \$31.86 interest, Callahan owed on boat 145 \$165.76, and on boat 228, including \$29.60

[*Lehigh Company v. Field.*]

interest, \$174.37. He was charged interest on the price of boats from delivery, and was allowed interest on the carriage. Callahan got the boats under the contracts. The company never refunded the amount retained to Callahan.

The plaintiffs then offered in evidence the following letter from A. Abbott, directed to William Zane, South Easton:—

“ MAUGH CHUNK, June 29, 1836.

“ Dear Sir:—Yours respecting the two boats which Callahan had is received. You will do whatever Porter advises to be done in that case. The boats are declared abandoned, as provided for in the contract.”

W. H. Sayre called again.—This paper is the hand-writing of Abiel Abbott. The paper dated 29th June 1836 is the only written entry of abandonment that I know of. Mr Abbott, the superintendent of the company, is dead, and this was found in the office of the company, in his hand-writing. Wm. Zane was superintendent of the company at South Easton. Callahan received these two boats.

The admission of this paper was objected to, but it was admitted, and the defendants excepted.

Ingham Smith, affirmed.—I was present when the boats were sold. I heard Mr Hoyt give public notice to all that were there that the Lehigh Company claimed the boats as exclusively theirs. He demanded them for the company. Mr Brittain said, persons buying them, if they did not get them, they would not have them to pay for. He assumed the responsibility of selling them, and directed the crier to go on and sell them.

Joseph Butler, sworn.—In the fall of 1836 I was agent for the Lehigh Company, on the Delaware division. I received a power from Mr Zane, agent for the company at South Easton, dated Nov. 4, 1836, to demand and take possession of the boats. On the 7th November 1836 I called on Brittain and demanded the boats in the name of the Lehigh Company. Mr Brittain replied they were now in the hands of the law; he was willing to abide the decision of the law; but said, if the Lehigh Company would pay him what they retained from Callahan, he would give them up. On the 10th November I called at the sheriff's office in Coylestown; Mr Field, then sheriff, absent; I demanded the boats of Dungan, deputy sheriff. He said he could do nothing unless he saw the attorney, Mr M'Dowell. M'Dowell, after being consulted, said the boats would not be given up. He was the attorney of Brittain.

W. H. Sayre, again.—“ This is the book that contains the register.”

The plaintiffs then gave in evidence the following entries from said book:—

[Lehigh Company v. Field.]

CANAL BOATS.

BOAT No. 145.	When contracted or transferred.	To whom contracted.	Price.	Retained.	Remarks.
6 month, 1836—sent contract to Wm. Zane, to be given to Jas. M. Porter. 229.	4 mo. 16, 1833. 1834.	John Callahan.	290 00	97 90	
		do.	156 10	58 20	
			133 90	156 10	
6 month—sent contract to Wm. Zane, to be given to Jas. M. Porter.	9 mo. 13, 1833. 1834.	John Callahan.	287 50	41 90	
		do.	142 80	100 90	
			144 70	142 80	

The defendants gave in evidence the record of a suit, brought in the Common Pleas of Bucks county, No. 39, to Feb. Term 1835, by A. C. Brittain & S. B. Brittain, trading under the firm of A. C. Brittain & Co., against John Callahan, attachment in case, bail \$640, issued Jan. 30, 1835, in which the sheriff was directed to attach the two canal boats, or scows.

They further gave in evidence the writ of attachment, and the petition of A. C. Brittain to said court for an order to sell the boats, &c., which was filed on the 14th March 1835. On the 16th December 1836 the sheriff returned that he had sold the canal boats to A. C. Brittain & Co. for \$320. No judgment was entered in this case.

The defendants then called H. N. Beaumont, who testified that he bought these boats of Mr Brittain, and paid \$275 for both. On his cross-examination he stated he paid for them in the summer of 1837. They lay in the basin below New Hope. They were sunk when he bought them; not as good as he expected when he bought them. When he paid Brittain he threw off the interest, because the bottoms were injured. It cost over \$100 to repair them.

The court (BURNSIDE, President) charged the jury as follows:

You will observe by the regulations of the company, No. 3, they proposed to sell contractors boats at cost for cash, or the contractors may pay for them cost and interest, by leaving in the hands of the company at least ten dollars for each trip to Bristol or Philadelphia, or in that proportion for shorter trips, until the amount is made up. When fully paid for, the boat will be transferred by bill of sale to the contractors, but until then the boat to remain the property of the company, and in case of forfeiture of contract, the amount paid on account of the boat to be forfeited also. The articles of agreement were predicated on this regulation. The company also furnished horses, provisions, tow-lines, and all things necessary for boating, at specific prices. By the contract the superintendent shall have power to determine that the contract has been abandoned, and such abandonment shall exonerate the company from any obligation imposed on them by this contract

Lehigh Company v. Field.]

and they may immediately proceed to dispose of the boat, as if the contract had never been made. On these terms the scows were sold—No. 145 for \$290, and No. 228 for \$287.50. Callahan got possession of the boats, and retained it in 1833 and 1834. On 145 he had a credit on the books of the company for \$156.10, and on 228 a credit, in 1834, of \$142.80.

The inquiry for the court is, is such a contract legal? It is all right as between the parties; but the inquiry here is, can it be sustained against the creditors of the purchasers of the boats upon such terms? In the early period of our judicial decisions there was a strong leaning in favour of such contracts, but as the country increased in population, and the transactions and business of the country increased, it was found not to answer any valuable purpose. In *Clow v. Woods*, (5 *Serg. & Rawle* 286), it was decided that a mortgage of the bark, tools in a tan-yard, and the leather and skins, with a provision that the mortgagor, the tanner, should remain in possession in the tanning and finishing the leather, was *per se* fraudulent and void against *bonâ fide* creditors. The subject again came before the Supreme Court, in *Babb v. Clemson*, (10 *Serg. & Rawle* 423). There Benjamin Pusey sold cattle to his sister-in-law, Elizabeth Clemson, and there was evidence that she paid Peter, a man on the farm, to take care of the latter: they remained on the same farm. This was held to be a colourable possession, and fraudulent as against creditors. Again, in *Martin v. Mathiot*, (14 *Serg. & Rawle* 214), the Supreme Court held that on a sale of chattels, if the vendor and vendee agree that the possession shall pass to the vendee, but the property remain in the vendor until the whole purchase money is paid, such agreement, as respects creditors, is fraudulent: and it is immaterial whether it appear that the creditor trusted the debtor on the credit of the goods which were in his possession, or not. We might cite other cases. Upon a careful examination of these written papers, it is the solemn opinion of the court, that the agreement between the company and John Callahan, under the rules and regulations, is *per se* fraudulent, and that the plaintiffs cannot sustain this action. The legal as well as the actual possession of the goods was in Callahan; that it was a sale of the boats for a specific sum; that no bill of sale was essential to the sale, and that the policy of the law will not tolerate such agreement between the company and Callahan; that the agreement that no sale by process against the contractor shall authorize the purchaser to hold or keep possession of the boats, or give him or them any interest therein or title thereto, does not better the case of the plaintiffs. The article calls it a sale; and a sale of personal property, when the vendor claims the right to regain the property if the whole purchase money is not paid at an indefinite period of time, is fraudulent and void against creditors. The plaintiffs contend that it is necessary, by the maritime law, that a sale of a vessel should be in writing, and that it does

[Lehigh Company v. Field.]

not pass by parol. We have already instructed you that the sale of a canal boat may be made by parol. We do not think our canals are subject to the maritime law. We see nothing in the case to take it out of the rule we have stated.

To this opinion the plaintiffs excepted.

Errors assigned :

1. The court erred in charging that the plaintiffs could not sustain this action; that the agreement between the company and Callahan, under the rules and regulations, was *per se* fraudulent.

2. In charging that the legal, as well as the actual possession of the goods, was in Callahan.

3. In charging that the agreement between the company and Callahan that no sale by process against the contractor shall authorize the purchaser to hold or keep possession of the boats, or give him or them any interest therein or title thereto, does not better the case of the plaintiffs.

4. In charging that, where the vendor claims the right to regain the property if the whole purchase money is not paid at an indefinite period of time, the sale is fraudulent and void against the creditors.

5. In charging that the sale of a canal boat may be made by parol.

6. In charging that our canals are not subject to the maritime law.

Chapman and Mallery, for the plaintiffs in error.

This was only an agreement to sell. The boatman had no right in the boat until it was paid for. The cases relied on are not like this. His possession was as a servant of the company, restricted to boat for them by regulations. He could, therefore, acquire no credit upon it. The possession was consistent with the ownership by the company, and the purpose was honest. It is difficult to keep these persons to their duty. The boats are registered as the company's at Mauch Chunk, and the captain has a certificate of it, by regulations of the canal commissioners. A bill of sale was necessary before the title passed. 1 *Binn.* 258; 2 *P. R.* 451, 263; 6 *Watts* 126; 4 *Watts & Serg.* 177; 1 *Baldw.* 528; 20 *Wend.* 554; 7 *Watts* 375.

Ross, contra.

Under such an agreement and possession delivered, a creditor may levy an execution. It is an actual sale and possession, not an agreement. The words are, "agree to purchase," "to sell." It is a purchase on credit. The boatman is owner. The company pays him for carrying. Part of the money is paid. *Martin v Mathiot* is not so strong a case as this. No money was paid there *Clow v. Woods*, (5 *Serg. & Rawle* 286); *Babb v. Clemson*, (10 *Serg & Rawle* 423); 5 *Whart.* 545.

[Lehigh Company v. Field.]

The opinion of the Court was delivered by

GIBSON, C. J. — The case which most resembles the present, is *Martin v. Mathiot*; but it had an all-important feature which this has not — an actual, unqualified, and a visible change of the possession by delivery to the purchaser in part execution of the contract. In *Jenkins v. Eichelberger*, there was a present sale with an attempt to reserve a lien for the price, which the law did not allow: in our case there is only an agreement for a future sale. No more was determined in *Martin v. Mathiot*, than that an executory agreement to sell, accompanied by present delivery of possession in part execution of it, constitutes, as to third persons, a present and an unconditional sale, for the same reason that retention of possession defeats it where the intention is to pass the title at the time of the transaction; but a previous delivery of possession for a different purpose, would not turn an executory agreement into an actual sale any more as to third persons than as to the parties themselves. A naked agreement to sell a team to the owner's wagoner, continuing to drive it in his employer's service, would not, before execution of the contract by payment of the price, vest the title in any aspect, because the possession of a servant is the possession of the master; and had it appeared in *Martin v. Mathiot* that the team had been delivered to Michael as the plaintiff's wagoner, and that the latter was still using it in the plaintiff's service, the event of the case would have been different. Now the contract before us was an agreement to purchase on terms expressed in the company's printed regulations, a condition of which is that the company will furnish its carriers with boats for cash at cost, or on credit with interest, but that the ownership shall remain with the company till all the instalments of the price be paid; and what more distinctly shows these agreements to be executory, is the clause providing for a bill of sale to close the transaction. It is a condition also that a forfeiture of the contract to carry shall be a forfeiture of payments made towards the price of the boat; which would be nugatory if the property were vested by the contract in the carrier. There was, therefore, no present sale between the parties; and what delivery of possession was there to make it so as to any one else? By the regulations which were part of the contract, the persons who had the boat in charge were the company's servants acting under its control. The company was to pay the tolls, and the contractor was to take freight from no other quarter except as back loads. Thus the ostensible, as well as the actual ownership was in the company, and the possession in its servants. The boat retained its place on the company's register, having its number painted in letters and figures on its stern; and neither by its marks nor the manner of its employment could it be distinguished from the company's other boats. Had the intention even been to effect an immediate transfer of the property, it would have admitted of more than a doubt

[Lehigh Company v. Field.]

whether the delivery, such as it was, exempted it from execution by the company's creditors. The agreement, then, to put these two boats into Callahan's hands, not as his property or to make him the immediate owner of them, but to be managed by him as a servant under its control, could not be and was not employed as a device to deceive or defraud.

Judgment reversed, and *venire de novo* awarded.

Girard Bank *against* The Schuylkill Bank.

Under the proviso of the 25th section of the Arbitration Act of 16th June 1836, if the arbitrators award a nonsuit of the plaintiff and he appeals, it is not a sufficient reason to allow the plaintiff to suffer a nonsuit without consent, that the arbitrators erred in law in finding as they did, nor that the plaintiff wishes to bring another suit and have another reference.

M'CALL and *J. M. Read*, for the plaintiffs.

R. Hare and *Williams*, for the defendants

The opinion of the Court was delivered by

SERGEANT, J.—This was an action brought by the Girard Bank against the Schuylkill Bank to recover \$50,000, the amount of three promissory notes, dated in 1839, drawn by the Beaver Meadow Railroad Company in favour of the Schuylkill Bank, and endorsed by H. J. Levis, cashier. The suit was referred to arbitrators under the compulsory arbitration Act, who after a hearing awarded "a nonsuit of the plaintiff in favour of the defendant." The plaintiff appealed, and now asks leave of the court to enter a nonsuit under the proviso of the 25th section of the arbitration Act of 16th June 1836.

The former arbitration Act of the 20th March 1810, laid no restriction on the right of a party appealing to withdraw his appeal whenever he saw fit. The exercise of this privilege was found to be attended with the inconveniences which are pointed out in *Martin v. Ives*, (17 *Serg. & Rawle* 365), and the 1st section of the Act of 28th March 1820, prohibited it without the written consent of the adverse party. On the representation of the commissioners to revise the civil code, that hardships were experienced under this general provision, the 25th section of the Act of 16th June 1836, contained the enactment which is now in force. In favour of plaintiffs, that the court may, after appeal, allow the plaintiff to suffer a nonsuit with like effect as if the cause had not been referred, if the special circumstances of the case shall appear

[Girard Bank v. The Schuylkill Bank]

to require it. The right, therefore, can only be exercised by the permission of the court, and the court can grant that permission only where the special circumstances of the case appear to require it, and it is incumbent on the plaintiff to make out those circumstances, and to show that the justice of the case requires that such permission should be granted.

It is said by the plaintiffs that the defendants being sued as endorsers, and the endorsements being in the name of H. J. Levis, cashier, and the notes and protests produced to the arbitrators, a *prima facie* case existed in favour of the plaintiffs, which threw on the defendants the burthen of showing that the cashier did an unauthorized act; whereas the referees, without requiring any such proof from the defendants, and mistaking the law, found the award which was reported. Admitting for the sake of the argument, that the referees erred in the law, yet the point may be adjudicated before the court on the appeal, and it is the most proper tribunal for such purpose. There does not seem to be the least reason for allowing the plaintiffs an opportunity to go before another set of referees for this purpose. It is further said that the plaintiff wishes to bring another suit and have another reference for the purpose of more conveniently examining a multitude of books and papers (if it should become necessary) which cannot be conveniently examined before a jury. This does not seem to me to be a legitimate reason for enabling the plaintiff to have another reference. However convenient an arbitration may be found in practice for the purposes of exploration, yet that was obviously not the design of the arbitration Act. A party would hardly take the oath that injustice was done him, merely because an award had deprived him of this advantage. The special circumstances mentioned in the Act must be something substantial; something by reason of which the plaintiff would sustain an injury, if the nonsuit were not permitted, and no injury be thereby done to the defendant. There may, I suppose, happen cases where the plaintiff is taken by surprise on a trial and where it might be just to allow him another chance of suing, and of that nature seems to be the case referred to in the Report of the Commissioners, although as is remarked in *M'Kennan v. Henderson*, (5 *Watts & Serg.* 370), there existed even there other modes of relief. But no such circumstance appears in the present case. There can be no surprise, for the trial is yet to come on. The whole object is avowed to be to obtain another reference, the result of which might even be to place the parties exactly in the predicament they are now in. I do not think such special circumstances have been exhibited as ought to exempt the plaintiff from the ordinary course of proceeding.

Motion denied.

Wiley's Appeal.

What things are assets in the hands of an administrator.

Tenant from year to year of a tavern: on his decease his administrator takes possession: he is chargeable with the leasehold interest and good-will as assets. at the price offered him for them by others and refused.

APPEAL from the decree of the Orphans' Court of Philadelphia county.

M. W. Ash, for the appellant.

The principle of law, to wit, that money obtained by an administrator for the good-will of a public house is assets in the hands of such administrator, need not be controverted, as in this case no money was received; and in justice and good faith no money could have been received for the good-will of the premises, as the administrator could have given no title to them; and if he had actually received the money, the same could have been recovered back again from him, as the consideration would have entirely failed, as no interest whatever could have been imparted by the administrator to the purchaser.

The charge of \$325 against the administrator, when it appears that he did not receive a cent for the good-will, and without the intervention of some tribunal to ascertain the fact of his mal-administration, and the amount of damages which he ought to pay therefor if anything, was illegal. The administrator had a right to a trial by jury to ascertain whether he was liable and to what extent. It was purely a question of damages; of unliquidated damages; and not of an ascertained sum of money actually received by the administrator; and it is fair to presume that when the appraisers made their appraisal they considered the good-will as valueless, as the bar and fixtures were valued by them, and were so intimately connected with the house in which they were located, that it could not have been overlooked by them. At all events, the administrator was entitled to all the advantage which such an argument before a jury would have been worth. This charge against the administrator is founded upon the *mala fides* of the administrator; and the suit against him would have been an action on the case, arising *ex delicto* and not *ex contractu*; which gives him an additional claim for a trial by a jury. Besides which, the administrator would have rendered himself liable to an action for damages by the landlord of the premises, if he had put another person therein as a tenant without his permission. Finally, it was not the duty of the administrator to increase the assets of the

[Wiley's Appeal.]

estate of his decedent by any act of speculation, or by the doing of anything which rigid justice and good conscience would not dictate or sanction.

H. M. Watts, for the appellee.

The appellant is charged in his account with the value of a certain lease for years, together with bar fixtures, the property of the decedent. It was proved that he was offered for the same the sum of \$325, the amount charged; that he declined the offer, and that he took possession and enjoyed the same for his own benefit.

A lease for years is legal assets in the hands of executors. *Matthews on Executors*, (9 *Law Lib.* 144); *Ram on Assets*, (8 *Ibid.* 245, 478); 1 *Ves. Jun.* 295; 1 *Chan. Rep.* 170. An administrator who ships goods of the intestate on a trading voyage is liable for any loss sustained. *Callaghan v. Hall*, (1 *Serg. & Rawle* 241). Where an administrator of a tradesman carried on the business with the stock in trade of the intestate, creditors had a right to consider him as taking the stock at the appraisement. *Wood's Estate*, (1 *Ashm.* 314).

The opinion of the Court was delivered by

KENNEDY, J.—William Wiley, the intestate, was in possession of a house and lot of ground situate in the city or county of Philadelphia at the time of his death, which he had held and occupied for some time previously as a tavern and public house, as a tenant from year to year under a verbal lease from the owner thereof. He had made repairs and improvements upon the house, and among other things done in that way he had put up a tavern bar, the cost of all which amounted to \$300 and upwards. The administrator took possession of the house and lot immediately after the death of the intestate, as also of the other personal estate belonging to the intestate. He made an inventory and procured an appraisement to be made thereof. The bar put up for the use of the tavern was appraised at \$40, but no account made or notice taken of the leasehold interest in the tavern. The administrator, however, kept possession of and used it for his own benefit, although he had several offers for the purchase of it by different persons, one as high as \$325, all which he refused. In his administration account he charged himself with the \$40, at which sum the tavern bar was appraised, but with nothing beyond this for or on account of the tavern or interest which the intestate had in the house and lot of ground at the time of his death. The account was therefore objected to, and an auditor appointed by the Orphan's Court to inquire into the matter and make report of the same to the court. The auditor, upon investigation, found the facts to be substantially as stated above, and made report thereof to the court, charging the administrator with \$325, the sum he was offered for the good-will and interest which the intestate had

v *

[Wiley's Appeal.]

in the house and tavern-stand at the time of his death, which came to the possession of the administrator as assets of the estate, and which the latter ought to have sold and converted into money, but instead of doing so retained it in his own possession and used the same for his own purposes and advantage. The Orphans' Court approved and confirmed this charge, to which the administrator excepted, and has appealed to this court in hopes of being relieved from it.

That a tenancy from year to year is considered assets, and as such devolves to the executor or administrator, cannot be doubted. 1 *Black. Rep.* 596; 3 *Term Rep.* 13; 6 *Ibid.* 295; *Ram on Assets* 143-4-5, and the cases there referred to. A lease belonging to an intestate, which he had pledged to a creditor by assigning it to him, was held by Lord Chief Justice ABBOTT to be assets in the hands of the administratrix after the death of the intestate, in a suit brought by the creditor against the administratrix to recover his debt. The chief justice said the legal estate was in the administratrix, and if she had done what she was desired to do, the lease might have been sold. *Vincent v. Sharp*, (2 *Stark. Rep.* 446). So money received by an executrix for the good-will of a public house was considered assets in her hands. *Worral v. Hand*, (1 *Peake's Rep.* 74). Lord KENYON, before whom the cause was tried, said it was assets in her hands, though she was only tenant at will after the death of the testator; and in a Court of Chancery it was the daily practice to consider all beneficial interests, such as renewable leases and the like, assets, and to charge the representative with the money arising from them. So an executor will be charged with the difference between the annual value of the land held under lease and the rent payable for it, where the real annual value exceeds the annual rent. 11 *Vin. Abr.*, pl. 42, p. 230; *Cro. Eliz.* 712. An executor or administrator being a mere fiduciary, is bound not only to perform his duty with fidelity but with proper skill and reasonable diligence, so as to promote the interests of those interested in the estate of the deceased. It has been argued in this case that the administrator was not chargeable with the \$325, as he never sold the tavern-house nor received any money on account thereof. But unquestionably it was his duty to have sold, and more especially when he was offered, if he would sell and deliver possession, all that he has been charged on account of it. He will not be allowed to make profit or gain out of it by retaining and occupying it for his own purposes, more than he would be allowed to retain and use the money for his own purposes in case he had sold the property for the price offered. In short, he will not be permitted to make gain or profit out of the estate in any way whatever for himself. See *Petit v. Storee*, (4 *Vez.* 620); *Newton v. Bennet*, (1 *Bro. Ch. Ca.* 359, 362), and the cases there cited in *Parker's Ed.*, (Boston 1844). Hence if he buy debts against the estate for less than the true amounts

[Wiley's Appeal.]

thereof respectively, he will not be allowed to gain or profit by it. *Ex Parte James* 346, 347; *Hall v. Hallet*, (1 *Cox* 135). For the same reason if he be offered a greater price for any portion or article belonging to the estate than it has been appraised at, but refuses to accept the same, and instead thereof converts the article to his own use, he ought to be charged with the highest price that he has been offered for it. Every principle of good faith and honesty, as also of sound policy, requires that it should be so. See *Wentworth's Ex'r.*, 14th *Ed.*, 302; *Ram on Assets* 497; *Jenkins v. Plombe*, (6 *Mod.* 181-2).

Decree of the Orphans' Court affirmed.

Commonwealth ex. rel. Bryan *against* The Pike Beneficial Society.

Where a charter of a society provides for an offence, directs the mode of proceeding, and authorizes the society, on conviction of a member, to expel him, this expulsion, if the proceedings are not irregular, is conclusive, and cannot be inquired into collaterally by *mandamus*, action, or any other mode.

The courts have jurisdiction to keep such tribunals in the line of order, and to prevent abuses.

ERROR to the Common Pleas of *Philadelphia* county.

This was a *mandamus* in the court below, issued against the Pike Beneficial Society at the instance of John Bryan, commanding them to restore him to the place and office of member of that society, from which they had expelled him, or show cause to the contrary.

The defendants filed the following return:

That true it is that John Bryan was duly elected and appointed to the place and office of one of the members of the said corporation. But they give the court here further to understand and be informed, that in and by the tenth article of the charter of incorporation of said defendants (a copy whereof, and of the by-laws of said corporation, they annex hereto, and pray may be taken as part of this their return) it is provided, *inter alia*, that should any member, while deriving the benefit allowed by the society, be engaged at his usual business or occupation, or any other employment (except giving the necessary directions to those employed by him), he shall, on being convicted thereof, be expelled.

And the said defendants do further certify, that afterwards, to wit, upon the 28th June 1841, the overseers for and on behalf of said society or corporation, and with that duty charged, reported

[Commonwealth ex. rel. Bryan v. The Pike Beneficial Society.]

thereto, that the said John Bryan, while receiving and deriving the benefits of the society or corporation, had been seen at and about some employment, and in violation of the article thereinbefore referred to. And, thereupon, it was ordered and directed that the secretary notify the said John Bryan to be and appear before the said corporation at their next stated meeting, to show cause (if any he had) why he should not be expelled. And the said defendants further certify and return, that due notice was forthwith given to the said John Bryan to appear as aforesaid; and that afterwards, to wit, upon the 26th July 1841, the said stated meeting, in the said direction and the said notice named, was then and there lawfully convened and held; and that, thereupon, then and there, after hearing the proofs and thereon carefully deliberating, it was resolved that the said John Bryan was guilty of the said charge, and had been so employed while deriving the benefits aforesaid; and then and there, by virtue and in pursuance of the eleventh article of the charter aforesaid, he, the said John Bryan, was convicted thereof by the concurrence and votes of two-thirds of the members present; and was then and there and thereby expelled of and from the said society or corporation, and of and from the place and office of or of the members or corporators aforesaid.

And that, therefore, they cannot readmit and restore the said John Bryan to the said place or office aforesaid, together with the liberties, privileges and franchises thereto belonging, as in and by the writ they are commanded.

Article IX. When any member, after twelve months' fellowship, is rendered incapable, by indisposition or injury, of attending to his usual business, he shall, if entitled, receive not less than four, nor more than six dollars per week, until his restoration to health; in case of death, fifty dollars shall be allowed towards defraying his funeral expenses: Provided, nevertheless, that should the indisposition of a member arise from insanity, old age, or other calamity likely to continue, the society shall have power, after the space of one year, to reduce the allowance in such case to a sum not below two dollars per week.

Article X. Should any member, while deriving the benefit allowed by the society, be detected in the act of gaming or other improper practice, or be engaged at his usual business or occupation, or any other employment (except giving the necessary directions to those employed by him), he shall, on being convicted thereof, be expelled.

The case was tried before PARSONS, J., who delivered the following charge to the jury, which sets forth the circumstances:

John Bryan asks to be restored, by the order of this court, to the rights and privileges to which he is entitled under the laws and regulations of the Pike Beneficial Society in this city. It seems that he was a member of that association; that he had be-

Commonwealth ex. rel. Bryan v. The Pike Beneficial Society.]

come, in consequence of the loss of health, unable to support himself, and was admitted to the benefits that individuals placed in his condition are entitled to by the regulations of the society. And it further appears that, on the 22d July 1841, a notice was given to the plaintiff that he had been guilty of such acts as deprived him of the support which the association were furnishing him, and he was notified to appear and answer the complaint. It also seems, that in consequence of sickness he was unable to appear at the time and place appointed; that a proceeding was had in his absence, on the 26th July 1841, and he was expelled from the society upon grounds set forth in the resolution requiring his expulsion.

The main inquiry before the court and jury is the validity of this act of the society. This is based upon the 10th article of the constitution of the society. The only act of which it is alleged he has been guilty, is that of painting a latch to his own gate, or, to use the language of some of the witnesses, the "handle" to the gate, a piece of wood used for its fastening, about ten inches long and three inches wide. The only question of fact which has been for the decision of the jury is, whether he painted it or not. The plaintiff denies that he did paint it himself; but the evidence seems to be tolerably clear that he did. The cause mainly turns upon a question of law to be decided by the court. Hence we instruct you, that even if the jury believe that Bryan did do the painting to the gate, as testified to by the witnesses, he has not so far violated the laws of that association as to warrant his expulsion.

Upon a fair construction of the tenth article, under which the society proceeded when they deprived the plaintiff of the benefits that he was enjoying, I do not think he had violated the law. The intention of that regulation was this: If a man were engaged in his own business, so as to perform any labour which would be a pecuniary benefit to himself, or engaged in business on his account, or in the employ of others, whereby gain or advantage would be derived to himself, or any ultimate profit would be received, he was then no longer to receive aid from the association. It is, undoubtedly, based upon this principle; a person to be entitled to support must be poor and unable to labour or engage in any business which would yield him a support; if, after being entered as a beneficiary, it was found that he was labouring for himself, or embarking in business on his own account, or engaged in the employ of others, it was evidence either that he had practised a fraud upon the society in first being admitted to relief, or the cause which entitled him to it had been removed; his health so far restored as not to entitle him to the benevolence of the association more than other members.

But, in my opinion, because a man, with exertion, merely performed some act which would contribute to the comfort of himself

[Commonwealth ex. rel. Bryan v. The Pike Beneficial Society.]

or family, it cannot be said he was engaged in labour or attending to his own business within the provisions of the tenth article of the constitution. Suppose a shoemaker was a beneficiary, and he should simply sew up a rent in his boot; or a glazier should put a pane of glass into the window of his house, to protect himself and family from the cold; or a painter, as in this case, simply took a porringer of paint, and with a brush painted the latch or fastening to his gate, that had got soiled; can it with propriety be said that he had been labouring for himself for gain, following his own business for profit, or doing any act which brings him within the provision of that article? Would it be fair from that act to say that he had practised a fraud upon the society when first admitted, or that his health was so far restored that he could labour or engage in usual business? In my opinion it would not; nor has there been any act of his proved which authorized the society in expelling him. Hence we instruct you that, under the whole evidence in the cause, the law of that society has not been violated, in this instance, by the plaintiff, and that your verdict ought to be in his favour.

The defendants excepted to the charge.

St. George T. Campbell, for the plaintiffs in error, cited 2 *Whart.* 309.

Earle, contra.

The opinion of the Court was delivered by

SERGEANT, J. — This case cannot be distinguished from that of *White and Blacksmith's Society v. Vandyke*, (2 *Whart.* 309). The charter to the defendants below provides for the offence, directs the mode of proceeding, and authorizes the society, on conviction of the member, to expel him. This has been done, after a hearing and trial, according to the mode prescribed; at least, there is no allegation of the irregularity of the proceeding. Under these circumstances the sentence is conclusive on the merits, and cannot be inquired into collaterally either by *mandamus* or action, or in any other mode. It is like an award made by a tribunal of the party's own choosing; for he became a member under and subject to the articles and conditions of the charter, and, of course, to the provisions on this subject as well as others. The society acted judicially, and its sentence is conclusive, like that of any other judicial tribunal. The courts entertain a jurisdiction to preserve these tribunals in the line of order, and to correct abuses; but they do not inquire into the merits of what has passed *in rem judicatam* in a regular course of proceedings.

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

M'Dermott's Appeal.

The refusal by a foreigner who arrives and becomes domiciled here, to receive his wife who follows him hither, is a virtual turning her out of doors, and the Court of Common Pleas may decree her alimony.

LIBEL for divorce by Ann M'Dermott, late Ann Lynch, by her next friend, Francis Dimond, against John M'Dermott, in the Common Pleas of *Montgomery* county, in which a decree was made in favour of the libellant, and the respondent appealed.

The following libel was filed on the 19th August 1843:

The petition of Ann M'Dermott, late Ann Lynch, by her next friend Francis Dimond, respectfully shows, that your libellant, on the 23d November 1831, was bound in holy matrimony, and married to a certain John M'Dermott, late of the parish of Knockbride, in the county of Cavan, Ireland, now of the borough of Norristown, in the said county of Montgomery; and from that day until the first day of June 1834, lived and cohabited with the said John M'Dermott, in the said county of Cavan, Ireland, as his wife, and as such was owned and acknowledged by him, and so deemed and reputed by their neighbours and acquaintances. During this period of two years and a half they lived very affectionately together, and had one child (a boy) born unto them, and who is still living, as this libellant believes. At the said last-mentioned period, to wit, about the first of June in the year last aforesaid, the said John M'Dermott took leave of the said Anne his wife and of his child (they being then domiciled in the county of Cavan, in Ireland aforesaid), in order to emigrate, as he said, to the United States of America, he promising at his departure to either send for or return to them, his said wife and child, in the course of a year from the said time of his departure. He then, to wit, in June of the said year 1834, departed from his native land and emigrated to the United States of America, leaving his said wife and child domiciled in the said county of Cavan, in Ireland. During a space of four years immediately succeeding the aforesaid time of his departure from his wife and native land, he continued to send many proofs of affection and remembrance to his said wife through the medium of a relative of his who lived near his said wife, and with whom he corresponded by letter. But from and after the expiration of the said space of four years these proofs of his kind remembrance began to be very rare, and in a short time entirely ceased to be afforded to his said wife. Nevertheless your unhappy libellant could not then be persuaded that her husband, the said John M'Dermott, had yet entirely alienated his affections from her the said libellant, and endeavoured to believe that he had not yet

[M'Dermott's Appeal.]

wholly abandoned her and his said child to the mercies of the world. She, your said libellant, therefore continued by her industry to support herself and the said child, in the hope and trust that her husband, the said John M'Dermott, would yet have compassion on his wife, the said libellant, and his child aforesaid, and would either return to or send for them, and relieve them from their pressing loneliness and abandonment; until the spring of the year 1842, when she received the most cruel proof that a woman can receive, that she the said libellant was indeed wholly and utterly abandoned by her said husband, the said John M'Dermott. It was then that, pressed by the evils of her poor and lonely condition, and abandoned by him who had bound himself to be her protector by the most sacred of human laws, and under the most solemn sanction of religion, she, your libellant, resolved to leave her country and her kindred, and to go to that part of the United States of America where she understood her said husband, the said John M'Dermott, resided, and there to demand from him the restoration of his shelter and protection, or, failing his compliance, to ask for herself the protection of the laws of that country which had afforded her said husband, the said John M'Dermott, a refuge. For this purpose she, your libellant, left her native home in the month of May last past, and arrived in the borough of Norris-town aforesaid on the 25th day of July last past, and took up her residence at the Railroad Hotel, kept by Mr Daniel Henkle, in the said borough, where she now resides. On the evening last mentioned of her arrival in the said borough, a messenger came to her from her said husband, the said John M'Dermott, saying that he, the said John M'Dermott, wished to see her, your said libellant; whereupon she forthwith went in company with his said messenger, and on the evening last aforesaid met her said husband, the said John M'Dermott, who immediately recognised her, the said libellant, as his wife, and received her with apparent kindness, but signified that under present circumstances it would be necessary for her, the said libellant, to take up her residence in Philadelphia, until he, the said John M'Dermott, could make his arrangements for going back with her, the said libellant, to their native country. This proposal for her to reside in Philadelphia apart from her said husband, this libellant thought proper to decline, whereupon they separated for the evening, he having conducted her to the door of her hotel aforesaid. On the next day following, your libellant met the said John M'Dermott, whereupon he reiterated to her the proposal of the preceding evening, to wit, that she should reside apart from him in Philadelphia, where he said he would provide for her, but declared that if she refused to comply with this proposal, he would not recognise her as his wife. Yet, notwithstanding this harsh usage, this libellant resolved to abstain for a few weeks from obtruding herself on her said husband's presence, or troubling him by her entreaties or reproaches, in the hope that, seeing her humi-

[M'Dermott's Appeal.]

lity and forbearance, his conscience and better feelings might be re-awakened, and he might be induced to do her justice without her invoking the aid of the laws in this behalf. But this your libellant's last hope was suddenly dashed to the ground by the arrival of a note or letter from the said John M'Dermott, directed to her host the said Daniel Henkle, on the 27th July last past, of which the following is a copy, to wit:

MR. DANIEL HENKLE—

SIR: I understand that there is a female person stopping at your house who is trying to make it known to the people of Norristown that she is my wife. I deny knowing or of ever having married such person, nor yet will I recognise any such person my wife as is described to be at your house. I notify you not to trust or harbour any such person on my account, as I will not be answerable for the same.

I am your friend respectfully,

JN. M'DERMOTT.

Sir, the sooner that person is from your house, the better.

Your libellant, therefore, finding herself utterly and hopelessly abandoned by her said husband, the said John M'Dermott, in a strange land, and upon the mercy and the sympathy of strangers, charged in the presence of those strangers as a base impostor that was utterly unworthy of their sympathies, by him from whom she thought herself entitled to look for sympathy, protection and support, by all the laws of Divine and human sanction, has at length resolved to appeal to these laws. She, the said libellant, now most humbly represents to this honourable court that the said John M'Dermott, from the said 25th July 1843, hath, the said parties being at that time resident at Norristown aforesaid, wilfully and maliciously absented himself from the habitation of this libellant, and abandoned his family without just or reasonable cause, and has, from the said date, persisted in such desertion. Wherefore your libellant prays your honours that a subpœna may issue from the said court, directed to the said John M'Dermott, commanding him to appear at the next November Term of the said court to answer this petition; and also that a decree of the said court may be given, granting this libellant a divorce from bed and board, and also allowing her such alimony as the said John M'Dermott's circumstances will admit of, so as the same do not exceed the third part of the annual profit or income of his estate, or of his occupation or labour. And the said libellant as in duty bound will ever pray, &c.

A subpœna was awarded by the court, T. B., on the 19th August 1843. To this petition and subpœna the respondent, on the 24th February 1844, filed the following demurrer and answer:

VIII. — W

[*M'Dermott's Appeal.*]

The said John M'Dermott, saving and reserving to himself all and all manner of benefit of exception to the manifold errors in the said libel contained, for answer thereto, or such part thereof as he is at this time required to answer, answereth and saith, that the said petition or libel of the said libellant, and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the said libellant to have or maintain her aforesaid action of divorce against him, the said John M'Dermott, and that he, the said John M'Dermott, is not bound by the law of the land to answer unto the same, and this he is ready to verify.

And this respondent further saith, that the said libellant hath not resided in the State of Pennsylvania one whole year next before the presenting of her said libel, and is not a citizen thereof, nor is the same alleged or attempted to be alleged in the aforesaid libel; wherefore for want of a sufficient libel and affidavit in this behalf, the said John M'Dermott prays judgment, and that the said libellant may be barred from having or maintaining her aforesaid action of divorce against him.

And the said respondent, for further plea in this behalf, saith that each and every the allegations contained in the said libel of her the said libellant are hereby expressly traversed and denied; and of this the said respondent puts himself upon the country, &c.

On the 1st March 1844 the court on argument gave judgment for the plaintiff on the demurrer. Same day, leave was given to amend the answer and to put in oath. On the 15th April 1844 the respondent filed the following amended answer:

This defendant saving and reserving to himself all manner of benefit and advantage of exception to the manifold untruths, uncertainties and imperfections in the said libel contained, for answer thereto, or unto so much thereof as this defendant is advised is in any way material for him to answer to, answereth and saith that he cannot admit that he, this defendant, was ever lawfully bound in holy matrimony and married to the said libellant, or that they lived and cohabited together as man and wife, or that they were so deemed and reputed by their neighbours and acquaintances for the period stated in the said libel or for any other time, unless the following statement of facts, which this defendant avers, shall in law amount to such lawful marriage and cohabitation as the said libellant supposes. This defendant avers and admits that he knew the said libellant in the county of Cavan, in Ireland; that some time in the year 1831 or about that time the said libellant was living at service in the family of defendant's father, where defendant then resided, and continued so at service there for the space of about six months, when she was discharged in consequence as defendant believes, of the discovery of an illicit intercourse between said libellant and this defendant; that after her dismissal

[M'Dermott's Appeal.]

this defendant visited her at her father's house, and some time after this defendant was at Cootehill, a market town in Ireland, some miles from home, and there met libellant with her mother and two cousins; that said libellant and her mother then told defendant that libellant was in the family-way, and that he must marry her or that bodily harm would ensue, and proposed that they should at once be married. Defendant knowing that the brothers of libellant were vicious, bullying characters, was somewhat intimidated and consented to be married. Bishop Brown was applied to to perform the ceremony, who, after inquiring into the circumstances refused to do so; parties then remained at the tavern drinking until evening. Libellant's mother proposed that libellant and defendant should that night be married, and that they would go to a priest near the road leading from said market town. Under the belief that the said libellant was enceinte by him as represented by her and the mother, and under the fear of bodily harm from the brothers of said libellant, this defendant consented, and the marriage ceremony was accordingly performed by said priest, between eleven and twelve o'clock of that night—the mother of libellant paid the priest for his services, and each of the parties retired to their respective homes. When this clandestine ceremony became known to defendant's parents, he, this defendant, was driven from home and remained away about six weeks, when through the intervention of friends a reconciliation was brought about, and defendant was again received by his parents, but on the condition that he the defendant would have no intercourse whatever with the said libellant. For the space of near two years after this, defendant continued to reside with his parents and libellant with her parents, and although defendant acknowledges that during this time he occasionally visited her, yet it was always clandestinely and without the knowledge of his, the defendant's parents or friends. The defendant then went to reside with a cousin, about fifteen miles distant, where he remained about six months; during defendant's residence at this latter place, he visited libellant twice, after which defendant came to America where he has resided ever since. The defendant further avers that the representations by the said libellant and her mother that she was enceinte by him, which was used as a means for coercing him to consent to the performance of the marriage ceremony, was fictitious and untrue, as the child was not born for near eighteen months after that time. The defendant expressly denies that he ever lived with the said libellant as man and wife, either in Ireland, or elsewhere, but that their intercourse with each other before the performance of the aforesaid ceremony and the cohabitation afterwards, was as before stated. The defendant further expressly denies that he, this defendant and libellant, ever resided together at Norristown or at any other place in the United States—or that he, this defendant, ever wilfully and maliciously absented himself

[M'Dermott's Appeal.]

from the habitation of said libellant and abandoned his family. But on the contrary, that he continues to reside at Norristown, as and where he has resided for many years, and where he supports and maintains himself by his industry — and defendant further avers that he is informed and believes that the child of the said libellant was, after the departure of defendant from Ireland, taken by defendant's parents and supported by them without any charge to libellant, and that the said libellant never had her habitation with the defendant, nor the defendant with the libellant, at Norristown, as is alleged by said libellant in her petition or elsewhere. All which matters and things this defendant is ready to aver, maintain and prove, as this honourable court shall award, and therefore prays to be hence dismissed, &c.

On the 15th August 1844 the court below decreed a separation from bed and board; and that the respondent should pay to the libellant the sum of \$50 on or before the 15th September following; and \$20 quarterly from and after that day, for her support and maintenance, and pay also the costs of the libellant.

Errors assigned:

1. The court erred in deciding against the respondent on the demurrer.

2. The court had no jurisdiction, as the alleged cause of divorce occurred out of the State of Pennsylvania.

3. There is no evidence to sustain the application on the part of the libellant.

Freedly and Mallery, for the appellant, contended that the court below had no jurisdiction.

Dimond and Tilghman, contra.

The opinion of the Court was delivered by

GIBSON, C. J.—There is no question that the courts here have not jurisdiction of marital duties abroad; and were we required to decree alimony for desertion before the parties were domiciled in the State, we would be bound to refuse it. But the refusal of a foreigner to receive his wife, when she has followed him hither, is a virtual turning of her out of doors. Our statute is a municipal regulation for the protection of the community as well as the wife. Now whatever may be the demerits of either party as to transactions in Ireland, about which we know nothing, it is sufficient for the purposes of the present adjudication that the libellant is the lawful wife of the respondent, and that when she rejoined him here he refused to maintain her. It is proper therefore that he, and not the community, bear the burthen of her support.

Decree affirmed.

Welsh against Speakman.

The existence of a partnership may be proved by the separate admissions of all who are sued, or by the acts, declarations, and conduct of the parties, the act of one, the declarations of another, and the acknowledgment or conduct (when the firm consists of three persons) of the third.

It cannot be proved by the act of one only, if the plaintiff fails as to the rest, but the whole testimony taken together may show it, if each and every one is connected together by their own admissions or acknowledgments.

To effect this the plaintiff has a right to prove one thing at a time, to add fact to fact, from which the jury may infer the partnership.

Held, therefore, that where the plaintiff showed a store existing, packages sent there marked W. S. & Son, that W. S. was frequently there so as to be likely to see the goods so marked, and other grounds for inferring partnership :

1. The plaintiff might give in evidence as against the son the admissions of the son that he was a partner, and proof that bills of goods furnished for the store were rendered in the name of both.

2. It made no difference that the father being dead and the son insolvent, the suit was against the executors of the father.

3. The day-book, ledger, and books of account of the defendant were evidence.

4. And if the court has first rejected evidence of books, but afterwards admits them, the proper course is for the party who offered it, if a witness who was to give explanatory evidence has since been discharged, to move to dismiss the jury or for a postponement of the case : he cannot go on and take the chance of a verdict and then assign the rejection as error.

5. The defendants might show the course and manner of doing business at the store before the controversy—as that the sign was in the name of the son—that the bills were made out in his name, and that suits were brought before a justice in his name.

6. The defendants might show that the son procured an insurance against fire on goods in the store in the name of the firm, and that a fire having taken place, it was settled by compromise after suit brought, and the son recovered the money.

ERROR to the Common Pleas of *Chester* county, where a judgment was rendered for the defendants below, the defendants in error.

This was an action of *assumpsit*, brought by Welsh, Longenecker & Co. against the executors of William Speakman, Senior, deceased, for goods sold and delivered to the testator and William Speakman, Junior, trading under the firm of William Speakman & Son.

The declaration averred the insolvency of William Speakman, Jun. The defendants pleaded the general issue. The main question, on the trial, was whether William Speakman, Sen., was connected in partnership with his son, William Speakman, Jun., as the plaintiffs alleged he was, in a store at Edgmont, Delaware county. The following bills of exception were taken by the plaintiffs during the course of the trial.

A witness for the plaintiffs having stated that in the spring of

[*Welsh v. Speakman.*]

1840, he, as clerk to Welsh, Cameron & Co., sold goods to William Speakman, Sen., and his son, both being present, on the credit of William Speakman & Son, though marked for William Speakman, Jun., the plaintiffs asked him: "Would you, or not, have sold the bill of goods on the credit of William Speakman, Jun., alone?" The defendants objected; the court sustained the objection and sealed a bill of exception.

2. A witness for the plaintiffs proved that he attended the Edgmont store for Mr Speakman, from March 1840 to December 1842, and most of the goods that came there were marked William Speakman & Son. The plaintiffs then asked him: "How were the bills made out?" The defendants objected to the question; the court overruled it and the plaintiffs excepted.

3. The plaintiffs offered the bills of various merchants in Philadelphia for goods purchased during the years 1840 and 1841, charged to William Speakman & Son, and receipts therefor. The defendants objected, the court overruled the evidence, and sealed a bill of exceptions.

4. The plaintiffs then offered in evidence the books of account kept in the store at Edgmont. The defendants objected, the court sustained the objection, and sealed a bill of exceptions. The court subsequently said they had probably fallen into an error in overruling this evidence, and permitted the plaintiffs to give it; which the plaintiffs declined, on the ground that they had designed to give it in connection with explanatory testimony which was not now at hand.

5. The plaintiffs offered three promissory notes dated in August 1842, drawn by William Speakman & Son in favour of John Trucks or order. The defendants objected, the court sustained the objection, and sealed a bill of exceptions.

6, 7, 8. After various other testimony had intervened, the plaintiffs again offered separately the same bills of goods mentioned in the 3d exception. The court again rejected them, and on the objection of the defendants, sealed a bill of exceptions.

9. The plaintiffs offered the day-book of William Speakman & Son, kept at Edgmont. The defendants objected, the court overruled the evidence, and the plaintiffs excepted.

10. The plaintiffs offered in evidence the ledger of William Speakman & Son, kept in the store at Edgmont. The defendants objected, the court sustained the objection, and the plaintiffs excepted.

11. The defendants called a witness, who stated that he dealt with the store at Edgmont, and produced three bills furnished him, made out in William Speakman, Jun.'s handwriting and in his name, dated in 1842 and 1843, for goods sold in 1842. The defendants then asked him as follows: "Look at these bills, state the date of them, in whose name made out, and the amount."

[*Welsh v. Speakman.*]

The plaintiffs objected, the court overruled the objection, and the plaintiffs excepted.

12. A justice of the peace proved in behalf of the defendants that suits were instituted before him to recover accounts due Edgmont store, brought to him by William Speakman, Jun. The defendants then asked him whether he brought suits in the name of William Speakman, Jun. The plaintiffs objected; the court, after the witness had stated on a question by them, that the bills were in the name of William Speakman, Jun., overruled the objection, and the plaintiffs excepted.

13. A witness for the defendants, having stated his boarding with William Speakman, Jun. at Edgmont from March to Christmas 1840, and the mode in which the goods were marked that arrived at the store, the defendants asked him to state what means William Speakman, Jun. had to go into partnership? The plaintiffs objected, the court overruled the objection, and the plaintiffs excepted.

14. Another justice of the peace stated on behalf of the defendants, that William Speakman, Jun. called on him to collect three bills in August 1841, and process issued on two of them. The plaintiffs objected to his testimony, the court overruled the objection, and the plaintiffs excepted.

15. The witness then stated the bills were for debts contracted at Edgmont store, and they were recovered and satisfaction entered by William Speakman, Jun. The defendants then offered in evidence the bills which were in the name, some of William Speakman, others of William Speakman, Jun. The plaintiffs objected, the court overruled the objection, and the plaintiffs excepted.

16. The defendants offered to prove by the Secretary of the American Fire Insurance Company, that in January 1842, William Speakman, Jun. procured insurance against fire on the stock of goods at Edgmont in \$5000, under an order signed by William Speakman, Jun. with the name or firm of William Speakman & Son, and in consequence of a fire, soon after was paid the sum of \$1800 for the loss, that being the amount settled in 1844 by compromise after suit brought and arbitration. The whole business was managed by William Speakman, Jun., and the witness never saw the elder Mr Speakman. With this evidence the defendants offered in evidence the policy of insurance in \$5000, dated 21st January 1842, by which William Speakman & Son were insured on store goods at Edgmont. To this evidence the plaintiffs objected, the court overruled the objection, and sealed a bill of exceptions.

Errors were now assigned in the matters contained in the bills of exception.

Lewis and *J. M. Read*, for the plaintiffs in error, referred to 4

[*Welsh v. Speakman.*]

Whart. 367; 11 *Serg. & Rawle* 372; 2 *Whart.* 553, 561; 1 *Watts & Serg.* 338; 2 *Watts* 277; 10 *Ibid.* 101; 6 *Ibid.* 698.

Darlington v. Meredith, *contra*, cited 6 *Whart.* 148; 1 *Whart.* 313.

The opinion of the Court was delivered by

ROGERS, J. — This is an action of assumpsit for goods sold and delivered to William Speakman and William Speakman, Jun., trading under the firm of William Speakman & Son. The declaration sets out the cause of action, avers the insolvency of William Speakman, Jun., and the death of William Speakman, Sen. The suit is brought to recover the amount due from the executors of William Speakman, Sen. The defendants pleaded the general issue, and on the trial the cause turned on two points; first, the insolvency of William Speakman, Jun., and secondly, the partnership of William Speakman & Son. It was admitted that the goods were sold and delivered to William Speakman, Jun., and the principal point in controversy was the alleged partnership.

The admission of one of the defendants sued as partner, that he and others composed the firm, has been ruled to be evidence. The existence of a partnership may be proved by the separate admissions of all who are sued. The law does not require direct and positive proof for this purpose; for it may be proved by the acts, declarations and conduct of the parties, by the act of one, the declarations of another, and the acknowledgment or conduct (where the firm consists of three persons) of the third. It cannot, however, be proved by the act of one only, but the whole testimony taken together may be and frequently is adjudged competent evidence of partnership. It is sometimes said that the admission of one is not evidence against the others, by which is meant that where the plaintiff fails in his proof against any one member of the alleged firm, he cannot recover, however strong and overwhelming may be the evidence arising from the admissions or conduct of the other defendants who are sued; for in order to sustain his case, he must connect each and every one by their own admissions or acknowledgments. But to effect this, the plaintiff has a right to prove one thing at a time, to add fact to fact, from which the jury, who must judge from the whole case, may infer the existence of the partnership. 4 *Whart.* 367; 11 *Serg. & Rawle* 372; 2 *Whart.* 553, 561; 1 *Watts & Serg.* 338.

And this course is permitted, because where there are no articles of copartnership, or they are suppressed, and no persons present at the contract, it would be impossible to prove a partnership, and thus the justice of the case would in many cases be perverted.

To support his case, the plaintiff in the first place proved certain confessions of the testator. Evidence was given that various packages of goods at different times were sent to the store at Edg-

[Welsh v. Speakman.]

mont, where the business of the firm was transacted, marked William Speakman & Son; that the testator was frequently at the store, and in a situation where it is more than probable he may have seen the goods so marked. Other evidence was also given which together raise a strong inference that William Speakman, Sen. was connected in business with his son. After these preliminary steps, the plaintiffs offer the evidence contained in the 2d, 3d, 5th, 7th, 8th and 9th bills, which in effect was an offer to show by the admissions of William Speakman, Jun. that he also was a member of the firm; and upon the principles above admitted, we think this evidence clearly admissible. Had the suit been brought against both, it would hardly admit of argument. The testimony rejected by the court shows that the bills of goods furnished for the store at Edgmont were rendered in the name of William Speakman & Son. It was, therefore, pregnant evidence against William Speakman, Jun., to whom the bills were sent; for the inference is irresistible that it was done with his consent and by his orders; for unless there was a connection between them in business, the error, it is reasonable to suppose, would have been immediately corrected. As then it would have been evidence if the suit had been brought against both, is there anything in the manner the suit is instituted which prevents its being received? The suit is brought against the executors of the solvent partner to prevent a failure of justice. By the death of the father the action survives against the son, who at law (being vested with the partnership funds) is alone liable; but he having become insolvent, it would be fruitless to proceed against him; hence, in this State, where we have no Court of Chancery, we aver the insolvency of the surviving partner, and proceed against the executors of the deceased partner. Now conceding that proof alone against the deceased partner would be all that is required (a point by no means clear), yet why should the plaintiff be prevented from strengthening his case by testimony of the admissions of the surviving partner? It certainly adds force to the allegation of the existence of the partnership, a principal and material fact that it is indispensable the plaintiff should establish to sustain his action. We are therefore of the opinion the court erred in ruling out the evidence contained in the 2d, 3d, 5th, 7th, 8th and 9th bills.

We also think, for the same reason, the court should have received the plaintiff's offer of the day-book and ledger. Of this the court were afterwards convinced, and, in a subsequent stage of the cause, said they might be given in evidence: but this offer the counsel for the plaintiff declined, stating that he had designed to give the books in evidence in connection with some explanatory testimony not now at hand, the witness having been discharged. On this state of facts two courses were open to the plaintiff—either to request that a juror should be withdrawn, or that the cause should be postponed, so as to give him an opportunity to

[Welsh v. Speakman.]

send for his witness. If either course had been pursued, and declined by the court, there would be some ground of complaint; but where such a request has been omitted, we should be unwilling to reverse a judgment for a mistake which the court was willing and offered to correct. He takes the chance of a verdict, and, having failed, he cannot now assign it as error.

The objections to the evidence in the 11th and 12th bills, which go to the form rather than the substance of the testimony, can be so easily obviated on another trial, that it requires no comment. It involves no principle which can be useful in another trial.

It is competent for the defendants to show the course or manner of doing business at the Edgmont store before any controversy arose: as, for example, that the sign was in the name of William Speakman, Jun.; that the books were kept in his name; that the bills were so made out, and that suits were before a justice in his name. And, as I understand it, this was the design of the testimony contained in the 14th and 15th bills. The evidence, we think, was properly received.

The evidence, also, in the 16th bill was properly admitted on the issue of the insolvency of William Speakman, Jun.

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

Cochran *against* Perry.

Partnership by written articles: the act by which the plaintiff was alleged to have retired, and that by which the defendants were alleged to have continued the firm, was reduced to writing: parol proof is inadmissible to show that the defendants only were partners when the plaintiff performed services.

A partnership is dissolved when one of the partners sells his share to a stranger or one of the firm, unless otherwise provided by agreement.

Where articles of partnership provided for the transfer of shares by members, subject to restrictions, that a shareholder, after such transfer, should cease to be a member, that the company should keep books, and the persons becoming members by transfer on the books should be entitled to receive a certificate in a particular form, the plaintiff executed an agreement to transfer, not entered on the books, to two of his copartners. *Held*, that this was either a present transfer, which dissolved the partnership, or an executory agreement, which left him standing as a member.

A subsequent ratification of a transfer by the other partner on a condition not performed makes no difference in the relations of the partners towards each other.

After a transfer not completed, no action lies by the party transferring against the other partners, but account render.

And to make such ratification binding, all the partners must join in it.

THIS case came up on exceptions to the opinion of Mr Justice ROGERS, before whom it was tried on the 28th December 1843,

[Cochran v. Perry.]

and who directed a nonsuit. It was an action brought in the Supreme Court by Richard Cochran against William Perry, Andrew Cochran, John D. Beers, and Gates Wilcox, late trading as the Williamsport and Philadelphia Lumber Company. Perry alone was served with process, and appeared and pleaded. The rest were returned not summoned. The plaintiff's demand was for services rendered to the defendants. After reading several depositions, he offered Andrew Cochran, one of the defendants not summoned (and who was willing to testify), as a witness to prove the partnership of the defendants. The defendants objected to his competency. The court sustained the objection, and the plaintiff excepted.

The plaintiff then gave in evidence articles of agreement, dated 31st May 1842, between William Perry, John D. Beers and Andrew Cochran respectively, reciting that these parties, together with Richard Cochran and Gates Wilcox, entered, on the 19th November, 1839, into articles of copartnership, under the style and title of the Williamsport and Philadelphia Lumber Company, a copy of which was annexed (marked A), and the whole of the beneficial interest in the property of the company had become vested in the parties to these presents and the said Gates Wilcox, although some of the shares of the stock of the company were nominally vested in others; and that these parties and Gates Wilcox, on the 25th October 1841 (the whole of the stock really representing an interest being then vested in them), entered into an agreement in writing, as per copy marked (B), for the sale of the real estate of the association; that a sale took place on the 24th November 1841, and the whole was purchased by the parties, except two lots, as appeared by schedule (C). That they were in debt; that the interests of the parties and of Gates Wilcox were represented by shares of stock, viz: Wm. Perry, 310 shares; John D. Beers, 208 shares; Andrew Cochran, 315 shares, and Gates Wilcox 167 shares—total, 1000 shares—the whole amount of stock representing the whole property of the association. It then recites the means applicable to paying debts, consisting, first, of personal estate, and, secondly, proceeds of sale of real estate; therefore, for the purpose of finally dissolving the concern, and winding up its affairs, and producing means to pay debts, &c., it was agreed that Wm. Perry should purchase and take a certain number of acres at certain prices, John D. Beers a certain other number, Andrew Cochran a certain other number, and conveyances should be mutually made. That Gates Wilcox might become a party to these articles at any time, expressing his assent to them under his hand and seal, and thereupon he should be considered a purchaser, under these articles, of the two lots, &c.; and all the covenants should be construed to extend to his purchase, and he considered as coming in under and making himself subject and liable equally with the other parties. And it was further agreed that the said association be, and is from

[*Cochran v. Perry.*]

henceforth, dissolved, except so far as joint action is necessary to the winding up and settling its concerns; and for that purpose the parties were to sell the lumber and convert logs into lumber, the residue of debts not thus provided for to be assessed on the purchasers of the real estate, in the ratio of stock, &c., to be secured by bond and mortgage. In conclusion it recites that it is assumed that Gates Wilcox owns the shares standing in the names of G. Jones and G. Griffin, and that Andrew Cochran owns the shares standing in the name of Richard Cochran, and that the shares standing in the name of James Armstrong are merely nominal, he having no interest therein; and that stock thus held should be transferred to the parties in the books of the company.

The articles of association marked (A), above referred to, were made the 19th November 1839, between Wm. Perry, Andrew Cochran, J. D. Beers, Richard Cochran, and Gates Wilcox. It was therein recited that they had associated with the object of forming a joint stock company, for the purpose of purchasing timber and timber lands, and mill-seats, and conducting the lumber business in Pennsylvania. It was agreed the estate, real and personal, should be vested in William Perry and Gates Wilcox, in trust for the copartners, their heirs, successors and assigns, in the manner thereafter described, they to make a declaration of trust. Various articles were then prescribed: the name was to be the Williamsport and Philadelphia Lumber Company; the copartnership was to consist of the parties, and such other person or persons as might become members thereof in the manner thereafter provided. The capital stock was to consist of the estate real and personal, valued at \$337,000.

Fourth. The capital stock of said company or copartnership shall be divided into fifteen hundred shares, valued at one hundred dollars each share, which shares shall be represented by certificates to be issued as hereinafter provided, certifying that the holder thereof is entitled to one or more shares, as the case may be, in the capital stock of said company or association, said shares to be transferable on the books of the company, by the holders thereof in person, or by power of attorney as hereafter provided.

Fifth. Any person becoming the owner or holder of one or more shares, as aforesaid, shall, from and thereafter, be a member of said company, and entitled to all the privileges of membership as such, as fully as any of the parties hereto are or may be.

Sixth. Any of the parties hereto, or any person or persons hereafter becoming members of said company, may, by person or power of attorney, transfer to such other person or persons as he or they may choose, subject to the restrictions hereinafter mentioned, all or any of the shares aforesaid to which he or they may be entitled; but on the transfer aforesaid of all such share or shares to which he or they may be entitled, such person or per-

[Cochran v. Perry.]

sons shall cease to be, from and thereafter, a member of said company.

Fourteenth. All persons becoming shareholders in said company by transfer on the books as aforesaid, shall be entitled to receive a certificate or certificates signed by the president, who shall be appointed by said directors from among their own body, and by the secretary, which certificates shall be in the form following: to wit—

“ Williamsport and Philadelphia Lumber Company.

“ No

Shares \$100 each.

This is to certify that _____ is proprietor of _____ shares of the capital stock and beneficial interests of the Williamsport and Philadelphia Lumber Company, created and acquired in pursuance of the articles of association constituting said company. Each share is of the par value of one hundred dollars, and is clear of all other incumbrance agreeably to the articles of association, and is only transferable on the books of the company and by surrender of this certificate.

“ Philadelphia, 18 { Trustees. }
 “ Sec’y. { A. B. }
 { C. D. }

Pres’t”

2. The plaintiff then offered Andrew Cochran as a witness to prove that the plaintiff had ceased to be a member of the said company before the period at which the cause of the present action arose. The defendants objected to his competency: the court rejected the witness and sealed another bill of exception.

3. The plaintiff then offered Andrew Cochran as a witness to prove the handwriting of the parties to an agreement dated January 31st 1840, between Cochran, and Perry, and the plaintiff, Richard Cochran, for the sale by the plaintiff of \$12,000 worth of stock in said company, in order to show that the plaintiff was not a member of said company when the cause of action accrued: the defendants, however, again objected to his competency; the court sustained the objection and sealed a bill of exceptions.

The court entered a nonsuit and the plaintiff excepted.

M’Call, for plaintiff in error.

Miller, contra.

The opinion of the Court was delivered by

GIBSON, C. J.—It is unnecessary to consider the bills of exceptions to evidence, as the testimony proposed was clearly inadmissible to vary or contradict the written evidence on which the relation of the parties depended. They entered into partnership by written articles; and the act by which the plaintiff is alleged to have retired, as well as the act by which the defendants are

[*Cochran v. Perry.*]

alleged to have continued the firm without him, was reduced to writing; consequently, to have admitted a witness to establish the existence of exclusive partnership between the defendants when the services were rendered, would have allowed the legal effect of the documents to be controlled by parol proof. As much of the plaintiff's evidence as was competent, then, being before the jury, the further question was on its sufficiency to make out a case.

The action was for services to a firm, of which the plaintiff was, at one time, confessedly a member; and it was necessary for him to show not only that he had retired from it in order to avoid an objection to the form of the action, but that the defendants were partners or joint contractors when the services were rendered, in order to entitle him to recover on the merits. It is clear that a partner cannot, consistently with a continuance of the partnership, retire from the firm, or introduce another into it, without a provision for it in the articles, or at least without subsequent ratification by all the partners. The contract of partnership is founded in personal confidence reposed by the partners in each other, which they may be unwilling to repose in a substitute; and it is for this reason that an involuntary transfer by judicial sale of a partner's share in the concern, has been held to dissolve it. Why should not a voluntary sale of it have the same effect? It has been held that a partner cannot transmit his capacity to act as such, by will or intestacy; and an act of bankruptcy is an immediate dissolution, because it vests his share in the partnership in his assignees. There can be no doubt that the same effect would be produced by a voluntary transfer to a stranger; and there is no reason to distinguish it from such a transfer to one or more of the copartners. The partners themselves may order it otherwise by a provision in the articles; or by subsequent agreement; but they may do so on their own terms; and a power to transfer a partner's share to a copartner, as well as to a stranger, must be executed in the manner, and in conformity to the conditions prescribed. Partnerships are sometimes formed in consideration of peculiar qualities attributed to particular members, and the others may be unwilling to carry on the business without them. The fundamental articles in this case prescribe that the original members or their successors may transfer their shares subject to restrictions; that a shareholder shall cease to be a member after transfer; that the company shall keep transfer books; and the persons becoming members of the company by transfer on the books shall be entitled to receive a certificate in a particular form. The plaintiff executed an agreement of transfer, not entered on the books, to two of his copartners; and it presents to him this dilemma: it was either a present transfer which dissolved the partnership, or it was an executory agreement which left it standing in the mean time, but left him standing also a member of it;

[Cochran v. Perry.]

and on the one or the other horn of which he must hang, unless some subsequent act of the defendants has released him from it.

The agreement subsequent to the plaintiff's irregular transfer, by which it was declared that Andrew Cochran owns the shares standing in the name of Richard Cochran, would undoubtedly be a sufficient act of confirmation as to all who executed it, if it were unconditional; but it was also declared that persons having stock standing in the names of others, must forthwith cause the same to be transferred in the books of the company; thus evincing an opinion, well founded in principles of law, that an imperfect transfer, though it pass an equitable title to the transferee, introduces no difference into the relations of the partners with each other. But the confirmation was to depend on a condition precedent, which has not been performed. As no transfer has been shown in the books, the plaintiff remains the ostensible owner of the shares for partnership purposes, and a member of the firm as regards the company; in which character he can maintain no action against his copartners but account-render. Even had the confirmatory clause been unconditional, it would not have entitled him to recover in *assumpsit* against these defendants, inasmuch as one of them (Wilcox) is not a party to it. He neither executed it nor did any other act to dispense with the original articles; and as the plaintiff was bound to prove a joint contract by all, he cannot recover against them on the ground either that the original partnership was continued or a new one formed.

Judgment affirmed.

Felton *against* The Commonwealth.

Under the 11th section of the Act of 12th April 1838, and the 33d and 36th sections of the Act of 7th March 1840, the remaining school directors have the power and it is their duty to declare the seat of a director vacant whenever the cases contemplated in those sections arise, as well in the county of Philadelphia as in other parts of the State.

But in Penn Township this power and duty are expressly vested by the 33d section of the Act of 7th March 1840, in the remaining directors respectively of each of its election districts of North and South Penn.

ERROR to the Common Pleas of *Philadelphia* county.

This was a writ of *quo warranto* in the name of the Commonwealth, at the suggestion of Jacob Heyberger, John Summers, William Rheiner and Grover Roberts, against Anthony Felton, Nathan Nathans and Edward T. Tyson. The writ and pleadings were as follows:

[*Felton v. The Commonwealth.*]

Be it remembered, that Jacob Heyberger, John Summers, William Rheiner and Grover Roberts, who sue for the Commonwealth in this behalf, come here into court, and give the court here to understand and be informed, that the said Jacob Heyberger was, on the third Friday in March 1843, that the said John Summers was, on the third Friday of March 1844, and the said William Rheiner on the day last mentioned, respectively, duly elected by the qualified electors of South Penn Township and North Penn Township, in the county of Philadelphia, directors of the public schools in and for said townships: That is to say: the said Jacob Heyberger a director as aforesaid for South Penn Township; the said John Summers a director for the same township; and the said William Rheiner a director for North Penn Township, to hold their said respective offices for the term of three years from and after their election as aforesaid, together with all the rights, powers and privileges to their said respective offices belonging or in any wise appertaining. Copies of the certificates of their due election as aforesaid, signed by the proper officers, being hereunto attached and submitted as part of this suggestion.

And the relators further give the court here to understand and be informed, that the said several offices were respectively accepted by them, and that they severally entered upon and assumed the discharge of the duties appertaining by law to the same, and that they have not, nor has either of them, resigned or in any way vacated said offices or either of them. That notwithstanding the premises, Anthony Felton, Nathan Nathans and Edward T. Tyson have, since the first day of July 1844, hitherto used, and still do use, the franchise, office and privilege of directors of public schools for the said townships of South Penn and North Penn respectively; that is to say: the said Anthony Felton, the office of a director of public schools for South Penn Township; the said Edward T. Tyson, the office of a director for said township, and the said Nathan Nathans, the office of a director for North Penn Township aforesaid; and during the aforesaid time have usurped, and do usurp, each of them, upon the Commonwealth therein, to the great damage and prejudice of the laws thereof.

Whereupon the said relators, for the said Commonwealth, do make suggestion and complaint of the premises, and pray due process of law against the said Anthony, Nathan and Edward, in this behalf to be made, to answer to the said Commonwealth by what warrant they claim and each of them claims to have and enjoy the franchise, office and privilege aforesaid.

And now, to wit, this thirtieth day of August, in the year 1844, comes the said Nathan Nathans, and protesting that the suggestion filed in this case, and the matters therein contained, are insufficient in law, and that he is not bound to answer thereto, yet for a plea in this behalf, he saith, that true it is as in said suggestion set forth, that said William Rheiner was elected a director on the

[*Felton v. The Commonwealth.*]

third Friday of March 1844; but that it is not true, as therein stated, that he accepted said office, or entered upon or assumed the duties thereof; but on the contrary he, the said William, though duly notified in writing so to do, refused to attend a regular meeting of the Board of Directors of the Eleventh Section of the First School District of Pennsylvania, the said township of Penn being part of said section, and which meeting was held on Monday the third day of June last past. And this respondent further saith, that on said day and year last mentioned, said meeting having been held for the purpose of electing a controller for said section, the said William came to the place of meeting, but refused, though then and there required so to do, to come into the room where said board of directors met, and vote for a controller; by reason of which said several premises, and by force and virtue of the 11th section of an Act of the Legislature of this Commonwealth, passed on the 12th day of April 1838, the seat of said Rheiner then and there became forfeited, and the directors present declared his seat in the said board vacant; and afterwards, to wit, on the 1st day of July 1844, appointed said Nathan Nathans in the place and stead of said William. And he the said Nathan then and there accepted the same, and entered upon the duties thereof; wherefore, and by reason whereof, he the said Nathan, during all the time mentioned in said suggestion, used and exercised said office of director, and all the liberties and franchises thereto belonging and appertaining, as it was lawful for him to do. Without this, that the said Nathan, the office, liberties and franchises aforesaid in said suggestion mentioned, or any of them, did usurp upon said Commonwealth, in manner and form as by said suggestion is supposed. All and singular which said things he the said Nathan is ready to verify, when and as the court shall award; and he prays judgment that the aforesaid office, liberties, privileges and franchises, by him above claimed, may be adjudged and allowed him, and he dismissed and discharged by the court here, of and from all the premises above charged upon him.

And now, to wit, this 30th day of August, in the year 1844, comes the said Anthony, and protesting that the suggestion filed in this case, and the matters therein contained, are insufficient in law, and that he is not bound to answer thereto, yet for plea in this behalf he saith, that true it is, as is in said suggestion set forth, that said Jacob Heyberger was elected a director on the third Friday of March 1843; but that after his said election, to wit, on the third Friday of March 1844, he was elected a commissioner in and for the incorporated district of Penn, under and by virtue of the Act of Assembly incorporating said district, and providing for the election of commissioners thereof, passed on the 26th day of February 1844, and that being so elected such commissioner, he the said Jacob did take upon himself and accept the said office or appointment aforesaid, and entered upon the duties thereof, by

x *

[*Felton v. The Commonwealth.*]

reason whereof and by force and virtue of the 4th section of an Act passed March 18th 1842, entitled, "An Act to authorize the citizens of Little Beaver township, in the county of Beaver, to elect two additional supervisors of the highways, and for other purposes," the said Jacob vacated his seat and office as director aforesaid; and afterwards, to wit, on the 8th day of April 1844, at a meeting of the Board of Directors of the Eleventh Section of the First School District of the State of Pennsylvania, it having been made to appear to said board that the said Jacob had, subsequently to his said election as director, been elected to and accepted the office of said commissioner, the said board then and there passed a resolution, unanimously declaring the said Jacob to have ceased being such director, and to have vacated his seat at said board. And the said Anthony further saith, that afterwards, to wit, on the 1st day of July last past, the remaining directors of the township of Penn, at a stated meeting duly and legally convened, did elect the said Anthony to be a director, in the place and stead of the said Jacob, and he the said Anthony then and there accepted the same, and entered upon the duties thereof. Wherefore, by reason of the premises, he the said Anthony, during all the time mentioned in the said suggestion, used and exercised said office of director, and all the liberties and franchises thereto belonging and appertaining, as it was lawful for him to do. Without this, that the said Anthony, the office, liberties, privileges and franchises aforesaid, in said suggestion mentioned, or any of them, did usurp upon said Commonwealth, in manner and form as by said suggestion is supposed. All and singular which said things, he the said Anthony is ready to verify, when and as the court shall award; and he prays judgment, that the aforesaid office, liberties, privileges and franchises by him above claimed, may be adjudged and allowed him, and he dismissed and discharged by the court hereof, and from all the premises charged upon him.

To each of these pleas the plaintiff filed a general demurrer, whereupon the court below, on the 30th day of November 1844 ordered judgment of ouster against all the defendants (against E. T. Tyson by default), and further ordered and adjudged that the relators Summers, Heyberger and Rheiner be restored to their respective offices to which they were elected by the people.

Errors assigned:

1. The court below erred in entering judgment of ouster against defendant Nathans.

2. In entering judgment of ouster against defendant Felton.

3. In restoring the relator Rheiner.

4. In restoring the relator Heyberger.

The case was argued by

J. A. Phillips and *Nathans*, for the plaintiffs in error; and by
G. M. Wharton and *Miles*, contra.

[*Felton v. The Commonwealth.*]

The following Acts of Assembly on the subject of schools were cited in the argument:— Act 12th April 1838, sec. 11; Act 13th June 1836; Act 7th March 1840; Act 4th March 1842; Act 18th March 1842, sec. 4; Act 19th April 1843, sec. 6; Act 26th Feb. 1844; Act 9th March 1844; Act 24th April 1844; Act 30th July 1842.

The opinion of the Court was delivered by

SERGEANT, J.—It is unnecessary to repeat the provisions of the different Acts of Assembly relating to the system of public schools which have been cited in the argument. It is sufficient to state the results to which we have come on a consideration of them.

We are of opinion that, under the 11th section of the Act of 12th April 1838, and the 33d and 36th sections of the Act of 7th March 1840, the remaining directors have the power, and it is their duty to declare the seat of a director vacant whenever the cases contemplated in those sections arise, as well in the county of Philadelphia as in other parts of the State; that provision in the Act of 1838 not conflicting at all with the Act of 1840, but being equally proper and necessary, it is, therefore, not repealed by the latter act. The truth is, that to the public the great object is to have these places filled, and the duties of them uninterruptedly attended to; and the board themselves are made competent to effect this without delay, and to their decision it is given.

But we are of opinion that this power and duty of declaring the seats of directors vacant is, in Penn township, expressly vested, by the 33d section of the Act of 1840, in the remaining directors respectively of each of its election districts, North and South Penn. No director of any other township or election district is empowered to participate in declaring or filling a vacancy. It follows that as these acts, in the present cases, were done by the 11th section of school directors, consisting of both North Penn election district and South Penn election district, and the township of Unincorporated Northern Liberties, they were unauthorized.

Whatever, therefore, may have been the acts of Rheiner or the disqualification of Heyberger, their seats in the respective boards have not been legally declared to be vacant, and of course Felton and Nathans were not legally appointed in their stead.

Judgment affirmed.

Cochran *against* M'Teague.

A creditor who assigns his claim a few months before the commencement of suit upon it, for the purpose of being a witness for the assignee, is incompetent.

ERROR to the Common Pleas of *Delaware* county.

Assumpsit to May Term 1843, No. 10, brought by Daniel M'Teague for the use of William Belt, and subsequently marked for the use of John Bouvier, against Isaac E. Cochran and others, administrators of John Cochran, deceased. The plaintiff claimed under the following promissory note and agreement:

"I promise to pay Daniel M'Teague or bearer \$200, if I get the contract of the Catholic church at Chester; one hundred to be paid on demand, the other hundred to be paid three months after date.

JOHN COCHRAN.

And I do further agree to pay Daniel M'Teague eight dollars per week for carrying on and superintending said church above mentioned, from this date till said church be all finished completely. Dated the 14th September 1842.

JOHN COCHRAN."

The plaintiff then gave in evidence the following assignment, endorsed on the foregoing:

"I hereby assign and transfer to William Belt all my right and title or interest in and to the within agreement, and all debts and moneys due or payable to me from John Cochran, founded upon the same, to this date.

DANIEL M'TEAGUE.

Witness P. B. Carter.

Chester, March 25th, 1843."

And also the following:

"In the Court of Common Pleas of Delaware county.

Daniel M'Teague, for the use of William Belt, v. John Cochran.	}	No. 10 to May Term 1843. And now to wit, May the 4th, 1843, judgment in favour of the plaintiff for the sum of \$295, &c.
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For a valuable consideration to me in hand paid, I hereby assign and transfer all my right, title and interest in the above-named judgment unto John Bouvier, Esq., of the city of Philadelphia, his heirs and assigns for ever, to have and to hold to his and their use, this 17th day of January 1844.

WILLIAM BELT. [SEAL.]

Witness P. B. Carter."

[Cochran v. M'Teague.]

The plaintiff then called Saurin, Le Brun, and other witnesses, to show that the defendant obtained the contract, and the plaintiff superintendence of the work. The defendant examined witnesses to show that the plaintiff and defendant were partners in the contract. The plaintiff then offered M'Teague as a witness, and produced the following release :

"Whereas Daniel M'Teague did, on the 25th day of March 1843, on the back of a certain note and agreement between him and John Cochran, assign and set over to me all his right and title to the said note and agreement, and all monies due him from said John Cochran :

Now I, William Belt, do hereby release and discharge the said Daniel M'Teague from all right of action, claims and demand for and on account of said matters so assigned to me, fully and absolutely, whether I or the person to whom I have assigned the same shall recover of the said Cochran or his administrators or estate any money, or wholly fail to recover anything upon said claims against said John Cochran or his representatives. Witness my hand, this 28th day of February 1844.

WILLIAM BELT. [SEAL.]

Sealed and delivered in the }
presence of E. Darlington. }

The plaintiff further called P. B. Carter, who testified as follows :—I know that M'Teague has no interest in any way in this matter. The transfer was made before suit at my office ; both parties were present. Belt gave M'Teague his note for \$400 payable in nine months. The transfer was made for the purpose of M'Teague's being a witness. I can't say that M'Teague was indebted to Belt. He brought Belt to my office. Belt's note is taken up in the transfer to Bouvier. That transfer was to have been made previous to the last court, but was not executed until January. I saw no consideration pass. Belt's note has been surrendered. It is to Judge Bouvier to whom the transfer has been made. Mr Elliott has feed me as the agent of Bouvier. What I know is from the parties. *Cross-examined.*—I have one or two letters from Judge Bouvier. He sent me a form of the transfer. I think I could find it. He has not been here at all himself. The first assignment was executed at Belt's house ; he and his lady were present. Belt and myself were present to-day. Belt's note to M'Teague was surrendered 17th January. I handed it to him. The note had remained in my possession from the time of the first transfer from M'Teague to Belt.

The plaintiff then called M'Teague, who on his voir dire stated :—Bouvier paid \$330 in cash to Belt in January when the transfer was made. I don't know what became of the note ; it was in Carter's hands. The \$330 was paid to me ; the moment I had the money paid down, I signed the agreement drawn up in Judge

[Cochran v. M'Teague.]

Bouvier's office. I have parted with all my interest in the claim. The money was paid to me by Judge Bouvier in his office. *Cross-examined*.—I signed an agreement against Belt's note. I don't know what became of the agreement. I received specie in part and \$105 in notes. I don't know who subpoenaed the witnesses. Elliott gave the directions as to the subpoenas. I accompanied him to Carter's office. Elliott is not here to-day, nor was he yesterday. I subpoenaed Le Brun. I was at Squire Bartram's office when the depositions of Saurin and Le Brun were taken. I happened to be in Carter's office, and he took me there; he did not say what for. I did suggest questions to my counsel in the examination. I had possession of Belt's note, but not out of Carter's office. The moment it was witnessed, it was handed into Belt's hand, and he handed it to me; it was witnessed by Carter; no others present.

The defendant objected to M'Teague as incompetent, but the court admitted him and sealed a bill of exceptions.

Some other exceptions were taken, but not insisted on here.

Edwards, for the plaintiff in error, referred to *Ludwig v. Meyre*, (5 *Watts & Serg.* 535).

Darlington, contra.

The opinion of the Court was delivered by

SERGEANT, J.—This case seems to fall within the principles decided in *Patterson v. Reed*, (7 *Watts & Serg.* 144), and in the previous cases of *Leiper v. Peirce*, (6 *Watts & Serg.* 555), and *Post v. Avery* (5 *Ibid.* 509). A few months before the commencement of the suit, M'Teague, alleging a claim against Cochran upon a note not negotiable and a contract for wages, assigns his interest to Belt, who then brings suit in M'Teague's name for his own use. The defendant sets up a partnership, and to repel this and procure a verdict, M'Teague is produced as a witness. To introduce his evidence and show that it was a fair and *bonâ fide* transaction, Carter is examined, who states that the transfer was made for the purpose of making M'Teague a witness. If so, then M'Teague, in consideration of transferring his claim, not only gives his note for \$330, but undertakes virtually to sustain the claim by his testimony, which brings it directly within the decision in *Patterson v. Reed*, and makes it indeed a much stronger case; for here the condition is directly avowed, which there was inferred from the circumstances. It is not to be expected that such a party to the record should be an indifferent witness, though he has assigned his claim, if he is still under an obligation to the assignee to stand ready as a witness for him when necessary to help out a doubtful case before the jury. There are some other circumstances calculated to raise suspicion, such as the note's not being delivered

[Cochran v. M'Teague.]

over to M'Teague but remaining in the hands of Carter, who appears to have been an agent of both, as well as Bouvier, and moreover, the activity of M'Teague in the preparation of the suit, that render doubtful that fairness in the transaction which the party offering such witness is bound to establish before he can be considered as competent.

Judgment reversed, and a *venire de novo* awarded

Jones *against* Murphy.

Will made 16th April 1837: the defendants alleged another will made about the 17th June 1837, different in its dispositions, revoking former wills, and that it was destroyed or suppressed by fraud.

Held, 1. That if such destruction or suppression is shown expressly or by circumstances, and that the dispositions of the second will are inconsistent with those of the first, it amounts to a revocation.

2. When the second will cannot be found, and the question is what became of it, the first presumption is that it was in the possession of the testator, and that he cancelled it; but if it was in the possession practically of the wife or executor whose interests are adverse to it, proof ought to be given on the subject, and the absence of proof is an argument against the presumption.

3. In case of spoliation or fraud in respect to the second will, it is not necessary to show its contents, or in what respect it revoked the first, as must be done in ordinary cases.

ERROR to the Common Pleas of *Philadelphia* County.

This was a feigned issue to try the validity of a certain instrument of writing dated 16th April 1837, purporting to be the last will and testament of Peter Shade deceased, in which Daniel R. Murphy and James Green, executors of the estate of Peter Shade deceased, were plaintiffs, and Thomas Jones and Maria his wife, daughter and heiress of said Peter Shade, defendants.

The instrument in question was as follows:

I, Peter Shade, of the county of Philadelphia, gentleman, do make and publish this as my last will and testament in manner and form following, that is to say, in the first place I direct my executors, Daniel R. Murphy and James Green, to pay and satisfy all my just debts and funeral expenses as soon after my death as can conveniently be done, out of the rents, issues and profits of my real estate; and the better to enable my said executors to pay and satisfy my said debts and funeral expenses, I do give and devise to them, the said Daniel R. Murphy and James Green, and the survivor of them, and the executors of such survivor, all my lands, tenements and hereditaments for the space of one year, (my house in Almond street, No. 41, excepted,) to keep the same in

[*Jones v. Murphy.*]

repair, and out of the rents, issues and profits thereof to pay and satisfy my said debts and funeral expenses, and after the payment of my said debts and funeral expenses, to pay to Elizabeth Green out of the said rents, issues and profits of my real estate the sum of \$500 for her sole and separate use and without any interference of her present husband, James Green, or any future husband, and her receipt shall be sufficient discharge for the said sum of \$500 to my said executors; and in case any surplus shall remain of the said rents, issues and profits of my real estate in the hands of my executors after the payment of my debts and funeral expenses and the legacy of \$500 to the said Elizabeth Green, my step-daughter, I give and bequeath unto my said wife, Hannah Shade, the said surplus. Item, I do give and bequeath unto my said wife all my moveable property at Francisville, to be disposed at public sale as soon as conveniently can be done. Item, I do give and devise unto my said wife my house situated on the north side of Almond street, No. 41, with all the furniture therein, to have and to hold the same for the term of her natural life and no longer, she to keep the said house in repair and to pay all taxes on the same; but in case my said wife shall marry, then this said devise shall cease. Item, I do give and bequeath the interests and dividends due and to grow due on my bank stocks to my executors in trust to pay the same over from time to time to my said wife for and during the term of her natural life; but in case my said wife shall marry after my death, then this bequest shall cease. Item, I do give and bequeath unto the said Elizabeth Green all that certain two story brick messuage or tenement situated on the west side of Delaware Seventh street, in the county of Philadelphia and next to the corner of Baker street, to have and to hold the said messuage or tenement and lot or piece of ground thereunto belonging unto the said Elizabeth Green for and during the term of her natural life and no longer, and without any control or interference of her present or any future husband, and for her sole and separate use. Item, I do give and devise and bequeath to my friend, Joseph S. Riley, his heirs, executors, administrators and assigns, in trust nevertheless for the only proper use and behoof of my grandson, John V. Shade, and my granddaughter, Elizabeth Shade, all that certain brick house situated in North Front street, No. 2, now occupied by John G. Martin, together with that brick and frame messuage or tenement situated in Biddle's Alley, share and share alike, as tenants in common and not as joint tenants, the rents to be collected quarterly and be deposited in the Savings Fund, the interest to be added to the principal, and the share of each to be paid as he or she may arrive at the age of 22 years: in case the death of one of them previous to the age of 22 years, the survivor shall be entitled to that portion bequeathed to both, but should they die without issue, then my heirs hereby named, that is, Susanna Ferguson, Margaretta Myers and Elizabeth Lenahan, shall inherit their estate.

[Jones v. Murphy.

And all the rest of my real estate (being all my real estate after the payment of my debts and funeral expenses, and the satisfaction of estates for life devised to my stepdaughter Elizabeth and my wife Hannah, and my personal estate with the exception of the furniture and moveables hereinbefore bequeathed to my said wife, and the interest and dividends of my bank stocks bequeathed to my executors during the life of my said wife and for her use, together with that portion hereinbefore mentioned, which I have bequeathed to my grandson, John V. Shade, and my granddaughter, Elizabeth Shade), whatsoever and wheresoever in possession or reversion or remainder, or to which I now am, or at the time of my death may be entitled to, I do direct to be divided into three equal parts. One-third part of which said residue I give, devise and bequeath to my daughter, Susanna Ferguson, her heirs, executors, administrators and assigns for ever, for her sole and separate use, and without any control or interference of her present or any future husband. And one other equal third part of the said residue of my estate I do give, devise and bequeath to my granddaughter, Elizabeth Lenahan, her heirs, executors, administrators and assigns for ever. And one equal third part of the said residue of my real estate I do give, devise and bequeath to my daughter, Margaretta Meyers, her heirs, executors, administrators and assigns for ever, for her sole and separate use, and without the control of her present or any future husband. I do acknowledge that I owe John Pizzant the sum of \$400, which shall be paid out of that part of my estate bequeathed to my heirs, as follows: Susanna Ferguson to pay \$100, Margaretta Meyers to pay \$100, Elizabeth Lenahan to pay \$100, John V. Shade to pay \$50, Elizabeth Shade to pay \$50, making in all \$400. And should any interest be demanded for the said \$400 which I owe to John Pizzant, it shall be paid by his mother Susanna Ferguson.

Item, I do give and bequeath to my granddaughter Susan Meyers a gold watch, which is marked S. S., together with gold chain and trinkets belonging to the same, which watch and trinkets and chain complete, I loaned to Susanna Ferguson.

Item, I consider that Maria Jones has had her full share of my said estate in moneys improperly taken, moneys loaned and property improperly taken.

Item, I do give, devise and bequeath to the children of Maria Jones, to be paid to them when they arrive at the age of 22 years, the sum of \$200 each, which sum shall be paid to them out of that portion of my estate which I have bequeathed to heirs, that is to say, Susanna Ferguson to pay to each child, when he or she shall arrive at the age of 22 years, \$50. Also, Elizabeth Lenahan to pay to each child, when he or she shall arrive at the age of 22 years, the sum of \$50. Also, Margaretta Meyers to pay to each child, when he or she shall arrive at the age of 22 years, the sum of \$50. Also, John V. Shade and Elizabeth Shade to pay to each

[Jones v. Murphy.]

child, when he or she shall arrive at the age of 22 years, the sum of \$25 each, making the sum to each child amount to \$200.

Item, I authorize Daniel R. Murphy to sell, or cause to be sold, all my moveable belonging to me at Francisville, and satisfy all my just debts, as far as may be due at my decease, and the balance of moneys collected shall be deposited in the Savings Fund Bank, for the benefit of my wife.

Item, I authorize Daniel R. Murphy, one year after my death, to draw all moneys on deposit belonging to me in bank therefrom, and deposit the same in the Saving Fund Bank, to the credit of my wife. Item, I do give and bequeath to Daniel R. Murphy that piece of furniture called a secretary, which he shall receive at any time his mother, my wife, may feel disposed so to do. Also, I do give and bequeath all the furniture in my house in Almond street, at the decease of my wife, together with such moneys remaining in the Savings Fund at the death of my wife. And, lastly, I do appoint my friends, Daniel R. Murphy and James Green, to be the executors of this my last will and testament. In witness whereof I have hereunto set my hand and seal, declaring this and this only to be my last will and testament, and I hereby revoke and annul all any other will by me at any time. This 16th day of April, in the year of our Lord 1837. Item, I wish to be understood that my grandchildren, John V. Shade and Elizabeth Shade, shall inherit one equal fourth of my estate at the death of my wife; that will be a second division.

PETER SHADE. [SEAL.]

Signed, sealed, and published, and declared by the testator, and as for his last will and testament, in our presence, who, at the request of the said testator, and in his presence, have subscribed our names as witnesses.

JOSEPH KLAPP,
JOHN V. TITTERMARY.Commonwealth of Pennsylvania, }
City and County of Philadelphia. } ss.

Register's Office, August 15, 1837.

Then personally came John V. Tittermary, the subscribing witness to the foregoing instrument of writing, the last will and testament of Peter Shade, deceased, therein mentioned, and on his solemn oath did depose, declare and say, that he was personally present, and did see and hear the said Peter Shade, the testator therein named, and whose name is thereto subscribed, sign, and publish, and declare the said instrument of writing to be as and for his last will and testament, and at the doing thereof he, the said testator, was of sound, disposing mind, memory and understanding, to the best of his knowledge and belief. And that he

[Jones v. Murphy.]

did subscribe his name thereto as witness, at the request of the said testator, and in his presence.

JOHN V. TITTERMARY.

Sworn and subscribed before me,

JOHN GEST, Register.

Commonwealth of Pennsylvania, }
City and County of Philadelphia. } ss.

Register's Office, August 15, 1837.

Then personally came Dr Joseph Klapp, one of the witnesses to the foregoing instrument of writing, the last will and testament of Peter Shade, deceased, and hesitated to testify to the foregoing written deposition; but on his solemn oath did depose, declare and say:—That Peter Shade, the testator, did put his finger on the seal thereof, and said he acknowledged the seal to be his seal, and his name (written) to be his signature, and that the said paper writing was his last will and testament; and at the doing thereof he, the said testator, was of sound, disposing mind, memory and understanding, to the best of his knowledge and belief, and that he did subscribe his name as a witness thereto.

JOSEPH KLAPP.

Sworn and subscribed before me,

JOHN GEST, Register.

The plaintiffs read the deposition of Dr. Joseph Klapp, which was in substance as follows:—That Peter Shade was under the medical care of deponent from the latter end of March to the 10th August 1837, when he died. At the close of one of his medical visits he was asked, he did not recollect by whom, to be a witness to Shade's will. Shade made the acknowledgments usual on such occasions, such as of his signature, his seal, and of the instrument submitted to be his last will, and deponent subscribed his name as a witness. The signature to the paper in dispute was deponent's signature. Thinks the other witness, Tittermary, was not present when deponent witnessed it. The will had been signed before deponent witnessed it. He handed it to Shade, who took it and acknowledged it to be his will.

On his cross-examination deponent stated he could not recollect how long before Shade's death the acknowledgment took place. The will was not read in deponent's presence, nor did he read it. To the best of his recollection the will was not subscribed at that time by the other witness. Deponent thinks he was the first witness to the will. To the best of his recollection, when he witnessed it there were two persons present besides the testator, viz: the testator's wife and Mr Murphy. Thinks these were all. Thinks he was in the presence of Shade, who was lying in bed, when first requested to witness the will. The will was then lying on a table or bureau, at the foot of the bed. Deponent subscribed

[*Jones v. Murphy.*]

his name to it while it lay there. No one presented or handed it to him. Could not tell how or by whom his attention was called to it while it lay there. To the best of his recollection it was lying open. Could not say it was so when he entered the room. He did not come there at that time by appointment. Could not say how long he was in the room. To the best of his recollection he witnessed another will for Shade. It was impossible for him to recollect whether the will in dispute was the first or last will that he witnessed. Both the wills were witnessed by him during the course of his visits in Shade's last sickness. Could not say that the facts he had stated in relation to the acknowledgment of the will referred to the first one he witnessed, or the last one. Could not specify the time that elapsed between the execution of the first and last will. Supposed the period of time may not have been more than two or three weeks, and may have been less; it might have been some days, or one or two weeks; it could not have exceeded three weeks. Could not recollect the time that either will was executed. Neither of the wills was read to or by deponent. Did not recollect of the first will being produced when the last was subscribed. To the best of his recollection, the testator assigned some reason for making another will, the nature of which he did not recollect. Does not know wherein the first and last will differed, from any personal knowledge derived from seeing the wills or expressed by the testator.

The plaintiffs then gave in evidence the testimony of Dr Klapp given on a former trial (he having since died), in which he stated he paid his first visit to Shade on the 28th March 1837. It was after that time that he witnessed two wills of Shade. His impression was that it was not within a day or two that he witnessed the first will. Did not think there was a considerable interval between his witnessing the first and second wills. To the best of his recollection he was the first witness to the second will. It was between two and three weeks between the signing of the first and second wills. The interval did not exceed three weeks.

The plaintiffs then read the deposition of John V. Tittermary, as follows:—I am the person named as a witness to the will of Peter Shade, deceased, now exhibited to me (the paper in dispute). I did not see Shade subscribe his name to the said will. To the best of my knowledge, he acknowledged the signature to the will to be his. The will was shown to him in my presence; he spoke of it as his will, and acknowledged it to be his will. No person subscribed the will as a witness in my presence at the time I subscribed it. Dr Klapp was not in the room when I witnessed the will, but to the best of my knowledge Dr Klapp had subscribed the will as a witness before I did. To the best of my knowledge and belief, the testator, Shade, was of sound mind and memory when I subscribed my name as a witness to the said will. The testator, Shade, did not request me to put my name as a witness

[Jones v. Murphy.]

to the said will. I was requested in his presence and hearing by Mr Murphy, the executor, to witness the said will, and I did then immediately after put my name as a witness to the said will.

Cross-examined.—Mr Murphy, Mrs Shade, and an elderly lady whose name I do not remember, but who I think lives now with Mr Shade, were present when I witnessed the will. It was on a Sunday in the day time, about noon, but whether before or after dinner I can't say. I was not in the habit of visiting Mr Shade, though I was well acquainted with him. The reason I went there that day, I was sent for, and told by Mrs Shade's black girl, that Mrs Shade had sent for me to come over there. I went over there. I had no conversation with Mr Shade about the will, nor did he converse with me about any matters at all. I only judge from Peter Shade's appearance on that day, that he was of sound mind and memory, for he did not converse that day with me about his will, or on any other day about his will. He was sitting up and appeared to look tolerably ill that day. He was bolstered up in the bed. To the best of my knowledge there was no fire in the room on that day, as it was a warm day. I saw him one other time while he was sick, but whether it was before or after I witnessed the will, I cannot now recollect. I don't think that Mr Shade was very deaf. I don't think that he was deaf. I don't recollect of having to speak loud to him: I refer now to the visit, and not to the time I was there to witness the will. At that visit I conversed with him, and saw nothing about him indicating want of sound mind.

Re-examined.—To the best of my knowledge I did not say anything to him when I went to witness the said will. I was in the room a very short time, and left there immediately after witnessing the will.

Cross-examined.—I think it was in July when I witnessed the will, but I am not certain. My memory is not good. I have never witnessed but one will there. I don't think any other persons were present when I witnessed the will, than those that I have named. I was sent over for by Mrs Shade's black girl. I think it was Mr Murphy who first mentioned to me that I was wanted to witness the will. Mrs Shade and a woman who lives in the house with Mrs Shade, were present when Mr Murphy spoke to me about witnessing the will. It was in Shade's room. There were no other papers exhibited at that time. Shade did not speak to any one further than to say that, when he was asked if the said will was his hand and seal, he said yes. The will was not read to him. I don't know that he was able to read at that time: he had not his spectacles on. I think he did not usually wear spectacles. I never saw him wear them. I don't think I was there more than five minutes. I teach school and was in a hurry to go to Sunday school. I am distinct in my recollection that Dr Klapp's name was there. I did not see the date of the will. I think Shade

[*Jones v. Murphy.*]

died in August. I received a notice to attend the funeral. I can't say how long it was after I witnessed the will, that Shade died. Murphy never spoke to me about the will until the time he asked me to witness it. He never spoke to me afterwards about it. None of the members of the family ever spoke to me about it. I don't think I ever stated that Dr Klapp was present when I witnessed the will, before the register or elsewhere. If I did, it was a mistake. Nothing was said about another will at the time I witnessed this will (the will in dispute). I think it was Mr Murphy who asked Mr Shade if that was his will. It was before I signed the will as a witness.

The plaintiffs then called Tittermary, who testified as follows :— This is my signature to the will dated 16th April 1837. I have reflected upon the matter since, and find that I was under a mistake in my deposition. I recollect that some time after that I called upon Mr M'Mullen to go with me to visit Mr Shade; from that, but not from that alone, I find I was under a mistake in my former testimony. I lived opposite Shade; he lived 41 and I lived 42. I could frequently hear him groan; from these circumstances Mr Shade lived upwards of three months after I signed that will. I am confident that it was either in June or July I paid the visit with Mr M'Mullen. Mr Shade died in August. It was on Sunday I witnessed the will; I was getting ready to go to Sabbath school; I recollect well the weather was warm. I was sent for to go over to Shade; I went over to the house, but did not go up stairs. This was before I signed the will. It was in cold weather; five or six weeks before. We had fire in our house that day. I was out when sent for the first time. I went over in the afternoon after I returned home.

Cross-examined.—I have been examined here three times; I have been examined about four times. I said on all those occasions but the last that it was in July. This was on the last time. After I had been examined the first time before a jury, I discovered the error. If I stated it after, I do not know how it was. I think, on the trial 11th of April I stated it was July. But I found I was mistaken. I do not know I can state I was mistaken except for the reasons above-mentioned. I recollect that it was two or three months after I signed the will I got M'Mullen to go with me. I think it was in July M'Mullen went with me. I have no memorandum by which I can fix that date. After I was examined before the first jury I found my mistake, but not after I was examined before the second jury. I think I mentioned that I was under a mistake when then examined. I do not remember having stated on the second trial that I called upon Shade on Sunday, having been sent for by a coloured girl. I have made no inquiry of any one about M'Mullen going with me. I think I was examined before Judge Randall, but do not say certainly. I was examined before Judge Jones and before Judge Parsons. It was

[Jones v. Murphy.]

previous to being examined before Judge Parsons I discovered my mistake. I have been turning over in my mind that it must be three months after I signed the will M'Mullen went with me; for three months after I signed the will I heard Shade groan. I did not mention this on a former trial. I cannot get at it in any other way but by reflection. M'Mullen lives in the city. We visited Shade on Sunday. I do not recollect I saw anybody but Mr and Mrs Shade. I have never seen M'Mullen since. I said nothing about M'Mullen or the groans of Shade on the last trial. I never thought of it before. I am sure that on some one of the trials I spoke of M'Mullen. My memory is not good. It is bad on some subjects. It is not bad on this subject, for I have been turning the matter in my mind, and feel sure I am not mistaken. I do not recollect of saying that the last time I saw Shade was when I witnessed the will. I never visited there with M'Mullen before the will. I do not recollect of stating as you have it down. I think Mr Shade died in August. I have reflected upon the matter, and I had a note to attend the funeral; it was dated in August. I do not recollect when it was the black girl called, but it was five or six weeks before I signed the will. I was told that the girl called. I recollect it was when we had fire in the stove; it was cold weather. I am not sure it was a month. I am sure it was more than a week before; it was in February or March. I went over, but did not see Shade; he was confined. Mrs Shade told me the will had been signed; I do not know how long Shade had been sick. It was more than a month before; it was the last time I saw him. I am not sure of the year. I might have stated before Judge Jones I had not seen him for three months. Mr Shade asked me to sign the will; it was in his room. I was not there more than five minutes; was in a hurry to go to Sunday school. Mr Murphy asked if it was his will. He asked if he acknowledged that to be his signature; he said it was. I asked him how he was; he said very poorly. I do not recollect of saying before, that I judged he was of disposing mind and memory by his looks. I was there to see him three times; the first time I did not see him. I went alone all but the last time; then M'Mullen went with me. I do not recollect saying that if I said M'Mullen went down with me after the will was signed, I was mistaken. I never saw any other, nor signed any other will of Peter Shade's.

The defendants offered to prove by Samuel Green, the regular and legal execution of a will, later in date and different in its contents and provisions, from that of 16th April 1837. That it took place a short time before the death of Peter Shade, and that it took place when he was unable to leave his bed. That such will passed immediately into the possession of these plaintiffs and Peter Shade's widow, by whom it had been fraudulently withheld or destroyed; that it was in point of fact and law a subsisting will at the death of the testator:—and to follow it by proof from other

[*Jones v. Murphy.*]

sources, of the contents of this will thus witnessed by Samuel Green and Dr Klapp. To this the plaintiffs objected on the ground that if proved it would not amount to a revocation of the will already proved; but the court overruled the objection and admitted the evidence.

Samuel Green, sworn. — I lived at the north-west corner of Almond and Front streets, in 1837, five or six doors from Mr Shade. I witnessed a will for Peter Shade. He sent his little coloured girl for me to come to his house; she said her master wanted to see me. I went; and Mrs Shade introduced me to Mr Shade's room. He asked if I would witness a will for him; he did not know how long he might live; he wished to have all his business fixed before he died. He told me then, that Dr Klapp and Mr Tittermary had witnessed a will before: the will was given to me, and he acknowledged it to be his will. I told him I had not been in the habit of witnessing wills, I did not know where I should put my name, there being no witness to the will. He said to his wife, Hannah, hand out the will witnessed by Dr Klapp, and which Mr Tittermary signed, and let Mr Green see where they signed it. This is like the will placed before me; there was no writing below their names. It is my impression this is the paper. I took the new will, and merely read a few lines, to satisfy me it was a will. I laid it on the table and put my name to it. There was no other witness to it. I think he said, let it lay on the table, I will get Dr Klapp to witness it. This was in the latter part of June or beginning of July 1837. I cannot tell how long it was before his death: not more than six weeks before it. I fix time by merely knowing it was summer, and my going to the country shortly after. I went to the country on Saturday before the big ship was launched at the Navy Yard. I was gone from Saturday till Monday. A very little time before this I went to the country. I went the next day after the ship launch. I was gone two weeks. When I returned, Mr Shade was alive. He died in about two weeks after I returned. I went with my own horse and wagon. I cannot say whether I bought the horse before or after I witnessed the will. This is the receipt for the purchase money of the horse, 17th of June 1837.

I was at work when I was sent for. I am positive that it was not earlier than June. He got hurt the same day I bought him. I cannot say whether it was before or after the accident I went to see Mr Shade. I do not recollect who brought to me the will I signed. She handed me out the second will. The old lady was rather slow. The wills I left on the table. Mr Shade was very low, hardly able to turn in the bed. From his appearance he did not seem able to turn himself in the bed. The trees were in leaf. When I went into the room my shirt-sleeves were rolled up. There was a gentleman sat opposite to me, his back was to the

[Jones v. Murphy.]

south He was dressed genteelly in black; a yellowish complexion. I have seen Mr Parkinson; he was not the man.

Cross-examined.—I swore in my deposition that Mr Shade said, leave it upon the table for Dr Klapp to sign. I think I said this on a former trial, but do not think I did in my deposition. I do not count much on my memory. I was in court when Dr Klapp died. I stated this before Dr Klapp died. I had no conversation with Mr Shade after I done my business. I said on a former time that Shade said, let it lay on the table; but do not recollect that I said it before Vogdes.

The plaintiff objected to this testimony on the ground that it did not come up to the offer made by the defendants, and that the witness did not prove the contents of the will; that this was not a revocation of the first will. The objection was then withdrawn for the present, to be renewed if the plaintiffs should desire it and the defendants failed to prove the contents of the will witnessed by Green.

Susan Green then testified as follows: I am the wife of Samuel Green. I know the black girl came for Mr Green. I did not know his business till he returned. I saw him go out of the house. I saw the girl. This was in warm weather. I think it was the last of June or early in July. We were preparing to go in the country. It was after the purchase of the horse, because the day Mr Green was sent for, he was preparing a poultice for the horse. The horse was hurt on the day he was bought. We owned no other horse. This is the horse with which we went to the country. I was at Shade's that day after my husband went. I spoke to Mr Shade. I found Mr Shade very low. I was informed in the morning he was very ill and helpless. I found his wife there. I asked him how he was; he said, very low. I visited him again. I found Mrs Jones there.

1. The defendants proposed to prove by this witness the conversation which took place between Mrs Jones and her father, and that a total reconciliation had taken place between her and her father at this time; and to be followed by testimony to show that the father had previously pledged himself in case his daughter returned certain property, to be entirely reconciled with her, and to divide his estate equally between her and his other children; or give her a child's portion under another will to be executed by him—and to show that the property thus referred to, was previously returned, and that a reconciliation had taken place between them, anterior to the will witnessed by Mr Green.

The plaintiffs objected to this testimony of the conversation of the deceased. 1. That this did not prove the contents of the will, nor had its execution yet been proved. 2. Nor did it prove a revocation of the first will already proved, under which the plaintiffs claimed. 3. That the proof of the contents, as now proposed, was not to be admitted; the declarations of the deceased were not

[Jones v. Murphy.]

evidence, and not legal proof of its contents. The court overruled the offer, and rejected the conversation proposed to be proved by Mrs Green with the testator, as there contained, on the authority of *Lewis v. Lewis*, (2 *Watts & Serg.* 455) and *Clark v. Morton*, (5 *Rawle* 235): and sealed an exception.

2. Wm. Nassau, Sen., was called by the defendants to prove, that for thirty or forty years he was acquainted with Mr Shade; that he was a relation of his, and upon terms of familiarity with him; that he visited him in the month of April 1837, at which time Mr Shade expressed his displeasure with his daughter, Mrs Jones, in relation to her retaining certain goods, and said if they were not returned he would cut her off. Mr Nassau prayed with him, and preached the mutual advantages of forgiveness, to those who expected to be forgiven hereafter. That afterwards he called upon Mr Shade, in May of the same year, after the execution of the will of the 16th of April, and at that time Peter Shade stated that his daughter Maria had been there and brought back the goods; pointed to the mantel-piece, where some of the goods were; expressed himself satisfied with his daughter; stated that she had begged his pardon, and acknowledged the reconciliation between them.

To this evidence the plaintiffs objected; the court rejected it and the defendants excepted.

3. The defendants offered to prove by Elizabeth M'Gill that she was Mr Shade's sister's daughter; that she visited her uncle, Peter Shade, from the first of his sickness till his death; that while sitting by his bedside Mrs Jones came in, threw herself upon her father's bosom, and said, "My dear father, I ask your pardon if I have done any wrong—I ask your forgiveness." She was much agitated, and the tears ran from the old gentleman's eyes; she sat a little while, got up, kissed her father, shook hands with him, and went away; he looked at her and said, "You bute," which witness understood a kind term for beauty; that previously there had been a coldness between them, and this, witness believed, was her first visit; she visited him several times afterwards. Witness saw her there herself three or four times, fanning him. There was an entire reconciliation, as witness thought. He appeared to be kind to her. Told witness the looking-glass and carpet had been sent back; and he had previously told witness, that if she would bring back the goods he would make an *alteration*, and he would make her equal to his other children; he said that repeatedly. It must have been the 17th or 18th of May that Mrs Jones made her first visit; that time being fixed from the witness having buried a sister the day before.

To this evidence the plaintiffs objected, and the court rejected it and sealed an exception.

4. The defendants offered to prove by Elizabeth Cristman that he was the niece of Peter Shade deceased. and visited him fre-

[Jones v. Murphy.]

quently during his sickness, and frequently met Mrs Jones there after the 15th April 1837; that she found Mrs J. engaged in reading the Bible to her father; that she was upon good terms with her father from that time to the time of his death; that the witness had previously been spoken to by Mr Shade about Mrs Jones; that he stated if Mrs Jones would acknowledge her fault and return the goods, he would make her equal with the rest of his children; that witness saw the goods at testator's house during his illness; that Mr Shade told witness those were the articles Maria had sent home. This was the second Sabbath in July that he showed witness these things, and told her Maria had brought back the things. It was some time before Mrs Jones's first visit Mr Shade showed witness the things.

To this evidence the plaintiffs objected. The court rejected it and the defendants excepted.

5. The defendants offered to prove by Michael M'Gill that he knew Mr Shade, visited him during his last illness; saw Mrs Jones his daughter there, either in June, July or August 1837; saw her administer to her father; her attentions were received with kindness; no coldness between them; acted as parent and child should.

To this offer the plaintiffs objected. The court rejected it and the defendants excepted.

6. The defendants offered to prove by Mrs Susan Green that the day after the execution of the will witnessed by Mr Green, witness visited Mr Shade and met Mrs Jones there; that the deportment of Mr Shade and Mrs Jones was that of father and child; she had his hand in hers, and upon his saying he was very ill, she told him to put his trust in the Saviour; that Mrs Jones asked the witness to procure some wine and water, her father was so faint, for the purpose of bathing him. The witness told her she was a stranger, and Mrs Jones had better do it herself. Mrs Jones replied she had no communication with any of them but her father, and again asked the witness. That she made the application to the family and was insulted. That witness was there only twice; the day the will was witnessed by her husband and the day after.

To this evidence the plaintiffs objected. The court rejected it and sealed an exception.

7. The defendants called George N. Jones, grandson of the testator, to prove that the testator repeatedly said, that if the goods were returned by Mrs Jones he would make her equal with the rest of his children, and to prove that they were returned, and that there was entire reconciliation between the father and Mrs Jones. The witness saw the furniture in the house of Mr Shade about the middle of June.

To this offer the plaintiffs objected. The court rejected the evidence and sealed an exception.

8. The defendants offered to prove by Shade Jones, a grandson of the testator, that he, in the summer of 1837, had the goods

[*Jones v. Murphy.*]

returned to his grandfather in a car and otherwise, consisting of carpets, looking-glasses, tables and other things. That this was between the 15th of April and the time of Shade's death, or witnessing the will by Mr Green.

To this the plaintiffs objected. The court sustained the objection and the defendants excepted.

9. The defendants offered to prove by Frederick Boley that Mrs Jones was the favourite daughter of Mr Shade; also to prove that Mr Shade was a little deaf, and seventy years of age, or thereabout.

To this the plaintiffs objected. The court sustained the objection and sealed an exception.

10. The defendants offered to prove by Mrs Ferguson an entire reconciliation between Mrs Jones and her father; that testator treated Mrs Jones with more affection than he did the witness. This reconciliation was after the will of the 16th of April, and before the will witnessed by Green; and that he frequently told witness, if Maria would return him the goods, he would make her equal with his other children; that the other children had as many goods as Maria, and those which she got were returned.

The plaintiffs objected to the witness on the ground of interest, and showed a marriage article of agreement of the 18th April 1831; also that the testimony was not relevant. The court rejected the evidence and the defendants excepted.

The following was the agreement above referred to :

Articles of agreement indented, made, concluded and agreed upon this 18th April in the year 1831, between Peter Shade of the county of Philadelphia, gentleman, of the first part, Hannah Murphy of the said county, widow, of the second part, and Daniel R. Murphy of the city of Philadelphia, tinman, of the third part. Whereas a marriage is intended shortly to be had and solemnized between the said Peter Shade and the said Hannah Murphy, Now this agreement witnesseth that the said parties of the second and third part, for and in consideration of the sum of one dollar, lawful money of the United States, to them in hand well and truly paid by the said party of the first part, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), have, for themselves, their heirs, executors and administrators, jointly and severally covenanted, promised and agreed to and with the said party of the first part, his heirs, executors, administrators and assigns, and by these presents do, for themselves, their heirs, executors and administrators, jointly and severally covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that she, the said party of the second part, shall not have, claim, challenge or demand any dower or third part of the estate of the said party of the first part. But that the estate of the said party of the first part shall be absolutely and entirely freed and discharged from al

[Jones v. Murphy.]

and all manner of claim and claims of dower or thirds of the said party of the second part. But it is expressly understood that nothing herein contained shall prevent or debar the said party of the second part from taking and receiving any devise or bequest which the said party of the first part shall think proper to make to the said party of the second part, by any will now made, or which may hereafter be made by the said party of the first part. In witness whereof, &c.

Scaled and delivered
in the presence of
JAMES J. BARCLAY. }

PETER SHADE, [SEAL.]
her
HANNAH \times MURPHY, [SEAL.]
mark.
DANIEL R. MURPHY, [SEAL.]

11. The defendants offered to prove by Joseph S. Riley the value of the property of Peter Shade at the time of his death; and that the will of the 16th of April 1837 was in the handwriting of Murphy, and to prove the place whence it was taken after Shade's death.

The plaintiffs objected to the first part of the offer, as to the value of the property of the testator. The court rejected that part, but suffered the defendants to prove in whose handwriting the will was, and also where it was found at the time of the testator's death. The defendants excepted.

Joseph S. Riley, sworn. I was present at the funeral of Peter Shade. I returned to the house after the funeral: the will was read by me. (The will shown.) This looks like it. The will was handed into my hands by Myers, the son-in-law of Mr Shade. Mr Murphy handed it to him. Mr Murphy took it from a secretary or bureau, from the east side of the room. I was on the north side of the room when I read it, and Murphy was on the south side. Other papers were taken out at the same time. I did not inspect any of the other papers; nothing but the will. Did not see what was done with the other papers. I did not see them pass out of the hands of Murphy. I cannot remember whether the drawer was locked or not. I do not recollect seeing any tin box. I never saw Murphy write.

It was admitted that the will was in the handwriting of Murphy.

Cross-examined.—Mr Myers requested me to read the will. Mr Murphy, Mrs Shade, Mr Ferguson, a son-in-law I do not know, all there. My wife, Mrs Sharpe, Mrs Rapp, Mr Blair.

Elizabeth M'Gill then testified that she was the niece of Peter Shade. The children that he had at the time of his death were Mrs Ferguson, Mrs Jones, and Mrs Myers. He had a daughter, Elizabeth, who died before her mother, and a son, John, who died before his father or mother, and left children. Shade had no children by his second wife.

The court below (PARSONS, J.) charged the jury as follows.—

[Jones v. Murphy.]

This is a feigned issue sent by the Orphans' Court to the Court of Common Pleas, to determine whether a paper writing dated the 16th April 1837, which has been read in evidence, is the last will and testament of Peter Shade deceased. The cause turns entirely on a question of law to be decided by the court. We shall submit no fact to you for adjudication, but will assume the responsibility of deciding the case upon principles of law which, it is believed, are settled by the Supreme Court. There have been three previous trials of this cause, and each verdict has been set aside by this court, the last one by me in the presence of the jury the moment it was rendered. I now desire a verdict rendered in accordance with the charge, in order that the court of last resort may judge of the correctness of my opinion. On this trial I have rejected nearly all the evidence offered by the defendants, so that the cause presents a different aspect from what it has done on any former trial, and leave no evidence to be weighed or considered by the jury. Therefore we instruct you that this will has been proved according to the requisitions of the 6th section of the Act of 1st April 1833, which is, "That every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction; and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall have no effect." This will was signed by the testator, and is proved by two competent witnesses; hence all the requirements of this section are answered.

The 13th section of the same Act to which I have referred, provides, "That no will in writing concerning any real estate shall be repealed, or shall any devise or direction therein be altered otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the same manner as is hereinbefore provided; or by burning, cancelling, or obliterating or destroying the same by the testator himself, or some one in his presence and by his express direction." And the 14th section makes the same provision respecting wills bequeathing personal property.

We instruct the jury that there is no evidence that Peter Shade altered this will by another will, or codicil in writing, or other writing declaring the same altered, by any paper executed and *proved* as is required by said act. There is no evidence that this will was obliterated, cancelled or destroyed by the testator himself, or by any one in his presence, or by his direction. Such being the state of the case as presented before you, your verdict should be in favour of the plaintiffs.

It is contended by the defendants that they have proved by Samuel Green that there was another will executed by the deceased after the will of the 16th April 1837, already in evidence

[Jones v. Murphy.]

and that Dr Klapp has testified that he executed two wills, and therefore this will is revoked. But we instruct you, that all this evidence does not amount to a revocation of this will. In order to do it, they must prove that the provisions of the will subscribed by Green revoked that of the 16th of April, either in whole or in part; and if in part, in what particular. It is likewise contended by the defendants that Green has testified that when he signed the will as a witness, it was left on the table in the room of the deceased, who was so ill that he could not leave his bed; that testator's wife and another person were in the room; and that the same was abstracted from the possession of the deceased by fraud, or has been destroyed by some one interested in its destruction since the death of Peter Shade. But it must be borne in mind that no notice has been given to the plaintiffs to produce another will, so that they could answer on oath relative to their knowledge of the fact of any such being in existence at the time of the testator's death. Mrs Shade has not been called as a witness to testify as to her knowledge of the paper signed by Green, nor the individual who Green swears was in the room. Hence we instruct you that there is no evidence of fraud against the plaintiffs, of spoliation or destruction of this paper signed by Green, either by the plaintiffs or any one else. And if there had been evidence of these facts, it would be necessary to prove what the contents of the will alleged to be destroyed were, and to show that it was a revocation of this in whole or in part, and in what particular it revoked this will.

I consider the case of *Clark v. Morton*, (5 Rawle 235), rules this. So the case of *Lawson v. Morrison*, (2 Dallas 286). It was likewise decided in England, 150 years ago, relative to the will of Sir Henry Killgrew, reported in *Salkeld* 592, that when a second will had been made, and the contents were not proved to the jury, it was not a revocation of the former. At a later day the same question was before the English Judges in the case of *Goodright v. Harwood*, reported first in 3 *Wilson* 497, again in 2 *Black*. 937, and in *Cowper* 87, that a second will, unless the contents thereof be proved, is not a revocation of the former will; and one of the Judges assigned as a reason, for it may or may not be consistent with the former. How can it be known, in this case, that the so-called second will revoked the former, when no one has appeared who ever saw it—when it has never been found or read by any person. It may or may not be consistent with the will now in evidence. Hence we instruct you that there is no evidence that this will has been revoked; and if you should believe all that Green has testified, your verdict cannot be in favour of the defendants.

The plaintiffs have submitted two questions of law, on which they ask the court to instruct the jury:

[*Jones v. Murphy.*]

1. That there is no evidence of a revocation of the will of the 16th April 1837.

This we answer in the affirmative, and say to the jury that there is no evidence of the revocation of this will.

2. That there is no evidence of fraud or spoliation of any subsequent will of Peter Shade, deceased.

This point we answer in the affirmative, and instruct you that there is no evidence of fraud, or of spoliation of any will made subsequent to this of the 16th April 1837; and if you believe all the evidence of Samuel Green, Dr Klapp and John V. Tittermary, and all the other evidence in the cause, there is no evidence of fraud, spoliation or destruction of any subsequent will by the plaintiffs, or legatees, or any one else, since the death of Peter Shade or before, unless he destroyed it himself.

It appears to the court that we have, in our general charge, and in answer to these points, decided the law of the case. But the defendants have submitted four propositions of law, on which they pray instruction to the jury, and we will proceed to answer each separately, as they have been presented.

1. That the issue in this case is, whether a paper writing, dated 16th April 1837, is the last will of Peter Shade.

The court say, this point is correctly stated; and it has been proved that this is the last will of Peter Shade, deceased; so we have already instructed you in our general charge.

2. That if the jury are satisfied that Peter Shade, after the 16th April 1837, regularly made and executed another and a different will, containing a different disposition, which he died without revoking, then the jury, upon the above issue, can find for the defendants.

If there were any facts on which to base this point, it would be correct. But we instruct you that there is no evidence that Peter Shade, after the 16th April 1837, regularly made and executed another and a different will, containing a different disposition, which he died without revoking; and we likewise instruct you that, upon the above issue, you cannot find for the defendants, because there is no evidence under the law of the land which would warrant this jury in rendering such a verdict.

3. That if the jury are satisfied from the evidence that a will was regularly made and executed by Peter Shade after the 16th April 1837, which contained a disposition of his property different from the alleged will of the 16th April 1837, and such last will of Peter Shade has been fraudulently withheld or destroyed without the consent of Peter Shade, then the jury, upon the above issue, can find for the defendants.

In reply to this proposition the court say that there is no evidence that Peter Shade, after the 16th April 1837, regularly made and executed another will, which contained a disposal of his property different from the alleged will of the 16th April 1837; nor

[Jones v. Murphy.]

is there any evidence that such will has been fraudulently withheld or destroyed without the consent of Peter Shade. Nor can the jury, on the above issue, find for the defendants; hence we refuse to give the instruction prayed for.

4. That it is the right of the jury to decide, under the evidence, whether a will later in execution and date than the 16th April 1837 has been so withheld or destroyed.

The court answer this point in the negative, because there is no evidence on which the jury can act. When there is any evidence of such facts, it is the province of the jury to decide them. But when there are no facts to submit to a jury upon a proposition of law presented to the court, we have no right to leave them for their decision. There is no evidence before us that a will of Peter Shade, later in date than that of the 16th of April 1837 has been withheld or destroyed by any one, or destroyed by anybody but the testator.

I have desired to answer every question fully, and have taken the whole cause from the jury in my general charge, and decided it as a question of law to be determined by the court alone, and refuse to give the instruction prayed for in the fourth point. And in conclusion I say, that even if the jury believe the *whole evidence* in the cause to be true, their verdict should be in favour of the plaintiffs. The evidence in the case is to be made a part of the record.

The defendants excepted to the charge.

The defendants assigned for error the rejection of the evidence in the bills of exception, and also the following errors in the charge.

1. The court erred in instructing the jury, that the case turned entirely upon a question of law.

2. In assuming the responsibility of deciding the case, and withdrawing the facts from the jury, when there were facts upon which the jury were legally entitled to decide, and upon which three former juries had decided in favour of the defendants.

3. In instructing the jury, that there is no evidence that Peter Shade altered the will (will in issue) by another will or codicil in writing, or other writing declaring the same altered, by any paper executed and proved according to law.

4. In directing the jury to find a verdict for the plaintiffs.

5. In instructing the jury unfavourably to the defendants on the ground that the defendants had given no notice to the plaintiff to produce the will alleged by defendants to be the last will of Peter Shade, so that the plaintiffs could answer on oath relative to their knowledge of the fact of any such being in existence at the time of testator's death; and that Mrs Shade had not been called as a witness to testify as to her knowledge of the paper signed by Green; nor the individual who Green swears was in the room. Hence the court instructed the jury that there was no evidence of fraud against the plaintiffs, or of spoliation or destruc-

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[Jones v. Murphy.]

tion of the paper signed by Green either by plaintiffs or anybody else.

6. In further charging the jury that if there had been evidence of these facts, (the facts last above referred to,) it would be necessary for defendants to prove what the contents of the will alleged to be destroyed were, and to show that such will was a revocation in whole or in part, and in what particular, of such will.

7. In instructing the jury upon the 1st point of the plaintiffs, that there was no evidence of the revocation of the will of the 16th of April 1837.

8. In instructing the jury in relation to the 2d point of plaintiffs, that there was no evidence of fraud or spoliation of any subsequent will of Peter Shade, deceased.

9. In their answers to the 2d, 3d, and 4th points of the defendants.

D. P. Brown and *B. Tilghman*, for the plaintiffs in error, referred to 1 *Bay* 464; 5 *Rawle* 235; 2 *Watts & Serg.* 455; 16 *Serg. & Rawle* 84; 2 *Binn.* 416.

J. M. Read and *Meredith*, *contra*, cited Act 8th April 1833, (*Par. & Johns.* 466); 1 *Dall.* 258; 2 *Ibid.* 286; 6 *Serg. & Rawle* 47, 452, 215, 489; 3 *Yeates* 511; 16 *Serg. & Rawle* 87; 6 *Wend.* 173, 181; 2 *Binn.* 406; *Roberts on Wills* 261, 265; 3 *Wils.* 497; 2 *Bl. R.* 937; *Coup.* 87; 7 *Bro. Parl. Cas.* 344; 2 *East* 488; 4 *Kent. Com.* 528; 14 *Mass.* 208; 1 *Pick.* 535; 4 *Burr.* 2512; 2 *Whart.* 582.

The opinion of the Court was delivered by

ROGERS, J.—This is a feigned issue to try the validity of a certain instrument of writing dated the 16th April 1837, purporting to be the last will and testament of Peter Shade, deceased.

The defendants deny it to be his last will, because they aver that the testator after that date, viz. on or about the 17th June 1837, made another will, different in its dispositions, revoking all former wills, and that said will was destroyed, or suppressed by fraud. If the defendants can substantiate the truth of this statement, the paper writing of the 16th April cannot be admitted to probate; and whether there was a subsequent instrument containing different and inconsistent dispositions from the former will, or a clause revoking all former wills, are the great questions in the cause.

Before entering into a particular examination of the case, I wish to premise that the point is not whether the evidence was sufficiently strong to establish the making of a will subsequent to the 16th April, but (from the course which the court below have thought right to pursue) it is whether there was evidence given or withheld proper to be submitted to the jury for their decision.

[*Jones v. Murphy.*]

It is enacted in the Act of the 8th April 1833, 6th section, that every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express directions; and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall have no effect.

The 13th section provides that no will in writing concerning real estate shall be repealed, nor shall any devise or direction therein be altered otherwise than by some other will or codicil in writing declaring the same, executed and proved in the same manner as is hereinbefore provided; or by burning, cancelling, or obliterating or destroying the same by the testator himself, or by some one in his presence and by his express direction. And the 14th section makes the same provision respecting wills bequeathing personal property.

It is not alleged that the testator cancelled, obliterated or destroyed the first will. The defence rests on the first clause of the 13th section of the Act. In the construction of that clause it is conceded that an instrument purporting to be a last will and testament, must have the same attestation, &c. to operate as a revocation, as is requisite to give it validity as a will. But although a will must be proved regularly by two witnesses, yet circumstances may supply the want of one witness, when they go directly to the immediate act of disposition. *Eyster v. Young*, (3 Yeates 511); *Reynolds v. Reynolds*, (16 Serg. & Rawle 87); *Miller v. Carothers*, (6 Serg. & Rawle 215). It has also been ruled (and with these principles, as will be hereafter seen, we do not interfere) that the contents of such second will must in general be found, and the contents so found must appear to be inconsistent with the dispositions of the former will, to operate as a revocation; and that if part is inconsistent and part is consistent, the first will shall only be revoked *pro tanto*, and to the extent of these discordant dispositions. 3 *Wilson* 497; *Cowp.* 87; 7 *Bro. P. C.* 344. But it is not necessary (as I conceive) where the will is destroyed, and especially where it is suppressed or destroyed by fraud, to prove the precise facts in which the latter will so set up as a revocation of a former will differs from it. For if the jury find expressly, or infer from circumstances (which I shall show hereafter they may), that the dispositions made by the second will are inconsistent with the dispositions in the former, that is a sufficient ground to decide the latter will a revocation. And this seems to be the opinion of Mr Powell, in his *Treatise on Devises*, p. 519.

In conformity to the principles above stated, the plaintiff having given the ordinary proof of the execution of the first will, it is incumbent on the defendant, to sustain his case, to prove to the satisfaction of the jury the factum of a subsequent will, and that it was suppressed or destroyed by fraud. These preliminary points

(Jones v. Murphy.)

being satisfactorily established, an inference will arise, as will be hereafter shown, that the first instrument was repealed or altered; and consequently the latter is a revocation of the former.

The points above indicated are the natural order in which the case should be viewed, for, it will be observed, if the defendants fail in sustaining either of the two first propositions, the third, which is a corollary from them, cannot arise.

1. As to the factum of a will subsequent in date to the writing of the 16th April 1837. It is admitted that a revoking will must be in writing, that it must be attested by two witnesses, or by one witness accompanied by proof of circumstances which go directly to the immediate act of disposition; and the first question to which the attention of the court and jury must be directed, is, have these indispensable requisites of the Act been complied with? If the jury find against the defendants on this point, further inquiry is needless. And the first thing which strikes the mind is, that no person can examine the testimony without coming to the conclusion that the testator made two, and but two wills, one on the 16th April 1837, the other a short time before or after that date. This is put beyond the possibility of doubt by the concurring testimony of Dr Klapp and Samuel Green, one a witness for the plaintiffs, the other for the defendants. The only conceivable difficulty which can arise is, whether the instrument which it is sought to set up as a revoking will, be subsequent or prior in date to the 16th April; and next, whether the witnesses refer to one and the same instrument of writing. Without stopping to inquire whether when a will is regularly attested one witness may prove its contents or the date of it, where the date becomes material, here we cannot fail to observe there are two witnesses, with a variety of circumstances to confirm their statements, who depose that the writing in question was executed on or about the 17th June 1837, and, of course, subsequent to the will now in issue. For on this part of the case the jury will pay great attention to the testimony of Samuel Green and Susan Green, corroborated, as they unquestionably are, by strong and cogent motives which the testator had after the execution of his first will to make a different disposition of his property. The testimony (and I refer as well to the testimony rejected as that which was received) discloses this case. The testator, aged 70 years, lying helpless in bed in the extremity of sickness, believing he had serious cause of displeasure against a young and favourite child, on the 16th April 1837, some three or four months before his death, made his last will and testament, containing a devise to his second wife and to her daughter, who was a stranger to his blood, and also this item: "I consider that Maria Jones (his daughter by a former wife) has had her full share of my said estate in moneys improperly taken, moneys loaned, and property improperly taken." That a misapprehension of improper conduct by his child was the operating cause of this

[Jones v. Murphy.]

singular, and, may I not add, unparental clause, appears not only from the will itself, but from repeated declarations of the testator. For the defendants offered to prove that he repeatedly expressed his displeasure with his daughter, in relation, as the witness says, to her return of certain goods, saying, if they were not returned he would cut her off. It also appears that subsequently to the signing of the first will, a complete reconciliation took place between father and child, in pursuance of his repeated pledges to that effect, she having returned the property which was the cause of the father's displeasure. This testimony adds great weight to the evidence of Green and wife on the point of time, for it suggests motives of the most powerful kind, operating with irresistible force on the heart of a parent, for an entire alteration in the previous disposition of his property. The testator's estate was worth say \$40,000, to be divided into five shares; consequently Maria's portion, on a fair and just division, would amount to \$8000; whereas by the will as it stood at the time she had regained the affections of her aged parent, she gets nothing. He bequeathed, it is true, to each of her five children the comparatively pitiful sums of \$200. To repair this glaring injustice, we may reasonably presume, was one, among other reasons, for an alteration in his will. It renders the allegation that a subsequent will was made by the testator a most probable event. Indeed, a contrary supposition comports but little with the ordinary conduct of parents placed in similar circumstances.

But another reason suggests itself equally cogent. The will of the 16th April contains an imputation of dishonesty in his own child, a direct charge of embezzlement and fraud. In the full flow of returning affection, he must naturally be anxious to prevent so disgraceful a charge from going on the records of the county. This is a conclusion from which no parent will dissent, and it may account for the fact that he preferred executing a new will rather than making the necessary alteration by means of a codicil. In the one case he gets rid of an odious imputation; in the other he perpetuates it. But it is said there is some conflict in the testimony of Dr Klapp and Green and wife; but it will be for the jury to say whether this is not more fanciful than real. The only thing of which Dr Klapp appears to have been certain was, that he witnessed two wills. After having proved the first will, he says, "To the best of my recollection I witnessed another will. It is impossible for me to recollect whether the will hereto annexed (meaning the will of the 16th April) marked (A), is the first or last will. Both wills were witnessed by me during the course of my visits in his last sickness. Of course I cannot say that the facts I have stated in relation to the acknowledgment of the will refer to the first one I witnessed or the last one. I cannot specify the time that elapsed between the execution of the first and last will. I should suppose that the period of time may not

[*Jones v. Murphy.*]

have been more than two or three weeks, and it may have been less.* Under the facts here disclosed, it will be for the jury to say what weight ought to be attached to this supposed discrepancy. It will be remembered that there is nothing more difficult to recollect than dates; and perhaps the jury may be inclined to rely more on the memory of Samuel and Susan Green than Dr. Klapp, as the former have something in aid of their recollection, whereas the latter has literally nothing. Besides, the precise date, except for purposes of identification, is totally immaterial; as the only matter of any consequence is whether the revoking will is subsequent in time to the execution of the instrument of writing offered for probate.

We will now notice the next subdivision of the factum of a subsequent will; that is to say, we will next inquire whether Dr Klapp and Samuel Green refer to the same instrument. It appears that the testator, at periods of time not far distant from each other, executed two wills, and we have not the least reason to believe he made more than two wills. Dr Klapp was a witness to two wills, and Samuel Green was a witness to one will. From this we arrive at the conclusion that as Dr Klapp was a witness to both wills, one in conjunction with John V. Tittermary, the will of 16th April, and there were but two wills, and Mr Green was a witness to one will only, they must have attested the same instrument. There was no other writing to which Dr Klapp could be a witness except the one attested by Green. Dr Klapp says neither of the wills was read over to him. He has no recollection of the first will being produced when the last was subscribed. He then adds, the testator, to the best of his recollection, assigned some reason for the making another will, the nature of which he does not recollect. This part of the testimony bears not only on this point, but the time of the factum of the revoking will; for the inquiry is pertinent, what motive could he have had so probable as that he felt it a duty to alter the unjust and unequal provisions of the will of the 16th April, obliterating, as far as he could, the cruel and as he was afterwards no doubt convinced unfounded aspersions on the character of an unoffending, or at any rate repentant child. A difference is also suggested in this, that Green states he was the first witness to the will of the 17th June, whereas Dr Klapp says, to the best of his recollection, he was the first witness to the second will, drawing an argument from this against the identity of the instrument. To this it may be replied that Dr Klapp testifies he cannot say that the facts stated by him in relation to the acknowledgment of the will refer to the first or the last will. By this it appears how confused and imperfect is his memory, confounding the one instrument with the other. Besides, it is not altogether improbable that this impression may be produced by a mistake as to the instrument; for, in truth, he was the first witness to the will of the 16th April. For these reasons we are of

[Jones v. Murphy.]

the opinion there was evidence of the factum of a will subsequent in date to the will offered for probate; and consequently there was error in withdrawing this part of the case from the decision of the jury.

The factum of the will being established, another question, necessary to the defence, presents itself. Was the will so made destroyed or suppressed by fraud? This, which is peculiarly a question of fact, presupposes that a will was made by the testator after the date of the first will. The next inquiry then is, was the second will cancelled by the testator himself, or by some person in his presence and by his express direction? or was it destroyed or has it been suppressed by others, without his privity and consent? In the investigation of this point the first and most natural inquiry is, to whose custody and control was the paper committed? It is idle to say it was in the actual custody of the testator. The condition of his health and all the testimony are in opposition to this idea. It is in proof the first will, in which, be it remembered, Mrs Shade is a devisee, and her brother, Daniel R. Murphy, one of the executors, was in the possession of Mrs Shade or Daniel R. Murphy, or of both; and the jury will have the right, under the facts disclosed, to infer that the subsequent paper was committed to her care also. I do not say they are bound to make this inference, but they may infer it without doing any violence to the probabilities of the case. If a subsequent devise was made, and that, with the first, went into the custody of Mrs Shade or Mr Murphy, the next and most natural inquiry will be, what has become of it? One of two things must have taken place. It was either cancelled by the testator, which he had an undoubted right to do, or it has been suppressed or destroyed by those to whose custody it was committed. The jury must choose between the one or the other of these alternatives. It is an undeniable principle, that while a will is in the possession of the testator, the presumption is that it has been cancelled by himself. But was this paper in the possession of the testator? Practically it was not, for the evidence shows it was under the control and in the power of the wife, or of his executor.

But is it probable it was destroyed by the testator himself, or in his presence and by his express directions? If it was, how easy to have proof of it! The absence of such proof is an argument against it. Besides, the very reasons which have been assigned for making a second will are those which make it so difficult to believe that he could have been induced to cancel it. The very supposition is a gross libel on his parental feelings, as there is no evidence, but directly the reverse, that anything afterwards occurred to alienate his affections from his erring but repentant child. He died, as is shown, in her arms. For these reasons and others which may be suggested, the jury may be of the opinion it was neither destroyed by him nor by his orders, or with his con-

[Jones v. Murphy.]

sent. If not cancelled by the testator, and there are strong grounds for believing it was not, we have but the other alternative, that it was destroyed or has been suppressed by those to whose custody it was committed, and whose interest it may have been to destroy it. If two wills have been traced into the lion's den, it will be for the jury to say why it is but one came out of it. It is true, fraud is not presumed. It, however, does not require direct or positive proof. It may, and often is, inferred with great certainty from attending circumstances.

From the remarks which have been made, it will appear that we entirely differ from the court in their positive instruction given to the jury, that there is no evidence of fraud or spoliation, either as against the plaintiff or any one else. Without undertaking to express an opinion on the weight of it, we think there is testimony which should be submitted to the jury, and of which they alone are the legitimate judges.

But the court further instruct the jury, that if there had been evidence of these facts, that is, the factum of a subsequent will, and its destruction or spoliation by any person other than the testator himself, it would still be necessary to prove what the contents of the will alleged to be destroyed were, and to show that it was a revocation of this, in whole or in part, and in what particular it revokes this will. For this position the court relies on *Morton v. Clark*, (5 *Raule* 235); *Lawson v. Morrison*, (2 *Dall.* 286); *Sir Henry Killgrew's Case*, (Salk. 592); and *Goodright v. Harwood*, (3 *Wils.* 497, 2 *Black.* 937, and *Cowp.* 87).

It is not denied that in the ordinary case of a disposing will lost or destroyed, and where there is no allegation of fraud, in addition to proof of the factum of the will, it is requisite to prove its contents; and this from necessity, for it is obvious it cannot operate as a disposition of the property without proof of its contents. So, if the instrument which was intended to be a will and not merely a revocation, cannot operate as a will, it cannot, as appears from all the authorities, take effect as a revocation. But even this doctrine must be taken with some qualification; for a will, though rendered inoperative by extrinsic circumstances, may revoke a former will. Thus, if properly executed and attested to pass freehold lands according to the statute of Cha. 2, though it should be prevented from operating by the incapacity of the devisee or any other matter *dehors* the will, the former will is nevertheless revoked by it. So a will devising lands in fee to the heir at law, though void as to the purpose of a will, yet operates as a revocation if attested according to the statute. 1 *Vez. Jun.* 17; *Ellis v. Smith*, (8 *Vez. Jun.* 370); 4 *Roll. Af.* 615; 1 *Roberts on Wills* 199. With much more reason is it that where a will is rendered inoperative as a will by the fraud of a person interested in its destruction, it will nevertheless operate as a revocation. It is better, surely, that a person should die intestate, than that a

[Jones v. Murphy.]

spoliator should be rewarded for his villany. So, in *Harwood v. Goodright*, (Coup. 87, 3 Wils. 497); 7 Brow. P. C. 344, it is ruled that a subsequent will, though it be found to contain a different disposition from a former, if the particulars of that difference be unknown, is no revocation of such former will. These principles are all granted; but I have looked into the cases on this head, and in none of them was there proof of spoliation. In truth, many of them go on the legal presumption that the subsequent will was cancelled by the testator himself; and it is not denied that a former will is not revoked by a subsequent will afterwards cancelled by the testator. In none of these did the controlling principle of this case arise; for where there is evidence of spoliation, I deny that it is necessary to give express proof in what particulars the two wills differ or that there are inconsistent dispositions, to produce a revocation, thereby causing an intestacy. A contrary inference is plainly deducible from the cases cited by the court itself. It was evidently the opinion of the judges who ruled the case of *Harwood v. Goodright*, that if the jury had found a spoliation of the paper, it would have altered the case. Thus Lord MANSFIELD, in *Harwood v. Goodright*, (1 Coup. 91), intimates that where there is spoliation the jury may presume inconsistent dispositions. Thus, he says, the jury might have had evidence to prove an inconsistent disposition, or circumstances to lay a fair foundation for presuming it to be so, *as spoliation, or the like*. But as no such circumstance appeared, the court ruled it was not a revocation. Had the defendant destroyed the second will, the judgment of the court in *Harwood v. Goodright*, we have reason to believe, would have been different. For Lord MANSFIELD, after stating the rule that a subsequent devise of lands must be inconsistent with a former devise of the same land, or the first will would stand as a good subsisting devise, observed, that it was not found that the second will was, in any particular, repugnant to or inconsistent with the first. Had the defendant destroyed the second will, he observes, there might have been good ground to presume such inconsistency or repugnancy, and the jury might have found the fact of revocation. And to the same effect are the remarks of Chancellor WALWORTH, in *Betts v. Jackson*, (6 Wend. 180). He observes, even when the exact contents of a will cannot be ascertained, if it has been suppressed or destroyed by a person interested in opposition thereto, the court or jury, *in odium spoliatoris*, will be authorized to presume many things as against the party who has been guilty of the fraudulent act.

If, therefore, on another trial the jury should find the factum of a subsequent will, and that this will was destroyed or withheld by fraud, they may, and, as I conceive, are bound to infer that the second will contained inconsistent dispositions with the first; nay more, *in odium spoliatoris*, that the second will contained a clause expressly revoking all former wills. In point of law it must be

[Jones v. Murphy.]

regarded as a will subsisting at the death of the testator, so as to operate as a revocation of all former devises. It is far better that there should be an intestacy than that a spoliator should be rewarded for his dishonesty. It is absurd to require strict proof of the contents of a will, so as to operate as a revocation, where it appears that it has been destroyed by fraud. From the great anxiety which testators frequently feel to conceal the disposition of their estates, it would, in a majority of cases, be impossible to prove their exact contents.

In conclusion, I have to remark that I have examined the several bills of exception, and it seems to me that in every case the evidence ought to have been received. The evidence rejected by the court has a bearing more or less direct on the factum of the revoking will, as well as the imputed fraud in its destruction. On the whole case we are of the opinion the facts were improperly withdrawn from the jury, and that the judgment must be reversed and a *venire de novo* awarded.

Judgment reversed, and *venire de novo* awarded.

Caldcleugh *against* Hollingsworth.

The owner of a chattel in the possession of a tenant which has been distrained for rent and sold, cannot maintain trover for it against the landlord, where notice of the distress was given to the tenant.

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

This was an action of trover brought by Mark Hollingsworth, who survived Edmund Tiliston, late copartners under the firm of Tiliston and Hollingsworth, against Robert A. Caldcleugh, to recover the value of a paper machine or roller. It appeared that the machine in question was consigned by the plaintiffs, living in Boston, to a firm in Philadelphia, by whom it was sent in 1840 to M'Ewen, a machinist, in whose shop it remained a year and a half or two years without undergoing any repairs, no instructions having been given for that purpose. While there, it was distrained for rent on the 10th June 1842 by the defendant. Notice of the distress was given to the tenant M'Ewen. Five days after this notice the property was appraised, and afterwards advertised for public sale on the 22d June, on which day the sale was adjourned

[Caldcleugh v. Hollingsworth.]

to the 28th. Notice of the first day of sale and adjournment was advertised in the Daily Chronicle, and notices were posted on the premises. No one attended at the sale to point out the machine nor was any notice given in respect to it. No claim was made for it till upwards of a year after the sale.

The court below charged the jury that trover lay. Goods left to be repaired were privileged from distress, and their owner could maintain this action against the landlord to recover their value.

To this charge the defendant excepted.

Hazlehurst for the plaintiff in error.

Oakford, contra.

The opinion of the Court was delivered by

GIBSON, C. J. — *Walter v. Rumball* is in point that the notice may be given to the tenant or the owner, at the landlord's discretion; and that when it has been given to the latter, he cannot maintain trover. The principal object of notice is to enable, and indeed compel the proper party to contest the legality of the distress before the property is sold, and thus to prevent the landlord from being involved in unforeseen difficulties. By the letter of the English statute, he is directed to give it to the tenant; yet in the case cited, it was held to be well given to the owners: our statute requires no interpretation whatever, for the letter allows it to be given either to the tenant or the owner. In the case at bar, it was given to the tenant, whose business it was to transmit it to the owner, whose agent, for that purpose, he may properly be considered. The facts of the case illustrate the propriety of this decision. The machine in question was left with the tenant to be repaired, but for want of specific instructions, was suffered to lie on the premises till it was distrained, after a lapse of two years and five months. How was the landlord to know it was privileged from distress, or who was the owner of it? Had he known all the circumstances, he would not have been bound to send notice to Boston, where it is conceded the plaintiffs lived. Nor is it clear that the machine, having been suffered to remain on the premises unclaimed for so long a time, by reason of the negligence of the owners or their agents, was in truth privileged. However that may be, it is part of the case that the requisitions of the statute had been complied with, and the owners were bound to proceed by replevin or not at all.

Judgment reversed, and *venire de novo* awarded.

Mechanics' Bank *against* Gorman.

An assignment in trust for creditors is good, although it excludes unreleasing creditors and reserves a trust of the surplus for the debtor.

To affect land in the hands of a purchaser, a judgment must have been not merely simultaneous with but anterior to the conveyance; and the precise time at which the judgment was entered must be shown by less than record proof.

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

The Mechanics' Bank of the city and county of Philadelphia against William T. Gorman. This was an amicable action of ejectment, in which the following case was stated in the nature of a special verdict, and subject to a writ of error.

Jacob Gilliams and wife, on the 21st day of September 1839, executed and delivered to John M. Odenheimer a general assignment, in due form, of all his estate, including the premises for which this ejectment is brought, in trust for creditors as set forth therein. The said assignment was duly acknowledged before an alderman of the city of Philadelphia by the proper parties, at a quarter after ten o'clock in the forenoon of said day. Said assignment was duly recorded on the 4th day of October 1839, which assignment is in words and figures following (prout assignment). Security was regularly given by the said assignee, who under said assignment sold the said premises in this writ mentioned to William T. Gorman, defendant, and conveyed the same to him by deed in due form of law, on the 31st day of August 1840. The defendant took possession thereof under said conveyance (which had been duly recorded), and still holds the same. The said plaintiffs, creditors of said Jacob Gilliams, the assignor, issued process against him in this court to September Term 1839, No. 241, returnable to the first Monday of September 1839; and a copy of the instrument of writing sued upon having been duly filed, judgment was duly entered thereon on the regular judgment day of that month, viz., the 21st day of September (the date of said assignment), between the hours of eleven and twelve o'clock A. M. of that day, for want of an affidavit of defence, and the damages were assessed on the 1st day of October 1839, at \$758.76. Writs of *feri facias* and *venditioni exponas* were afterwards duly issued upon said judgment by the said plaintiffs, who, after regular condemnation under the said *feri facias*, subsequently purchased the said premises at sheriff's sale under said *venditioni exponas*, paid the purchase money, and received a sheriff's deed duly acknowledged, and recorded the same.

If upon this case the court shall be of opinion either

[*Mechanics' Bank v. Gorman.*]

1. That the judgment so obtained by the plaintiffs against Jacob Gilliams after eleven o'clock of the 21st day of September 1839, took precedence and secured a lien on said premises, in preference to the said general assignment by Jacob Gilliams, executed and acknowledged before eleven o'clock on the same day, or,

2. That the said assignment is void in respect to the above-named plaintiffs, by reason of the terms of a provision for a release, and the resulting trust for the assignor as contained and expressed therein,

Then judgment to be entered in favour of the plaintiffs, to be released, however, on payment of their said judgment and costs. If otherwise, then judgment in this case is to be entered for the defendants, subject as above stated to a writ of error.

ASSIGNMENT.

This Indenture, made the 21st day of September 1839, between Jacob Gilliams of the city of Philadelphia, dentist, and Ann his wife, of the first part, and John M. Odenheimer of the same city, of the second part. Whereas, the said Jacob Gilliams is entitled to and possessed of certain estate, but owing to his misfortunes in business is unable to pay his various creditors, but is desirous of distributing said estate among them according to their several equities: Now this Indenture witnesseth, that the said Gilliams, as well for and in consideration of the premises as of the sum of one dollar to him in hand well and truly paid by the said John M. Odenheimer, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred and set over, and by these presents doth grant, bargain, sell, assign, transfer and set over unto the said John M. Odenheimer, his heirs, executors, administrators and assigns, all the estate real and personal of him the said Jacob Gilliams, and his rights, credits and expectancies of whatsoever nature or kind, and whether situate, lying, and being due and owing in the State of Pennsylvania, or elsewhere, to have and to hold the same with the appurtenances unto the said John M. Odenheimer, his heirs, executors, administrators and assigns, to his and their only use and behoof for ever, in trust, nevertheless, and to, for and upon the trusts, intents and purposes hereinafter set forth, viz.: That the said party of the second part shall, by public or private sale, at discretion, and by collections, suits or compromises, likewise at his discretion, convert all the assigned property, as speedily as may be, into cash, and as the proceeds are from time to time realized (after paying all the expenses of this trust, including the cost of this instrument), pay the creditors of the said party of the first part their respective demands, in the order of classes hereinafter enumerated, without preference as between individuals of the same class. Said classes to be paid according to their se-

[Mechanics' Bank v. Gorman.]

quence, so that no subsequent class shall receive anything until all those prior to it are paid in full.

First Class. All those creditors of the said Jacob Gilliams whose respective claims do not now without abatement exceed the sum of \$700. Also all sums due or to grow due for professional services rendered and to be rendered to the assignor. Also the debt due to Lewis Gilliams, amounting to \$2000 or thereabouts.

Second Class and lastly. All the residue of the creditors of the said party of the first part indiscriminately.

And should any part or portion of said trust and property or funds remain after fully complying with the trusts aforesaid, then the said party of the second part shall deliver over and reconvey the same unto the party of the first part, his heirs, executors, administrators and assigns. *Provided*, that no creditor of the said second class shall be entitled to participate in the said estate, who shall not, on or before twelve o'clock, noon, of the 25th day of October 1839, execute and deliver to the said Jacob Gilliams a full and entire release from all demands.

And the more effectually to enable the said party of the second part to accomplish and perform the trusts aforesaid, the said party of the first part doth hereby nominate, constitute and appoint the said party of the second part his true and lawful attorney, for him and in his name to ask, demand, sue for, recover and receive all such sum and sums of money, debts, goods, wares, dues, accompts and other demands whatsoever, which are now due and payable to him, or which are now due and may hereafter become payable. Giving and granting unto his said attorney by these presents, his full and entire power, strength and authority in and about the premises, to have, use and take all lawful ways and means for the purposes aforesaid, and upon the receipt of any such debts, dues, and sums of money, acquittances and other sufficient discharges to make, seal and deliver.

In testimony whereof, &c.

City of Philadelphia, ss.

This 21st day of September 1839, personally appeared before me (one of the aldermen of the city of Philadelphia), the within named Jacob Gilliams and Ann his wife, and John M. Odenheimer, and severally acknowledged the within written indenture to be their act and deed, and desired that the same might be recorded as such, the said Ann Gilliams being of full age and by me privately examined apart from her said husband, the contents thereof being made known to her, declaring that she freely executed the same without any compulsion from her said husband.

In testimony whereof, I have hereunto set my hand and seal the day and year last above written. Acknowledged at a quarter past ten o'clock, A. M.

P. CHRISTIAN.

[*Mechanics' Bank v. Gorman.*]

The court below gave judgment for the defendant on the case stated.

1. The court below erred in deciding that the judgment obtained by the plaintiff against Jacob Gilliams, as aforesaid, did not take preference and secure a lien on the premises for which the ejectment was brought, in preference to the general assignment by Jacob Gilliams, executed and acknowledged as aforesaid.

2. In deciding that the assignment made by Jacob Gilliams was not void in respect to the plaintiff, by reason of the terms of a provision for a release, and the resulting trust for the assignor, as contained and expressed in said assignment.

3. In giving judgment on the case stated in favour of the defendant.

V. L. Bradford, for the plaintiff in error.

Haly, contra, was confined to the first error.

The opinion of the Court was delivered by

GIBSON, C. J.—The rule of the common law, which rejects fractions of a day in determining the priority of liens, was restricted in *Metzler v. Kilgore* to judgments; and the reasons given for it show that it could not be otherwise. Judgments of the same date were held to start from the same point of time, not only because the common law principle of relation to the first day of the term had been altered no further than to let in record proof of the true day of rendition and not of the hour and minute, but because the date of a judgment being matter of record and triable only by itself, could not in general be established, falsified or explained by inferior evidence. Judgments of the same date were therefore admitted to come in together by force of a necessity, which did no injustice in putting them on a footing as to mere technical advantages resting on no principle of actual justice, but on an accidental interpretation of the statute of Westminster the second. But the precise time of delivering a conveyance, like the precise time of delivering a *feri facias*, being provable by evidence *in pais*, it follows that the necessities of justice, like the necessities of the law which required us to exclude inferior evidence in *Metzler v. Kilgore*, require us in this instance to admit it. The principle, in that case, brought in the judgments together; but in this, would exclude the assignment entirely. It is unnecessary to say that such a result would be contrary to natural right. It would be impossible to put a judgment and a conveyance on a footing of equality, not only because it would be impracticable to determine the relative proportions coming to each, but because they are inconsistent and irreconcilable. The one is a security which incumbers the property in exclusion of everything subsequent to it: the other, a conveyance excluding everything to which it is anterior; and they are therefore incapable of standing together. To affect land

[*Mechanics' Bank v. Gorman.*]

in the hands of a purchaser, a judgment must have been not merely simultaneous with, but anterior to the conveyance; and as an indispensable measure of justice, the precise time at which the judgment was entered must be shown by less than record proof.

The argument that a judgment whose date in contemplation of law covers the whole day, is necessarily anterior to a conveyance at an intermediate point of the same day, is too subtle to be solid. The conclusion attempted would not be borne out by the most fanciful effect of the legal fiction; for it might be possible to deliver a conveyance so exactly at the stroke of twelve as to leave no room for an intervening lapse of any appreciable portion of time. But justice is not to be dispensed on principles so artificial, where it can be avoided. When judgments bear the same date, they must necessarily come in together; but between a judgment and a conveyance, actual priority must be shown like any other fact.

The remaining point was agreed in *Livingston v. Bell*, (3 Watts 198) by sustaining an assignment in trust to pay debts, though it included unreleasing creditors, and reserved a trust of the surplus for the debtor. The reason is that the property is not less accessible to those creditors when a second time in the hands of the debtor, than it was before he parted with it. It is enough, however, that the point is no longer open.

Judgment affirmed.

Russell against Shuster.

In trespass against a constable for arresting the plaintiff and imprisoning him, the declaration stated it to have been done without reasonable or probable cause. *Held*, 1. That the defendant might under the general issue give evidence of the contents of the plaintiff's trunk for the purpose of showing he was addicted to burglary. 2. That the character of the plaintiff could not be given in evidence in mitigation of damages.

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

This was an action of trespass *vi et armis*, brought by Jacob Shuster against William Russell and Charles Downer. The declaration charged the defendants with arresting the plaintiff and taking him to the mayor's office and imprisoning and keeping and detaining him in prison there, without any reasonable or probable cause, for four days, &c. The defendants pleaded not guilty with leave.

On the trial the plaintiff called the mayor of the city, who tes-

[Russell v. Shuster.]

tified that the plaintiff, Shuster, *alias* Hand, was brought to his office by the defendants on the 13th March 1842. That he committed him for a further hearing. He thought the proof authorized the belief that he had been committing an offence elsewhere. The evidence was such as to make it proper to hold him. They had no process. The plaintiff was discharged by him from Moyamensing prison, after three days, because no offence was charged against him. There was an examination of Shuster's baggage with his own consent. That the greater part of the evidence was from the trunk and its contents, and from Shuster's past habit of life.

The defendants then asked the witness to state the contents of the trunk, for the purpose of showing that the plaintiff was addicted to burglary. The plaintiff objected; the court rejected the evidence, and the defendants excepted.

The defendants then offered to give in evidence the character of the plaintiff in mitigation of damages. This evidence was rejected by the court, and the defendants excepted.

The two bills of exception were the subject of the errors assigned.

M'Call and *C. Gilpin*, for the plaintiff in error, cited 6 *Binn.* 316; 5 *Vin. Ab.* 436, *pl.* 19, "*Constable*;" *Burns' Justice*, "*Arrest*;" 1 *Williams's Justice* 194-5; *Dougl.* 359; 6 *Barn. & Cres.* 635; 2 *Car. & Payne* 361; 1 *Carr. & Marsh.* 513, (41 *E. C. L.* 280); 2 *Stark. N. P.* 69; 1 *Alabama R.* 407; 1 *Saund. P. & E.* 121; 2 *Ibid.* 15; 2 *Esp.* 721; 2 *Phil. Ev.* 258; 1 *Carr. & Marsh.* 414, (41 *E. C. L.* 228).

H. Hubbell, *contra*, referred to 1 *Chitt. Pl.* 492; *Rosc. Ev.* 38, 298, 304, 372; 3 *Stark. Ev.* 1360.

The opinion of the Court was delivered by

GIBSON, C. J.—A constable may justify an arrest for reasonable cause of suspicion alone; and in this respect he stands on more favourable ground than a private person, who must show, in addition to such cause, that a felony was actually committed. The difficulty in regard to the first bill of exceptions before us, is to determine whether circumstances of suspicion which might have been pleaded in justification, as it is said the circumstances which would have been disclosed by the rejected evidence might have been, were competent to go to the jury under the general issue in mitigation of damages. The objection rests on the rule which requires matter of justification to be pleaded specially. At the first blush, one would not perceive a reason to preclude a party who had waived the benefit of a full defence, from showing the purity of his motives to shield him from exemplary damages; and there is in truth none except that the plaintiff is not apprized by

[Russell v. Shuster.]

the pleadings of the defendant's intention. Yet where the defendant is not at liberty to apprise him by pleading in justification, the matter is for that very reason allowed to be given in evidence. But whatever inconsistency there may seem to be in point of principle, it is certain that where the plaintiff had charged want of probable cause in his declaration, and thus evinced a readiness to meet the defendant on that ground, it was ruled in *Rowcliffe v. Murray*, (1 Car. & Marshm. 513), that the charge may be rebutted; and the point was not ruled on the 21 Jac. 1, c. 12, which allows special matter in certain cases to be given in evidence under the general issue, but on the principles of the common law. That case is in point; for the declaration before us charges the arrest to have been without probable cause; and if, as it is asserted, the plaintiff's trunk contained the instruments of a burglar, the defendants should have been allowed to show it. It is not the business of the officers to handle these people with gloves; and where they have, in strictness, transcended the authority of the law, they should be allowed to show that they had not molested them wantonly or inconsiderately.

But proof of the plaintiff's character was properly excluded. There are undoubtedly analogous cases in which the law has been held differently; for instance, *Leicester v. Walter*, (2 Camp. N. P. C. 251); *Williams v. Callender*, (*Holt's N. P.* 307); *Miles v. Spencer*, (*Ibid.* 534); and -- v. *Moor*, (1 M. & S. 284; all but the last, decided at Nisi Prius. But the doctrine was fully considered, and the incompetency of such evidence deliberately settled in *Jones v. Stevens*, (11 Price 283). The ground taken in the concurrent opinions of the barons of the exchequer, trite, but not the less true, is that a party whose character is not put in issue, is not bound to hold himself in perpetual readiness to defend it; otherwise, it was said, "any man might fall a victim to a combination made to ruin his reputation and good name, even by means of the very action he should bring to free himself from the effects of malicious slander." The second bill of exceptions, therefore, is not sustained.

Judgment reversed, and venire de novo awarded.

Northampton Bank *against* Balliet.

Payment into court or tender in notes of a bank, as between the bank itself and its debtors, is equivalent to payment in specie.

If the obligor of a bond to a bank holds the notes of the bank at the time he receives notice of the assignment of the bond, the assignee is bound to receive them as cash in payment of it; but if he obtained them after notice, they would be no defence either as payment or set-off in a suit on the bond by the assignee in the name of the bank.

In such suit, evidence of transactions between the defendant and the bank is admissible for the defendant, where such transactions commenced before he received notice of the assignment, though the liability of the bank was not complete at the time of such notice.

Evidence that the defendant in the suit was a man of business and in the habit of taking notes of that bank, is no proof of the time when the defendant received the notes set up as a defence.

ERROR to the Common Pleas of *Lehigh* county.

This was an action of debt brought by the Northampton Bank for the use of John Swander, against Stephen Balliet, Jun., who was impleaded with Jacob Huntzinger (who was not summoned), on a bond given by the defendants to the bank, dated in January 1840, in the penalty of \$1000 conditioned for the payment of \$500 on the 1st April 1843, with interest from the 1st April 1840. The defendant pleaded payment and tender.

The plaintiff, after giving in evidence the bond in suit, gave in evidence the following assignment endorsed on said bond:

The Northampton Bank hereby assigns and sets over unto John Swander, of North Whitehall township, Lehigh county, all the said bank's right, title and interest, to the within bond, and all moneys due, and to become due thereon, to secure to the said John Swander, his heirs, executors, administrators and assigns, the payment of a certain certificate of deposit bearing even date herewith for the sum of \$2000 with interest, on the 1st day of April 1843.

Witness, the corporate seal, and the signature of the president and cashier of said bank, this 5th day of April 1842.

JOHN RICE, President. [SEAL.]

GEORGE KECK, Cashier.

Also the following certificate of deposit:

\$2000

Northampton Bank, April 5, 1842.

This is to certify that John Swander deposited this day to his own credit \$2000, payable on the 1st day of April 1843 with interest, on his check and a re-assignment of certain bonds this day assigned to him, to wit—

[Northampton Bank v. Balliet.]

Bond, Paul Balliet, - - -	\$784—due April 1, 1843.
Bond, Paul Balliet, - - -	\$250—due April 1, 1843.
Bond, Stephen Balliet, }	- \$500—due April 1, 1843.
and Jacob Huntzinger, }	
And bond, Joseph Gross, -	\$500—due April 1, 1844.

\$2034

GEORGE KECK, Cashier.

The defendant called George Keck, who testified that on the 23d January 1843, Stephen Balliet paid him \$500 on a bond due April 1st 1844, which he returned to Balliet after making an endorsement on it. This was the first time he recollected notice having been given to Balliet of the assignment of the bond in suit.

The defendant proposed to prove further by the witness an agreement between the witness and defendant in relation to the bond in suit, to which evidence the plaintiff objected, but the court admitted the evidence, and sealed an exception.

The witness testified as follows:—"It was agreed that the payment made on the bond of 1844 should be applied to the bond of 1843, if the bank could get it. He wanted to pay the first bond, and I told him it had been assigned to Swander. I told him I had the bond of 1844, and he agreed to pay that and did pay it, with the understanding, that as soon as the bank could get the Swander bond back, he should have it."

The defendant then proposed to examine the witness in relation to certain drafts drawn by the Northampton Bank on the Western Bank of Philadelphia, in favour of said defendant, for \$325, to the admission of which, and of all evidence relating thereto, the plaintiff objected; but the court admitted the evidence, and sealed an exception.

The witness then testified as follows:—"This draft by Northampton Bank on the Western Bank of Philadelphia in favour of Stephen Balliet, Jun. for \$100, dated October 26th 1842, was drawn when it bears date. Stephen Balliet, Jun. deposited the amount in bank, and took this draft which is still unpaid: the money is yet in bank for this draft. On the same day that this draft was given, there were other drafts given to Mr Balliet, to the amount of \$1300 or \$1600; \$325 remained unpaid. On the 7th March 1843, John Balliet came to the bank with one of those drafts, and then John Rice, president of the bank, gave to Mr Balliet two drafts on Slemmer and Rogers, one for \$125, and the other for \$100, amounting to \$225. These were given in place of the draft on Western Bank for \$225. The difference of \$100 was paid to Balliet, and made up the \$325."

The witness then counted certain notes of the Northampton Bank, amounting to \$555.

The defendant proposed to examine the witness in relation to a

[Northampton Bank v. Balliet.]

certain draft of October 26th 1842 on Western Bank of Philadelphia for \$410; also a draft or acceptance by Slemmer and Rogers for \$1000; also to certain Western Bank drafts held by Waterman and Young; all which evidence was objected to by the plaintiff; but the evidence was admitted by the court, and the plaintiff excepted.

The witness then testified as follows:—"One of these drafts of October 26th 1842 for \$410 on the Western Bank is in the hands of Waterman and Young, to whom Mr Balliet passed it at the time it was given. Mr Rice placed in the hands of Waterman and Young one draft or acceptance for \$1000 by Slemm and Rogers, drawn by John D. George; that is not paid; another for \$200 is paid. Waterman & Young hold western drafts amounting to \$1175. These acceptances of Slemm & Rogers will be paid by the coal assignees. These acceptances of Slemm & Rogers were sent to Waterman & Young, to meet drafts held by them. One of these drafts is Balliet's draft for \$410. As I remarked, Balliet came there to pay Swander's bond, and I told him it had been assigned to Swander, and he paid the bond of 1844, and I was to deliver up bond of 1843, if the bank afterwards got it.

Cross-examined.—In all these draft transactions no allusion was made to Swander's bond. These drafts were given to Balliet on notes that he brought there; he got them to pay off debts which he owed to merchants in Philadelphia, and they were paid, except the one mentioned."

The defendant thereupon offered to prove by a witness that the defendant was a man of business, and in the habit of taking Northampton Bank money; to which evidence the plaintiff objected, but the court admitted the evidence and sealed an exception.

The witness then testified that Stephen Balliet was, in the fall of 1842, in the habit of taking Northampton Bank money, and was in a large business.

The court charged the jury as follows:

The plaintiff has given in evidence the defendants' bond to the bank, dated January 1840, and payable on the 1st April 1843, interest to be paid annually. This bond was assigned to Swander on the 5th April 1842. Notice of the assignment was not given until the 23d of January 1843. Balliet then came to pay this bond, and was told it had been assigned. He then paid the money on another bond, on condition that it was to be applied to this, if the bank could get it back from Swander. It was not got up, so that this payment of the bond due in 1844 stands good, and this money as payment forms no defence to this action.

The defendant has given in evidence other indebtedness by the bank to him or to Balliet before notice of the assignment. Is this a good defence to the bond? An assignment operates as a new contract. This contract between the debtor and assignee commences upon notice of the assignment. The assignee takes the bond subject

[*Northampton Bank v. Balliet.*]

to every defalcation existing between the obligor and obligee at the time notice is given of the assignment.

It is said by plaintiff that this indebtedness of the bank to Balliet is set-off and not payment, and therefore it is no defence to his action. Bank notes are something more than mere promissory notes. They are, to some considerable degree, money. They pass as money. If stolen and passed off for value, they cannot be followed and reclaimed as chattels or mere choses in action can. The bank could not now plead the statute to one of its notes. Until Balliet had notice of the assignment, he might well give credit to the bank on faith of the bond. This transaction is directly between the bank and Balliet. It is not the buying up of outstanding debts against the bank. The dealings were directly between them, and all the indebtedness that existed in favour of Balliet by the bank would be a good defence in this action. Balliet had a right to prepare to pay the bank the debt he owed. It was his duty to do so. If he got the money of the bank in claims against it, he was not to lose all this because the bank had made an assignment of which he had no notice, and which both the bank and assignee had kept secret. This is not the law, because it would be the most gross injustice.

The plaintiff has asked us to charge you "that the plaintiff, Swander, is entitled to recover in this issue, notwithstanding all the evidence given on the part of the defendant, because the defendant did not pay the bond in suit to the bank, but paid another bond which he owed to the bank, and which fell due in 1844; and because the evidence of defendant as to transactions between defendant and bank after the assignment of bond in suit to Swander are not available to defendant if offered by way of set-off, and are clearly no payment either to the bank or John Swander, who then held the bond."

The answer which we give to all this is, that the money which was paid on the bond that fell due in 1844 is no defence to this action, but that any other legal claims which the defendant held against the bank at the time of notice of the assignment to Balliet, and which he now holds, and which he has proved, are a good defence to this action. Whether any have been proved is for you to decide. If any such have been proved, you will determine their amount, and credit the same on the bonds. If the bond is thus paid in full, you will find for the defendant. If it has not been paid in full, you will find for the plaintiff to the amount of the unpaid balance, with interest. We have also been asked to charge you that "notice of the assignment is immaterial." We refuse so to charge you.

The jury found a verdict for the defendant.

Errors assigned:

1. The court erred in admitting the evidence embraced in the bills of exception.

[Northampton Bank v. Balliet.]

2. In charging, substantially, that the indebtedness of the bank to defendant, given in evidence, was payment, and not set-off.

3. In what they say with regard to bank notes.

4. In charging that "the dealings were directly between the bank and Balliet, and all the indebtedness that existed in favour of Balliet by the bank would be a good defence in this action."

5. In the answer to plaintiff's points.

6. In not answering the first point fully.

7. In not distinguishing between the drafts of October 26th, 1842, and those of 7th March 1843, the former having been either paid off or not in defendant's hands at the time of trial, and consequently not in evidence, and the latter having been given after notice of assignment, and thus misleading the jury, who could not otherwise have found for defendant.

C. Davis and Mallery, for the plaintiff in error, referred to *D. peau v. Waddington* (6 Whart. 233); *Petrie v. Clark* (11 Serg. & R. 398); Act of 28th May 1715 (*Purd.* (1841) 136; *Hinkley v. Walters* (8 Watts 260), S. C. (9 Watts 183); *Carmalt v. Post* (8 Watts 406), S. C. (2 Watts & Serg. 70); *Filbert v. Hawk* (8 Watts 443); *Uhler v. Metzgar* (2 Rawle 239); *Ramsey's Appeal* (2 Watts 228); *Huling v. Hugg* (1 Watts & Serg. 210).

Gibbons and King, contra.

The opinion of the Court was delivered by

ROGERS, J.—This was an action of debt to recover the amount due on a bond given by the defendants to the Northampton Bank, in the penalty of \$1000, conditioned to pay \$500 with interest on the 1st day of April 1843. The defendants plead payment and tender: replications and issues. The suit is brought for the use of John Swander, to whom the bond was assigned on the 5th of April 1842. But the defendants received no notice of the assignment until the 23d January 1843. The case may be viewed in two aspects: first, as between the Northampton Bank and the defendants; and next, between the assignee and the defendants.

By the Act of defalcation it is enacted, that it shall be lawful for the defendant to plead payment, and give any bond, bill, receipt, account or bargain in evidence. In this State, therefore, in a suit on a bond, the plea of payment is not viewed merely as a common law plea, in which only direct evidence of payment is admissible; but upon notice, according to the rules of court, the defendant may avail himself of set-off, or any equitable defence he may have against the plaintiff's claim. But granting that it is a common law plea, the question arises, in the first place, whether payment into court, or a tender in the notes of the bank, between the bank itself and its debtors, is equivalent to payment or tender in specie. In other words, has the bank a right to insist on gold

[Northampton Bank v. Balliet.]

and silver from its debtors, when they are willing and offer to discharge their obligations in notes issued by the institution itself?

In this State, although it is conceded to be different in Massachusetts and New Jersey (13 *Mass.* 235; 3 *Halsted* 172), the doctrine asserted by counsel has the merit of novelty; for the benefit of this principle, so far as my knowledge extends, has never been claimed by the banks, nor has it ever been supposed to exist by the public. If the law be as has been contended, it is time it should be known, as the citizens of this State have been labouring under a dangerous delusion; for it is notorious that the notes of insolvent banks have commanded a ready sale in market, for the simple reason that they can be used in payment of debts due the bank. This is the common understanding among the men of business throughout the State; and it would shock their ideas of common sense and common honesty, if they should now be told that it was not a matter of right, but depended entirely on the will of the institution (whether solvent or insolvent), who were at liberty to receive them or not, as they might think proper. Nor can the bank complain of injustice, if the law be adverse to this pretension, as it is of no consequence to them what price their debtors pay for their notes, whether par or their depreciated value, as the bank can lose nothing by the transaction.

The argument is, that notes are not money, and that it is in opposition to that clause in the Constitution of the United States which prohibits the several States from making anything but gold and silver coin a legal tender in payment of debts. If the Legislature should so far forget their duty as to undertake to make bank notes or bills issued by themselves a legal tender generally, in payment of debts to third persons or to other institutions, the objection would be unanswerable; but between the bank itself, which is the creature of the Legislature, there is nothing in the Constitution to restrain their power to impose terms, whether directly or by necessary implication; nor is there anything to prevent them from imposing terms on themselves. Besides, in the case of a solvent bank, such a privilege would be unavailing; as all it would be necessary to do would be, when the bank refused to receive its notes as payment, to demand the specie for the notes, and then pay their debt in gold and silver drawn from their own vaults. It must be conceded that no part of the Constitution can be so construed as to prevent either individuals or banks from making their own contracts, and agreeing to receive payment either in notes issued by themselves or in any other manner they may stipulate for. This, in truth, is in the ordinary course of business, as, for example, contracting to pay in current notes or some marketable commodity; and no person ever supposed it was an infringement of the Constitution to compel the contracting parties to perform their agreement.

These are cases of express contracts, it is true, but implied con-

[Northampton Bank v. Balliet.]

tracts create the same obligation and come within the same category. Of the latter description is this case. A bank is an incorporated institution, with peculiar privileges; among others, to issue or loan their own notes, which, in the common transactions of business, answer, and are so intended by the bank, all the purposes of money. They pass by delivery; and even when stolen, and transferred in the course of business, unlike choses in action or other property, they cannot be recovered from a *bonâ fide* holder. In *Race v. Miller*, where the principle was first decided, Lord MANSFIELD says, "They are not goods, nor securities, nor documents for debts, but are treated as money, as cash, in the ordinary course and transactions of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes; they are as much money as guineas themselves are, or any other coin that is used in common payment as money or cash." The same principles are recognised in *Bayard v. Shunk* (1 *Watts & Serg.* 92), where the whole matter is carefully examined by Chief Justice GIBSON, who delivered the opinion of the court.

If these principles be correct—and they cannot be contested, either on reason or authority—how can the bank, which has issued and passed them as cash, refuse in good faith to receive them as cash? They, at least, are estopped from denying they are cash, when offered in payment by their debtors. From the very nature of the transaction, there is an implied contract with them and the holders, that they will treat them, to all intents and purposes, as money. To adopt the language of Lord MANSFIELD, they are as much money as guineas themselves are, or any other coin that is used in common payment as money or cash. Having given them currency as money or cash, they shall not be at liberty afterwards to dispute it. It is cash so far as they are concerned, if to none others, and this upon the plainest principles of equity and justice. The furthest the banks in this State have ever ventured to go, was a denial by the branch bank to receive the notes of the parent bank, and the assignees of the United States Bank to receive the notes of the bank, which had depreciated in value, in payment of debts, which was promptly remedied by the Act of the 11th March and the 20th section of the Act of the 1st May 1841. In passing those remedial Acts, it was taken for granted that they would have no right to refuse to receive their own notes. If this case, therefore, rested between the Northampton Bank and the defendant, the payment into court would be a good payment, without regard to the time when they were procured by the defendants. There is a marked difference between such a case and a defence grounded on a set-off. But as the bond has been assigned, we must next consider the effect of the assignment.

The case would seem to be this. John Swander, the assignee for whose use the suit is brought, was the holder of notes of the

[Northampton Bank v. Balliet.]

Northampton Bank to the amount of \$2000. This money he loaned to the bank, taking as a collateral security several bonds, of which the bond in suit was one. The bonds were assigned on the 5th April 1842, but the defendants had no notice of the assignment until the 23d January 1843.

Although the agreement between Swander and the bank says but little for the solvency of that institution, yet we can perceive nothing in that contract that places Swander in a worse situation than any other assignees either from banks or individuals. It must be governed by the same rules which apply to assignments under the Act of the Legislature. The bond is payable to the bank or its assigns; it therefore goes into the hands of the assignee with all the incidents attached to other assignments of choses in action. From this it follows that after assignment of the bond and notice of it, no set-off afterwards accruing can avail the defendant; nor is the assignee bound to receive the notes of the bank in payment. In that particular the assignee stands in a different situation from the assignors. For although as between the defendants and the bank the notes may be treated as cash, yet between them and the assignee they cease to be such, and must be viewed in the ordinary light of a set-off merely. If, therefore, the defendant held the notes of the bank at the time he received notice of the assignment, the assignee would be bound to receive them as cash. But if afterwards, the assignee cannot be compelled to receive them, nor is there any defence against the plaintiff's demand either as payment or set-off. The important period to determine the rights of the assignee and the defendants is not the time of the assignment, but the time the defendants had notice of it, and this principle applies as well in the case of set-off as payment. The time the contract begins between the assignee and the obligor is when the latter has notice of the assignment. It is the duty of the assignee or the obligee to inform the obligor that he has parted with the bond, and if this is omitted they are in default, and not the obligor, who, until he is informed otherwise, has a right to suppose that the bond is still the property of the obligee, and to act and contract with the obligee or others under that reasonable supposition. These principles were first ruled in *Wheeler, assignee of Baynton v. Hughes*, (1 *Dall.* 23). The assignee takes the bond at his own peril, and stands in the same place as the obligee, so as to let in every defalcation which the obligor had against the obligee at the time of the assignment or notice of the assignment. This was the case of set-off, and has been repeatedly recognised since in cases cited at the bar. It is supposed, however, that all the earlier cases have been overruled in *Hinkley v. Walters*, (8 *Watts* 260), and same case, (9 *Watts* 183). A distinction has, it is said, been taken between payment and set-off; and to this effect, it must be confessed, is the reasoning of the learned Judge who delivered the opinion of the court. The court, however, never did

[Northampton Bank v. Balliet.]

intend to overrule the earlier cases on this subject, none of which, be it remarked, would seem to have been cited either in the argument or in the opinion of the Judge. It must be observed that this point was not necessary to the decision, which turned on the Act of Limitations as applicable under special circumstances to a plea of set-off, grounded on an erroneous and mistaken principle said to be ruled by this court, that the statute of defalcation or set-off *per se* applies the demand of one party to that of the other, so as to produce payment, satisfaction or extinguishment.

As this case goes down for another trial, I will now briefly notice the bills of exception. If the agreement proved by the witness contained in the first bill had been followed up with proof that the bank had obtained a re-assignment of the bond, it would be pertinent evidence. But this the defendant failed to do; it was therefore immaterial to the issue and improperly received. Of this the court were aware, and in the charge corrected the error by instructing the jury that it was no defence to the bond. For such an error I should be very reluctant to reverse the judgment, unless there was something in the case which induced a suspicion that it may have had an improper influence on the minds of the jury.

The court was right in admitting the evidence in the second bill, because although the liability of the bank was not complete when the defendant had notice of the assignment, yet the transaction out of which the defence arises commenced before he was informed of the transfer of the bond.

As the time when the notes were received by the defendants may be very material, it is necessary for the defence to give proof of it. And for this purpose we cannot perceive that the fact that one of the debtors was a man of business and in the habit of taking Northampton Bank notes is any proof whatever.

On the whole case, we think the judgment should be reversed, and a *venire de novo* awarded.

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

Selfridge *against* The Northampton Bank.

Evidence that a bank did not execute and issue certain of its notes until two years after their date, is admissible to show the time of their coming into the hands of a debtor to the bank.

Where a debtor directs the application of a payment to a particular debt, equity will not change that appropriation in favour of another debt.

ERROR to the Common Pleas of *Lehigh* county.

This was an action of debt brought by the Northampton Bank for the use of James Smoyer against the administrator of Mathew Selfridge, deceased, on a bond and mortgage given by Selfridge to the bank, dated 7th September 1836, for the payment of \$10,000 in five equal annual payments with interest. The plaintiff claimed to recover \$5800 with interest, amount deposited in the bank by Smoyer.

The plaintiff gave in evidence the bond and mortgage on which was endorsed "Interest paid to April 1st 1839." "Interest paid to April 1st 1842."

The plaintiff then gave in evidence the following assignment :

Know all men by these presents, that the Northampton Bank, as collateral security and to secure to James Smoyer the payment of the sum of \$5800, deposited by him this day in the Northampton Bank, payable on the 1st day of April 1843, interest from date of deposit till paid, the receipt of said money on the terms above-mentioned is hereby acknowledged, have granted, bargained, assigned and set over, and by these presents do grant, bargain, assign and set over unto the said James Smoyer, his heirs and assigns, the indenture of mortgage given by Mathew Selfridge, dated the 7th September 1836, to the said the Northampton Bank, on a certain brick messuage, &c., which said mortgage was given with a bond in the sum of \$20,000, conditioned to pay the said the Northampton Bank, the sum of \$10,000 with the lawful interest as by the said bond and mortgage will more fully appear, which said mortgage is on record and recorded, &c., the 12th September 1836, &c.; together with the rights, members and appurtenances thereunto belonging, and all the estate, right, title and interest therein on the terms aforesaid. To have and to hold all and singular the premises hereby granted and assigned, or mentioned, or intended so to be, unto the said James Smoyer, his heirs and assigns, subject nevertheless to be re-assigned to the said the Northampton Bank on the payment of the said sum of \$5800 on the said 1st day of April 1843, as above-mentioned, and subject also to all

[Selfridge v. The Northampton Bank.]

the reservations contained in said indenture of mortgage on the part of the said the Northampton Bank in this behalf made.

In witness whereof, the said the Northampton Bank have executed these presents by the signatures of the president and cashier, and affixing hereto the corporate seal of said bank, this 5th day of April 1842.

JOHN RICE, President.

GEORGE KECK, Cashier.

Also the following certificate of deposit :

Northampton Bank, April 5th, 1842.

This is to certify that James Smoyer has deposited this day five thousand eight hundred dollars, payable on the 1st day of April 1843, with interest, subject to his check and a re-assignment of a certain bond and mortgage, this day assigned to him by the Northampton Bank.

GEORGE KECK, Cashier.

\$5800.

The defendant gave in evidence a bundle of Northampton Bank notes amounting to \$12,300, and called Nathan Metzger, who testified that the defendant in April 1843 tendered these notes to George Keck, cashier of that bank, at his house, in payment of the bond and mortgage in suit, and that Keck refused to receive them, but gave no reason. On Keck's refusal the defendant handed the notes to witness, who tied them up with a memorandum, and had kept them in Selfridge & Wilson's fire-proof ever since.

The plaintiff then gave in evidence the following memorandum, dated 13th April 1843, after having proved by Metzger that it was in the defendant's hand-writing, and the same memorandum that he had tied up with the notes :

"Memorandum of \$12,300, tendered George Keck, Cashier of the Northampton Bank, April 13th 1843, in payment of the following mortgage, notes, &c., to wit :

"\$10,000 in payment of a mortgage of M. Selfridge, deceased, with arrear of interest, which said mortgage, it seems, has been assigned by the bank for the payment of \$5800—whereupon \$4200 balance of mortgage yet in bank's possession was tendered."

The plaintiff then called George Keck, who testified as follows : "On the very day the bond was assigned to Smoyer, I went up to the bank early in the morning. I there found William Selfridge and Mr Rice together. Selfridge drew a draft on William Wilson of Philadelphia, for \$1800, the amount of arrearage of interest on bond and mortgage. Rice passed his receipt for that amount, and on that Smoyer and Mr Wright came in, and Selfridge passed immediately out. Wright, Moser and Smoyer came into bank through the director's door. I think at that time the papers were in Wright's hands. Smoyer's money was counted and deposited on the 5th

[Selfridge v. The Northampton Bank.]

April 1842. Selfridge went out the same door they came in. It was before bank hours. Smoyer had been there prior to the 5th April, the week before. There was but two and a half years interest due at the time. I don't recollect that anything was said in presence of Metzger about the bond or mortgage having been assigned. These notes are all of the new issue."

The plaintiff then offered to ask the witness when these bank notes were executed, to which the defendant objected, but the court overruled the objection and sealed an exception. The witness then testified as follows: "These notes were executed on the 3d day of February 1843. They are dated January 18th 1841. They are dated back to correspond with the plate. They were taken out of the bank on the same day by Mr Rice for New York and Philadelphia."

The plaintiff further proposed to ask the witness how much Mathew Selfridge individually, and as late partner of the firm of Selfridge & Wilson, was indebted to the Northampton Bank in April 1843. The defendant objected to this offer, but the court overruled the objection and sealed an exception.

The witness then testified that Mathew Selfridge was the drawer and William Wilson the endorser of a note due July 6, 1835, for \$2700, upon which two years' interest had been paid; and also of a note due January 3d, 1837, for \$5000. That Mathew Selfridge was the drawer of a note due December 10th, 1839, for \$1000. That Selfridge & Wilson owed a note for \$2968, which was paid by Thomas B. Wilson, the surviving partner, on the 13th June 1843. That Selfridge & Wilson were indebted a note of \$1000, due August 20, 1833; also a draft for \$1500 on James M. Hirst; also a note for \$5000, due November 1st, 1836. That there was due June 13th, 1843, a balance on deposit account of \$8164.62, by over-draft. That they were entitled to a credit for a draft on Holland & Co. of \$3000.

The witness also stated that on the 1st, 2d or 3d of April 1843 William Selfridge came to his house, the evening he returned from Philadelphia, some eight or ten days before he made the tender. That the bank notes in question were taken by Rice, and hypothecated in Philadelphia and New York. They were not issued at the counter of the bank.

The plaintiff further proposed to ask the witness when these notes first appeared in the market; to which the defendant objected, but the court overruled the objection and sealed an exception. The witness then stated that the first he knew these notes were in market was on the 23d March 1843. On his cross-examination he stated: "On the 1st, 2d or 3d April 1843, Selfridge said he had some \$12,000. I asked him to show them to me, and he did. They were the same notes as these. I did not count them. I looked at them. I don't recollect that anything was said about the transfer of the mortgage. I told him I would not re-

[Selfridge v. The Northampton Bank.]

ceive the notes, owing to the issue. Objection was to the issue. He had a bundle of notes, I should think as large as these. I think these are the notes. I never notified William Selfridge of these debts or notes anterior to the first tender. This is Mathew Selfridge's bank-book. Balance due Mathew Selfridge, \$47.19. The bond and mortgage passed together."

The plaintiff then called a witness, who stated he thought William Selfridge was in the office of the Recorder of Deeds of Lehigh county, some time in the spring of 1843, looking at the record of the deeds and mortgages; witness could not say which. Before that time he had been in the office examining the books. The Recorder testified that William Selfridge had been at the office, looking at the mortgage-books, in the summer and spring of 1843. He could not say whether it was before or after April. The assignment of the bond in suit was entered in one of the mortgage-books.

It appeared that the Northampton Bank closed on the 22d or 23d March 1843, and had not been open since for business; and that it was bankrupt. It appeared, also, that Mathew Selfridge died before the assignment of the bond in suit.

The court charged the jury that every equity which existed in an obligor prior to his receiving notice of the assignment of the bond, against payment of it to the obligee, was a good defence against the assignee. That it was the duty of the assignee to give this notice. That if the debtor, by bond to a bank, gets its notes for payment before notice of the assignment, and tenders them in payment, it is a good defence, and to him is equivalent to payment, if pleaded, proved, and the notes are produced on the trial and brought into court. That whether notice was given to the defendant's administrator before the tender of the notes in question, was a fact for the jury to determine from the evidence. The legal effect of want of notice was a question of law for the court.

The court went on to say:—"Has notice been proved? This is a contested point. The plaintiff relies upon what took place at the bank on the morning of the assignment. The defendant was in the bank, and paid off the interest on the bond. Having done this, he went out; as he went out he met Smoyer and his counsel coming in. There is no proof that anything was said to the defendant by the officers of the bank, while he was in, about the assignment. There is no proof that anything was said to him by Smoyer as they passed each other. They transacted no business together. They had no conversation with each other on any subject. Does this prove notice, or tend to prove it? You will consider it and decide it. The written paper, which was tied up with the notes and is in defendant's hand-writing, is relied on as proof that he had notice. It is said in that paper that *it seems* the bond and mortgage has been assigned. The argument is, that he was

[*Selfridge v. The Northampton Bank.*]

not then told that they had been assigned, and therefore the conclusion is drawn that he knew it before. You will say how far this proves notice. You will pass upon all the evidence, and decide this fact."

They also charged that so far as there were other debts proved to be due by the estate of Selfridge to the bank, the notes tendered should be applied to them before the debt assigned to Smoyer; and that the fact that the defendant tendered the notes in payment of this particular debt would not prevent its being done. That if the defendant had notice of the assignment before he procured the notes which he tendered, then the defence failed, and their verdict should be for the plaintiff for the full amount of Smoyer's claim. That if such notice was not proved, they should apply the notes tendered to the indebtedness of the testator, in his own right, to the bank at the time of the tender. If this indebtedness absorbed the whole amount of the notes, they should find for the plaintiff the whole amount of Smoyer's claim; if it did not, the residue of the notes should be applied to the debt assigned to Smoyer. If they covered this, the verdict should be for the defendant; if not, for the plaintiff, for such part not covered by the notes.

Both parties excepted to the charge. The defendant assigned the following errors:

1, 2, 3. The court erred in admitting the evidence embraced in the three bills of exception.

4. In leaving to the jury the question of notice of the assignment as a fact for them to determine from the evidence.

5. In charging the jury that if other debts due by the estate of Selfridge to the bank have been proved, then the bank notes tendered should be applied to those debts, and not to the debt assigned to Smoyer.

Gibbons and *Meredith*, for the plaintiff in error, referred to 12 *Serg. & Rawle* 305; 3 *Watts & Serg.* 553; 6 *Ibid.* 9; *Gilpin* 106; 4 *Watts & Serg.* 19; 3 *P. R.* 405; 6 *Watts* 487; 8 *Watts* 385; 5 *Watts* 49, 275; 10 *Watts* 397; 2 *Watts* 75; 1 *Price* 133; 1 *Rawle* 108.

Davis and *Mallery*, contra, cited 12 *Wend.* 356; 6 *Dana* 224; 13 *Mass.* 235; 1 *Halst.* 226; 3 *Halst.* 172; 6 *Conn.* 233; 8 *Ibid.* 505; 5 *Watts & Serg.* 223; 8 *Watts* 260; 9 *Watts* 183; 8 *Watts* 260, 416, 443; 2 *Watts & Serg.* 70; 2 *Watts* 228; 1 *Binn.* 433, 435; 4 *Serg. & Rawle* 175; *Act 28th May* 1715; 19 *Wend.* 397; 6 *Whart.* 233.

The opinion of the Court was delivered by

ROGERS, J. — The general principles ruled in the case of *The*

[Selfridge v. The Northampton Bank.]

Northampton Bank v. Balliet (ante 311) apply here. Nothing, therefore, remains but to notice the bills of exception.

1. The court were right in admitting the testimony contained in the 1st bill, because the evidence has a direct bearing on a material question, viz: whether the defendant received the notes on which he relies as a defence before or after notice of the assignment.

2. If a different state of facts existed, the evidence of the indebtedness of Selfridge individually, or as the partner of Wilson, would be material; because, if the defendants had tendered the notes generally, without specifying to which debt the payment should be applied, a court of equity, under the circumstances of this case, would so apply it as to do justice to all parties. But this equitable principle cannot be invoked in aid of the plaintiff, where the debtor himself directs the application of the payment. He has a right, of which he cannot be deprived, to direct which debt, where he owes more than one, shall be paid. This point has been repeatedly ruled, and in a very recent case, where the whole law was reviewed.

We also think the court was wrong in leaving it to the jury to infer notice of the assignment from what took place at the bank the morning of the assignment. The court, it is true, refer to a written paper tied up with the notes, in the handwriting of the defendant, and afterwards refer the whole evidence to the jury. But this does not cure the error; for it is plain, from the charge, that the jury would be warranted in supposing that, aside of all other evidence, they would be justifiable in inferring that the defendant had notice of the assignment. We cannot, however, perceive, in what took place there, a spark of evidence of that material fact.

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

CASES
■
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—MARCH TERM 1846.

Ebenhardt's Appeal.

H. obtained judgment against R. then owner of three lots, Nos. 1, 2 and 3. Afterwards R. by deed conveyed lot No. 3 for \$400 to S., who paid \$100 and gave his note for \$300 payable to R.'s order, "on account of the lien on his (R.'s) property in favour of H.," &c. After this there were three judgments obtained against R. by B., W. and P. At the time W.'s and P.'s judgments were entered there were no judgments against S.; but subsequently there were twelve entered against him. Out of the proceeds of lots Nos. 1 and 2, sold under H.'s judgment, the court allowed H. and B. the amount of their judgments, W. the balance of the fund towards his judgment, and subrogating W. and P. to the rights and interest of H. as to the lien of his judgment against the real estate of S., decreed them the amount, with interest, of the note given by S. to R. No notice was given S.'s creditors of the application for this decree of distribution, and but one appeared to contest the subrogation. Subsequently to the decree, lot No. 3 was sold by the sheriff as S.'s property, and W. and P. claimed the amount of the note out of the proceeds. Exceptions afterwards taken to the decree by two of S.'s creditors were dismissed, and, on an appeal by them to this court, the decree of substitution was reversed. SERGEANT, J., *dissenting*.

THIS was an appeal by Michael D. Ebenhardt and Charles F. Diekenschiedt from the decree of the Common Pleas of *Lehigh* county.

The facts of the case were as follows:—On the 26th April 1842, Henry Hein obtained a judgment for \$1200 against John Rice, who was then the owner of three lots of ground, viz: Nos

(327)

[Ebenhardt's Appeal.]

(1), (2) and (3). On the 26th October following, Rice, by deed which was recorded 16th March 1843, conveyed lot No. (3) to George Spinner for the consideration of \$400, the receipt of which was acknowledged in the deed. Spinner paid \$100, and gave Rice the following note:

"For value received, I promise to pay to the order of John Rice, on account of the lien on his property in favour of Mr Hein, due in April 1843, \$300, to be paid on or before the 27th day of May 1843 in specie-paying funds.

GEORGE SPINNER.

October 21st, 1842."

(Endorsed) "Pay on Mr Hein's lien \$300 within mentioned.

JOHN RICE."

There were three other judgments obtained against Rice: one by Henry Bender, November 5th, 1842, for \$65.44; one by John A. Waechter, June 11th, 1843, for \$103, and one by George Probst, June 21st, 1843, for \$2662.37½. At the time the two latter judgments were respectively obtained, there were no judgments against Spinner. On the 11th July 1843, Pretz, Saeger & Co. obtained judgment against Rice for \$987.24, on which they issued an attachment execution on the 2d August 1843, with a clause of *scire facias* against Spinner as garnishee, which was returned served same day, and on which judgment was entered against Spinner on the 8th September 1843 for \$311.65. Previous to this judgment four others had been entered against Spinner, the first of which was on the 18th July 1843. On the 20th January 1844, lots Nos. (1) and (2), above mentioned, were sold under Hein's judgment against Rice for the sum of \$1310. On the 2d February 1844, two judgments were respectively obtained against Spinner; one by Ebenhardt and Dickenschiedt, and one by Michael D. Ebenhardt. After these, five other judgments were entered against Spinner, the last on 20th February 1844.

On the 7th February 1844, rules were taken to show cause why Hein and Bender should not take the amount of their judgments out of the fund in court arising from the sale of lots (1) and (2); and why Waechter and Probst should not be subrogated to all the rights and interest of Hein, to the extent of their judgments against Rice. On the same day an auditor was appointed to ascertain and report the nature and amount of the liens on the real estate late of Rice, and all the facts in relation to said liens. Same day affidavit of Spinner, garnishee, was filed, stating the facts of his purchase from Rice of lot No. (3); that he paid \$100 on account of the lots, and gave the note to Rice's order on account of the lien on his property in favour of Hein; that there was no balance in his hands in favour of Rice on the 2d August 1843, nor at any time since, except the balance due for the lot, and payable as above stated, and according to said note; that he had not, on that

[Ebenhardt's Appeal]

day nor since, any goods, &c., or effects belonging to Rice, except the money due on said note, to be applied on Hein's judgment. Same day Waechter, on an affidavit that Rice had moved off to New Jersey with his family in July 1843, and had not visited Allentown or lived there since, took a rule to show cause why the writ of attachment issued by Pretz, Saeger & Co. and the service of the writ should not be quashed.

On the 29th April 1844, the auditor reported distribution of the fund arising from the sale of lots (1) and (2) to the judgments of Hein and Bender, leaving a balance of \$50.96, which, together with \$311.65 the amount with interest of Spinner's note to Rice, which he considered as part of the fund, he allowed Waechter and Probst on their judgments.

On the 1st May following the report was confirmed. Hein and Bender were allowed the amount of their judgments. Waechter was allowed the \$50.96, the balance in the sheriff's hands, and was subrogated to the rights and interest of Hein as to the lien of Hein's judgment against the real estate of Spinner, to the amount of \$68.14, the balance due on Waechter's judgment. Probst was also subrogated to the rights and interest of Hein as aforesaid, to the amount of \$243.51. These two sums made up the sum of \$311.65, the amount of the note and interest.

No notice was given to Spinner's creditors of the proceedings in relation to distribution of the proceeds of Rice's property, although on the hearing Pretz, Saeger & Co. contended that their attachment had attached the debt due from Spinner to Rice, so that the other judgment creditors of Rice had no claim to it; and contested the right of subrogation claimed by Waechter and Probst. No other creditor appeared or took part in the argument.

On the 8th August 1844, Spinner's property, including lot No. (3), which he had bought from Rice and which he had improved by buildings, was sold by the sheriff. This lot (3) brought \$1003. On the 6th September 1844, on the petition of Michael D. Ebenhardt, setting forth "that no notice of the auditor's proceedings, or of the application for the decree of the court, was ever given to him or Spinner, or any of his judgment creditors; nor were they ever aware of these facts until the sale of the real estate of Spinner, when the above-mentioned sum was claimed by the creditors of Rice," the court permitted him to file exceptions to the auditor's report, and granted a rule on Waechter and Probst to show cause why the decree subrogating them to the interest of Hein, &c., should not be rescinded. One exception was made to the auditor's including among the assets of Rice the amount of Spinner's note, and distributing it among the creditors of Rice as part of the proceeds of his real estate. The court dismissed the exceptions and discharged the rule. From this decision Eben-

[Ebenhardt's Appeal.]

hardt and Dickenschiedt now appealed, and filed exceptions, as follows :

1. That neither the auditor nor the court had any right to proceed to dispose of the fund, as the money was not actually in court.

2. That no notice was given to the parties interested, as required by law.

3. That the auditor was simply appointed to ascertain the nature and amount of the liens against the premises sold, and all the facts in relation to said liens, and he undertook to distribute the proceeds and to dispose of a chose in action between other parties than those before the court. That he erred therein, and the court erred in confirming his report, and decreeing the distribution, and making the subrogation reported.

4. That it was not competent for the Court of Common Pleas, in the distribution of the proceeds of the sale of the real estate of Rice, to make a decree calculated to affect the rights of the judgment creditors of Spinner, and in effect to distribute the proceeds of the sale of the real estate of Spinner.

5. That the decree of subrogation was erroneous upon principle, even had all the parties been before the court.

6. That the judgment creditors of Rice had no superior claims in equity to the judgment creditors of Spinner, to entitle the former to the subrogation decreed to the prejudice of the latter.

This case was argued at December Term, 1844, and was now reargued by

J. M. Porter, for the appellants.
Davis, contra.

The opinion of the Court was delivered by

KENNEDY, J.—Appeal by M. D. Ebenhardt and Charles F. Dickenschiedt from the decree of the Court of Common Pleas of Lehigh county, in the matter of the distribution of the moneys arising from a sheriff's sale of the real estate of John Rice, and as it would seem also, in effect, from a like sale made of the real estate of George Spinner. The controversy in this case does not exist between judgment creditors of the same debtor, but between the judgment creditors of John Rice on the one side, and the judgment creditors of George Spinner on the other. Were it between the judgment or lien creditors of John Rice alone, where some of them, having a right to go only upon or against one fund, were seeking to be substituted to the rights of others, having a right to go upon two funds belonging to Rice, the debtor, the court might very well interpose, so that both funds might, as far as requisite, be applied to the satisfaction of both descriptions of judgments, provided no injustice should be done thereby to Rice. (*1 Story's Equity*,

[Ebenhardt's Appeal.]

pl. 634, 642.) But where the parties seeking the aid of the court are not creditors of the same common debtor, they cannot claim to have the funds marshalled, in order to have a larger dividend out of one fund for those who can claim only against that. For example, if a joint debt be due to one creditor by two persons, and a several debt be due by one of them to another creditor, and the joint creditor obtains a judgment against the joint debtors, and the several creditor obtains a subsequent judgment against his own several debtor, a court of equity will not compel the joint creditor to resort to the funds of one of the joint debtors, so as to leave the second judgment in full force against the funds of the other several debtor, unless, indeed, it should appear that the debt, though joint in form, ought to be paid by one of the debtors only, or there should be some other supervening equity. *Story's Equity*, pl. 642; *Dorr v. Shaw* (4 Johns. Ch. 17, 20).

In the case before us, Henry Hein obtained a judgment against John Rice first, as early as the 26th of April 1842, for a debt of \$1200, which became a lien on the real estate owned at the time by Rice, consisting of a lot of ground situate in Allentown, of seven acres of meadow situate in the same place, and of another lot of ground situate in Allentown, which he, on the 26th of October following, sold and conveyed to George Spinner for the consideration of \$400, of which \$100 was paid, and a note given by Spinner to Rice for the payment of the remaining \$300 on or before the 27th May 1843; and was intended, as would appear from the tenor of the note and an endorsement thereon, to be applied towards discharging the judgment of Hein. After this, from the 5th November 1842 to the 21st June 1843, several judgments were obtained by Henry Bender, John A. Waechter and George Probst respectively against Rice, amounting in all to a sum exceeding \$2800, which became liens upon the two parcels of Rice's real estate before mentioned, which remained unsold, and were taken in execution afterwards, and sold by the sheriff on the 20th January 1844, under Henry Hein's judgment, for the sum of \$1310; of which sum, after paying the costs of sale, a prior lien of \$232.42 to the widow Heimbach, \$919.93, the balance due on Hein's judgment, and \$71.89, the amount due on Bender's judgment, there remained a residuum in the hands of the sheriff, of \$53.96.

Upon this state of facts the court below, on the 1st May 1844, decreed that John A. Waechter should be substituted to the right of Henry Hein, to proceed on his judgment against John Rice, to levy, by virtue thereof, out of the lot of ground sold by Rice to Spinner, the sum of \$68.14, being the balance still due on his judgment against Rice, after applying towards the payment thereof, the residuum in the hands of the sheriff; and that George Probst should be substituted also, to proceed in like manner to levy out of the same lot of ground the further sum of \$243.51, these two sums being, as it was alleged, the amount of the principal and in-

[Ebenhardt's Appeal.]

terest still due on the note given by Spinner to Rice for the balance of the purchase money of the lot. At the time of making this decree, there were several judgments against Spinner for various sums, amounting in all to several hundred dollars, though none of them were obtained until after Waechter and Probst had obtained their judgments respectively against Rice. Other judgments were subsequently obtained against Spinner, and on the 8th of August 1844, his real estate, including the lot of ground he purchased of Rice, having been taken in execution, was sold by the sheriff for the purpose of paying his debts, for a sum which fell short of the amount thereof.

Now, according to the principles laid down above, which seem to govern in regard to the right of substitution, I confess I am unable to discover any clear ground upon which either Waechter or Probst is entitled to claim it in this case. It is true that they and Henry Hein were severally the creditors of John Rice, and that he was their common debtor; but then the funds against which the demands in question are made, are not the property of the same person or debtor. This, according to Lord ELDON, would seem to be necessary. In *Ex parte Kendall*, (17 *Vez.* 520), he says, "We have gone this length: if A. has a right to go upon two funds, and B. upon one, having both the same debtor, A. shall take payment from that fund to which he can resort exclusively, that by those means of distribution both may be paid. That course takes place where both are creditors of the *same person*, and have demands against *funds*, the *property* of the *same person*." And in further illustration of the subject he adds, "It has never been said that if I have a demand against A. and B., a creditor of B. shall compel me to go against A. without more; as if B. himself could insist that A. ought to pay in the first instance; as in the ordinary case of a drawer and acceptor, or principal and surety; to the intent that all the obligations arising out of these complicated relations may be satisfied; but if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded upon some equity, giving B. the right for his own sake to compel me to seek payment from A." Now apply the principle here advanced by Lord ELDON, as between Hein and Rice; and what colour, or even shadow of equity, I would ask, had Rice to say to Hein, that he must or ought to go first against Spinner or the property of Spinner for any portion of his judgment against Rice? There was no privity of contract whatever between Hein and Spinner, though there was between Spinner and Rice. Spinner was debtor to Rice, and Rice was debtor to Hein; and this seems to be the whole extent of the relationship that existed between them. But surely it has never been thought that a debtor who is the creditor of others, has the slightest colour of equity on his part to demand of his creditor that the latter shall proceed in any form or upon any terms and conditions whatsoever, first, to

[Ebenhardt's Appeal.]

recover his claim from the debtors of the former. There would, therefore, seem to be no ground for substitution in such case, and I am not aware of any, in which it has ever been made. Rice is not the owner of both funds here, so as to entitle his junior judgment creditors to claim substitution upon that ground; neither can he be said to be a surety merely for the payment of the judgment or any part thereof, against him in favour of Hein, for the payment of which Spinner is bound as principal; and therefore he or his creditors cannot set up a claim to substitution upon the principle which governs in favour of a surety. The case, indeed, does not present to my mind, under any view that can be taken of it, sufficient ground to support the claim to substitution that has been made; but on the contrary, as it appears to me, there are insuperable objections to its being allowed. The creditors of Spinner are affected by it, whose claims to the fund in contest (that is, to the lot of ground sold by Rice to Spinner, or otherwise to \$311.65 of the moneys arising from the sale made thereof by the sheriff) are of a legal character, and, for aught that appears, founded upon as much equity as those of the creditors of Rice. The claims, however, of the latter can at most be only said to be equitable, and upon this ground, if there were no other, would have to be postponed to the former. The decree of substitution, made by the court below in favour of John A. Waechter and George Probst severally, as to the \$311.65, in the proportions thereof therein mentioned, is reversed; and the costs accrued thereon, as also those which have accrued on the appeal, are directed and ordered to be paid by them.

SERGEANT, J., dissenting.—The exercise of the power of substitution is often necessary to do justice between contending claimants, and has accordingly been applied in practice by this court, on chancery principles. In the present case it is imperiously demanded to prevent a result which would be unfair and inequitable, were the mere legal powers of the parties rigidly carried out under the forms of our ordinary proceedings. Hein has a judgment against Rice which binds his lands. Rice afterwards sells a portion of the land thus bound to Spinner. Spinner, therefore, buys it subject to this lien, and his creditors can be in no better situation. This is the legal position of the parties, and by it Hein might at law resort to the land still owned by Rice, or that owned by Spinner, at his own election. There might, however, be circumstances which would operate in equity to compel Hein to limit his demand to the land still owned by Rice. But all these are put aside here by the express agreement of Spinner, as shown by his note to Rice, that the \$300 of the purchase money was to be paid on account of the lien to become due to Hein in April 1843. This was an express engagement by Spinner that the land he purchased should pay off the \$300. It cannot, therefore, be pretended that

[Ebenhardt's Appeal.]

it should be thrown on any other land remaining in Rice; and as between Rice or his creditors and Spinner or his creditors, I entertain no doubt of the liability of Spinner's lot, No. 3, to pay this sum. I consider the case, then, exactly that put by Lord ELDON in *Ex parte Kendall* (17 Vez. 520). "Hein has the right to go upon two funds (Rice's remaining land and Spinner's lot No. 3). Waechter and Probst have the right to go upon only one (Rice's remaining land). Having both the same debtor (Rice), Hein shall take payment from that fund to which he can resort exclusively (lot No. 3), that by such means of distribution both may be paid. That course takes place where both are creditors of the same person (Rice), and have demands against funds the property of the same person (Rice)."

Decree reversed.

Lehigh Coal and Navigation Company *against* Northampton County.

The bed, berm-bank and tow-path of an incorporated canal are not taxable as land or real estate under the Acts of 15th April 1834 and 29th April 1844.

Nor are the toll-houses and collectors' offices belonging to the canal and incident thereto.

ERROR to the Common Pleas of *Northampton* county.

The following case was stated in the court below, in which the defendant in error was plaintiff, and the plaintiff in error defendant, in the nature of a special verdict, with liberty to either to take a writ of error.

The assessor of the township of Allen has returned for taxation, per county rates and levies, 76 acres of land and six lock-houses as the property of the defendant at the valuations specified in the assessment, a copy of which is hereto annexed and made part of this case. The assessor of the borough of South Easton has returned among the property of the defendants liable to taxation for the same purposes, an office and a house, (designated as "1 house on flat,") each valued at \$300.

The land in Allen township so assessed, except seven acres, is the land occupied by the bed, berm-bank, and tow-path of the canal constructed by the defendants, in improving the navigation of the river Lehigh, and for keeping the same in repair, from the mouth of Nesquehoning creek to the mouth of said river at Easton; and the houses situated in Allen township, and the said house situated in South Easton, so assessed, are lock-keepers' houses

[Lehigh Coal and Navigation Company v. Northampton County.]

occupied by the keepers of the locks on the said canal, contiguous to the said locks respectively. The said houses in Allen township being erected by the defendants expressly for the purpose, and the said house in South Easton having been partly erected before the construction of the said canal, and enlarged and finished since its completion, having been used and occupied exclusively as a lock-keeper's house for many years past. The said "office" in South Easton, having been erected by the defendants expressly for a collector's office, and used as the office for the collection of tolls for said company at the eastern end of their navigation. The said lock-keepers' houses and collector's office are necessary to the proper transaction of the business of the said navigation. The defendants were incorporated, and constructed their said navigation in pursuance of the Acts of the General Assembly of Pennsylvania, entitled an Act to improve the navigation of the river Lehigh, passed 20th March 1818, and an Act to incorporate the Lehigh Coal and Navigation Company, passed 13th February 1822.

The questions for the decision of the court are, whether any, and if any, what part of the said property is liable to be assessed for purposes of taxation under the Acts of Assembly for that purpose. If the court shall be of opinion that the said 69 acres of land, occupied as aforesaid for the bed, berm-bank, tow-path, &c. of the said canal, or the said lock-houses or toll-houses, or the said collector's office are liable to assessment for taxation, then judgment to be entered for plaintiff, specifying in their opinion which, if any, of the said premises are so liable; otherwise judgment to be entered for the defendants.

(Copy of the assessment and notice, Allen township).

To the Lehigh Coal and Navigation Company. Take notice that you stand rated for the following year, as follows:

For County use—

Profession, trade, or occupation, - - - - -	\$—
Real Estate, 69 acres land, - - - - -	\$2760
7 " - - - - -	250
6 lock-houses - - - - -	2100
<hr/>	
Whole valuation, - - - - -	\$5140
Rate 15 cents to the \$100.	
Amount of county tax, - - - - -	\$7.71

State use—

Real Estate, - - - - -	\$5140
Amount of State tax. - - - - -	5.14

(And notifying time of appeal, &c.)

[*Lehigh Coal and Navigation Company v. Northampton County.*]

(Assessment and notice. South Easton).

For County use—

Real Estate—100 acres of land	- - -	\$7000
Office	- - - - -	300 (Col's. Office.)
1 house on flat	- - - -	300 (Lock-House)
1 house & 9 lots, n. side canal		1500
5 lots south side canal	- -	1000
Barn & 11 lots on M. C. street		2500
Furnace and lot	- - - -	3000
1 house	- - - - -	75
		<hr/>
		\$15,675

Rate 15 cents to the \$100.

Amount of county tax, - - - - - \$23.57

For State use—

Real Estate, - - - - - \$15,675 - - \$15.75

Money at interest, &c.

(A notifying of time and place of appeal).

The court were of opinion that the 69 acres of land were not liable to taxation, but that the lock-houses and collector's offices were, and gave judgment for the plaintiff, so far as related to the lock-houses and collector's offices.

Error assigned :

The court should have rendered a judgment in favour of the defendants on the case stated, as none of the property described therein was liable to taxation as real estate.

J. M. Porter, for the plaintiff in error.

Reeder, contra.

The opinion of the Court was delivered by

KENNEDY, J.—The defendant in error claims that the tax in question was legally assessed. The allegation is, that it is real estate, consisting of land and houses belonging to the plaintiffs in error, being the same that is used for the bed, berm-bank, and tow-path of the canal, and the lock-houses and collectors' offices appertaining thereto, constructed by them, in improving the navigation of the river Lehigh. Such assessment, it is contended by the counsel for the defendant, is authorized and sanctioned, first, by the Act of the 15th April 1834, relating to county rates and levies, and township rates and levies. By the 4th section of this Act it is required that the assessors and assistant assessors of the several counties shall, on the receipt of the precepts, &c., proceed to take an account, in the form directed by the commissioners, of the names and surnames of all the taxable inhabitants within their respective wards, townships and districts, and also an account of the following real and personal property: "1. Real estate, viz.: All houses, lands, lots of ground and ground-rents, mills and ma-

[Lehigh Coal and Navigation Company v. Northampton County.]

nufactories of all descriptions, all furnaces, forges, bloomerics, distilleries, sugar-houses, malt-houses, breweries, tan-yards, and ferries. 2. The following personal estate, viz.: All horses, mares, geldings and cattle above the age of four years. 3. All offices and posts of profit, professions, trades and occupations, and all single freemen above the age of twenty-one years, who shall not follow any occupations or callings." And again, by the Act passed the 29th April 1844, for reducing the State debt, and to incorporate the Pennsylvania Canal and Railroad Company, in which the same enumeration of real estate, with the addition of "fisheries, wharves, and all other real estate not exempt by law from taxation," are made taxable by the 32d section thereof. The same description of personal property is also made taxable thereby; and likewise all mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment; also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever, except notes or bills for work and labour done, and bank notes, also all shares of stock in any bank, institution or company, then or thereafter incorporated by or in pursuance of any law of this Commonwealth or of any other State or government; and on all shares of stock or weekly deposits in any unincorporated saving fund institution, and all public loans or stocks whatsoever, except those issued by this Commonwealth; and all money loaned or invested on interest in any other State; also all household furniture, including gold and silver plate owned by any person or persons, corporation or corporations, when the value thereof shall exceed the sum of \$300; salaries and emoluments of office, all offices and posts of profit, professions, trades and occupations, except the occupation of farmers, together with all other things then taxable by the laws of this Commonwealth.

Other things, specifically set forth in the 34th section of this latter Act, are made taxable also for the purposes mentioned in the Act; but it is not pretended that any thing therein contained can be extended to sustain the assessment in question here, which renders the particular mention of them unnecessary. No other Act has been referred to by the counsel for the defendant in error, making the property in question taxable, than these, and the parts thereof recited above. But if the lock-houses and collectors' offices attached to the canal belonging to the plaintiffs in error, are to be considered as constituent parts of the canal, or necessarily incident thereto, it will be very difficult, if not impossible, fairly to show that they are embraced within the list of enumerated articles above. If the lock-houses and collectors' offices be necessarily incident to the canal, of which I think there is no doubt, they cannot well be considered as either land, houses, or lots of ground, according to the true meaning of the Acts recited, and a fair interpretation thereof. The lands, houses and lots of ground, intended to be made taxable

[Lehigh Coal and Navigation Company v. Northampton County.]

by the Legislature, were such as formed the principal part of that which was designed to be charged and taxed, and not merely such things as were accessory to something else which everybody regarded as the principal. It must be admitted that a canal is a species of property, and that it may also be very valuable, and as such may be made taxable; but few, if any, would consider it as properly designated by either of the terms "lands," "houses," or "lots of ground," or even by all of these terms put together. Canals and every species of improvement calculated to promote and facilitate the trade and commerce of the State, have ever been considered a matter of public interest and concern, and instead of being made the subjects of taxation, have, on the contrary, been patronized by the Legislature, in lending the aid of the State to their construction and subsequent preservation. Under this view of the subject it was held, in *The President, Directors & Co. for erecting a Permanent Bridge over the Schuylkill v. Frailey* (13 Serg. & Rawle 422), that the bridge, or the land necessarily connected with it, was not taxable under the Act of the 11th of April 1799, which was similar in its enumeration of the taxable property to that of the Act of 1834, as recited above; indeed the latter appears to be an exact transcript of the former. Also in the *Ridge Turnpike Company v. Stoevers* (6 Watts & Serg. 378), a toll-house, erected by the company under their charter, within the limits obtained by them for constructing the road, was considered necessary to the proper use and management of the road, and therefore warranted by the Act of incorporation, which authorized them to construct a turnpike road and to receive tolls from those who should travel upon or use the same; and that the owner of the land upon which the road was constructed where the toll-house was erected, could maintain no action against the company for such occupation and use of the land, because the house was a necessary appendant to the road. It can scarcely be doubted that lock-houses and collectors' offices are not still more necessary, if possible, in order to make a canal answer the purposes of its construction. If they were to be taxed as lands and houses, it might in some instances prove a serious detriment to the public at large, as well as the owners of such property. The profits derived therefrom have seldom as yet, I apprehend, amounted to what would in general be deemed a reasonable remuneration for the cost and expenses of making such improvements. And possibly from this consideration, as well as motives of public policy, the State has never intentionally, I apprehend, attempted to tax such property. The court below considered the land occupied by the bed, berm-bank, and tow-path of the canal, as belonging to and forming part of the canal itself, and therefore held it not liable to be taxed. In this the court were doubtless right; and I must confess that I am unable to discover any good reason why they took a different view of the lock-houses and collectors' offices.

[Lehigh Coal and Navigation Company v. Northampton County.]

I may also observe that the lands, houses and lots mentioned in the Act of Assembly are placed under the head of *real estate*. But it would seem from the 4th section of the Act of 13th February 1822, incorporating the plaintiffs in error, that their whole capital stock is denominated and made personal estate, by declaring in express terms that "the shares of the stock of the said Lehigh Coal and Navigation Company shall be considered and taken as *personal property*." Now it appears to be not only fair, but necessary, to consider all the land and buildings necessarily connected with the canal, constructed by the company, and without which it could not be made to answer its purposes, as composing the stock, or at least a part of the stock of the company. The whole of the land upon which the canal is constructed, including the lock-houses, collectors' offices, as also everything thereto appertaining, must be considered as the product of the moneys subscribed and paid by the stockholders, and all that they have or ever can claim for the same; and therefore may be regarded as forming part at least of the stock, which is made personal and not real estate, by the Act of incorporation; and if liable to be taxed at all, it must be under some denomination that would seem to embrace it with more certainty than that of land, houses, or lots of ground, which are clearly intended to be a designation of real estate.

Judgment reversed, and judgment for the defendants.

Commonwealth *against* Crommie.

Where the father is living with the mother, to make a valid indenture of apprenticeship of their son, the assent of the father before the magistrate at the time of the binding, expressed in writing, is necessary : the assent of the mother is not sufficient.

COMMONWEALTH *ex relatione* George Bustard *against* Edward H. Crommie. Habeas corpus to bring up the body of James Bustard, an indented apprentice. The depositions of witnesses were taken, by which it appeared that James Bustard, a son of the relator, and under 21 years of age, was bound an apprentice to the defendant Crommie by an indenture executed before alderman Zantzinger. The mother of Bustard was present and assented to it in the indenture, but there was no written assent of the father, nor was he present. He swore he never consented, but left the care of the boy entirely to his mother, by whom he was informed of the binding at or after the time it took place, and

[Commonwealth v. Crommie.]

that the boy had previously been put at several places by his mother. He had an objection to binding him as apprentice to any one. The mother deposed that James was bound to Crommie at his own instance, but his father had no knowledge of it and did not consent to it, and was opposed to binding him at all. She told him of it about the time. Alderman Zantzinger deposed that Mrs Bustard told him that it was with the consent of her husband and herself, that he was sick and unable to attend; that he expected the husband to call if there was any objection on his part and remedy it.

Miles, for the relator.

Kneass, contra.

PER CURIAM.—The form of the assent is immaterial; but it must be expressed before the magistrate at the time of the binding, which is the time material to the validity of the act; and it must be a written accompaniment of the indenture. In this instance, the mother was not the parent indicated by the statute; and as the father was not present, and did not attest the paper, or give any other written expression of his assent to it, the binding was void.

Apprentice discharged.

Stofflit against Troxell.

One who has made a lease for years of his land to a tenant in possession, cannot maintain ejectment until the lease expires.

ERROR to the Common Pleas of *Lehigh* county.

Ejectment to September Term 1843, by Peter Troxell against Jonas Stofflit for a strip of land in that county. Before bringing the ejectment, viz., on the 28th April 1841, Troxell had leased his farm to one Metzger, and while the lease continued Stofflit tore down his part of the line-fence between his land and Troxell's, and extended it on Troxell's two or three feet.

The defendant requested the court to charge the jury that the plaintiff could not recover, inasmuch as he had leased the land prior to the commencement of this action, and the tenant was in possession of the same when the suit was brought, in virtue of said lease. The court answered as follows:

In giving an answer to this point, it is proper to say, that there is a difference of opinion with the members of the court in relation to it. I therefore charge the jury, that said lease and possession under it does not stand in the way of the plaintiff's recovery. I thus charge you in conformity to the opinion of my associates, and

[Stoffli v. Troxell.]

will consider the point answered, so that the defendant may have the benefit of it, if the verdict should be against him.

To this part of the charge the defendant excepted.

The jury gave a verdict for the plaintiff.

Gibbons, for the plaintiff in error.

Brown, contra.

The opinion of the Court was delivered by

KENNEDY, J. — Ejectment is emphatically a possessory action, and cannot be maintained by the plaintiff, unless he has a right to the possession of the property at the time of commencing his action. By the common law, an ejectment will not lie for anything, whereupon an entry cannot be made, or of which the sheriff cannot deliver possession. *Adams on Eject.* 18; *Black v. Hepburne*, (2 *Yeates* 333); and it is confined to cases in which the plaintiff or claimant has a right to the possession. *Adams on Ejectment* 10. Though originally it was necessary that the plaintiff or lessor in the ejectment should make an actual entry anterior to commencing his action, yet it is not so now; it is sufficient if he have a right to enter, which necessarily involves in it an immediate right to the possession. *Hylton's Lessee v. Brown*, (2 *Wash. C. C.* 165); *Adams on Eject.* 10. "An ejectment, says Lord MANSFIELD, is a *possessory* remedy, and only competent where the lessor of the plaintiff *may enter*; therefore it is always necessary for the plaintiff to show that his lessor had a *right to enter*, by *proving* a possession within 20 years (in Pennsylvania 21 years), or *accounting for the want* of it, under some of the exceptions allowed by the statute. *Twenty years'* (in Pennsylvania *twenty-one years'*) adverse possession is a *positive title* to the defendant; it is not a bar to the *action* or *remedy* of the plaintiff only, but takes away his *right of possession*. Every plaintiff in ejectment must show a *right of possession* as well as of *property*; and therefore the defendant need not *plead* the statute as in the case of actions." *Taylor Atkyns v. Horde*, (1 *Burr.* 60). It is clear, therefore, that the associate Judges, who formed a majority of the court below and overruled the President Judge, were wrong in directing him to instruct the jury that a lease given by the plaintiff below, including the premises in question, for a term of three years to Nathan Metzger, which remained in force and unexpired at the time of commencing this action, did not stand in the way of the plaintiff's recovery. Metzger having been placed in, or taken possession of the premises in question, in pursuance of the lease as it appeared, became thereby most clearly entitled to the possession, if the plaintiff below had any right at the time himself to give or bestow it upon Metzger; so that until the term in the lease expired the plaintiff could have no right to enter or claim the possession.

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

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Megargell *against* The Hazleton Coal Company.

Where an Act of Assembly directs a penalty to be recovered by any person suing for the same, the sum when recovered to be paid one half to the person suing, the other to the treasurer or county commissioners, a common informer may sue in his own name.

Where the practice is on appeal from a justice to go to trial on his transcript, and the justice orders that the penalty be paid one half to the plaintiff and the other half to the county commissioners, this is equivalent to a declaration *qui tam*.

Where a person sues as common informer, an amendment to the declaration that he sues as well for himself as the treasurer of the county ought to be allowed.

ERROR to the Common Pleas of *Northampton* county.

John Megargell against the Hazleton Coal Company. This case was before in this court, and is reported in 4 *Watts & Serg.* 424. It originated before a justice of the peace, and was brought to recover the penalty of fifty dollars, mentioned in the 2d section of the Act of 22d March 1817, entitled "An Act to prevent the making, issuing, reissuing and circulating certain description of notes and tickets in the nature of bank notes, and for other purposes." The justice rendered the following judgment, prout the transcript:—

"And now, Nov. 13, 1840, after due consideration of the case, I render judgment against the corporation, to wit, the defendants, as well as against the president of the said corporation, Samuel Moore, Esq., upon whom the summons was served, for the afore-said penalty of fifty dollars, and costs, agreeably to the 3d section of the said Act of the 22d March 1817; and the said sum, when recovered, to be paid one half thereof to the plaintiff, who sues for the same, to his own use, and the other half thereof into the hands of the treasurer or county commissioners of the county of Northampton, where the recovery is had for the use thereof."

On the trial of the cause, after the evidence was closed, and before the charge, the plaintiff asked to amend the record and declaration, by adding to the name of John Megargell these words: "who sues as well for himself as the treasurer of Northampton county." The defendants objected, and the court refused the amendment and sealed an exception.

The court below charged the jury as follows:—

This suit is brought to recover a penalty under the Act of the 22d of March 1817. The prohibition in the Act is in these words: "No incorporated body, public officer, association or partnership, or private individual, other than such as have been expressly in-

[Megargell v. The Hazleton Coal Company.]

corporated or established for the purpose of banking, shall make, issue, reissue or circulate any promissory note, ticket, or engagement of credit in the nature of a bank note," &c. The penalty annexed is in the words following: "under the penalty in the case of a public officer, of ten dollars, and in case of a corporation, association or partnership, fifty dollars for each and every note so made, issued, reissued, circulated, paid, or received, to be recovered by *any person suing for the same* before any alderman or justice of the peace," &c. It is enacted in the 4th section that "all sums recovered under this Act shall be one half thereof paid to the person or persons suing for the same, to his or their own use, and the other half into the hands of the treasurer or county commissioners of the county wherein the recovery shall be had, for the use thereof."

So far as relates to the facts, there can be no doubt or difficulty. That the defendant did make and issue the paper which was here given in evidence as the foundation of this suit is, no doubt, well proved. The truth of this fact cannot be questioned, and therefore the counsel for the defendant has rested the case very much upon matters of law.

It is said the plaintiff should have shown the defendant's charter of incorporation; and that inasmuch as he has not, the verdict must be for the defendant. As the case stands, it is not necessary that the charter should be shown. The defendant is sued as an incorporated body; and if it was intended to deny this fact, it should have been pleaded in abatement. This not having been done, its legally incorporated existence is conceded by the pleadings, and therefore need not be proved by the exhibition of the charter.

It is said this paper is not a promissory note, ticket or engagement of credit in the nature of a bank note, within the meaning of this Act of Assembly. If it is not, the penalty claimed has not been incurred. This induces a necessity to ascertain what its true and legitimate character is. It acknowledges a specific sum to be due, and that for value received. It promises to pay this sum, and that to a person named or bearer. It is made payable at a particular place. It is not made payable on demand, but on a distant day, and is to be paid with interest, and therefore it is agreed that it is not in the nature of a bank note. It is conceded that in the two last particulars it wants conformity to a bank note, properly so called. But does not the prohibition embrace in its terms other writings than those that are technically legitimate bank notes in form. Every bank note is a promissory note, and in form nothing more. A ticket or engagement of credit must mean something different from a promissory note, or their introduction would be nugatory. They do mean something different in form from a promissory note, in the nature of a bank note. The argument of the defendant's counsel is, that nothing is pro-

[*Megargell v. The Hazleton Coal Company.*]

hibited but that which is in form a promissory note. If that argument be adopted, the two last descriptions of transgressions are entirely omitted. He makes but one form of instrument the subject matter of offence. This construction is entirely too restricted to meet the object of the law. Indeed it is too narrow even to fulfil the letter of the statute. A ticket or engagement of credit in the nature of a bank note are very comprehensive terms. To be in the nature of a bank note does not require that the paper should be of the exact form of a bank note in words. It must partake of its nature so far as to be fitted to pass from hand to hand as a circulating medium. This characteristic is, in my judgment, the true criterion. A little reflection will clearly demonstrate this position. A promissory note in the nature of a bank note, in its enlarged and liberal sense, would comprehend any instrument having that form, given by one individual to another for money loaned, or for a debt contracted on the purchase of lands or goods between individuals, though limited to a single transaction in the usual course of business. This was not intended; and, in spirit, the statute does not touch such transactions. This itself teaches us that the language of the Act and the mischief to be prevented must be considered together, in giving an interpretation to this statute. The prohibition does not apply to private and single transactions in private life, in the ordinary and usual course of business, in the purchase and sale of property, and in giving securities for debts. The idea contained in the statute is far different from and beyond this. It is to prevent the making and issuing of paper, circulated and designed to circulate through the community, for its ordinary purposes, as money. This is the sense in which I understand the words employed by our law-makers. This circulation was felt throughout the country as a mischief deeply affecting the interest and property of all. To cut it up by the roots was the object of the Legislature in passing this law. If its prohibitions mean anything, if the terms are not mere empty sounds, they must comprehend the making and issuing of any paper medium, by any unauthorized individual or corporation, for the purpose of a common medium.

What is the character of this paper? What office is it to perform? It purports on its face to be fitted to pass from hand to hand as money. Its very denominations, such as five dollars and lesser sums, makes it convenient and suitable for ordinary circulation. It was made, and issued, and put in circulation, or intended to be put in circulation; no one who looks at the paper itself can doubt this. It is accomplishing the very thing the Legislature intended to prevent. Issuing, as used in this statute, means more than one man's giving his note to another for a debt he owes; so does putting in circulation. They mean substantially the same thing. This note for circulation is of the nature of a bank note. It has this character, which fits it for circulation as

[Megargell v. The Hazleton Coal Company.]

a bank note: it is this character, rather than its particular form in words, that the statute is aimed at. Indeed I understand the statute as forbidding the making and putting in circulation as a bank note, any promissory note, ticket or engagement of credit whatever, by persons who are unauthorized. This is the real and true object of the law. It therefore comes to this: is the proposition to be maintained, that the Legislature designed to prohibit names and forms only, and not things? Is it to be understood that a legislative Act forbidding, by words most appropriate for its description, an evil big with weighty and ruinous mischief, should be evaded by the alteration of a form, or addition of some immaterial thing, or by the mere substitution of another name? If it be so, then any and every important law may at any time be evaded by giving a new form or a new name to an old instrument of mischief. This cannot be so, and is not so.

That which cannot be done directly, cannot be legalized by any change of names or forms, and be thus done indirectly. I have no doubt this particular form was adopted to enable this company to do with impunity that which the law forbids. The law, while the parties are in my hands, is not to be outwitted by any such cunning. This attempt at evasion, if successful, would be a fraud upon the law, which in itself would be a violation of its provisions. Every fraud upon a statute is a violation of such statute. That the law will not tolerate any such transaction, no matter what shape or form may be assumed, has been long and well settled. Therefore, to conclude, I do not entertain a doubt that the making of this paper and putting it in circulation is committing the very evil which the Legislature has prohibited, and against which this penalty is declared.

Can the suit be maintained in the name of Megargell alone? The second section provides for the recovery of the penalty by any person suing for the same. By the 4th section, his right to recover is limited to one-half; the other half is to be paid to the county. When a penal statute expressly gives the whole or a part of the penalty to a common informer, and enables him, generally, to sue for the same, he must not declare *qui tam*, unless where a penalty is given for a contempt. I do not think this statute gives the informer a general right to sue in his own name. He is entitled to but one-half, and the other half is not even to be paid to him. The parties to whom the money is to be paid should appear upon the record. They should appear in all the process, both mesne and final; in the summons as well as the execution. The parties should appear to the suit, and merely mentioning them in the judgment will not do. A payment to this plaintiff alone would not be a good payment. The payment of the one-half to the treasurer is positively directed. This he has no right to receive. Can he alone sue for that which he has no right to receive? I think not. The penalty is not given for any private or individual injury

[Megargell v. The Hazleton Coal Company.]

No individual injury has been or can be suggested in the case. The penalty is given for the violation of a public law, irrespective of private wrongs. It is given for the naked transgression of the statute. This violation of statute law is a contempt of the sovereignty of the State. In its head the whole community has suffered. To punish, and not to repair individual loss, this penalty is given. The cases cited by the defendants, more especially those from the New Jersey Reports, fully settle the question that the plaintiff cannot maintain this suit in his own name. For this reason alone you will render a verdict for the defendant. The application to amend is also overruled.

The plaintiff excepted to the charge.

Errors assigned ;

1. The court erred in refusing to permit the amendment.
2. In charging the jury that the suit should be *qui tam*, and that it could not be maintained in the name of John Megargell alone.

Brodhead for the plaintiff in error.

Reeder, contra.

The opinion of the court was delivered by

ROGERS, J.—A common informer may bring an action in his own name, whether the penalty be given to him in whole or in part, and that without any positive direction in the Act imposing the penalty. But in the Act on which this suit is brought, the penalty is to be recovered by any person suing for the same; and in the 4th section, the sum, when recovered, is ordered to be paid, one-half to the person or persons suing for the same, &c., and the other half to the treasurer or county commissioners. Independently, therefore, of the general principle, the Legislature recognise the right of action in the common informer, but direct the use to which it is to be put when recovered. The Act, when fairly viewed, we think, admits of no other construction; and if the point depended alone on the words or the import of the language used by the Legislature, the court erred in ruling the plaintiff out of court. It was intended that the action should be brought on his responsibility, and that the common informer alone, in case of failure, should be answerable for the costs. A common informer has not only the right to sue, but, as is held in *Caswell qui tam v. Allen* (10 Johns. 118), he may receive and give an acquittance for the money; the statute, as in this State, providing that any person might prosecute the action for the penalty, and that one moiety should belong to him, and the other moiety, when recovered, should be paid into the treasury of the State. The right to receive, as is there held, is an incident to the right to sue; a positive and direct opposition to that assumed by the Court of Common Pleas. The right of the common informer to institute the action in his own name is expressly ruled in *Vandeventer v. Van Court* (1 Penn. N. J. Rep. 168).

[Megargell v. The Hazleton Coal Company.]

But the court say that when the penalty is given to him and others, he must *declare* specially *qui tam*, that the interest of those who have the right may appear of record. And for the latter reason only, the judgment was reversed. And to this effect is the case of *Butler v. The President of the College of Physicians* (Cro. Car. 256), and ——— v. *The Inhabitants of The Hundred* ——— (Cro. Car. 336). That a suit may be brought in the name of both is admitted, for so are the precedents; but that it must is denied on the authority of the cases cited. It may be brought, as is said in *Cro. Car. 256*, in both ways. If brought by the common informer, it is good, if it appears to be *qui tam* on the record; for it is not necessary it should be *qui tam* in the writ; for if the interest be set out in the declaration, it is good; for the only reason it is required is that no doubt may exist as to the persons entitled to the penalty when recovered. And whether this judicially appears is the only thing which creates any doubt in the case in hand. This, be it remembered, was an appeal from a justice; and the practice in Northampton county is to go to trial on the transcript, which is substituted for a declaration. Now, in the transcript it appears that the justice ordered the penalty, when recovered, to be paid, one-half to the plaintiff and the other half to the treasurer or county commissioners. This was equivalent to a declaration *qui tam*, and for this reason good.

Besides, the plaintiff offered to amend by adding to the name of John Megargell these words: "who sues as well for himself as the treasurer of Northampton county." Why this application was refused can only be conjectured; but I presume the amendment was rejected because it was supposed to change the cause of action by adding another party. But this is a mistake, as has been already shown: the proper party is the common informer, and the only effect of amendment is to perfect the record by a designation of the persons to whom the money when recovered is to be paid.

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

Duffield *against* Morris.

After several devises and bequests, testator proceeded as follows: "All the residue and remainder of my estate, of every description and wherever found, I order and direct to be divided into twenty-two shares, and divided as follows, to wit: S. M. four shares, &c.;" then naming thirteen others, and giving each a different number of shares, the aggregate amounting to but twenty shares. Held, that the remaining two shares were undisposed of by the will, and did not pass to the legatees named.

ERROR to the Common Pleas of *Chester* county.

The case is stated in the opinion of the court. It was argued by

Meredith, for the plaintiff in error, and

Lewis and *Dillingham*, contra.

The opinion of the Court was delivered by

KENNEDY, J.—This was an amicable action in case, instituted by agreement of the parties in the court below, for the purpose of settling the question, whether two equal twenty-second parts of the residuum of the estate of the defendant's testator, the whole residuum being divided into twenty-two equal parts, did not remain undisposed of by the will of said testator. That part of the will which has given rise to this question is in the following words: "And all the residue and remainder of my estate, of every description and wherever found, I order and direct to be divided into twenty-two shares, and divided as follows, to wit: Samuel Morris four shares; Dr Morris Shallcross four shares; Morris Jackson one share; Hannah M'Caully one share, to be secured as her legacy hereinbefore mentioned; Joseph Shallcross one share, to be secured as his legacy hereinbefore mentioned; Margaret Carter one share; Alice Jackson, Jun., one share; Catharine Maxwell one share; Amelia Jackson one share; Eliza Wood one share; Hannah Jackson one share; Maria Duffield one share; Sabilla Kennedy and Alice Ann Robinson each one share." Notwithstanding I think it must be conceded that the testator, from the language employed by him, intended to dispose of the whole of the residue of his estate, yet it appears to me pretty clear that he has not done so in such terms as will enable us to pronounce, with the least degree of certainty, how he intended it should be. In order to apportion the distribution of it with certainty among those, as we must suppose, to whom he intended giving it, he first orders and directs it to be divided into *twenty-two shares*, meaning, of course, *equal* shares, in language free from all ambiguity and that cannot possibly be mistaken, and next to be "*divided*," that is, "*distributed*" (for the word "*divided*," in this part of the

[Duffield v. Morris.]

clause, will admit of no other meaning), as follows, to wit: Samuel Morris four shares (necessarily and most clearly meaning four shares of the *twenty-two* shares first mentioned), and so continues to name others above mentioned, annexing one or more shares to their names respectively, as he has done to that of Samuel Morris, until he, in that way, disposes of *twenty* of the *twenty-two* shares, thus leaving, as it appears to my mind most clearly, *two* shares of the *twenty-two*, into which he directed that the residue of his estate should be divided, undisposed of.

Now, it must be observed that the question here is not whether he intended to dispose of the whole residue of his estate; it is, has he done so? And if he has, the next question is, to whom has he given it? As to twenty shares of the *twenty-two* into which he directed it to be divided, he has given them to certain persons, by name and in certain proportions, so clearly and distinctly expressed that it cannot be misunderstood, so as to afford the least colour of ground for increasing or diminishing the same, in either number, quantity or quality. Suppose he had stopped after giving Samuel Morris and Dr Morris Shallcross each their four shares, without disposing of or saying a word about the remaining fourteen shares of the *twenty-two* into which he directed that the whole residue of his estate should be divided, could it be said, or even pretended, with the least degree of plausibility, that the testator thereby intended to give the *twenty-two* shares, or the whole of the residue of his estate, to them? Such a conclusion, as it appears to me, would be most perfectly fanciful, and wholly unwarranted by the terms of the will. But he has stopped after giving twenty shares of the *twenty-two*, and why must not the conclusion be the same in either case? for it is clear that the principle of construction must be the same. Twenty shares can with no more propriety be said to include the whole, that is, the *twenty-two*, than eight. If a testator fails to use language or terms suited to show, with some degree of reasonable certainty, the disposition which he wishes, by will, to make of his estate after he is gone, courts cannot undertake to make out by conjecture what it may have been; they must ascertain this from the terms of the will itself, by looking throughout and into every part of it for that purpose; and if the intention of the testator in this respect cannot be discovered by so doing, with certainty, at least, I would say, to a common intent, the will must be regarded as ineffectual to the extent to which his intention cannot be ascertained with such certainty. We conceive it utterly impossible, in this case, to say how or to whom the testator intended to give the two shares not mentioned in the distribution clause in regard to the residuum of his estate, and therefore are necessarily brought to the conclusion that they remain undisposed of by his will.

Judgment reversed, and judgment for the plaintiff.

VIII. — 2 ■

Franklin Fire Insurance Company *against* West.

Any debt due by the garnishee in a foreign attachment to the defendant at the time of the answer to interrogatories is embraced by the attachment.

A claim uncertain at the time of the attachment but rendered certain at the time of the answer to the interrogatories, is embraced.

An assignment after the attachment is subject to its lien, and will not convey as against the plaintiff in the attachment a claim uncertain at the time of the attachment, but fixed and ascertained when the answers to the interrogatories are put in.

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

West, Oliver & Co. instituted a foreign attachment to June Term 1843 against H. Diffenderfer & Co., and summoned the Franklin Fire Insurance Company as garnishee. The writ of attachment was sued out and served on the 7th March 1843. Judgment was obtained against the original defendants, and this *scire facias* issued against the garnishee to December Term 1843. Interrogatories were filed by the plaintiffs, and the defendants filed the following answers:

1. That on the 6th March 1841 they executed a policy of insurance in favour of H. Diffenderfer & Co., by which in consideration of a premium of \$37.50 these respondents insured the sum of \$10,000 upon H. Diffenderfer & Co.'s stock of dry-goods contained in the two story brick buildings No. 43 Baltimore street, Baltimore, Maryland, for the term of one year from the 4th day of the said month of March 1841; and by endorsements upon the said policy the said insurance was continued for one year, viz: from the 4th day of March 1842 to the 4th day of March 1843 for the same sum of \$10,000, and the same premium, viz., \$37.50, was paid upon the said continuation of insurance. And the respondents annex hereto a copy of said policy of insurance.

2. That they received notice and information that a fire occurred upon the premises in the night of the 6th February 1843, by which the goods insured were destroyed or injured. The loss sustained by the said insured in consequence of the said fire was on the 5th day of September last (1843) settled and adjusted at the sum of \$7333.34, which sum became payable to the insured, their heirs, executors, administrators or assigns, according to the terms of policy.

3. That they had not any goods, moneys, rights, credits or effects of H. Diffenderfer & Co. or of either of them in their pos-

[Franklin Fire Insurance Company v. West.]

session when the said attachment was laid or since, other or further than they have stated in answer to the 2d interrogatory, to which they refer in answer to this interrogatory. And the respondents further answering say that on the 11th April 1843, a notice of which the following is a copy, was served upon their agent in the city of Baltimore, viz:

" F. H. SMITH, Esq. }
Agent Franklin Ins. Co. }

" Sir—We have to inform you that we have assigned our claim for insurance on the Franklin Fire Insurance Company to R. Carter & Son.

H. DIFFENDERFER & Co.

Baltimore, April 11th, 1843."

which notice was forthwith transmitted to these respondents by their agent F. H. Smith, Esq., and on or about the 5th September 1843, one of the said firm of R. Carter & Son presented to the respondents the said policy of insurance, which contained the following endorsement:

" For value received we hereby assign to R. Carter & Son all our right, claim and interest in and to the within policy of insurance, and all and every sum or sums of money which may or might be collected, recovered or received under the same.

(Signed)

H. DIFFENDERFER & Co.

April 11th, 1843."

4. And the said R. Carter & Son thereupon required payment to them of the amount due upon the said policy of insurance.

And the respondents further say that they have paid to the said R. Carter & Son as assignees aforesaid, the sum of \$6333.34, and have retained in their hands the sum of \$1000 to meet the attachment laid by the plaintiffs in this case, if they shall be entitled to receive out of the same the amount of their claim upon H. Diffenderfer & Co.

And these respondents submit to the decision of the court whether upon the facts stated in their foregoing answers, the claim of the said H. Diffenderfer & Co. upon them under the covenants in the said policy of insurance was the subject of a foreign attachment at the time the attachment in this case was laid, or at any time afterwards.

The court below rendered judgment for the plaintiffs on the answers filed.

Errors assigned:

1. The court erred in rendering judgment for the plaintiffs for the amount of their demand on the answers of the garnishee.

[Franklin Fire Insurance Company v. West.]

2. They ought to have rendered judgment for the garnishee, the defendant, on the answer filed.

T. I. Wharton, for the plaintiffs in error.
Gibbons and *F. W. Hubbell*, contra.

The opinion of the Court was delivered by

SERGEANT, J. — A foreign attachment under the Act of 13th June 1836, binds all the estate and effects of the defendant in the possession or charge of the garnishee, or due and owing from him to the defendant, as the case may be, at the time of the service of such writ, or at any other time; and by the 55th section, the garnishee is bound to answer interrogatories to those points; and under the 58th section, if issue be taken and trial had, the jury are to find what goods or effects were in the hands of the garnishee at the time the attachment was executed, or afterwards. If, therefore, there was any debt due by the garnishee in the present instance at the time of the answer to the interrogatories, it was embraced by the attachment. That there was is clear, for the amount of the claim had then been adjusted and fixed; it became a debt due and owing to the defendant, and such as was decided in *Boyle v. The Franklin Fire Insurance Company*, (7 Watts & Serg. 76), to be liable to an attachment. The assignment having been made by the defendant after the attachment levied, was subject to all the liens under it created by the Act of Assembly, and one of these included debts due subsequently to the service of the writ. It is, therefore, unnecessary to determine whether the claim for the loss was originally liable to the foreign attachment; for, however unsettled it may have been at first, it became fixed by the adjustment before the answers of the garnishee, and in sufficient time within the law to be bound by the attachment.

Judgment affirmed.

Charnley *against* Dulles.

Where a certificate of deposit not negotiable is issued by a bank and afterwards sold by a broker, who endorses it without recourse, and it turns out that the endorsement of the payee was forged, the broker's liability depends upon the particular circumstances attending the sale of the note.

It is for the jury to say whether on the evidence the plaintiff took the note subject to every risk or not.

The question of laches in presenting a certificate of deposit to the bank for payment, is a mixed question of law and fact.

So also is the time of giving notice to the prior endorser.

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

This was an action of assumpsit, brought by Joseph H. Dulles against Charnley & Whelen, to recover the sum of \$2224.76 with interest from the 21st May 1838, in which the plaintiff declared for money had and received to his use, and the defendants pleaded *no assumpsit*.

On the 21st May 1838, the plaintiff purchased from the defendants for \$2224.76, a certificate of deposit of the Bank of the Mississippi and Alabama Railroad Company, which was in the following words.

No. 38. Bank of the Mississippi and Alabama Railroad Company.

Alexander Harris has this day deposited in this bank three thousand dollars for the use of J. S. Skinner, and payable only to his order upon the return of this certificate.

Z. P. WARDELL, *Cashier*.

This certificate was endorsed

Pay to the *ordre* of Henry Shroeder,

J. F. Skinner.

Pay Charnley & Whelen, or order,

Henry Shroeder.

Pay without recourse,

Charnley & Whelen.

Cr. Bank of Vicksburg.

Vburg, Mi., Feb. 18, 1839.

R. B. MILLIKIN, *Cashier*.

On its face was the following:

Registered thirty-eight,

W. J. Hullock.

Three thousand dollars bearing interest }
at the rate of 6 per cent. per ann. }

Z. P. WARDELL, *Cashier*.

[Charnley v. Dulles.]

The plaintiff offered Hancock Smith, who testified as follows :—
“I was in Charnley & Whelen’s office some two or three weeks since, and there was some conversation in regard to their suit with Mr Dulles; they both admitted the fact of their having sold the certificate to Mr Dulles—sold it at 20 or 30 per cent. discount. I talked more to them of the endorsement. I can’t say whose handwriting that is (a bill was here handed to witness). They were talking of this suit. The occasion of it was that I copied the interrogatories to Vicksburg. I can’t say I am positive as to the discount, but there was a discount, I think between 20 or 30 per cent. I talked with them about the endorsement on it—J. F. instead of J. S. Skinner.”

Being cross-examined, he said, “Mr Whelen said that he had stated that he had informed Mr Dulles of the imperfection ^{whole} he sold him the draft—that is my impression.” Being re-examined he said, “the difference between J. F. & J. S., that’s what he referred to—he did not mention the letters—that handwriting (the endorsement ‘Pay without recourse Charnley & Whelen,’ on the certificate hereinafter set forth), is Mr Whelen’s, of the firm of Charnley & Whelen.”

The plaintiff then offered to read the deposition of John S. Skinner, the payee of said certificate, to which the defendants objected, insisting that Skinner was not a competent witness, but the court admitted the deposition, which was as follows :—“I reside in Baltimore. I resided in Baltimore in March 1838. I know Alexander Harris. He was employed as a private clerk for me, before he went to live at the west. He went out to live at the west as a clerk in the Brandon bank. I employed him to collect a debt of \$3000 from Mr Alexander Falls. I have no doubt that I am the J. S. Skinner mentioned in the body of the paper now produced to me. I have a nephew of that name. The endorsement in the name Skinner is not this deponent’s handwriting, nor executed by any one by his order, and if it is intended to be my name, it is a forgery. It is not the handwriting of the other J. S. Skinner, of whom I have spoken. I believe I know a man by the name of Henry Schroeder. I do not know his handwriting. After the date of the certificate above referred to, the Mississippi and Alabama Railroad Company granted me a certificate of deposit for \$3000; this was granted to me in consequence of the certificate above referred to being lost, and I think it was stated in the body of it, that this certificate was lost. I am not confident whether this new certificate was granted upon an application made by myself, or whether the bank issued it spontaneously, upon information received by them from Mr Harris of the loss; but I believe that I applied to them, and sent to them Mr Harris’s letter or a copy of it, or a statement of the facts contained in it announcing the loss. The new certificate I sent to Philadelphia, and it was disposed of, and I do not know the subsequent history of it. I endorsed the

[Charnley v. Dulles.]

new certificate. I received the proceeds of the sale. I will leave the city in the afternoon, at half past three o'clock. If I did not send the letter of Alexander Harris announcing the loss to Brandon, I have it among my papers, if I have not lost or destroyed it. My papers are in various places, some in Baltimore and some at West River in Maryland. The witness says, that the initials before the name Skinner, endorsed on the certificate above referred to and produced, he thinks are F. G., intended for that; witness has a son of that name. The son's name is Frederick Gustavus. That endorsement is not the handwriting of my son, Frederick Gustavus. I shouldn't take it for any signature of his that I ever saw. I received by letter information of the deposit of funds in that bank, upon which the bank issued that certificate. I received that annunciation by letter from Harris. If in existence at all, that letter is probably at West River, where the mass of all my papers are. It is a thing that I had no interest in preserving; but I don't know that I took the trouble to turn back and destroy it. I will look for it on my return, and if found, will return the whole mass of them."

The plaintiff then read the following deposition of Alexander Harris:

I know Mr J. S. Skinner of Baltimore. I was in his employ as a private clerk, I think in the summer of 1836. I went out to the West in the fall of 1836. In the month of March, in the year 1838, I obtained from the Mississippi and Alabama Railroad Company a certificate of deposit for \$3000, for the use and payable to the order of J. S. Skinner. This is the certificate now produced to me. I had previously collected the amount of \$3000 for Mr J. S. Skinner in Mississippi Bank paper, and being about to proceed to the city of Baltimore, I obtained this certificate to convey it to him. On my journey from Vicksburg to Louisville I was robbed of or lost my pocket-book, in which the said certificate of deposit was contained. At the time the said certificate was lost or stolen as aforesaid, it had never been endorsed by the said J. S. Skinner nor by any other person. Soon after my pocket-book was lost or stolen, the passengers on the boat were searched, but the pocket-book was not recovered. I arrived at Louisville the next day after the loss of this certificate, and advertised the loss of my pocket-book, describing the contents, forewarning the public from negotiating the said certificate, and offering a reward for their recovery. This was advertised in the afternoon paper of that city; but fearing that the certificate might be negotiated before the paper came from press, I left written notices of my loss with several of the brokers. I wrote from Louisville to the President of the said Mississippi and Alabama Railroad Company, informing him of the loss of the certificate: since the said certificate of deposit was lost or stolen as aforesaid, I have never seen it until shown me yesterday by Mr Dulles. On my return to Mississippi, which, as well

[Charnley v. Dulles.]

as I can recollect, was about the 1st of June 1838, I met with the cashier of the Mississippi and Alabama Railroad Company at Vicksburg, and requested him to send to Mr Skinner a certificate of deposit of \$3000, in place of the one which had been stolen or lost as aforesaid. He replied in substance that he would do so immediately on his return home. Mr Skinner subsequently informed me that he had received the certificate of deposit, which the cashier had promised me to send him. I should never recognise the endorsement 'J. F. Skinner' as the handwriting of the Mr J. Skinner to whose order the certificate was payable. I know nothing of the individual or the name of Henry Schroeder, whose name is endorsed on the certificate. I do not recognise the endorsement 'J. F. Skinner' as being any handwriting that I know. I am about to leave the city to-morrow morning.

Edward Law, Esq., one of the plaintiff's counsel, then testified as follows: "Previous to the commencement of this suit, on the 31st of May 1839, I went down to the defendants with this certificate, and tendered it to them and demanded the money; they refused it, and sent me a note subsequently." Witness here read the note, which was as follows:

PHILADELPHIA, May 31, 1839.

E. LAW, Esq.—Sir: We have consulted with Mr Ingraham since we had the pleasure of seeing you this morning, who advises us to refer you to him for all information in regard to the matter in question.

The plaintiff then read the following testimony of R. B. Millikin and John M. Taylor, taken under commissions to Vicksburg.

R. B. Millikin, Esq., cashier of the Vicksburg Branch of the Mississippi Union Bank, deposeth as follows:

1. To the first interrogatory of the plaintiff he answers: I was acquainted with both plaintiff and defendants, during my residence in Philadelphia five years ago.

2. To the second interrogatory: I reside in Vicksburg, Mississippi, and I am cashier of the Branch of the Mississippi Union Bank at this place.

3. To the third interrogatory: I received the original certificate, a copy of which accompanies these interrogatories, and made by the Mississippi and Alabama Railroad Company, in exchange for bank notes issued by the same institution, commonly called Brandon Bank notes. After a reasonable time, I enclosed said certificate of deposit to the address of Z. P. Wardell, cashier of said Mississippi and Alabama Railroad Company, for credit of the Bank of Vicksburg, of which I was at that time the cashier. The certificate was returned to me by due course of mail, under date the 23d of February 1839, with a statement from said Z. P. Wardell, cashier of said bank, that the signature of J. S. Skinner could not be genuine (a copy of which letter accompanies this deposition

[Charnley v. Dulles.]

marked Exhibit A). As soon after the return of said certificate as I could see John M. Taylor, Esq., from whom I received it, I informed him thereof and requested him to return me the notes of the said bank, which I had given him in exchange therefor; and he did so, and received from me said certificate.

4. To the fourth interrogatory: I have exercised an agency with respect to said certificate as described in my answer to the third interrogatory, as cashier of the Bank of Vicksburg.

5. To the fifth interrogatory: I did present said certificate to the bank which issued it, between the 18th and 23d of February 1839, on behalf of the Bank of Vicksburg, the result of which was its return as stated in my answer to the third interrogatory.

6. To the sixth interrogatory: I made no other disposition of said certificate than such as is stated in the third interrogatory.

7. To the seventh interrogatory: Said certificate was rejected by the said bank which issued it, at the time and for the reason mentioned in said third interrogatory, and fully expressed in Exhibit A; as to the further inquiries in the seventh interrogatory, I know nothing except from the information of J. M. Taylor, Esq., from whom I obtained said certificate.

8. To the eighth interrogatory: The bank named in said interrogatory was in a state of suspension and non-payment, from the time I had first any knowledge of said certificate down to the time of its rejection by the said bank, and its obligations were at a discount of from 25 to 30 per cent.

9. To the ninth interrogatory: I believe the Bank of Vicksburg to have been the creditor of the said bank which issued said certificate, at the time of its reception by me.

10. To the tenth interrogatory: I know nothing on the subject of this interrogatory.

Lastly. I do not know of any other matter, event, or thing, which may benefit the plaintiff in the above suit.

The following was the letter referred to by Millikin in his deposition as the paper marked Exhibit A:

Bank of the Mississippi and Alabama Railroad Company.

BRANDON, Feb. 23d, 1839.

R. B. MILLIKIN, Esq., Cashier, Vicksburg.—

Dear Sir: Your favour of the 18th inst. is at hand, and enclosed I return you the enclosed certificate 38. It was lost and never came to J. S. Skinner's hands, or whose signature on the back cannot be genuine.

We have paid the amount to Mr Skinner.

Yours respectfully.

Z. P. WARDELL,
Cashier.

John M. Taylor, Esq., deposeth as follows:

[Charnley v. Dulles.]

1. To the first interrogatory of the plaintiff he answers: I know the plaintiff, and have known him between three and four years, as well as I remember. I do not know the defendants.

2. To the second interrogatory: I reside at present near Clinton, in Hinds county, in this State, and am an attorney at law.

3. To the third interrogatory: I know this mark, with regard to the certificate, to which the third interrogatory refers. About the 1st of November 1838, it was placed in my hands by C. S. Tarpley, with whom I was then in partnership in the practice of the law, it having been previously remitted to him by the plaintiff, as I understood. I resided then in the city of Vicksburg, Mississippi, and the intention was that I should dispose of it to the best advantage for the plaintiffs. Not being able to sell it for cash at a price that satisfied me, I endeavoured to vest it in the promissory notes of individuals at par, and did purchase one note for \$1100 and another for \$533. To enable me to pay for these notes, it was necessary to get the certificate changed or converted into smaller paper. I applied to Mr R. B. Millikin, who was then the cashier of the Bank of Vicksburg, and requested him to give me Brandon Bank notes for the certificate; at what time previously this was done, I cannot say. I think I had used Brandon Bank notes, which I held, in the purchase of the promissory notes, and got the certificate changed to reimburse the Brandon money which I had thus used. My belief is that it was some time in the month of February 1839 that I made the exchange with Mr Millikin. Some days after the exchange, I cannot remember precisely how many, Mr Millikin applied to me to take back the certificate and return him the Brandon notes, alleging that he had forwarded the certificate to the bank from which it had issued, and that it had been returned to him by the cashier of that bank, who informed him that the certificate had been lost, had never come to the hands of J. S. Skinner, and whose signature on the back of the certificate could not be genuine, and that the bank had paid the amount of the certificate to Mr Skinner; whereupon I received back the certificate, and refunded to Mr Millikin the amount in Brandon Bank paper; and as I expected to set out in the course of a very few days to the city of Philadelphia, on pressing and important business, and to reach there as soon as possible, I thought it the safest and best way, and probably as speedy as any other, of advising the plaintiff of the spuriousness of the endorsement of Mr Skinner's name, and of returning the certificate to him, to take it with me. I did set out to Philadelphia early in March 1839, on the 7th of that month, I think. I was unexpectedly detained one or two days in New Orleans, and as much as a day by high waters in Georgia, but went immediately on to Philadelphia; and soon after reaching there, as early as the next day, I feel satisfied, being about the last day of March or the first day of April 1839, I delivered the certificate to the plaintiff, and informed him of the cir-

[Charnley v. Dulles.]

cumstances of the endorsement of the name of J. S. Skinner, which are before stated in this answer.

4. To the fourth interrogatory :— I have exercised an agency, as is stated in my answer to the last interrogatory. My instructions were to dispose of the certificate to the best advantage, according to my discretion.

5. To the fifth interrogatory :— I did not present such certificate myself to the bank that issued it, and have no knowledge of the present action except as stated in my answer to the third interrogatory.

6. To the sixth interrogatory :— I refer to my answer to the third interrogatory as containing my answer to this.

7. To the seventh interrogatory :— With regard to the honouring or rejecting of said certificate by the bank that issued it—the time it was rejected—on what account it was rejected, and where it had been in the mean time, I refer to my answer to the third interrogatory. I did not demand payment of it at the bank, because Mr Tarpley, who lived nearer to the bank than I did, had had it in his possession for some time before I received it ; because I knew the bank was in a state of suspension, that it was paying none of its debts ; had no suspicion that there had been anything improper either in the issuing or endorsing of the certificate, and considered it totally useless to make any application to the bank with respect to it.

8. To the eighth interrogatory :— It was in a state of suspension and non-payment for a considerable time before I knew anything of the certificate, down to the time of its rejection by the bank, and has been ever since. The obligations of the bank, as well as I recollect, sold in the market at the time I received the certificate at a discount of from twenty-five to thirty per cent., and continued gradually to depreciate from that time.

9. To the ninth interrogatory :— I do not know whether the Bank of Vicksburg was at that time the creditor or debtor bank to the bank that issued the certificate.

10. To the tenth interrogatory :— My answer to this is contained in my answer to the third interrogatory.

Lastly. I do not remember of any other matter, event or thing which may be advantageous to the plaintiffs in the above suit.

The plaintiff then gave in evidence a bill rendered by the defendants, in the following words :—

Sold by order of Joseph H. Dulles, Esq.

By Charnley & Whelen.

1838, May 25, draft on New York, - - - -	\$1492.54
1½ from - - - -	20.52

Deduct balance due, - - - -	1513.06
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[Charnley v. Dulles.]

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It was admitted by the plaintiff that both the plaintiff and defendants were of respectability and character, and no fraud whatever in the transaction was imputed to the defendants.

No testimony or evidence was given on the part of the defendants.

The judge in his charge, among other things, told the jury that, in the absence of any special agreement between the parties, the law implied a warranty, on the part of the sellers of this certificate, that they had a good title thereto.

That the law had assigned no particular period within which the certificate ought to have been presented for payment to the bank; nor had it fixed any period after knowledge of the forgery within which the plaintiff was bound to communicate this fact to the defendants. That the certificate was not like a bank note, in regard to which it had been decided that the retention by the person who had received a counterfeit bank note for six months after he knew it was counterfeit, was a bar to a recovery of what it purported to be worth, from the person by whom it had been paid. That the certificate had endorsed upon it the name of the person by whom it was transferred directly to the defendants. That the defendants had not shown that they had made any efforts to find this person, nor have they proved any loss sustained for want of an earlier communication of the forgery than was made. That it was for the jury to consider whether, under the circumstances, there had been gross negligence on the part of the plaintiffs, either in respect to the long detention of the certificate before presentment to the bank, or in regard to the communication of the fact, when known to them, of the forgery of Skinner's name.

Errors assigned:—

1. That the judge charged that the law, in the absence of any special agreement, implied a warranty on the part of the sellers of the certificate that they had a good title thereto.

2. That the judge charged that the law had assigned no particular period within which the certificate ought to have been presented for payment to the bank, nor had it fixed any period after the knowledge of the forgery within which the plaintiff was bound to communicate this fact to the defendants; that the certificate was not like a bank note, in regard to which it had been determined that the retention by a person who had received a counter-

[Charnley v. Dulles.]

feit bank note for six months after he knew it was counterfeit, was a bar to a recovery of what it purported to be worth from the person by whom it had been paid. That the certificate had endorsed upon it the person by whom it was transferred directly to the defendants; that the defendants had not shown that they had made any efforts to find this person, nor have they proved any loss sustained for want of an earlier communication of the forgery than was made. That it was for the jury to consider whether, under all the circumstances, there had been gross negligence on the part of the plaintiffs, either in respect to the long detention of the certificate before presentment to the bank, or in regard to the communication of the fact when known to them, of the forgery of Skinner's name.

The case was argued by

Ingraham and Meredith, for the plaintiffs in error.
Law and Hubbell, contra.

The opinion of the Court was delivered by

SERGEANT, J.—The decisions in this and other courts seem to have established the rule that a party selling as his own, personal property of which he is in possession, warrants the title to the thing sold; and that if, by reason of defect of title, nothing passes, the purchaser may recover back his money, though there be no fraud or warranty on the part of the vendor. This doctrine is held to apply to choses in action, as well as other descriptions of personal property; and therefore if one innocently sell or transfer for value a bank note, negotiable note, bond, or other instrument, and it turns out that the instrument is forged, so that it is worthless in the hands of the transferee, the latter may recover back again the value given for it on the implied warranty of genuineness. This being the general principle, the question arises, what is the effect of a special or modified endorsement of a note by the vendor, "pay without recourse?" Ordinarily, the effect of such endorsement of a negotiable instrument is, that the endorser is not to be liable for the payment of the note, in case of its dishonour at maturity, as he would be, by the law merchant, on an unqualified endorsement: but it goes no further; it does not exempt him if the note be forged. Where, however, the note is not a negotiable instrument, the endorser is not responsible as such, though his endorsement be absolute and unqualified. And that is the case before us; for an instrument of the kind in question was decided by this court, in *Patterson v. Poindexter*, (6 *Watts & Serg.* 227), to be merely a certificate of deposit, transferable by endorsement which did not render the endorser liable for its payment. The words "without recourse," therefore, in the present case, have of themselves no legal meaning or operation, since the position of these parties is the same with or without them. In a

[Charnley v. Dulles.]

case of this description we must look to the understanding of the parties as to the design with which they were used; and where there is parol evidence of what passed at the time, it must be considered in connection with the writing, to explain the transaction. Evidence was given at the trial that the defendants informed the plaintiff of the imperfection of the endorsement, and of the difference between the name of the payee, J. S. Skinner, and the endorsement, J. F. Skinner. It was for the jury to say, on all the evidence, what was the understanding of the parties as to the liability of the defendants; whether the plaintiff took the note subject to every risk, as well of the solvency of the parties as of the genuineness of the signature of the payee to the endorsement. If he did, the defendants are not responsible: but if, on the other hand, there was no such understanding, the words "without recourse" alone do not, in law, exempt the defendants from responsibility.

On the other points we are not satisfied there was any error. It was the case of a fund deposited in a distant bank, bearing interest at the rate of 6 per cent. per annum, and a variety of parol evidence was given, on which the question of laches in presenting the certificate to the bank for payment, was a mixed question of law and fact, which the jury was to decide under the instruction of the court; and it cannot be said that the time merely was unreasonable. So, on the question of giving notice to the defendants after the plaintiff was informed of the forgery, it was for the jury to say how long it was before such notice was given, it being alleged by the plaintiff that the demand made by Mr Law, on the 31st May 1839, was not the first notice; and also whether the plaintiff, under all the circumstances, had been guilty of such neglect as to forfeit his right. We do not think the time, about two months, of itself sufficient for the court to say he is barred by it. Other circumstances in the case must be considered in connection with it.

Judgment reversed, and *venue facias de novo* awarded.

Leidich *against* Leidich.

Testator devised certain property to his wife and son T., their heirs and assigns forever, as tenants in common, charging T. with \$100, to be paid to his daughter J., and the wife with \$100, to be paid to his grandson; and proceeded thus: "And as to the rest and residue of my estate, real or personal, &c., I give and bequeath the same to all my *other* children, with the exception of my daughter J. and the wife of E. M., to be equally divided among them, share and share alike." The testator left, at his decease, other children besides those mentioned in the will. *Held*, that T. was entitled to a share in the residue beyond that devised to his mother and himself as tenants in common.

ERROR to the Common Pleas of *Northampton* county.

This was an amicable action of ejectment for a lot of ground in the borough of Easton, in which Thomas Leidich was plaintiff, and William Leidich, Henry Leidich, Samuel Snyder and Catharine his wife, John Leidich and Christina Singer, defendants. The following case was stated for the opinion of the court below, in the nature of a special verdict, either party to have the right to a writ of error.

John Leidich, late of the borough of Easton, in the county of Northampton, made his last will and testament, dated the 11th September 1841, which, after his decease, to wit, on the 26th October 1844, was duly proved, &c. By it, *inter alia*, he devised and bequeathed as follows:

"To my said wife Juliana, and my son Thomas, I give and devise all that certain two-story house, together with the lot, &c., to have and to hold the same to them, the said Juliana and Thomas, and their heirs and assigns for ever as tenants in common, nereby charging the said house and lot with the payment of \$200; that is to say, the said Thomas with \$100, to be paid by him to my daughter Jeannette immediately after my decease, and my wife with \$100, to be paid to my grandchild, Francis Sanders, upon his arriving at the age of 21 years.

"And as to the rest and residue of my estate, real or personal, after the payment of all my debts, and the expenses attendant upon my funeral, and of the execution of the trust hereby reposed, I give and bequeath the same to all my other children, with the exception of my daughter Jeannette and the wife of Ebenezer M'Cord, to be equally divided among them, share and share alike."

The testator left, at the time of his decease, the following children: John Leidich, Henry Leidich, William Leidich, Catharine Snyder, wife of Samuel Snyder, Christina Singer, widow of Lewis

[*Leidich v. Leidich.*]

Singer, Jeannette, wife of Henry Schwartz, Anna Maria M'Cord, and Thomas Leidich.

The question for the decision of the court is, whether Thomas Leidich, the plaintiff, is entitled to any share in the remaining real estate of which the testator died seised, beyond that devised to his mother and himself in the first clause of the will. If the court shall be of opinion that he is entitled, then judgment to be entered for the plaintiff. But if the court shall be of opinion that he is not so entitled, then judgment to be entered for defendants.

The court below gave judgment for the defendants. This was the subject of the error assigned.

W. A. Porter and J. M. Porter, for the plaintiff in error.
Reeder, contra.

The opinion of the Court was delivered by

SERGEANT, J.—The determination of the intention of this testator must rest upon the language of his will, there being no other circumstances in the case stated tending to shed any light upon it. What the amount of the residue was, or what idea the testator entertained as to its ultimate benefit to the several residuary devisees, or how many and who they were, is unknown to us. Reading the will merely, I perceive nothing positive in it that shows an intention to exclude his son Thomas from a share in the residue. The word "other" may easily be satisfied by a transposition of the words of the residuary clause, a resort which we are sometimes obliged to adopt, if we desire to arrange methodically language which has been written or spoken without reference to exactness of composition. The residuary clause will be complete and clear if we read it thus: "And as to the rest and residue of my estate, real and personal, &c., with the exception of my daughter Jeannette and the wife of Ebenezer M'Cord, I give and bequeath the same to all my other children," &c. That the word "other," in the will, does not refer to the previous legatees would appear by the subsequent exception of Jeannette, who was one of them. We are not to attribute to the testator a superfluous exclusion, when there is a subject on which its operation is important, and when the opposite construction is, at best, but conjectural. On the whole, we think Thomas Leidich is entitled to a share in the residue beyond that devised to his mother and himself in the first clause of the will.

Judgment reversed, and judgment for plaintiff.

Whitemarsh Township *against* The Philadelphia, Germantown and Norristown Railroad Co.

Under the Act of 14th June 1836, giving the Courts of Common Pleas within their respective counties power to issue writs of *mandamus* "to all corporations being or having their chief place of business within such county," a Court of Common Pleas cannot issue a *mandamus* to a railroad company, whose office and chief place of business is not in such county, although their road may pass through the same.

2. Supervisors of a township may apply for a writ of *mandamus* commanding a railroad company to make a road for public accommodation, required by their charter.

ERROR to the Common Pleas of *Montgomery* county.

A petition was presented to the court below by Jonathan Adamson and Benjamin Jones, supervisors of Whitemarsh township, Montgomery county, setting forth that the Philadelphia, Germantown and Norristown Railroad Company, after the passage of the Act of 8th February 1834, a supplement to their act of incorporation, occupied part of the bed of a public road in Whitemarsh township, Montgomery county, leading from the Spring Mill road to the Philadelphia county line, and constructed and laid their railroad on the same, thereby obstructing, &c., the free use and passage of the same. That the company had not, in compliance with said act, made a good and sufficient road for public accommodation alongside of said railroad, in place of the part of the public road so occupied by them; and prayed for a *mandamus* commanding the company to make such road for public accommodation, &c. The court granted the *mandamus* prayed for.

The defendants responded that the court had no authority to issue the writ against them on the complaint of Jonathan Adamson and Benjamin Jones, supervisors, for the following, among other reasons:

1. Because Adamson and Jones are not the whole board of supervisors of Whitemarsh township, and do not, by their petition, show any legal right they have to call upon the defendants to do the matters, &c., which said writ commands them to do.
2. Because the defendants, as a corporation, have their office and chief place of business in the city of Philadelphia, and have no office or chief place of business in Montgomery county, and therefore this court has no jurisdiction or right to issue a *mandamus* to them.
3. Because there are other remedies, &c.

[Whitemarsh Township v. The Philad., Germantown and Norristown Railroad Co.]

The relators replied that said court had authority and jurisdiction to issue said writ, and to issue it against the defendants on the complaint of Adamson and Jones, supervisors.

The court below refused the application for a peremptory *mandamus*, on the ground that the plaintiffs had other remedies which they might pursue, and quashed the first writ and proceedings under it.

G. R. Fox, for the plaintiff in error.
Freedley and Miles, contra.

The opinion of the Court was delivered by

ROGERS, J.—The several Courts of Common Pleas, the President Judge being one, have within their respective counties the like power with the Supreme Court to issue writs of mandamus to all officers and magistrates elected or appointed in and for the respective county, &c., and to all corporations being or having their chief place of business within such county. Act of 14th June 1836. The jurisdiction of the court in the latter clause is confined to two classes; one where, as for example, banks are located in the body of the county exclusively; the other as canals and railroads, where they run through two or more counties. The words “being in the county” embrace the former, and the latter is included in the words “having their chief place of business in the county.” The latter part of the section applies to a case like the present, where the road extends through several counties, and where the place of business is necessarily located in one. It was thought reasonable that the corporation should be amenable to this high prerogative writ only in the county where their business was principally transacted. The Legislature, in pursuance of an enlightened policy, have shown a disposition by every reasonable enactment to encourage the construction of railroads and canals when it can be done without interfering with the just rights of others. We think the provision in question a wise one, of which it was the duty of the directors to avail themselves, and of which we do not feel inclined to deprive them by any forced construction. The respondent denies the jurisdiction of the court because the office and chief place of business of the company is in the city of Philadelphia, and not in the county of Montgomery. The averment is distinctly made in the plea; it is neither traversed nor denied in the replication; nor could it be with any regard to the fact. For this reason we think the court was right in giving judgment for the respondent.

Several points have been pressed by the relators with great force, supported by a great weight of authority, but on which we think it premature to give an opinion. It will be time enough to decide whether the writ of mandamus is the proper remedy when the cause is brought in the appropriate forum. It is proper to add

[Whitemarsh Township v. The Philad., Germantown and Norristown Railroad Co.]
that we see nothing in the objection that the writ was issued in the name of Jonathan Adamson and Benjamin Jones, supervisors. The township which they represent have an interest in the subject-matter in controversy, whether it lies contiguous to the road which was vacated or more remote from it.

Judgment affirmed.

Martin *against* Schoenberger.

Defendant guaranteed to plaintiff \$3000 commissions for transporting goods west for defendant, plaintiff covenanting to forward no goods for any other person or line for any place west of Hollidaysburg. Plaintiff cannot recover on the guaranty, if he forwarded goods by other lines as far as Hollidaysburg, if their ultimate destination was for places west of Hollidaysburg.

A person cannot recover for part performance of an entire contract, where he has failed in the performance on his part.

THE opinion of this Court, which states the facts of this case, was delivered by

BURNSIDE, J.—The parties in this case, on the 13th March 1839, entered into a written agreement, by which the plaintiff was to receive goods at his depôt on Willow street corner of Front, and forward them per the Reliance Transportation Company during the coming season at certain prices; the goods received at his depôt and shipped on board of boats at Schuylkill, for groceries and goods paying a lower rate of freight \$1 per 2000 lbs., for dry-goods and all goods paying a higher rate of freight \$2, and to receive goods coming from the west from the boats on the Schuylkill and deliver them at his depôt on the Delaware or ship them on board a vessel at his wharf for 50 cents per 2000 lbs., unless the rates of freight from Philadelphia to Pittsburgh should be reduced to a lower price than \$1 per 100 lbs. for groceries and \$1.25 per 100 lbs. on merchandise, when a new arrangement was to be entered into. Also for goods sent by the Reliance Transportation Company from their warehouse in Market street (to be shipped from Schuylkill) if accompanied by the list of the goods and weights attached, for those destined for any place west of Hollidaysburg 75 cents per 2000 lbs., and for those destined for Hollidaysburg or any place intermediate 50 cents per 2000 lbs. Martin was to receipt for goods and furnish copies to transmit by mail to the agent of the Reliance Transportation Company at Pittsburgh; to keep a record of all goods shipped, with rates of freight annexed, in such way as the Reliance Transportation Company may direct

[Martin v. Schoenberger.]

The plaintiff was to direct the loading and starting of all boats loaded, and to prefer, in loading, the boats selected by the Reliance Transportation Company, unless where goods were on hand over 24 hours and no such boat in port, when he might engage any other boat in port. Martin engaged to forward no goods for any other person or line for any place west of Hollidaysburg, but he reserved the right of landing and delivering to owners or consignees any goods arriving from New York, Baltimore or elsewhere. The plaintiff was to render an account of advances and commissions monthly; and the Reliance Transportation Company guaranteed to Martin business to the amount of \$3000 for commissions, and to furnish the necessary books, blanks, stationery, &c., to pay freight on goods going west to the boatman at Hollidaysburg, and on goods coming east at Philadelphia. The Reliance Transportation Company to pay the account of Jacob Martin when presented monthly and found correct.

The action was brought for the guaranty, the commissions only amounting to about \$600, which had been paid; and the plaintiff declared in case, setting out the agreement, and averring, as he was bound to do, that he had faithfully kept and performed his part of the agreement. On the trial it clearly appeared from the plaintiff's books and by witnesses that the plaintiff shipped goods by other conveyances than the Reliance Line, and that he forwarded goods to many persons and places west of Hollidaysburg. The Judge of the District Court instructed the jury that if the plaintiff during the season forwarded goods by other lines as far as Hollidaysburg, if the ultimate destination of the goods was for places west of Hollidaysburg, the plaintiff could not recover on the guaranty. If the suit had been for the commissions, or if he was claiming for his services actually performed, his case might be different. But as this suit was urged on the ground of the guaranty, the plaintiff could not recover if he violated his agreement in forwarding goods contrary to its terms. This is the principal error complained of, the plaintiff's counsel contending the case should have been submitted to the jury, as in *Steigleman v. Jeffries*, (1 Serg. & Rawle 477), as a question of defalcation.

On the other hand it was contended he was bound to aver and prove performance, and if he failed in that, he could not recover; and so has the law ever been held in Pennsylvania. Questions of this kind are of frequent occurrence and of great practical importance. To permit a man to recover for part performance of an entire contract, or to permit him to recover on his agreement where he has failed to perform, would tend to demoralize the whole country. If the law were so, a man would just perform as much of his contract as would suit his convenience or cupidity; all faith and fair dealing would be at an end, and all confidence between man and man would be destroyed. The law is settled in *Harris v. Ligget*, (1 Watts & Serg. 201), that he who has per-

[Martin v. Schoenberger.]

formed a special agreement to do a particular thing may recover the stipulated price of it by an action of *indebitatus assumpsit*, and use the agreement as evidence of the amount of compensation due. But if there be but part performance by the plaintiff of his part of the contract, he cannot recover. So in *Shaw v. Turnpike Company*, (2 P. R. 254; 3 *Ibid.* 445), where a contract is entire, before any recovery can be had of the consideration money, the plaintiff must prove that he has performed or is ready to perform his part of the contract, or that the performance was prevented by the defendant. The Judge properly held to the written contract, and he instructed the jury, as he ought to have done, that if they found the plaintiff had violated his engagements, he could not recover. No plaintiff ought ever to be permitted to recover for part performance of his engagements, unless prevented by the defendant from performing, or so trifled with, that it becomes his duty to declare the contract at an end.

There is but one other question worth noticing. The plaintiff objected to the defendant's evidence and the examination of his own books, because he had not received notice of the matter. The defendant's defence was not defalcation. The court below were the best judges of their own rules. The plaintiff was bound to make out his case; and we incline to the opinion the evidence was admissible under the general issue, and cannot reverse on that ground after a full trial on the merits.

Judgment affirmed

Whitesell against Crane.

In a suit to recover the value of a trunk lost from a stage-coach, the plaintiff is competent to prove the contents of his trunk, and the value of the articles composing them.

A mere service of a subpoena on a witness residing within 40 miles of the court will not authorize his deposition to be read in evidence in the cause: the party must bring him in by attachment if he can.

Parol evidence is admissible to show the contents of a handbill put up in a stage-office four years before, containing a notification of limited responsibility.

Evidence of the usual course of a stage-office for passengers to call there and have their names registered in the stage-book and where they were to be called for, is evidence to affect a party with notice.

The printed conditions of a line of public coaches are sufficiently made known to passengers by being pasted up at the place where they book their names.

ERROR to the Common Pleas of *Northampton* county.

This was an action brought by Franklin L. Crane against Andrew Whitesell and others, to recover the value of a trunk and its

viii. — 47

[Whitesell v. Crane.]

contents. It appeared that, in October 1838, the plaintiff and wife took passage from Philadelphia to Easton, the residence of the plaintiff, in a stage-coach of the defendants. Their baggage, consisting of one trunk, was placed in the boot, which was securely fastened. On their arrival at Doylestown the trunk was gone. and from the evidence it would seem to have been stolen.

1. The plaintiff, Crane, was offered to prove the contents of his trunk, and the value of the articles composing them. The defendants objected on the ground of interest, but the court overruled the objection and admitted the witness, and the defendants excepted.

2. The plaintiff read a subpoena for Owen Rice to appear and testify, with an *ex parte* affidavit endorsed thereon as to the service of the same, and offered in evidence the deposition of Rice, taken under a rule of court. The defendants objected to this evidence, 1. Because the *ex parte* affidavit of service of the subpoena was not sufficient. 2. That Rice was living at the Crane Iron Works, only 16 miles from Easton (place of trial), and that due diligence had not been used to procure his attendance. The court overruled the objections, and admitted the deposition to be read, and the defendants excepted.

Several agents of the defendants testified that in 1838 they had put up the handbills of the defendants in all the taverns and stage-offices in Easton, and distributed them throughout all the routes. They were also posted up in the stage-office of the defendants in Philadelphia, upon the side of the wall, up against the wall fairly, so that any one coming in might see them. Some parts were in large type, some in small. That, shortly before the trial, in April 1844, they had searched for these bills in the present office of the defendants in Philadelphia, but could not find them. The old office was then occupied as a fancy dry-goods store. They had also searched for them at Easton without success.

3. The defendants then offered to prove by witnesses the contents of handbills put up in 1838, and that they contained a distinct notification, in conspicuous characters, that "all baggage was at the risk of the owners." The plaintiff objected to this evidence the court overruled it, and the defendants excepted.

4. The defendants then offered to prove by witnesses, who travelled in the said line of stages before and about the time of the alleged loss of the plaintiff's trunk, the fact of such handbills being up at divers places on the route, and at Philadelphia and Easton, containing the notification above stated—"all baggage at the risk of the owners"—and that it was notorious to all persons passing and repassing in the stages. The plaintiff objected; the court rejected the evidence, and the defendants excepted.

5. The defendants then offered to prove by witnesses the usual manner in which the names of the passengers in this line of stages were entered, and the passengers called, to wit: "that the pas-

[Whitesell v. Crane.]

sengers called at the stage-office, and had their names registered in the stage-book, with the places mentioned in the margin where they were to be called for." The plaintiff objected; the court overruled the evidence, and the defendants excepted.

6. The defendants then again offered to prove the matters contained in the 3d and 4th bills of exception. The plaintiff objected: the court overruled the evidence, and the defendants excepted.

The defendants requested the court to charge "that the plaintiff's own oath as to the quantity and value of the contents of the trunk is insufficient, alone, to satisfy the jury of that value." Answer. The plaintiff's own oath is evidence as to the quantity and value of the articles in the trunk. It is not conclusive evidence. The quantity and value are facts for your decision, and if there is nothing in the case which makes you distrust the truth of the plaintiff's own oath, it would be sufficient alone to satisfy you both as to the quantity and value of the contents of the trunk.

Errors assigned:

1. In receiving the evidence mentioned in the 1st bill of exceptions.

2. In admitting the deposition of Rice.

3. In rejecting the evidence mentioned in the 3d, 4th, 5th and 6th bills of exception.

4. In their answer to defendants' point.

W. A. Porter and *J. M. Porter*, for plaintiff in error.

The plaintiff was competent to prove the contents of his trunk, but not their value. That might have been proved by others. *Clark v. Spence*, (10 Watts 335); *Bingham v. Rogers*, (6 Watts & Serg. 500).

Service of the subpœna was not sufficient to make the deposition evidence. There might have been an understanding that the witness was not to attend. The party should have had him brought in on an attachment.

That the handbills put up in the office were sufficient to affect the plaintiff with notice, they cited 2 *Stark. Ev.* 288; 4 *Burr.* 2298; 2 *Amer. Com. L.* 545; 2 *Watts & Serg.* 230; 2 *M. & S.* 2: 1 *Stark. R.* 72; 4 *Whart.* 482; 5 *Rawle* 188.

Reeder, contra.

The object of proving contents is to judge of their value. At all events, the plaintiff must show their state, quality, condition, &c.; and their value is but an inference from these. In *Clarke v. Spence* and *Bingham v. Rogers*, the plaintiff was allowed to prove value.

The affidavit of service of the subpœna is the usual practice, and sufficient to satisfy the court that it has been served. 16 *Serg. & Rawle* 220; 1 *P. R.* 320.

[Whitesell v. Crane.]

Clear and explicit notice of the contents of the handbills must be shown to the plaintiff. *Chitt. Con.* 489; 9 *Wend.* 9.

The opinion of the Court was delivered by

GIBSON, C. J. — On the ground of necessity, the plaintiff was competent not only to specify the articles contained in the trunk, but to prove the value of them. Book entries by the party's own hand are evidence, not only of sale and delivery, but also of price, which is a part of the contract. Originally such entries were allowed to prove, perhaps, no more than delivery; but experience induced the courts to go further. Yet the value of merchandise, bearing, as it does, a determinate price in the market, might be more readily estimated from description than the more uncertain value of clothing in every degree of wear, which the owner would be better able to estimate than a disinterested witness, who must, after all, found his judgment on the description which the owner may choose to give. Why trust to his data, and not to his estimate? It is as easy to give a false description as to overstate the value. The plaintiff's testimony, therefore, was properly received.

But the deposition of the witness, who was within sixteen miles of the court-house, ought to have been ruled out. The rule of the Common Pleas in regard to it is a fragment of a most excellent system, established by the presidents of the judicial districts at the organization of the county courts under the constitution of 1790; and this part of it has been preserved entire until the present day. Indeed, it was taken from the rule of this court, which is still in force, and depositions under it have always been deemed provisional and secondary. In days gone by, the superiority of an examination in the face of the court and jury was justly appreciated, and I will not dwell on it; but to prevent truth and justice from being sacrificed to indolence and want of preparation, or something worse, it is our business to preserve at least the remembrance of it. These depositions have invariably been received as substitutes for present examination only when it was unattainable without a too great expenditure of money or trouble; and the party has always been required to produce the witness, if he were able to attend, and within the compass of forty miles. Was it in the plaintiff's power to produce him? It is not pretended that he could not have been compelled to attend: and why was he not? When a party would prefer the deposition of his witness to an examination of him in court—and there are too many instances of such preference—the mere service of a subpoena ought obviously not to stand for an excuse for his absence. If it were allowed, causes would, for the most part, be tried on depositions only; for few witnesses would attend of choice. It is easy to serve a subpoena; and easier still to make the witness comprehend that his attendance is not desired. Even where a party has acted

[Whitesell v. Crane.]

with good faith, he is chargeable with laches if he do not have a defaulting witness brought in on attachment. A proper ground, therefore, was not laid.

The other exceptions are to the exclusion of evidence to prove conditions contained in handbills, conspicuously placed in the stage-offices at Easton and Philadelphia, and put up in taverns along the route, one of which was said to be exemption from risk for luggage, and to prove the course of the office in regard to booking the names of passengers, in order to raise a presumption of notice.

The evidence of destruction was sufficient. Of all documents, a handbill is the most fugitive and perishable. Who ever knew such a thing to be preserved, as required in this instance, for four years? Pasted on an outside wall, it is destroyed by the elements; in the bar-room of a tavern, by those who light cigars; and in an office, by the next occupant. The apartment in which the office of the defendants had been kept in Philadelphia was used as a dry-goods store at the time of the search; and it is probable the office at Easton had undergone a similar transformation. In these circumstances, to require the original to be produced, or its destruction to be positively proved, would be unreasonable; and the proposed evidence of contents ought to have been received.

Evidence of the course of the office was competent to affect the plaintiff with notice. It was held, in *Mesnard v. Aldridge*, (3 *Esp.* 271), that the printed conditions of an auction are sufficiently made known to bidders by being pasted up in the auction-room; and the printed conditions of a line of public coaches are, with equal reason, sufficiently made known to passengers by being pasted up at the place where they book their names. It is their business to take notice of regulations which are sufficiently notorious by being published there, without requiring the book-keeper to repeat to each that luggage is at the risk of the owner. They are bound at all events; and though a servant be sent to the office, constructive notice to him is notice to his principal.

There is no apparent error in the charge; but as the cause will be tried on evidence which will probably present a different case, it has not been thought proper to examine the points in detail.

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

Pairo *against* The American Insurance Company.

The prothonotary can receive a fee of 75 cents for issuing a *venire* only for the term at which the cause is tried, though it may have been repeatedly before on the trial list.

ON the taxation of the bill of costs in this case, the question was, whether a fee of 75 cents for issuing a *venire* is chargeable by the prothonotary for every time a cause is on the trial list, besides the term at which the cause is tried, under the 6th section of the Act of 22d February 1821, allowing for "issuing *venire* in each case when tried by a jury, 75 cents."

Hubbell for the defendant.

Tilghman, contra.

The Court decided that only one fee was allowable.

Mertz's Case.

A person convicted in the Quarter Sessions of Philadelphia county for keeping a tippling-house, and sentenced to pay a fine of \$50 and stand committed, is not entitled to be discharged at the end of one month without paying the fine.

THE prisoner, John T. Mertz, was brought up on *habeas corpus*. and *Brightly* moved for his discharge. The prisoner was convicted in the Quarter Sessions of Philadelphia county, on the 8th March 1845, on an indictment for keeping a tippling-house, and sentenced to pay a fine of \$50 and costs, and stand committed until the sentence was complied with. The indictment charged that "he sold and retailed less than one quart of rum, wine, brandy and other spirituous liquors, then and there delivered at one time and to one person and to more than one person, without having first obtained license agreeably to law for that purpose, contrary to the form of the Act of Assembly, &c."

Brightly, for the relator, contended that the conviction was under the Act of 27th January 1819, relating to the city and county of Philadelphia, by the 1st section of which the fine is fixed at \$50 and the alternative is to pay the fine, or, if unable, to be committed for any time not exceeding one month. The prisoner was.

[Mertz's Case.]

unable to pay the fine, but had served out the month, and was therefore entitled to be discharged.

J. A. Phillips, contra. The Act of 1819 is virtually repealed by the general Act on the subject passed the 11th March 1834, and it was under this Act the sentence was passed. The 25th section provides that if any person shall sell less than one quart of spirituous or vinous liquors, to be delivered at one time to one or more persons, without having first obtained a license agreeably to law for that purpose, such person shall be liable to indictment, and on conviction thereof shall forfeit and pay for every such offence a sum not exceeding \$100. He must therefore stand committed till his fine is paid. If unable to pay it, provision is made by the 47th section of the Insolvent Act of 16th June 1836 for his discharge after being confined three months. The Act of 1819 is repealed by the intermediate Act of 7th April 1830, the provisions of whose 9th section correspond with those of the Act of 1834.

Per Curiam.—Prisoner remanded.

Chew's Case.

Since the Act of 29th March 1832, the Supreme Court have no power to take bail on appeal from the Orphans' Court. This power is vested exclusively in the latter court.

SERGEANT, J.—A petition has been presented to this court by Benjamin Chew, stating that the Orphans' Court for the county of Philadelphia had required from him, as one of the executors of Benjamin Chew, deceased, bail on appeal to this court in the sum of \$50,000, which he alleges to be excessive, and prays the interference of this court to hear the case and determine and take the proper amount of bail.

It is very clear that this court has no jurisdiction to interfere in the matter. The provisions of the 59th section of the Act of 29th March 1832, give the power exclusively to the Judges of the Orphans' Court. It provides that the party appealing shall give security by recognizance with sufficient surety in the Orphans' Court or before one of the judges thereof. No such power is vested in this court or its Judges. By a general provision of the 7th section of the Act of 11th March 1809, the Judges of this court, as well as the courts below, might formerly take bail in error or on appeals; but the substitution in the Orphans' Court Act of 1832, of a specific provision as to appeals from that court, vesting the power in the Judges of that court alone, seems to have altered the

[Chew's Case.]

former law so far as respects the Orphans' Court; and by the 61st section of the Act of 1832, such part of any former law as is altered by that Act is repealed.

Petition dismissed.

Mertz *against* Detweiler.

In a suit against a physician for malpractice whereby the plaintiff lost his leg,
Held,

1. It being shown that other medical men had been called in for a consultation without invitation or notice to the defendant, a medical witness for the plaintiff might be asked by the defendant as to the practice of physicians in regard to consultations.

2. The witness could not be asked as to the measure of the defendant's responsibility for his patient, not being a subject of professional skill.

3. Nor is testimony admissible on the part of the defendant as to his general skill.

4. The nature and properties of the powders employed by the defendant in the case, were proper questions to medical witnesses called by the plaintiff.

5. The declarations of a *prochein amy* for the plaintiff made before the writ purchased, are not admissible on behalf of the defendant.

ERROR to the Common Pleas of *Northampton* county, in which a verdict and judgment were rendered for the defendants.

This was an action on the case brought by Henry Mertz by his next friend Jacob Mertz against Henry Detweiler and Charles Detweiler for malpractice as physicians, *per quod* the plaintiff lost his leg. The case came up on bills of exception to evidence.

The plaintiff proved that a consultation was held by several physicians at the request of the plaintiff's father, who examined the plaintiff's leg after it had proceeded to mortification under the attendance of the defendants. A witness for the plaintiff (a physician) stated that Dr Detweiler was not invited to attend this consultation. The defendants then asked the following questions: What is the practice of physicians in regard to consultations? Is it considered fair to exclude a physician, who has had the charge of a case formerly, from the consultation? To this the plaintiff objected, but the court admitted it and sealed an exception.

A witness for the plaintiff (a physician) stated that if the physician had ordered the patient to remain quiet and he ran about, the conduct of the patient would not be proper. Whereupon the defendants asked the witness, "If the patient thus behaves, is the physician responsible for what happens to the wound, or for the termination of the case?" To which the plaintiff objected, but the court admitted the question and the plaintiff excepted.

The plaintiff asked the witness, "What are the component parts

[Mertz v. Detweiler.]

of medicines usually called No. 1 and 2 in Dr Detweiler's practice?" To this the defendants objected, and the court overruled the question and sealed an exception.

The plaintiff then asked, "Are or are not in Homœopathic practice the medicine No. 1 and 2 white?" Also, "Are or are not powders No. 1 and 2 cooling powders?" The defendants objected, the court overruled the questions and sealed bills of exception.

The defendants called a physician, and proposed to prove by him, "that he knows Dr Henry Detweiler—that he had practised with him as a surgeon—and his skill and character as a surgeon." The court admitted the testimony after the plaintiff's objection and sealed an exception.

The defendants further offered in evidence the opinion of the witness in regard to Dr H. Detweiler's knowledge of surgery and anatomy, derived from conversations had with Dr Detweiler on surgical and anatomical subjects. The plaintiff objected, the court admitted the evidence and sealed an exception.

The defendants offered to prove that a witness said to Jacob Mertz he should try and settle it with Dr Detweiler; it would cost him a good deal of money if he went to court with it. He said it would not cost him anything; the doctors would help him through. Also by another witness that J. Mertz said he would put it in law and the doctors would work it through. In the conversation the names of Dr Stout and Dr Martin (two of the plaintiff's witnesses) were mentioned. This was in Mertz's house the day after the leg was taken off. The court admitted the evidence after the plaintiff's objection and sealed an exception.

The bills of exception were the subject of the errors assigned.

W. A. Porter, for the plaintiff in error, referred to 3 *Burr.* 1918; 9 *Bingh.* 333; 5 *Barn. & Ald.* 840; 1 *Holt's Cas.* 283; 7 *Wend.* 79; 1 *Phil. Ev.* 290; *Greenl. Ev.* 61, 491; 1 *Green* 232; 10 *Serg. & Rawle* 60; 2 *Bos. & P.* 532; 6 *Cow.* 673; *Greenl. Ev.* 201, 204, 210.

A. E. Browne, contra, cited 13 *Serg. & Rawle* 132; 5 *Binn.* 488; 2 *Stark. Ev.* 313; 1 *Ibid.* 548; 1 *Stra.* 548; 2 *Ibid.* 1026.

PER CURIAM.—Under the circumstances of the case, evidence of the "practice of physicians in regard to consultations," was properly admitted. It had been testified that the medical gentlemen called in by the plaintiff's father had met in consultation without notice to the defendant who was the attending physician, or desiring his presence; and they were produced as the plaintiff's witnesses. The fact that they had not extended to him the customary courtesy due to the occasion, therefore, was a circumstance, though a slight one, tending to show that their minds were biassed against him.

[Mertz v. Detweiler.]

But the measure of a physician's responsibility for his patient is not a subject of professional skill. Whether the patient's imprudence in disregarding directions led to an aggravation of the disease may be otherwise; but it requires no medical skill to determine that a man is not chargeable with the consequences of another's act; and the question allowed to be put belonged not so much to medicine as to morals. Besides being irrelevant, these fishing questions always contain a concealed argument which it would be improper for the witness to endorse. The answer ought not to have been received.

Of the same stamp was the testimony of the defendant's general skill, which was clearly irrelevant. It was not that, but his treatment of the particular case, with which the jury had to do. If the latter was notoriously bad, of what account would be his abstract science, or treatment of other cases? It may be said that his general qualifications might serve to shed light on the propriety of his practice in this particular instance; but it is light which would be less likely to lead to a sound conclusion than to lead astray. The jury, assisted by the opinions of medical witnesses, would be better able to judge of the treatment from the treatment itself than from the more remote consideration of the defendant's professional reputation, which was consequently not the best evidence of which the case was susceptible.

The nature and properties of the powders employed by the defendant in the particular instance, were subjects of medical inquiry, and proper for the medical witnesses as experts. The questions put to them on that head ought to have been answered.

But the matter which was probably most prejudicial to the plaintiff in the estimation of the jury, was the evidence to prove the declarations of his *procchein amy*, before he had acted as such, that "the doctors would help him through," or that "the doctors would work it through." The plaintiff would have little chance if the testimony of his most material witnesses were put down to the account of professional jealousy. But according to the testimony, these declarations were made before the writ was purchased, and when the *procchein amy* had no other concern in the contest than every father has in the welfare of his child; and that they were not competent for that reason, is stated as an elementary principle in *Greenleaf's Evidence* (page 211), a book whose accuracy is surpassed only by its usefulness. As admissions or confessions, therefore, these declarations were incompetent.

Judgment reversed, and *venire de novo* awarded.

Penrose *against* Pawling.

A plaintiff who is nonsuited after an appeal by the defendant from an award of arbitrators, must refund the costs of the appeal which the defendant had paid on appealing; and that is the case, although the plaintiff sues as administrator.

ERROR to the Common Pleas of *Montgomery* county.

The following case was stated for the opinion of the court in the nature of a special verdict, either party to have the right to a writ of error;

To November Term 1837, No. 34. George H. Pawling, the defendant in this case, as administrator of Thomas Ferguson, deceased, brought an action on the case in *assumpsit* in the Common Pleas of Montgomery county, against Morris Penrose, executor of the last will and testament of Samuel Penrose deceased, the plaintiff above named, which action, at the instance of and upon a rule entered by Pawling as administrator as aforesaid, was referred to arbitrators, under the Act of June 16, 1836, who, on the 8th May 1838, reported in favour of the then plaintiff \$173.97, with costs of suit. On the 14th May 1838, the defendant in that suit, plaintiff in this, appealed from the award of arbitrators. On the 1st November 1839, the cause came on for trial before a jury, when, after a short progress made therein, the jury was discharged, and the plaintiff suffered a nonsuit, with leave to move to take it off. On the same day, on motion, the court granted a rule to show cause why the nonsuit should not be taken off; and on the 26th June 1841, the rule was discharged and judgment entered on the verdict. The costs which accrued prior to the appeal were paid into the office of the prothonotary by the said Morris Penrose, as executor as aforesaid, in order to obtain his appeal. They were \$19.71, and were composed of the following items:

Attorney and writ - - - - -	\$4.00
Crier - - - - -	12½
Arbitrators, rules, &c. - - - - -	11.25
Sheriff's fees - - - - -	2.33½
Prothonotary - - - - -	2.00
Making in all - - - - -	<u>\$19.71</u>

George H. Pawling has not and never had any assets of his intestate in his hands, by which he could satisfy the above claim for costs.

The question for the opinion of the court is, whether Morris

[Penrose v. Pawling.]

Penrose, executor as aforesaid, is entitled to have these costs or any proportion of them refunded to him by the said George H. Pawling out of his own proper estate. If the court shall be of opinion that the defendant is bound to refund, as aforesaid, the whole or any part thereof, then judgment to be entered for the plaintiff accordingly. If of opinion that he is not bound to refund the whole or any part thereof, then judgment to be entered for the defendant.

The court gave judgment for the defendant on the case stated, and this was the subject of the error assigned.

Freedley, for the plaintiff in error, cited 11 *Serg. & Rawle* 247; 2 *Rawle* 180.

G. R. Fox, contra, referred to 6 *Serg. & Rawle* 299; 7 *Watts* 341.

The opinion of the Court was delivered by

SERGEANT, J.—Pawling, as administrator, sued Penrose, as executor, in *assumpsit*; and the cause being referred to arbitrators, an award was rendered in favour of the plaintiff for \$173.97. The defendant, Penrose, appealed, entered into recognisance and paid the costs of the appeal. On trial the plaintiff Pawling became nonsuit; and the question is, whether the defendant, Penrose, is entitled to a return of these costs. This question is raised by a case stated, in which Penrose is plaintiff and Pawling defendant.

We are of opinion that Penrose is entitled to recover. Costs are given to the defendant by statute 23 Hen. 8, c. 15, which enacts that in actions of debt, case, &c., if the plaintiff after appearance of the defendant be nonsuit, the defendant shall have judgment to recover his costs, &c.; and this is our daily practice. It makes no difference that the plaintiff sues as administrator, for it is decided in *Muntorf v. Muntorf* (2 *Rawle* 180), that in Pennsylvania an executor or administrator is bound to pay costs to the defendant in case of nonsuit or of a verdict for the defendant, as well when he necessarily sues in his representative character as when the cause of action arises after the death of the testator; and the distinction which prevails in England in this respect has not obtained here. The cases of *Pratt v. Naglee* (6 *Serg. & Rawle* 299); *Landis v. Shaeffer* (4 *Ibid.* 199); and *Bellas v. Oyster* (7 *Watts* 341), do not resemble the present, for there, on the defendants' appeal, the plaintiff recovered, though it was a smaller sum than that which had been awarded to him by arbitrators; but here he fails entirely, and judgment of nonsuit is entered against him. In *Gallatin v. Cornman* (1 *P. R.* 115), it was held that where the defendant appealed, and on trial obtained a verdict and judgment in his favour, it was a case not provided for by the Act of 20th March 1810, and the costs should follow the final judgment

[Penrose v. Pawling.]

which was for the defendant. One portion of the costs in that case were those paid on the appeal. This case seems to be similar in principle to the present.

Judgment reversed, and judgment entered for the plaintiff (Penrose) according to the case stated.

Pancoast's Appeal.

Ground-rent created by deed with a clause of re-entry is payable out of the proceeds of a sheriff's sale of the property under a judgment by a stranger in preference to such judgment.

THIS was an appeal by Pancoast and Snyder, judgment creditors of T. J. Willits, from the decree of the District Court for the city and county of *Philadelphia*, allowing B. Tevis and others arrears of ground-rent and interest out of the proceeds of the sheriff's sale of certain real estate under a judgment of the Western Bank against Willits. The property consisted of five distinct pieces, each of which was subject to a ground-rent, and they were set up and sold subject to the same respectively. The ground-rents were all created by ordinary ground-rent deeds, with the usual covenants and clauses of distress, re-entry, &c.

J. A. Phillips, for the appellants, referred to *Bantleon v. Smith*, (2 Binn. 148); *Sands v. Smith*, (3 Watts & Serg. 9).

Hood and Meredith, contra, referred to *Cruise's Dig. ch. 1, sec. 1, 6*; *Walton v. West*, (4 Whart. 221); *Ingersoll v. Sergeant*, (1 Whart. 347); *Reed v. Reed*, (1 Watts & Serg. 239); *Brown v. Johnson*, (4 Rawle 146); *Gordon v. Correy*, (5 Binn. 552); *Torr's Estate*, (2 Rawle 252); 1 Miles 291; *Buck v. Fisher*, (4 Whart. 516).

PER CURIAM.—A design to impair the authority of *Bantleon v. Smith* by what was said in *Sands v. Smith*, was studiously disclaimed. The principle of that case was treated as a rule of property not to be disturbed in cases of the same stamp; but it was thought not to be so conclusively founded in legal reason as to be a rule for cases in which the premises were not debtor for the rent. As there was no condition of re-entry in *Sands v. Smith*, the landlord's immediate recourse was to the person or chattels of the tenant, as in the case of a tenancy for years. Here there is a clause of re-entry, as there was in *Bantleon v. Smith*; and as the

[Pancoast's Appeal.]

tenant's estate was immediately liable to make satisfaction, what matters it whether it has been sold on a judgment recovered by a stranger, or on a judgment recovered by the landlord on the covenant in his ground-rent deed? The landlord had a lien on the estate of the tenant, and he may have recourse to its substitute brought into court, however the conversion into money may have been effected.

Decree affirmed

Commonwealth *against* Zephon.

The 1st section of the Act of 3d February 1843, transferring the jurisdiction of the criminal court to the court of Oyer and Terminer, General Jail Delivery and Court of Quarter Sessions for the city and county of Philadelphia, is not unconstitutional.

ERROR to the Court of Oyer and Terminer and General Jail Delivery and the Court of Quarter Sessions of the Peace in and for the city and county of *Philadelphia*, in which the defendant, Zephon, was indicted and convicted of murder in the first degree. The following entries appeared on the docket:

Now, February 14th, 1844, the court order and direct that the Honourable James Campbell, Associate Judge of said court, shall hold the Court of Oyer and Terminer and General Jail Delivery and Quarter Sessions of the Peace of the city and county of Philadelphia, for the trial of indictment and all other cases for the ensuing Term of March 1844.

March Term 1844.

Monday, March 4th, 1844. The court met. Present, Judges King, Jones, Campbell and Parsons.

Commonwealth of Pennsylvania }
v.
Samuel Zephon, *alias* Brainard. }

No. 12, March Term 1844. Sur charge of murder of Cuffee Todd. March 14th, 1844, true bill. March 25th, 1844, the defendant being arraigned pleads not guilty, &c. Attorney-General similiter et issue.

Now, March 30th, 1844, the court order and direct that the Honourable Anson V. Parsons, Associate Judge of said court, shall hold the Court of Oyer and Terminer and General Jail Delivery and Quarter Sessions of the Peace of the city and county of Philadelphia, for the trial of indictment and all other cases for the ensuing Term of May 1844.

[Commonwealth v. Zephon.]

May Term 1844.

Monday, May 6th, 1844. The court met. Present, Judges King, Jones, Campbell and Parsons.

Commonwealth of Pennsylvania }
v. }
Samuel Zephon, *alias* Brainard. }

Sur charge of murder. May 10th, 1844, defendant convicted of murder of first degree. June 8th, 1844, defendant sentenced.

This case was argued by *J. A. Phillips* and *Barton* for the prisoner, and by *F. Wharton* and *Kane* for the Commonwealth, and now re-argued by *J. A. Phillips* for the prisoner and *Kane* for the Commonwealth.

For the prisoner were cited *Constit., Art. V. sec. 1, 5; Act 3d February 1843; Act 14th April 1834, sec. 58, Purd. (1841) 229; Act 14th April 1834, sec. 110, Purd. (1841) 615; Kline's Case, (2 Penn. Law Jour. 324); Act 4th April 1843, sec. 5; Flanagan's Case, (3 Law Jour. 477).*

For the Commonwealth were cited, 9 *Serg. & Rawle* 269; 1 *Binn.* 424; *Act 19th March 1838; Act 25th February 1840; Purd. (1841) 266; Act 16th March 1819, sec. 14; 3 Hawk. 31; 2 Sm. Laws 468; 2 Bac. Ab. 472; 6 Sm. Laws 121; 7 Ibid. 228; 3 Binn. 577; 7 Serg. & Rawle 427; 9 Ibid. 296; 12 Ibid. 340; 4 Binn. 117.*

The opinion of the Court was delivered by

BURNSIDE, J.—Prior to the adoption of the Constitution of 1790 Pennsylvania had no law Judges in her Courts of Common Pleas or other inferior courts, except for some time in the city and county of Philadelphia. Nor were all her Judges of the Supreme Court, at times, gentlemen of the legal profession. In the convention of 1790 there were lawyers of high professional attainments, as well as eminent statesmen. A change and a reform of the Judiciary was a primary object with that convention. To have a law Judge to preside in the courts of each county was deemed of the first importance. Prior to 1790, when a Court of Oyer and Terminer and General Jail Delivery was held in the interior, a Judge of the Supreme Court had to order it. They were obliged to travel in every direction for that purpose. They had also to hold Courts of Nisi Prius in every county then organized for judicial purposes in the State. The Courts of Common Pleas, Quarter Sessions, and Orphans' Courts were held by the justices of the peace.

The 5th article of the Constitution of 1790 relates to the judiciary. The 1st section provides that the judicial power of this Commonwealth shall be vested in a Supreme Court, in Courts of

[Commonwealth v. Zephon.]

Oyer and Terminer and General Jail Delivery, in a Court of Common Pleas, Orphans' Court, Register's Court, and a Court of Quarter Sessions of the Peace for each county, in justices of the peace *and in such other courts as the Legislature may from time to time establish*. The 4th section declares that until it shall be otherwise directed by law, the several Courts of Common Pleas shall be established in the following manner: The Governor shall appoint in each county not fewer than *three* nor more than *four* Judges, who during their continuance in office shall reside in such county. The State shall be divided by law into circuits, *none* of which shall include more than *six* nor fewer than *three* counties. A President shall be appointed of the courts in each circuit, who during his continuance in office shall reside therein. The President and Judges, any two of whom shall be a quorum, shall compose the respective Courts of Common Pleas.

By the 5th section, the Judges of the Court of Common Pleas in each county shall by virtue of their offices be justices of Oyer and Terminer and General Jail Delivery for the trial of capital and other offenders therein; any two of the said Judges, *the President being one*, shall be a quorum; but they shall not hold a Court of Oyer and Terminer or General Jail Delivery in any county when the Judges of the Supreme Court or any of them shall be sitting in the same county. Although this Constitution declared that there should be no less than *three* Judges commissioned in each county, yet the Legislature reduced the number to *two*. It declared that there should not be less than *three* counties in each circuit; but the Legislature, as population increased and necessity required it, in some instances made one county a circuit, in others *two*, besides creating other courts, and this under the words "until otherwise established by law." No one questioned the power of the Legislature to make these changes under the Constitution of 1790, when the public interest required it. Let us see whether the power of the Legislature is not equally extensive under the Constitution of 1838-9.

The 1st section of the 5th article provides—The judicial power of this Commonwealth shall be vested in a Supreme Court, in Courts of Oyer and Terminer and General Jail Delivery, in a Court of Common Pleas, Orphans' Court, Register's Court, and a Court of Quarter Sessions of the Peace, for each county; in justices of the peace, *and in such other courts as the Legislature may from time to time establish*.

The 2d section declares the Judges of the Supreme Court, the President Judges of the several Courts of Common Pleas and of such other courts of record as are or shall be established by law, and all the other *Judges learned in the law*, shall hold their offices for ten years, if they shall so long behave themselves well; and the 3d section provides, "*until otherwise directed by law, the Courts of Common Pleas shall continue as at present established*." By the 5th

[Commonwealth v. Zephon.]

section, the Judges of the Court of Common Pleas in each county shall by virtue of their offices be justices of Oyer and Terminer and General Jail Delivery for the trial of capital and other offenders therein; any *two* of the said *Judges, the President being one, shall be a quorum*. But they shall not hold a Court of Oyer and Terminer or Jail Delivery in any county when the Judges of the Supreme Court or any of them shall be sitting in the same county. The amended Constitution gives the Legislature power from time to time to establish other courts, and it expressly provides that until otherwise directed by law, the Courts of Common Pleas shall continue as at present established.

The power of the Legislature is clear, that they may change, alter and establish the Court of Common Pleas as they may deem wise and expedient. The Constitution of 1838-9 does not abridge this power. This Court is to remain as it was when the Constitution was adopted, *until otherwise directed by law*. It is manifest that a sacred principle of both Constitutions was, that when the Judges of the Court of Common Pleas, by virtue of their offices as Judges of the Common Pleas, held a Court of Oyer and Terminer, one of them, to constitute a quorum, should be learned in the law. The object was to secure to a prisoner and the public, in all cases capital before the amelioration of the penal code, the advantages of a presiding Judge learned in the law.

In the winter of 1843 the Legislature deemed it necessary to reorganize the Criminal Courts of this city and county. By the Act of 3d February 1843 they abolished the then Criminal Court, which had been but recently established, a court not mentioned in the Constitution. The 1st section of the Act transferred all the powers, jurisdiction and authority given to the Criminal Court, and vested them in the Court of Oyer and Terminer, General Jail Delivery, and Court of Quarter Sessions of the Peace in and for the city and county of Philadelphia. When the amended Constitution was adopted, the three Judges of the Common Pleas in the city and county were Judges learned in the law, and as such recognised in the 2d section of the 5th article of the Constitution to hold their commissions for ten years. By the 2d section of the Act of 1843 the Governor was directed to nominate and the senate to confirm a fourth Judge for this court learned in the law to serve for the term of ten years. This was done. The 3d section provided that the Court of Oyer and Terminer and General Jail Delivery and Quarter Sessions of the Peace for the city and county of Philadelphia should hold six terms or sessions in the course of each year. The 4th section authorised any one of these four Judges, all of whom were learned in the law, to have *full power* and authority to hold said court for the trial of all indictments except in cases of homicide, when there shall be two of the said Judges. Each of the Judges was authorised to hold separate sessions at the same time for the trial of criminal cases over which the court

[Commonwealth v. Zephon.]

had jurisdiction. And the 5th section directed this court at least 10 days before the term or at the commencement of the year to decide which of the Judges should hold the Courts of Oyer and Terminer and General Jail Delivery and Quarter Sessions of the Peace for the trial of indictments and other cases of which one Judge has jurisdiction by this Act; and in all cases in which by the same two Judges are required to hold the Oyer and Terminer, the designated Judge holding the court shall select one of the others to hold the court with him, and the said Judge, who it has been decided shall hold the court, shall preside during the session. Motions for a new trial and arrest of judgment are to be heard before the whole court, if either party request it.

The unfortunate prisoner Samuel Zephon was tried before Judge Campbell, assisted by Judge Parsons, at March Term 1844, for the crime of murder, convicted and sentenced to be hanged on the 8th June 1844; and the error assigned is that the court had no jurisdiction; that the Act of 1843 is unconstitutional and void, and that no Court of Oyer and Terminer could be held for the trial of capital offenders, without the President (Judge King) being a member of the court. In the case of *The Commonwealth v. Clark*, the Supreme Court declared that "a Constitution is not to receive a technical construction like a common law instrument or a statute. It is to be interpreted so as to carry out the great principles of the government, not to defeat them." It must be a clear and unequivocal case to induce the court to pronounce the Act of the Legislature unconstitutional. *Commonwealth v. Duquet*, (2 Yeates 493); *Eakin v. Raub*, (12 Serg. & Rawle 320).

The Constitution provides that until otherwise directed by law the courts of Common Pleas shall continue as at present, and they have express power to create such other courts as they may from time to time deem expedient. By the Act of 1843 they created a Court of Oyer and Terminer. They prescribed the necessary number for the trial of indictments in that court in case of homicide, and they preserved the great object of the Constitution, a law Judge to preside and another law Judge to assist him. The Constitution of 1776 declared that "*Trials by jury shall remain as heretofore.*" So did the Constitution of 1790; yet the Legislature have been extending the jurisdiction of Justices of the Peace until recently in civil cases. They passed a compulsory arbitration law. It is true, they gave an appeal to the Common Pleas, but it is under restrictions as to bail and the payment of costs. The Legislature can add and change jurisdiction, and I can see no good reason, if they could make a Court of Oyer and Terminer, why they may not add jurisdiction to the Judges of the Common Pleas for that purpose, preserving the safety of the citizen in having law Judges to preside, which is according to the spirit and object of the Constitution.

Judgment affirmed

Lowber and Wilmer's Appeal. Wilson, Jones and Co.'s Appeal.

In the distribution of moneys raised by a sheriff's sale of goods, no other person than the defendant in the execution or his legal representatives will be permitted to object that a judgment on which another execution has been levied on the same goods, was erroneously entered, or the execution erroneously issued thereon.

Nor will the defendant or his representatives be permitted to do so in a collateral action or other manner than by suing out a writ of error or by making a direct application to the court in which the judgment is entered or from which the execution has been issued, to vacate it or set it aside.

APPEAL from the decree of the District Court for the city and county of *Philadelphia*, distributing moneys arising from the sheriff's sale of personal property under several executions.

The property levied on and sold on the 24th October 1839, consisted of machinery, &c., formerly the property of Robert W. Richardson & Co., a firm composed of Robert W. Richardson, Samuel R. Wood and Richard Blundin, and used by them in their factory at Manayunk, all the partners being equally interested therein. On the 20th May 1839 the partnership was dissolved by these partners by an agreement in writing under seal, and Richard Blundin and Samuel R. Wood, in consideration of the payment of the debts and liabilities of the firm by Robert W. Richardson, assigned all the estate, right, title, interest, trust, property, claim and demand whatsoever of Blundin and Wood in and to the estate and effects real and personal of the partnership to Richardson, upon condition he should pay the debts of the firm, and in case he should find it necessary to make an assignment, then he was authorized and empowered to make such preferences in payment of the partnership creditors as he might deem just and equitable, with power to use the firm name in legal proceedings, and a covenant by Richardson to pay the firm debts. This was recorded and published in the papers.

Prior to this time there were three judgments on which executions were subsequently issued and the respective plaintiffs claimed the funds. Wilson, Jones & Co. obtained judgment against Robert W. Richardson and Samuel R. Wood for a debt of Robert W. Richardson & Co. incurred prior to 20th May 1839, Blundin's name being omitted in the suit. The Pennsylvania Company for Insurance on Lives also had a judgment before the partnership was formed, against Richardson alone, on a warrant of attorney accompanying a mortgage executed by him. Lowber and Wilmer

[Lowber and Wilmer's Appeal—Wilson, Jones & Co.'s Appeal.]

obtained from Robert W. Richardson, Samuel R. Wood and Richard Blundin on the 13th October 1838, a confession of judgment signed by the three, for \$3725.87; the plaintiffs at the same time by another writing reciting the confession and that the defendants had that day executed 17 promissory notes payable in various sums at intervals of 60 days, commencing on the 10th October and extending to the 10th June 1841, agreed that the said judgment should not be entered up or recorded unless there should be a failure of payment of either of said notes at the time or times they respectively fell due; which happening, then the said judgment was to be entered up and execution issue thereon.

On the 15th August 1839 Lowber and Wilmer issued their execution and delivered it to the sheriff, whose return was as follows: "Levied on and sold personal property for \$11,016.91." On the 20th August 1839 the Pennsylvania Company for Insurance on Lives issued their execution and delivered it to the sheriff the same day, real debt \$12,000. The sheriff returned as follows: "August 20th, 1839. Levied on the right, title and interest of defendant in the goods and chattels previously levied on by me by virtue of a writ of *feri facias* to me directed out of this honourable court, of September Term 1839, No. 96, in which William T. Lowber and others are plaintiffs, and Robert W. Richardson, Samuel R. Wood and Richard Blundin, trading under the firm of Robert W. Richardson & Co. are defendants, and by virtue of said last-mentioned writ of *feri facias*, and sundry other writs of *feri facias* to me directed, sold the said goods and chattels for \$11,016.91, as in my return to said writ of *feri facias* to September Term 1839, No. 96, is set forth." Wilson, Jones & Co. issued their execution and delivered it to the sheriff on the 20th September 1839, real debt \$1225.81, and the sheriff made the same return as the last, *mutatis mutandis*.

The other plaintiffs denied the right of Lowber & Wilmer, on the ground that their execution had issued in violation of their agreement, and Samuel R. Wood testified that the two first notes were taken up when due, but previous to the third becoming due Lowber & Wilmer made an agreement with him that the third and fourth should be withdrawn, and in lieu of them two notes should be given to come behind the last notes they held. Richardson drew these notes in blank for Lowber & Wilmer to fill up two days before the third came due, and the witness left them with Wilmer, it being distinctly understood the original agreement was to stand. Wilson, Jones & Co. contended that the property being the joint property of Robert W. Richardson & Co., and Lowber & Wilmer's claim being thus removed, they were first entitled to the proceeds. The Pennsylvania Company insisted that they were entitled because the property had previously been transferred to Richardson alone, and their execution being against him gave them the preference. There was a report of an auditor in the

[Lowber and Wilmer's Appeal—Wilson, Jones & Co.'s Appeal.]

court below, and also an issue tried on the subject of the agreement between Wood and Wilmer, which was afterwards deemed immaterial.

The court below decreed the money in dispute to be paid to the Pennsylvania Company for Insurance on Lives.

C. Fallon, for the appellants, cited *Stewart v. Stocker*, (13 Serg. & Rawle 204); *Lewis v. Smith*, (2 Ibid. 156); *Hauer's Appeal*, (5 Watts & Serg. 474); *Stewart v. Stocker*, (1 Watts 139); *Dyott's Estate*, (2 Watts & Serg. 557); *Meason's Estate*, (4 Watts 341); 2 Bac. Ab. 279; *Story Part*. 511, 527; 10 Vez. 347; *Ross Vend.* 60; *Gow Part.* 294; 22 Wend. 664; *Bell v. Newman*, (5 Serg. & Rawle 78); 2 V. & B. 172; 11 Vez. 3; 6 Vez. 119; 6 Mass. 242; 6 Pick. 348; 16 John. 106; *Taylor v. Henderson*, (17 Serg. & Rawle 456); *Carter v. Connell*, (1 Whart. 398); *Lewis v. Williams*, (6 Whart. 264); *Deckert v. Filbert*, (3 Watts & Serg. 454).

Williams, contra, referred to 1 Madd. Ch. 583; *Campbell v. Shrum*, (3 Watts 63); *Meanor v. M'Kowan*, (4 Watts & Serg. 302); *Doner v. Stauffer*, (1 P. R. 199); 5 John. Ch. 320; *Hickman v. Caldwell*, (4 Rawle 380); *Corlies v. Stanbridge*, (5 Ibid. 290); *Campbell v. Kent*, (3 P. R. 72); *Castle v. Reynolds*, (10 Watts 51); *Azcarati v. Fitzsimmons*, (3 Wash. C. C. 134); *Cary Part.* 166, 201; *Collyer Part.* 514.

The opinion of the Court was delivered by

KENNEDY, J.—It is unnecessary to notice all the different points raised and discussed in this case, as there is one which, when rightly decided, will dispose of the whole of it. Because it is clear, if it was competent only for the defendants named in the execution in favour of Lowber & Wilmer and for no others to object to the validity of it, that the decree of the court below must be reversed and a decree passed in favour of Lowber & Wilmer, who sued out and placed their execution first in the hands of the sheriff. The execution issued in favour of these gentlemen was founded upon a judgment entered in their favour in a court of competent jurisdiction, apparently regular as it would seem from the record, and such as justified the issuing of the execution. In *Stewart v. Stocker*, (13 Serg. & Rawle 199), it was held that an execution issued before the stay of execution had expired was irregular but not void, and that its validity could not be called in question by another execution creditor, who sued the sheriff for the proceeds. That case was substantially pretty much like the present. There the judgment upon which the execution was issued, was given, as the judgment was here, to secure the payment of several notes given by the defendants in the judgment to the plaintiffs in liquidation of a previous debt owing by them and made payable within limited

[Lowber and Wilmer's Appeal—Wilson, Jones & Co.'s Appeal.]

periods from their respective dates; and the execution was sued out before a failure on the part of the defendants to pay any of their notes at maturity had taken place; yet this court held the execution good against a subsequent execution sued out regularly by Mr Stocker against the same defendants and placed in the hands of the sheriff to be executed, and that it was not competent for Mr Stocker or any other execution creditor to object to or take advantage of the irregularity that existed in issuing the first execution. The existence and justness of the debt was not questioned there, nor has it been here; so that no complaint was made against the issuing of the execution on the ground of fraud, a thing that undoubtedly any execution creditor would have a right to make, and the court would be bound to hear him. But where the objection extends no further than that the judgment upon which the execution has been issued has been erroneously entered or obtained, or the execution erroneously issued thereon, no other person than the defendant therein or his legal representatives, will be permitted to make it. Nor will they be permitted to do so in a collateral action or other manner than by suing out a writ of error or by making a direct application to the court in which the judgment is entered or from which the execution has been issued, to vacate or set the same aside. This course is settled by a train of authority in this State which cannot be contested or resisted. Besides the case of *Stewart v. Stocker* already cited, to show that it is so, I will refer to 2 *Serg. & Rawle* 155-6; 1 *Watts* 139; 4 *Watts* 341; 2 *Watts & Serg.* 557; 5 *Ibid.* 460, 474. From which it will likewise appear that a contrary principle laid down by the late Mr Justice WASHINGTON in *Azcarati v. Fitzsimmons*, (3 *Wash. C. C.* 134), has been most clearly and decidedly overruled.

The decree of the court below reversing the report of the auditor in favour of Lowber and Wilmer is therefore reversed; and it is further decreed by this court that the amount of the debt and interest appearing to be due to them at the time of the sale made of the goods by the sheriff, be paid to them out of the moneys in the court below, after deducting all costs which have accrued, including the costs of this appeal; and that the residue of the money so made and remaining there be paid to the Pennsylvania Company for Insurance on Lives, in satisfaction *pro tanto* of their debt.

Decree reversed.

Unangst *against* Kraemer.

A suit after the widow's death to recover the principal sum of her dower charged on land sold by the administrator under the order of the Orphans' Court, one-third of the purchase money to be paid on the confirmation of the sale, one-third in one year thereafter with interest, and one-third to remain charged on the premises for the use of the widow, may be brought either by the administrator to whom the bond was given or the heir entitled.

The suit ought to be brought against the purchaser at the Orphans' Court sale, who gave his bond to the administrator, or one who purchased of him by a later conveyance of the land chargeable with the money and gave a similar bond, with notice to the terre-tenant in both cases.

Such terre-tenant is not liable unless he took upon him the payment, and then he is personally bound.

This case distinguished from *Pidcock v. Bye*.

The defendant in such suit, after the two first instalments have been paid, cannot object to irregularity in the proceedings of the Orphans' Court in ordering the sale.

This court will not reverse for an error which does no injury to the party complaining.

The court may instruct the jury to disregard evidence which is afterwards discovered to have been improperly admitted. If it appear that the jury have not followed this instruction, the proper course is a motion for a new trial.

It is evidence to rebut the presumption of payment in such case arising from the lapse of twenty years since the widow's death, that the bonds were not given up and some payments were made, though it does not distinctly appear they were on that account.

ERROR to the Common Pleas of *Northampton* county.

This was an action of debt brought on the 22d July 1842, by Henry Kraemer, administrator of Henry Kraemer, deceased, against Joseph Unangst, to recover \$390.76, the principal sum of the dower of the widow of the plaintiff's intestate. The declaration stated that the plaintiff's intestate died about the 1st February 1795, seised of a tract of land, &c., which was afterwards sold under an order of the Orphans' Court, subject to a charge of one-third of the purchase money for the use of the widow, and that a deed for it, dated 15th July 1815, was given by Henry Kraemer, the administrator, to John King, who on 26th August 1815 conveyed to Nicholas Kraemer, who on the 3d April 1816 conveyed to Mathias Gress, who conveyed to Joseph Unangst, September 9, 1816. That Unangst and those from whom he claims took the premises subject to the payment of \$390.76 to said administrator on the death of the widow, and also to the sum of \$23.54 payable to the widow annually during her life. That when John King received his deed, to wit: 15th July 1815, he made his bond in the penal sum of \$781.50, conditioned for payment of \$390.76 at and immediately after the decease of the widow, together with

[Unangst v. Kraemer.]

the interest on the same, to the said Henry Kraemer, administrator. That when Nicholas Kraemer bought: viz. August 26th 1815, he made his bond in the same sums, and payable in the same way, and which said last bond was transferred to the administrator in lieu of the bond received from King, and of all which Unangst and Gress had notice. That the widow died on or about August 1st 1827, when the said sum of \$390.76 became payable by Unangst.

The second count stated that the defendant, on the 1st July 1842, was also indebted to said administrator in the sum of \$781.50, for interest upon and for forbearance of large sums lent and advanced to him by the said administrator, and that none of these monies had been paid, although often requested, etc., and made profert of letters of administration.

The defendant pleaded payment with leave, &c., and gave the following notice of special matter; "That the defendant will offer evidence to prove that Henry Kraemer, the elder, was not seised in his demesne as of fee in the premises mentioned in the plaintiff's declaration, and that the said intestate in fact had no lawful title thereto. That he does not claim the premises mentioned and described in the plaintiff's declaration, by, from or through the said intestate, but by a title altogether independent of the said Henry Kraemer and derived from the proprietaries of Pennsylvania or their legal representatives."

From the record evidence given by the plaintiff, it appeared that Henry Kraemer, the intestate, died in 1795, seised of a tract of land in Bethlehem township, Northampton county, subject to the payment of the purchase money due to the proprietaries, being part of the manor of Fermor. He left a widow and seven children. On petition of one of the heirs, the Orphans' Court on the 21st January 1814 awarded an inquest, which on the 22d April following was returned and confirmed, finding that the premises could not be divided, and appraising the same at \$1133.20. On the 19th August following, a rule was granted on the heirs to accept or refuse, &c., returnable at the next term. On the 21st January 1815 the rule, not having yet been served, was enlarged to the 4th February following, when proof of service of the rule personally on all the heirs being made by the petitioner, the court awarded an order of sale to take place on the 11th March following, one-third of the purchase money to be paid at the confirmation of sale, one-third in one year thereafter with interest, and one-third (remainder) to remain charged on the premises for the use of the widow. On the 21st April following, the administrator reported that on the 11th March then past he had sold the premises to John King for \$1172.29 on the terms and conditions prescribed by the court. This sale was confirmed same day.

The plaintiff produced a deed for the premises from Nicholas Kraemer to Mathias Gress, dated April 3d 1816. Also a deed

[Unangst v. Kraemer.]

dated September 9th 1816 from Mathias Gress to Joseph Unangst, endorsed on the deed from Kraemer to Gress, subject to the payment of the original purchase money to the proprietaries, and reciting that Henry Kraemer had conveyed to John King, who by deed poll, dated August 26th 1815, had conveyed to Nicholas Kraemer.

1. The plaintiff offered in evidence a bond, dated August 26th 1815, from Nicholas Kraemer to John King, for the sum of \$390.76, payable at the death of the widow of Henry Kraemer, deceased, with interest payable annually; after having proved the handwriting of Mathias Gress as a witness to the bond, and that Gress was dead.

The defendant objected to this offer, but the court admitted the bond and sealed an exception.

The plaintiff proved that the intestate's widow died on the 22d July 1822.

The plaintiff called a witness, who testified that he knew that Kraemer owned the tract in question, and that Unangst bought it, as much as he knew, of Mathias Gress. Witness hauled 1000 rails, and Unangst said he was hauling these rails, and he did not know if it was his.

2. The witness was then offered to prove that Unangst said there was a dower in the land, to which the defendant objected, but the court overruled the objection and the defendant excepted.

The witness then stated that this conversation took place at the time Gress owned the land — before Unangst owned it. The evidence was afterwards excluded by the court.

The plaintiff then called Solomon Kraemer, who testified as follows:—“About the 16th June 1842 I went with my father (the plaintiff) to Joseph Unangst. Unangst came to the door and they went into the house, and after some time came out again. Unangst and my father came down to the fence and there they parted. My father asked Unangst ‘about the middle of August?’ Unangst answered ‘yes.’ I called on Unangst about the 29th June the same year, at my father’s request. I asked him, ‘did you promise my father to come to settle about the middle of August?’ He answered ‘yes.’ I told him that was a bad time, it would then pass over the 20 years. I asked him, ‘will you pay a small sum on the dowry and acknowledge the debt, and then make your own time to settle?’ He said, ‘if you and your father won’t trust me.’ I said, ‘we do trust you.’ He said, ‘I don’t know any thing of 20 years; I thought a dowry was always good.’ I said ‘I thought so too, but judgments run out in 20 years; I had been to Easton to inquire about Kreidler’s debt and also about this.’ He asked me, ‘one share is coming to your father?’ I replied, ‘my father holds the bond, is administrator, and the bond, it must be paid to him.’ He said he paid Nicholas and had taken a release from him. I asked him, ‘young Nicholas?’ He replied, ‘Con-

[Unangst v. Kraemer.]

rad's son.' I said 'he had no right, it must be paid to my father. We parted. Then I asked him, 'about the middle of August you will come to settle?' He replied 'yes, perhaps sooner, the first of August.' We parted then."

3 The plaintiff then offered to prove by a witness that the defendant paid this money to young Nicholas Kraemer, son of Conrad. The defendant objected, but the court overruled the objection and sealed an exception.

The witness then stated that three or four years previously Unangst paid Nicholas Kraemer, the son of Conrad, in the neighbourhood of \$40; that Nicholas took it, signed and gave a release, and asked if it was right, and Unangst said yes. Nothing was said what it was for, when they were together.

4. The defendant then called a witness, who testified that the knowledge he had of the death of the intestate's widow was from a tomb-board erected. The defendant offered to prove by him that on her tomb-board she was stated to have died on the 20th July 1822; that the board had rotted away. The plaintiff objected, and the court rejected the evidence and sealed an exception.

5. The defendant then offered to prove that at the last trial of this cause the plaintiff alleged and proved that the intestate's widow died on the 20th July 1822. The plaintiff objected, the court sustained the objection, and the defendant excepted.

A witness for defendant testified as follows:—"Henry Kraemer was examined in a suit by me against Regina Kraemer in 1819. I claimed as purchaser at a sheriff's sale as the property of Nicholas Kraemer; it was a 2½ acre lot in Hecktown where the widow died. He testified that Nicholas Kraemer gave Regina that lot for keeping the old lady, the widow of Henry Kraemer, deceased." Cross-examined, "I did, as administrator of Elizabeth Kraemer, bring suit to recover the arrears of dower."

6. The defendant then offered in evidence a deed dated 19th January 1818 from the proprietaries to Joseph Unangst for the land in question. The plaintiff objected, the court sustained his objection, and the defendant excepted.

The court charged the jury as follows:—"The Orphans' Court sale transferred the decedent's right in the land to King: for this right he agreed to pay \$1172.29. By the order of the court the one-third of this sum was to remain charged upon the land until the widow's death. She died the 21st or 22d July 1822. The widow was entitled to the interest on this sum during her life. This sum was a lien on the land in the hands of King. It was made a lien by law. This lien would continue against his grantees until it was paid by the parties or discharged either by them or by operation of law. Has this sum been paid? There is no proof of actual payment. Has it been discharged by lapse of time? Twenty years delay in this case, if unaccounted for, would entitle the defendant to a verdict. This is a rule of law established as

[Unangst v. Kraemer.]

being necessary to the peace of society and the security of individuals. No one is permitted to let his claim rest until it has become obscured with uncertainty. It is then too late for fair inquiry. Justice cannot then be done, parties may be dead, witnesses may be gone or dead, memory may fail or prove treacherous, papers may be lost, vouchers may be given up or destroyed. If the 20 years have not elapsed, it is incumbent on the defendant to make out his defence by proof; then something is requisite on his part with the length of time to make out his case. If the 20 years have elapsed, this would be a good defence, and then it throws the proof necessary to remove it upon the plaintiff. Here the defendant lived on the land; he was at all times able to pay this debt. The land was always good for it. The plaintiff lived near him; why then all this delay if the debt was justly due? The bond of King has not been shown; where is it? It may have been paid; if so, how and when and by whom and under what circumstances, might be of importance if it had been shown. Has a demand been made within the 20 years? If it has, this might satisfy you. An acknowledgment of the debt no doubt would. What then has been proved by the witness Kraemer? Does it amount to a demand of this debt? This is a fact for you to decide. If it does, it would rebut the presumption of payment. Does this witness prove an acknowledgment of the debt? If he does, this would rebut the presumption of payment.

The defendants have requested us to charge you :

1. This suit is brought wrong. The proper parties are not brought into court. *Answer.* The suit is correctly brought. The proper parties are brought into court. The sale was made by the administrator. The promise to pay was made to him. The suit was therefore properly brought in his name.

2. There is no evidence that Joseph Unangst ever took upon himself the payment of the sum claimed in this suit. *Answer.* This point in point of fact is true. The money was charged upon the land. It is the land that stands charged with the debt. This suit is to recover this money out of the land. The defendant is not personally a debtor, nor will this suit make him personally liable. The suit is therefore rightly brought against him; and if the debt has not been discharged by payments, presumed from the circumstances or lapse of time or both or by actual payment, the plaintiff is entitled to a verdict, which would only charge the land in the defendant's hands.

3. The Orphans' Court was not warranted by law to grant the order of sale, because the rule on the heirs was not served for 20 days, and because there was no security given by the administrator. *Answer.* Neither reason will avail the defendant. Those objections cannot now defeat the payment of the money. In these things he has no concern. He has held the land for more than 20

[Unangst v. Kraemer.]

years. We do not give our assent to this point. If it be law, then defendant would hold the land, and it not paid for.

4. That if the debt were due, Kenry Kraemer cannot recover in his capacity of administrator; it would be due to the heirs and legal representatives of Henry Kraemer the elder deceased. *Answer.* We refuse to charge as requested on this point.

5. That if the widow even died on the 22d July 1822 and this suit was brought on the 22d July 1842, the legal presumption of payment would arise, unless repelled by evidence. *Answer.* The computation is to be made from the time the money became due. It might then have been demanded; it might have been demanded on the 22d July 1822, and therefore the 20 years would expire on the 21st July 1842. This would complete the legal presumption of payment and will entitle the defendant to a verdict, unless the presumption has been repelled by the evidence given on the part of the plaintiff. To this point therefore the court give their assent.

6. The sum claimed was not a lien on the land in the hands of Joseph Unangst. *Answer.* It was made a lien by the law and the order of the court. This lien adhered to the land into whomsoever it passed by grant from the purchaser at the sale, until paid or discharged by the parties or by operation of law.

The defendant and plaintiff objected to the charge.

The plaintiff requested the court to charge the jury:

1. By the pleadings in this case the defendant admits that he took the land subject to the charge of one-third of the sum of \$1172.29, and is confined to proof of payment made subsequent to his purchase from Gress. *Answer.* He may show it is paid in fact or discharged by lapse of time. The rest agreed to.

2. That if the 20 years had not elapsed when this suit was brought, and if one day were wanting to complete the time, the jury have no right to presume payment without some evidence on the part of defendant, tending to prove payment. *Answer.* This is correct.

3. That this suit having been brought within 20 years, and defendant having given no evidence of payment, the jury are bound to presume the debt unpaid. *Answer.* This is not assented to.

4. If the 20 years have expired before suit brought, the evidence of Solomon Kraemer (if believed by the jury) is sufficient to rebut the presumption of payment. *Answer.* This must be determined from this evidence, with all other circumstances in the case.

Errors assigned:

1. The court erred in admitting the evidence mentioned in the 1st, 2d and 3d bills of exception.

2. In rejecting the evidence mentioned in the 4th, 5th and 6th bills of exception.

[Unangst v. Kraemer.]

3. In their answers to the defendant's 1st, 2d, 3d, 4th and 6th points.

4. In their answers to the plaintiff's 1st and 4th points.

Ihrig and *J. M. Porter*, for the plaintiff in error.

1st bill. The bond offered in evidence was not given under or in pursuance of any order of the Orphans' Court by the purchaser, but by another person substituted without order of the court.

2. This was confessedly improper evidence, yet it was admitted by the court. Their exclusion of it afterwards could not cure the error, as it was not in the power of the court by so doing to efface the impression made by it on the minds of the jury. *Nash v. Gilkeson*, (5 *Serg. & Rawle* 352).

3. This evidence of money paid was irrelevant until it was first shown the alleged payment was made on account of the dower.

4, 5. The evidence offered by us of the knowledge of the death of the widow, obtained from the tomb-board, as well as the plaintiff's assertion on a former trial, was admissible. The proof of death is like that of pedigree, and the dates of births and deaths are proved in the same manner as pedigree is. *Douglas's Lessee v. Sanderson*, (2 *Dall.* 118); 3 *Stark. Ev.* 1100, 1115; 2 *Cowp.* 594; 2 *Saund. Pl. & Ev.* 556; *Greenl. Ev.* 117.

The suit should have been against John King who was the original debtor, in conjunction with the terre-tenant. If not, then, at least, Nicholas Kraemer's representatives (if he was the purchaser) should be parties with Unangst, that they might have an opportunity to show that the money was paid by Nicholas Kraemer or released. The widow might have released. It is like a suit for a legacy charged on real estate, in which the executor must be sued as defendant, with notice to the terre-tenant, as has been decided in several instances, and is now the established law. *Brown v. Furer*, (4 *Serg. & Rawle* 213); *Brown v. Webb*, (1 *Watts* 414).

The Orphans' Court had no jurisdiction, because due notice had not been given according to the Act of 2d April 1804. The defendant is a stranger to the proceeding, and may question its regularity collaterally. *Hampton v. Speckenagle*, (9 *Serg. & Rawle* 220); *M'Donald v. Campbell*, (2 *lb.* 473); *Messinger v. Kintner*, (4 *Binn.* 97, 103); *Richter v. Fitzsimmons*, (4 *Watts* 251); *Snyder v. Markel*, (8 *lb.* 416); Act of 29th March 1832, *Purd.* (1841) 808.

The suit should have been brought by the heirs, or for the use of the heirs; the defendant could then have credit for the money paid to Nicholas. No charge on land is authorized by the Act of 1804 in case of sale to another purchaser; it can only be by order of the court.

Maxwell and *Reeder*, contra. The sale to Unangst was ex-
viii. — 21

[Unangst v. Kraemer.]

pressly subject to the payment of the original purchase money to the proprietaries, and the widow's third was a charge running with the land, into whosoever hands it should come. *Medlar v. Aulenbach*, (2 P. R. 358); *Pidcock v. Bye*, (3 Rawle 183); *McCarty v. Gordon*, (4 Whart. 327); *Hawk v. Geddis*, (16 Serg. & Rawle 28); *Geddis v. Hawk*, (1 Watts 280). The Act of 2d April 1804, Section 2d, authorizes a sale subject and liable to the payment of the purchase money according to the terms of sale. The suit is properly brought. *Long v. Long*, (1 Watts 269). The parties are right. The administrator sold and was entitled to receive the money, settle it in his accounts, and charge his commissions, and he did so. There is no reason why he should not collect the one-third as well as the rest. The law as to suing for legacies charged on land has no application. The reason in that case is, that the land is liable for the debts of the decedent, but there are no creditors here that can have a claim after the Orphans' Court sale. The plea is payment with leave, and notice is given of the special matter, viz: that the defendant held by an independent title. That plea admits the cause of action. *Lewis v. Morgan*, (11 Serg. & Rawle 234); *Gilinger v. Kulp*, (5 Watts & Serg. 264). His deed from the proprietaries, under which he asserts title in his notice, is the very title he bought subject to. That deed has never been put on record, and he is not to be considered as claiming under it without putting it on record. *Penrose v. Griffith*, (4 Binn. 231); *Plumer v. Robertson* (6 Ser. g. & Rawle 185). Every man is bound by the recorded evidence of his title. The validity of the decree of the Orphans' Court cannot be disputed in a suit on the bond. On a judicial sale there is no warranty of title. The decree is binding till reversed, except in cases of fraud and collusion. *MPherson v. Cunliff*, (11 Serg. & Rawle 431); *Groff v. Groff*, (14 Ib. 181); *Messinger v. Kintner*, (1 Binn. 103); *Thompson v. McGaw*, (2 Watts 164); *Bashore v. Whisler*, (3 Watts 490).

1st bill. The bond is evidence to show it unpaid.

2. Any error here committed was rectified by the subsequent act of the court excluding the evidence. *Bank of Pennsylvania v. Haldeman*, (1 P. R. 161).

3. This evidence goes to rebut the presumption by showing payment on account.

4, 5. The time of a person's death cannot be proved by such evidence. It was no better than hearsay, which cannot be received to establish an independent fact, of which there is always better evidence in existence. It is entirely different from a question of pedigree, which is governed by peculiar principles. *Norris's Peake's Evid.* 24; 7 *Cranch* 190; 1 *Wheat.* 128; 5 *Cow.* 320; 8 *East* 542; 2 *Stark. Ev.* 611.

They also cited *Green's Appeal*, (6 Watts & Serg. 328); and *Delany v. Robinson*, (2 Whart. 503); to show that the twenty

[Unangst v. Kraemer.]

years had not elapsed since the widow's death so as to create a legal presumption of payment.

The opinion of the Court was delivered by

ROGERS, J.—This is an action to recover \$390.76 charged on the defendant's land to secure the widow's dower, the interest to be paid to her during life, and the principal after her death. It is not brought against him personally, but in respect to the land of which he is the assignee and owner, and for this purpose it has been ruled in *Pidcock v. Bye*, debt or assumpsit, under certain circumstances, is an appropriate remedy, the court taking care to give such a judgment as shall affect the real estate only, charged with the payment.

The principal grounds of defence are that the suit is improperly brought, and that the money has been paid. Under these heads the objections taken at the trial may be properly arranged.

It is contended first that the suit must be brought in the name of the heirs to whom the money after the death of the widow belongs, and not, as here, by the administrator. The property was sold by the administrator under the order of the Orphans' Court, one-third of the purchase money to be paid at the consummation of sale, one-third in one year thereafter with interest, and one-third to remain charged on the premises. Now to whom is the purchase money to be paid but to the administrator, who is the agent of the court and directs the sale, who is bound to pay all the expenses attending it, and to distribute the money when received, after deducting an adequate compensation for his services? No difference in these respects is perceived between the first and second instalment and the residue remaining charged and unpaid until after the death of the widow. But as to the former, it will not admit of doubt he is entitled to receive it in his fiduciary character, and if so, to recover it by suit. There is a convenience in this form, as it supersedes the necessity of bringing as many suits as there are heirs. In judicial sales made by sheriffs, which is an analogous case, when the purchase money is withheld, a suit lies in the name of the sheriff against his vendee. Nor do I perceive any insuperable objection against an action either by the administrator or the heirs; for whether the one mode or the other be adopted, it is the same to the defendant, who will be protected in either case against another action.

But it is said that this suit should be brought against John King the purchaser, or the administrator of Nicholas Kraemer, with notice to Unangst as terre-tenant. The property was sold by the administrator to John King, who was returned to the Orphans' Court as the purchaser. John King by deed-poll conveys the property to Nicholas Kraemer, who is since dead, who conveyed to Mathias Gress, who conveyed to the present defendant. It is contended that John King or the administrator of Nicholas Kraemer

[Unangst v. Kraemer.]

should be made parties, as one or other of them is personally liable for the purchase money; and this position we think right; first, because they may show that the money was paid; and next, because in the absence of any proof of contract to the contrary, they are primarily liable to pay the amount due. The land is only chargeable in the hands of the terre-tenant after failure to obtain payment from the original purchaser; I mean as between him and the terre-tenant. On principle, therefore, the mode of bringing the action is by suit against the original debtor, whether it be John King or the administrator of Kraemer, with notice to the terre-tenant. If there was evidence that Unangst took upon himself the payment of the money, it would present a different case. The court in effect in the 1st and 2d points was asked to charge the jury that inasmuch as there was no proof that Joseph Unangst ever took upon himself the payment of the sum claimed, the suit cannot be sustained. The court acknowledged the fact to be as stated, but notwithstanding instructed the jury that the action will lay, inasmuch as the defendant was liable in respect to the land, but not personally. The point would seem to be ruled under a misapprehension of the case of *Pidcock v. Bye*, (3 Rawle 185), which was decided under peculiar circumstances, this case furnishing an exception rather than the general rule. In that case Bye was bound to pay the money. He was, as respects those under whom he claimed, the principal debtor. It was part of the purchase money of the estate, and unlike in those essential particulars the case of a legacy charged where the purchaser takes the land subject to the charge. As between Bye and those under whom he claimed, he became the debtor. Under the peculiar circumstances the court decided that assumpsit, which is an equitable action, will lie without an express promise to the plaintiff to pay; or in other words, that the law under such a statement of facts implies a promise to pay. The plaintiff's counsel, with some reason, complained that if there was error in the judgment, it was against the plaintiff, for it was entered so as to bind the land only, whereas the defendant was personally bound. It would be difficult to assign any reason why any other person should have been made a party. He had taken on himself the payment of the money, and at the same time was the owner and terre-tenant of the land. It is clearly distinguishable from *Brown v. Furer*, (4 Serg. & Rawle 216); *Gause v. Wiley*, (4 Serg. & Rawle 523); and *Nailer v. Stanley*, (10 Serg. & Rawle 450). In order, therefore, to succeed on another trial, it will be necessary for the plaintiff to show that the defendant, in respect to those under whom he claims, is the principal debtor, that the sum charged on the land to secure the widow's dower was part of the purchase money which he Unangst, agreed to give for the land.

Next as to the plea of payment. On the trial it became important to prove that twenty years had elapsed from the death of the

[Unangst v. Kraemer.]

widow until the commencement of the suit. The action commenced on the 22d July 1842, and a difficulty was made on the trial whether the widow died on the 20th or 22d July 1822, and on that point the evidence contained in the bills of exception, Nos. 4 and 5, was offered and rejected by the court. But the evidence was wholly immaterial, and so the court instructed the jury; for whether the widow died on the 20th or 22d, the twenty years had expired, which made it necessary for the plaintiff to rebut the presumption of payment arising from lapse of time. Now although we are of opinion that the evidence was improperly rejected, yet we never reverse for an error which we are convinced does no injury to the party complaining.

The evidence contained in the 1st and 3d bills was rightly admitted, because it was proof proper to be submitted to the jury to rebut the presumption of payment arising from lapse of time; for if the money was paid, why was not the bond given by Nicholas Kraemer to John King given up? and if discharged, why was payment made by the defendant to Nicholas Kraemer the younger, unless on the supposition that his share still remained due? It is no answer that it does not with certainty appear it was in payment of this debt; for the jury might and perhaps ought to infer this from the facts proved, as there was no evidence of any other dealings between them.

Under a mistaken supposition that the declaration was made after the defendant obtained his title, the court erroneously permitted the plaintiff to prove that the defendant said there was a dower in the land, but afterwards discovering that at the time he had no interest, they directed the evidence to be excluded. It is said that the court having committed an error in admitting the testimony, it cannot afterwards be corrected by directing the jury to disregard it. And such undoubtedly is the decision of the court in *Nash v. Gilkeson*, (5 *Serg. & Rawle* 352). The reason given is that the impression made by the evidence could not in the nature of things be entirely removed; at least, as is said, the court could not be judicially certain that it had not some effect on the mind of the jury, and the quantum of that effect is immaterial, provided it had any. With great respect, I am inclined to think that the rational presumption is that it had no effect whatever, as we are not at liberty to suppose the jury would disregard the direction of the court. And if it appeared that they did so, the remedy, and it is an effectual one, is in a motion for a new trial. The practical effect of the decision is that whenever the court has inadvertently made an erroneous decision they cannot correct it, and the only course which remains in justice to the party in whose favour the mistake is made, is forthwith to discharge the jury. This, it is plain, would seriously interfere with the course of business; for although the party might get a verdict, yet it would be of no avail, as his judgment must be inevitably reversed. Is it not therefore

[Unangst v. Kraemer.]

better to leave the correction to the court which tries the cause, who will grant a new trial, if there is the least reason to suppose it had an improper effect on the minds of the jury.

The objection to the regularity of the proceedings of the Orphans' Court in ordering the sale cannot avail the defendant. The court had jurisdiction over the subject-matter, and their decree is conclusive; it cannot be controverted in a collateral suit. Besides if the rule, as has been alleged, was not served on the heirs, the irregularity may be waived, as was the case here. All the purchase money has been paid except the money now in suit. It would therefore be incompetent to the heirs now to question the title. As they are estopped the defendant cannot be permitted to take this objection, as this would give him the land and the money too.

The deed from the proprietaries was properly excluded. It furnished no defence, as the defendant took his title expressly subject to the original purchase money. It is not a different but the same title, consummated by the proprietary deed.

Judgment reversed, and *venire de novo* awarded.

Merrick's Estate.

Where goods are sold by a factor here for a principal abroad, and the factor dies before payment, his authority is revoked, and a payment to his administrator by the purchaser is a mispayment.

If such administrator receives the money, it ought not to be involved in his accounts in the settlement of the intestate's estate, either as general or special assets, nor can the Orphans' Court or the Supreme Court on appeal make any order in favour of the principal on such settlement of accounts.

Money so received by the administrator is trust estate and can be followed in his hands or those of his representatives only by a bill in equity or perhaps here by an action for money had and received.

THE facts of this case are stated in the former report of it in 5 *Watts & Serg.* 9. In the Orphans' Court an auditor had been appointed upon the accounts of the administrators of Samuel Merrick, deceased, to make distribution among the creditors, who reported on the 13th March 1841 the sum of \$7209.24 principal and interest as payable by John Vaughan, administrator of said estate, to the assignees of William Walker. This report the Orphans' Court confirmed. On appeal to this court the fund was decided to be payable to the assignee of William Roberts, Jun. On the 4th January 1845, on motion of Mr Miles, this court permitted the name of George Young, assignee of William Roberts,

[Merrick's Estate.]

Jun., to be appended to the record as a party claiming the fund and granted two rules, one on all parties interested to show cause why Jacob Snyder, Jun., executor of John Vaughan deceased, who was the administrator of Samuel Merrick deceased, should not pay the amount awarded by the Orphans' Court to the said George Young. 2. To show cause why John B. Newman, Samuel H. Thomas and Josiah Randall, executors of B. Dahlgren, who was the assignee of John Vaughan, who was the administrator of Samuel Merrick deceased, should not pay the said sum to the said George Young. Answers were put in by the parties respectively, but the question which the court decided was whether the fund, which was in the hands of the executors of B. Dahlgren, could be reached by this mode of proceeding.

Miles, for the assignee, contended it could, assuming that the money was in their hands, but there was some dispute amongst themselves. They were assets of Merrick's estate, and so considered and adjudged below; not ordinary assets, but such as might be termed special assets, distinguishable from the estate of Merrick, and appropriated by law as well as by the acts of Mr Vaughan, to the payment of this claim. The powers of the Orphans' Court have been much extended by the Act of 29th March 1832, section 4, *Purd.* (1841) 808. They have jurisdiction in the distribution of assets among creditors or others interested. It was a devastavit for Vaughan to pass them away; and moreover, these defendants have made themselves parties. The Orphans' Court is a court of equity, and having the fund under its control, will act in respect to it for all purposes that justice and equity require. *Guier v. Kelly*, (2 *Binn.* 299); *M'Coy v. Porter*, (17 *Serg. & Rawle* 60). By the Acts of 14th April 1835, and 16th June 1836, the Supreme Court on appeal are to decide according to right and equity. *Mylin's Estate*, (7 *Watts* 64); *Aycinena v. Peries*, (6 *Watts & Serg.* 243).

Randall, contra. The fund came into Vaughan's hands after Merrick's death, and could not be assets of Merrick's estate. It was trust property, and not embraced in the settlement of Merrick's estate. The case of *Aycinena v. Peries* decides the point in our favour, that the Orphans' Court had no jurisdiction, nor could the court get it by the application or consent of parties. The Orphans' Court is a court of limited jurisdiction. 1 *Law Journ.* 321; *Grider v. M'Clay*, (11 *Serg. & Rawle* 231); *Purviance v. Commonwealth*, (17 *Ibid.* 37); *Metts's Appeal*, (1 *Whart.* 7); *Hossler's Appeal*, (5 *Watts* 176); *Gossner's Estate*, (6 *Whart.* 403); *Olwine's Appeal*, (4 *Watts & Serg.* 492); *Merrick's Estate*, (5 *Ibid.* 20); *Warner's Estate*, (2 *Whart.* 295). The Orphans' Court had no jurisdiction over the claim of adversary creditors, and as to them their decree is void.

[Merrick's Estate.]

The opinion of the Court was delivered by GIBSON, C. J. — It is a decisive answer to the rule in this case, grafted as it is on the report of an auditor to make distribution among the creditors of an insolvent intestate, that the money in question is no part of the assets. Mr Merrick, the intestate, was the factor of Walker and Coghill, an English house, to whose title the present claimants have succeeded; and the money in contest is the price of goods sold by him as the property of the house, but received by Mr Vaughan, one of his administrators; and consequently not as the intestate's property, whatever Mr Vaughan himself may have supposed; but, in contemplation of law, as a portion of the partnership effects. Had it been part of the intestate's assets, it must have gone in a course of administration to pay the general creditors, the English house coming in *pro rata* as a creditor on its own property; but that the money was not so considered by Mr Vaughan himself, is manifest from the fact that he set it apart for the house in the hands of a trustee, as what has been called in the course of the argument, *special* assets—the meaning of which I am unable to conjecture. Assets are said to be real or personal, legal or equitable; but a distinction between general and special, I believe, has been taken only in the present proceeding. It was this unlucky phrase which, seeming to solve all difficulties at the outset, drew the attention of all concerned from an inquiry into the nature of the title, and made the record of this proceeding a budget of blunders in which this court participated. It would also have been found that a factor, though competent to sell and to sue in his own name, is not the owner either of the property or of its price, but barely an agent to contract for his principal; and that his commission, except in very special cases, is revoked by his death. This familiar principle was directly decided in *Burdett v. Willet*, (2 Vern. 639), where it was held that the price of goods sold by a factor is payable not to his administrator, but to the merchant who consigned them to him; and it was held also in *Whitecombe v. Jacob*, (Salk. 160), as well as in many other cases collected in a note to it. The mispayment to Mr Vaughan consequently operated no discharge of the purchaser. The price might have been recovered on the contract of sale, at any time before the confirmation of the transaction by participating in the present proceeding; and it is plain, therefore, that it ought not to have been involved in the factor's estate. Whether the court would summarily order a stranger to the proceeding to bring it in, even if it were assets, it is at present unnecessary to say. The question, when it arises, will be whether a creditor can recover a claim immediately from a debtor to the estate, and not from the administrator or by his agency, but by the instrumentality of an order paramount to him, the court taking the administration of the assets into its own hands. It is enough for the present, however, that this proceeding is irregular and

[Merrick's Estate.]

must stop. This trust estate can be followed into the hands of Mr Dahlgren's executors who represent him in the management of the fund, only by a bill in equity or perhaps by an action for money had and received. The rule must, therefore, be discharged, the money struck out of the auditor's report, and the decree affirmed for the residue.

Decreed accordingly.

Vandever's Appeal.

In matters of discretion, in contradistinction to ministerial acts, co-trustees cannot act separately in discharging their trust; their receipts and their signing certificates of bankruptcy must be joint.

A case of urgent necessity might be an exception to the rule; but if the other trustee might be consulted, such necessity does not exist.

Nor does it exist where the acting trustee might have secured an equal benefit to the estate by due vigilance, which he omits to exercise.

THIS was an appeal from the decree of the Common Pleas of *Chester* county, awarding to the estate of Elisha Phipps \$500 for one year's rent, out of the balance in the hands of Alexander Mode and Ellis Phipps, assignees of William Steadman, deceased, on a settlement of the account of their trust, by Thomas Vandever, one of the preferred creditors under the assignment. It appeared that Steadman, on the 28th March 1843, being in the personal occupancy of certain premises demised to him by Elisha Phipps at a yearly rent of \$500, assigned all his goods and chattels to Mode and Ellis Phipps, in trust for the benefit of creditors. The property assigned remained on the premises till the 1st May following, when part of it was exposed to public sale and sold by the assignees. On the 20th April of the same year, Elisha Phipps requested his son Joseph (a witness for the appellees, and objected to by the appellants on the ground of interest,) to take out a landlord's warrant for him, and levy on the goods in the hands of the assignees for a year's rent, which had been due since the 1st of the month. While the father was giving these directions, Ellis Phipps, another son and one of the assignees, came in, and learning his father's intentions, requested him not to distrain, and promised that as soon as he could make sale of the property and collect the money, he would pay him the one year's rent. Mode, the other assignee, was not present on this occasion. Joseph did not take out any warrant or make any distress. Elisha died in June 1843, leaving a will, of which he appointed his son Ellis executor, and one of the residuary legatees.

[Vandever's Appeal.]

There were three classes of preferred creditors under the assignment. Elisha Phipps was not one of them. The assignees settled an account of their trust, showing a balance in their hands, which was insufficient for the payment of all the preferred creditors. The court below decreed to the estate of Elisha Phipps out of the balance, \$500 for one year's rent. From this decree Vandever, one of the preferred creditors, appealed.

The following opinion was delivered by BELL, President :

The first question made under this state of facts is whether the promise made to Elisha Phipps by Ellis alone, he being but one of two parties, is binding on the fund. That such a promise, made by all the assignees upon the consideration stated, is so binding, and will entitle the landlord to a preference of payment over the other creditors of the assignor, is fully established by *Stevenson v. Wood*, (5 Esp. 200); *Osborne's Estate*, (5 Whart. 267). But it is said that, unlike the case of executors and administrators, where there are several trustees all have equal power, interest and authority, which is in its nature joint, and all must join in the execution of the trust, and so one cannot sell without the other, or desire to receive more of the creditor's money, or to be more of a trustee than his partner; it is indeed regularly true that when the execution of a private power or trust is committed to more than one, all must join in the acts necessary to carry the trust or power into execution, *Beltzhoover v. Darragh*, (16 Serg. & Rawle 337); and the act of less than the whole number is invalid at law. But the act of the assignee in this instance was not so much in furtherance of the trust as to prevent its utter frustration by a sacrifice of the property, the subject of the trust. The exercise of such a power, I take it, is inherent in each of the trustees from necessity, and being for the advantage of the *cestui que trust*, the assent of the co-trustee would if necessary be presumed, in order to sustain a procedure essential to the continued existence of the trust, at least in the absence of an express negative; on the ground that it is the duty of each of the trustees to do everything proper and necessary to the promotion of the interest of the *cestuis que trust*; and equity, in the absence of proof to the contrary, will take it for granted he has so done.

If instead of a promise to pay there had here been a payment of the rent by one of the assignees in avoidance of the distress, it is scarcely to be questioned he would have been entitled to a credit in his account for the amount thus paid, and yet there is no difference in principle between the payment and the promise as shown by *Osborne's Estate* already cited. But again: it is a rule in equity that what is compellable by suit is equally valid if done by the trustees without suit. *Lewin on Trusts* 413. Here payment of the rent out of the fund assigned might have been enforced by the landlord without the assent of the trustees. Surely then the agree-

[Vandever's Appeal.]

ment of one of them to do what in truth could not be refused, by which the costs and sacrifice of a forced sale were avoided, is effective as against those whose interests were thus subserved.

The creditors too have had the benefit of the consideration upon which the promise of their trustee was based, and it is ungracious in them now to attempt its defeat upon a mere technical objection. This would be in fact to perpetuate a fraud on the estate of Elisha Phipps by those who have been benefited by an arrangement by which alone he was induced to forego his hold on the goods assigned; and to this, I think, equity could never be induced to lend itself. The arrangement between Ellis and his father was then binding upon the funds in the hands of the assignees at the time it was made.

But it is urged that its efficacy is destroyed by Ellis's subsequently becoming executor of the will and one of the residuary legatees of the estate of his father. In support of this position the argument is that a man cannot take advantage of his own promise, to put money in his own pocket, as it is said is the attempt here. But it must be remembered that Ellis is here in two capacities as distinct and separate as if they were represented by two different men. In both he acts in a mere representative character, bound to take care of both the trusts which are confided to him, but without possessing any quality destructive of the right of either. If another than he had become executor, there would have been no shadow of reason for saying that a claim perfectly good in the hands of Elisha in his lifetime was destroyed by his death; and I am at a loss to comprehend how the fact of the representative of the debtor estate becoming as here the representative of the creditor estate, can make such a result.

Even admitting the assignees to be beneficially interested as legatees in the fund to be recovered from the hands of the assignees, it cannot operate to destroy the virtue of an arrangement made upon a valuable consideration between parties competent to make it, and which being in fact executed, it would be iniquitous to rescind. I am aware of the rule that generally a trustee shall not be permitted to derive a benefit to himself by an act of his own on a subject connected with the trust, during the subsistence of the trust. This rule would perhaps have been applicable had Ellis been the owner of the rent at the time of his promise; though even this is doubtful. But he was not such owner, nor had he in fact or in law any connection with the claim, through which he might enjoy a benefit flowing from his arrangement. That he subsequently became beneficially interested in the promise without any act of his own surely cannot have the effect by retroaction to destroy that which before was binding and operative. The law allows a trustee to purchase at his own sale; but suppose in this instance Elisha had become the purchaser of the chattels assigned for a less price than their value and then died, when the goods

[Vandever's Appeal.]

passed to Ellis as residuary legatee, would the sale be invalid as against the creditors in the absence of actual fraud? Surely not. Many other similar illustrations might be put, but this may suffice. As then there is no suggestion of collusion or fraudulent pretences between the father and son, there is nothing in morals to forbid Ellis, as executor, or even as legatee, asking that the contract shall be wholly completed; and I see nothing in law which prohibits it. It is not analogous to the case, to which at the bar it has been likened, of the deposition of a witness, who, before it is used, becomes interested, and which courts of law under a rule of evidence founded in supposed policy, exclude, though Chancery constantly hears such depositions. This is a question of abstract justice that must be settled according to the more enlarged and comprehensive principles which govern rights and remedies.

But it is said that here the legal remedy is gone; that no action can be maintained to enforce this agreement, because no action at law could in the present position of the parties be brought to enforce this contract; but the consequence by no means follows. Where a creditor makes his debtor his executor, the legal remedy for the recovery of the debt is gone, and therefore at law the debt itself is said to be extinguished; but in equity it is held to be no more than a parting with the action; the duty still remains, and the executor must bring the debt into his account in favour of creditors, legatees, and even next of kin. *Pusey v. Clemson*, (9 *Serg. & Rawle* 208). So here, though the legal action be parted with, the obligation resting upon the assignees as representatives of the trust fund, to pay the rent, still remains and may be rendered available through the medium of a decree of distribution.

This case was argued at December Term 1844, and now re-argued by

Darlington, for the appellant, who contended that one of two trustees could not make a promise or contract to bind the trust fund. *Lewin on Trusts* 265; *Willis on Trusts* 136; 2 *Moore* 583; *Ex parte Rigby*, (19 *Vez.* 463); *Beltzhoover v. Darragh*, (16 *Serg. & Rawle* 337). They form one collective trustee, and are bound to join in all acts connected with the trust. The act of the assignee here, moreover, was in defeat of the trust.

J. Lewis, contra. If the contract had been made by both the assignees, it would have bound the fund. *Osborne's Estate*, (5 *Whart.* 267). This was a case of necessity to prevent a sacrifice of the trust property. Forbearance is a sufficient consideration, and the forbearance here was for the benefit of the trust and for the protection of the fund. This was sufficient to authorize the assignee to make the promise in question. *Unangst v. Shortz*, (5 *Whart.* 506). Chancery would have compelled trustee to make this contract.

[Vandever's Appeal]

The opinion of the Court was delivered by

ROGERS, J. — When the administration of a trust is vested in co-trustees, they all form but one collective trustee. They must, therefore, execute the duties of the office in their joint capacity. Thus a receipt for money or a certificate of bankruptcy, &c. must receive the joint signature of the whole body; for the power, interest and authority of co-trustees in the subject-matter of the trust being equal and undivided, they cannot like executors act separately, but all must join. *Lewin on Trusts* 265, (24 *Law Lib.*); *Willis on Trusts* 136, (10 *Law Lib.*); *Ex parte Rigby*, (19 *Vez.* 463). And this principle enters into all cases depending on the discretion and judgment of the trustees in contradistinction to acts of a mere ministerial nature. The former requires the concurrence of all the trustees; the latter may be performed by one. The contract in question is without doubt one of the former description, and consequently comes within the general principle. And the only doubt is whether there are circumstances in the case which make it an exception. It may be admitted on the authority of *Osborne's Case*, (5 *Whart.* 267), that if the contract had been made by both the assignees, it would have bound the fund; but the question is whether one of the trustees without any authority from his co-trustee, can bind the estate. And that this cannot be appears from the principles above stated, unless there are some circumstances attending the case which make it an exception from the general rule. The validity of the contract is put on the ground of necessity and the benefit which the fund derived from the agreement. It is said that the act of the assignee in this instance was not so much in furtherance of the trust as to prevent its utter frustration by a sacrifice of the property. The exercise of such a power is inherent in each of the trustees from necessity, and being for the advantage of the *cestui que trust*, the assent of the co-trustee would, if necessary, be presumed, in order to sustain a procedure essential to the continued existence of the trust, at least in the absence of an express negative, on the ground that it is the duty of each of the trustees to do everything proper and necessary to the promotion of the interest of the *cestui que trust*, and equity in the absence of proof to the contrary will take it for granted he has so done.

It is not my intention to deny the justice of the abstract principles asserted by the court, but it seems to me they do not apply, because there is no room for the presumption of any acquiescence or consent to the contract; for the proof is that the co-trustee was not present when the agreement was made, nor has any consent, either previous or subsequent, been shown, nor is any pretended to have existed. It is the naked case of one of two trustees making an important contract without any authority whatever from the other to act for him. Nor do we perceive any necessity whatever for the agreement. The co-trustee was in the immediate vicinity

[Vandever's Appeal.]

and could have been consulted without any detriment whatever to the interests of the trust. It is therefore unlike the case to which it has been assimilated in the argument, of a fire where one of two trustees makes a contract in the absence of his co-trustee, to preserve property of the trust from destruction. The urgent necessity of the case would constitute an exception to the general rule, and on that account alone the contract would bind the estate. The argument also assumes the contract to be for the advantage of the estate. Now whether this be so it is impossible to say, as that may depend on a variety of considerations. But the conclusive answer to this suggestion is, that it is a matter in the first instance solely for the discretion and judgment of all the trustees. It is a question which one alone cannot decide. To say that the validity of the contract depends on its being afterwards deemed advantageous to the trust would in fact abrogate the rule, and would lead to perplexing inquiries and to questions which in many cases it would be difficult to settle. It is a rule in equity, as is said, that what is compellable by suit is equally valid if done by the trustees without suit. And this is true; but to give force and application to the suggestion it must be shown that a Court of Equity would compel the trustee to enter into this contract. But as no Court of Equity would interfere in such a case, the application of this principle is not very obvious. It is urged that if instead of a promise to pay there had been a payment of the rent by one of the assignees in avoidance of the distress, it would scarcely be questioned he would be entitled to a credit for the amount thus paid. Without expressing any positive opinion on this point, I would barely observe that it seems to me to be stating the same question in a different form, and that it would be more prudent at least to refrain from doing so without the assent of the other trustees. It is strongly urged that the creditors have the benefit of the consideration on which the promise of the trustee was based, and that it is ungracious in them now to dispute it. This argument addresses itself rather to the generosity of the creditors than any legal right arising from the contract; but the latter is the question now under consideration. Besides, it assumes a matter admitting of some doubt, and which the trustees must determine for themselves, viz., whether the contract may not have been a detriment rather than a benefit to the fund. Hardship cannot with truth be alleged; for the contracting parties were aware, or at least ought to have been, of the rule which prevents one of two or more trustees from making a contract binding the fund. If any loss arises from a violation of this well-settled rule, it is but right that they alone should abide the consequences. Whether the contracting party is personally liable is not the matter in dispute, but its obligatory force on the fund in the hands of the trustees. We think it better to adhere to the rule which requires the assent of both, and that this case presents a strong illustration of the pro-

[Vandever's Appeal.]

priety of this course. It was clearly the duty of the trustees to manage the trust for the best interests of the creditors; and had the property been removed immediately on the assignment, the landlord would have had no lien whatever. But instead of pursuing this obvious course, they permit the goods to remain on the premises until the rent becomes due and the right of distress attaches, and then one of them, the son of the landlord, without any consultation with his colleague, undertakes to make the contract in question.

This view of the case makes it unnecessary to consider the objection to the competency of Joseph Phipps.

The decree of the court ordering \$500, one year's rent, to be paid to the estate of Elisha Phipps is reversed.

Decree reversed.

CASES
■
THE SUPREME COURT
—
PENNSYLVANIA.

EASTERN DISTRICT—DECEMBER TERM 1844—CONTINUED.

Duffy against The Insurance Company.

A post-nuptial contract between husband and wife, though declared void at law, is held good and carried into effect in equity.

If made without a valuable consideration, it will be deemed fraudulent in law against creditors; but if a valuable consideration is received by the husband from his wife for a settlement to her separate use, it is valid.

Where, therefore, the husband had a life-estate in his wife's land, and in consideration of \$4000 paid them, they joined in a conveyance of the fee in trust to collect the rents and apply one half of them to its repayment, and to pay the other half to such persons as the wife should direct, and afterwards in trust to convey as she should direct, and subsequently made another conveyance to the assignees in that deed, in consideration of \$12,000 advanced to the wife to enable her to pay off the \$4000, in trust to sell, mortgage or let the premises, and after repaying the \$12,000, to pay off certain creditors of the husband to the amount of \$5509.25, which sum greatly exceeded the value of the husband's life-estate, (the property consisting of unproductive lots), and there being no ground to presume fraud or collusion, the conveyances were held to be valid.

THIS was an action of ejectment instituted in the District Court for the city and county of *Philadelphia*, by Francis Duffy against The Mechanics' and Tradesmens' Insurance Company, John Rankin and others, to recover possession of certain real estate. Michael Fox died on the 13th July 1838, intestate, without

[*Duffy v. The Insurance Company.*]

widow, leaving issue four children, one of whom, Margaretta, married Woodburn Potter. He was seised at his death of certain real estate, and partition was made thereof. On the 20th March 1841, Potter presented his petition to the Common Pleas of Philadelphia county, praying to be discharged as an insolvent debtor. This petition was in the ordinary form, and notice was given to the creditors personally, among others to Samuel Badger. The proceedings in the Common Pleas resulted in the discharge of Potter, and the appointment of Duffy as his assignee or trustee for the benefit of creditors. On the 14th April 1841, an indenture tripartite was executed as follows:

This Indenture, Tripartite, made the 14th day of April 1841, between the Girard Life Insurance Annuity and Trust Company of Philadelphia of the one part, Woodburn Potter of the City of Philadelphia Gentleman, and Anna Margaretta his wife, of the second part, and the Mechanics' and Tradesmens' Insurance Company of Philadelphia, of the third part. Whereas, the said Woodburn Potter and Anna Margaretta his wife, by Indenture of Agreement, dated the 26th day of October 1838, recorded, &c., after reciting as is therein recited, did for and in consideration of the sum of \$4000, lawful money to them advanced, grant, bargain, sell, release and confirm unto the said the Girard Life Insurance Annuity and Trust Company of Philadelphia, their successors and assigns, all their and each of their right, title and interest of, in and to all and singular the Real Estate, whereof Michael Fox (the father of the said Anna Margaretta Potter) died seised, wheresoever the same may be situated. To hold in trust nevertheless, and upon the special uses and confidences therein declared, that is to say, first, that they the said the Girard Life Insurance Annuity and Trust Company of Philadelphia, should and might collect and receive all and singular the rents, issues and profits of said real estate, and deducting and retaining from the amount so collected, as a full compensation and commission for their trouble and pains in such collection, four per centum on such amount, (which commission it is thereby mutually covenanted and agreed that they should so retain and deduct) apply the monies received and collected as aforesaid, the one-half thereof to the payment of the aforesaid sum of money by them advanced, with lawful interest thereon from the day of the date thereof, and the remaining one-half part thereof, pay to such person or persons as the said Anna Margaretta Potter should, by her written order direct and appoint, notwithstanding her coverture and wholly independent of any control of her said husband, without the same being in any manner liable for or in consequence of any of the debts or engagements of her said husband then or thereafter to become due, and the receipt of the said Anna Margaretta should at all times be a full and sufficient discharge for any payments made to her by the said parties of the second part thereto. Se-

[Duffy v. The Insurance Company.]

condly, after full satisfaction of the said sum and interest and deduction of the said commission, then upon this further trust, that they the said The Girard Life Insurance Annuity and Trust Company of Philadelphia should and would, and they the said the G. L. I. Co. of Phil. did thereby covenant, promise, and agree to and with the said parties of the first part thereto, their heirs and assigns, that they would forthwith grant and convey (by such instrument as the counsel learned in the law of the said Woodburn Potter, and Anna Margarettta should advise and direct) all the premises thereby conveyed or mentioned and intended to be conveyed without any other or further incumbrances than might then exist thereupon, to such persons and upon such trust as she the said Anna Margarettta Potter should or might by deed duly executed in the presence of two subscribing witnesses and duly acknowledged according to law direct and appoint, and it was furthermore mutually covenanted and agreed by, and between the said parties thereto, that the said Woodburn Potter and Anna Margarettta Potter should and would proceed as soon as might be to procure a partition of the real estate whereof the said Michael Fox was as aforesaid seised, and that if it should be necessary or expedient, they should have the right and privilege to use the name of the said parties thereto of the second part in any proceedings which might legally be adopted in order to effect said partition at the proper cost and charge of the said Woodburn Potter and Anna Margarettta Potter, and that from and after such partition made, the part allotted in severalty to the said Woodburn Potter and Anna Margarettta Potter should be deemed and taken to pass and be conveyed by the indenture now in recital, in lieu of the undivided share therein before specified, and be held for the purposes and upon the uses, terms and conditions and trusts therein contained, set forth and declared.

And whereas, proceedings in partition have been lately had and prosecuted in the Orphans' Court for the city and county of Philadelphia in pursuance whereof Daniel Fitler, Esquire, High Sheriff of the said county, and an inquest have parted and divided the real estate of the said Michael Fox deceased in way and manner by law directed, and by a certain schedule under their respective hands and seals returned to the said court bearing date the 20th day of November 1840 and now filed therein, did allot and assign one full, equal and undivided fifth part of the said real estate being all and singular the messuages, tenements, lots of ground and yearly rent charge therein as such specifically described and designated unto the said the Girard Life Insurance Annuity and Trust Company of Philadelphia, their successors and assigns forever, in trust nevertheless and to, for, and upon the special use and confidences set forth, declared, and contained in, and by the said above recited Indenture of agreement as in and by the said

[*Duffy v. The Insurance Company.*]

recited Indenture and the records and proceedings of the said court, reference thereto severally being had, will fully appear.

And whereas the said The Mechanics' and Tradesmens' Insurance Company of Philadelphia have advanced to the said Anna Margaretta Potter, with the consent and approbation of her husband, the said Woodburn Potter, the sum of \$12,000 to enable them, among other things, to pay off and discharge the sum now due by them to the said The Girard Life Insurance Annuity and Trust Company of Philadelphia, and have agreed to accept of a conveyance of the premises aforesaid upon the uses, terms and conditions hereinafter declared and set forth, as well for the purpose of securing the repayment of the said sum of \$12,000 by them advanced as aforesaid, with interest, and also at the request of the said Anna Margaretta Potter to secure the persons hereinafter named the payment of the several sums hereinafter mentioned.

And whereas the said Anna Margaretta Potter has fully paid to the said The Girard Life Insurance Annuity and Trust Company of Philadelphia, the said sum of money by them advanced as above mentioned, together with interest and commission, according to the true tenor of the said above recited indenture of agreement:

Now this indenture witnesseth that the said Anna Margaretta Potter, pursuant to and in exercise and execution of the power and authority to her for this purpose reserved and given by the said herein above recited indenture of agreement, and of every or any other power or authority in any wise enabling her in this behalf, doth by this present deed by her duly executed in the presence of the two witnesses whose names are hereunto subscribed, and by her duly acknowledged according to law, direct and appoint that the said The Girard Life Insurance Annuity and Trust Company of Philadelphia, shall and do by this present deed grant and convey all the said trust, estate and premises in them vested under the said above recited indenture of agreement, with the appurtenances, unto the said The Mechanics' and Tradesmen's Insurance Company of Philadelphia, their successors and assigns, to and for their own proper use and behoof, for ever to hold the same and every part thereof (excepting only a certain yearly rent charge of \$112.50, hereinafter more particularly mentioned and designated) to, for and upon the uses, intents and purposes, and with and under and subject to the powers, terms, conditions and agreements hereinafter limited, declared and set forth of and concerning the same, and to and for no other use, intent and purpose whatsoever; that is to say, upon trust to let and demise or when and as from time to time they may deem proper, to bargain and sell all or any part of the said estate and premises by public or private sale to any person or persons whomsoever, either absolutely or on ground rent for the greatest and best price or prices,

[Duffy v. The Insurance Company.]

or yearly rent or rents that can or may be reasonably had and gotten for the same, and by good and sufficient deeds of conveyance and assurance in the law to grant convey and assure the same unto the purchaser or purchasers thereof, his her or their heirs, successors and assigns for ever, freed and discharged from all and every the uses, trusts and estates hereby declared of and concerning the same, and out of such part or parts of the said estate as may be disposed of on ground rent as aforesaid, to reserve the yearly rent or rents that may be agreed upon for the same, free of any deduction, charges or assessments whatsoever. to them the said The Mechanics' and Tradesmen's Insurance Company of Philadelphia, their successors and assigns for ever, in trust for the like and same uses, intents and purposes, and with, and under, and subject to the like and same powers, terms, conditions and agreements as are herein and hereby limited, declared and set forth of and concerning the trust, estate and premises aforesaid, and with the clauses of entry, distress, and re-entry and covenant for the payment of the rent and taxes, and provisions for the extinguishment of the same rent or rents within a limited time, as are usual in ground rent deeds in the city of Philadelphia, and further, as to the yearly rent charges, or ground rents which may be reserved in pursuance of the trust above created, to grant, bargain, sell and dispose of the same or any part thereof, upon such terms as they, the said The Mechanics' and Tradesmen's Insurance Company of Philadelphia may deem proper, and by good and sufficient deeds of conveyance in the law to grant and convey and assign the same to the purchaser or purchasers thereof, his, her or their heirs, successors and assigns for ever, freed and discharged from all and every the use, trust and estates hereby declared of and concerning the same and without any liability on the part of any purchaser or purchasers as to the application of the purchase money of any part or parts of said estate, or of any ground rent or rents that may be sold, or of the extinction money of any such rents, and upon this further trust, that the said The Mechanics' and Tradesman's Insurance Company of Philadelphia, their successors and assigns shall and may when and as from time to time they may deem proper, raise, borrow and take up on interest such sum or sums of money as they may see fit, and thereupon in order to secure the payment of all such sum and sums of money with interest, to grant and convey any part or parts of the whole of the said trust estate, or of the said yearly rent charges or ground rents, which may be reserved as aforesaid to the person or persons, or body or bodies corporate from whom or which such loan or loans may be obtained, his, her or their heirs, successors and assigns, in mortgage freed and discharged from all and every the uses, trusts and estates hereby declared of and concerning the same, and without any liability on the part of such mortgagee or mortgagees as to the application of the moneys so raised on loan.

[*Duffy v. The Insurance Company.*]

and as to the moneys that may be produced from the rents and income of the said premises, or by any sale or sales, or mortgage or mortgages of any part or parts of the whole of the said estate, or of the ground rents which may be reserved as aforesaid, and by the extinguishment of any such ground rents and all other moneys in any way coming to them, the said The Mechanics' and Tradesman's Insurance Company of Philadelphia, under the trusts hereinbefore declared, in trust to apply the same from time to time when and as received (after deducting and paying all taxes, ground rent and necessary repairs to the premises and commission charges, and necessary and reasonable expenses attendant upon the creation and execution of the trust) for and towards the payment, liquidation and discharge of the said \$12,000 so as aforesaid advanced by them the said The Mechanics' and Tradesman's Insurance Company of Philadelphia, with lawful interest thereon, from the day of the date hereof and after full satisfaction, and payment of the said sum of \$12,000 with interest, as aforesaid, Then, in the second place, to pay to Elhannan W. Keyser and Charles Fox, administrators de bonis non, &c. of Michael Fox deceased, the sum of \$2969.25, the amount by them alleged to be due for advance in money and furniture made to the said Anna Margaretta Potter, during the lifetime of the said Michael Fox; and after full satisfaction and payment of said lastmentioned sum, then, in the third place to pay to the several persons hereinafter named, the sums of money hereinafter mentioned, to wit, to Samuel Badger, Esq., the sum of \$1500, to John Buddy the sum of \$690, and to Crawford Riddle the sum of \$350; the said four last mentioned sums of money to be paid, with lawful interest thereon, from the date hereof. And after paying all taxes, ground rent, and necessary repairs to the premises, and commission charges and necessary expenses as aforesaid, and paying and fully discharging the said sum of \$12,000, and the said four other several sums hereinbefore mentioned, then in trust to pay over and assign the overplus of the moneys that may be produced as aforesaid, and to grant, convey, and assure, all the real estate that may then remain undisposed of, in pursuance of the hereby created trusts, unto and to the use of such person or persons, and for such estate and estates, and in such sort, manner and form as she the said Anna Margaretta, by any deed, or by her last will and testament or any writing in the nature of and by her intended as and for her last will and testament, such deed or last will and testament, or writing intended as and for a last will and testament, to be by her signed and sealed in the presence of at least two credible subscribing witnesses, notwithstanding any coverture or whether she be covert or sole, shall at any time hereafter direct, limit and appoint. Provided that it shall and may be lawful for the said The Mechanics' and Tradesman's Insurance Company of Philadelphia to deduct and retain five per centum on all such sums of money received as

[Duffy v. The Insurance Company.]

rents, as they shall collect under the trust hereby created, as a full compensation and commission for their trouble and pains in such collection, and in the management of the trust. And as to the yearly rent charge excepted as aforesaid, being all that certain yearly ground rent or sum of \$112.50, lawful silver money of the United States, chargeable half yearly, issuing and payable by John F. Willetts, his heirs and assigns, (in trust to convey to Rossanna Fraley, in consideration of money that had been advanced by her to Anna M. Potter).

And this indenture further witnesseth, that the said the Girard Life Insurance Annuity and Trust Company of Philadelphia, for and in consideration of the sum of \$4600, lawful money, unto them well and truly paid by the said Woodburn Potter, and Anna Margaretta, his wife, at and before the ensembling and delivery hereof, the receipt whereof is hereby acknowledged, (being in full of the sum of money by them advanced as aforesaid, together with interest and commission, as aforesaid), have granted, bargained, sold, enfeoffed, released, and confirmed, and by these presents (pursuant to and in execution of the direction of the said Anna M. Potter, herein above contained, and of all and singular the powers in them vested in this behalf), do grant, bargain, sell, alien, enfeoff, and confirm unto the said Mechanics' and Tradesman's Insurance Company of Philadelphia, their successors and assigns, all and singular the messuage, tenements, lots of ground, rents, hereditaments, real estate whatsoever in them vested under the said first above recited indenture of agreement, and to them, the said the Girard Life Insurance Company of Philadelphia, allotted on the partition aforesaid, and every part and parcel thereof, together with all and singular the rights, members, incidents and appurtenances whatsoever, thereunto belonging, or in any wise appertaining, and the reversions, remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever of them the said the Girard Life Insurance Annuity and Trust Company of Philadelphia, as well at law as in equity of, in, to, and out of the same, and every part and parcel thereof, to have and to hold all and singular the hereditaments and premises hereby granted or mentioned and intended so to be with the appurtenances unto the said the Mechanics' and Tradesman's Insurance Company of Philadelphia, their successors and assigns, to and for the only proper use and behoof of the said the Mechanics' and Tradesman's Insurance Company of Philadelphia, their successors and assigns for ever, in trust nevertheless to, for, and upon the uses, intents, and purposes, and with, and under, and subject to the powers, terms, and conditions, and agreements herein above limited, expressed and declared, and to and for no other use, intent, or purpose whatsoever, Provided, however, and it is hereby expressly declared that nothing herein contained shall be construed and taken as a warranty

[Duffy v. The Insurance Company.]

referred to in the last mentioned transcript was due at the date of that petition, and was acknowledged so to be upon the records of the Common Pleas. Objection was made, the offer overruled, and exception taken.

The said petition was again offered by the plaintiff, for the purpose of affecting the defendants with notice of Potter's indebtedness on the 14th October 1838, at the time of the execution by him of the settlement bearing that date. Objection was made, the offer overruled and exception taken.

The plaintiff then proposed to examine John Powell (a creditor of W. Potter, whose claim was due before October 1838), for the purpose of establishing the existence and amount of the debt by the usual mode of proving his book of original entries, &c., the entries having been made by himself. Upon the defendant's objection, the testimony was overruled and exception sealed.

Julius Alsop, a clerk in Mr Scherr's piano factory, was offered to prove the existence of a claim against Potter, for a piano sold him 24th October 1840 for \$450, by the book of original entries. The testimony was objected to, overruled and exception taken.

Woodburn Potter was then produced by the plaintiff for the purpose of proving his insolvency prior to and in October 1838. Objection was made by the defendants, and the offer overruled and exception taken.

Samuel Badger testified that he was President of the Mechanics' and Tradesmen's Company, previous to and at the date of the deed in their favour, 14th April 1841.

The plaintiff put this question to the witness:—"Did you receive notice of Woodburn Potter's application to the Court of Common Pleas for the benefit of the insolvent laws in March or April 1841?" The question was objected to upon the ground that notice should be traced to the Board of Directors and not to the President. The offer was overruled and exception sealed.

The witness continued and was cross-examined. In the course of this the defendants put the following question:—"Was Mr Potter's application under the insolvent laws mentioned at the Board of Directors?" The plaintiff objected to the question, the objection was overruled and exception taken.

Witness continued.—I have no recollection of having heard it mentioned at the Board. The business of the Board of that Institution was done by the Board or by the Directors. The whole \$12,000 was paid by the company to me as the attorney of Mrs Potter, and were paid out by my checks.

Question by defendants.—Did all that money go to the payment of debts? The plaintiff objected, the objection was overruled and exception sealed.

Witness continued.—I paid the greater part of the money to the creditors myself. I can't say which debts they were. I recollect one to the Girard company, \$4600; one to the Marshall House

[Duffy v. The Insurance Company.]

(my brother and myself) for \$2000 or \$3000; Crawford Riddeli about \$200, &c., &c.; indeed all but \$700 or \$800 was paid to Potter's creditors. My impression and Mrs Potter's at that time was that her estate could not be worth less than \$40,000. I knew who were creditors by the instructions of Mr and Mrs Potter.

The plaintiff again offered to read in evidence the insolvent petitions and proceedings thereon of Woodburn Potter, to March Term 1835 and to September Term 1832, upon the ground that the defendants had given in evidence other declarations of Potter as to his indebtedness, and were precluded from urging that objection. The defendants objected to the offer. The court sustained the objection and sealed an exception.

The defendants produced in evidence deeds from the Mechanics' and Tradesmen's Insurance Company to their co-defendants, executed in or about the month of January 1842. The consideration moneys had been paid to the company by the purchasers.

The defendants then produced Alexander Dougherty, who testified that he had been cashier of the M. & T. I. Co. since 1840, and attended all the meetings of the Board of Directors in 1841 at which any business was transacted in reference to this trust.

Question by defendants.—From your attendance at those meetings at the time the company paid the \$12,000, and before, had they any notice, or had the directors notice of Potter's application for the benefit of the insolvent laws? The plaintiff objected. The objection was overruled and exception taken.

Witness continued.—No, there was no such notice. As the cashier of the company I had no such notice, nor any reason to dream of such an application.

Cross-examined.—I did hear Mr Badger speak of Potter's indebtedness in reference to the application of the fund from the company. I think it was after the payment by the company. I have no recollection of any particulars stated before the board. My impression is, that the money was to be appropriated to payment of his debts and his wife's; this was, I think, after the money was paid over by us. I think the loan was applied for by Mrs Potter or some one in her behalf. There certainly was a statement that the Girard Loan Company were first to be paid. I heard the money was to pay debts with on the same day with the execution of the deed to the company.

The Judge charged the jury as follows:

This is an action of ejectment to recover possession of several lots in this city and county. The plaintiff claims as assignee of Woodburn Potter, an insolvent debtor, appointed as it is said on the 16th April 1842 by the Court of Common Pleas, upon the discharge of previous assignees. The plaintiff claims to recover all the title and estate which Potter had in the lots described on the 29th March 1841. It appears that Potter was at that time the husband of Anna Margaretta Fox, who was the daughter of Mi-

[Duffy v. The Insurance Company.]

Michael Fox, deceased. It is agreed that Michael Fox died on the 13th July 1838, intestate, leaving four children, of whom Anna Margaretta, wife of Potter, was one, and six grandchildren, the issue of a deceased child. Upon the death of Michael Fox, Potter became seised in right of his wife in his wife's share. On the 18th September 1840, proceedings in partition were commenced and the estate was divided, and the property in question was set out as the share of Mrs Potter.

But nearly two years previously to the proceedings in partition, viz: on the 26th October 1838, Potter and wife executed a conveyance of the wife's interest to the Girard Life Insurance Annuity and Trust Company, and it was upon the petition of this company and Charles Fox that the partition was made. The sheriff allotted the share of Mrs Potter to this company, referring expressly to the terms of the conveyance by Potter and wife to the company. On the 14th April 1841, The Girard Life Insurance Annuity and Trust Company conveyed the same property to the Mechanics' and Tradesman's Insurance Company, one of the defendants. On the 25th and 31st January 1842, The Mechanics' and Tradesman's Insurance Company conveyed part of this property to the other defendants, John Ranken, Isaac Noble, John Coulter, John C. Cusac, Samuel Kennedy, and Joseph Arbuckle.

An objection is made by the defendants founded upon the partition, which I may as well notice before going further. The conveyance by W. Potter and wife to the Girard &c. Co. was made before the partition. Of course he conveyed only an undivided interest in the whole of the real estate of Michael Fox deceased, and not these particular lots now in question. These lots were set off upon the partition afterwards, and the sheriff made the deed directly to the Girard Life Insurance Annuity and Trust Company. Now the argument is, that as Mr Potter made no conveyance at all of these lots, but at the utmost of his right in an undivided fifth part of them, and as the plaintiff demands the exclusive possession of the lots in question, he cannot recover. It is unnecessary to decide whether the plaintiff might not under this view of the case, recover an undivided fifth part of these lots, because I think he may adopt the partition as valid between the heirs, without admitting the right of the Girard Life Insurance Annuity and Trust Company to hold the title. A partition is not strictly a conveyance of title. The object and the effect of the proceedings is to divide and apportion lands held in common by several persons into purparts or shares to be held afterwards in severalty by the same title they were held before. The plaintiff therefore may treat the partition as valid, and at the same time deny the right of the Girard Life Insurance Annuity and Trust Company to have the title.

This matter being disposed of, I proceed to state the ground on which the plaintiff expects to recover. The plaintiff alleges that

[Duffy v. The Insurance Company.]

the deed by W. Potter and wife, on the 26th October 1838, to the Girard Life Insurance Annuity and Trust Company was fraudulent and void in law. He says, in the first place, that it was a voluntary settlement made by Mr Potter on his wife, he being indebted at that time. It is contended that a man who is in debt cannot make a settlement of his property or any part of it on his wife after their marriage. If he does so, it is contended that his creditors may set it aside. This is correct in point of law. A man who is in debt, cannot after his marriage, make a valid conveyance of his property for the benefit of his wife and children. His creditors may, notwithstanding the conveyance, take the property for the satisfaction of their debts. In this case, evidence has been given of several debts due by Mr Potter at the time of his conveyance to the Girard Life Insurance Annuity and Trust Company. I refer to the judgments in favour of Samuel Hobson, for \$564 30—in favour of Joseph Piper for \$152—in favour of S. Watkinson for \$63—and in favour of Hugh Boyle. The plaintiff has also given evidence of debts contracted after the date of this deed, which need not now be particularly mentioned. The plaintiff contends that he has a right to recover the property in question for the benefit of the creditors subsequent to the conveyance as well as those who were creditors at the time. There is no difficulty on this point; for the law permits all the creditors to come in, whether they were creditors at the time of the conveyance or became so afterwards, if the conveyance was voluntary and void in respect to persons who were creditors at the time of the conveyance.

But the defendants, on the other hand, contend, that even admitting that the conveyance was voluntary and void in respect to the creditors of Mr Potter—and even admitting that the plaintiff had a right to take this property away from the Girard Trust Company, still it by no means follows that the plaintiff can take it away from them, because they say that they are *bonâ fide* purchasers, and paid a full consideration for the property, and had no notice of the fraud, if there was one. There is no difficulty on this point. The Mechanics' and Tradesmen's Insurance Company took a conveyance from the Girard Life Annuity and Trust Company of the whole property; and the other defendants (Messrs Arbuckle, Rankin, Noble, Coulter, Cusac and Kennedy) afterwards bought of the Mechanics' and Tradesmen's Insurance Company; and if the Mechanics' and Tradesmen's Insurance Company did take the conveyance of this property *bonâ fide* and paid a valuable consideration for it, without notice of any fraud, their title would be good, though the title of the Girard Life Annuity and Trust Company should be void. And if the title of the Mechanics' and Tradesmen's Insurance Company is good, it would protect the title of the other defendants.

But even if the title of the Mechanics' and Tradesmen's Insur

[Duffy v. The Insurance Company.]

ance Company and the title of the Girard Company should both be fraudulent and void, still each of the other defendants may protect his own title to the particular land conveyed to him by showing that he at least bought *bonâ fide* and paid a valuable consideration for the land conveyed to him without notice of any previous fraud; so that there is no difficulty on this point.

The questions upon this part of the case then, are these:

1. Was the conveyance of 26th October 1838, by Mr Potter and wife, voluntary?

2. Was Mr Potter indebted at the time?

If both these questions are decided in favour of the plaintiff, then it will be necessary to inquire,

3. Whether the defendants or any of them are *bonâ fide* purchasers for a valuable consideration, without notice of any fraud?

Before mentioning the other questions raised in this case, I will ask your attention to the first of these questions. Was the conveyance of the 26th October 1838, by Potter and wife to the Girard Life Annuity &c. Company a voluntary conveyance? It purports on its face to be a conveyance in fee-simple upon the consideration of \$4000 paid to Woodburn Potter and wife, in trust to collect the rents, issues and profits, and apply one half of them to the re-payment of the \$4000; and to pay the other half to such persons as Mrs Potter shall direct; and after the \$4000 with the interest should be paid in trust, to convey the premises to such persons and upon such trusts as she shall direct. Now a deed may purport to be what it is not in truth. It may purport to be made on a valuable consideration, when in truth no consideration is given. But no question has been made about the consideration in this case. It is not denied that the Girard Company paid the \$4000 to Mr and Mrs Potter as stated in this deed. Is this then a voluntary conveyance? A voluntary conveyance is a conveyance which is made without any pecuniary inducement, or a conveyance made without any such consideration as the law deems valuable. But this deed not only purports to have been made upon the consideration of \$4000, but in truth was made upon that consideration, paid to the grantors. It is not, therefore, a voluntary conveyance, and if it is void against creditors, it must be so for some other reason.

The plaintiff's counsel compare this deed to a mortgage—the principal intent of it, so far as respects the company, being to secure the re-payment of \$4000. If it were in form a mortgage for that sum actually lent, no one would think of calling it a voluntary conveyance. And certainly if it is in substance a mortgage, it can with just as little propriety be called a voluntary conveyance. How, then, can this deed be defeated? If it was actually a fraudulent deed, got up by collusion between Mr Potter and wife and the Girard Company to enable Mr Potter to put his property beyond the reach of his creditors, it would be void. But this is

[Duffy v. The Insurance Company.]

not pretended. There is no evidence, or even a suggestion or surmise that the company had any design not perfectly consistent with honesty and fairness towards the creditors of Mr Potter. Here, then, we have a deed made upon the consideration of \$4000, paid by the company—and the company acting in perfect good faith.

It is contended, however, that Mr Potter's intentions were fraudulent. He intended, it is said, by means of this deed, to settle the bulk of the property on his wife, with a view to delay, hinder and defraud his creditors. But even if this be so, it will not make the deed fraudulent and void as to the Girard Company, if they did not participate in the fraudulent intention. Actual fraud, which shall make a deed void, cannot exist, except between two or more persons (*Rolle's Abr.* 549); and, therefore, if you should be convinced that Mr Potter and his wife had an intention to defraud creditors, yet if the company knew nothing of such an intention, and did not take the conveyance by collusion with them, the deed is good in the hands of the company.

It is contended further by the plaintiff that the trusts declared in this deed in favour of Mrs Potter are void, because so far as it respects these trusts, it is a voluntary settlement by Mr Potter upon his wife of property in which he had a life estate. This is a distinct ground from the former, and if the plaintiff had gone to the Girard Life Annuity Company while they held the estate, and had tendered the \$4000 and the interest to the company, they might have recovered the property in an action of ejectment. But without paying or tendering the money, the company might have held the lands under the deed. The company, however, have been paid their debt, and by direction of Mrs Potter conveyed the estate to the Mechanics' and Tradesmen's Insurance Company. And the question now arises, whether this last deed is fraudulent or void as to the creditors of Mr Potter.

This deed recites the conveyance by W. Potter and wife to the Girard Life Insurance Company on the 26th October 1838; also the proceedings in partition; also that the Mechanics' and Tradesmen's Insurance Company have advanced to Mrs Potter with the consent of her husband, \$12,000, to enable them to pay off the sum due to the Girard Company. It recites also, that they have agreed to accept a conveyance upon certain uses, terms, and conditions, for the purpose of securing the \$12,000 advanced by them, and to secure certain persons named in the deed, specified sums. After this recital, follows an appointment or direction by Mrs Potter, to the Girard Company to convey the premises to the Mechanics' and Tradesmen's Insurance Company in trust, (with the exception of a rent charge of \$112.50), to let or demise the property, or to bargain and sell it absolutely or on ground rents, reserving the rents to the Mechanics' and Tradesmen's Insurance Company in trust for the purposes mentioned in the deed. Or to sell the rents

[Duffy v. The Insurance Company.]

reserved, and upon the further trust to mortgage the premises to secure the payment of money borrowed by the company. And as to all the money received by the company on the sale or mortgage of the premises, or rents and income, and other monies received under the trusts declared, to apply the same, after deducting expenses, towards the payment of the \$12,000 advanced by the company to Mrs Potter, with the interest, and in the second place, to pay Elhannan W. Keyser and Charles Fox \$2969.25 for advances made to Mrs Potter during the lifetime of her father. 3. To pay Samuel Badger \$1500, John Buddy \$690, Crawford Riddle \$350, the last four sums with lawful interest from the date of this deed. And upon the further trust to pay the overplus, and grant and assume all the estate undisposed of, to the use of such persons as Mrs Potter should by deed or will appoint. And as to the ground rent of \$112.50, in trust to convey it immediately to Rosanna Fraley.

This deed does not appear upon its face to be a voluntary conveyance any more than the other. It recites \$12,000 had been advanced to Mrs Potter by this company with the consent of her husband, for the purpose, among other things, of paying the \$4000 due to the Girard Company. Mr Richards testifies this sum was paid to the Girard Company, and Mr Badger testifies the \$12,000 came into his hands as assignee for Mrs Potter, and that he paid the Girard Company. This deed was also taken to secure the repayment of the \$12,000 among the purposes. If it is void as against creditors, therefore, it is not so for the reason that it was made without a valuable consideration. But in regard to this company also, it is not pretended that they were guilty of any actual fraud or collusion with Mr Potter and wife, with intent to delay, hinder and defraud creditors. Why then is it not valid? Because, it is said, the deed was made in pursuance of a power which was void in respect to creditors of Mr Potter. The \$4000, it is said, is paid to the Girard Company and they could claim nothing more under the deed from Potter and wife to them. The residue of the trusts in that deed were for the benefit of Mrs Potter, and being after marriage they were void as to creditors. These trusts are made to depend upon a power of appointment vested in Mrs Potter, which was void, and so no estate passed by the deed of the Girard Company to the Mechanics' and Tradesmen's Insurance Company. Upon this point it is to be observed if the power was simply and merely void to all intents and purposes, the title to this estate remains in the Girard Company, and as the deed to that company was neither voluntary nor fraudulent in fact, and vested in them before the assignment of Mr Potter in the insolvent court, the fee-simple did not pass by the assignment to the plaintiff. Upon this view of the case the legal estate would not be vested either in the plaintiff or the defendants, and the Girard Company is not a party to this action.

[*Duffy v. The Insurance Company.*]

And as to the right in equity to the estate; the Girard Company, if they had not been paid, would have the right to keep the possession. If the Girard Company still held the estate, no conveyance having been made, and the plaintiff had paid or tendered the money, he then would be entitled to recover. But the uncontradicted evidence is that the Mechanics' and Tradesmens' Insurance Company furnished the money to pay the Girard Company, and the deed recites the fact that they advanced it for that purpose. And it is not equitable that the plaintiff should avail himself of the payment to the Girard Company, made by the money advanced by the Mechanics' and Tradesmens' Insurance Company as a part of the consideration of the conveyance to them. Upon this view of the case the plaintiff ought at the least to have reimbursed the \$4000 and interest before he claims the estate which the Mechanics' and Tradesmens' Insurance Company had taken as their security for it. That is to say, if this power of appointment is merely and absolutely void to all intents and purposes, the Mechanics' and Tradesmens' Insurance Company have the right to stand in the place of the Girard Company, and keep the estate till this sum be paid. But this power is not merely and simply void. It was good as between the parties; and if Mr Potter had not been indebted on the 26th October 1838, nor became so afterwards under circumstances that would justify the inference of fraud in the conveyance, the power would be good and the estate under it valid.

Whether, under the circumstances of the case, the estate passed by the conveyance of the Girard Company to the Mechanics' and Tradesmens' Insurance Company or not, perhaps is not necessary to be determined. For if the estate did pass by that conveyance, the situation of the Mechanics' and Tradesmens' Insurance Company in respect to the \$4000 paid to the Girard Company is certainly no worse than if it did not pass. For on this supposition, they would not only have the legal estate, but the equitable right to retain it until the \$4000 should be paid to them. And that sum not having been paid or tendered, the plaintiff has not put himself in a situation to recover. As to the residue of the \$12,000, it was advanced to Mrs Potter generally without reference to any particular appropriation of it. But it is said that she used the whole of it to pay her husband's debts, except \$700 or \$800 which she used to pay her own private debts. But in regard to \$4600 of the sum advanced, it was advanced expressly to pay the Girard Company, and was so applied; and to this extent the Mechanics' and Tradesmens' Insurance Company have the rights of the Girard Company, whether the power was void or not.

The difference between these two deeds (which I state rather for the sake of informing the parties how the matter strikes my mind than because it is necessary to this case) is this:

(1.) The conveyance by Potter and wife to the Girard Company

[Duffy v. The Insurance Company.]

was a deed upon a valuable consideration, without actual fraud; and the deed is valid so far as it was intended as a security for the \$4000 and interest. The equity of redemption, as it has been called, or the right to the property settled upon the wife by way of a trust estate after the payment of this sum, vested in the company, subject to the exclusive control and appointment of Mrs Potter. This part of the deed is invalid as to the previous creditors of Mr Potter, so far as his life estate is concerned.

(2.) The conveyance to the Mechanics' and Tradesmens' Insurance Company was also made upon a valuable consideration, and without actual fraud, and thus far it corresponds with the other deed, but it depends upon a power contained in the vicious portion of the preceding deed. And the question is, whether the previous creditors cannot defeat the conveyance under the power upon the same grounds they could defeat the power itself, if it had not been exercised. There may not be much difficulty in resolving this question, but as it does not necessarily arise, and as this precise question has not been discussed by counsel, I shall not go into it.

The other ground is sufficient. The deed to the Girard Company not being infected with the fraud, is good to the extent of a security. The money to pay the Girard Company was furnished by the Mechanics' and Tradesmen's Loan Company expressly for the purpose of paying them, and was in fact so applied. The consideration of this advance was intended to be the transfer of the property held by the Girard Company. The plaintiff has neither paid nor offered to pay either the Girard Company nor the Mechanics' and Tradesmen's Loan Company, and no evidence has been given to show that the money has been reimbursed out of the estate. Whether, therefore, the appointment be void or not—in other words, whether the estate passed by the deed of the Girard Company to the Mechanics' and Tradesmens' Insurance Company or not, the plaintiff has not the right upon the evidence and conceded facts in the case to recover the possession of the property in question.

It is said, however, that the deed by Potter and wife to the Girard Company is a mortgage, and that the plaintiff has a right to recover, subject to the mortgage. But this deed is not in form a mortgage. It is a conveyance in fee-simple upon certain trusts, and contemplates a change of the possession from the grantors to the grantees. The grantees took possession and claimed to hold it, and undertook to transfer the possession to the Mechanics' and Tradesmen's Insurance Company. This point, therefore, will not avail the plaintiff. This view of the case makes it unnecessary to decide the numerous points of law proposed by the counsel on both sides. So far as they relate to the matters which I have spoken of, they are answered. So far as they relate to other matters, they are irrelevant to the turning points of the case. I will now sum-

[Duffy v. The Insurance Company.]

marily state what I had stated upon the cardinal points of the case.

1. The deed by Potter and wife to the Girard Life Insurance Annuity and Trust Company does not appear on its face to be a voluntary conveyance.

2. It is in evidence, and the fact is not denied, that \$4000, the consideration expressed, was paid by the company to the grantors.

3. There is no evidence of actual fraud or collusion with Potter and wife by the company to defraud the creditors of Mr. Potter. This deed, therefore, was valid in the hands of that company, as a security for the sum of \$4000 and the interest.

4. The Mechanics' and Tradesman's Insurance Company furnished the money to pay the Girard Company upon the faith and consideration of the transfer of the estate to them, and the money so advanced by them was actually paid, as intended, to the Girard Company.

5. No evidence has been given to show that the Mechanics' and Tradesman's Loan Company have been reimbursed this sum or any other sum out of the estate in question.

6. There is no evidence of an offer or tender of payment by the plaintiff either to the Girard Company or to the Mechanics' and Tradesman's Insurance Company of this sum of \$4000 and the interest or any other sum, either before the institution of the suit or since.

7. But without the payment or tender of that sum during the trial or before, the plaintiff in this action cannot recover in this action against either of the defendants.

If any of these facts were disputed, it would belong to you to decide them, but as no question has been made about these facts, and as they give rise to a question of law which decides the action, I have thought it improper to trouble you with the consideration of any other, which, however they might be found by you, would not change the rights of the parties in this action.

The plaintiff directed my attention to the sums received by the Mechanics' Company, and said they amounted to more than \$4600. I therefore charged as follows:

It is, however, said that the Mechanics' Company have been reimbursed this \$4600 which was due to the Girard Company. This matter was not called to my attention on the argument. But this inaccuracy in the statement of the facts makes it necessary, if the fact be so, to decide whether the deed by the Mechanics' Company is void because of the invalidity of the power in the deed to the Girard Company. Upon this point, then, I have to say to you that if the Mechanics' Company paid the \$12,000, as stated in the deed, and took the conveyance *bonâ fide*, as a security for that sum, and without collusion with Mr Potter and wife, they have a right to hold the premises as a security for the repayment of the \$12,000 mentioned in the deed and proved to have been paid. But

[Duffy v. The Insurance Company.]

there is no evidence that they have realized this sum out of the estate, nor is there any evidence that it has at any time been tendered.

The plaintiff excepted to the charge.

Errors were assigned in the several bills of exception: also to the court's instructing the jury:

1. That the agreement between Potter and wife and the Girard Insurance Company of the 26th October 1838 was not a voluntary conveyance, so far as it affected Potter's life estate in one-half the profits, and in the whole after payment of the \$4000.

2. That the said agreement was not a mortgage nor in the nature of a mortgage.

3. That the Mechanics' and Tradesmen's Insurance Company had a right to hold the property until the \$4000 paid by Mrs Potter to the Girard Company was repaid them.

4. That the creditors of Potter could not defeat the conveyance to the Mechanics' and Tradesmen's Insurance Company made under the power reserved in the agreement of 26th October 1838, upon the same grounds that they could defeat the power itself had it not been exercised.

5. That without the payment or tender of the \$4000 to the defendants, the plaintiff could not recover.

6. That the Mechanics' and Tradesmen's Insurance Company had a right to hold the premises as a security for the re-payment of \$12,000.

7. In deciding the whole matter as a question of law and not leaving anything to the jury, whereas the questions of notice and of fraud were questions of fact that ought to have been left to the jury.

M'Call and *Guillou*, for the plaintiff in error, referred to 4 *Kent* 137; 2 *Whart.* 240; *Ather. Mar. Set.* 241; 2 *Atk.* 600; 2 *P. R.* 82; 5 *Watts* 410; 1 *Rawle* 349; 3 *Watts & Serg.* 127; 5 *Rawle* 149; 3 *P. R.* 162; 3 *Johns. Ch.* 481, 492; 2 *P. R.* 82.

St. G. Campbell, for the defendants in error, cited 6 *Cranch* 8; 4 *Watts & Serg.* 546; 5 *Ibid.* 499; 10 *Vez.* 139; 5 *Madd. R.* 414; 4 *Russ.* 112; 5 *Johns. Chan.* 431; 3 *Page* 440, 614; 10 *Watts* 29, 139; 1 *Rawle* 131; 9 *Vez.* 190; 4 *Serg. & Rawle* 321; 11 *Ibid.* 179; 6 *Watts & Serg.* 285; 5 *Serg. & Rawle* 231; 1 *Dall.* 128; 3 *Bro. Ch. Ca.* 214.

M'Murtrie and *J. Sergeant*, for Mrs. Potter, cited 1 *Bligh* 105; 1 *Binn.* 126-7; 2 *Watts* 82; 4 *Watts* 287; 6 *Whart.* 576; 2 *Lev.* 148, 71; *Prec. Chan.* 113; 3 *Wils.* 358; *Cowp.* 278; 1 *Brown's P. C.* 145; 2 *Atk.* 514, 521; 10 *Vez.* 129; *Sid.* 133; 9 *Vez.* 190; 2 *Pow. Mortg.* 1024, 1035; 3 *Atk.* 377; 2 *Sug. Powers* 25, 26; 1

[Duffy v. The Insurance Company.]

Rawle 171; 5 *Rawle* 144; 12 *Vez.* 103; 17 *Serg. & Rawle* 419; 1 *Watts* 397; *Bac. Ab.* "Bargain & Sale," *D.*; *Dyer* 337 *a*; *Sh. Touch.* 511; 22 *Vin. Ab.* "Uses," *O. pl.* 8; 2 *Rolle's Rep.* 191; *Plowd.* 59; *Co. Lit.* 554; 2 *Rolle's Ab.* 5; *Sug. Vend.* 286, 290; 1 *Hill* 579; 24 *Pick.* 276; *Chit. Eq. Dig.* 394; 1 *Tanlyn* 172; 1 *Bro. Ch. C.* 138; 1 *Meriv.* 638; 9 *Vez.* 190; 5 *Rawle* 144; 5 *Watts & Serg.* 100; 6 *Ibid.* 300; 3 *Ibid.* 194; 1 *Vez.* 179; 2 *Atk.* 384; 2 *Vern.* 437; 1 *P. Wms.* 264, 347; 2 *Ibid.* 664; *Amb.* 150; *Cas. Tem. Talb.* 64; 1 *Vern.* 213, 294; 3 *East* 119.

The opinion of the Court was delivered by

KENNEDY, J. — The evidence mentioned in the several bills of exception which was rejected by the court, could have had no weight in the determination of the cause by the jury, if it had been received, and therefore may well be regarded as wholly immaterial and insufficient to produce a reversal of the judgment. Several points were made and discussed on the trial of the cause in the court below, but all may be included and considered in the question whether the arrangement made by Potter and his wife first with the Girard Life Insurance Annuity and Trust Company of Philadelphia, and afterwards with the Mechanics' and Tradesmen's Insurance Company of Philadelphia as a third party, was binding upon the parties and valid against the creditors of Mr Potter. By this arrangement a certain portion of the real estate which Potter became possessed of in right of his wife after marriage, was settled upon her for her separate use. It is objected by the creditors of Potter that according to the rules of the common law he could not make such an arrangement with his wife after marriage; and even if he could, it was made without consideration, and therefore void as against them. It is doubtless true that there must be always two parties at least to a contract, and hence a man cannot make a contract with himself, or in other words with his wife, as she is generally considered the same as himself, or both as but one person in law. Her being or legal existence as a distinct person is suspended during the marriage, or at least is incorporated and consolidated with that of her husband. And upon this principle of the union of person in husband and wife, depend all the legal rights, duties and disabilities, which either of them acquires by or during the marriage. For this reason it may be said a man cannot grant anything to his wife or enter into a covenant with her; for the grant would be to suppose her to possess a separate and distinct existence. And therefore it is also generally true that contracts made between husband and wife when single are avoided by the intermarriage. *Story's Equity pl.* 1367. But in courts of equity, although husband and wife are regarded as one person in proper cases, yet they are not considered so in every case. On the contrary, courts of equity in England, and here in Pennsylvania, where we have no courts of equity

[Duffy v. The Insurance Company.]

regularly organized as such, courts of law, for many purposes treat the husband and wife, as the civil law treats them, as distinct persons, capable, in a limited sense, of contracting with each other, of suing each other, and of having separate estates, debts and interests. *Arundell v. Phipps*, (10 *Vez.* 144, 149); *Story's Equity pl.* 1368. Accordingly it was ruled by this court that a wife might acquire a separate property in equity by an agreement with her husband, even without the intervention of trustees *M'Kennan v. Phillips*, (6 *Whart.* 571). And for want of a court of chancery in Pennsylvania to compel a husband to convey to a trustee for the separate use and benefit of his wife, where a court of equity would interpose for that purpose, the courts of law will consider him a trustee, so that the wife shall have all the benefit she would be entitled to claim and receive, the same as if the property were vested in a trustee for her separate use. *Jamison v. Brady*, (6 *Serg. & Rawle* 467). Hence a bequest to the wife for her separate use cannot be set-off by the husband, I take it, without her consent, against a debt due by him to the testator's estate; and it was held that in an action by the husband and wife for the recovery of the legacy, the debt owing by the husband to the estate of the testator could not be set-off so as to defeat the payment of the legacy for the separate use of the wife. *Jamison v. Brady*, (6 *Serg. & Rawle* 467). So post-nuptial contracts between husband and wife, though declared void at law, have been held good and carried into effect by a court of equity. For example, where a wife having a separate estate, entered into a contract with her husband to make him a certain allowance out of the income of such separate estate for a reasonable consideration, the contract, although void at law, was held obligatory and was enforced in equity. *More v. Freeman*, (*Bunb.* 205). So if the husband shall after marriage for good reasons contract with his wife that she shall separately possess and enjoy property bequeathed to her, the contract will be upheld in a court of equity. See *Harvey v. Harvey*, (1 *P. Wms.* 125-6); *S. C.* (2 *Vern.* 659, 660), and *Mr Raithby's note*. So a wife may become a creditor of her husband by acts and contracts during marriage; and her rights as such will be enforced against him and his representatives. As for instance, if a wife unite with her husband to pledge her estate or otherwise to raise money out of it to pay his debts or meet any other occasion for his accommodation, whatever may be the mode or form adopted to carry such purpose into effect, the transaction will in equity be treated according to the true intent of the parties. See *Tate v. Austin*, (1 *P. Wms.* 264), *Mr Cox's note thereto*; *S. C.* (2 *Vern.* 689), and *Mr Raithby's note*: also *Pawlet v. Delaval*, (2 *Vez., Sen.*, 663, 669); from which it appears that this doctrine is settled and clearly established; and likewise recognised as being so by Mr Justice STORY in his *Equity Jurisprudence*, *pl.* 1373. The

[*Duffy v. The Insurance Company.*]

principle contained in it most clearly embraces the case under consideration, and the only objection made to the application of the principle, if it does exist, is that the husband's indebtedness at the time he made the arrangement here with his wife, put it out of his power to make it available against his creditors, unless he had received a full and adequate consideration for doing so.

But it is said that the provision made for his wife by it was voluntary and without consideration, and therefore must be deemed fraudulent in law as against his creditors. If this were true, that is, that it was made without a valuable consideration, the conclusion might be correct; but it is perfectly manifest that a most valuable consideration was received by the husband from his wife for all that was given by him in trust for her separate use and benefit; but this is not all: for what would seem to render the arrangement still more firmly binding if possible upon the creditors is that the whole of the consideration so far as received by Mr Potter the husband on the credit of his wife's estate, amounting to \$12,000 received by her consent, without which he could not possibly have received it, was, with the exception of about \$700 or \$800, actually applied to the payment of his debts and received by his creditors towards liquidating their claims against him; and the further sum of \$5509.25, the residue of the consideration, to be raised by the trustees out of the same estate with interest thereon from the date of the deed, was also to be applied to the payment of other debts therein specifically mentioned. Mr Potter, the husband, had but a life-estate, at most, in the property out of which the \$17,500 were to be raised with interest thereon, upon which, for aught that appears to the contrary, he could not at most, probably have raised \$1000. His wife, however, had the fee-simple therein, and the property being in an unproductive state, of but little annual value, and such as money to any considerable amount could only be raised from by disposing of the fee-simple estate therein, it became necessary, if his creditors or any portion of them were to be paid at all, that he should get by some means or other his wife to join him in disposing of her right to some part of the estate in addition to all his own right therein. With a view to raise money for this purpose, which was certainly a most laudable one, Mrs Potter joined with her husband in giving up her right to the fee-simple in the whole of the estate to raise out of the same the \$17,509.25 with interest thereon, in consideration that the residue of the proceeds of the whole estate which was to be sold and disposed of, after defraying all the expenses and charges attending the execution of the trust, should be held by the trustees for her immediate and separate use and benefit as therein directed. Here there was a giving up by the wife of her right to the fee-simple in part of the estate which she alone had the right to dispose of as the owner thereof, in consideration of

[Duffy v. The Insurance Company.]

which the husband granted his right to the immediate possession of the residue thereof to trustees for the separate use and benefit of his wife. The right to the fee-simple in the estate may well be regarded as the separate estate of the wife in a limited or qualified point of view; for without her consent and act it could not be disposed of or even encumbered by her husband or any other person. This being the case, why then was it not competent for her to purchase with her interest in a part of the estate the interest of her husband in the whole of it, her interest being greatly more valuable than his? The reasoning of the Lord Chancellor and all that he says on the subject in *Lady Arundell v. Phipps & Taunton*, (10 Vez. 149), is in support of the proposition that a wife with her separate estate may purchase from her husband, and the purchased interest will be protected even against creditors, if the transaction between the husband and wife be *bonâ fide*. And the conclusion to which Mr Roper comes from a view of the cases on this subject in his treatise on the law of property arising from the relation between husband and wife, vol. 1, page 324, is, that "the giving up of any *valuable* interest by her in consideration of the settlement after marriage, will support it against creditors and subsequent purchasers, because such a settlement does not class among those that are voluntary, but among such as are made for a valuable consideration; in fact the wife herself becomes a purchaser for herself and family." That the wife gave up a *valuable* interest in the present case over which her husband had no control, cannot be questioned. And it must be presumed too that it was of sufficient value, at least, to prevent all presumption of collusion or fraud being raised from its inadequacy to the value of what was settled upon her by the husband; for no evidence was offered by the plaintiff on the trial, as it would appear, to prove the contrary. Neither does it appear that collusion or fraud in fact was alleged or even pretended to have been intended by the parties in the transaction against the creditors of the husband. The consideration given by the wife for all that was settled upon her by the husband, which could with the least propriety be said to belong to him exclusively, must therefore be taken to be amply sufficient to support the provision in favour of the wife. And indeed the consideration in such cases will never be weighed in very nice scales, if the transaction otherwise appears to be honest. *Middlecome v. Marlow*, (2 Atk. 520); *Nunn v. Wilsmore*, (8 T. R. 529); or unless it be *proved* that the settlement *vastly* exceeded the consideration, so that from the inadequacy a collusion or fraud may be fairly inferred to have been intended on the creditors. Per Lord Hardwicke in *Ward v. Shallet*, (2 Vez., Sen., 18).

From the view thus taken of this case it will be seen that a different decision of the court below in regard to the admission or rejection of the evidence mentioned in the several bills of excep-

[*Duffy v. The Insurance Company.*]

tion, would not have varied materially the true character of the case, and that the ultimate decision of it ought still to have been the same. The judgment is therefore affirmed.

Judgment affirmed.

Jones against Janney.

Lands bordering on the flats of a river and the flats in front naturally go together, and therefore the flats pass in a conveyance of the land described as running by the course of the river.

An express exception is required in the grant or some unequivocal declaration or certain immemorial usage, to limit the title to the edge of the river.

The nature of the right to flats on a river.

One having land in front of a river by conveyance from the proprietary, out of which the flats were reserved, but afterwards claiming the flats under an office right of dubious validity, and making a settlement of the land on the river on certain of his children together with the flats, and afterwards confirming such settlement by his will, shall be considered as intending to pass the flats to such children, in preference to his residuary devisees under a general clause in his will.

ERROR to the District Court for the city and county of *Philadelphia*, where a verdict and judgment were rendered for the defendant below.

Trespass *quare clausum fregit* brought by Robert E. Jones against Oliver S. Janney. The *locus in quo* was a strip of flats on the river Delaware in Moyamensing in front of land, part of Greenwich island, owned by the defendant. The acts constituting the trespass were proved and admitted, and the question was on the title.

Both parties claimed under William Jones. The plaintiff, Robert E. Jones, was his son; the defendant was his grandchild by Mary Jones, who married — Janney. The title of William Jones was as follows: By deed dated 20th October 1758, Thomas and Richard Penn, proprietaries of Pennsylvania, appointed Richard Peters and Richard Hockley their attorneys to enter into agreements and contract with any person for the sale and conveyance of the fee-simple and inheritance of the whole or any part of all and every our marsh lands or cripple or swamp grounds situate, lying and being on or near to the — of Delaware river, and in the townships of Moyamensing and Passyunk or one of them, in the county of Philadelphia, containing in the whole by estimation 600 acres,—and to execute deeds, &c. at not less than ten pounds Pennsylvania currency per acre.

In pursuance of these powers, Richard Peters and Richard Hockley on the 28th February 1759 contracted with William

[Jones v. Janney.]

Jones and Edward Croston, in consideration of £2000 sterling paid and money to be paid, to convey to them in fee as tenants in common all the vacant and unimproved marsh, cripple and swamp situate below the Greenwich Point ferry-house, &c., bounded by the river Delaware to the south-east, by Joseph Lowndes's marsh to the south-west, by Hay Creek and the improved meadows of Edward Shippen, Esq. and Company to the north-west, and by the marsh or meadows of Stephen Pascal and Andrew Bankson to the north-east, computed to be 600 acres or thereabouts. It was covenanted that the premises should be surveyed by the Surveyor-General, Mr C. Scull, and all the marsh, swamp and cripple, it was practicable to bank in and improve, should be included in the survey. "And further, that all the flats which shall be left out of the survey and intended outline banks are to remain the sole property of the said Thomas and Richard Penn and their heirs, and are not intended to be included in the said purchase. But that when the said proprietaries or their heirs shall be inclined to sell and dispose of such flats without the said intended outline banks and survey aforesaid, the said William Jones and Edward Croston and their heirs and assigns, are to have the preference in the purchase thereof, they paying for the same as much as other persons who may be willing to become purchasers thereof, and in the mean time that full liberty and privilege is and shall be reserved for all the necessary drains, sluices and watercourses that the said William Jones and Edward Croston, their heirs and assigns, shall want to pass and empty themselves through the said flats into the river." On the 24th September 1759, a deed was made for 546 $\frac{3}{4}$ acres on the same terms, bounded as follows: "beginning at a corner post on the south side of Hay Creek, being a corner of Stephen Pascal's ground, thence by the said Stephen Pascal's ground and ground of Andrew Bankson south 8 degrees 20 minutes east 234 perches to a cedar post put for a corner, thence by the flats on Delaware river (not included in this survey) the four courses and distances next following, &c.," together with all mines, minerals, quarries, meadows, marshes, savannahs, swamps, cripples, woods, underwoods, timber and trees, ways, (particularly a certain lane) waters, watercourses, liberties, profits, commodities, advantages, hereditaments and appurtenances whatsoever, to the said hereby granted, &c. 546 $\frac{3}{4}$ acres of swamp, marsh and cripple, belonging, &c., and also full and free liberty and privilege for all the drains, sluices and watercourses, as before.

On the 10th May 1766. William Jones procured a survey to be made and returned by the Surveyor-General of 50 acres and allowance of cripple and flats in Moyamensing township, situate in front of William Jones's meadows, part of Greenwich island, in pursuance of a warrant bearing date the 27th March 1755, granted to Thomas Preston for 1504 acres in any part of the province purchased of the Indians, being part of the original purchase of

[*Jones v. Janney.*]

George Palmer, deceased; 100 acres part of said 1504 acres, the said Thomas Preston and Sarah his wife, by indenture bearing date the 24th day of November 1755, did grant and convey unto Enoch Elliott of Derby in the county of Chester, and the above-named William Jones then of Kingsess in the county of Philadelphia, in fee as tenants in common.

In 1761 a division took place between William Jones and Edward Croston, by which that part of the tract conveyed to them by the proprietaries which was nearest the river Delaware was assigned to William Jones, and the other part inland to Edward Croston.

On the 15th December 1766, William Jones made a deed of settlement of real estate on his son Mathew Jones, and Mary and Elizabeth Jones his two daughters, conveying it to trustees for their respective uses. Mathew's portion consisted of tracts of land in the township of Kingsessing in the county of Philadelphia, that is to say, 172 acres 86 perches of upland—117 acres of marsh, one boundary of which was "to a stake by the river Schuylkill, thence by the said river"—7 acres of meadow, and one moiety and three-eighths of the other moiety of 5 acres of meadow—4 acres and 16 perches of marsh or meadow, part of which was described as bounded by Land's creek. On Mary and Elizabeth he settled each one half of his tract of 273 acres 60 perches in Moyamensing (being his half of the lands purchased of the proprietaries), described as follows: "All that piece or parcel of marsh or new-made meadow ground situate in Moyamensing township in the said county of Philadelphia, in the district called Greenwich Island, &c., beginning at a post for a corner as well of this and the late Edward Croston's marsh as of the said Stephen Pascal's and Andrew Bankson's meadow ground, thence running by the said Andrew Bankson's south 8 degrees 20 minutes east 107 perches to a post on the edge of the flats on the river Delaware, thence running by and upon the said flats south 70 degrees, west 176 perches, &c." He also settled on Mathew 30½ acres and 55 perches in Moyamensing called Garlick Hall—and also a lot near it containing 3½ acres and 25 perches. The deed in the conveying part to the trustees, after describing all the above, contained this clause, "together with all houses, outhouses, edifices, buildings, woods, underwoods, timber and trees, meadows, marshes, savannahs, swamps, cripples, flats, mines, minerals, ways and waters, watercourses, liberties, easements, privileges, profits, commodities, advantages, hereditaments and appurtenances, to the said premises severally and respectively belonging or in anywise appertaining, &c." To this deed of settlement was added a power of revocation by deed or will.

In 1799 William Jones made his will, in which he confirmed his deed of settlement, and gave to Robert (the plaintiff), born since, a messuage in Southwark, and to Mathew half of 54 acres and 60

[Jones v. Janney.]

perches of meadow in Kingessing, he paying thereout to Robert £800. "And whereas I did some years past with my own proper monies, erect, build and finish on a lot of ground, the property of my former deceased wife, a large three-story brick house, situate on the south side of High street, between Fifth and Sixth streets from the Delaware, and nearly adjoining the house I live in; and whereas since the death of my said wife, her two sons William and Joseph Gray have by their deed conveyed to my said son Robert the above-described lot—now I do give and devise the said three-story brick house, together with all the rest, residue and remainder of my real estate, whatsoever or wheresoever, to him my said son Robert, his heirs and assigns, for ever." He further gave £1000 to William, son of Robert, and the rest of his personal estate to Robert. He afterwards declares the share of Elizabeth to be for her separate use; and by a codicil dated November 6, 1802, settles her share in trustees for that purpose. By a further codicil dated November 19, 1802, he annuls the legacy to William of £1000, gives him £500, and £500 between Mary and Elizabeth. The will was proved December 8, 1802.

The court below charged the jury as follows:—

It is conceded by the plaintiff that if William Jones had no title on the 10th May 1766, this suit must fail. It is conceded also that if he had title and legally disposed of it in his lifetime, the suit must fail. Now I assume for all the purposes of settling this controversy, that which both plaintiff and defendant say is true, to wit, that on the 10th May 1766, William Jones *had* title. If he had any doubt about his title, independent of the survey of the 10th May 1766, he seems to have considered that such survey removed the difficulty. What the parties say now for him, he may be presumed to have asserted for himself at that time. With this title, then, and his knowledge of it, he, on the 15th December 1766, makes a deed of settlement on some of his children. He owned the fast land or meadow clearly by virtue of his deed of 24th September 1759. He owned the flats in front of that meadow. The flats, but for the reservation in the deed of the 24th September 1759, would have passed with the meadow. He was, as both parties now before us assert, free from the effect of that reservation, and his title went to low-water mark. Now the point of the case is reached: by a conveyance of the meadow running to the bank, which bank was the high-water mark, the flats and everything to low-water mark would pass also.

But even if this were not clear, a conveyance of the meadow land, together with the flats belonging or in anywise appertaining thereto, would indubitably carry the flats in question. The suggestion that such a conveyance must be limited by the metes and bounds of the meadow land, as they alone are set out in the deed, is to strike out the word 'flats' altogether, and the clause of which it is a part. From the character of this property, a conveyance

[*Jones v. Janney.*]

of the meadow by metes and bounds together with the flats to said meadow belonging, the said meadow being bounded by a bank; the bank being the dividing line between the meadow and the Delaware river; the flats, too, belonging, without dispute, to the owner of the meadow, no matter whether by the same title or another title — such a conveyance would clearly carry the flats. Then the application of this principle is clear.

[The Judge then read parts of deed of trust, particularly the statement of the parties—the description of the meadow land, as copied from the deed of the 24th September 1759, and the following clause:

“ Together with all houses, outhouses, edifices, buildings, woods, underwoods, timber and trees, meadows, marshes, savannahs, swamps, cripples, flats, mines, minerals, ways and waters, water-courses, liberties, easements, privileges, profits, commodities, advantages, hereditaments and appurtenances to the said premises severally and respectively belonging, or in anywise appertaining, and the reversions and reversionary rents, issues, and profits thereof and of every part thereof,” and then proceeded]—

The result is, that the title to the flats passed by the deed; and the defendant is entitled on this ground to a verdict.

But I have said that this is deciding the case according to William Jones's declared understanding of his own rights, and is executing the purposes of his last will and testament. By the deed of settlement he spoke of the flats; and he could hardly be supposed to be under the impression that by some legal construction of his deed, the flats which he said should pass, would not pass. He seems to have lived and died in the belief that the flats passed according to his language expressed in a formal deed. By his will made in 1799, upwards of thirty years after the deed of settlement, he refers to that deed and establishes, ratifies and confirms it. By this reference and ratification, he again recognises the right of such of his family as held this meadow to the flats also. He disposes of sundry pieces of real estate not embraced in the deed of settlement, giving to his son Robert, the present plaintiff, a house and lot in Front street between Shippen and Almond streets; confirms his right to a house built by the testator on a lot of the plaintiff's mother, the title to which lot had vested in the plaintiff; and then devises to him in fee all the residue of his real estate. Now it seems to me, that to hold that the flats now in dispute are a part of the residuary estate of William Jones, would be to violate his own very carefully expressed disposition of his property as solemnly and deliberately ratified by his last will.

It is hardly necessary to add anything on the subject of the plaintiff's possession. It is not pretended that he had actual possession further than was held by him while he was erecting the shed, and while the shed remained as the alleged representative of his possession. Before 1840, he does not assert any possession

[*Jones v. Janney.*]

except that which follows the right: as he had not the right, of course he had not the possession. The suit must then fail on this ground also.

As to the defendant's possession of the flats, it is as complete in a legal sense as his possession of the meadow land. The possession of the flats has gone with the possession of the meadow ever since the deed of 1766; whether it did also before that time it is useless to inquire.

The plaintiff excepted to the charge.

Errors assigned:

1. The court erred in stating to the jury, that by a conveyance of the meadow running to the bank, which bank was high-water mark, the flats and everything to low-water mark would pass also.

2. And also; but even if this was not clear, a conveyance of the meadow land, together with the flats belonging or in anywise appertaining thereto, would undoubtedly carry the flats in question.

3. In stating that the suggestion that such a conveyance must be limited by the metes and bounds of the meadow land, as they alone are set out in the deed, is to strike out the word 'flats' altogether and the clause of which it is a part.

4. In stating, that from the character of this property, a conveyance of the meadow by metes and bounds with the flats to the said meadow belonging, the said meadow being bounded by a bank—the bank being the dividing line between the meadow and the Delaware river; the flats too, belonging without dispute to the owner of the meadow, no matter whether by the same title—such a conveyance would clearly carry the flats.

5. The court erred in the construction given to the deeds read in evidence, and to the deed of trust so called, and in charging that the title to the flats passed by the deed and that the defendant is entitled on this ground to a verdict.

6. In stating that the foregoing opinion is deciding the case according to William Jones's declared understanding of his own rights, and is executing the purposes of his last will and testament.

7. In stating that William Jones seems to have lived and died in the belief that the flats passed according to his language expressed in a formal deed.

8. In stating that William Jones by his will again recognised the right of such of his family as held his meadow, to the flats also.

9. In charging the jury that the flats in dispute were not a part of the residuary estate of William Jones, and did not pass to the plaintiff under the will.

10. In not answering the plaintiff's points.

Todd, for the plaintiff in error, referred to *Freytag v. Powell*, (1 *Whart.* 536); *Pickering v. Stapler*, (5 *Serg. & Rawle* 107); *Blaine v. Chambers*, (1 *Ib.* 169); *Hill v. West*, (4 *Yeates* 154); 15

[Jones v. Janney.]

Johs. 447; 1 *Sumner* 37; 11 *Pick.* 193; 10 *Peters* 25, 54; *Union Burial Ground v. Robinson*, (5 *Whart.* 18).

Hirst and Meredith, contra, cited *Ball v. Slack*, (2 *Whart.* 540): 3 *Kent's Com.* 349; *Hart v. Hill*, (1 *Whart.* 131); *Klingensmith v. Ground*, (5 *Watts* 459); *Carson v. Blazer*, (2 *Binn.* 475); *Commonwealth v. Fisher*, (1 *P. R.* 467); *Ueberoth v. Lehigh Navigation Co.*, (7 *Haz. Reg.* 293).

The opinion of the Court was delivered by

SERGEANT, J.—It is rightly conceded by the counsel for the plaintiff, that he has no title, if it appears to have been the design of William Jones to embrace the flats in question by his deed of settlement of the 15th December 1766. That such was his design we think fairly inferrible from the language used in the deed, as well as from the circumstances attending the acquisition of his title and the nature of the property. This deed conveys the meadow ground, together with, among other things, all flats appurtenant to it: and unless this word be applied to the flats in question, it has no meaning or operation, it being admitted that in the only other properties lying on water, the words “to a stake by the river Schuylkill, thence by said river,” and “to a creek called Lands creek, thence south, &c., by the said creek,” carry the flats in front of them without any addition. Besides, it is observable that in the deed to William Jones from which the description of this property was taken, the word “flats” was properly omitted, being expressly reserved and excluded by the grantors, and it would not be inserted in the next following deed without a reason. Where words inserted in a deed may have a reasonable application to the subject in controversy, they ought not to be considered as merely expletives thrown in to fill up the parchment and give employment to a scrivener. The words commonly used in our conveyancing, though they may not in every case be necessary, are not on that account to be deemed superfluous; nor will a prudent grantee lightly dispense with them, since their use may turn out to be important. In the present instance I am inclined to think the word “flats” in the clause was inserted with especial reference to the property in question. For it appears that although William Jones was unable to succeed in having the flats included in his contract and deed with the proprietaries, and, for some reason or other unknown to us, their agents carefully excluded them and conveyed only the marsh bounding on the edge of the flats, yet Jones made it a part of his bargain with them that he should have the pre-emption right to the flats. Of course the proprietaries were bound, if ever they concluded to sell the flats to any one, to offer them to Jones, and Jones had an equitable title and could compel them to convey in such case on tender of as much as another person would give for

[*Jones v. Janney.*]

them and without this right it is not likely the grantees would have paid so much for the meadow. So that when Jones got his deed of the 24th September 1759 from the proprietary agents, he had a legal title to the marsh, and an equitable pre-emption right to the flats in front, and might thus even then conceive himself in some sort the owner of both as one property. And it was manifestly with the view of completing this object that he obtained an old right, and had it applied to these flats opposite to his ground. The character of this kind of property is such that land bordering on the flats and the flats naturally go together. Their most beneficial enjoyment is derived from their connection; and it is inconceivable that any man in his sober senses having or supposing he had a title to both would intentionally separate them and convey the meadow to one of his children and the flats in front of it to another. For this reason it is that an express exception is required in the grant, or some clear and unequivocal declaration or certain immemorial usage to limit the title of the owner in such cases to the edge of the river. 3 *Kent's Com.* 427. Though the agents of the Penns reserved the flats in their grant, perhaps from too rigid a construction of their powers, which were to convey the "marsh-lands, cripple or swamp grounds," yet there is no instance known in which the proprietaries granted the front of the river to one person and the flats adjacent to it to another: nor is it easy to see that they could have gotten a price for them under such circumstances, whilst the value of the other part would have been necessarily diminished. Flats have always been deemed an appurtenance to the adjoining river front; they pass with it as appurtenances if not expressly excluded: they are a peculiar kind of right, situate in the bed of a navigable river, where the tide flows and reflows, covered by the water at high tide, and left bare at low. While covered with water they are a part of the river, in which the public have the right of navigation, fishing, passing and repassing, and in many instances are not capable of being reclaimed, except by wharves or piers, regulated according to the will of the State in whom the right of the river bed is vested. Under these circumstances, it is fair to presume that William Jones, from the 10th May 1766, when he had the flats surveyed and claimed title to them, (the validity of which, under his warrant to a first purchaser, it is not necessary here to inquire into, since both parties claim under it,) to the deed of settlement of the 15th December 1766, and during the remainder of his life till 1799, when he made his will, considered it as all one property, held as other properties similarly situated on the river were, in the manner best adapted to its beneficial enjoyment, and could not have designed, while he confirmed the settlement, to cut off these narrow flats and pass them under a general residuary clause as a distinct property in favour of another. We are of opinion, therefore, that by the true construction of the conveyances it was the

[Jones v. Janney.]

intention of William Jones to pass these flats by the deed of settlement of December 1766, as an appurtenance to the meadow ground settled on his two daughters, and that there are words in it sufficient and proper to convey them.

Judgment affirmed.

Commissioners of Spring Garden's Appeal

A judicial sale devests all liens definite and certain in their amount.

Therefore the lien of the Commissioners of Spring Garden for curbing and paving in 1836 and 1837 under the Act of 3d March 1818, is devested by a subsequent sheriff's sale in 1841.

And this is the case though the property be sold subject to the ground-rent then existing and created before such lien.

Quære, if the contest were between the owner of the ground-rent and the commissioners as to the appropriation of the proceeds of sale, to whom the money would go.

Quære, whether a different case would not be presented if the claim of the commissioners had been filed of record under the Act of 16th April 1840; and whether the whole estate, ground-rent and all, does not pass to the sheriff's vendee by a judicial sale in pursuance of the provisions of that Act.

THIS was an appeal by the Commissioners of The District of Spring Garden from the decree of the District Court for the city and county of *Philadelphia*, confirming the following report of an auditor, awarding the proceeds of sheriff's sale of the real estate of Peter V. Weaver, to John H. Cavender and George Schryer:

"John H. Cavender claims arrears of ground rent as assignee of Barclay Haines, who assigned the real estate, sold under the execution in this case, to the Norristown and Valley Railroad Company, the 9th May 1836, reserving an annual ground-rent of \$117.25 to Barclay Haines, his heirs and assigns. Under a writ of *feri facias*, tested 6th March 1841, Daniel Fitler then High Sheriff of the county of Philadelphia, made sale of the real estate in question, as the land of the Norristown and Valley Railroad Company, to Peter V. Weaver, the defendant in this execution, and conveyed the same to him by deed executed and acknowledged 15th May 1841, subject to the same ground-rent. Afterwards, on the 21st December 1841, Barclay Haines, the original owner of the ground-rent, conveyed the same to John Cavender, who claims as arrears of rent \$175.86.

The Commissioners of Spring Garden claim \$205.66, including interest and commissions, for paving and curbing in October 1837 and December 1836. This amount they ask to be paid first out of the fund. The validity of this claim as a lien on the property is

[Commissioners of Spring Garden's Appeal.]

denied on two grounds: 1. That it is barred by the Statute of Limitations. 2. That it was devested by the sheriff's sale to Peter V. Weaver in 1841, several years subsequent to the paving and curbing in question.

As to the first of these objections, that the lien is devested by the operation of the Statute of Limitations, the auditor is of opinion that the statute has no effect upon the lien. In *Knorr v. Elliot*, (5 *Serg. & Rawle* 49), the Supreme Court decided that a mechanic's lien did not expire in five years like that of a judgment, inasmuch as the act then in force creating the lien affixed no limit to its existence in point of time. The principle in this case rules this point.

As to the second objection to the claim of the district of Spring Garden, the auditor is of opinion that it *was* devested by the subsequent sheriff's sale. The curbing was done in 1836 and the paving in 1837, while the property was in the possession of the Norristown and Valley Railroad. It was not until 1841 that the property was seized under execution and sold by the sheriff to Weaver. The ground rent under which Cavender claims, was created before the curbing and paving were done by the district, that is on the 9th May 1836. The arrears claimed fell due May 1 and November 1, 1842, and May 1, 1843. The Act of 3d March 1818, provides that the real estate in the district of Spring Garden shall be subject to payment of debts thereafter contracted by the commissioners of the district for work done or materials furnished for or in pitching, curbing and paving any street, &c. in front of said real estate, before any lien thereafter created. It follows then that until the sheriff's sale in 1841 the lien of the commissioners had preference over the ground rent, though the rent was created before the paving and curbing were done.

Then the question follows, whether the sheriff's sale in 1841 subject to the ground rent devested the lien of the district. This will be considered, first as a general question, and secondly under the circumstances of this case. A long series of decisions in the courts of Pennsylvania establishes the general rule that a sale under execution by the sheriff devests all liens definite and certain in their amount, and that the lien creditor who omits to claim out of the proceeds of sale loses his resort to the land. *Custer v. Detterer*. (3 *Watts & Serg.* 28). The question then arises whether the Acts of 3d March 1818 and 16th April 1840, which latter provides for the filing in the District Court and Common Pleas all claims due the commissioners and inhabitants of the incorporated districts of the county of Philadelphia for paving, curbing, &c., preserve the lien notwithstanding a subsequent sale under execution. The Act of 3d March 1818, simply gives the lien, but is silent as to its duration. The Act of 1840, after providing for the filing of the claim on record, proceeds to say "which said claim shall remain a lien from the time the debt was contracted and

[Commissioners of Spring Garden's Appeal.]

became due &c. until the same be fully paid and satisfied." The object of the 9th and 10th sections of the Act of 1840, was mainly to give the district a mode of enforcing the payment of their claim. But it was evidently also the intention of the Legislature, in accordance with their uniform policy, to place all liens upon real estate on record, that purchasers may have it in their power to ascertain clearly what incumbrances are binding on the property they are about to purchase. The clause declaring that the claim shall remain a lien upon the land until fully paid, refers to claims filed of record. The claim made before the auditor has not been filed of record anywhere, and must be governed by the Act of 1818, which is silent as to the duration of the lien.

But if it were otherwise it cannot be supposed that the Legislature, in opposition to the established policy of Pennsylvania to give a clear title to purchasers at sheriff's sale and thus encourage competition, intended to preserve the lien. Notwithstanding the neglect or refusal of the district to make its claim at the proper time upon the proceeds of a former sale, if the Act is to be thus construed, the Legislature has not only not protected the public interests, but holds out an encouragement to the authorities of the districts to neglect their duty. The lien being unlimited in its duration, such a construction would result in great injustice to purchasers at sheriff's sales, who would naturally suppose that the authorities of the district had attended to their duty by making their claim upon the fund raised by a previous sheriff's sale, and not extend their searches beyond that time. The adjudged cases lay down the rule broadly that all liens, except certain ones expressly excepted by the Legislature or former decisions, are devested by a sheriff's sale. The auditor deems himself bound to consider the claim in question governed by the general rule until some express authority is shown to make it an exception.

It was then contended that in this case the sheriff's sale in 1841 was subject to the lien of the ground rent; that the lien of the district was prior to that of the ground rent, and that the second lien not being devested, the first could not be discharged by the sheriff's sale. In point of time the lien of the district was subsequent to the creation of the ground rent. The arrears now claimed have become due not only since the lien of the district accrued, but also since the sheriff's sale in 1841. The auditor does not deem it necessary to go into the question whether a sheriff's sale subject to a second incumbrance is also necessarily subject to a previous one. The ground rent, subject to which the sale was made, was not an incumbrance or lien upon the interest of the Norristown and Valley Railroad, sold by the sheriff. It was a separate estate in the land which the sheriff could not sell under the writ in his hands. The estate or interest of the then defendants was in fact sold subject to no incumbrance whatever.

A further point was made by the counsel for the commissioners

[Commissioners of Spring Garden's Appeal.]

of the district of Spring Garden, that the interest of the Norristown and Valley Railroad was sold in 1841 under proceedings on a lien which was subsequent to the lien of the district, and therefore could not divest that prior lien. The auditor has no difficulty under the decisions of the courts, in deciding against the commissioners on this point."

The auditor awarded to Cavender his arrears of ground rent, and the balance of the fund to George Schryer, the plaintiff in the execution, on account of his judgment. The court below confirmed the report. From their decree the commissioners of Spring Garden now appealed.

H. M. Phillips, for the appellant, referred to the Act of the 3d March 1818, (*Pamph. L. 136*), which declares, section 1, "that all real estate within the incorporated district of Spring Garden shall be subject to the payment of the debts hereafter contracted by the commissioners of the said district for or by reason of any work done or materials furnished for or in the pitching, curbing, or paving any road, street, lane, court or alley, in front of said real estate, before any other lien hereafter created: and that the commissioners of the said district be and they are hereby authorized, &c. to collect the said debts, together with interest thereon from the time of assessment, in the like manner as county rates and levies are collected."

He also referred to the Act of 16th April 1840, (*Pamph. L. 412*), which declares, section 9, "that it shall and may be lawful for the commissioners and inhabitants of the district of Southwark, and also for the commissioners and inhabitants of any of the other incorporated districts and townships within the county of Philadelphia, to file of record in the office of the Prothonotary of the Court of Common Pleas for the county of Philadelphia, and also in the office of the Prothonotary of the District Court for the city and county of Philadelphia, all claims and demands due to the said commissioners, &c. for pitching and paving streets and alleys, for digging down, filling up, and for curbing, paving and repairing any footway within the same, &c. &c.;" and section 10, that "the said commissioners, &c. shall in filing their claims for debts contracted as aforesaid, &c., set forth in the same the name of the owner, &c. of the premises, &c. &c., which said claim shall be and remain a lien against the estate from the time when the debt was contracted and became due, &c., and until the same be fully paid and satisfied; and the said commissioners, &c. shall be authorized, &c. at any time after the filing of the claim, to proceed to recover the amount thereof by writ of *scire facias* against the real estate upon which it is a lien, which said writ of *scire facias* shall be served and proceeded upon to judgment and execution, in the same manner as is now provided for by law, for mechanics and material men, in the Act, &c. passed the 16th June 1836, &c."

[Commissioners of Spring Garden's Appeal.]

He also cited *Pennock v. Hoover*, (5 *Raule* 291); *Custer v. Detterer*, (3 *Watts & Serg.* 34); Act 19th April 1843.

St. George Campbell and *Price*, contra, referred to Act 31st March 1843; *Wilson v. Stowe*, (10 *Watts* 436)

The opinion of the Court was delivered by

ROGERS, J.—We think the decree of the District Court should be affirmed for the reasons given by the auditor. It is a general rule that a judicial sale devests all liens definite and certain in their amount, and we see nothing in the circumstances stated by the auditor to make this an exception. This principle, therefore, rules the present case. If, however, this was a contest between the owner of the ground rent and the commissioners as to the appropriation of the proceeds of the first sale, other considerations would enter into the question. In that case there would be some reason to ask an award of the money in court to the latter, although posterior in point of time; because all such improvements enure as well to the benefit of the owners of the ground rent as to tenant in fee. It would, therefore, seem equitable to give it to the latter in preference to the former. It must be observed, however, that the point does not arise, and to prevent mistake we wish it to be understood that the decision is made on the Act of the 3d March 1818. Moreover, had the claim been filed on record, it would present a different case; for it is a point well worthy the attention of the holders of this species of property, whether the subsequent Act of the 16th April 1840 has not introduced an essential change in the effect of judicial sales so far as the lien creditors mentioned in that Act are concerned. For be it remarked, the words peculiar to that Act, "that the lien shall remain until the claim is fully paid and satisfied," have not received judicial construction. I also do not think it out of place to observe, that it may save future difficulty for ground landlords to examine to what extent their interest may be affected by a judicial sale in pursuance of the provisions of the Act of 1840 for a lien created by reason of expenses incurred in pitching, curbing, paving, &c. under that Act and the Act of 1818. If, as there is some colour at least for supposing, the lien covers the whole interest carved out of the estate, whether belonging to the ground landlord or the tenant in fee, it will be well for them to inquire, with a view to the protection of their rights, whether such a sale does not pass the whole estate. Or in other words, the question will be, under such a state of facts, whether the property does not pass to the sheriff's vendee, divested of all interest in the premises by the ground landlord. We cannot avoid seeing that it is a different question from the principle decided in *Auwerter v. Mathiot*, and similar cases. It may perhaps, on investigation, be found to resemble much more a judicial sale of unseated land for payment of

[Commissioners of Spring Garden's Appeal.]

taxes, which passes the fee unincumbered to the sheriff's vendee. We do not wish to be understood as expressing any opinion on any of the points indicated. The design merely is to direct the attention to these questions, of a numerous class of our citizens whose interests are deeply involved in their investigation and proper adjudication.

Decree affirmed.

Parker's Appeal.* Mayor, Aldermen and Citizens of Philadelphia's Appeal.*

Under the Act of 3d February 1824, the taxes, rates and levies assessed on real estate in the city and county of Philadelphia, are a lien on such estate from the date of their assessment, and have priority to mortgages and other incumbrances charged on such estate prior to their assessment.

A relinquishment of a distress made by a collector for taxes assessed under that Act, on the goods of a tenant lying on the premises charged with the tax, does not release the priority of the lien of the tax in favour of other lien creditors.

It seems it would, if the goods were the property of the owner of the estate charged with the tax.

Quære, whether in the latter case, it would not entirely discharge the estate from the lien of the tax.

The provisions of the Act of 3d February 1824 do not apply to State taxes assessed under the Act of 11th June 1840.

THESE were appeals severally by I. B. Parker and the Mayor, Aldermen, and Citizens of Philadelphia, from the decree of the District Court for the city and county of *Philadelphia*, confirming the report of an auditor, allowing out of the proceeds of a sheriff's sale of certain real estate the amount of county and poor taxes for the year 1842, and disallowing the amount of city taxes for the same year.

The fund in question was raised by the sale, in two distinct parcels, of a lot of ground with the buildings thereon, on Chesnut and Ninth streets, in the city of Philadelphia, under a purchase money mortgage given to Parker in 1835 by the late Judge Barnes. Parker was the purchaser at the sale. It appeared that in April 1836, Judge Barnes conveyed to Nathan Dunn the whole of the mortgaged premises. In August 1841, Dunn conveyed to the American Philosophical Society part of the mortgaged premises, being the building and lot called the Philadelphia Museum. Between the 3d and 7th April 1843, while the museum building was

* This case was argued at March Term 1844.

[Parker's Appeal.]

the property of the American Philosophical Society, the collector of South Ward levied there for a city tax of \$192 and costs, on the personal property of Dunn, who then occupied part of the building as tenant of the Society. Dunn owned the goods and chattels on the premises at that time, excepting the museum collection, which was the property of the museum company, who then occupied another part of the building as tenants of the Society. During the years 1842 and 1843, there had been personal property on the premises worth \$2000, exclusive of the museum collection. On the 6th April, after a request by the agent of Dunn and the museum company for a stay of proceedings, and a communication from a committee of the Philosophical Society, the collector gave his agent a written order to stay proceedings in the case, and not to advertise till further notice. Nothing was afterwards done in the matter.

Parker claimed the fund on account of his mortgage. The other claims were for state, county, city and poor taxes, for the year 1842, under the 1st and 8th sections of the Act of 3d February 1824, *Purd.* (1841) 212; the 7th section of the Act of 5th March 1828, *Purd.* (1830) 751; and the Act of 11th June 1840, *Purd.* (1841) 986. In opposition to these claims, Parker contended that personal property was, by analogy to the rule in case of executions, the primary fund for the payment of taxes, and must be exhausted before the real estate can be resorted to. That the collector of the tax having made a levy, could not abandon it to the prejudice of other parties. That no lien could exist unless recorded. That no lien could be claimed for the State tax.

The auditor was of opinion that under the Act of 1824 both real and personal property were rendered liable, without any provision as to the order in which such liability was to be enforced. That the 1st section provided for a general lien on real estate in the city and county of Philadelphia, without requiring a previous resort to personal property. That the provisions of the 4th section as to the entry of taxes in the register were directory, and the lien would not be invalidated by any omission in this respect. *Pennock v. Hoover*, (5 *Rawle* 317). That the Acts of 1824 and 1828 only required that the tax, when assessed, should be lawfully assessed to make it a lien. That the collector was not authorized to suspend indefinitely proceedings already commenced against personal property, which would have sufficed for the payment of the tax, and then resort to the real estate: and his laches was to be deemed evidence of a waiver of the lien as against third parties. That the provisions of the Act of 1824 did not extend to the State tax assessed under the Act of 11th June 1840.

On these grounds the auditor awarded payment of the county and poor taxes, and excluded the claims for State and city taxes. The court below confirmed the report. From this decree Parker

[Parker's Appeal.]

and the Mayor, Aldermen and Citizens of Philadelphia, now appealed.

T. I. Wharton, for the appellant, Parker, to show that the lien for the city taxes was discharged by the neglect of the collector to take the personal property, cited *Commonwealth v. Vanderslice*, (8 *Serg. & Rawle* 452); *Commonwealth v. Haas*, (16 *Ib.* 252); *Quinn v. Wallace*, (6 *Whart.* 452, 458); *Hunt v. Breeding*, (12 *Serg. & Rawle* 37, 40); 2 *Saund. R.* 47, note; *M'Cormick v. Miller*, (3 *P. R.* 230); 7 *Taunt.* 56. He also referred to Act of 3d February 1824, *Purd.* (1841) 212; *Burd v. Ramsay*, (9 *Serg. & Rawle* 109).

Olmsted, for the Mayor, &c., referred to the 6th section of the Act of 1824, as giving a tenant who pays the taxes a right to recover the same from the owner of the land; and to *Fleming v. Beaver*, (2 *Rawle* 132), as to the subrogation of the tenant to the right of the party to whom the tax was coming.

The opinion of the Court was delivered by

KENNEDY, J.—The view taken by the auditor in his report, which was approved and confirmed by the court, of the several claims to the fund in question, appears to be correct, excepting as to the claim of the Mayor, Aldermen and Citizens of Philadelphia for taxes, amounting to \$192, beside interest due thereon. This claim, as also all the other claims to the fund, the whole whereof was claimed by Mr Parker under a mortgage which he held upon the property, from a judicial sale of which the fund was raised, was resisted by his counsel on the ground that the several claims, though regularly assessed on the property sold as taxes, never became liens on it, because not registered for non-payment in due time in the commissioners' office of the county of Philadelphia. It is argued that the registry is the only thing required to be done by the Act of the 3d February 1824, that is calculated to give publicity to the existence of the assessment, and that to consider the bare assessment of the tax a lien on the estate intended to be charged with it, before a registry made thereof for non-payment, would be to create and establish secret liens, which could not have been intended by the Legislature, as they would inevitably produce great mischief as well as injustice. It is alleged that the assessment itself is comparatively a secret act, as it is not required to be entered in any book of registry or record, to which recourse is or may be generally had by the public for information; and hence to construe the Act as making the tax a lien upon the estate from the date of the assessment, would be giving to it an operation contrary to the judicial policy of the state, founded upon principles of both expediency and justice.

This course of reasoning, though in some degree plausible, is not

[Parker's Appeal.]

properly applicable to the case so as to sustain the construction of the Act of the 3d February 1824, contended for by the counsel of Mr Parker. For in the first place the assessment of the tax cannot well be regarded as a secret act, which any one interested in knowing whether it exists or not may not inform himself of, if he will only take the trouble of making inquiry at the proper source. It is made by officers who are known and publicly appointed for the purpose; and by them committed to writing in such manner as to show the estate on which it is intended to be charged, with its date and amount. It is, therefore, in the power of every person to inform himself fully in regard to every assessment of a tax, as soon as made, by calling on those who have made it, or who may be in possession of their proceedings in respect to it, which are always committed to writing as evidence of what has been done. A lien, therefore, created by the bare assessment of the tax, cannot be considered such a *secret* lien as will be likely to work any serious mischief or injustice to any one, from his want of knowledge in regard to it, provided he will only resort to the proper sources of information which it is in his power at all times to ascertain with certainty.

But we are of opinion, in the second place, that to give to the Act the construction contended for by Mr Parker's counsel, would be contrary to both the letter and meaning of it. The Act in terms declares that "all taxes, rates and levies, which may hereafter be lawfully imposed or assessed, to be applied for any purposes, either in the city or county of Philadelphia, on real estate situate in the said city and county of Philadelphia, shall be and they are hereby declared to be a lien on the said real estate, on which they may hereafter be imposed or assessed;" and again, that "the said lien shall have priority to, and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or responsibility, which the said real estate may become charged with or liable to, from and after the passing of this Act." From the letter of the Act it is perfectly clear that the tax, when legally imposed or assessed, becomes a lien instantly upon the estate charged with it; but that is not all, for it is further expressly declared, that such lien shall have priority to and be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation, or responsibility, which the estate may have become charged with after the passing of the Act, though prior to the assessment of the tax. This latter provision of the Act, giving the lien of taxes assessed subsequently a preference to prior mortgages or other incumbrances, shows very clearly that the registry of the tax and its non-payment, directed by the Act to be made in the commissioners' office, was not required or directed to be made for the benefit or advantage of the owners of the prior incumbrances, as it is plain it could not have availed them anything to have acquired a knowledge of the existence of the tax by means

[Parker's Appeal.]

of such registry. Every man taking a mortgage or other incumbrance, as a security for the payment of money, upon real estate situate within the city and county of Philadelphia, or in either, is bound to know that he takes his mortgage, or other incumbrance, subject to the future assessment of such taxes as are in question here, and he must therefore take his chance as to the result, as it is impossible for him to know it beforehand. The exigencies of the public cannot be told always before they exist; but when they arise, it is right and often indispensably necessary that they should be met and removed, though it may operate to the prejudice of private individuals. Private interest must yield to that of the public, the latter being of much greater importance than the former. If the tax were not to be considered a lien upon the estate from the date of its assessment, nor until the collector shall endeavour and fail to collect it and make a return thereof as uncollected to the commissioners of the county to be by them registered as directed by the Act, the owners of real estates, in many instances, might have it in their power to sell the same, and thereby prevent or defeat the collection of the tax. The Legislature certainly never intended that this should be the case, but on the contrary framed the Act with a view to prevent everything of the sort, and to secure the payment of the tax in every possible event, so far as it might be practicable to obtain the same out of the estate itself, by making the tax a lien thereon from the date of its assessment.

But the counsel of Mr Parker contend further that even admitting that the city tax became a lien on the property intended to be charged with it immediately upon its being assessed, the lien ceased or was discharged by the subsequent distress made by the collector for the tax on Nathan Dunn's personal property, which was found at the time on the property charged with the tax. Nathan Dunn, though he had been the owner of the property charged, had parted with his right to it the year preceding the assessment of the tax, to the American Philosophical Society, who were the owners of it at the times of the assessment and distress respectively, and stood in the relation of landlords to Mr Dunn, who had become their tenant as to that part of the premises charged with the tax, in which his personal property distrained on was found. Had the property distrained on been owned at the time by the American Philosophical Society, there would be great force in the argument of the counsel of Mr Parker, that the lien of the tax on the real estate ought to be considered as thereby discharged, seeing the distress was voluntarily abandoned and given up by the collector. Though the distress of itself cannot be considered either a discharge or satisfaction of the tax, yet where the property distrained on belongs to the owner or owners of the estate assessed, the distress may be regarded as an additional security obtained from the real debtor for the payment of the tax

[Parker's Appeal.]

or debt, and a voluntary relinquishment of it by the collector as the agent of the creditor or body corporate to whom the debt or tax when collected may be coming, might perhaps, in equity at least, be considered a release of the lien in favour of the owners of all other existing liens. This, however, is not the case before us, and I do not, therefore, wish to be understood as giving any decisive opinion on it. Here the real estate charged may be looked on as standing in the place of the owner, and regarded as the real debtor, and bound both in law and equity for the payment of the tax; and although the goods of a tenant or of a stranger found on the premises charged with the tax, may be distrained on at law for the tax, and if taken and applied to that end, a remedy by action at law is given to him by the Act of Assembly to obtain redress of the owner of the premises charged, still that does not appear to be a sufficient reason why he should be deprived of every equitable principle or consideration that otherwise might be brought to bear in his favour. Equity may well consider the tenant or stranger whose goods have been distrained on and appropriated to the payment of the tax, in the light of a surety; and as such entitled to be substituted to the rights of the party to whom the tax was coming. It has been contended that the goods or personal property, even of the tenant or a stranger, found on the real estate or premises charged with the tax, is the fund in law that ought and must be first resorted to in order to obtain payment of the tax, and in this respect has been compared to the ordinary case of a common debtor, against whose personal estate, if he has any, the creditor must first proceed to obtain payment of his debt before he can go against the real estate. There is certainly no *imperative* direction to this effect given by the Act of Assembly prescribing the manner in which the tax shall be collected by the collector. The words of the 6th section of the Act of the 3d February 1824, which relate to this point, are, "that all collectors, &c. shall be and they are hereby *authorized* and *empowered*, (not *required*, it must be observed), at any time when the same may be found on the estate on which such taxes, &c. may be due, to levy upon any goods, chattels, or personal property, which may be found thereon; and to sell and dispose of the same, after ten days' notice of such sale, &c." But in the case of proceeding to collect an ordinary debt, the creditor is expressly prohibited from taking the real estate of his debtor in execution, as long as he has goods or personal property which may be seized and taken for that purpose. The two cases, therefore, are different; so that a fair conclusion as to the law in the one, might be erroneous in the other. There is nothing equitable in making the goods of the tenant or of a stranger liable to the payment of a tax due on the real estate, whereon they may happen to be found. It is founded on a principle of expediency, or perhaps in some measure necessity, for the purpose of rendering the collection of the

[Parker's Appeal.]

tax as certain as possible, so that the body corporate or body politic, on whose behalf it has been assessed, may not suffer for the want of it. But if the tenant or stranger is in effect compelled to pay the tax, it is highly equitable that he should be permitted to take the place of the party to whom the tax was due, and be substituted to all the rights of the same. Be this, however, as it may, it would not seem to be right to allow any other than the party to whom the tax is owing, to insist upon the sale of the goods of the tenant or a stranger after being distrained on by the collector; and in case the collector refuses or declines to do so by giving them to the tenant or stranger again, or permitting him to take and dispose of them to his own use, it would appear to be highly unjust, if not iniquitous, to hold that the lien of the tax was thereby released and gone as against those who had no right whatever to interfere in the matter.

We, therefore, think that the court below erred in rejecting the claim of the Mayor, Aldermen and Citizens of Philadelphia, for a tax due to them, and in refusing to allow it to be paid with the interest due thereon, out of the fund in that court, and accordingly reverse their decree in this respect, and decree that the amount of said tax together with the interest due thereon, and the costs which have accrued in the case, be paid out of said fund to the Mayor, Aldermen and Citizens of Philadelphia; and that the residue of the decree of said court be affirmed with the costs to be paid by Mr Parker, if the fund in court should be insufficient for that purpose after paying the Mayor, Aldermen and Citizens of Philadelphia the amount of their claim.

Fitler *against* Patton.

A *fiery facias* returnable first Monday in August was placed in the sheriff's hands July 25th, and the defendant's goods sold under it on the 12th October. It did not appear when the goods were seized. *Held* the presumption was that the seizure was made before the writ was returnable.

It is not requisite that the sheriff should specify in his return to a *fiery facias* the particular goods taken, the sum for which each article sold, or the time of their seizure.

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

This was an action of trespass brought by Price J. Patton against Daniel Fitler, sheriff, and Benjamin F. Hedges, for taking the plaintiff's goods. The plaintiff, Patton, proved an assignment to him by John C. Hopewell, a hatter, dated the 17th September 1839, of all

[Fidler v. Patton.]

his property consisting of hats, caps, &c. in a store, in trust for the payment of creditors, recorded on the 18th September 1839, and that these hats, caps, &c. were sold by the sheriff on the 12th October 1839, after the plaintiff had taken possession as assignee.

The defendants justified under a *pluries fieri facias* issued out of the District Court for the city and county of Philadelphia, returnable the first Monday of August 1839, and placed in the hands of the sheriff on the 25th July 1839, on a judgment at the suit of Henry Bromley against John C. Hopewell, sued with Edward Shewell. On this writ were the following endorsements: "The sheriff will stay proceedings for the present on the within writ. September 2d, 1839. H. Bromley." "Levied and sold personal property of the defendant Hopewell for \$224.80. So answers B. F. Hedges, D. F. Daniel Fidler, sheriff. October 12th, 1839." It was a subject of dispute, and evidence was given on both sides to show when the levy was made and the sheriff's officer placed in possession. The defendants gave some evidence to prove the levy was made previous to the return day of the writ, and the watchman removed at the request of Hopewell in the beginning of September, the levy to remain.

The defendants asked the court to instruct the jury :

1. That if the jury believe that a levy was made under the writ of execution, the presumption is that it was made in proper time, and in the absence of testimony to the contrary, the jury should so find; which instruction the court refused to give.

2. That if the levy was made by the sheriff before the execution of the assignment to Patton, the suit should be brought in the name of Hopewell, and not of Patton. *Answer.* This is correct, provided the levy was not only made before the execution of assignment: but was continued afterwards down to the time of the assignment.

3. That if the jury believe the goods were in possession of Hopewell when the levy was made, Patton cannot, in the absence of notice given by him to the sheriff that he owned the goods levied on, recover in this suit. *Answer.* This is correct.

4. That Patton cannot recover in this suit without evidence of an application to the court to set aside the levy if improperly made. *Answer.* This is not so.

The court instructed the jury, *inter alia*, as follows:—"The plaintiff alleges that the *fieri facias* was not levied before the return day of the writ. The question is of the first importance whether the execution was levied before the first Monday of August. The return is dated 12th October 1839. It was in the power of the sheriff to have stated the day on which the levy was made, and the law would have received it as *prima facie* evidence of the levy." And again: "Is there any evidence that the levy was made before 2d September 1839? There is very slight evi

[Fitler v. Patton.]

dence; it is in the conversation with Hopewell, spoken of by Harrington. The sheriff had no power to levy after the return day.

The defendants excepted to the charge.

Errors assigned:

1. That the court refused to continue the cause, while no plea had been put in to the amended narr.
2. That the court refused, on the application of the defendants, to direct that a verdict be rendered in favour of Daniel Fitler, after the plaintiff had closed his case.
3. That the Judge erred in not charging the jury, as requested in defendants' 1st point.
4. In his answer to the defendants' 2d point.
5. That the court refused to charge as requested in the defendants' 4th point.

Fallon, for the plaintiff in error, referred to *Brotherton v. Livingston*, (3 *Watts & Serg.* 336); *Dolan v. Briggs*, (4 *Binn.* 500); *Act 16th June 1836*, *Purd.* (1841) 416, sec. 39; *Shafner v. Gilmore*, (3 *Watts & Serg.* 438); 3 *Munroe* 211; 3 *Gill v. Johns.* 368; *Jackson v. Shaffer*, (11 *Johns.* 517); *Hartwell v. Root*, (19 *Johns.* 345); *Hickman v. Caldwell*, (4 *Rawle* 381); *Howell v. Alkyn*, (2 *Ibid.* 282).

F. W. Hubbell, contra, cited *Eberle v. Mayer*, (1 *Rawle* 369); *Commonwealth v. Stremback*, (3 *Ibid.* 344); *Englebert v. Blanjet*, (2 *Whart.* 240); *Knowles v. Lord*, (4 *Ibid.* 500); *Hyskill v. Givin*, (7 *Serg. & Rawle* 369); *M'Cormick v. Miller*, (3 *P. R.* 230); *Lewis v. Smith*, (2 *Serg. & Rawle* 158); *Barnes v. Billington*, (1 *Wash. C. C.* 38); *Wood v. Vanarsdale*, (3 *Rawle* 401); *Williams v. East India Company*, (3 *East* 192); 3 *Chit. Pl.* 154; 2 *Caines* 243; *Prescott v. Wright*, (6 *Mass.* 23); *Bliss v. Ball*, (9 *Johns.* 132).

The opinion of the Court was delivered by

KENNEDY, J. — The third error assigned is the only one which requires special notice; for as to the remaining errors, that is, the first, second, fourth and fifth, it is sufficient to say that we think there is nothing in them.

The question presented by the third error is, whether in an action of trespass against a sheriff for taking and selling the goods of the defendant, named in a writ of *feri facias*, placed in his hands some days before the return thereof, it ought to be presumed that the seizure of the goods was made before the writ became returnable, in the absence of testimony showing when it was made, but evidence given showing that the sale was made two months after the return day mentioned in the writ. The point submitted by the counsel of the defendant below, out of which

[Fidler v. Patton.]

this question arises, is in the following terms: "That if the jury believe that a levy was made under the writ of execution, the presumption is that it was made in proper time; and in the absence of testimony to the contrary, the jury should so find." This instruction, however, the court refused to give. The point would seem to have arisen very fairly in the cause, which made it the duty of the court, upon request, to instruct the jury in regard to it. From the evidence given it did not appear when the seizure of the goods sold by the sheriff was made. For aught that was shown, it might have been either before or after the return day mentioned in the writ. This being the case, it was very important to the defendant to have a proper direction from the court to the jury on this point, which would have gone far towards acquitting him of the trespass complained of by the plaintiff below. For it is a well settled rule of law, that where any act is required to be done by any one, and especially by an officer, within a limited time, which were he not to perform as required, would render him guilty of a criminal neglect of duty, the law will presume that it was done rightly, and will throw the burthen of proving the contrary on the other side. *Monke v. Butler*, (1 *Rolle's Rep.* 83); *Bull. N. P.* 298; *Williams v. The East India Company*, (3 *East* 199). Accordingly, in an information against Lord Halifax for refusing to deliver up the rolls of the auditor of the Exchequer, the Court of Exchequer put the plaintiff upon proving that he did not deliver them; for, as it was said, a person shall be presumed duly to execute his office till the contrary appear. *Bull. N. P.* 298; *Best on Presumptive Evidence*, p. 63, pl. 57. So in *Hartwell v. Root*, (19 *Johns.* 345), the very point raised here was decided in favour of the sheriff, who had sold a pair of horses in the month of May under a writ of *feri facias* returnable on the third Tuesday of February preceding, alleging that he had made the seizure of the horses before the return day of the writ, leaving them in the possession of the defendant named therein, who afterwards sold them to the plaintiff, from whom the sheriff took and sold them again. It did not appear on the trial when the horses had been first seized by the sheriff, whether before or after the return day mentioned in the writ; whereupon the court held that he was entitled to the benefit of the presumption that the levy was legally made. See also *Powell v. Milburn*, (3 *Wilson* 362): 2 *Black.* 852-3; *King v. Hawkins*, (10 *East* 216).

In the course of the argument the return of the sheriff to the writ of *feri facias* in this case was objected to as being altogether too general and loose to furnish any justification for his taking and selling the goods of the defendant named in the writ. It is not requisite, however, that the sheriff should specify in his return the particular goods taken, and the sum for which each article has been sold. It is sufficient to make the return in general terms, as for example, that he has levied a certain sum of money, naming it,

[Fidler v. Patton.]

out of the goods of the defendant. And accordingly the court in *Willett v. Sparrow*, (6 Taunt. 576), refused to grant a rule upon the sheriff to amend his return, by particularly specifying the goods which he had taken under the writ of *feri facias*, whereon he had returned merely an aggregate sum exceeding £600, made of the goods of the defendant. Neither is it necessary that the time of the seizure by virtue of the *feri facias* should be mentioned in the sheriff's return thereof; and indeed it is seldom if ever made, as may be seen by a reference to *Impey's Sheriff and Coroner* 350, where the forms of general returns to such writ are given. See also *Sewell's Sheriff*, 392-3-4 and 5, of the Appendix. The sheriff is not even obliged to make a return to a writ of *feri facias*, unless ruled to do so, which rule may be obtained by either party; for it is a sufficient justification to him in an action of trespass for taking the defendant's goods, to plead that he took them by virtue of the *feri facias* directed to him, without showing it returned. *Watson's Sheriff* 143. And if he does make a return, it is sufficient to endorse on the writ, which is most generally all that is done, "I have levied and made of the goods and chattels of the within named C. D. deceased, in the hands of A. B., executor within mentioned, to the value of £50, which money I have ready. The answer of ——— High Sheriff."

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

Levering *against* The Philadelphia, Germantown and Norristown Railroad Company.

Under the 15th section of the Act of 17th February 1831, incorporating the Philadelphia, Germantown and Norristown Railroad Company, if there be a report made by viewers ascertaining the damages to the owner by the occupation of land for the railroad, and appeal therefrom and verdict and judgment thereon, the company is bound to pay the amount fixed by the verdict and judgment, before they can become seised in fee of the land.

After report of viewers and during the pendency of the appeal, the company have a qualified right to enter upon and use the land in the meanwhile and until the final result; but unless they pay the amount found by the verdict and judgment, the owner may recover the land in ejectment.

"Or" in the first proviso of that Act should be read "on."

THIS was an action of ejectment, in which Jacob Levering was plaintiff and The Philadelphia, Germantown and Norristown Railroad Company defendants, for all that certain piece or parcel of land, situate, lying and being in the village of Manayunk in Roxborough township in the county of Philadelphia, begin

[Levering v. The Philadelphia, Germantown and Norristown Railroad Co.]

ning at a corner of land of Jacob Levering, and now or late of the Philadelphia, Germantown and Norristown Railroad Company, thence south $54^{\circ} 30'$ west 82 feet 3 inches, &c., containing $63\frac{1}{8}$ perches, more or less. The following case was stated as upon a special verdict at *Nisi Prius* in February 1844, before Mr Justice KENNEDY, who thereupon gave judgment for the defendants.

The premises described in the summons in ejectment are admitted to have been the property of the plaintiff before and on the 4th day of October 1834. On that day a petition was filed in the Court of Common Pleas of the county of Philadelphia by the Philadelphia, Germantown and Norristown Railroad Company, defendants in the above suit, praying the court to appoint six persons as viewers according to the provisions of the Acts of Assembly incorporating the said the Philadelphia, Germantown and Norristown Railroad Company, passed 17th February 1831, and 8th February 1834, to examine and survey certain lands of Jacob Levering in the borough of Manayunk, over which the Norristown Railroad about to be constructed by the said Philadelphia, Germantown and Norristown Railroad Company was intended to pass, and report the damages according to law. Due notice having been given by the said Company to Jacob Levering to appoint viewers amicably in accordance with said petition, and the parties having been unable to agree on said appointment, six viewers were appointed by said court according to the Act of Assembly, who duly made their report into the office of the Prothonotary of said court on the 12th day of November 1834.

This report awarded to Jacob Levering the sum of \$1222.16 as damages for the land viewed, embracing in said view two pieces of property, viz., one a property in Manayunk on the rear end of the hotel lot, and the other the premises described in the summons in ejectment in this suit. The plaintiff entered an appeal from said report and award to the Court of Common Pleas aforesaid to December Term 1834, according to the provisions of the Act of Assembly in such case made and provided. The Philadelphia, Germantown and Norristown Railroad Company having made tender of payment of the sum specified in the report of the viewers to the plaintiff, who refused to accept the same, before appealing from said report or award, proceeded to take and use the land of the plaintiff described in the survey of said road, which are the same premises claimed in said ejectment, and they or their trustees still occupy and hold the same. A trial was had on said appeal and a verdict rendered for the plaintiff on the 27th April 1839, for the sum of \$5161.65, and judgment duly entered on said verdict. The said Railroad Company had made and completed their road from Philadelphia to Norristown, and the said road had been used prior to the said verdict. A *feri facias* was issued on said judgment to which the sheriff (having received notice that the real and personal property of the defendants had been mortgaged some

[*Levering v. The Philadelphia, Germantown and Norristown Railroad Co.*]

time previous to the rendition of said judgment to certain trustees to secure loans made by the Philadelphia, Germantown and Norristown Railroad Company under authority of law, and that the said trustees had taken possession of all the personal estate under the mortgage, and the management of said road, so as to receive the toll for the payment of the interest according to the terms of the mortgage), returned *nulla bona*. An *alias fieri facias* was issued to September Term 1840, to which the sheriff also returned *nulla bona* (prout the whole record of the Common Pleas and the mortgages to said trustees and the exhibits attached under this statement of facts). The question submitted to the court is, is the plaintiff entitled to recover the premises claimed in this ejectment?

If he is, then judgment to be entered for him; if not, then for defendants. The said case stated and judgment rendered thereon, to be subject to a writ of error or removal for revision by certificate to the Supreme Court in bank, agreeably to the provisions of the Act of Assembly of 26th July 1842, and the practice of the Court of Nisi Prius.

The entry of judgment for the defendants was now assigned for error.

V. L. Bradford and Dallas, for the plaintiff in error, referred to 4 *Hill* 140; *Federalist* No. 84; *Turnpike Company v. Wallace*, (8 *Watts* 316); 1 *Blac. Com.* 139; *Leader v. Moxon*, (3 *Wils.* 461); *Vanhorne's Lessee v. Dorrance*, (2 *Dall.* 312); 2 *Amer. Jurist*, (Oct. 1829) 203; *Harvey v. Thomas*, (10 *Watts* 63); *Norman v. Heist*, (5 *Watts & Serg.* 174); *Borough of Harrisburg v. Crangle*, (3 *Ibid.* 462); *Gardner v. Hashbrouck*, (2 *Johns. Ch.* 162); *Belknap v. Belknap*, (*Ibid.* 463); *Agar v. The Regent's Canal Company*, (*Coop. Eq. R.* 77); *Shand v. Henderson*, (2 *Dowl.* 519); *Hughes v. Merton College*, (1 *Vez.* 188); *Lessee of Pickering v. Rutty*, (1 *Serg. & Rawle* 511); *Enslin v. Bowman*, (6 *Binn.* 462); *Case of The Plan of the Third Division of Kensington*, (2 *Rawle* 448); *Springfield v. Miller*, (12 *Mass.* 416); *Const. Article IX. sec. 6*; *Wilkinson v. Leland*, (2 *Pet. S. C.* 657); 2 *Kent* 13, 340; *Varick v. Smith*, (5 *Paige* 137); *In re Albany Street*, (11 *Wend.* 149); *Bloodgood v. Railroad*, (18 *Ibid.* 59); *In re John & Cherry Streets*, (19 *Ibid.* 659); *Act 17th February 1831, sec. 15*, (*Pamph. L.* 61); *Commonwealth v. M'Closkey*, (2 *Rawle* 374).

Miles and Williams, contra, cited 4 *Yeates* 133; *Schuler v. Railroad Company*, (3 *Whart.* 555); *Stokely v. Bridge Company*, (5 *Watts* 546); *Allison v. Delaware Coal Company*, (5 *Whart.* 482); *Ammant v. Turnpike Road Company*, (13 *Serg. & Rawle* 210); *Schuylkill Navigation Company v. Thoburn*, (7 *Ibid.* 411); *Schuylkill Navigation Company v. Kittera*, (2 *Rawle* 438); *Rogers v. Bradshaw*, (20 *Johns.* 735); *Jerome v. Ross*, (7 *Johns. Ch.* 343); 4 *Wend.* 650; 13 *G. III. c.* 38, s. 17; 3 *G. IV. c.* 126, s. 7; 8 *G*

[*Levering v. The Philadelphia, Germantown and Norristown Railroad Co.*]

IV. c. 24, s. 15; Woolrych on Ways, 14, 58, 117, 110, 122; *Cro. Car.* 266; 1 *And.* 234; *The King v. Severn Railroad Company*, (2 *B. & Ald.* 646); *The King v. Tippet*, (3 *Ibid.* 193); *M'Clenachan v. Curwin*, (6 *Binn.* 514; 3 *Yeates* 373); *Beekman v. Saratoga Railroad Company*, (3 *Paige* 45); 3 *Fairf.* 222; 4 *Ohio* 206; 3 *Yerger* 41, 52; 2 *Porter's Louis. R.* 296; 2 *N. Hamp.* 25; 1 *Nott & M'Cord* 387; 2 *Devereux & Butler* 451; *Amer. Law Mag.* (Jan. 1845) 264; 1 *Wend.* 53; *In the matter of the District of the City of Pittsburgh*, (2 *Watts & Serg.* 322); *Williams v. Sheldon*, (10 *Wend.* 657); *Harvey v. Thomas*, (10 *Watts* 66); *Emerick v. Harris*, (1 *Binn.* 416, 424); *Petition of Mayor, &c. of N. York*, (20 *Johns.* 269).

The opinion of the Court was delivered by

SERGEANT, J.—This case does not require the determination of those grave questions, which have been treated of in the argument concerning the power of the Legislature under the Constitution to take away private property for public use. The Legislature of Pennsylvania in passing laws incorporating companies for constructing canals and railroads, has invariably conformed to the injunction of the constitution, by providing means for ascertaining the compensation to be made to owners and compelling its payment; and the Act of Assembly now under consideration does not differ in that respect from others of a similar nature. The only question is the true construction of the Act of Assembly.

This Act was passed on the 17th February 1831. The 15th section enacts that in case of disagreement of the owners and company on the compensation, and if they cannot agree on the viewers, the Court of Common Pleas may appoint six men to estimate the damage, whose report being confirmed, judgment shall be entered thereon. "Provided that either party may appeal to the court within 30 days after such report may have been filed in the Prothonotary's office of the proper county, in the same manner as appeals are allowed by the provisions of the arbitration Act of the year 1810; and upon the coming in of such report and the confirmation thereof, or upon final judgment or appeal therefrom, and the said company paying to such owner the sum in such report or judgment specified, in full compensation for said lands or for the injury sustained as aforesaid, the said company shall become seised of the same estate in the said lands which the owner held in the same, and they and all who act under them, shall be acquitted and freed from all responsibility for and on account of such injury: Provided, upon payment or tender of payment by the said company, of the sum specified in the report of said viewers or appraisers to the owner of said land, the said president and managers of said company, their agents or contractors for making or repairing the said road, may immediately take and use the same without awaiting the issue of proceedings as hereinbefore prescribed."

[*Levering v. The Philadelphia, Germantown and Norristown Railroad Co.*]

This section is certainly confused and obscure, and indeed may be said to be unintelligible; but interpreting it according to its obvious meaning and intent and by a comparison with former Acts, it becomes perspicuous and consistent. The object of the enactment is to provide a satisfactory mode of assessing the damages when the parties cannot agree; in the first place by six viewers appointed by the court with a right of appeal to either party, and on payment by the company of such sum as becomes ascertained and fixed, they are to be seised of the estate in the land. This sum may be fixed by a report of the viewers not appealed from; in which case the company can at once make the payment or tender, and the right vests. But when an appeal takes place the sum is not fixed till final judgment, and the company cannot pay it till then. The appointment of viewers and a report by them is a matter ordinarily soon disposed of, and the company may well wait till that is done, before they commence their work. But where there is an appeal to a court and jury, it is well known considerable delay occurs in carrying on and terminating the trial, and it might be exceedingly injurious to the undertaking if the company should be compelled to wait its result before they could use the route. There is therefore given to them as a temporary favour, prior to final judgment and without waiting its result, a qualified right to enter upon and use the road in the meanwhile and until they can know by the result of the final judgment what sum they are to pay. When, however, final judgment is rendered, they are to pay the sum fixed by it. Their temporary right of user then ceases, and they are to become seised of the soil on payment of the amount of the judgment. This payment is a condition precedent which they are bound to perform or else they lose all right in the land of every description. Their temporary right of user as a way ceases on the rendition of final judgment, and their right to the soil is to take place only on payment of the amount of the judgment. They cannot hold the land in fee and yet refuse to pay the judgment any more than they can where there is a report of viewers unappealed from. The first proviso indicates the terms on which the company shall become seised of the soil; the second is to give them the temporary use in case of an appeal, until the amount shall be fixed by final judgment.

The whole confusion in the 15th section arises from the use of the word *or* in the first proviso, "upon final judgment *or* appeal therefrom," which it seems evident has been used instead of *on*. If this substitution is made, the whole is intelligible and plain: and that it ought to be may be inferred from various considerations. In the first place, the absurdity of saying "on final judgment *or* appeal therefrom," there being no such thing as appeal allowed from final judgment, but only from the report of viewers. In the next place, in all the former railroad Acts, this proviso is verbatim the same except that the word *on* is used and not *or*.

[*Levering v. The Philadelphia, Germantown and Norristown Railroad Co.*]

which induces the belief that *or* has crept in by inadvertence. See the Act of 8th April 1826 incorporating The Danville and Pottsville Railroad Company; Act of 11th April 1827 incorporating The Oxford Railroad Company; Act of 16th March 1830 incorporating The Philipsburg and Juniata Railroad Company; Act of 6th April 1830 incorporating the Middleport and Penn Creek Railroad Company; Act of 7th April 1830 incorporating the Beaver Meadow Railroad Company.

The subject will receive further illustration by noticing the former proviso in the Acts prior to the one now under consideration, and which was, so far as I have been able to ascertain, the first Act of Assembly in which the proviso was altered to its present shape. The proviso in former Acts was this: "*Provided* that the payment of damages aforesaid for land through which the said road may be laid shall be made before the said company or any person under their direction or in their employ shall be authorized to enter upon and break ground in the premises, except for the purpose of laying out and surveying such road, unless the consent of the owner of such land be first obtained." Thus prior to the Act of 17th February 1831, incorporating The Philadelphia, Germantown and Norristown Railroad Company, no railroad company could even enter and break the ground until they paid the damages to the owner; but by the modification of the proviso they obtained the privilege, when a delay was occasioned by an appeal, to enter and temporarily use the land: but it never was intended to give them a right to the seisin of the soil without paying for the land at all. If the company are not able or not willing to pay for the land on the rendition of final judgment, they must give it up.

Judgment reversed and judgment for plaintiff with stay of execution for six months as per special decree, February 27th, 1845.

Roberts *against* Wilcock.

Grant of a cartway "of eight feet wide at least," agreeable to a plan and draft endorsed, *held* to entitle the grantee to more than eight feet, if necessary for its use as a cartway.

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

Trespass *quare clausum fregit*, brought by Lewis Roberts

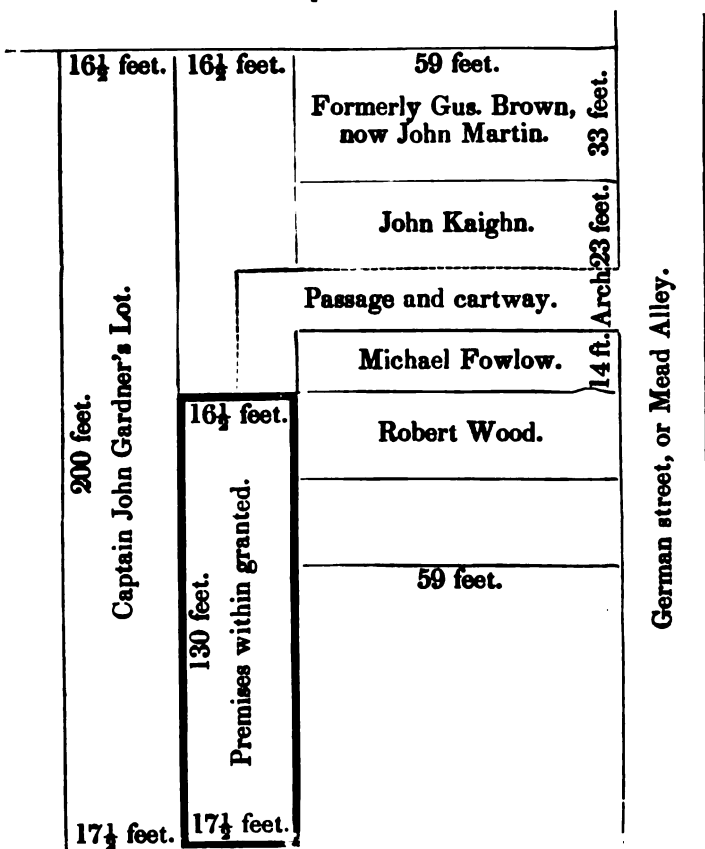
[*Roberts v. Wilcock.*]

against William Wilcock, to recover damages from the defendant for trespassing, by himself and his agents, and with horses, carts, and carriages, upon the ground of said plaintiff, situate next to and adjoining a certain passage-way or alley of eight feet in width, leading from the rear end of defendant's lot, on the east side of Second street, and communicating with another passage-way, running into Mead alley. The plaintiff was the owner of the ground on either side of the said two passage-ways, through their whole length; and both parties claimed under a certain John Kaighn, who being the owner, *inter alia*, of the ground now owned by the plaintiff and defendant respectively, conveyed to John Grover, by deed dated September 15th 1792, the premises now the property of the defendant. The grant by that deed to Grover was in the following words: "All that messuage or tenement, and lot or piece of ground, situate on the east side of Delaware Second street continued, heretofore called Moyamensing Road, in the district of Southwark, containing in breadth on said street $17\frac{1}{2}$ feet, and at the east end, or rear of said lot, $16\frac{1}{2}$ feet, and in length or depth, east and west, 130 feet: bounded southward partly with ground sometime of Joseph Richardson, and partly with ground now or late of Robert Wood; eastward by the said John Kaighn's remaining ground; northward by the messuage and lot late of Samuel Kaighn and since of Captain John Gardner, and westward by Second street aforesaid." "Also, the right and privilege for the tenants and occupiers of the hereby granted premises, of a cartway and passage of eight feet wide *at least*, from the east end of the said hereby granted lot, over and along the said John Kaighn's remaining ground, to and from the aforesaid cartway or passage, left open and extending over and along the said lot granted by the said Robert Wood to the said John Kaighn, into and from the said German street, (or Mead alley) agreeable to the plan and draft hereon endorsed, and free ingress, egress and regress into, through, out of, and along the same cartway, arch and passages, with and without horses, cattle, carts and carriages, at all seasonable hours and times hereafter, in common with the said John Kaighn, his heirs and assigns, the owners and occupiers of his adjoining messuage and lot."

The lot granted by Robert Wood to John Kaighn, (referred to above) was conveyed by deed of September 25th 1788, as follows: "A certain tenement and lot of ground, situate on the north side of German street, (or Mead alley) in the district of Southwark, containing in breadth 23 feet, and in length or depth 59 feet, bounded northward by John Kaighn's lot, and westward by ground of Michael Fowlow. On which said lot, adjoining the line of the said Michael Fowlow's lot, an arch and cartway is left open, and continued northward from said German street to the said John Kaighn's other ground, hereinbefore described."

[Roberts v. Wilcock.]

The endorsed draft and plan above-mentioned were as follows :



Second street continued.

The plaintiff, after having proved by the production of the deeds, his title and that of the defendant, as deduced from John Kaighn and John Grover respectively, gave the following evidence :

Alexander Carlisle sworn.—I put up a post there in a court back of Mead alley. Lewis Roberts employed me. Gave them 8 feet 6 inches clear of the post, up to the head of the defendant's lot, in the open space. Put up one post. There was one taken down. I only put up one cedar post, about 18 months ago. It was in the summer of 1841. The suit was brought in December 1840. I put up the post twice. Mr Wilcock came there and said, I'll cut it down. I afterwards spliced it. I put it directly in the same hole.

Cross-examined.—It was a post about 6 inches diameter. I measured it for the mark of the hole—measured it twice—after

[Roberts v. Wilcock.]

and before. I did not put the post opposite the angle of the fence, but inside. No gateway. There was an up and tumble down fence there in Wilcock's lot. I knew an old gate there 20 years ago. At one time a cart could not get up except hub deep in mud. Mr Roberts put it (the court) in order and paved it; and till then a quarter of a cord of wood could not be got up.

Benjamin Morton sworn.—I made that draft and measured the distance on the ground. The court is in width 9 feet at the end on Mead alley, and falls back here 2 feet. Opposite the angle it is 12 feet wide. The 9 feet cartway is straight. Never saw any post. We lived there 20 years. I was born there, and moved away when Wilcock came, about 6 years ago. The head of the court was in a dreadful condition. It is now in complete order.

Mary Ware sworn.—I lived in the plaintiff's upper house (the frame) full 4 years ago. Moved from there about 19 months ago; and lived there about 3 years. The defendant's carts came up with coal, turned round the horse, emptied the coal, and came out. They cut the post down twice. This was soon after we moved there, about 4 years ago. Saw the carts more than once. In turning the horse, his head was towards our door. The horse's head came near the window and his feet on the cellar door. The clothes lines were over and across the lot, from fence to fence—just at the upper part.

Cross-examined.—The tenants of the plaintiff put up the clothes line. The owners of the line took them down. The post was put there to tie the clothes line on, and went across. Should not suppose that there was room for a cart to get up with the post up. The defendant built up to 4 feet of his east line.

The defendant called

B. Callaghan sworn.—I drove up my cart there empty; tried to turn while the post was there, but could not. It was impossible to turn my cart in the space left for the defendant.

Robert Mancher sworn.—I am a carpenter. I was present when the post was cut down; distance was 7 feet 8 inches from post to fence. There was a stone at the corner to protect the fence, 7 or 8 inches from the fence. I saw a cart try to get up. The carter attempted to back up with an empty cart. The carter said it was impossible.

Cross-examined.—I made this measurement in the summer of 1841. I measured with a two-foot rule.

Hugh Erle sworn.—Saw the post standing. A cart could not get along; could not manage it in the year 1840 or 1841.

Mary Gardner sworn.—Have known these premises 60 years. Gate always in the middle. The opening was through the arch from Mead alley. John Grover used to come up with a load of hay to the stable that stood at the east end—only way of getting up.

Cross examined.—This passage is the same that it ever was. Houses up the court have been built 30 or 40 years.

[*Roberts v. Wilcock.*]

Eliza Gardner sworn.—Have known these premises since 1798. There were just the brick houses then; it was open then where the frames now are. There are two frames at the end of the court. There was a stable on the rear of John Grover's lot, where the defendant's shop is. The tenants of the court put up a pig-pen on the vacant ground. My father, John Grover, complained; the tenants took it away. They had put up their clothes lines, which he forbid.

Cross-examined.—This pig-pen was before my father's death, in 1807; it did not remain there long. Sometimes the tenants were contrary, and my father cut down the lines, and not without his permission to be up. My uncle was John Kaighn. Saw them try to get up with horse and cart, and could not with post up.

Richard Bambrick sworn.—I saw an effort made to get by that post; the cart was backed in. The defendant told the carter to do his utmost to get in, which he did, but could not get in; there was not room enough. I cut down the post. The man who put up the post measured with a shovel.

Catharine Shermor sworn.—I have known these premises since the year 1799. There was a pig-pen at the end of the court. Mr Grover used it with loads of hay—two horses' load of clover hay, as high as would come under the arch; everything, clothes line, dog-house, that prevented the turn, had to be removed. Mr Kaighn told them that nothing was to be out; nothing to obstruct in any way.

Cross-examined.—This pen was put up by one of Mr Kaighn's tenants about 37 years ago, and the dog-house a little after, during Mr Grover's life. It is about 30 years since I have known anything about this lot.

The defendant also gave in evidence deed dated December 6th 1839, from Abigail Grover, &c. to him.

The plaintiff recalled Alexander Carlisle, who testified: "I did use a rule to measure the distance of the post, as I have stated, and there is the rule I measured with. I always carry it in this pocket. I did not measure with a shovel. I measured the distance, and made it 8 feet 6 inches after the post was planted."

Plaintiff's points:

1. That under the grant from John Kaighn to John Grover of 15th September 1792, the defendant is not entitled to a passage of greater width than 8 feet from the east end of his lot, into the cartway and passage leading out into Mead alley.

2. That the plan endorsed on the above-mentioned deed fixes the right of the parties claiming under that deed; and that the defendant has no right of passage over any part of the ground now of the plaintiff, not designated and marked down in said endorsed plan as the 8 feet passage and cartway.

3. That if the jury believe that the defendant entered upon the ground of plaintiff, without his license, beyond the said 8 feet passage-way above referred to, he was guilty of a trespass, and the plaintiff is entitled to a verdict.

[Roberts v. Wilcock.]

The court declined to charge specifically on these points, and said they were sufficiently answered and included in the following charge, which they delivered to the jury :

“That if the jury believe from the evidence that a post was placed by the plaintiff at the point, at which a line drawn in continuation of the western line of the passage leading up from Mead alley, northward, would intersect a direct northern line of a passage drawn from a point in the rear end of the defendant's lot, 8 feet northward from the point at which this line intersects the northern line of the lot formerly of Robert Wood [as marked on the deed of 1792], and that the defendant could not, whilst such a post stood there, pass with a cart from the rear of his lot to Mead alley, without running against that post, then the defendant had a right, under the deed of 1792, to remove that post, and the doing so was no trespass.”

To this charge, and to the refusal of the court to answer the above points specifically and affirmatively, the plaintiff excepted.

The jury found for the defendant.

Errors assigned :

1. The Judge erred in declining to answer specifically the three several points of the plaintiff.

2. In not answering them affirmatively.

3. In charging “that if they believed that the defendant could not, while the post described by him stood where it did, pass with a cart from the rear of his lot to Mead alley, without running against that post, then said defendant had a right, under the deed of 1792, to remove that post, and the doing so was no trespass.”

This case was argued at March Term 1844, by *G. M. Wharton*, for the plaintiff in error, and *Dallas* and *Wheeler*, contra; and was now re-argued by *G. M. Wharton* for the plaintiff in error, and *Dallas*, contra.

For the plaintiff in error were cited, 3 *Steph. N. P.* 27. 67; *Douglas* 716; *Woolrych on Ways* 50; 1 *Wms. Saund.* 323, note 6; 4 *M. & S.* 392; *Senhouse v. Christian*, (1 *T. R.* 560); *Howton v. Frearson*. (8 *Ibid.* 50); *Kirkham v. Sharp*, (1 *Whart.* 323); *M'Donald v. Lindall*, (3 *Rawle* 492); *Jer. Eq.* 366; *Metzler v. Kilgore*, (3 *P. R.* 250); *Darcy v. Askwith*, (*Hobart* 234).

For the defendant in error, 1 *Scott* 576; 3 *Stark. Ev.* 1480; *Watson v. Bioren*, (1 *Serg. & Rawle* 227).

The opinion of the Court was delivered by

GIBSON, C. J.—Rules of construction are not the less to be regarded because they are trite; and there are three which bear directly on the grant before us. One of them requires that the construction be brought as near as may be to the apparent intent of the parties; and the others require, not only that every word be made to operate, but that it operate most strongly against the speaker.

[Roberts v. Wilcock.]

Now the intent of this grant was to pass a right of way adequate to the purpose named, and all the words must be taken, as far as they may, to be subsidiary to it. No construction is to be made that would defeat the grant; and so far is this principle carried, that a repugnant saving or reservation, however explicit, is to be disregarded. The subject of this grant is the cartway, not the ground over which it passes; and it would be unreasonable to let the grant be frustrated by words of description exclusively applicable to the ground. The grantee is to have a cartway, "eight feet wide at least," but at all events a cartway; and the evidence abundantly proved that a passage barely eight feet wide would not be available for the purpose. The subject is designated as a cartway and passage, to express that the design was to grant, not a passage merely, but a passage for a particular vehicle—a cart of the ordinary size and construction; and it is to be presumed that the parties meant to appropriate space enough for such a vehicle. I will not say that a positive restriction of the breadth would not overbear this presumption; but the grant is of a passage and cartway, "eight feet wide *at least*"; and this calls for the application of the other rules which require every word in a grant to have effect, and most strongly so against the grantor.

What then is the effect of the words "at least?" To bind it to the expression of an exact quantity, would be to give them no effect at all; for an exact quantity would have been more certainly expressed without them. It will not be said that the words "eight feet wide *at least*" are as definite as the words "exactly eight," which express no more than would be expressed by the words "eight feet," without an adjunct, which can serve no purpose but to qualify a meaning positively expressed without it. The words "at least," therefore, must be allowed to have a meaning; and it is not hard to assign an obvious one to them. While they express that the width of the passage shall not be less than a given measure in any event, they distinctly imply that it may be more. This conclusion is unavoidable, unless we assume that they express a definite quantity; and to do so would bring the construction into collision with the rule just stated. But it is seen at a glance that they import uncertainty; and it is obvious on which side the uncertainty lies. The words "fully, or not less than" would have the same effect, as they would express that the grantee should have eight feet certain, and more if more should be indispensable, but eight at all events, whether indispensable or not. On the other hand the words "not more than" would have thrown the uncertainty on the other side, and implied that the grantee should not have so much if he could do with less. The reference to the diagram on the back of the deed, shows the side of the lot over which the grantee was to pass; but as it imports nothing like quantity in feet and inches, it does not affect the interpretation.

Judgment affirmed.

INDEX.

ACCOUNT RENDER.

PARTNER, 11.

ACTION.

COMMON INFORMER, 1.

DOWER, 1, 2.

HUSBAND AND WIFE, 1.

INTESTATE, 1, 2, 3, 4.

PARTITION, 1.

PARTNER, 6, 11.

PRINCIPAL AND AGENT, 5.

VENDOR AND VENDEE, 6.

For an act which happens to be both a public and a private wrong, the public and the party aggrieved each has a distinct concurrent remedy, the former by indictment, and the latter by an action suited to the particular circumstances of his case: the 26th and 27th sections of the Act of 16th June 1836, which provides the remedy and punishment for publications respecting the conduct of Judges of the court, do not alter this principle with regard to offences of that kind. *Foster v. The Commonwealth*, 77.

AGENT.

PRINCIPAL AND AGENT.

AGREEMENT.

HUSBAND AND WIFE, 1.

AMENDMENT.

COMMON INFORMER, 2.

It is not in the power of the Court of Common Pleas to permit an amendment after suit brought, by which the christian name of one of the plaintiffs should be changed. *Horbach v. Knox*, 30.

APPEAL.

COSTS, 1.

DECLARATION, 1.

FOREIGN ATTACHMENT, 3.

1. Under the proviso of the 25th section of the Arbitration Act of 16th June 1836, if the arbitrators award a nonsuit of the plaintiff and he appeals, it is not a sufficient reason to allow the plaintiff to suffer a nonsuit without consent, that the arbitrators erred in law in finding as they did, nor that the plaintiff wishes to bring another suit and have another reference. *Girard Bank v. The Schuylkill Bank*, 242.

2. Since the Act of 29th March 1832, the Supreme Court have no power to take bail on appeal from the Orphans' Court. This power is vested exclusively in the latter court. *Chew's Case*, 375.

APPLICATION.

INTEREST, 1.

APPRENTICE.

Where the father is living with the mother, to make a valid indenture of apprenticeship of their son, the assent of the father before the magistrate at the time of the binding, expressed in writing, is necessary: the assent of the mother is not sufficient. *Commonwealth v. Crommie*, 339.

APPROPRIATION.

Where a debtor directs the application of a payment to a particular debt, equity will not change that appropriation in favour of another debt. *Selfridge v. Northampton Bank*, 320.

ARBITRATION AND AWARD.

APPEAL, 1.

COSTS, 1.

The amount of an award of arbitrators, appealed from by the defendant, is a lien upon his land, but not the costs which subsequently accrue upon the trial of the cause. *Christy v. Crawford*, 99.

ARREST.

In trespass against a constable for arresting the plaintiff and imprisoning him, the declaration stated it to have been done without reasonable or probable cause. *Held*, 1. That the defendant might under the general issue give evidence of the contents of the plaintiff's trunk for the purpose of showing he was addicted to burglary. 2. That the character of the plaintiff could not be given in evidence in mitigation of damages. *Russell v. Shuster*, 308.

ASSETS.

EXECUTORS AND ADMINISTRATORS, 1, 2.

ASSIGNMENT.

BOND, 1, 2.

FOREIGN ATTACHMENT, 6.

JUDGMENT, 1.

PARTNER, 2.

TRUST AND TRUSTEE, 3, 4, 5

WITNESS, 2.

An assignment in trust for creditors is good, although it excludes unreleasing creditors and reserves a trust of the surplus for the debtor. *Mechanics' Bank v. Gorman*, 304.

ASSUMPSIT.

PARTITION, 1.

ATTACHMENT.

A draft upon a particular fund in the hand of an attorney for collection is an equitable assignment of it, and although not accepted by the attorney, yet it is not afterwards subject to be attached for the debt of the drawer. *Nesmith v. Drum*, 9.

ATTORNEY AT LAW.

Representations by counsel in the presence of his client, on the faith of which one has advanced money, are the representations of the client. *Gilkeson v. Snyder*, 200.

BAIL.

APPEAL, 2.

BANK.

BOND, 1, 2, 3.

EVIDENCE, 7.

PAYMENT, 1.

PRINCIPAL AND AGENT, 1

BANKRUPT.

1. After a petition has been presented for the benefit of the Bankrupt Law, and before the applicant has been declared a bankrupt, his goods found upon demised premises may be distrained and sold by his landlord for the payment of his rent *Butler v. Morgan*, 53.

2. A ground-rent coming due after the discharge of the debtor as a bankrupt is not extinguished by his certificate. *Bosler v. Kuhn*, 183.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

CERTIFICATE OF DEPOSIT.

PRINCIPAL AND AGENT, 1.

1. Notice directed to an endorser may be deposited in the post-office at which he receives his letters and newspapers, if he do not live in the post-town or at any other place as convenient to the holder. *Jones v. Lewis*, 14.

2. A notice of the protest of a bill of exchange to be given by one to another who resides in the same city, must be served personally or by leaving it at his house or place of business: depositing it in the post-office directed to him, is not sufficient. *Kramer v. M'Dowell*, 138.

BILL OF SALE.

VENDOR AND VENDEE, 8.

BOARD OF PROPERTY.

EVIDENCE, 4, 5.

BOAT.

VENDOR AND VENDEE, 8.

BOND.

DOWER, 1, 2, 3, 6.

VENDOR AND VENDEE, 2, 7.

1. If the obligor of a bond to a bank holds the notes of the bank at the time he receives notice of the assignment of the bond, the assignee is bound to receive them as cash in payment of it; but if he obtained them after notice, they would be no defence either as payment or set-off in a suit on the bond by the assignee in the name of the bank. *Northampton Bank v. Balliet*, 311.

2. In such suit, evidence of transactions between the defendant and the bank is admissible for the defendant, where such transactions commenced before he received notice of the assignment, though the liability of the bank was not complete at the time of such notice. *Ibid.*

3. Evidence that the defendant in the suit was a man of business and in the habit of taking notes of that bank, is no proof of the time when the defendant received the notes set up as a defence. *Ibid.*

BOOK ENTRIES.

PARTNER, 6.

PRINCIPAL AND AGENT

BOUNDARY.

The compromise of a doubtful right is a sufficient consideration to establish the boundary line between conflicting titles, and although in making such compromise the parties act in good faith, but in a mutual mistake of the law, yet will it bind them. *M'Coy v. Hutchinson*, 66.

BREACH OF PROMISE.

In an action on the case founded on a breach of promise of marriage, no legal inference in support of the action can arise from proof that the plaintiff was got with child by the defendant.

Quære: If in an action in case, the plaintiff declare in two counts for seduction and getting the plaintiff with child, and for a breach of promise of marriage, upon which the jury find a general verdict for the plaintiff, is it competent for the court to render a judgment upon the second count in the declaration alone? *Hay v. Graham*, 27.

CANAL.

TAXES, 1, 2.

CARTWAY.

GRANT.

CASE STATED.

An agreed case in the nature of a special verdict is to be considered as a special verdict found by a jury, and if it be defective in substance, the judgment rendered upon it will be reversed and a *venire de novo* awarded. *Whitesides v. Russell*, 44

CLIENT.

ATTORNEY AT LAW, 1.

CERTIFICATE OF DEPOSIT.

1. Where a certificate of deposit not negotiable is issued by a bank and afterwards sold by a broker, who endorses it without recourse, and it turns out that the endorsement of the payee was forged, the broker's liability depends upon the parol circumstances attending the sale of the note. *Charnley v. Dulles*, 353.

2. It is for the jury to say whether on the evidence the plaintiff took the note subject to every risk or not. *Ibid.*

3. The question of laches in presenting a certificate of deposit to the bank for payment, is a mixed question of law and fact. *Ibid.*

4. So also is the time of giving notice to the prior endorser. *Ibid.*

CHARTER.

FOREIGN ATTACHMENT, 1, 2, 3.

COLLATERAL SECURITY.

DEED, 2.

COLLECTOR OF TOLLS.

TAXES, 2.

COMMISSIONS.

CONTRACT, 1.

COMMON CARRIER.

1. If a steamboat on the Ohio river run upon a stone and knock a hole in her bottom, the carrier will not be discharged from liability by virtue of the clause in his bill of lading, "The dangers of the river only excepted:" but in order to relieve himself from responsibility it is incumbent on him to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. *Whitesides v. Russell*, 44.

2. The privilege of transshipment reserved to a common carrier in his bill of lading does not discharge him from any liability which is incident to his contract until the goods be delivered at the destined port. *Ibid.*

COMMON INFORMER.

1. Where an Act of Assembly directs a penalty to be recovered by any person suing for the same, the sum when recovered to be paid one half to the person suing, the other to the treasurer or county commissioners, a common informer may sue in his own name. *Megargell v. Hazleton Coal Co.*, 342.

2. Where a person sues as common informer, an amendment to the declaration that he sues as well for himself as the treasurer of the county ought to be allowed *Ibid.*

COMPANY.

PARTNER, 9.

COMPROMISE.

BOUNDARY, 1.

CONTRACT, 2.

CONSIDERATION.

- BOUNDARY, 1.
- CONTRACT, 2.

CONSTITUTION.

- STATUTE, 1.

CONTRACT.

- HUSBAND AND WIFE, 3, 4, 5.
- MECHANICS' LIEN, 1.
- VENDOR AND VENDEE, 2.

1. A contract which is usurious cannot be confirmed so as to make it available to either party. *Chamberlain v. McClurg*, 31.

2. The settlement of an existing controversy being a good consideration for a contract, a party having a good defence to the payment of his obligation may release it upon an agreement of compromise, and if he do so, he will be thereby estopped from setting it up as a defence afterwards. *Ibid.*

3. A party is not concluded, by his written agreement stipulating the terms and conditions of a loan, from showing by parol evidence that the contract was usurious. *Ibid.*

4. Defendant guaranteed to plaintiff \$3000 commissions for transporting goods west for defendant, plaintiff covenanting to forward no goods for any other person or line for any place west of Hollidaysburg. Plaintiff cannot recover on the guaranty, if he forwarded goods by other lines as far as Hollidaysburg, if their ultimate destination was for places west of Hollidaysburg. *Martin v. Schoenberger*, 367.

5. A person cannot recover for part performance of an entire contract, where he has failed in the performance on his part. *Ibid.*

CORPORATION.

- FOREIGN ATTACHMENT, 1, 2, 3.
- MANDAMUS, 1.
- PARTNER, 9.
- SOCIETY.

A plaintiff who is nonsuited after an appeal by the defendant from an award of arbitrators, must refund the costs of the appeal which the defendant had paid on appealing; and that is the case, although the plaintiff sues as administrator. *Pearse v. Pawling*, 379.

COSTS.

- ARBITRATION AND AWARD, 1.

COURT.

- CRIMINAL COURT.
- ERROR, 1.
- EVIDENCE, 13.

COVENANT.

- BANKRUPT, 2.
- GROUND-RENT DEED,
- VENDOR AND VENDEE, 6.

CREDITOR.

- INTESTATE, 1, 2, 3, 4.

CRIMINAL COURT.

The 1st section of the Act of 3d February 1843, transferring the jurisdiction of the criminal court to the court of Oyer and Terminer, General Jail Delivery and court of Quarter Sessions for the city and county of Philadelphia, is not unconstitutional. *Commonwealth v. Zephon*, 382.

CURBING.

- SHERIFF'S SALE, 4, 5, 6, 7.

DAMAGES.

- ARREST, 1.
- MOB.
- RAILROAD.

DEBTOR AND CREDITOR.

- APPROPRIATION, 1

DECEDENT.

- INTESTATE.

DECLARATION.

- BREACH OF PROMISE.
- JUDGMENT BY DEFAULT, 1.

Where the practice is on appeal from a justice to go to trial on his transcript, and the justice orders that the penalty be paid one half to the plaintiff and the other half to the county commissioners, this is equivalent to a declaration *qui tenet Megargell v. Hazleton Coal Co.*, 342.

DEED.

- GRANT.
- HUSBAND AND WIFE, 5.
- VENDOR AND VENDEE, 3.

1. The rule which requires an express limitation to heirs in a fee simple conveyance of a legal estate, is not to be applied to an executory agreement, which is a conveyance only in equity. *Defraunce v. Brooks*, 67.

2. In an action founded upon a covenant of warranty of title in a deed of conveyance, it is competent for the defendant to prove that the deed, though absolute on its face, was executed and delivered as collateral security for the payment of a debt to a third person, and that the plaintiff had no real interest in the title. The fact of his having obtained the title without the payment of the purchase money is sufficient to put the plaintiff upon inquiry as to the circumstances under which the deed was made to him. *Parke v. Chadwick*, 96.

3. An erased deed is not such a deed as a vendor ought to furnish to a vendee in compliance with his engagement to make a title. *Markley v. Swartzlander*, 172.

4. The subscribing witnesses to an instrument are required to enable the opposite party to inquire into the circumstances attending the sealing and delivery. *Ibid.*

DEFALCATION.

- VENDOR AND VENDEE, 2.

DEMAND.

- CERTIFICATE OF DEPOSIT, 3.

DEPOSITION.

- EVIDENCE, 8.

If a deposition be taken by one party, it is competent for the other to read such parts of it as tend to prove his case, leaving to the other party the right to read the other parts if they be legal evidence for him. *Calhoun v. Hays*, 127

DEPUTY-SURVEYOR.

There is no law to prevent a deputy-surveyor from becoming interested in the location and appropriation of vacant lands, or for a consideration pointing them out to another for appropriation, provided he acts with good faith towards all others in his official conduct respecting the same. *Quin v. Brady*, 139.

DEVISE.

1. A devise of land to A. "to be enjoyed during his life, and at his death to be enjoyed by his heirs, so on in tail for ever," creates an estate tail. *Elliott v. Pearsoll*, 38.

2. After several devises and bequests, testator proceeded as follows: "All the residue and remainder of my estate, of every description and wherever found, I order and direct to be divided into twenty-two shares, and divided as follows to

DEVISE

wit: S. M. four shares, &c.," then naming thirteen others, and giving each a different number of shares, the aggregate amounting to but twenty shares. *Held*, that the remaining two shares were undisposed of by the will, and did not pass to the legatees named. *Duffield v. Morris*, 348.

3. Testator devised certain property to his wife and son T., their heirs and assigns for ever, as tenants in common, charging T. with \$100, to be paid to his daughter J., and the wife with \$100, to be paid to his grandson; and proceeded thus: "And as to the rest and residue of my estate, real or personal, &c., I give and bequeath the same to all my other children, with the exception of my daughter J. and the wife of E. M., to be equally divided among them, share and share alike." The testator left, at his decease, other children besides those mentioned in the will. *Held*, that T. was entitled to a share in the residue beyond that devised to his mother and himself as tenants in common. *Leidich v. Leidich*, 363.

DISTRESS.

BANKRUPT, 1.

TAXES, 4, 5, 6.

The owner of a chattel in the possession of a tenant which has been distrained for rent and sold, cannot maintain trover for it against the landlord, where notice of the distress was given to the tenant. *Caldeleugh v. Hollingsworth*, 302.

DIVORCE.

The refusal by a foreigner who arrives and becomes domiciled here, to receive his wife who follows him hither, is a virtual turning her out of doors, and the Court of Common Pleas may decree her alimony. *MDermott's Appeal*, 251.

DOWER.

PARTITION, 1.

1. A suit after the widow's death to recover the principal sum of her dower charged on land sold by the administrator under the order of the Orphans' Court, one-third of the purchase money to be paid on the confirmation of the sale, one-third in one year thereafter with interest, and one-third to remain charged on the premises for the use of the widow, may be brought either by the administrator to whom the bond was given or the heir entitled. *Unanget v. Kraemer*, 391.

2. The suit ought to be brought against the purchaser at the Orphans' Court sale, who gave his bond to the administrator, or one who purchased of him by a later conveyance of the land chargeable with the money and gave a similar bond, with notice to the terre-tenant in both cases. *Ibid*.

3. Such terre-tenant is not liable unless he took upon him the payment, and then he is personally bound. *Ibid*.

4. This case distinguished from *Pidcock v. Bye*. *Ibid*.

5. The defendant in such suit, after the two first instalments have been paid, cannot object to irregularity in the proceedings of the Orphans' Court in ordering the sale. *Ibid*.

6. It is evidence to rebut the presumption of payment in such case arising from the lapse of twenty years since the widow's death, that the bonds were not given up and some payments were made, though it does not distinctly appear they were on that account. *Ibid*.

EJECTMENT.

ERROR, 1.

VENDOR AND VENDEE, 1, 3.

1. In an action of ejectment wherein the defendant sets up an outstanding lease by the plaintiff to a tenant as a defence, it is competent for the plaintiff to explain by parol evidence what land was embraced in the terms of the lease, or to show a parol surrender of the lease so far as it embraced the land in dispute, by the tenant before the action was brought. *Tate v. Reynolds*, 91.

2. In an action of ejectment when either party claims by virtue of the Act of Limitations, it is competent for him to give in evidence his own declarations made at the time he went into possession, in order to show that his entry was adverse. *Miles v. Miles*, 135.

3. In an action of ejectment, where the question arises upon the validity of the original title of the parties, and not upon the extent of the claim or the Act of

EJECTMENT.

Limitations, the payment of taxes for the land by one party or the other cannot affect the title, and is therefore illegal evidence. *Quin v. Brady*, 139.

4. One who has made a lease for years of his land to a tenant in possession cannot maintain ejectment until the lease expires. *Staffit v. Trozell*, 340.

ERASURE.

DEED, 3.

VENDOR AND VENDER, 3.

ERROR.

REVERSAL.

TRESPASS, 2.

In an action of ejectment, when the title of the parties depends upon written evidence, it is error in the court to submit it to the determination of a jury. *Connellogue v. English*, 11.

ESTATE TAIL.

DEVISE, 1.

ESTOPPEL.

DOWER, 5.

An estoppel can only be asserted or pleaded by one who was affected by the act which constitutes the estoppel. *Miles v. Miles*, 135.

EVIDENCE.

ARREST, 1.

BOND, 2, 3.

EJECTMENT, 3.

JUDGMENT, 1.

MUR.

PARTNER, 3, 4, 5, 6

TRESPASS, 2.

1. Notes of evidence, taken by the judge in the course of a trial, are no part of the record, and they cannot be received, in a subsequent trial of the cause, as evidence of what an absent witness then testified, unless their accuracy be established by other proof. *Livingston v. Cox*, 61.

2. In an action against an attorney at law, for negligence in conducting and prosecuting the claim of his client, the opinion of a witness as to the discretion exercised by the defendant cannot be given in evidence. *Ibid.*

3. A party may cross-examine as to the *res gesta* given in evidence, though it be new matter. *Markley v. Swartzlander*, 172.

4. The proceedings in a suit before the Board of Property between R. and B., are not evidence in an ejectment by K. against R. *Rose v. Klinger*, 178.

5. Facts stated by the Board of Property are not even *prima facie* evidence of their truth, in the trial of an ejectment. *Ibid.*

6. Recitals of title in a deed more than 30 years old, where possession accompanied the deed, are *prima facie* evidence against persons claiming by title under the grantor previous to such deed. *James v. Letzler*, 192.

7. Evidence that a bank did not execute and issue certain of its notes until two years after their date, is admissible to show the time of their coming into the hands of a debtor to the bank. *Selfridge v. Northampton Bank*, 320.

8. A mere service of a subpoena on a witness residing within 40 miles of the court will not authorize his deposition to be read in evidence in the cause; the party must bring him in by attachment if he can. *Whitesell v. Crane*, 369.

9. Parol evidence is admissible to show the contents of a handbill put up in a stage-office four years before, containing a notification of limited responsibility. *Ibid.*

10. Evidence of the usual course of a stage-office for passengers to call there and have their names registered in the stage-book and where they were to be called for, is evidence to affect a party with notice. *Ibid.*

11. The printed conditions of a line of public coaches are sufficiently made known to passengers by being pasted up at the place where they book their names. *Ibid.*

EVIDENCE.

12. In a suit against a physician for malpractice whereby the plaintiff lost his leg, *Held*,

1. It being shown that other medical men had been called in for a consultation without invitation or notice to the defendant, a medical witness for the plaintiff might be asked by the defendant as to the practice of physicians in regard to consultations.

2. The witness could not be asked as to the measure of the defendant's responsibility for his patient, not being a subject of professional skill.

3. Nor is testimony admissible on the part of the defendant as to his general skill.

4. The nature and properties of the powders employed by the defendant in the case, were proper questions to medical witnesses called by the plaintiff.

5. The declarations of a procchein amy for the plaintiff made before the writ purchased, are not admissible on behalf of the defendant. *Mertz v. Detweiler*, 376.

13. The court may instruct the jury to disregard evidence which is afterwards discovered to have been improperly admitted. If it appear that the jury have not followed this instruction, the proper course is a motion for a new trial. *Unangst v. Kraemer*, 291.

EXECUTION.

HUSBAND AND WIFE, 2.

STATUTE, 1.

1. In the distribution of moneys raised by a sheriff's sale of goods, no other person than the defendant in the execution or his legal representatives will be permitted to object that a judgment on which another execution has been levied on the same goods, was erroneously entered, or the execution erroneously issued thereon. *Louber and Wilmer's Appeal*. *Wilson, Jones and Co.'s Appeal*, 387.

2. Nor will the defendant or his representatives be permitted to do so in a collateral action or other manner than by suing out a writ of error or by making a direct application to the court in which the judgment is entered or from which the execution has been issued, to vacate it or set it aside. *Ibid*.

EXECUTORS AND ADMINISTRATORS.

COSTS, 1.

PRINCIPAL AND AGENT, 3, 4, 5.

1. What things are assets in the hands of an administrator. *Wiley's Appeal*, 244.

2. Tenant from year to year of a tavern; on his decease his administrator takes possession: he is chargeable with the leasehold interest and good-will as assets, at the price offered him for them by others and refused. *Ibid*.

3. A *feri facias* returnable first Monday in August was placed in the sheriff's hands July 25th, and the defendant's goods sold under it on the 12th October. It did not appear when the goods were seized. *Held* the presumption was that the seizure was made before the writ was returnable. *Fittler v. Patton*, 455.

4. It is not requisite that the sheriff should specify in his return to a *feri facias* the particular goods taken, the sum for which each article sold, or the time of their seizure. *Ibid*.

FACTOR.

PRINCIPAL AND AGENT, 2, 3, 4, 5.

FALSE IMPRISONMENT

ARREST, 1.

FEE-BILL.

1. The fee-bill is a penal statute. The dictum in 3 *P. R.* 523, that it is a remedial statute, corrected. *Aechternacht v. Watmough*, 162.

2. Amendments of the fee-bill suggested to prevent extortion. *Ibid*.

3. To recover the penalty in the fee-bill, the narr. should state the particular service for which the officer took an illegal fee. *Ibid*.

4. On a narr. charging generally that the defendant, for services done in his office of sheriff, on a writ of *feri facias*, took other and greater fees than were allowed by Act of Assembly, the judgment was arrested. *Ibid*.

FEE-BILL.

5. The prothonotary can receive a fee of 75 cents for issuing a venire only for the term at which the cause is tried, though it may have been repeatedly before in the trial list. *Pairo v. The American Insurance Company*, 374.

FIERI FACIAS.

EXECUTION, 3.

FLATS.

RIVER.

FOREIGN ATTACHMENT.

1. In foreign attachment against a corporation as defendant, the civil death of the corporation before judgment against it, produced by the decree of forfeiture of its charter by a judicial tribunal, dissolves the attachment. *Farmers' and Mechanics' Bank v. Little*, 207.

2. The garnishee may take advantage of this by pleading it, notwithstanding judgment had been entered against the defendant for default of appearance. *Ibid.*

3. Such decree of a court forfeiting a charter, made before judgment signed in the foreign attachment, appealed from by a devolutive appeal, which had not the effect by the law of the State to suspend proceedings, afterwards reversed by the appellate tribunal because the reasons given by the court below were erroneous, but making a like decree, does not restore the corporation as to intermediate acts done in pursuance of the prior forfeiture, so as to render the judgment by default in foreign attachment valid. *Ibid.*

4. Any debt due by the garnishee in a foreign attachment to the defendant at the time of the answer to interrogatories is embraced by the attachment. *Franklin Fire Insurance Company v. West*, 350.

5. A claim uncertain at the time of the attachment but rendered certain at the time of the answer to the interrogatories, is embraced. *Ibid.*

6. An assignment after the attachment is subject to its lien, and will not convey as against the plaintiff in the attachment a claim uncertain at the time of the attachment, but fixed and ascertained when the answers to the interrogatories are put in. *Ibid.*

FORFEITURE.

FOREIGN ATTACHMENT, 1, 2, 3.

GARNISHEE.

FOREIGN ATTACHMENT, 2.

GOOD-WILL.

EXECUTORS AND ADMINISTRATORS, 2.

GRAND JURY.

MOB, 2.

GRANT.

Grant of a cartway "of eight feet wide at least," agreeable to a plan and draft endorsed, held to entitle the grantee to more than eight feet, if necessary for its use as a cartway. *Roberts v. Wilcock*, 464.

GROUND-RENT.

BANKRUPT, 2.

SHERIFF'S SALE, 5, 6, 7.

Ground-rent created by deed with a clause of re-entry is payable out of the proceeds of a sheriff's sale of the property under a judgment by a stranger in preference to such judgment. *Pancoast's Appeal*, 381.

GROUND-RENT DEED.

Articles of agreement to let land on a certain ground-rent forever, with covenant for its payment free of taxes, the grantor to execute a deed or deeds when the ground is improved by buildings. The land not being improved, nor the rent paid, the grantor obtains judgment against the grantee in an action of covenant, 2

GROUND-RENT DEED.

and sells the ground on an execution, and becomes the purchaser. *Held*, that the grantee was discharged from his covenant. *Huston v. Davidson*, 181.

GUARANTY.

CONTRACT, 1.

GUARDIAN.

TRUST AND TRUSTEE, 1.

HANDBILL.

EVIDENCE, 9, 11.

HEIR.

INTESTATE, 1, 2, 3, 4.

PARTITION, 1.

HUSBAND AND WIFE.

1. Upon the sale by a husband and wife of the wife's lands, and a subsequent separation, an agreement between them that one half of the unpaid purchase money shall be paid to the attorney of the wife for her sole use and maintenance, upon her giving security to indemnify the husband against any debts which she might contract, is binding between the parties; and upon the money having been paid by the purchaser to the attorney of the wife, the husband cannot maintain assumpsit for money had and received against him, although the wife had not given the indemnity against her debts, which the agreement required: he could only sue and declare specially upon the agreement, setting out a breach, and the damages then recoverable would be measured by the amount of debts of the wife which the husband had been obliged to pay. *Lehr v. Beaver*, 102.

2. A husband and wife seised, in right of the wife, of an estate of inheritance, "granted, demised, leased, set and to farm let the same unto A. B., to have and to hold to the said A. B., his heirs and assigns, from the day of the date hereof, for and during the existence of the world, he yielding and paying therefrom and thereout yearly and every year hereafter to the said grantors, their heirs and assigns, the yearly rent of \$100;" and in the same deed the grantees covenanted to erect a house upon the premises of the value of \$100; and upon their failure so to do, a right to the grantors to re-enter was reserved: *Held*, that upon the death of the wife the husband was seised of the whole estate, created by the deed, in fee, and that it was subject to a levy and sale for the payment of his debts. *Robb v. Beaver*, 107.

3. A post-nuptial contract between husband and wife, though declared void at law, is held good and carried into effect in equity. *Duffy v. The Insurance Company*, 413.

4. If made without a valuable consideration, it will be deemed fraudulent in law against creditors; but if a valuable consideration is received by the husband from his wife for a settlement to her separate use, it is valid. *Ibid*.

5. Where, therefore, the husband had a life-estate in his wife's land, and in consideration of \$4000 paid them, they joined in a conveyance of the fee in trust to collect the rents and apply one half of them to its repayment, and to pay the other half to such persons as the wife should direct, and afterwards in trust to convey as she should direct, and subsequently made another conveyance to the assignees of that deed, in consideration of \$12,000 advanced to the wife to enable her to pay off the \$4000, in trust to sell, mortgage or let the premises, and after repaying the \$12,000, to pay off certain creditors of the husband to the amount of \$5509.25, which sum greatly exceeded the value of the husband's life-estate, (the property consisting of unproductive lots), and there being no ground to presume fraud or collusion, the conveyances were held to be valid. *Ibid*.

IMPROVEMENT.

WARRANT AND SURVEY, 2.

INCUMBRANCE.

VENDOR AND VENDEE, 5.

VIII.—61

INDICTMENT.

ACTION, 1.
PRACTICE, 1.

INSOLVENT.

1. If one who is exempt from arrest by reason of his having taken the benefit of the Insolvent Law suffers himself to be sued, judgment to be entered, and execution to issue against him, upon which he is arrested and gives a bond to take the benefit of the Insolvent Law, and the condition of the bond is broken by his failure to make an application for that purpose, he cannot, in an action brought on that bond, avail himself of the fact that his arrest was illegal. *Johnston v. Coleman*, 69.

2. If one illegally arrested give bond with surety, conditioned for his appearance to take the benefit of the Insolvent Law, instead of suing out a *habeas corpus*, the surety will be bound by his obligation. *Ibid.*

3. One who has been arrested for debt prior to the passage of the Act of 12th July 1842, and given bond and filed his petition for the benefit of the Insolvent Laws, is not relieved from his obligation to appear and prosecute his application at the time appointed by the Court, by the passage of that Act before that time arrived; and upon his failure to appear, he and his surety are liable upon their insolvent bond. *Lilley v. Turbet*, 89.

INTEREST.

If an unconditional payment be made upon a bond bearing interest, which is not yet due, it must be applied first to the extinguishment of the interest up to the time when the payment is made; then to the principal, *pro tanto*. *Spires v. Hamot*, 17.

INTESTATE.

1. A creditor of an intestate does not release the real estate of the decedent from liability by suing and obtaining judgment against the administrator alone, without joining the widow and heirs under the 34th section of the Act of 24th February 1834, where the sale of the real estate for the payment of debts takes place by order of the Orphans' Court on the application of the administrator. *Murphy's Appeal*, 165.

2. The 34th section of that Act means that the judgment obtained shall not be paid by force of an execution issued thereon. *Ibid.*

3. After judgment obtained against the executor or administrator, the plaintiff may issue a *scire facias* thereon against such executor or administrator, and the heirs or devisees to recover the same out of the real estate, and such heirs or devisees may make the same defence which they could have made if originally joined in the suit. *Ibid.*

4. But where such judgment is obtained against the administrator alone, and a sale is about being ordered by the Orphans' Court, that court ought to allow the heirs to show, if they can, that the creditors' claim is unfounded as fully as they could in an action in which they were joined as parties. *Ibid.*

JOINT GUARDIAN.

TRUST AND TRUSTEE, 1.

JOINT TRUSTEES.

TRUST AND TRUSTEE, 2, 3, 4, 5.

JUDGES.

ACTION, 1.

JUDGMENT.

EXECUTION, 1, 2.

PRACTICE, 1.

VENDOR AND VENDEE, 4.

Effect land in the hands of a purchaser, a judgment must have been not merely simultaneous with but anterior to the conveyance; and the precise time at which the judgment was entered may be shown by less than record proof. *Mechanics' Bank v. Gorman*, 304

JUDGMENT BY DEFAULT.

To entitle a party to judgment by default under the Act of the 13th June 1836, he must have his declaration filed at the time prescribed by the Act. *Foreman v. Schricen*, 43.

JURISDICTION.

CRIMINAL COURT.
SOCIETY, 1, 2.

LANDLORD AND TENANT.

The Act of 3d April 1830, does not apply to the case of a landlord and tenant, where the tenant refuses to pay rent under a claim of right to the reversion, which, being a denial of the landlord's title, gives him an immediate right of entry and action at the common law. *Clark v. Eerly*, 226.

LEASE.

EJECTMENT, 1.

LEGACY.

DEVISE, 2, 3.

LEGISLATURE.

ROADS

LIEN.

ARBITRATION AND AWARD, 1.

GROUND-RENT, 1.

MECHANICS' LIEN.

SHERIFF'S SALE.

TAXES, 3, 4, 5, 6.

VENDOR AND VENDEE, 4.

Where one owns both land and the money due upon it, there is no lien on it for the money. *Gilkeson v. Snyder*, 200.

LIMITATIONS.

DOWER, 6

MANDAMUS.

SOCIETY.

1. Under the Act of 14th June 1836, giving the Courts of Common Pleas within their respective counties power to issue writs of *mandamus* "to all corporations being or having their chief place of business within such county," a Court of Common Pleas cannot issue a *mandamus* to a railroad company, whose office and chief place of business is not in such county, although their road may pass through the same. *Whitemarsh Township v. The Philadelphia, Germantown and Norristown Railroad Co.*, 365.

2. Supervisors of a township may apply for a writ of *mandamus* commanding a railroad company to make a road for public accommodation, required by their charter. *Ibid.*

MECHANICS' LIEN.

Where there is a special contract between a mechanic and the owner or builder of a house for the work which the former is to do in constructing the house, he must look to his contract alone for his security, and cannot resort to the remedy which the mechanics' lien law provides. *Haley v. Prosser*, 133.

MOB

1. In an action of trespass for pulling down a building, evidence that the building was peaceably taken down and its materials preserved in conformity with the directions of the commissioners of the township during a period of great public excitement and disorder, with a view of saving the neighbourhood from threatened violence, is admissible in mitigation of damages. *Reed v. Bias*, 189.

2. In such action evidence that the commissioners had by law the power to abate and remove nuisances, and that a grand jury after instructions by a com

MOB.

petent court presented the building as a public nuisance and recommended the abatement, is not admissible in mitigation of damages. *Ibid.*

MORTGAGE.

TRUST AND TRUSTEE, 2.

NONSUIT.

COSTS, 1.

APPEAL, 1.

NOTES.

EVIDENCE, 1.

NOTICE.

BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 2.

CERTIFICATE OF DEPOSIT, 4.

DISTRESS, 1.

EVIDENCE, 9, 10, 11.

NUISANCE.

MOB, 2.

OFFICER.

DEPUTY SURVEYOR, 1.

OPINION.

EVIDENCE, 2.

ORPHANS' COURT.

APPEAL, 2.

DOWER, 5.

OYER AND TERMINER.

CRIMINAL COURT.

PARDON.

The governor may annex to a pardon any condition, whether precedent or subsequent, not forbidden by law, and it lies on the grantee to perform it.

If he does not, in case of a condition precedent, the pardon does not take effect—in case of a condition subsequent, the pardon becomes null; and if the condition is not performed, the original sentence remains in full force, and may be carried into effect. *Flavell's Case*, 197.

PAROL EXCHANGE.

CERTIFICATE OF DEPOSIT, 1.

PARTNER, 7.

It is not essential to the efficacy of a parol exchange of land that each party should take immediate possession of the property exchanged. *Miles v. Miles*, 135.

PAROL EVIDENCE.

CONTRACT, 3.

EJECTMENT, 1.

EVIDENCE, 9.

PARTITION.

WATER-COURSE.

A. bought land from an heir who took it at the appraisement, subject to one-third to the widow, to be paid on the death of the widow. Under the 41st section of the act of 29th March, 1832, the heir may recover his portion of this after the widow's death, in *assumpsit* against A.

The suit, if against the heir taking the land at the appraisement, must be on the recognizance.

When an heir takes land at an appraisement, his own share of the price is merged in his fee.

ARTITION.

Qu. How it would be if his wife were the heir ?

But even if this were so in that case, yet his vendee may agree with him otherwise ; and if such vendee give a bond for his wife's share, payable on the death of the widow, and sell the land to another subject to that bond, the obligee, or his administrator, if dead, may recover in *assumpsit* against such vendee. *Shelly v. Shelly*, 153.

PARTNER.

1. One of several partners, who are plaintiffs in an action, if he be willing to testify, is a competent witness for the defendant. *Moddewell v. Keeper*, 63.

2. A general assignment for the benefit of creditors by one who is a member of a partnership, gives to his assignee no control over the partnership funds or claims, so as to enable him to receive or release them. *Ibid.*

3. The existence of a partnership may be proved by the separate admissions of all who are sued, or by the acts, declarations, and conduct of the parties, the act of one, the declarations of another, and the acknowledgment or conduct (when the firm consists of three persons) of the third. *Welsh v. Speakman*, 257.

4. It cannot be proved by the act of one only, if the plaintiff fails as to the rest, but the whole testimony taken together may show it, if each and every one is connected together by their own admissions or acknowledgments. *Ibid.*

5. To effect this the plaintiff has a right to prove one thing at a time, to add fact to fact, from which the jury may infer the partnership. *Ibid.*

6. *Held*, therefore, that where the plaintiff showed a store existing, packages sent there marked W. S. & Son, that W. S. was frequently there so as to be likely to see the goods so marked, and other grounds for inferring partnership:

1. The plaintiff might give in evidence as against the son the admissions of the son that he was a partner, and proof that bills of goods furnished for the store were rendered in the name of both.

2. It made no difference that the father being dead and the son insolvent, the suit was against the executors of the father.

3. The day-book, ledger, and books of account of the defendant were evidence.

4. And if the court has first rejected evidence of books, but afterwards admits them, the proper course is for the party who offered it, if a witness who was to give explanatory evidence has since been discharged, to move to dismiss the jury or for a postponement of the case ; he cannot go on and take the chance of a verdict and then assign the rejection as error.

5. The defendants might show the course and manner of doing business at the store before the controversy—as that the sign was in the name of the son—that the bills were made out in his name, and that suits were brought before a justice in his name.

6. The defendants might show that the son procured an insurance against fire on goods in the store in the name of the firm, and that a fire having taken place, it was settled by compromise after suit brought, and the son recovered the money. *Ibid.*

7. Partnership by written articles : the act by which the plaintiff was alleged to have retired, and that by which the defendants were alleged to have continued the firm, was reduced to writing : parol proof is inadmissible to show that the defendants only were partners when the plaintiff performed services. *Cochran v. Perry*, 262.

8. A partnership is dissolved when one of the partners sells his share to a stranger, or one of the firm, unless otherwise provided by agreement. *Ibid.*

9. Where articles of partnership provided for the transfer of shares by members, subject to restrictions, that a shareholder, after such transfer, should cease to be a member that the company should keep books, and the persons becoming members by transfer on the books should be entitled to receive a certificate in a particular form, the plaintiff executed an agreement to transfer, not entered on the books, to two of his copartners. *Held*, that this was either a present transfer, which dissolved the partnership, or an executory agreement, which left him standing as a member. *Ibid.*

10. A subsequent ratification of a transfer by the other partner on a condition not performed makes no difference in the relations of the partners towards each other. *Ibid.*

PARTNER.

11. After a transfer not completed, no action lies by the party transferring against the other partners, but account render. *Ibid.*

12. And to make such ratification binding, all the partners must join in it *Ibid.*

PASSENGERS.

EVIDENCE, 9, 10, 11.

PAVING.

SHERIFF'S SALE, 4, 5, 6, 7

PAYMENT.

BOND, 1.

DOWER, 6.

INTEREST, 1.

PRINCIPAL AND AGENT, 3.

TRUST AND TRUSTEE, 2.

Payment into court or tender in notes of a bank, as between the bank itself and its debtors, is equivalent to payment in specie. *Northampton Bank v. Bellist*, 311.

PENAL STATUTE.

FEE-BILL, 1.

PENALTY.

COMMON INFORMER, 1.

DECLARATION, 1.

FEE-BILL, 3, 4.

PENN TOWNSHIP.

SCHOOLS, 2.

PHYSICIAN.

EVIDENCE, 12.

PIDCOCK v. BYE.

DOWER, 4.

PITTSBURG.

That portion of Pitt township which adjoins the city of Pittsburg, and which by Act of Assembly is created a city district, is subject to the general road laws until it is admitted into the city according to the provisions of the 11th section of the Act of 16th June 1836. *The Pitt Township Road Case*, 74.

PITT TOWNSHIP.

PITTSBURG.

PLEADING.

ESTOPPEL.

FOREIGN ATTACHMENT, 2.

POOR.

Directors of the Poor are authorized and required to pay the funeral expenses of a destitute person upon the order of two justices granted after the death and burial of such person. *Directors of Poor v. Wallace*, 94.

POSSESSION.

VENDOR AND VENDEE, 8.

POST-NUPTIAL CONTRACT.

HUSBAND AND WIFE, 3, 4, 5.

PRACTICE.

1. Upon an indictment for a misdemeanor, and a demurrer by the Common-

PRACTICE.

wealth to a plea in bar of the defendant, which contains no confession of facts which constitute guilt, a judgment against the defendant is that of *quod respondet ouster*. *Foster v. The Commonwealth*, 77.

PRESENTMENT.

CERTIFICATE OF DEPOSIT, 3.

PRESUMPTION.

DOWER, 6.

PRINCIPAL AND AGENT.

1. If an agent procure the note of his principal to be discounted, and deposit the proceeds in bank to his own credit, the principal may maintain an action therefor against the bank in his own name, notwithstanding the bank, after notice, had paid the money on the check of the agent. *Frasier v. The Erie Bank*, 18.

2. If the books of a factor exhibit a balance due to his principal, and this be communicated to him, it is conclusive upon the factor, and he cannot afterwards alter or in any way impair it. But if the state of the account be not communicated to the principal, so that he may have acted upon the supposition that such balance was in his favour, he may afterwards show that the entries were made by fraud or mistake. *Vantries v. Richey*, 87.

3. Where goods are sold by a factor here for a principal abroad, and the factor dies before payment, his authority is revoked, and a payment to his administrator by the purchaser is a mispayment. *Merrick's Estate*, 402.

4. If such administrator receives the money, it ought not to be involved in his accounts in the settlement of the intestate's estate, either as general or special assets, nor can the Orphans' Court or the Supreme Court on appeal make any order in favour of the principal on such settlement of accounts. *Ibid.*

5. Money so received by the administrator is trust estate and can be followed in his hands or those of his representatives only by a bill in equity or perhaps here by an action for money had and received. *Ibid.*

PROTHONOTARY.

FEZ-BILL, 5.

RAILROAD.

MANDAMUS, 1, 2.

1. Under the 15th section of the Act of 17th February 1831, incorporating the Philadelphia, Germantown and Norristown Railroad Company, if there be a report made by viewers ascertaining the damages to the owner by the occupation of land for the railroad, and appeal therefrom and verdict and judgment thereon, the company is bound to pay the amount fixed by the verdict and judgment, before they can become seised in fee of the land. *Levering v. The Philadelphia, Germantown and Norristown Railroad Co.*, 459.

2. After report of viewers and during the pendency of the appeal, the company have a qualified right to enter upon and use the land in the meanwhile and until the final result; but unless they pay the amount found by the verdict and judgment, the owner may recover the land in ejectment. *Ibid.*

3. "Or" in the first proviso of that Act should be read "on." *Ibid.*

RATIFICATION.

PARTNER, 10, 12.

RECITALS.

EVIDENCE, 6.

RENT.

BANKRUPT, 1.

DISTRESS, 1.

RETURN.

EXECUTION, 4.

REVERSAL.

This court will not reverse for an error which does no injury to the party complaining. *Unanget v. Kraemer*, 391.

REVERSIONER.

EJECTMENT, 4.

RIVER.

1. Lands bordering on the flats of a river and the flats in front naturally go together, and therefore the flats pass in a conveyance of the land described as running by the course of the river. *Jones v. Janney*, 436.

2. An express exception is required in the grant or some unequivocal declaration or certain immemorial usage, to limit the title to the edge of the river. *Ibid.*

3. The nature of the right to flats on a river. *Ibid.*

4. One having land in front of a river by conveyance from the proprietary, out of which the flats were reserved, but afterwards claiming the flats under an office right of dubious validity, and making a settlement of the land on the river on certain of his children together with the flats, and afterwards confirming such settlement by his will, shall be considered as intending to pass the flats to such children, in preference to his residuary devisees under a general clause in his will. *Ibid.*

ROADS.

PITTSBURGH.

Neither the State nor a person, artificial or natural, acting by its authority, under a law which the Legislature is competent to make, is answerable for consequential damages, occasioned by the construction of a highway, further than is specially provided by the law itself. *Henry v. The Pittsburgh and Allegheny Bridge Co.*, 85.

SALE.

VENDOR AND VENDEE, 1

SCHOOLS.

1. Under the 11th section of the Act of 12th April 1838, and the 33d and 36th sections of the Act of 7th March 1840, the remaining school directors have the power and it is their duty to declare the seat of a director vacant whenever the cases contemplated in those sections arise, as well in the county of Philadelphia as in other parts of the State. *Felton v. The Commonwealth*, 267.

2. But in Penn Township this power and duty are expressly vested by the 33d section of the Act of 7th March 1840, in the remaining directors respectively of each of its election districts of North and South Penn. *Ibid.*

SCIRE FACIAS.

INTESTATE, 3.

SEDUCTION.

BREACH OF PROMISE

SET-OFF.

BOND, 1

SETTLEMENT

FLATS, 4.

SHERIFF.

EXECUTION, 4

FEE-BILL, 4.

SHERIFF'S SALE.

GROUND-RENT, 1.

SUBROGATION, 1.

TENANT IN TAIL, 1.

1. An award of money to a lien creditor who has no lien, cannot be questioned in a collateral proceeding depending in the same court. *Yerkes's Appeal* 234.

SHERIFF'S SALE.

2. G. purchased lot No. 1 on the 14th December 1835. On the 24th March 1836 B. obtained judgment against G., which was revived on the 18th May 1840. On the 21st March 1838 G. purchased lot No. 2. Y. obtained judgment against G. on the 3d December 1838. On a sheriff's sale in 1842 of No. 2, the proceeds were decreed to B.'s judgment. No. 1 was afterwards sold by the sheriff. *Held* that the equitable right of substitution did not apply so as to give Y. the amount of his judgment out of the proceeds of No. 1. *Ibid.*

3. A judicial sale devests all liens definite and certain in their amount. *Commissioners of Spring Garden's Appeal*, 444.

4. Therefore the lien of the Commissioners of Spring Garden for curbing and paving in 1836 and 1837 under the Act of 3d March 1818, is devested by a subsequent sheriff's sale in 1841. *Ibid.*

5. And this is the case though the property be sold subject to the ground-rent then existing and created before such lien. *Ibid.*

6. *Quare*, if the contest were between the owner of the ground-rent and the commissioners as to the appropriation of the proceeds of sale, to whom the money would go. *Ibid.*

7. *Quare*, whether a different case would not be presented if the claim of the commissioners had been filed of record under the Act of 16th April 1840; and whether the whole estate, ground-rent and all, does not pass to the sheriff's vendee by a judicial sale in pursuance of the provisions of that Act. *Ibid.*

SOCIETY.

1. Where a charter of a society provides for an offence, directs the mode of proceeding and authorizes the society, on conviction of a member, to expel him, his expulsion, if the proceedings are not irregular, is conclusive, and cannot be inquired into collaterally by *mandamus*, action, or any other mode. *Commonwealth v. The Pike Beneficial Society*, 247.

2. The courts have jurisdiction to keep such tribunals in the line of order, and to prevent abuses. *Ibid.*

SPECIAL VERDICT.

CASE STATED

SPRING GARDEN.

SHERIFF'S SALE, 4, 5, 6, 7.

STAGE COACH.

EVIDENCE, 9, 10, 11.

WITNESS, 3

STATUTE.

A local statute which suspends, for a reasonable time, execution of a judgment on a previous contract, is not prohibited by the tenth section of the first article in the constitution of the United States.

Therefore the statute enacted by the Legislature of Pennsylvania in 1842, and suspending for a year a sale on execution for less than two-thirds of the appraised value, is not unconstitutional in respect of its retrospective operation. *Chadwick v. Moore*, 49.

STATUTE OF FRAUDS.

VENDOR AND VENDEE, 1

SUBROGATION.

SHERIFF'S SALE, 2.

H. obtained judgment against R. then owner of three lots, Nos. 1, 2, and 3. Afterwards R. by deed conveyed lot No. 3 for \$400 to S., who paid \$100 and gave his note for \$300 payable to R.'s order, "on account of the lien on his (R.'s) property in favour of H.," &c. After this there were three judgments obtained against R. by B., W. and P. At the time W.'s and P.'s judgments were entered there were no judgments against S.; but subsequently there were twelve entered against him. Out of the proceeds of lots Nos. 1 and 2, sold under H.'s judgment, the court allowed H. and B. the amount of their judgments, W. the

SUBROGATION.

balance of the fund towards his judgment, and subrogating W. and P. to the rights and interest of H. as to the lien of his judgment against the real estate of S., decreed them the amount, with interest, of the note given by S. to R. No notice was given S.'s creditors of the application for this decree of distribution, and but one appeared to contest the subrogation. Subsequently to the decree, lot No. 3 was sold by the sheriff as S.'s property, and W. and P. claimed the amount of the note out of the proceeds. Exceptions afterwards taken to the decree by two of S.'s creditors were dismissed, and, on an appeal by them to this court, the decree of substitution was reversed. *SERGEANT, J., dissenting. Ebenhardt's Appeal*, 327.

SUBSTITUTION.

SUBROGATION, 1.

SUPERVISORS.

MANDAMUS, 2.

TAVERN.

EXECUTORS AND ADMINISTRATORS, 1.

TAXES.

EJECTMENT, 3.

1. The bed, berm-bank and tow-path of an incorporated canal are not taxable as land or real estate under the Acts of 15th April 1833 and 29th April 1844. *Lehigh Company v. Northampton County*, 334.

2. Nor are the toll-houses and collectors' offices belonging to the canal and incident thereto. *Ibid.*

3. Under the Act of 3d February 1824, the taxes, rates and levies assessed on real estate in the city and county of Philadelphia, are a lien on such estate from the date of their assessment, and have priority to mortgages and other incumbrances charged on such estate prior to their assessment. *Parker's Appeal. Mayor, Aldermen, and Citizens of Philadelphia's Appeal*, 449.

4. A relinquishment of a distress made by a collector for taxes assessed under that Act, on the goods of a tenant lying on the premises charged with the tax, does not release the priority of the lien of the tax in favour of other lien creditors. *Ibid.*

5. It seems it would, if the goods were the property of the owner of the estate charged with the tax. *Ibid.*

6. *Quare*, whether in the latter case, it would not entirely discharge the estate from the lien of the tax. *Ibid.*

7. The provisions of the Act of 3d February 1824 do not apply to State taxes assessed under the Act of 11th June 1840. *Ibid.*

TENANT IN COMMON.

1. In an action of ejectment between two of several tenants-in-common between whom, as alleged by the defendant, there had been an amicable partition, it is competent for him to give in evidence a release of the other parties to the partition in order to establish the fact in issue. *Calhoun v. Hays*, 127.

2. A parol partition of lands between tenants-in-common who derive their title by descent, when fair and equal, and followed by a due execution of it, is binding upon all, whether they be femes-covert, their husbands joining them, or minors, with the assent of their guardians or not. *Ibid.*

TENANT IN TAIL.

A sheriff's sale of the estate of a tenant in tail does not so divest him of the inheritance that he may not afterwards execute a deed, in pursuance of the Act of Assembly, for the purpose of barring the issue in tail. *Elliott v. Pearson*, 88.

TERRE-TENANT.

DOWER, 2, 3.

TIPPLING-HOUSE.

A person convicted in the Quarter Sessions of Philadelphia county for keeping

TIPPLING-HOUSE.

a tipping-house, and sentenced to pay a fine of \$50 and stand committed, is not entitled to be discharged at the end of one month without paying the fine. *Meris's Case*, 374.

TOLL-HOUSE.

Taxes, 2.

TRESPASS.

1. In an action of trespass against two or more defendants, if there be no evidence given against one of them, the court may direct a verdict to be rendered for him, and he may be sworn as a witness for the other defendants. *Over v. Blackstone*, 71.

2. When, in an action of trespass which involves a question as to the right to personal property, a witness testified that when he had sold and delivered the property to the plaintiffs he had told them that he had previously made a sale of the same property to the defendant, it is error to refuse to permit the plaintiffs to ask the witness whether he had not at the same time told them that the previous sale was but a conditional one, and the condition had been complied with. *Ibid.*

TROVER.

DISTRESS, 1.

TRUNK.

WITNESS, 3.

TRUST AND TRUSTEE.

HUSBAND AND WIFE, 5.

1. It is not universally or even generally true that money which has come to the hands of a trustee by the act or consent of his colleague, without positive negligence on the part of the latter, is chargeable indifferently to either.

The diligence required of a trustee in the care of the trust estate is precisely the diligence which a man of ordinary prudence would practise in the care of his own.

Held, therefore, that where joint guardians in affluent circumstances and in good repute apportion the custody and management of the property to suit the peculiar capacity and qualifications of each, but without surrendering the right of either to intermeddle with the whole, each is chargeable with no more than he received, unless he stood supinely by while his colleague was manifestly impairing the estate. *Jones's Appeal*, 143.

2. Mortgagee assigns his mortgage and accompanying bond and warrant to two trustees in trust for the use of his daughter and her children. Payment by the debtor to one of these trustees discharges the debt. *Bowes v. Seeger*, 222.

3. In matters of discretion, in contradistinction to ministerial acts, co-trustees cannot act separately in discharging their trust; their receipts and their signing certificates of bankruptcy must be joint. *Vandever's Appeal*, 405.

4. A case of urgent necessity might be an exception to the rule; but if the other trustee might be consulted, such necessity does not exist. *Ibid.*

5. Nor does it exist where the acting trustee might have secured an equal benefit to the estate by due vigilance, which he omits to exercise. *Ibid.*

USURY.

CONTRACT, 1, 3.

VENDOR AND VENDEE.

PARTITION, 1.

1. Upon a parol sale of land which is in the actual possession of a tenant under a parol lease, and the agreement of the vendor that the rent should be paid to the vendee and the attornment of the tenant to him; this is such a delivery of possession to the vendee as, with proof of the payment of the purchase money, will enable him to maintain ejectment upon his title. *Williams v. Landman*, 55.

2. If bonds and a mortgage be given by a vendee to secure the payment of the purchase money of the land sold, it is competent, in an action upon the bond, for the vendee to prove that it was a part of the contract of sale that the vendor was

VENDOR AND VENDEE.

to look alone to the property sold as a security for the payment of the purchase money. This proof, when made, constitutes no defence to the recovery of a judgment upon the bond, but the court will so control the execution of it, that it shall not be levied upon any other estate or property of the vendee. *Irwin v. Shoemaker*, 75.

3. In an action of ejectment brought to enforce the payment of the purchase money, where the plaintiff retains the legal title, it is not requisite that the plaintiff should have tendered a deed before suit brought, where he claims a conditional verdict: it is sufficient if done on the trial.

If the deed filed be erased, a court of error will allow the plaintiff to execute a new one in its stead. *Markley v. Swartzlander*, 172.

4. On the 21st November 1835, A. purchased at auction the land of B. Both signed conditions of sale stipulating that one-third of the purchase money was to be paid on the 1st April 1836, when title would be executed and possession given. On the 8th April 1836, C. obtained a judgment against A. On the next day a deed was executed in pursuance of the conditions of sale, and the first instalment was paid. On the 10th April 1837, D. obtained a judgment against A. The land was afterwards sold by the sheriff as the property of A. *Held*, that C.'s judgment was entitled to the proceeds in preference to that of D. *Stephen's Appeal*, 186.

5. Where, by articles of agreement for the purchase of land, part of the money is to be paid when the agreement is executed, and the articles are executed, but instead of money, the vendor takes the promissory note of the vendee for such sum, the vendee cannot object to its payment on the ground of incumbrances on the title then existing. *Roland v. Tiernan*, 193.

6. His remedy is in such case by action of covenant to recover damages. *Ibid*.

7. If one purchase land of which the title fails, yet if a third person advance money to the vendor in part payment, on the representation of the purchaser that he would be safe in so doing, and the purchaser gives a bond to such third person for the amount, he cannot, in a suit on the bond, bar a recovery on the ground of defect of title. *Gilkeson v. Snyder*, 200.

8. Agreement between a Coal and Navigation Company and an individual for the purchase of a boat by the latter of the former, on terms expressed in the company's printed regulations, one condition of which was, that the company will furnish its carriers with boats for cash at cost or on credit with interest, but that the ownership shall remain with the company till all the instalments of the price be paid, with a clause providing for a bill of sale at the close. The company was to pay the tolls, and the contractor to take freight from no other quarter. The boat retained its place in the company's register, having its number painted in letters and figures on its stern, not distinguishable from the other boats of the company. *Held*, that the boatman was merely the servant of the company till the boat was paid for, and that the delivery of possession of it during this agreement to the boatman did not make the boat his so as to be levied on by his creditors. *Lehigh Company v. Field*, 232.

VENIRE.

FEE-BILL, 5.

VERDICT.

TRESPASS, 1.

WARRANT AND SURVEY.

1. If a warrant for vacant land be put into the hands of the deputy-surveyor, and the land is bounded by older surveys made, marked upon the ground and returned, the deputy may execute such warrant by adopting the old lines and returning the survey accordingly without actually going upon the ground. *Quinn v. Brady*, 139.

2. K., by connecting his warrant with R.'s improvement, when it otherwise would have been void, got a warrant and survey and patent for 350 acres of land. *Held*, that it was error to instruct the jury that R. could not hold against K. without paying his proportion of the expenses of the warrant, survey and patent, when there was evidence that R., by K.'s agreement at the time, was to get 50 acres, clear of all expenses, and R. held possession and paid the taxes for that portion. *Rose v. Klenger*, 178.

WARRANTY.

DEED, 2.

WATERCOURSE.

Where several persons unite in the purchase of a piece of ground, and divide the same into smaller lots, upon each of which a house is built, and then partition is made between them, each must so regulate and grade his own lot as that the water that falls or accumulates upon it shall not run upon the lot of his neighbour. *Beniz v. Armstrong*, 40.

WAY.

GRANT.

WIDOW.

INTERSTATE, 1.

WIDOW'S SHARE.

PARTITION, 1.

WILL.

DEVISE, 2.

FLATS, 4.

1. It is essential to the probate of a will, to which the alleged testator did not sign his name but made his mark, that it should be proved by two witnesses that he was so infirm as to be unable to write his name: it is not sufficient that it should have been testified by one witness that he was unable to write, and by the two subscribing witnesses that he acknowledged the instrument to be his last will and testament after he had put his mark to it. *Cavett's Appeal*, 21.

2. Will made 16th April 1837: the defendants alleged another will made about the 17th June 1837, different in its dispositions, revoking former wills, and that it was destroyed or suppressed by fraud.

Held, 1. That if such destruction or suppression is shown expressly or by circumstances, and that the dispositions of the second will are inconsistent with those of the first, it amounts to a revocation.

2. When the second will cannot be found, and the question is what became of it, the first presumption is that it was in the possession of the testator, and that he cancelled it; but if it was in the possession practically of the wife or executor whose interests are adverse to it, proof ought to be given on the subject, and the absence of proof is an argument against the presumption.

3. In case of spoliation or fraud in respect to the second will, it is not necessary to show its contents, or in what respect it revoked the first, as must be done in ordinary cases. *Jones v. Murphy*, 275.

WITNESS.

DEED, 4.

EVIDENCE, 2, 8, 12.

PARTNER, 1.

TRESPASS, 1, 2.

1. A terre-tenant is incompetent to testify on the trial of an issue which may affect the estate which he occupies. *Kuester v. Keck*, 16.

2. A creditor who assigns his claim a few months before the commencement of suit upon it, for the purpose of being a witness for the assignee, is incompetent. *Cochran v. M^r Teague*, 272.

3. In a suit to recover the value of a trunk lost from a stage-coach, the plaintiff is competent to prove the contents of his trunk, and the value of the articles composing them. *Whitesell v. Crane*, 369.

END OF VOL. VIII.

R E P O R T S
OF
C A S E S
ADJUDGED IN
THE SUPREME COURT
OF
PENNSYLVANIA.

BY
FREDERICK WATTS AND HENRY J. SERGEANT.

VOL. IX.
CONTAINING THE CASES DECIDED IN PART OF MAY TERM 1866.

WITH A GENERAL INDEX OF THE PRINCIPAL MATTERS CONTAINED IN
THE NINE VOLUMES OF WATTS AND SERGEANT'S REPORTS,
AND A TABLE OF ALL THE CASES IN THE SAME.

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JUDGES
OF THE
SUPREME COURT OF PENNSYLVANIA,
DURING THE PERIOD OF THESE REPORTS.

JOHN BANNISTER GIBSON, Esq., Chief Justice.

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

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

TABLE OF CASES.

	Page		Page
Benner v. Phillips	13	Gardner v. Klinefelter	59
Bevan v. Insurance Company.	187	Green Township, Case of	22
Bingham, Johnston v.	56	Gregg v. Patterson	197
Bonham, Susquehanna Canal Co. v.	27	Heitshu, Caldwell v.	51
Boyd, Brown v.	123	Insurance Co., Bevan v.	187
Brien v. Smith	78	Johnston v. Bingham	56
Brown v. Boyd	123	Johnston's Estate	107
Bruner v. Sheik	119	Kauffelt v. Leber	93
Caldwell v. Heitshu	51	Kaufman v. Crawford	131
Campbell, Spencer v.	82	Klinefelter, Gardner v.	59
Chew's Appeal	151	Kopp, Stitzell v.	29
Commonwealth v. Lightner...	117	Kornhaus, May v.	121
Commonwealth v. Reitzel	109	Leber, Kauffelt v.	93
Coryell, Easton Bank v.	153	Leonard, Ludwig v.	44
Coulson, Sample v.	62	Lightner, Commonwealth v. ...	117
Crawford, Kaufman v.	131	Ludwig v. Leonard	44
Creigh v. Shatto	82	Magehan v. Thompson	54
Culbert, Odell v.	66	Maurer v. Mitchell	69
Cummins's Appeal	73	May v. Kornhaus	121
Darlington v. Speakman	181	M'Clintock, Devor v.	80
Devor v. M'Clintock	80	M'Gonigle, Flinn v.	75
Dougherty's Estate	189	M'Gregor, Pattison v.	180
Easton Bank v. Coryell	153	Mitchell, Maurer v.	69
Eby's Case	145	Morrison's Case	116
Erb v. Erb	147	M'Williams, Payran v.	154
Flinn v. M'Gonigle	75	Neff's Appeal	96

	Page		Page
Odell v. Culbert.....	66	Smith, Brien v.....	78
Okeson v. Shirlock	142	Spangler's Estate.....	135
Okie's Appeal.....	156	Speakman, Darlington v.....	181
		Spencer v. Campbell.....	32
Patterson, Gregg v.....	197	Stitzell v. Kopp.....	29
Pattison v. Macgregor.....	180	Stoner v. Stroman.....	85
Payran v. M ^W Williams.....	154	Stroman, Stoner v.....	85
Phillips, Benner v.....	13	Susquehanna Canal Co. v. Bon-	
		ham	27
Reed, Shaw v.....	72	Susquehanna Canal Co. v.	
Reitzel, Commonwealth v.....	109	Wright	9
Sample v. Coulson.....	62	Thompson, Magehan v.....	54
Scott's Estate.....	98	Tower's Appropriation.....	103
Seitzinger, Wetherill v.....	177		
Selfridge's Appeal	55	Walker, Witman v.....	183
Shatto, Creigh v.....	82	Wetherill v. Seitzinger.....	177
Shaw v. Reed.....	72	Witman v. Walker.....	183
Sheik, Bruner v.....	119	Wright, Susquehanna Canal	
Shirlock, Okeson v.....	142	Co. v.....	9

CASES

■

THE SUPREME COURT

OF

PENNSYLVANIA.

MIDDLE DISTRICT — MAY TERM 1845.

Susquehanna Canal Company *against* Wright.

The State is never presumed to have parted with one of its franchises, in the absence of conclusive proof of such an intention; hence, a license accorded by a public law to a riparian owner to erect a dam in the Susquehanna river, and conduct the water upon his land for his own private purposes, is subject to any future provision which the State may make with regard to the navigation of the river; and if the State authorize a company to construct a canal which impairs the right of such riparian owner, he is not entitled to recover damages from the company.

ERROR to the Common Pleas of *Adams* county.

William Wright against the Susquehanna Canal Company. This proceeding originated upon the petition of William Wright, setting forth: "That he is the owner of a tract of land in Hellam township, York county, bounded north-west by land of the heirs of James Wright, north and east by the Susquehanna river, south by Limekiln Alley in the borough of Wrightsville, west by land of James Wright's heirs; that by an Act of Assembly passed 11th February 1803, the said William Wright was authorized to lead off and use part of the waters of the Susquehanna upon his said land; and that by an Act of Assembly passed the 21st March 1836, it was provided that any damage done to his rights, privileges or property by the location or construction of the dam or

[Susquehanna Canal Company v. Wright.]

canal of the Susquehanna Canal Company, should be ascertained and determined as directed by the Act incorporating said Susquehanna Canal Company in other cases of damages. And your petitioner represents, that by the location and construction of the dam of said company, his 'rights, privileges and property' are seriously 'injured and interrupted;' and that he has not been able to agree with the company on the compensation to be made to him, nor on six men to assess the same. He therefore prays the court to award a *venire* directed to the sheriff of York county, commanding him to summon a jury of disinterested men, to ascertain and report to the court what damages, if any, have been sustained by him, by reason of the premises."

The Act of Assembly which gave the right to the plaintiff which is referred to in his petition, provides: "That William Wright, proprietor of the land adjoining Chiques falls, on the west side of the river Susquehanna, in York county, and his heirs and assigns, shall have liberty, and are hereby authorized and empowered to lead off on the said river a part of the water out of the said river, for the supply of such water-works as he the said William Wright, his heirs and assigns, may see fit to erect thereon, and to build such dam in the said river adjoining his said land as shall be necessary for effecting the purpose intended: Provided always, That the said William Wright, his heirs or assigns, in building such dam and leading the water out of said river, do not infringe on or injure the rights and privileges of any individual, nor in any wise impede or obstruct the navigation in the same: And provided also, That nothing herein contained shall be construed to impair any contract existing between this State and the Chesapeake and Delaware Canal Company, incorporated or to be incorporated by virtue of an act entitled 'An Act to incorporate a company for the purpose of cutting and making a canal between the river Delaware and the Chesapeake bay, and to authorize the clearing of obstructions in the river Susquehanna, down to the Maryland line, and for other purposes therein mentioned.'"

By an Act passed the 26th March 1836, incorporating the Susquehanna Canal Company, provision is made for a mode of ascertaining the damage which any individual may sustain by reason of the construction of the said canal; and it contains also this clause: "That any rights, privileges or property which William Wright may have conferred on him by virtue of an Act of Assembly passed the 11th of February 1803, entitled 'An Act authorizing William Wright to lead off and use part of the waters of the Susquehanna on his own land in York county,' if injured or interrupted by the location or construction of the dam or canal hereby authorized, any damage which shall be sustained by him shall be ascertained and determined as directed by the eighth section of the Act to which this is a supplement, in other cases of damage.'

It was admitted that an injury was done to this supposed right

[*Susquehanna Canal Company v. Wright.*]

of the plaintiff (for the jury so found it). The question presented to the court below was, whether it was such a right as entitled him to recover damages from the defendant. The court instructed the jury that it was such a right vested in the plaintiff as entitled him to recover: and this was the subject of the error assigned.

Stevens and *Mayer* for plaintiff in error, argued that the Commonwealth did not by the Act of 1803 part with the right to improve the navigation of the Susquehanna river, but on the contrary expressly reserved it: and by the Act incorporating the Susquehanna Canal Company it was authorised to construct a canal along the stream, by which a consequential injury was done to the plaintiff, but for which he was not entitled to recover damages: the company was but exercising the right which the State had reserved: 6 *Watts & Serg.* 101; 9 *Conn. Rep.* 456; 8 *Cow. Rep.* 146.

Cooper and *Hambley*, contra, contended that, by the plain provisions of the Act by which the defendants were incorporated, it was a condition that the plaintiff should be compensated for any injury that he should sustain by reason of the construction of the canal. The grant to the plaintiff by the Act of 1803 was a contract with him, which the State had no power to violate. 3 *Story Const. sec.* 1385; 5 *Wend.* 424.

The opinion of the Court was delivered by

GIBSON, C. J.—The principle which rules the first point in the cause has been determined since the former argument of it, in the *Monongahela Navigation Company v. Coons*, in which it was held that the State is never presumed to have parted with one of its franchises in the absence of conclusive proof of such an intention. It was held that the license accorded to riparian owners, by the public Act of 1803, to erect mill-dams in navigable streams, is defeasible and subordinate to the public will. The license accorded by this private act is, for reasons equally good, also defeasible and subordinate. Before the canal company was incorporated, it was enacted that Mr. Wright and his heirs should be at liberty “to lead off on the said land (the land of Mr. Wright) a part of the water out of the said river (Susquehanna), for the supply of such water-works as he the said William Wright, his heirs and assigns, may see fit to erect thereon; and to build such dam in the said river, adjoining the said land, as shall be necessary for effecting the purpose intended: Provided, that the said William Wright, his heirs or assigns, in building such dam and leading the water out of said river, do not infringe on or injure the rights and privileges of any individual, or in any wise impede or obstruct the navigation in the same.” This proviso is an express saving of the public navigation, and consequently of the ancillary right to im-

[Susquehanna Canal Company v. Wright.]

prove it. It is palpable therefore that the legislature did not intend to part with a particle of control over this great and leading highway. A surrender of any part of it would have been an act of political suicide; and a privy to it would certainly not be allowed to derive an advantage from it to the prejudice of the public, if the grant were at all open to interpretation. What remains, therefore, is to inquire whether the legislature intended to pay Mr Wright gratuitously for his dam and canal, and without regard to the solidity of his claim.

To give the Act that effect, would impute to the legislature an intent to squander the company's money, which would be still more reprehensible than an intent to squander the money of the State, over which it has at least a constitutional control, and one which is not to be imputed in the absence of explicit terms. The sixth section of the supplement to the Act of incorporation, from which such an intent is thought to be inferable, provides: "That any *rights, privileges or property* which William Wright may have (had) conferred on him by virtue of an Act of Assembly passed the 11th day of February 1803, entitled 'An Act authorizing William Wright to lead off and use part of the waters of the Susquehanna on his own land in York county,' if injured or interrupted by the location or construction of the dam or canal hereby authorized, any damage which shall be sustained by him shall be ascertained and determined as directed by the eighth section of the Act to which this is a supplement, *in other cases of damage.*' The section thus referred to provided a remedy for damages done immediately to the soil by taking it for public use, which was decisively a constitutional wrong; and when the same remedy was extended to the consequential damage done to the property of Mr Wright, there was no intention to put him on higher ground, and compensate him for damage which should turn out to be no wrong at all. The constitutional question of the duty of the State to make compensation for consequential damages to property not absolutely taken by its authority, had not been determined; and as it was uncertain whether Mr Wright had not a valid claim, an immediate tribunal was provided to try the right and compensate a loss, if any such there were, which neither the State nor a grantee of its power could compel him to bear. The avowed design was to compensate him for "*rights, privileges or property*" injured or interrupted, and these could not have existed without the guarantee of the fundamental law. He had been authorised to take the water, but with an express proviso that the navigation should not be obstructed; and as the grant was on that condition, the legislature could revoke it without incurring even a moral obligation to see him reimbursed the expense incurred in the prosecution of his works. The license was granted at his solicitation, for his private benefit, and without the consideration of public benefit to raise an implied duty of even imperfect obligation on

[Susquehanna Canal Company v. Wright.]

the part of the State. He was bound to know that the State had power to revoke its license whenever the paramount interest of the public should require it; and in this respect, a grant by a public agent of limited powers, and bound not to throw away the interests confided to it, is different from a grant by an individual who is master of the subject. To revoke the latter after an expenditure in the prosecution of it, would be a fraud; but he who accepts a license from the legislature, knowing that he is dealing with an agent bound by duty not to impair a public right, does so at his risk; and a voluntary expenditure on the foot of it gives him no claim to compensation. It is to be presumed, therefore, that, in the absence of an explicit declaration, it was not intended to impose on the company, standing in the place of the State, a burden which the State itself was not bound to bear.

Judgment reversed.

Benner *against* Phillips.

An action against the executor or administrator of a decedent, without making the heirs or devisees parties to it, does not release the real estate from the lien of the debt; but they may be brought in afterwards by a writ of *scire facias* upon the judgment when obtained; but in such case the heir or devisee may make any defence which he could have made to the original action.

The 24th section of the Act of the 24th February 1834, which limits the lien of the debts of a decedent upon his real estate to five years, is not applicable to the estates of those who died previously to the time when that Act took effect, which was the 1st October 1834.

Under the provisions of the Act of 24th February 1834, if suit be brought against the executor or administrator within five years after the death of the decedent, and a *scire facias* to bring in the heirs be issued within five years from the rendition of the judgment in the original suit, the lien of the debt upon the real estate will be preserved.

Upon a *scire facias* against the administrator *de bonis non* with the will annexed of a decedent, with notice to the devisees of the land to appear and show cause why the plaintiff should not have execution against the land devised to them, it is competent for such devisees to prove that, by an order of the Orphans' Court, the lands of the testator were sold by the administrator to an amount sufficient to pay all his debts; and if this be established, although the plaintiff may be entitled to judgment *quod recuperet* against the administrator, he cannot recover against the devisees of the land. It is the duty of the creditor in such case to look to the appropriation of the proceeds of the sale of a decedent's land made by an order of the Orphans' Court.

ERROR to the Common Pleas of *Centre* county.

William Alexander, for the use of the executor of Henry Phillips, against James Gelleland, administrator *de bonis non cum testa-*

[Benner v. Phillips.]

mento annexo of Philip Benner deceased, with notice to all the heirs and devisees of the said testator.

Philip Benner owned a very large estate, which by his will he bequeathed and devised to his children and grandchildren, and died on the 18th July 1832, owing a large amount of debts. On the 18th March 1836, James Gelleland, administrator *de bonis non* with the will annexed, presented a petition to the Orphans' Court, setting forth a list of debts amounting to \$23,460.24, and praying the Court to order a sale of part of the real estate of the testator for their payment. This order was granted. In pursuance thereof, from 1836 to 1839, the administrator sold lands to the amount of \$24,947.03. It appeared on the trial that there were other debts of the testator than those set out in the petition to the Orphans' Court, amounting to about \$6000. It also appeared that there was a large personal estate. On the 1st March 1839 a suit was brought by William Alexander for the use of the executor of Henry Phillips, the present plaintiff, against James Gelleland, administrator *de bonis non* with the will annexed of Philip Benner, in which a judgment was rendered for the plaintiff for \$3902.70, on the 24th November 1840. On the 2d March 1842 a *scire facias* issued upon this judgment against the administrator of Philip Benner deceased, and Josiah M. Benner and others, heirs and devisees of the said Philip Benner. To this the said heirs and devisees appeared and made defence upon the following grounds:

1. That as the heirs and devisees were not made parties to the original action, their lands were thereby released from the lien of the debt sought to be recovered.

2. That their lands were released by the lapse of time from the death of the testator to the suing out of the writ in the original action, and especially to the suing out of the writ of *scire facias* to which they were first made parties.

3. That by the proceedings in the Orphans' Court by which other lands of the testator had been sold for the payment of debts, their lands were discharged.

The court ruled all these points against the defendants, and directed a verdict and judgment for plaintiff.

J. T. Hale and *Burnside*, for plaintiffs in error, argued that this case would be governed by the Act of 1834; and referred to the 24th and 70th sections to show that the liens of debts were limited to five years. The sale by the administrator, by order of the Orphans' Court, was a judicial sale; and all the creditors of the estate, for whose especial benefit and at whose instance such sales are always made, must look to the appropriation of the money. The instruction of the court was, that although money enough was raised to pay the debts, yet if it were not applied, the loss must fall upon the devisees. This cannot be so: the money was raised to pay debts; the administrator gave security for the benefit

[Benner v. Phillips.]

of the creditors that he would rightly appropriate the money, and the devisees can have no control over the subject. All judicial sales for the payment of debts will devalue the lien of those debts. 1 *Rawle* 302; 1 *Penn. Rep.* 240; 8 *Serg. & R.* 150; 8 *Watts* 253.

Miles and *Blanchard*, contra, contended that the case must be governed by the provisions of the Act of 1797; that in passing the Act of 1834 the legislature did not intend to give it a retrospective operation, which is manifest from that part of the Act which provides that it shall take effect from and after the 1st October 1834. It would work manifest injustice to give this Act any other construction. 5 *Watts* 158; 5 *Watts & Serg.* 397; 2 *Whart.* 396; 8 *Watts* 257; 12 *Serg. & R.* 340; 2 *Johns.* 505; 10 *Serg. & R.* 101. Upon the death of the testator, his debts were a lien upon all his estate, real and personal; and nothing but a payment of those debts will discharge that lien. It was not pretended that the plaintiff's debt had not been a lien. It has been determined, as is said, in a case not yet reported, that our suit and *scire facias* are well brought. It is not pretended that the debt has been paid and all we ask now is that the judgment may be revived, that the debt may some time or other be paid. The sale by the administrator was for the payment of other debts; this debt was not even mentioned in the petition to the Orphans' Court, and the sales were not more than sufficient to pay those set out: at all events, such sale will not deprive us of the right to have the judgment revived. 8 *Watts* 504; 9 *Watts* 526; 6 *Binn.* 395; 2 *Rawle* 419.

The opinion of the Court was delivered by

ROGERS, J.—The 18th July 1832, General Philip Benner died, leaving a large real and personal estate, but greatly indebted, and among others to a certain William Alexander. To the April Term 1839, William Alexander, for the use of Edward Kinsey, executor of Henry Phillips, brought suit against James Gelleland, administrator of Philip Benner, and on the 1st February 1840, obtained judgment for want of a plea. At the April Term following the judgment was opened, so far as to let the defendant into a defence on the merits. The 24th November 1840, a verdict was given for \$3902.70, on which judgment was rendered, which, on the 29th May 1841, was affirmed by the Supreme Court. On the 2d March 1842, a *scire facias* to April Term 1842 was issued against the administrator and the heirs and devisees. The plaintiff, after giving evidence of the above facts, rested; whereupon the defendants gave in evidence the will of Philip Benner, and that the testator died the 18th July 1832. A petition dated the 18th May 1836, of James Gelleland, administrator *de bonis non*, to the Orphans' Court of Centre county, praying an order of sale of real estate of General Benner, not specifically devised, for payment of debts. To this petition was attached a schedule of debts

[Benner v. Phillips.]

amounting to \$23,460.24. On the 18th May 1836, the court decreed that \$25,000 be raised, and for this purpose ordered that the land described in the petition be sold. The administrator sold the property in pursuance of this decree, as appears by a return to the court, confirmed by them, to the amount of \$24,947.03. The defendants further gave in evidence suits by the administrator against Henry Benner, Thomas R. Benner, and Philip Benner Jun., administrator of Thomas R. Benner, heirs and devisees of Philip, amounting to \$5576.08, with proof that the said Henry Benner and Thomas R. Benner had property sufficient to satisfy and pay the amount of the respective judgments against them. The amount of assets which came into the hands of the administrator, or which might have come into his hands, amounts to \$30,523.11. The plaintiff in reply gave evidence of two judgments against the administrator, one, the 8th May 1840, in favour of the Bank of Northumberland for \$5595.60; the other, Jacob Lex against the same, judgment 25th November 1840, for \$887.

On the trial three points of defence were taken :

1. That by suing the administrator, without making the heirs parties, the plaintiff released the real estate of the testator in the hands of the devisees and heirs.

2. As to the extent and duration of the lien on the real estate.

3. That by the sale of the real estate, under the order of the Orphans' Court, an amount was raised more than sufficient to pay the debts, and that consequently the creditors must look to the administrator, and not the heirs, for payment.

It has been ruled in *Murphy's Appeal*, (8 *Watts & Serg.* 165), that suing the administrator alone, without joining the heirs, does not release the real estate of the decedent from the liens and debts against it; that notwithstanding, the *scire facias* is well brought against the heirs and devisees, they having the same defence as if originally brought against them, even permitting them to go behind the judgment, and make a defence which it would be competent for them to make if parties to the original suit. This disposes of the first point.

Next, as to the extent and duration of the lien on the real estate. The testator died the 18th July 1832. Suit was brought against the administrator to April Term 1839, so that more than five and not seven years had expired from his death. Whether, therefore, the original suit was in time to preserve the lien, depends upon whether the case is governed by the Act of Assembly of 1797, which allows seven years, or the Act of 1834, which reduces the time to five years. The Act of 1834 was passed the 24th February. The 70th section provides that "This Act shall take effect from and after the first day of October next after its passage; and all such Acts of Assembly as are hereby altered or supplied, shall be and are hereby repealed, except so far as may be neces-

[Benner v. Phillips.]

sary to finish proceedings commenced, or to settle the estates of persons who may have died before that time." It is insisted that this Act applies as well to persons who died before as after the 1st day of October 1834. This is a point not without difficulty; but as there is some ambiguity in the Act, and the intention is by no means clear, we think it best to give this section a prospective, rather than a retrospective operation. At the time of the death of Benner, the creditors had seven years to prosecute their suits and preserve the lien against the real estate; and to deprive them of it, by reducing it to five, ought not to be done without some plain, unequivocal intent, clearly expressed, to that effect. Now, this intent cannot be gathered from the 24th section; and the language of the 70th section would seem to be rather adverse to such a construction; for by that section the Act is not to take effect until after the 1st day of October 1834; but if it is made to embrace this case, it takes effect on the creditors before that period. This interpretation would take creditors by surprise, who would naturally suppose, applying the common rules of construction, that they had seven years—the Act of 1834 notwithstanding—to prosecute their claims, when the debtor died before the Act of 1834 went into operation. Our unlimited respect for the legislature forbids us giving such a construction to this Act as would impair vested rights. Such is not their intention, whatever aspect it may assume in a literal or narrow interpretation.

Another question, however, arises. The *scire facias* against the heirs and terre-tenants was brought the 2d March 1842, to the April Term 1842, more than nine years after the death of the testator. Is there any limitation to the time when suit shall be brought against the heirs and devisees? The 24th section of the Act of 1834 enacts that "no debts of a decedent, except they be secured by mortgage or judgment, shall remain a lien on the real estate of such decedent longer than five years after the decease of such debtor, unless an action for the recovery thereof be commenced and duly prosecuted against his heirs, executors or administrators, within the period of five years after his decease; or a copy or particular written statement of any bond, covenant, debt or demand, where the same is not payable within the said period of five years, shall be filed within the said period of five years, in the office of the prothonotary of the county where the real estate to be charged is situate, and then to be a lien only for the period of five years after said bond, covenant, debt or demand becomes due." Unless by analogy we put some limit to the time, the lien against heirs, where suit is brought against the administrator, may be indefinite; for, where the creditor commences suit and obtains judgment against the personal representatives every five years, as he may, he might, at any distance of time, issue a *scire facias*, and call upon the heirs to show cause why the debt should not be levied off their land. But this would be contrary to the whole course of

[Benner v. Phillips.]

legislation, and of the judicial decisions which treat devisees and heirs in some measure as purchasers, freeing their lands from the lien of debts, unless duly prosecuted in a certain limited period. If, then, the lien is not indefinite, what is the limitation, and what is the method to be pursued by the creditor to preserve the lien? As has been already decided, commencing suit against the administrator, without naming the heirs and obtaining judgment, does not release the lien. It is competent for the creditor, notwithstanding, afterwards to proceed against the heirs; and when this is done within five years from the rendition of the judgment against the administrator, we think, in analogy to the 24th section of the Act of 1834, the lien remains. This will furnish an intelligible rule, equally just to the creditor as the heirs. The judgment is record evidence of the claim. It shows the amount due or claimed to be due, and is as much a notice to the heirs as the copy or statement of the bond, &c. not due. We think it unreasonable that the lien should be suffered to remain longer, as that would continue the mischief which the legislature and the courts have taken such pains to remedy. As, then, the *scire facias* against the heirs was brought within five years from the judgment against the administrator, we are of opinion there is nothing in the second objection.

The third point remains to be considered. In relation to this part of the case the court say, "The next question is raised out of the evidence given by the defendants. They have shown that in 1836 the administrator, Mr Gelleland, exhibited to the Orphans' Court an inventory of debts against the estate, amounting to \$23,460.24, which sum, however, did not include this debt now in suit, nor some others which have been mentioned; that he obtained an order of that court for the sale of certain portions of Benner's real estate; and at various times from 1836 to 1839, sold different parcels for about \$25,000; that he obtained judgments against several of the heirs, to the amount of \$4620.56, which were and are collectable; and it is argued that from these sources, &c., the administrator has had or might have had funds enough to pay this debt, and all others against the estate, and that the creditor is bound to look to him and his sureties for satisfaction of this debt, and has no right to pass by him, with so much money in his hands, and come upon the real estate of the heirs for his satisfaction. Mr Gelleland has not been called on to settle his administration account, and he has settled none; and we have not the means of ascertaining the precise amount of indebtedness of the estate he has in charge, nor have we any evidence of the receipts by him of the proceeds of the sales he made, or of the amount of the judgments he obtained. Under such circumstances the plaintiff asks for a revival of his judgment and a continuance of his lien. The counsel for the defendants agree that the judgment may be revived against the administrator, which is an admission

[Benner v. Phillips.]

that the debt is still existing against the estate; but they insist, on behalf of the heirs and legal representatives, that the revival ought not to affect the real estate. But suppose (and from all we have seen, the case is very probable) that on the application by the administrator of all the assets in his hands to the debts of the estate, a balance of the debt should remain unpaid? The plaintiff will then be condemned to fall back on his lien on the real estate; and to preserve that lien for the purpose of such an emergency, is the object of this proceeding. We have seen that thus far his lien has been preserved, and that it will continue until next July; but why should he then lose it? If the administrator has funds which he ought to apply to it, the heirs can compel the application as well as the plaintiff; and since the debt has not been actually paid, the plaintiff has a right to insist that his lien should be preserved, for the security of whatever balance may be due to him, after the administrator shall be compelled to make distribution of the assets in his hands. He will not be permitted to enforce the lien by a sale of the real estate of the heirs, until distribution of the money in the administrator's hands shall be made. For this purpose our powers over our process are ample. We can and we will restrain the plaintiff from seizing and selling the land bound by his judgment, until the necessity of permitting him to do so is made apparent by a settlement of the administration account; but, meanwhile, we will not deny him the security afforded by a continuance of his lien. The estate is a large one and its indebtedness was large; and to refuse to continue the plaintiff's lien until the estate can be settled in a manner advantageous to all parties, especially the defendants, in the regular course of administration, would be to punish the plaintiff for the forbearance and indulgence he has shown. There is no merit in this ground of defence. The heirs do not question the debt, nor show that it has been paid. Hitherto the plaintiff has done all the law required him to do to preserve his lien; and now, when the legal limit of indulgence is being approached, and he asks for a renewal and continuance of his lien, the defendants object, on the ground that he did not rush upon the estate, which was in process of administration, and compel payment of himself, when, most probably, it would have torn from them the inheritance which they have.

Whether the allegation of the defendants that there is an amount in the hands of the administrator arising from the sale of the real estate is true, is not the question. It is sufficient that it was alleged on one part and denied on the other. Assuming the fact to be as stated, the court decided that taking the whole case and every fact which they have established, it does not afford a reason why the plaintiff should be estopped from obtaining a judgment against them which shall continue the lien which he now has on their land. It might present a case for denying the plaintiff pro-

[Benner v. Phillips.]

cess on his judgment to seize and sell their land, but this is the utmost of it.

It must be remarked that this is a *scire facias* to the heirs and devisees to show cause why the lien should not continue, and why the plaintiff should not have execution on the land devised to them by the testator. In this suit, as has been already seen in *Murphy's Appeal*, it is open to show that the judgment has been paid, and even to go behind the judgment for that purpose. If they can satisfy the court that it has been wholly paid, they are entitled to a verdict; if in part only, then the plaintiff is only entitled to a judgment to be levied on their lands for what remains due. And whether it be an actual or judicial payment matters not, as it may be that the judgment remains good as to the administrator, and yet that it is paid and satisfied so far as respects the heirs. In other words, the creditor may be entitled to judgment against the personal representatives without having any right to resort to the land. And when is the proper time to try these questions? Doubtless on the *scire facias*; for if a judgment once passes against the heirs, they are concluded, for they cannot afterwards, as the learned judge erroneously supposes, ask the equitable interposition of the court by denying process on his judgment to reach their land. Taking it, therefore, to be true, that there is money in the hands of the administrator arising from the sale of the real estate, sufficient to pay all the debts of the testator, or to pay all the other debts, and this in part, is this a defence to the *scire facias* as against the devisees? The case involves this question, whether if there be a loss by the default of the administrator, that loss is to be borne by devisees or the creditors, and who is to look to the application of the purchase money, the devisees or the creditors? It is obvious that if we adopt the decision of the Court of Common Pleas, the land of the devisees may be taken twice for the payment of the same debts. Thus, in this case, the land of the devisees has been taken already to the amount of upwards of \$25,000 for payment of debts; and if this be squandered, the remaining estate will be swept from them for payment of the same debts. I am not aware that the question has been directly ruled, although some cases which have a bearing on it have been decided, and all the analogous cases are adverse to the grounds assumed by the Court of Common Pleas. Lands in Pennsylvania are chattels for payment of debts, and may be reached through the medium of our common law courts, by seizure, condemnation and sale, by virtue of a *venditioni*. And when this mode is pursued, and the money goes into the hands of the sheriff, it is a payment of the amount raised by the sale, and operates forthwith as a discharge of the heirs and devisees to the amount for which it sold, and that whether it ever reached the pockets of the creditor or not. He must look to the application of the purchase money; his resort is to the sheriff where there is a misapplication of the fund. With

[Benner v. Phillips.]

this, as is acknowledged, the heirs and devisees have nothing to do. Does this principle apply to the case of a sale by an administrator under an order of the Orphans' Court? We think that it does. The administrator is a judicial officer, acting under the authority of the court. On the application of the administrator, setting forth that the personal estate is insufficient for the payment of debts, the court may and ought to appoint suitable persons to investigate the facts of the case, and report upon the expediency of granting the application, and the amount to be raised by sale or mortgage, whereupon the court make their decree. The Act of the 29th March prescribes the manner of sale, and directs that the executor or administrator shall in all cases make return of his proceedings in relation to the sale or mortgage to the court, when, if approved by the court, it shall be confirmed. It is usual, when the court makes the order, to exact adequate security for the faithful performance of the trust; and this enures to the benefit of all who have an interest in the application of the fund, to wit: to the creditors of the deceased, and to his heirs and devisees. The creditors have an interest to the amount of their debts; the heirs and devisees to any surplus which may remain after these purposes are answered. In *Finney v. The Commonwealth*, (1 P. R. 240), it is laid down, that everything which a due attention to their interest would entitle the creditors to receive, they are considered as paid by operation of law as regards the debtor. When the money has been raised by a sale under the order of the court, two remedies (and they are very effectual ones) are open to the creditors. They may bring suit on the bond against the administrator, or on a proper application the Orphans' Court will compel the money to be brought into court for distribution. It is difficult to suggest any good reason why this duty should be devolved on the heirs, or why, in case it is not pursued, the loss should be thrown on them. It is very certain the court would defer a second application for a sale of the land, until some account was given, or the disposition was made of the proceeds of the first sale ordered by the court for that purpose. Thus, in *Pry's Appeal*, (8 Watts 253), it is ruled, that if the assets which come into the hands of the administrator be sufficient for the payment of all the debts of the intestate, the Orphans' Court will not at any future time grant an order for the sale of the real estate. And in the same case it is decided that the Orphans' Court will not grant an order for the sale of real estate for the payment of debts of the intestate which have lost their lien by lapse of time. If, therefore, an application had been made to the court for another order to sell, it would be refused; but the present suit is an attempt to do that through the medium of common law form, which would not be allowed by the court to whom this subject is more particularly committed.

Judgment reversed, and a *venire de novo* awarded

Case of Green Township.

Upon a petition of the inhabitants to divide a township, the court have not power to adopt any other line of division than that prayed for in the original petition.

CERTIORARI to the Quarter Sessions of *Franklin* county.

This case was decided in the court below in the absence of the President Judge. The facts are fully stated in the opinion of the Court. The case was argued here by

Baird, for plaintiff in error.

Null and *Smith*, contra.

The opinion of the Court was delivered by

KENNEDY, J.—This was a proceeding commenced under the provisions of the 13th and 14th sections of the Act of the 15th of April 1834, for the purpose of having a division made of Green township, in the county of Franklin. By the 13th section it is enacted that “the several Courts of Quarter Sessions shall have authority within their respective counties to erect new townships, to divide any township already erected, and to alter the lines of any two or more adjoining townships so as to suit the convenience of the inhabitants thereof, and to cause the lines or boundaries of townships to be ascertained and established.” And by the 14th section it is directed, that “upon application by petition to a Court of Quarter Sessions for the purpose of erecting a new township, or altering the lines of any township, or of ascertaining and establishing the lines or boundaries of any township, the said court shall appoint three *impartial* men, if necessary, to inquire into the propriety of granting the prayer of the petition; and it shall be the duty of the commissioners so appointed, or any two of them, to make a plot or draft of the township proposed to be divided, and the division line proposed to be made therein, or of the township proposed to be laid off, or of the lines proposed to be altered of two or more adjoining townships, or of the lines proposed to be ascertained or established, as the case may be, if the same cannot be fully designated by natural lines or boundaries; all which they or any two of them, shall report to the next Court of Quarter Sessions, together with their opinion of the same: and at the term after that at which the report shall be made, the court shall take such order thereupon as to them shall appear just and reasonable.” See *Pamph.* 537.

To the Court of Quarter Sessions of Franklin county, at its ses

[Case of Green Township.]

sion in August 1844, a petition, signed by 164 inhabitants of Green township in said county, was presented, stating, among other things, that the township contained 756 taxable inhabitants; that from the great extent of its territory and the number of inhabitants, the transaction of the business of the township had become inconvenient to a large number of the inhabitants thereof; that it contained two election districts, with the exception of one of them which included a small portion of Guilford township; and therefore praying the court to appoint commissioners to view said township of Green and to divide the same, by starting where the point then was, dividing the township into two election districts, and ending where the said line then ended, so as to suit the convenience of the inhabitants thereof, and make a report thereof according to law. The court therefore appointed Dr S. Kennedy, James Logan and Hugh Auld, commissioners to inquire into the propriety of granting the prayer of the petitioners, requiring them to make a plot or draft of the said township proposed to be divided, and the division line proposed to be made therein, if the same could not be designated by natural boundaries; and to make report thereof to the next Court of Quarter Sessions, together with their opinion of the same.

The commissioners, in pursuance of this appointment, after having been sworn to execute and perform faithfully and truly the duties imposed upon them, made a report to the next Court of Quarter Sessions on the 30th of October 1844, stating that they had proceeded to view the lines of the said township of Green, and to divide the same, on the 22d, 23d, 24th and 25th days of that month, and that they had viewed the lines of said township, and the proposed division lines as mentioned in the prayer of the petitioners, and therewith returned a plot or draft of the said township of Green, and of the proposed division line, which division line they represent as follows; namely, beginning at a post in the road known as M'Kesson's Mill, on the line dividing Green and Guilford townships and the said township of Green into two election districts, 1146 perches from the corner of Guilford and Hamilton townships, on the Green township line, in the middle of East Conococheague creek; and thence north two degrees east, 436 perches through clear land of John and Jacob Shively, William Vanderane, Jacob Hollinger, William Hambright and others, to the south-east corner of George Brindle's house; and thence south 75 degrees east, 2376 perches, to the Adams county line; and stated, also, they were of opinion that it was inexpedient to divide the said township of Green as proposed in the petition; but were of opinion, upon due reflection and examination, that the said township of Green ought to be divided by a line marked as the black dotted line on their draft: beginning at the same point as in the division line proposed by the petitioners, and thence along the said proposed line to the house of George Brindle, and thence from

[Case of Green Township.]

the south-east corner of said house, north 35 degrees east, to the Southampton township line; a plot of which was thereto annexed.

The report of the commissioners thus made was filed with the records of the court, without anything further being done with or in regard to it at that session of the court; but at the following session of the court, on the 20th of January 1845, a petition signed by 184 of the inhabitants (including the 164 who signed the first petition, presented at the August session of the court, 1844) of the said township of Green, was presented, praying a division of the township for the same reasons mentioned in the first petition; and, after referring to the report of the commissioners made thereon, pray the court to divide the said township of Green into two townships, by and according to the division line recommended and approved by the commissioners. But on the same day, 20th January 1845, a remonstrance against the division, signed by 168 of the inhabitants of the township, was presented to the court, denying the inconvenience complained of by the petitioners; and among other reasons for their opposing the division of the township, stated that the burden of taxation for road and school purposes would fall with unequal severity upon the southern division, inasmuch as the roads and bridges centred more in that end of the township, which was poorer in its soil, and contained a much greater proportion of the poor population; and that in case of a division both townships would be too small. The court, however, at the same session, on the 28th of January 1845, made an order requiring the same commissioners to proceed and mark the boundaries recommended and reported by them, by distinct marks and lines; of which they were required to make a return or report at the next March sessions of the court, at which time the court said the complainants would be further heard, if deemed proper. The commissioners accordingly made a report to the next March Quarter Sessions Court, stating that, in conformity to the requisition of the court, they had gone on the ground, and run and marked the line in favour of which they had previously reported to the court; setting forth the beginning, the courses and distances, and the end thereof, together with a plot or draft of the same annexed. At the same court, a remonstrance signed by 368 persons was presented to the court, opposing the division of the township.

Various exceptions were also filed on the part of the remonstrants to the proceeding in the case, showing that it was irregular, and not in conformity to the Acts of Assembly made in that behalf. 1st. That the court had connected the petition presented at the August session, and the report of the commissioners thereon, with the petition presented subsequently at the January session for a division of the township by an entirely different line from that asked for in the petition presented first at the August session, which could not be done. 2d. That the second petition presented for a division did not ask for the appointment of commissioners, as

[Case of Green Township.]

it ought to have done, to inquire into the propriety of granting the prayer of the petition; nor did the court appoint any for that purpose, as prescribed by the Act, but instead of doing so, adopted the division line, not prayed for by the first petition, but recommended by the commissioners appointed upon it, who were appointed for the purpose of inquiring into the propriety of dividing the township by a line altogether different; so that the line recommended was therefore entitled to no regard whatever from the court. There were many other exceptions filed, some of which could not well be inquired into and passed on here; and others of them, which come within our cognisance, are not deemed of sufficient importance to require particular notice. The court, however, overruled them all; and passed a decree directing Green township to be divided into two townships, according to the line recommended by the commissioners in their report to the first petition, presented at the August session of the court, and afterwards prayed for in the second petition, presented at the January session of the court, 1845.

The exceptions mentioned above, as well as many other matters, have been assigned for error here. It is conceived unnecessary, however, to discuss and pass upon any others than the two above specified, as they present, in our opinion, insuperable objections to the validity of the decree and order of the court below. The commissioners appointed by the court upon the first petition at its August session of 1844, were appointed for a special purpose; which was, to inquire into the propriety of granting the prayer of the petitioners to have a division of the township made according to the line set forth in their application. Beyond this the commissioners were not authorized to go; nor indeed do I think that the court had the power upon that petition to give them any further authority. They reported against the propriety of dividing the township according to the line mentioned in the petition, which, agreeably to the provisions of the Act of Assembly, was all they had to do, and put an end to all further proceedings upon that petition. They, it is true, did not stop there, or content themselves with reporting against the propriety of the division as asked for, but undertook to report in favour of a different division, neither asked for nor suggested, nor authorized by the commission under which they acted from the court; and consequently could not, and at no subsequent period ought to have been regarded as an official act, or entitled to any respect as such by the court. The report, therefore, of the commissioners against the propriety of dividing the township according to the prayer of the petitioners, put an end to all further proceedings thereon. It cannot be supposed, or even imagined, that it would have been right for the court, at the January session following, to have passed a decree, dividing the township according to the line recommended by the commissioners, as it might have done according to the line pointed

[Case of Green Township.]

out and designated by the petitioners, if the commissioners had reported in favour of the propriety of the township being so divided; yet the court might just as well have made such decree then, as to have made it in the manner it was done at the March session following. For then the court had no report in favour of the division which they by their decree established, from commissioners appointed and authorized by them under the Act of Assembly to make it. Thus, in contemplation of law, at least, if not in fact, it appears that the court decreed a division of the township without any commissioners having been appointed to inquire into the propriety of its being done as it was; which we think was contrary to the true meaning of the Act of Assembly. And even if the Act of Assembly were such in its terms as to authorize the court, in the exercise of their discretion, to make the division without appointing commissioners and having their report in favour of the propriety of it first, yet it would seem, from the great opposition made by the inhabitants of the township to the division in this case, that it would have been highly proper, if not necessary, for the court to have appointed *impartial* commissioners, and to have had their report first in favour of the division, before decreeing it. But, according to a fair construction of the Act, the court could not dispense with the aid and advice of commissioners in favour of the division asked for, as directed by it.

It may, however, be proper to observe further, that the Act of Assembly expressly requires that the commissioners directed to be appointed shall be impartial men; and hence, if the court had appointed commissioners upon the second petition praying a division of the township according to the division line recommended by the gentlemen appointed commissioners on the first petition, it would not have been proper to have appointed them on the second; because they could not be said to be impartial, no more than the petitioners themselves could be said to be so; as to whom it will scarcely be said, that it would have been right in the court to have appointed three of them to examine into and report to the court on the propriety of making the division which they themselves with others had asked for in their petition. By their petition they had shown that they had already made up their minds and formed an opinion on the matter, and could not therefore well be considered as competent to judge impartially in regard to it. And so it may be said of the gentlemen who were appointed commissioners on the first petition, that they had formed an opinion in favour of the division asked for in the second petition, without having been required to do so under the discharge of any duty imposed upon them, but most probably moved to do so from motives similar to those which influenced the petitioners, and therefore were rendered equally incompetent with the peti

[Case of Green Township.]

tioners to serve impartially as commissioners. The proceeding and order of the court below dividing the township of Green is quashed.

Proceedings quashed.

The Susquehanna Canal Company *against* Bonham.

The franchises and corporate rights of a company, and the means vested in them which are necessary to the existence and maintenance of the object for which they were created, are incapable of being granted away and transferred by any act of the company itself or by any adverse process against it.

ERROR to the Common Pleas of *York* county.

Samuel C. Bonham, Esq., against The Susquehanna Canal Company. The plaintiff upon an award obtained against the defendant issued an execution and levied upon a house and lot upon which an inquisition was held and it was condemned. A *venditioni exponas* was issued to sell the same. The defendant obtained a rule to show cause why the execution and levy should not be set aside on the grounds: 1st, That no judgment had been entered upon the award; and 2d, That the property levied, being the toll-house of the defendant, was not the subject of levy and sale.

The court below discharged the rule, and on the second point said: "that although the property levied is clearly proved to be essentially necessary to the enjoyment of the corporate rights and privileges of the defendant, the house being necessarily occupied by the collector of tolls on the canal as a dwelling for himself and family, and as a collector's office, in which he performs the duties of his employment, it is not exempt from levy, it not being within the limits of the canal, or of the ground appropriated as the site of the canal."

Mayer and *Fisher*, for plaintiff in error, argued that the toll-house was not the subject of levy and sale, and cited 13 *Serg. & Rawle* 210; 2 *Watts & Serg.* 548; 6 *Watts & Serg.* 378. The remedy given by the Act of 16th June 1836, section 74, title "execution," is by sequestration; and this remedy would be wholly ineffectual if the sequestrator were deprived of the means of collecting toll by a sale of the houses provided for that purpose. Cited 5 *Watts & Serg.* 265; 2 *Penn. Rep.* 462; 2 *Watts & Serg.* 116, 2 *Hill* 142; 20 *Wend.* 645.

[The Susquehanna Canal Company v. Bonham.]

Chapin and Hambly, contra, argued that the language of the court in 13 *Serg. & Rawle* 210, supported this proceeding by execution. There is no exception in the Act of 16th June 1836, sections 19 and 72, which gives a right to execution, which exempts the property of a corporation.

The opinion of the Court was delivered by

SERGEANT, J. — The spirit of the decision in *Ammant v. New Alexandria and Pittsburgh Transportation Company*, (13 *Serg. & Rawle* 210), seems to be, that privileges granted to corporations to construct turnpike roads, canals, &c., are conferred with a view to the public use and accommodation, and that they cannot voluntarily deprive themselves of the lands and real estate and franchises which are necessary for that purpose; nor can they be taken from them by execution and sold by a creditor, because to permit it would tend to defeat the whole object of the charter by taking the improvements out of the hands of the corporation and destroying their use and benefit. It has therefore always been held, and our Acts of Assembly are constructed on that idea, that the franchises and corporate rights of the company and the means vested in them which are necessary to the existence and maintenance of the great public object for which they were created, are incapable of being granted away and transferred by any act of the corporation itself, or by process of another against it *in invitum*. By the 2d section of the Act of 15th April 1835, authorizing the incorporation of the defendants, they are made capable, among other things, of purchasing, taking and holding such lands, tenements and estates, real and personal, as are necessary in the prosecution of their business as a canal company. And by section 8, they are empowered to enter upon and occupy for the purpose, all the land necessary and suitable for constructing the canal. It is admitted by the court below, and the evidence proves beyond a doubt, that the property levied on here is essentially necessary to the enjoyment of the corporate rights and privileges of the defendants, the house being necessarily occupied by the collector of tolls on the canal as a dwelling for himself and his family, and as a collector, in which he performs the duties of his office. That being the case, what difference can there be whether it is on the site of the canal or on ground adjacent? especially where it may happen, and indeed such appears to be the case here, that if confined to the former, the site would be inconvenient, unsafe, and unfit for a dwelling place for the collector's family. Nor would the company have expended their money in procuring another building, if they could have been accommodated without it in the office built on ground already taken as part of the line of the canal. The remedy for creditors in such case by sequestration was suggested in the opinion of Chief Justice TILGHMAN, (13 *Serg. & Rawle* 210), and has since been carried into effect by the provisions of the Act of

[The Susquehanna Canal Company v. Bonham.]

16th June 1836, and it gives to the creditor all the redress the Legislature thought he could have against the property necessary to the company, consistently with the preservation of the public interests.

Levy and condemnation, and *venditioni exponas* set aside.

Stitzel *against* Kopp.

When the covenants between a vendor and vendee of land for the payment of the purchase money and delivery of the deed are mutual and dependent, the vendor must, at the time fixed by the contract, have in him such a title as he covenanted to make, otherwise the vendee may elect to rescind the contract; but when these covenants are independent, and by their terms the payment of the purchase money in part precedes the execution and delivery of the deed, it is not a good defence in an action for that part of the purchase money that the vendor had not then power to make a good title.

ERROR to the Common Pleas of *York* county.

Sebastian Stitzel and Jacob Asper against Leonard Kopp. This was an action of debt upon the joint and several sealed note of Peter Kopp and Leonard Kopp. The plaintiffs, as the assignees of Isaac Hull, sold at public sale a tract of land upon the following conditions:

"The condition of this present sale, held the 29th September 1843, namely, of a plantation or tract of land containing 140 acres more or less of patented land, as the property of Isaac Hull. The highest bidder is to be the buyer; any person purchasing the said plantation or tract of land must pay \$300 at the close of sale, or give his note with approved security to be considered part of the hand money, the said purchaser to sign his name to these conditions and give security if required. The assignees of the said Isaac Hull will execute a deed clear of all incumbrance unto said purchaser on the 2d day of April 1844. The assignees except half of the grain that is put out this fall, and the purchaser is to deliver it in the bushel. The one half of the purchase money to be paid on the 2d day of April next, and the residue of the purchase money to be paid in four equal annual payments, with satisfactory security, when possession will be given on said 2d day of April next."

Peter Kopp became the purchaser at \$2300, bound himself to comply with the conditions, and gave the note upon which this suit is instituted, with the defendant as his security.

On the 2d April 1844, Peter Kopp tendered to the plaintiffs \$1150, and demanded a deed of conveyance. At that time there

[Stitzel v. Kopp.]

were several judgments and mortgages which were liens upon the land, and Kopp had gone into possession of it. On the 4th, 5th and 6th of April, all of the mortgages and judgments were satisfied on the record but one. On the 15th April, the plaintiff tendered a deed to defendant, the incumbrance being then \$600. On the 17th April, Kopp left the possession of the premises, and abandoned the possession of the land. On the 20th April, the remaining incumbrance was satisfied.

The plaintiffs founded their claim to recover upon the following points, upon which the court was requested to charge the jury :

1. That if the jury believe that the obligation on which this suit is brought was given for part of the purchase money of the land sold to Peter Kopp, and that the purchaser took possession under the contract and held it as long as he chose, the contract between the parties was so far executed that it could not be avoided by the mere fact that there were incumbrances on the property on the 2d day of April when the parties met, although the plaintiffs might not have been prepared to remove them on that day, provided they could do it, and did it in reasonable time afterwards, and before this suit was brought ; and this is so, whether the purchaser made any tender or not on the aforesaid 2d day of April.

2. That after Peter Kopp the purchaser had taken possession of the premises, he could only, apart from all other considerations, put the plaintiffs in default and rescind the contract, if at all, by tendering to the plaintiffs on the day the parties met, the money payable on that day, and satisfactory security for the residue of the purchase money, and also the possession of the premises.

3. That there is no evidence that the plaintiffs waived the tender of the possession, and that the purchaser, Peter Kopp, by neglecting to make it on the 2d of April 1844, and by remaining in possession on that day and afterwards, failed to put the plaintiffs in default in regard to the contract, and justified them in considering it still in force.

DURKEE, (President), was of opinion that the plaintiffs were not entitled to recover, and instructed the jury that the defendant might tender his money at the time stipulated by the contract ; and if the vendors were not then ready to make the title, the defendant might rescind the contract.

Mayer, for plaintiff in error, argued that the defendant's remaining in possession was a waiver of a strict compliance with the contract as to time and an acceptance of the title. *Sug. on Vend.* 10 ; 4 *Watts & Serg.* 318 ; 5 *Serg. & Rawle* 323 ; 2 *Story's Eq.*, sec. 776. But if he had determined to rescind the contract, he could only do so by an immediate restoration of the possession or a tender to restore it as well as to pay the money. He must put the vendor in the same situation he was. 1 *Watts* 248 ; 4

[Stitzel v. Kopp.]

Watts 152; 8 *Serg. & Rawle* 294; 3 *Amer. Eq. Dig.* 509, pl. 25; 2 *Watts* 478, 434; 3 *Watts & Serg.* 56.

Fisher, contra, contended, that when the deed was tendered by the plaintiff, the land was incumbered, and the defendant not, therefore, bound to accept; and no principle is better settled than that it is in the power of the vendee to tender his money on the day stipulated in the contract and demand his deed; and if it be not given to him, he may rescind the contract. *Sug. Vendors* 342; 1 *Watts* 247.

The opinion of the Court was delivered by

BURNSIDE, J. (after stating the facts of the case).—The covenants to deliver the deed clear of all incumbrances, and the payment of one half the purchase money, were mutual and dependent; the distinction between dependent and independent covenants is well settled; in the former, between a vendor and vendee of land, the conveyance and payment of the purchase money are to be simultaneous acts, and there must, therefore, be an existing capacity in the vendor to give a good title; in the latter, when the payments are to precede the conveyance, it is no excuse for non-payment that there is not a present existing capacity in the vendor to convey a good title, unless the one whose duty it is to convey offers to do so on receiving a good title, and then it must be made to him or the contract will be rescinded. *Robb v. Montgomery*, (20 *Johns. Rep.* 20.)

If the vendee had paid his money, and an incomplete deed were tendered to him, he may refuse to accept it or to enter on the land; and if he has entered, may restore the possession and sue for his money. *Sug. Vend.* 312; *Withers v. Atkinson*, (1 *Watts* 247–8.) Here the purchaser gave notice and restored the possession on the 17th April; all the incumbrances were not removed until the 20th; and when the deed was tendered to him, he refused to accept it. We cannot say that under these circumstances he was bound to accept it. The plaintiff had not regarded his covenants; had not, in time, placed himself in a situation to enforce performance by the vendee. If a sufficient conveyance clear of incumbrances had been tendered to the vendee before he had removed from the premises, the plaintiffs would have presented a better case. We can discover no error in the charge of the court. The present defendant as security on the note might avail himself of any defence with which his principal was clothed.

Judgment affirmed.

Spencer *against* Campbell.

For an injury done to the horse of a customer by the bursting of a steam-boiler at a mill, case and not trespass is the proper form of action, and it may be maintained by the owner of the horse which was at the time in the possession of another person.

The admissions of one who is jointly sued with others are competent evidence against himself.

One who is exercising a public trade or business which requires the use of a steam-engine, is responsible for any injury to another which is the consequence of its insufficiency.

ERROR to the Common Pleas of *Centre* county.

William Campbell against Samuel Spencer, William Spencer, David Spencer and Aquila Spencer, trading under the firm of Samuel Spencer & Brothers. This was an action on the case in which the plaintiff alleged that the defendants were owners and proprietors of a steam grist mill, inviting the custom of the public and for reward grinding the grain entrusted to them; that as such they were required to provide and use safe and convenient machinery for the conduct of their business, so that persons and cattle necessarily employed in conveying grists to and from the mill might receive no injury; that in disregard of this duty they procured a defective steam-boiler, and well knowing it to be defective used it; that one Samuel Hall who had procured them to grind for him, obtained from the plaintiff his mare and sent her to the mill to fetch away his grist, and that whilst she was waiting for it the defective boiler burst and killed her, whereby the plaintiff sustained damages to the value of the mare.

The second count substantially charged the defendants with negligently managing their engine, by means whereof the plaintiff was injured in his property.

The plaintiff offered in evidence the following letter from one of the defendants, William Spencer to a John Meixsell:

"Friend—We have started our engine, and are fully of opinion that the heads of the boiler will not stand to raise the steam as high as will be necessary to drive two run of stones and the machinery. The highest we have had it yet is to raise the weight hung as near the nave as possible, which is hardly sufficient to run two run of stones, and that springs the head between a quarter and a half an inch, and there is also a seam round in the head next mill where it don't appear to have been cast solid, through which the steam and water passes in different places. I have written this same day to George W. Singly to Frankstown to come and run the engine and put up the governor, and if he should

[Spencer v. Campbell.]

have left Frankstown and come to Blairsville, I would wish thee to send him on or let him know that we want him."

This evidence was objected to on the ground that it was the letter of one only of the defendants. The court overruled the objection and sealed a bill of exception.

The plaintiff offered in evidence the deposition of Thomas Boyle, which was objected to by defendants on the ground that the contract for the engine was made with him, and was furnished by him and his partner Meixsell, and that the witness would therefore be liable to an action by the plaintiff Campbell; but the court overruled the objection and sealed a bill of exception.

Other points which arose in the cause grew out of exceptions to the following charge of the court:

WOODWARD, (President). — There is little ground to doubt the legal duty that was upon the defendants to provide reasonably sufficient and safe machinery for carrying on their business. This duty is on men in every branch of business, when they ask people to risk life and property in their hands and for their profit. The transporter of passengers or property by land or water is required to have all the means and appliances necessary for a safe accomplishment of the work in hand; the innkeeper is bound to provide safe and convenient house-room for his guests and stabling for horses; and the rule applies with peculiar force to manufacturers and mechanics whose occupation brings customers and their property into the immediate vicinity of their machinery.

But whilst the defendants do not deny the alleged defectiveness of their steam-boiler, nor controvert the general principle of law applicable to all machinery, they seek to excuse themselves from liability in this case on the ground that being themselves unacquainted with steam engines, they applied to an experienced machinist for a competent and good engine for their grist mill, paid him a sound price, and received a machine which he represented to be safe and sufficient for their purposes; that he put it up for them, and instructed them in the use of it, and that they never applied all the power to the boiler which he assured them they might with safety put on; and that, until the explosion occurred, they did not know that the boiler was defective. The plaintiff charges them with "well knowing" the defective character of the boiler; and the negligence which constitutes the tort in this case depends on this question of knowledge. It is well known *now* and admitted that the boiler was defective; but did the defendants know this whilst they were using it? If they did, it was the grossest negligence in them to continue to use the boiler; if they did not, the plaintiff cannot recover on the first count of his declaration. This is a question of fact upon which the jury must pass, and their verdict will depend essentially on their finding of this fact. If the jury had seen all that they have heard described

[Spencer v. Campbell.]

in respect to the appearances of the boiler whilst in use, would they, as reasonably prudent men, have accounted it unsafe?

Let them picture to their minds that boiler as described in Spencer's letter and the testimony of the witnesses, and then laying out of view all the evidence of unsoundness produced by the explosion, let them pass upon the question of the safety and sufficiency of the boiler as it appeared whilst in actual use. If in this mode the jury should satisfy themselves that they or other men of ordinary sense and prudence would have condemned that boiler as unsafe and insufficient, then the Spencers were bound in like manner to condemn it. They are men of ordinary sense and prudence: they were bound to exercise in their business reasonable diligence, discretion and judgment, and they saw and experienced all these appearances about the boiler-head which the jury have heard described. If, therefore, the conclusion of a right judgment in the premises be, that those appearances sufficiently indicated unsoundness, this conclusion must be forced upon the Spencers. We must say that they knew what other men of common sense with their opportunities for observation would have known, that the boiler was unsound and unfit for use.

If the jury should find it necessary thus to impute knowledge of the defectiveness of the engine to the defendants, they are not to be excused on account of any false security into which the representations of Meixsell, the machinist, may have betrayed them. They employed him at their own risk; they took his advice at their peril. Their customers never trusted in Meixsell; their confidence was in the Spencers. As between one of those customers and the Spencers, the opinions and assurances of Meixsell become unimportant. If the defendants chose to make his opinions the rule of their conduct in opposition to the testimony of their own senses, they have no right to visit the consequences of their folly on their innocent customers. The public repaired to their mill on the presumption that they employed all the precautions and care in conducting their business that men of ordinary prudence do commonly employ, and they were bound to know that the faith and confidence of their customers were in them, rather than in some irresponsible and unknown individual whose advice they had sought and obtained. Meixsell was undoubtedly false to the defendants, but this is their misfortune. They cannot transfer it to another innocent party who was a stranger to all that occurred between Meixsell and the defendants. They brought on the misfortune, and must therefore bear it.

The same line of observations is applicable to the plaintiff's second count, which charges the negligent management of the engine. From all the jury have heard of it, would a man of ordinary care and skill have removed the pea so far out upon the lever of the valve as Kirk says he did? If he would not, from regard to the existing appearances of the boiler-head, then the defendants

[Spencer v. Campbell.]

cannot justify their imprudent conduct by the rash assertions of Meixsell.

If, then, the jury find that the defendants knew, or what is the same thing, were bound to know of the unsoundness and insufficiency of their boiler, it was greatly wrong in them to persist in using it; and if the destruction of the plaintiff's mare were the consequence of their wrongful act, he is entitled to a verdict in damages equal at the least to her value. Or, if they did not know of the unsoundness, and are not to be held responsible for such knowledge, yet if they used their boiler rashly and without ordinary skill and care, it would be culpable negligence, and if this occasioned the plaintiff's loss, he would be entitled to damages on his second count.

But a point has been made by the defendants that goes to the plaintiff's right of action. The mare had been bailed to Hell, and it is said he is responsible to the plaintiff, and is the proper party to seek redress from the defendants. If the jury believe the mare was taken there to obtain a grist in the ordinary course of business, and was not unnecessarily kept there, the owner is entitled to sue for the loss of her, though his bailee took her there.

R. C. Hale, for plaintiffs in error.

M'Callister, for defendant in error.

The opinion of the Court was delivered by

GIBSON, C. J. — Most of the exceptions before us merit but a brief notice, even under the statute which imposes on us the duty of expressing an opinion on all the points which were ruled below. First, then, the admissions of a defendant are evidence against himself even when he is jointly sued; and it is just as clear that the plaintiff in this suit could not maintain an action against either Boyle, the deponent, or Meixsell his quondam partner; with neither of whom did he stand on any relation of privity. Boyle, therefore, was disinterested. It is equally clear, too, that case, and not trespass, is the proper form of action for an injury like the present.

The exceptions to the charge also are unfounded. The plaintiff certainly, or his bailee at the time of the injury possibly, might maintain an action on the case for the loss of the mare. The principle of *Ward v. M'Cauley*, (4 T. R. 490), is that trespass, founded as it is on possession, cannot be maintained by a bailor unless the bailee had the custody of the thing merely as his servant; but that trover may be maintained on the right of property without question as to the possession. That principle is an elementary one. The only material inquiry, in the case before us, regards the nature and extent of the defendant's responsibility to their customers. It is true that the judge put the responsibility of a carrier or an innkeeper as illustration, not of the degree of diligence required

[Spencer v. Campbell.]

but of the duty which the law imposed on him to provide all the means and appliances necessary for a safe accomplishment of his business; but he put the question on the true ground as a conclusion from the whole, that of ordinary care and skill. As the defendants were bound to use reasonable diligence to ascertain the quality of their machinery in regard to safety, they were answerable certainly for gross negligence of which there was evidence. They were warned of the danger not only by others, but by their own eyes; yet they preferred to rely on the assurances of the manufacturer; and the judge was right in charging that "if they chose to make his opinion the rule of their conduct in opposition to the evidence of their own senses, they had no right to visit the consequences of their folly on their customers." To work the engine under an extraordinary head of steam, though the boiler-head had been perceptibly sprung at the lowest pressure, was an act of rashness; and it is to be remembered that they were bound, not only to use due care, but to possess a competent share of skill on the principle by which the law implies an agreement to that effect on the part of every one who undertakes to perform a business, an office, or a duty. Now it appeared that Aquila Spencer, who was attending to the engine, and for whose management of it the other defendants also are answerable, had placed the pea of the safety valve at half the length of the lever from the fulcrum, though the boiler-head had been sensibly sprung when the pea was close to the nave. It is not to be doubted, then, that the disaster which ensued is one which he was bound to prevent, and for which all are answerable.

Judgment affirmed.

Neff's Appeal.

Upon an appropriation of the proceeds of a sale by the sheriff of the real estate of A, a judgment against him as security of B must be paid, although it may appear that the same judgment is a lien upon the real estate of B, which is sufficient security for its payment; the remedy of the subsequent judgment creditors of A is by subrogation.

A creditor who releases any security which he holds for the payment of his debt, thereby releases a surety *pro tanto*.

A creditor having a judgment against his debtor and his surety, which was a lien upon the real estate of the principal, agreed to release a part of the said real estate in order to make a title to one who purchased it for its full value, upon condition that the purchase money should be applied to the extinguishment of a mortgage which was a prior lien upon the whole estate: *Held*, that the surety was not thereby released.

APPEAL from the decree of the Common Pleas of *Mifflin*

[Neff's Appeal.]

county, appropriating the proceeds of the sale of the real estate of Isaac Neff.

The court referred this subject to an auditor, who made the appropriation of the proceeds of the sale by the sheriff, amounting to \$12,040, to the judgments in the order of the dates of the liens as they appeared upon the record, and thus stated and disposed of the objections made by those creditors whose judgments were not reached by the appropriation:

On the part of judgment creditors of Isaac Neff whose judgments have not been reached by the foregoing distribution, the appropriation to judgment No. 168, April Term 1839, P. Givin's executors now for the use of Rosanna Wilcox v. David Miller, Stephen Miller and Isaac Neff, has been resisted before the auditor on the ground that when a judgment creditor has a lien upon two funds, either good, and a subsequent creditor has a lien only on one of them, equity will compel the former to resort for satisfaction to the fund upon which the latter has no lien; it being admitted by the counsel in the above judgments that Isaac Neff is merely bail of the Millers; and the said creditors offering to prove by the admission of one of the executors of P. Givin, and by other evidence, that the lien of the said judgment, upon the property of the Millers, renders it perfectly safe. But the auditor is of opinion that he could not be governed by the principle stated unless both funds were actually before him for present distribution; and that the subsequent creditors, in any other case, must urge their equity by an application to the court for substitution, or to compel an assignment of the prior judgment. It has also been contended before the auditor, that Rosanna Wilcox, by a release (filed 9th August 1843, and produced before the auditor) of 30 acres of the land of David Miller from the lien of the judgment referred to, released Isaac Neff, the bail, from liability upon it. But it being shown that the released part of Miller's land was sold to Robert M'Burnly for \$1050, and the whole proceeds of the sale applied to the payment of a prior mortgage upon that and all the tract of land of Miller, that the release and sale were both for that purpose, and did not affect or alter the situation of any of the parties in the judgment, the auditor is of opinion the result contended for does not legally follow the release. The auditor has therefore appropriated to the judgment in its place the full amount of its debt, interest and costs.

The court confirmed the report of the auditor, and decreed that the money be paid accordingly.

Miles, for appellants. The appropriation to the judgment in question was opposed, and is now opposed, on two grounds:

1. That this judgment was a lien on real estate of David Miller the *principal* in the judgment as well as on the real estate of Isaac Neff, who was a mere *surety*. That the property of Miller, the

[Neff's Appeal.]

principal, was an ample security for the payment of the judgment; and that under such circumstances the executors of Givin cannot be permitted to take satisfaction of their judgment out of the property of the surety, to the injury of a subsequent purchaser from the surety, and to the injury of the judgment creditors of the surety.

2. That Rosanna Wilcox, who owned the judgment, by a release dated 10th July 1843, discharged thirty acres of the land owned by Miller, from the lien of the judgment, without the consent of Isaac Neff.

To sustain the first position taken by the appellants, the following authorities are relied upon. If a creditor has a lien on two parcels of land, and another creditor has a lien of a younger date on one of these parcels only, and the prior creditor elects to take his whole demand out of the land on which the junior creditor has a lien, the latter will be entitled either to have the prior creditors thrown upon the other fund, or to have the prior lien assigned to him, and to receive all the aid it can afford. 1 *Rawle* 304; 1 *Johns. Ch.* 412. "Where a creditor has had two funds, we have prevented him from frustrating the lien of another who had but one." Chief Justice GIBSON in 1 *Rawle* 302; 12 *Serg. & Rawle* 40; 10 *Watts* 304. So Mr Justice KENNEDY, in 6 *Watts* 225, citing *Story's Eq.*, sec. 633, says, "If A has a mortgage upon two estates for the same debt, and B has a mortgage upon one only of the estates for another debt, equal in amount to the value of the latter estate, while the other estate is amply sufficient to satisfy A's debt, B has a right to throw A, in the first instance, for satisfaction upon the estate which B cannot touch. Thus A is only made to act in conformity to the principles of equity and natural justice; and to exercise his right according to the common civil maxim, *sic utere tuo, ut alienum non lædas*." Mr Justice STORY, in 1 *Story's Eq.*, sec. 634, lays down this rule: "If a first creditor has a judgment against A and B, and a second against B only, and it does not appear whether A or B ought to pay the debt due to the first creditor, nor whether any equitable right exists in B to have the debt charged on A alone, in such a case, equity will not compel the creditor first to take the land of A in satisfaction." But it is submitted, if it be shown that A ought to pay the debt, is not the converse of the proposition true?

Here it is shown that Miller ought to pay the debt, and the distinction between principal and surety is not destroyed by obtaining a judgment on the original security. 8 *Serg. & Rawle* 458; 1 *Watts & Serg.* 158. The executors of Givin (or Rosanna Wilcox, the owner of the judgment) were not compelled to claim the money arising from the sale of Neff's property at the risk of losing their lien upon Miller's. In 1 *Rawle* 303, Chief Justice GIBSON says: "It (the Bank) waived its preference in favour of a surety to pursue the principal, the very thing that a court of

[Neff's Appeal.]

equity would have compelled it to do." Again, page 304: "Echelman, therefore, could have compelled the bank to exhaust its means of obtaining satisfaction from the lands of Winger, or, on payment of the debt, to assign its lien." In the case cited, the junior creditor had taken an assignment of the prior lien for the purpose of enabling him to waive its priority. A chancellor, under the circumstances of the case before the court, would restrain Givin's executors from taking satisfaction out of the property of the surety to the injury of his creditors, when the property of the principal is an ample security for their debt.

2. If the obligee undertake to discharge the principal, or in any considerable degree to lessen his responsibility without consulting the surety, the latter will be discharged. 3 *Binn.* 520. An extension of credit to the principal by a contract sufficient to tie up the hands of the creditor, without consulting the surety, will discharge him. 3 *P. R.* 439. The acceptance of a judgment before a justice of the peace by the payee of a note against a principal payer upon whose freehold there are liens, with a stipulation that he shall be entitled to a stay of execution, is a release of a surety in that note. 2 *Watts* 45. A surety is entitled to every remedy which the creditor has against the principal, to enforce every security and all means of payment, and to stand in the place of the creditor. He has a right to have the securities transferred to him. If the obligee (says Mr Justice DUNCAN in 16 *Serg. & Rawle* 28) renders any such security which he took from the principal debtor, void, this discharges the surety; for the very taking of that security by him may have excited confidence in the security, and lulled him asleep, and deprived him of taking other security for his own eventual responsibility, until it was too late, and the rights of third persons had intervened; and therefore equity imposes an obligation on the creditor who takes the security, to take it fairly and lawfully, and to hold it impartially and justly; as for instance, the security, by his very character and relation as security, has an interest that a mortgage taken from the principal debtor shall be dealt with in good faith, and held in trust, not only for the creditor's security, but for the surety's indemnity. See also 4 *Johns. Ch.* 130. A surety who has paid the debt is entitled to be substituted for the creditor. 2 *Rawle* 131. A surety in a judgment who is compelled to pay it is entitled to have it paid out of the land of his principal, notwithstanding the intervening rights of the judgment creditors of the principal. 3 *P. R.* 62.

The principles and the reasons of the authorities here cited to establish the correctness of the second point made on behalf of the appellants, all tend to one conclusion, that the creditor cannot impair his securities or remedies against the principal, by *positive* acts of his own, without the consent of the surety, except at the hazard of discharging him. And it is no answer in this case to say, that the thirty acres of land which were released from the

[Neff's Appeal.]

lien of the judgment were sold by Miller and the proceeds applied to the satisfaction of a prior lien. The surety had a right to have the lien of the judgment enforced upon the whole of the land. But the creditor and the principal debtor have deprived him of that right without asking his consent. And the question is not, *is* he injured by the transaction? for that cannot be ascertained; but *may* he have been injured by it? If he could be, as he was not consulted, he is discharged.

Orbison, for appellees. This court, in doing equity, has never taken away money raised by a sale of land from the first creditor and given it to the subsequent creditors, unless in a case where there has been a loss of lien, &c. But in a case like this, the court has never gone further than to give to the junior creditor the securities which a prior creditor has, upon the whole money being paid to him. 3 *Watts* 477; 6 *Watts* 277. The defendants in the *Givin* judgment are considered as principals so far as third persons are concerned. 3 *P. R.* 200; 16 *Serg. & Rawle* 202; 3 *Serg. & Rawle* 20. Although part of Miller's land was released from the lien of the judgment, yet the proceeds or value of that part was applied to a prior mortgage, and was rather a benefit to Isaac Neff than an injury. But so far as Isaac Neff's creditors are concerned, they would have no equitable claim to this money, unless they had given the owner of the *Givin* judgment notice not to release any part of Miller's property. However, they admit that if they were substituted plaintiffs in the *Givin* judgment, Miller's property would be ample security. If any risk is to be run, the subsequent creditors are not to take away the money now in court from the *Givin* judgment and place the hazard of depreciation in value of land, loss of lien, &c., upon the owner of the prior judgment. 5 *Rawle* 51; 3 *Watts* 477; 3 *P. R.* 57; 5 *Watts* 172.

We think that in a case like this the court would not take away the money from the prior judgment creditor, but direct it to be applied to the first judgment; and upon an application for substitution, would do full and entire equity in the case, having regard to the claims of Miller's creditors as well as those of Neff; and also to the rights of Isaac Neff as security. As the owner of the *Givin* judgment has done nothing which would postpone it, in favour of subsequent creditors, upon inquiring into the best way of doing equity (and an application for substitution), would not Isaac Neff be the person entitled to preference so far as his creditors are concerned, inasmuch as their judgments are not against Miller? See 3 *P. R.* 57; 5 *Watts* 229. And would not the creditors of Miller, subsequent to *Givin*, be preferred to, and have a more equitable claim than even Isaac Neff, to be paid out of Miller's property in case of a sale of it, and the money brought into court? A surety is not discharged by a release of a security except to the extent he is injured. 1 *Law Lib.* 84-5-7.

[Neff's Appeal.]

The opinion of the Court was delivered by

KENNEDY, J. — A number of judgments, of various dates, in favour of different persons, had been obtained against Isaac Neff and Neff and Walker, which bound their respective real estates, which were afterwards sold by the sheriff by virtue of judicial process sued out on some one or more of said judgments. The money arising from the sale was brought into court by the sheriff, and not being sufficient to satisfy all the judgments, a contest arose about the appropriation of it. Among the judgments which bound the property sold, was one in favour of Patrick Givin's executors, assigned to Rosanna Wilcox, upon which a balance of debt and interest, amounting to \$2203.92, remained due and unpaid, besides \$4.35 costs. This judgment was joint against David Miller, S. Miller and Isaac Neff, Isaac Neff being admitted to be a mere surety for the Millers. The judgments posterior in date to it were, in amount, more than sufficient to absorb all the residue of the money after paying the judgments prior thereto, without applying any portion thereof to it. It was offered also to be proved in the court below, before the auditor appointed by it to ascertain the facts, and to make and report the appropriation that ought in his opinion to be made of the money, that the Millers, the principals in the judgment, were perfectly solvent, and that their real estate, bound by the judgment, was of amply sufficient value to satisfy the amount thereof. The auditor, however, considering this evidence immaterial, did not receive it, and in this he was sustained by the court, as it approved and confirmed his report. But it was shown that Rosanna Wilcox had released thirty acres, part of a tract of land bound by her judgment belonging to David Miller, one of the principals in it, from the lien thereof, in consideration of the thirty acres having been sold for \$1050, a sum equal to the full value of the same, which was agreed to be applied to the payment and discharge of a mortgage of the same amount, which was a prior incumbrance on the whole tract to the lien of her judgment, and that the \$1050 were so applied, and the mortgage thereby discharged and satisfied. Isaac Neff, as it seems, had sold other land bound by the judgments against him to a John Henry, to whom John Neff and Daniel Neff became bound as the sureties of the said Isaac Neff, to keep and save harmless the said Henry from the said judgments. And again, John Neff and Jacob Neff were bound as co-defendants and as sureties for Isaac Neff in a judgment of subsequent date to Mrs Wilcox's, in favour of James Smith. John Neff, Daniel Neff and Jacob Neff, in order that they might be protected from being made liable to the payment of money as sureties for Isaac Neff, claimed, first, that Rosanna Wilcox should be compelled to go against the property of the Millers, the principal debtors, for the amount of her judgment, and not be permitted to take the same out of the money made by the sale of the estate of Isaac Neff, who

[Neff's Appeal.]

was a mere surety and derived no benefit whatever from the debt ; and that this ought more especially to be done, because otherwise it would not only leave them liable to pay moneys for Isaac Neff for which they had never received any benefit, but most likely leave some of Isaac Neff's creditors without the means or the power of getting anything towards satisfying their claims. But if this be done, every one may receive what is justly due or coming to him or her ; but if not, it is pretty certain that one or more will lose and must suffer. Equity and justice would therefore seem to require that Mrs Wilcox should be compelled to look to the property of the Millers, the real debtors, for payment. But it has also been argued, if she cannot be compelled to do this, that she has, by the release of the thirty acres from the lien of her judgment, released Isaac Neff and his property from all liability to pay her judgment. The court below, however, as well as the auditor, decided against the Messrs Neffs on both points ; from which decision they have appealed to this court.

The argument of the appellants, in support of their first point, would be irresistible, perhaps, if the real estate of the Millers had been converted into money and brought into court for appropriation as Isaac Neff's was. But this was not the case, and could not be effected without some considerable delay, a delay most probably of six months at least, which might be very injurious to Mrs Wilcox, who had an undoubted right to receive the amount of her judgment immediately out of the moneys in court arising from the sale of Isaac Neff's estate. Her right, in this respect, was not only legal and perfect, but likewise consistent with every principle of equity. It would therefore have been wrong to have compelled her to give up her right to receive the amount of her judgment out of the money in court, or to have postponed the payment of it a single day after it was judicially ascertained that she was clearly entitled to have it paid out of the money in court. If the Messrs Neffs had any claim or right to have the appropriation made of the money in court, which they requested, it was purely equitable, and such as they could not ask to have carried into effect at the expense, or more properly, as it may be said, the sacrifice of either the legal or equitable rights due to others. To entitle themselves to relief or any benefit on the ground of equity, it was incumbent upon them to do equity, by placing Mrs Wilcox immediately in the possession of the money due and coming to her on her judgment, that is, by paying it, instead of asking that she should be delayed, for some uncertain period of time, in the receipt of it. Had they paid or tendered her the amount of her judgment, and in case of her refusal to accept have brought it into court, they might then have been said to stand on ground that would most probably have entitled them to an order or decree of the court giving them the benefit and control of Mrs Wilcox's judg-

[Neff's Appeal.]

ment. But having done nothing of this sort, we think the court were right in deciding against them on their first point.

We also think that the second point of the appellants cannot be sustained. It is doubtless true, if the creditor, by a new agreement with the principal, without the assent of the surety, makes any material alteration in the agreement whereby the surety became bound as such, the surety will thereby be discharged, because the only contract that bound him is no longer in being; for the change and alteration of it by the operation of the new contract, made without his consent, in effect annuls and sets aside the contract by which he bound himself, and the only one to which he was a party. So if the creditor releases the principal from the payment of the debt, he thereby releases the surety entirely. But if he release the principal from a part only of it, he only releases the surety *pro tanto*; and there is not even the shadow of reason why it should be considered a release for any more. So if the creditor give up to the principal or release a security which he has obtained from him for the whole of the debt, it will operate as a release or discharge of the surety from all liability as such; but if the security released be only for part of the debt, the surety will only be released *pro tanto*. The ground upon which the relinquishment or negligent losing of a security taken of the principal debtor by the creditor for the whole or part only of the debt, is held to be a release of the surety either for the whole or *pro tanto*, as the case may be, is, that the surety upon payment of the debt to the creditor, is entitled to the benefit of all securities which the creditor has, that he could have rendered available against the principal debtor; and if any of those securities have become lost, or have become lessened in value, in consequence of the neglect or default of the creditor, the surety's liability to the creditor will be diminished to that extent. *Vide Pitman on Principal and Surety* 113-14; 40 *Law Lib.* 86; *Theobald on Principal and Surety* 84, 85, &c.; *Commonwealth v. Miller*, (8 *Serg. & Rawle* 452, 457-8); 2 *Swanst.* 189. When the real value of the security, lost by neglect of, or given up by the creditor, is capable of being ascertained with certainty, and it is less than the amount of the debt, it would not only be contrary to reason to extinguish the liability of the surety entirely, as a diminution equal in extent to the value of the security given up or lost is amply sufficient to protect him from any loss that could accrue from his not obtaining such security, which is the utmost that he can with reason claim; but it would likewise be repugnant to the ground or principle upon which the surety has a right to claim a discharge from his liability as such. But when it is impracticable to ascertain, with any degree of certainty, whether the security lost or relinquished might not have availed the surety to the full extent of the debt, in case he had paid it, it would seem to be right that he should be discharged entirely from all liability, and that the bur-

[Neff's Appeal.]

then of proving the value of the security should lie on the creditor. In the present case, however, although it appears that Mrs Wilcox released thirty acres of the land of the principal debtor from the lien of her judgment, yet it was done for the purpose of increasing the value of the security, and, in this respect, rendering it more certain, which she had for the payment of her debt, instead of lessening it; and in the opinion of the auditor, and according to the evidence given before him, this would seem to have been the effect of what she did; that by making a small portion of the tract pay the mortgage debt, which was an incumbrance upon the whole tract, prior in date to the lien of her judgment, and might at a forced sale have swept away the whole tract to pay it. It was in fact a charge upon the whole tract of land, and from all that appears in the case, the land was the only resource from which payment of it could be obtained, so that Mrs Wilcox had no alternative which seemed so well suited to preserve at least a portion of the land as a security for the payment of her judgment, as that of releasing the thirty acres from the lien of it. It may, therefore, be very properly considered an improvement of her security, instead of a diminution of it.

Decree affirmed.

Ludwig *against* Leonard.

An agreement by one of several heirs of an intestate to sell and convey all his interest in the real estate, "except so much of said estate as shall be coming to the said E at the decease of the widow," is to be construed to mean an agreement to sell and convey two-thirds of the interest of the vendor in his father's estate.

The evidence necessary to establish a sale of land by parol must be clear and positive.

ERROR to the Common Pleas of *Cumberland* county.

This was an action of ejectment by Ludwig & Kneedler against William Leonard to recover the one-fifth of the one-third and the one-fourth of another fifth of a house and lot in Carlisle. Christian Leonard died in 1825 seised of the property, leaving a widow and six children, of whom Edward Leonard was one. On the 23d December 1841, the plaintiffs obtained a judgment against him, upon which executions were issued, and his interest in the property in dispute was levied and sold to the plaintiffs and conveyed to them by the sheriff on the 15th January 1844. Margaret, another of the heirs, died intestate and without issue in 1840. The defendant, to maintain the issue on his part, gave in evidence the following agreement:

[Ludwig v. Leonard.]

"It is agreed this 25th January 1831, between Edward B Leonard of the one part and William Leonard of the other, both of the borough of Carlisle, and legal heirs of Christian Leonard, late of said borough, deceased, died intestate, seised in his demesne of certain real estate situate in the borough of Carlisle; and that whereas, the said Edward, for and in consideration of the sum of \$600, the receipt whereof is hereby acknowledged, doth bargain, sell and release unto the said William all his interest in said real estate except so much of said estate as shall be coming to the said Edward at the decease of the widow of said Christian. Witness our hands and seals the day and year first above written."

Proof was then given that the purchase money mentioned was paid in full. The defendant then gave in evidence the following assignment by Margaret Leonard to Sarah Leonard:

"I, Margaret Leonard, daughter of Christian Leonard, late of Carlisle, deceased, who died intestate, for good causes and consideration, do by these presents transfer and assign to my sister Sarah Leonard my share, right and title and interest due, or to become due to me out of my said father's estate in the hands of William Leonard my brother, to be paid by him, being about the sum of \$200 more or less. Witness my hand and seal the 30th December 1840."

Sarah Leonard was examined as a witness and testified that in 1835 the heirs had a meeting with the view of settling their father's estate, and that the agreement among the heirs was that William was to get the real estate; she thinks it was not in writing. She also said that Margaret often wished William to have a release; she told him so.

The proof was that the family lived together in the house except Edward, and that William had made valuable improvements. Releases from the other heirs to William were given in evidence.

The plaintiffs requested the court to charge the jury on the following points:

1. That the agreement between Edward Leonard and William Leonard, of the 25th January 1831, does not convey all the interest of Edward Leonard in the land in dispute.

2. That under the exception in said agreement, to wit: "Except so much of said estate as shall be coming to the said Edward at the decease of the widow of the said Christian," the interest of the said Edward in one-third of the real estate of his father did not pass to the said William Leonard.

3. That by virtue of the sheriff's sale to the plaintiffs all the estate of Edward Leonard in the land in controversy, not conveyed by him to William Leonard, was vested in said plaintiffs, and they are entitled to recover whatever the same may be in this suit.

4. That the sale of Margaret to Sarah, if there was a sale, and from Sarah to William, being unrecorded are fraudulent and void as against the plaintiffs.

[Ludwig v. Leonard.]

The Court answered the points as follows :

1st. The agreement between Edward and William Leonard of the 25th January 1831, conveys all the interest of Edward in the lot in dispute, except what is reserved by that agreement, which is or might be something or nothing, under the evidence upon which a construction is given to that paper. What the parties intended by this exception is left unexplained by any parol testimony in the cause. It was perfectly competent for the plaintiffs to have shown by parol testimony the meaning of the parties in this reservation. Not having done so, we are left to the paper and compelled to give it a legal construction such as we think it warrants. A widow, under our intestate laws, is entitled to the one-third of the lands for her life of which her husband died seised. All the interest then, which a widow has, terminates with her death, and on the happening of that event she has no interest in the real estate that could descend as a separate estate to her heirs, or those of her deceased husband. All that Edward acquired at the death of his mother, was the enjoyment of an increased portion of his father's estate which had descended to his heirs at his death, of which his mother had the possession during her life. The reservation therefore in this agreement, unexplained by parol testimony, vested in Edward no additional estate which was subject to the lien of a judgment, and which would be liable to a separate sale by the sheriff, from that estate which he acquired at the death of his father, or separate and distinct from that conveyed by Edward to William under this agreement of the 25th January 1831, which would justify a recovery by the plaintiffs in this suit.

2d. For the reasons already given we refuse this instruction.

3d. All the interest which Edward had in this property passed to the purchasers at sheriff's sale. That interest, however, may be something or nothing as you shall find from the evidence. If you are satisfied from the evidence that William was the owner of Edward's interest, and that Margaret had before her death agreed to sell this lot, &c. to William—received part of the purchase money from him, and transferred the balance to her sister Sarah, then Edward could acquire no interest in this estate at the death of Margaret intestate, which would vest in the purchasers at sheriff's sale a right to any portion of this property. The plaintiffs must recover on their own title, and not because the defendant's is not as strictly legal as it might have been. It is not indispensable to a man's title that he have a regularly executed deed. If he buys by parol, pays his purchase money, and enters into possession of the property, his possession is notice to others, sufficient to put them on enquiry as to his mode of holding; and would be sufficient to protect him in that possession against the purchaser of the legal title under a sheriff's sale. It is true a deed conveys the legal title, but if all the purchase money be paid the purchaser of the legal title, under a judgment against the

[Ludwig v. Leonard.]

vendor, would acquire no such interest in the property as would enable him to disturb the purchaser in his possession. It will be for you to say whether William Leonard did buy this property under this family arrangement and pay for it as contended for by his counsel, or not.

4th. We cannot instruct you as matter of law, under the circumstances in evidence in this cause, that the non-recording of Margaret's transfer to Sarah or William's agreement with her, makes them fraudulent and void.

The plaintiffs excepted to the charge.

Brandebury and *Biddle*, for plaintiffs in error.

Watts and *Reed*, for defendants in error.

The opinion of the Court was delivered by

ROGERS, J.—Both parties claim under Christian Leonard, who died seised of the premises, intestate, leaving a widow and six children, one of whom, Margaret, is since deceased. To the November Term 1841, the plaintiffs, Ludwig and Kneidler, obtained judgment against Edward B. Leonard, one of the heirs, and on a *venditioni* his interest in the house and lot was sold, and conveyed by the sheriff to the plaintiffs. This gives the plaintiffs a *prima facie* title; but the defendant resists the right to recover on an article of agreement, by which he contends Edward conveyed his whole interest in his father's real estate to him, and an alleged parol sale of Margaret's interest to him, or an agreement to convey to her sister, Sarah Leonard.

The agreement between Edward and William Leonard is in these words: "It is agreed, this 25th January 1831, between Edward B. Leonard of the one part, and William Leonard of the other, both of the Borough of Carlisle, and legal heirs of Christian Leonard, late of said Borough, deceased, died intestate, seised in his demesne of certain real estate situate in the Borough of Carlisle; and that whereas, the said Edward, for and in consideration of the sum of \$600, the receipt whereof is hereby acknowledged, doth bargain sell and release unto the said William all his interest in said real estate, *except so much of said estate as shall be coming to the said Edward at the decease of the widow of said Christian.*"

In the construction of all instruments of writing *inter partes*, the intention is the governing rule. Thus, the words of an indenture, executed by both parties, are to be construed as the words of both; for although delivered as the words of one party, yet they are not his words only, but the other party has given his assent to every one of them. In this way, an indenture is distinguishable from a deed poll, which shall be taken most strongly against the grantor. *Shep. T.* 177. It is also a cardinal rule in the interpretation of all instruments of writing whatever, that the construction be made on the entire deed, and not merely disjoined parts of it;

[Ludwig v. Leonard.]

and that every part of it be (if possible) made to take effect; and no word but what may operate in some shape or other. *Shep. T.* 176; 1 *Buls.* 101; *P. Will.* 459. Taking this to be the rule the objection to the construction given by the court to the agreement is, that it rejects altogether the exception, which is an essential part of the contract. The court give it the same meaning as it would bear if those words were stricken entirely out of the agreement. But this is contrary to the rule, that every part of it (if possible) is to take effect, and that every word must be permitted to operate in some shape or other. This, be it observed, is an exception and not a reservation, nor is there any repugnancy between the exception and the grant.

But let us inquire whether it is possible, by giving every word of it its proper signification, it may not be so interpreted as that the different parts of the instrument may stand very well together. It does not strike me that it is very difficult to understand the reason of introducing the exception, or the manner in which it operates upon and modifies the previous part of the agreement. When an intestate leaves a widow and lawful issue, by the third and fourth sections of the Act of 1794, the widow is entitled to one-third of the real estate during life, and the remaining two-thirds immediately descends to the children. At the death of the intestate, two-thirds goes into their possession, and one-third into the possession of the widow. That part, therefore, which remains after taking out her life estate, in common parlance, and perhaps in legal contemplation, takes effect only on the death of the widow. It is certain that until this event the heirs have no immediate enjoyment or possession of it. So, when the real estate is appraised, the widow's third remains a lien on the land, the interest to be paid to her annually; the principal to the heirs after her death. Keeping this in view, it furnishes the key to the intention, and enables us to give the agreement such a construction as to give every word its legitimate effect. The words "except so much of said estate as shall be coming to the said Edward at the decease of the widow," obviously mean that part of the estate, whether it be real estate or money, which remains after deducting the two-thirds to the heirs and the one-third during life to the widow, or the reversionary interest in the widow's part of the real estate, or the money which by operation of law is a substitute for it. It is very obvious the exception was introduced for some purpose, and it is equally plain that Edward did not intend to part with all his interest in the estate. It can therefore be referred to nothing else; there is no medium between that interpretation and rejecting that part of the agreement altogether; the latter of which is to be avoided, as we have seen, if possible. Besides, the interpretation is neither repugnant nor unreasonable, nor is there an insuperable difficulty in understanding the reason of the exception. It was easy to ascertain the value of the two-thirds, but not equally so to agree

[Ludwig v. Leonard.]

as to the price of that portion which remained after the termination of the life estate; it depended on the contingency of the death of the mother, a risk which neither the vendor nor vendee may have been willing to run. Besides, (operated upon by these considerations), it is by no means unusual for heirs to dispose of all their share or interest in the real estate with a reservation such as is contained in this agreement, expressed, it is true, in language rather more intelligible than that used by these parties.

Next, as to the disposition of Margaret's share. I have had some difficulty in understanding on what grounds precisely the defendant rests this part of the defence, whether on a sale to Sarah or a sale to himself, directly; but whether on one or the other, it equally avails him, as the plaintiff must recover on the strength of his own title. The case must be viewed, therefore, in both aspects.

The sale to Sarah Leonard depends on the meaning of a release or assignment, in the following words:—"I, Margaret Leonard, daughter of Christian Leonard, late of Carlisle, deceased, who died intestate, for good causes and considerations do by these presents transfer and assign to my sister Sarah Leonard, my share, right and title and interest due, or to become due to me out of my said father's estate, in the hands of William Leonard my brother, to be paid by him, being about the sum of \$200 more or less." This instrument does not purport to assign or convey real estate, but the proceeds of real estate and personal estate. It is absurd to say of real estate that it is due, or that it becomes due; such expressions are only applicable to personal property. And this is further probable from the fact that about the sum of \$200 would be coming to her from William on settlement, as it is fair to believe he received the rents and some part at least of the personal estate. And what is conclusive as to this is, that Sarah, who was examined as a witness, does not say that Margaret conveyed to her, or intended to convey, her interest in the realty. Her evidence, as far as it goes, tends rather to prove that it was sold to William.

But did Margaret sell her interest to her brother William, is the next inquiry? It is not pretended there is any written contract. It depends altogether on parol proof. As a general rule, contracts, as to real estate, must be in writing; and to take a case out of the statute upon the ground of a parol sale, it is indispensable that the contract be established by clear unequivocal proof, and that it be definite in its terms. If the terms are uncertain or ambiguous, or are not proved by clear and satisfactory proof, a specific performance will not be decreed. No title passes to the vendee. A Court of Equity will not, nor should a jury be permitted to deprive another of his land, on uncertain and inconclusive inferences. Now what proof was there that there was any contract whatever, either written or parol, for the sale of this pro-

[Ludwig v. Leonard.]

perty? It amounts to this and no more, that men were appointed who performed the duty to value and appraise the estate belonging to the heirs, real and personal, and to a presumption, which is a fair one, that this was done with a view to a settlement, and to an intended purchase by William. But that this design, though contemplated, was consummated either before or after the valuation, is a mere matter of conjecture. Sarah, who must have known the fact, if it was as is contended, does not prove a sale. In 1815, she says, my sister had a meeting in reference to the settlement of my father's estate. My sister Margaret often wished William to have a release. She told her she wished he could have a release. The agreement among the heirs was that William was to get the real estate. She frequently heard Margaret wish that William should have a release. All that can fairly be collected from the testimony is, that it was the common understanding that William, if he desired, should be the owner of the real estate at a fair valuation. This would seem particularly to have been the wish of Margaret, and her expressions, repeatedly made, indicate her regret that he had not become the purchaser. She is sorry that William had not a release; or, in other words, for some reason, she regrets William was unable or unwilling to purchase the property. Her expressions are unmeaning and idle on any other supposition.

Besides, there is no proof of any contract nor of any change of possession in pursuance of a contract. William had and continues to have possession of the property as a tenant in common with the other heirs. No distinct possession by him has been proved. And as to the improvements, they amount to nothing, unless some evidence is given of a contract by which William became the owner. Improvements, as it appears, were made, as well before as after the time of the alleged purchase. They were made by him as tenant in common, and the cost of these improvements was an item in the valuation made by the men specially selected for that purpose. There was no proof that a dollar of the purchase money was ever paid. If there was a contract, when was it made, what were its terms and conditions, and what part of the purchase money, if any, was paid? These are questions to which you may look through the testimony in vain for an answer. In all these essential particulars the evidence is deficient; and to decree a specific performance on such proof would in effect repeal the Statute of Frauds.

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

Caldwell *against* Heitshu.

The issuing of a writ of summons, although returned not served, is a suit brought; and would release the guarantor of a bond who had stipulated in consideration of total forbearance.

"Further forbearance" as the consideration of a guaranty is construed to mean forbearance for a convenient or reasonable time, taking into view in its computation as one element the period which had theretofore been permitted to elapse without enforcing payment; and what is a reasonable or convenient time the court must determine.

ERROR to the District Court of *Lancaster* county.

This was an action of debt by Philip Heitshu against Andrew Caldwell, founded upon the guaranty of a bond. The plaintiff gave in evidence a bond of John Caldwell, Henry A. Carpenter and Thomas B. Burrows, to Philip Heitshu, dated the 25th April 1834, in the penalty of \$6000, conditioned for the payment of \$3000 on the 1st April 1835, with interest; and the interest had been paid up to the 1st April 1837. On that day the following endorsement was made on the bond and signed by Andrew Caldwell:

"I, Andrew Caldwell, of Leacock township, in Lancaster county, farmer, in consideration of further forbearance, do hereby guaranty the payment of the within bond to the obligee thereof. In witness whereof I have hereunto set my hand and seal this 1st day of April 1837."

The suit was brought upon this guaranty to June Term 1844. Henry A. Carpenter and Thomas B. Burrows were sureties in the bond, and it appeared that to June Term 1842 suit had been brought against Henry A. Carpenter on the bond which was subsequently tried and verdict rendered for the defendant on the ground that the sureties were discharged by the agreement of the plaintiff to forbear suit as stipulated for in the above guaranty. It also appeared that to June Term 1842, a writ of summons was issued on the same bond against John Caldwell, which was returned by the sheriff "not served." It was also proved that Thomas B. Burrows' estate was solvent and able to pay.

The defendant requested the charge of the court on the following points:

1. The contract of the defendant was, that if all the obligors mentioned in the bond were unable and refused to pay the amount of the bond, he was liable.

2. No demand was ever made, and no attempt made to recover the money in dispute from Thomas B. Burrows; and it being

[Caldwell v. Heitshu.]

proved that he was able to pay this bond, Andrew Caldwell cannot be made to pay.

3. By a forbearance in general, without adding any particular time, is to be understood a total forbearance; and the original debtor having been sued, defendant is not liable to pay it.

4. Any act of Philip Heitshu the plaintiff, in reference to the sureties in the bond, that would work a discharge as to them, cannot affect the defendant, or alter the nature of the guaranty.

In answer to which the court thus instructed the jury.

HAYES, (President).—1. The contract has been read to you, as it is endorsed upon the bond. It is, in effect, that if Philip Heitshu would further forbear to sue this bond, Andrew Caldwell guaranteed its payment. The forbearance was granted to John Caldwell, by reason of which the other obligors in the bond who were sureties, were discharged. John Caldwell has become a bankrupt; and Andrew Caldwell is bound by his guaranty to pay.

2. This does not excuse the defendant, or defeat the plaintiff's claim by the contract of guaranty.

3. John Caldwell, the original debtor, was not sued; a writ was issued, but not served; and the defendant's liability is not affected by that supposed fact.

4. If the taking of the guaranty in question prevented Philip Heitshu from recovering against the sureties, as it did, the defendant was affected by this consequence of Philip Heitshu's and his own act, in the matter of guaranty, so as to make him liable upon his contract according to its terms.

N. Ellmaker, for plaintiff in error, cited 3 *P. R.* 19; 3 *Kent Com.* 120; 2 *Watts* 128; 6 *Watts & Serg.* 70; 5 *Ibid.* 21; 3 *Watts* 213.

Reigart, for defendant in error.

The opinion of the Court was delivered by

SERGEANT, J. — The defendant's undertaking was, in effect, for the payment of the bond by the principal obligor, Andrew Caldwell, and it is not necessary to show an endeavour to collect it from the sureties. Indeed, that it could not be collected from them, but that they were discharged by the forbearance stipulated, was decided by this court at the last term in a suit brought by the present plaintiff against Carpenter. It would, therefore, have been useless to attempt to recover from Burrows, the other surety, who stood on the same footing as Carpenter.

The only question which it becomes necessary to consider seems to be, whether the suit brought by the plaintiff against John Caldwell, the principal obligor, to June Term 1842, was a violation of the plaintiff's contract of forbearance, so as to discharge the present defendant from his undertaking of the 1st April 1837

[Caldwell v. Heitschu.]

For I cannot agree with the court below, that John Caldwell, the original debtor, was not sued, though a writ was issued which was returned not served. A writ issued and returned by the sheriff, and in addition a declaration filed *de bene esse*, ought properly to be deemed the bringing of an action, which is defined to be a lawful demand of one's right. The defendant might have come in under this process and appeared, and the action might, in that case, have proceeded without a new writ. A *capias* taken out and returned *non est inventus*, saves the bar of the Statute of Limitations, if it be properly continued down. If, therefore, the agreement is to be construed as a stipulation for total forbearance, it was broken; but if, on the other hand, it was for a forbearance for a reasonable or convenient time, the result may be different.

The principles of law on this head have been settled in a variety of cases, ancient and modern. It is not necessary that the forbearance, to be a sufficient consideration, should extend to an entire discharge of proceedings. Forbearance to sue for a little time, or for some time, is not sufficient; but forbearance for a limited period, with power to continue it if the debt be not then paid, is sufficient. Where the declaration stated the consideration to be an agreement for forbearance, (not showing for what time), and there was an averment that the plaintiff forbore for a long time, it was held, on motion in arrest of judgment, to be sufficient; for it shall be intended that the plaintiff agreed to forbear for a convenient or reasonable time, and that is a sufficient consideration. *Leigh's N. P.* 32; *Mapes v. Sydney*, (*Cro. Jas.* 683). Chief Justice HOBART, in this case, held that the plaintiff was not bound (by his agreement) to forbear totally. He denied that upon this agreement he is chargeable in assumpsit, if he, after the debt recovered from the defendant, should sue for the same debt; for it is not a promise to restrain him totally; and without express words he is not chargeable by promise. Wherefore it was adjudged for the plaintiff. So in the case before us, a deliberate agreement reduced to writing and under seal, for a further forbearance, shall be intended, in the absence of any reason to the contrary, to be for a convenient or reasonable time, taking into view in its computation as one element, the period heretofore permitted by the plaintiff to elapse without enforcing payment. And what is a reasonable or convenient time the judges are to determine. 1 *Com. Dig.* 186; 6 *Com. Dig.* 322; *Mo.* 854; 1 *Rol.* 26; 3 *Bulst.* 207; 1 *Sid.* 45; *Hob.* 216; *Cro. Eliz.* 387; 1 *P. R.* 185; 4 *Wash. C. C.* 148; 5 *Rawle* 69; 3 *Watts & Serg.* 420; 2 *Binn.* 509.

The bond had become due on the 1st April 1835. The interest had been paid up to that date, and to the 1st April 1836 and 1837, in the month of March in each year, without exacting the principal. But about the time of this guaranty, the plaintiff became dissatisfied and asked payment, rather, it would seem, with a view to obtain other security. This the defendant gave in consideration

[Caldwell v. Heitschu.]

of further forbearance—not, as I consider it, a total and perpetual forbearance—a discharge or release of the principal obligor, but waiting a further time, a longer period; and the plaintiff could not have sued on the next day, but was bound to give what ought to be deemed a reasonable time under existing circumstances. If there were no danger or risk of loss, a time equivalent to that elapsed; if the circumstances of the parties should alter, less might be deemed so; after which the plaintiff might sue the principal obligor. The plaintiff did not sue him for more than five years, and therefore did not, we think, violate the stipulation.

Judgment affirmed.

Magehan *against* Thompson.

As the credibility of a witness must be judged of by the jury, any evidence which tends to affect it is competent.

• ERROR to the Common Pleas of *Huntingdon* county.

James Thompson against Jacob Magehan, surviving partner of William Richardson. This was an action of debt brought into court by appeal from the judgment of a Justice of the Peace, and the only question which arose is stated in the opinion of the court.

Wilson, for plaintiff in error.

Miles, for defendant in error.

The opinion of the Court was delivered by

BURNSIDE, J. — The only assignment of error worthy of consideration in this case, is the exception of the defendant below to the admission of the petition and discharge of Jacob Magehan, Jun., as an insolvent debtor. This will be found without difficulty when the case is stated and the question understood. A material inquiry on the trial was whether Jacob Magehan, the defendant, was a partner in the purchase of the cattle and in the butchering of them with Richardson. Thompson had given evidence in chief of the sale of the cattle, and some evidence of the partnership. To rebut this, the defendant had examined his son, who had been discharged as an insolvent debtor, and had bought the cattle from Thompson in Clearfield, who proved that he had been at one time in partnership with Richardson in the butchering of Lewis's cattle. There was a detailed examination of this witness. He swore that he believed Richardson to be in his debt, but he did not return him as a debtor because the account was not settled; that he did

[Magehan v. Thompson.]

not return him as a creditor, because he thought he was paid. To discredit him, the plaintiff Thompson offered his insolvent petition, with the oath and return of debts and credits, as evidence to the jury. It is true, that with the witness's explanation there was no direct contradiction; but it was believed to have some relevancy. As the jury were the exclusive judges of the credit of the witness, as well as the weight of the evidence, we cannot say there was error in admitting the insolvent petition of the witness, and the return he made of his debts and credits, for the purpose for which it was offered.

Judgment affirmed.

Selfridge's Appeal.

The Act of 1840 extends the jurisdiction of the Orphans' Court in partition to estates held jointly or in common which have been created by will, when the parties, or any of them, are minors, and to cases where the descent has not been altered or interrupted, though the decedent did not die absolutely intestate: but where the estate is devised to executors to be sold, the statute is wholly inapplicable to it.

APPEAL from the decree of the Orphans' Court of *Huntingdon* county.

In 1812 John Ramsey made his will, which was then proved, by which he appointed two of his sons and a third person to be his executors, and devised to them his real estate, to be sold, and the proceeds to be divided among his children as therein stated. The executors went into the possession of the estate, and continued to hold and use it for the benefit of the family until 1843, when some of the children having become insolvent, their interest in the estate was levied and sold to William Selfridge, who instituted a proceeding in partition in the Orphans' Court. The inquest was awarded by the court, the partition and valuation made and returned to the court, when, upon exceptions filed by the parties in interest, the court (Wilson, President) set the whole proceedings aside, on the ground that the court had no jurisdiction of the subject.

William Selfridge appealed from this decision.

Fisher, for plaintiff in error.

Miles, for defendant in error.

The opinion of the Court was delivered by
GIBSON, C. J.—The act of 1840 extends the jurisdiction of the Orphans' Court, in partition, to estates held jointly or in common

[Selfridge's Appeal.]

which have been created by will when the parties, or any of them, are infants; and to cases where the descent has not been altered or interrupted, though the decedent did not die absolutely intestate. The latter provision was, perhaps, superfluous; for wherever exactly the same interest passes by the law that would pass by the will, the devisee takes by descent, and the testator may be said, in language strictly technical, to have died intestate as to the particular land. But in this instance the land did not pass to the legatees at all, either by descent or by the will; and the statute is altogether inapplicable to it. It was converted into personalty by the devise to the executors to sell for payment of the legacies; and on the plain and undeniable principle of *Morrow v. Brenizer*, (2 Rawle 185), as well as *Allison v. Wilson*, (13 Serg. & Rawle 330), the legatees had not an interest that could be bound by judgment. The title passed immediately to the executors, and will pass from them to a purchaser; so that the legatees can have no estate in the land, legal or equitable, inchoate or complete. What remedy, then, have their creditors, when, as here, the executors refuse to execute their trust? A very palpalable one. They may attach the legacies by execution, and compel the executors to sell by a decree in equity under the thirteenth section of the Act of 1836, relative to the jurisdiction and power of the courts. An executor is a trustee, as well as a legitimate subject of equitable control; and by an exercise of the power thus given, the courts have ample power to do justice.

Decree affirmed.

Johnston *against* Bingham.

When powers are granted to several persons to transact private business, all must join in the execution of it. And the rule applies in all cases, whether the duty be ministerial or judicial.

ERROR to the Common Pleas of *Huntingdon* county.

William Bingham against William Johnston and George Kelly. This was an action of ejectment, in which the jury found "for the plaintiff all the land within the survey of Alexander Miller which is not included in the survey of John Engleton; and by consent George Gooshorn and William Brewster are to go upon the ground and fix the lines in accordance with the verdict, and return a draft to the court, on which the court are to enter judgment." The parties subsequently consented that William Reed should be substituted in the place of William Brewster. William

[Johnston v. Bingham.]

Reed went upon the ground and made the survey and draft, and returned it to the court on the 21st December 1842. On the 25th June 1844, the following certificate of George Gooshorn was filed, and at August Term 1844, on motion of the plaintiff, judgment was entered on the verdict by the court:

"I do hereby certify that, some time in November 1842, there was a draft of a survey made by William Reed, Esq., pursuant to an order of court in the case of William Bingham and George Kelly, presented to me for my signature, as I was one of the surveyors appointed by the court to lay down a line according to the decision of the court; and I having run the lines myself at sundry times, and being satisfied with William Reed's survey, I signed the draft and certificate at the time aforesaid."

Bell and *Orbison*, for plaintiff in error, argued that the power given to the surveyors was not well executed: that their duties could only be performed by both going upon the ground and joining in the report; and cited 9 *Serg. & Rawle* 99; 9 *Watts* 466; 7 *Serg. & Rawle* 204; 4 *Dall.* 272.

Miles, contra, that it was but a ministerial act which might be performed by one, especially when the other joined in certifying to the correctness of the work.

The opinion of the Court was delivered by

ROGERS, J.—The propriety of entering the judgment depends on the interpretation of the verdict, coupled with the agreement incorporated into and made part of it. The jury find for the plaintiff all the land within the survey of Alexander Miller which is not included in the survey of John Engleton; and by consent (as it is expressed) George Gooshorn and William Brewster are to go on the ground and fix the lines in accordance with the verdict, and return a draft to the court, on which the court are to enter judgment. As a prerequisite, therefore, to the action of the court, it is expressly required that the persons designated for that purpose should, on the ground, ascertain the precise limits of the land for which judgment should be rendered; the object of the parties being to prevent the possibility of dispute as to the quantity or location of the ground to which the plaintiff should be entitled to possession. Was, then, the plaintiff entitled to judgment on the facts stated? The intention would seem to be clear, that the survey, as well as the return, should be the act of both; for if it were designed that one only should be competent to make it, it was easy to say so by giving the power to the persons named, or either of them, to make the necessary investigation and return. They use the copulative instead of disjunctive conjunction, thereby clearly indicating the intention that both should concur in the survey as well as the return. It was supposed that, inasmuch as

[Johnston v. Bingham.]

this was a matter in one sense ministerial, requiring science, judgment, and professional skill, accuracy would be best attained by requiring the duty to be performed by two persons instead of one. And if this were the understanding, it is not competent for the court to say it was immaterial. Even according to the report of Mr Reed, there appears to have been great difficulty in fixing the lines of the respective surveys, and it is impossible to say what would have been the result had the survey been made under the superintendence and with the advice and counsel of the other appointee. Although Gooshorn, as appears by his certificate, ran the line sundry times, and was satisfied with Reed's survey, it cannot alter the case. It is obvious he never went on the ground after his appointment; and if he did, it was not in the presence of the parties or his colleague. His knowledge of the location acquired before amounts to nothing, although it would have been valuable if he had assisted at the time the survey was last made. It is a rule of law, that when powers are granted to several persons to transact private business, all must join in the execution of the power. And the rule applies in all cases, either ministerial or judicial, unless it be public business of a judicial nature, or public business of a deliberative nature, though not strictly judicial, as to cases where powers are given to corporate bodies. *Commissioners v. Lecky*, (6 Serg. & Rawle 176); *Baltimore Turnpike*, (5 Binn. 481).

But it is asked, what is to be done if the plaintiff fails to obtain the joint services of the persons designated to fix the lines? If this, contrary to all reasonable expectation, should unfortunately occur, the court may set the verdict aside, and grant a new trial; or, perhaps, upon its being made satisfactorily to appear that the persons appointed refuse to do their duty, to appoint an artist to go on the ground and ascertain the boundaries in accordance with the verdict. On a return so made it would be at least within the spirit of the agreement that the court should have power to enter judgment. It would seem to be a harsh construction, to deprive the plaintiff of the benefit of the verdict by the death of one or both the appointees, or the refusal of either to perform their duty. We would wish it to be understood, that although the judgment is reversed, the verdict remains subject to the future action of the court; and that it be their duty to take the necessary steps to carry it into effect.

Judgment reversed.

Gardner *against* Klinefelter.

If a sheriff take a bond for the amount of the purchase money of a tract of land sold upon an execution, he is not entitled to recover interest upon it from the purchaser, who was a judgment creditor of the defendant, as whose property the land was sold, and who ultimately was entitled to and received the money by a decree of the court.

ERROR to the Common Pleas of York county.

Adam Klinefelter against James Lewis, executor of John Gardner, deceased. *Scire facias* upon a judgment in which the parties stated the case as follows, and agreed to consider it as a special verdict.

John Gardner, the defendant's testator, bought at sheriff's sale, on the 3d April 1837, of Adam Klinefelter, the plaintiff, then sheriff of York county, the real estate of Michael Smith, for the sum of \$1000, and executed for the said purchase money, for said Klinefelter, his bond, with warrant of attorney to confess judgment, in the following words and figures, viz :

"3d April 1837. I John Gardner, of York Borough, Pennsylvania, having this day purchased of Adam Klinefelter, high sheriff of the county of York, a certain tract of land containing 190 acres more or less, with the improvements, &c., situate in Manheim township, at and for the sum of \$1000, sold by the said Adam Klinefelter as high sheriff of said county, as the property of Michael Smith; in consideration aforesaid I promise to pay to the said Adam Klinefelter, high sheriff of said county, or his assigns, the just and full sum of \$1000 on the 3d day of April inst. And further, we do hereby empower any attorney of any court of record of this commonwealth to appear for us and confess judgment against us, as for the aforesaid sum, with stay of execution until the day of payment. Witness our hands and seals.

"JOHN GARDNER, [L. s.]
[L. s.]

"For the above property make the deed to Martin Shearer, Esq.

"3d April 1837.

JOHN GARDNER," [L. s.]

Upon which judgment was entered February 20, 1840, to January Term 1840, No. 142, in the Common Pleas of York County, prout said bond, warrant of attorney and judgment. The writ of *venditioni exponas* No. 7 of April Term 1837, upon which said rule was made, was returned by said Klinefelter on the 5th day of April 1837, as follows:—"Tract of land sold to Martin Shearer for the sum of \$1000," and a deed acknowledged to Martin Shearer for said land on the same day, according to the direction of said

[Gardner v. Klinefelter.]

Gardner in writing upon said bond, prout said *venditioni exponas* the return thereto, the said deed and the said direction in writing.

Extract from the record :

" November 5, 1840.—Rule on late sheriff Klinefelter to show cause why he should not bring into court the proceeds of sale with the interest thereon in this case, returnable on the 7th December 1840. December 24th, 1840, sheriff directed to bring into court the principal, and rule discharged as to the interest. December 31, 1840, Mr Klinefelter paid into court \$939.14."

The costs to which the said Klinefelter was entitled, and for which he is liable, amount to \$51.45. On the 7th May 1841, the defendant paid to the plaintiff upon the said judgment the sum of \$1018.33.

If the plaintiff is entitled to interest on his bond from 3d April 1837, till paid, then judgment in his favour for \$281.07. If he is not entitled as above, but is entitled to interest on the unpaid balance of the judgment (being costs), then judgment for him for \$33.75. If he is entitled to interest only from the time he paid the money into court, and only upon the amount paid into court, then judgment for defendant.

On the 4th June 1841, the Supreme Court reversed the decree of the Common Pleas of York county, and decreed the proceeds of the sale of the real estate of Michael Smith to Martin Shearer; which decree was filed in the Common Pleas on 27th September 1841. On the same day, on the application of James Lewis, Esq., executor of John Gardner, deceased, said executor was subrogated to the right of Martin Shearer to receive the proceeds of said sale.

The court entered judgment for plaintiff for \$281.07, which was now assigned for error.

Campbell, for plaintiff in error, cited 1 *Watts & Serg.* 142; 3 *Binn.* 121.

Chapin, for defendant in error, cited 4 *Watts* 49.

The opinion of the Court was delivered by

KENNEDY J.—It is difficult to conceive upon what principle the court below held the plaintiff there, who is the defendant here, entitled to recover interest upon the principal sum mentioned in the bond from its date, the 3d April 1837. It is made payable on the day it bears date; and had it been the intention of the parties that it should have borne interest if not paid on that day, it is probable that it would have been so expressed; especially when we consider the particular circumstances under which it was given. It is said, by the counsel for the executor of Gardner, that Gardner purchased or bid off the property at the sheriff's sale for his client, Martin Shearer, who had a lien upon it more than equal in amount to the purchase money, which was \$1000:

[Gardner v. Klinefelter.]

and being the earliest lien in point of time, as he conceived, he therefore claimed the purchase money. That Gardner purchased for Shearer is clear from the statement of the case, for he directed the sheriff, in writing under his hand, to make the deed perfecting the sale to Shearer, which was accordingly done. And that Shearer claimed the money arising from the sale is equally clear; for after a decree of the court below deciding against his claim to it, and giving it to another, it appears by the case stated that he obtained a decree of this court on the 4th June 1841, reversing that of the court below, and giving the money to him. From these circumstances it may be fairly inferred that the obligation in question was given by Gardner to the sheriff, to be paid only in the event of the sheriff's being called on and required to pay the purchase money to some other than Shearer. But the sheriff was not called upon to do so, as it would seem, until the 5th November 1840, when a rule in the court below was taken upon him to show cause why he should not bring into court the proceeds of the sale, with interest thereon, which was made returnable on the 7th of December 1840. The court made the rule absolute only as to the principal sum, but discharged it as to the interest. After which, on the 31st of the same month, the sheriff paid into court \$939.14, being part of the principal of the purchase money; something less than the balance thereof, after deducting the costs, for which the sheriff was liable, amounting to \$51.45. But, on the 7th May 1841, the executor of Gardner paid to the sheriff \$1018.33, being the amount of the money paid into court by the sheriff, with interest thereon from the time he paid it; so that the sheriff was thus reimbursed, with interest thereon, all the money that he had been required to pay, and all that he can now be said to be bound to pay. Upon what principle, then, is it that he can demand or ought to be allowed more? It must be borne in mind that he acted as an officer appointed by law, and in a ministerial and fiduciary character, in what he did; and that the law is watchful, if not jealous, of its officers as to the manner in which they discharge the duties appertaining to their offices. The sheriff is allowed certain fees as a compensation for all the duties and services that he is required to perform, and is forbidden, under a penalty, to receive, or, at least, to demand more. The object of the law in making such regulation and prohibition was to prevent the sheriff from delaying the execution of the duties of his office, to the prejudice of any one, until he should be paid for it something beyond what the law allowed, or from granting favour to any one by forbearing to do what his duty required with reasonable promptitude. The expediency of the regulation cannot be questioned; and I take it to be the duty of the courts to carry it out to its utmost extent, by applying it to every thing either growing out of or appertaining to the execution of the duties of their officers, whether immediately or medi-

[Gardner v. Klinefelter.]

ately. A sheriff will not be permitted to take of a purchaser, for property sold by him under judicial process, when it may not be convenient for the purchaser to pay the cash in hand, a bond, bill, or note, securing the payment of a larger sum in money than the price for which the property was sold; for if he may add one dollar to the price more than what he is bound to account for himself, he may add fifty or a hundred, and thus practise a course of oppression, if not extortion, which could not be tolerated. But if the sheriff takes a bill for that amount, as in the present case, and he is not called upon for years afterwards to pay the money, and then is only required to pay the price bidden for the property, without interest, to allow him to recover interest on the bill from its date, though he has never even paid all he was required to pay, would in effect, as it appears to me, not only be rewarding him for a breach of his duty, but permitting him to speculate and make profit on judicial sales made by him, by improperly withholding the moneys arising therefrom from the parties entitled to receive the same, as long as possible, that he might, during the interim, receive the interest thereon for his own use and benefit. To allow a sheriff to recover interest under such circumstances would be contrary to the whole policy of the law, which requires from him a faithful and diligent execution of the duties of his office, and will not suffer him to claim or to receive anything that might, in the slightest degree, interfere with his doing so. The judgment of the court below is therefore reversed, and judgment rendered by this court in favour of the plaintiff in error, who was the defendant below.

Judgment reversed, and judgment for defendant.

Sample *against* Coulson.

To make a former verdict, and the testimony therein given, evidence in a subsequent trial of an ejectment, it must have been between the same parties or their privies, and in relation to the same title.

The return of a sheriff found in the office purporting to have been made by the officer, must be taken to have been regularly made; it cannot be disproved.

It would be a violation of the act of frauds and perjuries to permit the establishment of a trust in lands by the proof of parol declarations, made by the purchasers at or after the sale; there being no allegation of the payment of money by the *cestui que trust* or fraud, whereby a resulting trust would be established.

ERROR to the Common Pleas of York county.

This was an action of ejectment by William Coulson against Joseph and Cunningham Sample, for 35 acres of land.

[Sample v. Coulson.]

On the trial of the cause the plaintiff proved that John Sample, Sen. died in possession of the land, and that he had levied upon it since 1808; and then gave in evidence the proceedings of the Orphans' Court, by which it was ordered to be sold by his administrators, and in pursuance thereof a deed from them to Patrick Scott, dated 2d November 1824; and then offered in evidence the record of a former ejectment for the same land, brought to March Term 1832, by William Coulson, executor of Patrick Scott, deceased, against John Sample, Cunningham Sample and Joseph M. Sample; and to prove the testimony of Richard Porter and Thomas Kelly as given on that trial, identifying a certain draft, those witnesses being now dead, and then to give the draft in evidence. This evidence was objected to by the defendants, but the court overruled the objection, admitted the evidence and sealed an exception.

The record showed that on that trial, after the plaintiff had given all his evidence, a verdict was rendered for the defendant upon the following charge of the court:—"The court instructs the jury that, as to the land in dispute, Patrick Scott died intestate; that on his death it went to his heirs, not to his executors: consequently, your verdict will be for the defendants."

The plaintiff in conclusion of his cause offered in evidence the writ of ejectment and the sheriff's return; the defendants objected, alleging and offering to prove that the return was not in the handwriting of the sheriff; admitting that the writ was brought from the prothonotary's office into court. The court admitted the evidence, and sealed an exception at the instance of the defendants.

In the progress of the trial, the defendants gave in evidence a deed, dated the 19th October 1824, of James Johnston and John Kelly, administrators of John Sample, deceased, to Josiah Johnston, and called James Johnston, and then offered to prove by witness that the land mentioned in the last deed was sold by him and John Kelly as administrators, to Josiah Johnston, and was purchased by the latter in trust for Sarah, Catharine and Rebecca Sample, daughters of the deceased and sisters of the defendants, and that it was so declared at the time by him and since; to be followed by proof that they and the defendant with their consent have been in possession ever since the purchase. This was objected to, rejected, and exception taken by defendants.

These several exceptions were the subjects of the errors assigned.

Fisher, for the plaintiff in error. The record of the former ejectment should not have been admitted; the parties were not the same, nor did the plaintiff sue in the same right in which he now sues. 1 *Munf.* 403, 446; *Phil. Ev.* 321. There was no necessity for a cross-examination of the witnesses, for the plaintiff showed no title in himself.

[Sample v. Coulson.]

Mayer, contra, on the same point insisted that the evidence was rightly received: the criterion by which to judge is the power of the party to cross-examine the witnesses. The plaintiff sued merely as a trustee, and calling himself executor was but description of his person; the parties were therefore the same. 11 *Serg. & Rawle* 440; 2 *Watts & Serg.* 438; 17 *Serg. & Rawle* 409; 4 *Yeates* 129; 3 *Yeates* 289; 6 *Watts & Serg.* 51; 1 *Dal.* 120.

The court were right in rejecting the evidence to establish a trust. 2 *Watts* 323; 5 *Watts* 389; 9 *Watts* 35; 3 *Watts & Serg.* 319.

The opinion of the Court was delivered by

SERGEANT, J.—The principal question in this case arises on the 1st and 2d errors, embracing the 4th and 5th bills of exception. The present suit was brought by William Coulson in his own right to recover 35 acres of land which he claimed under a deed made to him in December 1840, by T. S. Williamson, whose title was derived from a sale by the executor of Patrick Scott, by order of the Orphans' Court, on the petition of Scott's heirs in March 1839. A former ejectment had been brought to November 1829, in the Common Pleas of York county, by William Coulson, as surviving executor of Patrick Scott, deceased, against John Sample, Cunningham Sample and Joseph M. Sample, on which a verdict passed for the defendants in August 1833. On that trial the court instructed the jury that Patrick Scott died intestate as to the land in dispute, and that on his death it went to his heirs and not to his executors; consequently their verdict must be for the defendants. On the present trial, the plaintiff offered and the court admitted the verdict and judgment in evidence, and also the testimony given by John Evans, Esq., of the evidence of Richard Porter, since deceased, proving a draft identified by him as having been made by Richard Porter, with a survey at the instance of the administrators of John Sample; also, that T. Kelly, since deceased, was a witness, and that on his examination the defendant's counsel admitted that the draft was the one referred to in the deed.

It would rather seem, from a consideration of the authorities and legal principles on this subject, that the evidence was not admissible. To make a former verdict and the testimony then given evidence in a subsequent trial, it must be between the same parties or their privies, and in relation to the same title. It was competent to the defendants in the former suit to fold their hands as to everything else, and rely upon the incapacity of the plaintiff to recover, and it was upon that ground alone the case was decided. It would not be fair to implicate the defendants at a future day in points which they were not legally bound to regard, and concerning which, though they may have been at liberty to cross-examine, they were not under any obligation to do so, it being

[Sample v. Coulson.]

sufficient for them to say the plaintiff has no capacity to sue, and cannot recover, and on that alone we rely. If it were otherwise, a third person, a stranger to the parties who had the right, might institute a suit under a pretended title, and make other parties liable to be affected by the evidence in a subsequent suit. The plaintiff here stands in the same situation as a third person. It is of no importance, that Coulson who sues now is the same individual who formerly sued. The character in which he sued is the important consideration, and is that by which his legal obligations and rights are to be determined. He does not now claim as executor of Patrick Scott, or under such executor, or under his will, as he did in that suit, but independently of, and in opposition to it, holding the title of the heir, and alleging an intestacy of Patrick Scott. The first of these may be a bad title, and the second a good one; and the decision on the first ought to have no legitimate effect upon the claim on the second. Indeed, if it be admissible at all, as being *inter partes*, and on the title now in question, I do not perceive why it should not have the full effect of one verdict and judgment in ejectment against the plaintiff, which certainly would not be contended. In *Chapman v. Chapman*, (1 *Munf.* 403), George Chapman, the uncle, brought ejectment against George Chapman, the nephew. Afterwards George, the nephew, and his brother John, as heirs of their elder brother Nathaniel, revived a suit brought by Nathaniel, while living, against George the uncle, and the Court of Appeals held the record in the former suit not evidence. One of the reasons given is, that Nathaniel could not have availed himself of the verdict between his younger brother and his uncle, for he was not his heir, nor did he claim the land *under* him; so neither could he be prejudiced by it. In like manner, in the case before us, as William Coulson in the former suit did not claim as heir, the record of that suit would not be evidence for the defendants in the present suit, and therefore not for the plaintiff. So in *Mason's Devises v. Peters' Administrators*, (1 *Munf.* 445), a judgment against executors only is no proof against the devisees of land; for there is no privity between an executor and the heir or devisee of land. In the case of *Hocker v. Jamison*, (2 *Watts & Serg.* 438), this court went upon the ground that the former trial was substantially between the same parties, the plaintiff in the former suit acting on behalf of the plaintiff in the latter; which brings it within a class of cases in which that principle has frequently been decided. We think, therefore, there was error in the admission of the evidence.

The 6th exception has been but little relied upon, and we think there is nothing in it. The writ filed in the office became thereby a record of the office, and must rightly be taken to have been signed by the sheriff, as it purported to be, nor could parol evidence be received to contradict it.

The 7th and 8th bills of exceptions were taken to the rejection

[Sample v. Coulson.]

by the court of evidence offered by the defendants that the administrators of Josiah Johnston purchased in trust for the daughters of the deceased and sisters of the defendants; and it was so declared at the time by him and since, to be followed by proof that they and the defendants, with their consent, have been in possession ever since the purchase. But a trust cannot be established by the proof of parol declarations made by a purchaser at the time of his purchase or afterwards. This would be in direct violation of the provisions of the Act of Assembly to prevent frauds and perjuries, which requires interests in lands to be created or transferred by writing. It is true there are exceptions admitted on equity principles of a resulting trust arising from the payment of money by the *cestui que trust* for the purchaser — or of a parol contract of sale and possession taken and money paid by the vendee — or cases of fraud or mistake in the preparation or drafting of instruments; but a mere parol declaration by a purchaser who has taken the deed in his own name and paid his own money, cannot be admitted as competent to establish a trust in favour of third persons without subverting the provisions and frustrating the design of the statute. This evidence was therefore properly rejected.

11th bill. Nor can the intent or design of the purchaser to take the land for the use of third persons be entered into by evidence other than writing, where the case does not fall within those exceptions which equity has established, and which have been adverted to.

But for the first two errors assigned the judgment is reversed, and a *venire facias de novo* is awarded.

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

Odell *against* Culbert.

The rule of the common law with regard to the admission in evidence of books of original entry is greatly relaxed: such book of a plaintiff who is dead may be given in evidence upon proof of his handwriting.

The demand of a plaintiff as set forth in his declaration is to be considered the sum in controversy in a question of jurisdiction which is limited by statute.

Although a plaintiff recover an amount below the jurisdiction of the court, yet if it be reduced by evidence of set-off, the plaintiff will be entitled to his costs.

ERROR to the District Court of Lancaster county.

Joanna Culbert, administratrix of Michael Culbert, deceased
against Charles Odell, Thomas Keating, James Haughey and Phi-

[Odell v. Culbert.]

lip Gossler, late partners. The case is fully stated in the opinion of the court.

Stevens, for plaintiffs in error.

Frazer, for defendant in error.

The opinion of the Court was delivered by

BURNSIDE, J.—There are two errors assigned in this case. 1st In admitting the account-book of the plaintiff. 2d, In giving judgment for costs. It was in evidence that the plaintiffs in error constructed the first section of the railroad next to Wrightsville, laying the rails, not grading the road, in the latter part of 1839 and beginning of 1840. It was further in evidence that Michael Culbert boarded the hands of Odell & Company under a contract for \$2.25 per week, and found them in whiskey by the directions of Haughey, one of the firm, who appeared particularly to superintend this contract. Several of the hands were examined, as well as others, who proved the contract, the boarding and the furnishing the whiskey by directions of the defendant below. Culbert, who was dead at the time of the trial, kept a book of original entries, in which he charged the whiskey in lump, and opposite each boarder's name a row of short strokes or figures, *one* for each meal; and, in footing it up, called 22 meals a week's boarding. The book was proved to be Culbert's book and in his handwriting. The District Court admitted the book in evidence, and this is the first error complained of.

Taking this book in connection with the parol evidence given on the trial, we do not see that the plaintiffs in error have any just ground of complaint. The English rule, or more properly speaking, the rule of the Common Law, which admitted the party's own shop-book in proof of the delivery of goods therein charged, the entries having been made by a clerk when the books were kept for that purpose, and the entries made cotemporaneous with the delivery of the goods, and by the person whose duty it was for the time being to make them, never was rigidly adhered to in Pennsylvania, nor in any of the United States. *Greenl. Ev.* 137, 144. Hence we find in 1 *Dall.* 239, President SHIPPEN says that here, from the necessity of the case, where business is often carried on by the principal, and many of our tradesmen do not keep clerks, the book proved by the oath of the plaintiff himself has always been admitted. And in 1 *Yeates* 347, it was held that a day-book is *prima facie* evidence of the price of goods, as well as the sale and delivery. Judge HUSTON, in 16 *Serg. & Rawle* 133, says it is difficult to lay down any other rule than that such mode of keeping books as is usual and known to all tradesmen in the same business and all customers, cannot be safely declared bad by the court; and Judge ROGERS, in 2 *Watts & Serg.* 20, that where due proof is made of the entries, the only inquiry on the

[Odell v. Culbert.]

point of admissibility of the book, is whether such facts are disclosed in respect to the delivery of the goods as destroy the right of the plaintiff to have the book submitted to the jury as *prima facie* evidence of the sale and delivery of the goods to the defendant; and Judge KENNEDY, 1 *Watts & Serg.* 467, that where the books of original entry were kept (as in this case) in the form of a ledger, it would not prevent its admission in evidence to the jury. We have relaxed the ancient Common Law rule still further by admitting the books in evidence for the consideration of the jury where the clerk who made the entries is dead or out of the State, on proof of his handwriting, and proof that it was his business to make the entries. 2 *Watts & Serg.* 137. It has long been the universal practice to admit a deceased man's book in evidence, when the book would have been evidence with his oath if living, on proof of his handwriting. I can see no reasonable objection to this practice. Dead men's estates are sufficiently plundered even with this safeguard.

2d. This case was *assumpsit*; the plaintiff declared for \$600 for work, labour and services, for goods, wares and merchandise, and for meat, drink, washing, and other necessities. The pleas were *non assumpsit* and payment. On the face of the pleadings, the District Court had jurisdiction; the verdict was for \$75; neither affidavit nor certificate of counsel was filed. To determine the question of costs we must look into the evidence given by the defendants; we find that in order to reduce the plaintiff's demand, the defendants gave in evidence a judgment from Squire Lloyd's docket, Henry Prenneman for the use of James Haughey against Michael Culbert for debt, \$83.99, entered on the 13th December 1841, in the Common Pleas; also, a judgment or transcript entered in the Common Pleas to April 1843, for \$14.99. These judgments, with their interest and costs, would amount to more than \$100; and the defendants might or might not have set them off in this action. The 5th section of the Act of 1826 gives the District Court jurisdiction in all cases where the sum in controversy exceeds \$100. The demand is the sum in controversy upon a question of jurisdiction. 10 *Watts* 299; 3 *Dall.* 401. Here the demand gave the court jurisdiction. That demand was reduced under \$100 by set-off, and that set-off enables the plaintiff to recover his costs. 16 *Serg. & Rawle* 253; 7 *Watts* 346.

Judgment affirmed.

Maurer *against* Mitchell.

A contract of compromise between the reputed father and the mother of an illegitimate child, by which the former agreed to pay a stipulated sum for the lying-in expenses of the mother and for raising the child, is not founded upon such an illegal consideration as will avoid it: nor will the subsequent death of the child relieve the father from the payment of any part of the stipulated sum.

ERROR to the Common Pleas of *Clinton* county.

Peggy Mitchell against Daniel Maurer. This was an action of debt, in which the following special verdict was found:

We the jurors empanelled and sworn in the above case, do find that, on the 13th day of September 1841, the defendants, Daniel Maurer and Jacob Maurer, did execute and deliver to the plaintiff, Peggy Mitchell, their sealed note or single bill for the sum of \$50, payable the 1st September 1842, being the same single bill on which this action is founded, and which is in evidence. They further find, that at the same time the said single bill was executed and delivered, articles of agreement were entered into by the said Daniel Maurer and Peggy Mitchell, bearing even date with said note, and which fully disclose the consideration of said sealed note or single bill, and which said articles are in the words and figures following, to wit:

Commonwealth v. Daniel Maurer. Fornication and bastardy, on the oath of Peggy Mitchell. In the Court of Quarter Sessions of Clinton county.

It is agreed between Peggy Mitchell, the plaintiff in this cause, and Daniel Maurer, the defendant, that the said Maurer shall pay to the said Peggy the sum of \$250, good and lawful money, for her lying-in expenses and the raising the female child with which she charges the said Maurer of being the father; which said \$250 is to be paid as follows: \$50 in hand, \$50 on the first day of September 1842, and \$50 on the first day of September 1843, and \$50 on the first of September 1844, and \$50 on the first of September 1845; for which payments the said Daniel is to give his notes, with good security; and in consideration thereof the said Peggy Mitchell doth agree firmly to discharge and forever acquit the said Daniel Maurer, his heirs and assigns, from all charges, demands or suits for or on account of the above prosecution; and for all time to come she is not to make further demands of said Maurer for raising and clothing said child, hereby agreeing to take the above specified sum in full discharge of the premises aforesaid; and he, the said Maurer, is to pay the costs that have

[Maurer v. Mitchell.]

accrued in said suit. Witness our hands and seals, the 13th day of September 1841.

Present—JOS. F. QUAY.

DANIEL MAURER, [L. S.]
PEGGY MITCHELL, [L. S.]

And we the jurors aforesaid do further find that on the same 13th of September 1841, the said Daniel Maurer paid to said Peggy Mitchell the sum of \$50, in discharge of the first payment mentioned in said articles of agreement, and made the several notes therein mentioned, with Jacob Maurer as his surety, and that the note in suit is one of the said notes, to wit, the one that was to fall due on the 1st September 1842. And we do further find that the bastard child referred to in said articles of agreement was born on the 13th day of June 1841, and died on the 11th June 1842; and that before the note in suit and the said articles of agreement were executed, the said Peggy Mitchell had charged the said Daniel Maurer on oath with being the father of the said child, and had instituted a public prosecution against him for fornication and bastardy, which was depending in the Court of Quarter Sessions of Clinton county at the execution of said papers, and still is; that no bill of indictment has ever been preferred or found against said Maurer, and that the said prosecution has not been proceeded in or dismissed from the record in any manner. And the jurors aforesaid do further say, that they are ignorant in point of law, on which they ought, upon these facts, to find the issue; that if, on the whole matter, the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly the sum of \$56 dollars debt.

The court below (WOODWARD, President) rendered a judgment for the plaintiff.

Linn and *Hale*, for plaintiff in error, contended that the consideration was illegal, and cited 13 *Serg. & Rawle* 35; *Leigh's N. P.* 23; 1 *Chipman* 137: that the death of the child within so short a period after the contract was entered into relieved the defendant *pro tanto* from his obligation to pay. 5 *Eng. C. L. Rep.* 1; 13 *Eng. C. L. Rep.* 33; 5 *Esp.* 142; 1 *Campbell* 396.

Armstrong, contra, argued that the consideration of the compromise was valid, and cited 2 *Rawle* 24; 3 *Serg. & Rawle* 327; 11 *Serg. & Rawle* 155, 164; 2 *Penn. Rep.* 531.

The opinion of the Court was delivered by

GIBSON, C. J. — It is pretty clear that the consideration of the contract was to be a cessation of voluntary prosecution by the mother, for it is incredible that the father would have been so far actuated by a sense of moral duty as to execute the articles and the single bills, had it been understood that she might continue to

[Maurer v. Mitchell.]

pursue him. She agreed to release him from "all charges, demands, or suits for or on account of the prosecution;" but what charges, demands or suits could she have on account of it, except the prosecution itself? She could give effect to her agreement only by ceasing to press her accusation; and the question is, whether that alone would make the contract of the accused illegal. There certainly was a time when fornication and bastardy stood on the foot of every other offence, and when an agreement to stifle the prosecution of it would have been an illegal consideration. Originally the principal object attempted by the punishment of it was the correction of the offender, the penalty annexed to it being stripes at the whipping-post, or a fixed fine at the election of the convicted; and on this footing it stood, as it was placed by the Act of 1705, till the infamous alternative was commuted by the Act of 1790. Still the pecuniary penalty remained fixed till the Act of 1806 empowered the courts to moderate specific fines; after which the support of the child, where there was one (and no one took the pains to prosecute where there was not), came to be viewed as the substantial, though not the formal, end of the prosecution; and the fine was, in practice, only nominal. Prompted by the general sentiment, the Legislature authorized the Attorney General, by an Act passed in 1819, to enter a *nolle prosequi* in prosecutions for fornication and bastardy "*on agreement between the parties*" after indictment found. Thus the offence, like assault and battery, with which it was associated in that statute, became little more than a private wrong; and when the Legislature authorized the parties to treat it as such between themselves, the contract certainly became legal, so far as they were individually concerned. I therefore am bound to dissent from the dictum of my late learned and able brother, Mr Justice DUNCAN, in *Shenk v. Mengle*, (13 *Serg. & Rawle* 26,) that a contract founded on the abandonment of a prosecution for fornication and bastardy is illegal and void. The parties have certainly a right to let the matter drop, where the Attorney General consents to let them do so; and when the public interest does not forbid it, he may relieve them from the burthen of prosecuting even on compulsion. Surely, then, a contract which looks to that contingency is lawful, at least in the first instance. It may be that a private agreement to hold back, being inconsistent with public policy whenever the prosecution is to go on, would depend for its ultimate effect on the event of his determination; about which I intimate no opinion. In this case, it is true, there has been no bill found on which the Attorney General could exercise his power; but none has been presented, and the prosecution is virtually at an end. The Act of 1819 was not brought into the view of the court in *Shenk v. Mengle*, probably because the professional mind had not become familiar with it, else the legality of the contract would not have been questioned.

[Maurer v. Mitchell.]

Touching the other point of defence, it is sufficient to say that the contract was entire and indivisible. A gross sum was agreed to be given for the relinquishment of the mother's claim, whatever it might be; and though it was to be paid piecemeal, it was not to be graduated to the quantum of the maintenance actually furnished. The mother took upon herself the burthen of the whole; and the chances, on the one side and on the other, must be supposed to have been estimated in the concoction of the contract. The father is therefore not entitled to any deduction by reason of the death of the child.

Judgment affirmed.

Shaw *against* Reed.

The owner of a raft, although not present, is liable for any damage which may be done to the property of others upon the river, occasioned by negligence or unskilful management of his pilot.

ERROR to the Common Pleas of *Clearfield* county.

William C. Reed against Richard Shaw. This was an action on the case, to recover damages for injury done to the plaintiff's raft on the Susquehanna, by which it was wholly lost. It appeared that the plaintiff's raft was lashed to the shore in the Muncy dam, and the defendant's raft, which was conducted by a skilful pilot, the owner not being with it, was coming down the river, and made an effort to land above the plaintiff's raft but failed, in consequence of which it ran against it, broke it loose from its fastenings, and it was driven off, broke up and lost.

The court below (WOODWARD, President) instructed the jury that if the injury done to the plaintiff was caused by the negligence or unskilfulness of the persons who had charge of the defendant's raft, he was liable in this action, although he was not present, and although he had employed men who were reputed to be skilful watermen. The question of negligence as to the situation of the plaintiff's raft, and the manner and time of running the defendant's, were submitted to the jury.

Wallace and Blanchard, for plaintiff in error, argued that the defendant was not liable, that the suit should have been against the pilot. 2 *Bac. Ab.* 151; 12 *Serg. & Rawle* 112; 3 *Stark.* 12; 2 *Stark.* 438; 14 *Pick.* 1; 2 *Stark. Ev.* 34; 1 *East* 106.

Burnside, contra, on the same point cited 4 *Dall.* 20; 5 *Bos. & Pul.* 102; 6 *Whart.* 321; 8 *Pick.* 23; 21 *Pick.* 254.

[Shaw v. Reed.]

The opinion of the Court was delivered by

ROGERS, J.—The judgment is affirmed, for the reasons given by Judge Woodward. Throughout the whole cause Wurtz is treated as the servant of Shaw, and of course Shaw is answerable for any damages caused by his negligence. The raft was constructed by Shaw in the usual mode for market, and committed to the custody of Wurtz, but on what terms he took charge of it does not appear. Wurtz, it seems, employed the hands, but who paid them we are not informed. The case is governed by the principles applicable to the law of master and servant, and it follows that the suit is well brought, as in nothing does it differ from the case of a stage-driver, a captain or pilot of a ship, for whose negligence the owners are unquestionably liable. We think the court right in leaving it to the jury to decide whether there was negligence in the person who had charge of plaintiff's raft, leaving it after tying up, without any one on board. It depends so much on the usage of the river, which the jury is most competent to decide, that we cannot say that in this there was error.

The first and fourth errors were properly abandoned in the argument.

Judgment affirmed.

Cummin's Appeal.

A levy of personal property, upon an execution issued by a Justice of the Peace, does not take away the lien upon real estate created by a transcript of the judgment upon which it issued, filed in the Common Pleas, if the goods levied were not removed or sold by the constable.

APPEAL from the decree of the Common Pleas of *Mifflin* county, appropriating the proceeds of the sale of the real estate of C. Swartz by the sheriff.

The first lien upon the land sold was a transcript of the judgment of a Justice of the Peace. It appeared that after the transcript was filed an execution was issued by the justice, upon which the constable levied a store of goods of the defendant, but did not remove or sell them. The subsequent lien creditor claimed the money on the ground that the execution issued by the justice, and levy upon it, was a satisfaction as to his judgment, and therefore the lien of the transcript should be postponed.

The court below (WILSON, President) was of opinion that the lien of the transcript was not postponed by the levy, and decreed that it should be first paid.

Fisher, for plaintiff in error, argued that the lien of the trans-

[Cunmin's Appeal]

cript was postponed by the execution and levy, and cited 12 *Serg. & Rawle* 37; 2 *Serg. & Rawle* 142; 6 *Watts* 468; 3 *Rawle* 401 343; 17 *Serg. & Rawle*, 436.

Benedict, contra, cited 1 *Wash. C. C. Rep.* 29.

The opinion of the Court was delivered by

KENNEDY, J.—The only question presented in this case is, whether a seizure by a constable of goods, by virtue of an execution issued by a Justice of the Peace upon a judgment obtained before him, which had been made a lien upon the real estate of the defendant by filing and entering a transcript thereof in the court of Common Pleas, be such a satisfaction of the judgment as to discharge the lien of it on the real estate, where the goods were of sufficient value to satisfy the judgment, but the constable did not take possession of them by removing them, but left them in the possession of the defendant in the execution, by whom they were used and disposed of. As between the plaintiff and the defendant in the judgment, it cannot be pretended for a moment that the judgment has been satisfied by the bare seizure of the goods, where the defendant has been left to use and convert them to his own purposes, in the same manner as if the execution had never been issued upon the judgment. The plaintiff has received no benefit or advantage whatever from the seizure, nor was the defendant deprived of any thing by it; so that the parties may be said, notwithstanding the suing out and placing of the execution in the hands of the constable, to have continued *in statu quo*. The natural, if not the inevitable consequence, would therefore seem to be, that the plaintiff had the same right afterwards that he had before, to proceed by an alias or new execution upon his judgment, to have the amount thereof levied out of the personal property of the defendant, if sufficient were to be had, and if not, then out of his real estate. But, it is alleged, although the judgment may still be good and valid as against the defendant in it, that yet it is not so as against subsequent lien creditors of the defendant; or at least that the payment of it out of the proceeds of the real estate of the defendant, must be postponed until all the subsequent liens are satisfied. If any act had been done by the plaintiff in the judgment in question, which could in any way have operated to the prejudice or injury of the subsequent lien creditors, there might be some ground for the position assumed on their behalf. All, however, that the plaintiff in the judgment did, was to issue his execution and place it in the hands of the constable, where it remained without any part of the defendant's property having been removed or disturbed, in any way whatever, by virtue of it; so that any other judgment creditor of the same defendant, entitled to have an execution upon his judgment, could not be said to have been stopped, hindered, or delayed from doing

[Cummin's Appeal.]

so, if he had been so disposed: he, notwithstanding all that the constable did, would have had a right to have sued out an execution upon his judgment, and to have had the goods taken by virtue thereof and sold, and the proceeds arising therefrom applied to the discharge of his judgment, as the goods were not touched or removed under the execution of the administrator of Shem Ash, which is the one in question here. It is true, as has been said, that the constable, by his neglect, may have made himself liable to the plaintiff in the execution for the amount of it; but why should the plaintiff, who has done no act which can be said to have injured either the defendant in the judgment or the subsequent lien creditors, be compelled to give up a fund that is certain, upon which he has a lien, and pursue a remedy that may be doubtful, to say the best of it? We think that his right to have his judgment, or the residue of it, which still remains unpaid, satisfied out of the money arising from the sale of the real estate of the defendant, is supported by reason, and no authority has been referred to or shown, tending even to prove the contrary.

Decree affirmed.

Flinn *against* M'Gonigle.

In order to the admission of secondary evidence of the contents of a paper, its loss must be proved; but slight evidence is required for that purpose, of the sufficiency of which the court must judge.

A covenant of F to become the surety of O to M in a certain note in which G was then the surety, and thereby "relieve and exonerate" the said G as surety, is rightly sued in the name of G.

ERROR to the District Court of *Lancaster* county.

Bernard M'Gonigle against Bernard Flinn. The facts of this case are so fully stated in the opinion of the court as to render any other statement of them unnecessary.

Ford, for plaintiff in error, argued that the present plaintiff could not maintain the action, and cited 7 *Peters* 492; 15 *Serg. & Rawle* 107; 8 *Watts* 362.

Stevens, contra, on the same point, cited 4 *Wend.* 414; 1 *Chit. Pl.* 2-5; 4 *Whart.* 72; 6 *Watts* 182.

The opinion of the Court was delivered by

BURNSIDE, J. — This was an action of covenant, in which the plaintiff below declared on the following deed:—"Whereas, Ber-

[Flinn v. M'Gonigle.]

nard M'Gonigle did, on the 26th day of November last (1841), become the surety of Bernard O'Conner in four respective notes, (bills single), each for the sum of \$400, to John Masterson, Patrick O'Conner, Francis Keennan and Patrick Brady: Now be it known by these presents, that I, Bernard Flinn, of Lancaster township, in the county of Lancaster, do for myself, my heirs, executors and administrators, promise and agree to become the surety of the said Bernard O'Conner in the said four several and respective notes, each for \$400, and thereby relieve and exonerate the said Bernard M'Gonigle as surety as aforesaid. Witness my hand and seal, the 19th of February 1842. **BERNARD FLINN.**" [L. s.]

The plaintiff below having given this deed in evidence, and the four notes referred to, executed by Bernard O'Conner and Bernard M'Gonigle to Masterson, O'Conner, Keennan and Brady, and proved that after actions brought on the notes, by the records, he had paid the judgments on the notes to the attorneys of the respective plaintiffs, as well as notice to Bernard Flinn to defend the suits and the insolvency of Bernard O'Conner his principal tested.

The defendant then proved by the payees of the four notes that they never accepted of Flinn as surety in the place of M'Gonigle, and that they had no part in that agreement. It was admitted no money passed between the parties at the time the covenant was executed, nor any other property.

The plaintiff, to repel this evidence, offered to prove by George Bomberger, the subscribing witness to Flinn's engagement, and others, that at the time of executing the contract there was another executed immediately at and preceding between O'Conner and Flinn which was lost. To prove the loss and the contents and to show that it was an agreement between Flinn and O'Conner, by which Flinn became an equal partner with O'Conner in a contract which the latter held on the New York and Erie railroad, and for the purchase of which the four notes were given by Bernard O'Conner, the contract having been originally held by Bernard O'Conner, Bernard Flinn, John Masterson, Patrick O'Conner, Francis Keennan and Patrick Brady, all of whose interests had been purchased by O'Conner, and the notes for \$400 given to each of the vendors, four of which are those already given in evidence, and for which M'Gonigle was surety for O'Conner. That it was left with the witness, and endorsed upon the first contract, and to prove what that contract was. The plaintiff having proved the execution, and that the paper was lost at the trial before the arbitrators, offered evidence and proved its contents; and this forms the first error for our consideration.

The rules which prevail on this branch of the law of evidence are well settled. If the instrument is lost, the party is required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose; and that a *bond fide*

[Flinn v. M'Gonigle.]

and diligent search has been unsuccessfully made in the place where it was most likely to be found, if the nature of the case admits of such proof; after which his own affidavit is admissible to the fact of its loss. *Greenl. Ev.*, sec. 349, 558, and the numerous cases there cited. It is not easy to define the degree of diligence necessary in the search. Each case must depend on its peculiar circumstances. The question whether the loss of the instrument is sufficiently proved to admit the secondary evidence of its contents, is to be determined by the court. It is a preliminary inquiry, addressed to the legal discretion of the judge. The only matter complained of here is, that Mr Montgomery, who once had the instrument and made a copy of it, was not examined, being absent in Philadelphia. But it was clearly shown, that after Mr Montgomery had the paper, it was produced at the arbitration, and left on the table after the adjournment, and after Mr Montgomery had left the room and gone home. The examination as to the loss of the paper was full and diligent. From the whole evidence it was very clear that there was no probable presumption that Mr Montgomery could have the paper; on the contrary, I think it was clear that it was not in his possession. The court are of opinion there was no error in admitting the secondary evidence. The secondary evidence was full and satisfactory that the paper lost was an assignment of the interest of the four persons who were payees in the notes; that the consideration of the notes was for their interest in the contract in the New York and Erie railroad. The sale was to O'Conner, and M'Gonigle was his bail on the notes. It further appeared that Flinn proposed to O'Conner to buy or sell. It is manifest when O'Conner sold to Flinn he procured the engagement on which this action was founded to relieve his bail. The defendant's counsel below contended that on the deed in evidence M'Gonigle could not maintain his action of covenant, and asked the court to instruct the jury that the instrument upon which the plaintiff had declared gave no right of action. The judge very properly refused to give the instruction requested, but instructed the jury that the covenant on the part of Bernard Flinn was to become the surety of Bernard O'Conner for the four notes mentioned in the deed, and thereby exonerate and relieve Bernard M'Gonigle as surety in these notes; and if the jury found that Flinn did not perform his engagement according to his undertaking, covenant would lie; and this is alleged to be error.

When a bond is made to A, to pay him or a third person a sum of money for the benefit of the latter, the action must be brought in the name of A. 1 *Chit. Plead.* 4. When a deed is made *inter partes*, (that is, between A of the first part and B of the second part), C, a stranger, cannot sue on a covenant therein, though made for his benefit. 1 *Chit.* 4. It must appear that the covenant which is alleged to have been broken was made for the benefit of the person bringing the action. 4 *Wend.* 119. Here the covenant

[Flinn v. M'Gonigle.]

entered into by Bernard Flinn was to indemnify, save and keep harmless Bernard M'Gonigle from the payment of certain notes in which he was bail for Bernard O'Conner. The consideration of these notes was their interest in a contract on the New York and Erie railroad. The railroad contract had been exclusively purchased and vested in Bernard Flinn, who had refused to perform his engagement. M'Gonigle was compelled to pay the notes. Flinn's covenant was broken, and there was no error in the instructions given by the District Court to the jury.

Judgment affirmed.

Brien *against* Smith.

A mortgage given to a surety to indemnify him against loss will pass to a third person, who paid the money for the surety on the faith of an agreement that the mortgage should be assigned to him.

ERROR to the Common Pleas of *Adams* county.

John L. Smith, assignee of Alexander Neill, against John M'Pherson Brien. This was a *scire facias* sur mortgage, in which the defence was made by the judgment creditors of the defendant.

On the 14th November 1840, John M'P. Brien, the defendant, gave his note, with James A. Buchanan and Alexander Neill as sureties, to the Bank of Hagerstown for \$7000, payable at sixty days after date. Brien made partial payments on the note; and on the 21st December 1842, there being still due upon it \$5028, he executed a mortgage, on which this suit was brought, to Alexander Neill, to indemnify him as surety. In the following May Brien was declared insolvent according to the laws of Maryland; and Neill, being the only responsible party to the note, was called on to make provision for its payment. In this state of things, Neill being required to pay the money due on the note, his principal and co-surety both being irresponsible, an arrangement was made between him and the plaintiff in this suit, John L. Smith, by which Smith was to furnish the money to pay the note to the bank and take an assignment of the mortgage, to be executed by Neill. In pursuance of this arrangement, according to the evidence in the case, Smith paid the amount due on the note subject to the order of Neill, who applied it to the payment of the note; and on the 6th of June following executed an assignment of the mortgage to Smith, who claimed to recover in the present suit a judgment against the mortgaged premises for \$3058.58, on account of the money which he paid for the use and relief of Neill.

[Brien v. Smith.]

The defendant contended that, by the payment of the note to the bank, the mortgage given as an indemnity to Neill, the surety, was extinguished; that Smith, therefore, acquired no right by the assignment of it, and consequently could not recover in this suit, and especially as the money was paid on the 23d of May, and the assignment was not made until the 6th of June.

The court below (DURKEE, President) instructed the jury that the plaintiff had a clear and indubitable right to recover.

Cooper, for plaintiff in error, contended that the payment of the debt by Smith to the bank, on the 23d May, extinguished the mortgage, and there was nothing afterwards, on the 6th June, to assign to the plaintiff. 4 *Rawle* 252; *Story's Eq.*, sec. 1013.

Smyser and *Reed*, contra. Whether the mortgage was extinguished by the payment of the debt depended upon the agreement and intention of the parties. 6 *Johns. Chan.* 395; 4 *Whart.* 410; 8 *Watts* 148; *Pitman on Prin. and Surety*, (40 *Law Lib.* 93). Here the assignment was made in pursuance of the original design of the parties, and was the consideration for the payment of the money.

PER CURIAM.—The plaintiff, Smith, stands in the place of Neill, the mortgagee; and why shall he not have the same remedy? Because, says the defendant's counsel, the condition of the mortgage was to save harmless Neill, and not Smith, his assignee, who paid the original debt; and it consequently has not been broken. But the payment of the debt for which Neill was surety was in effect his payment, and not the payment of Smith, who furnished the money at his request, and on the security of the mortgage. Had Neill received this money in the first instance, raised as it was on the security of the mortgage, and paid it in extinction of the original debt with his own hand, there would not be a doubt that the contingency had happened to his disadvantage, against which the mortgage was a security; and it happened in effect, when Smith paid it with the consideration of the assignment. The money which constituted that consideration was Neill's money; and the payment was his. That is not all; for Neill is ultimately bound to Smith for so much paid to his use at his request: and in every aspect the plaintiff is entitled to recover.

Judgment affirmed.

Devor *against* M'Clintock.

Upon the erection of a new county out of part of an old one, the latter may enforce the payment of taxes due before the separation by a treasurer's sale; and upon such sale being made and a purchase by the county, it is bound to pay the taxes which accrue subsequent to the division; and if they be not paid, the new county may collect them by a treasurer's sale of the land, and the purchaser will have a title superior to one made by the commissioners of the old county.

A bond given to the treasurer for the surplus money "arising from the sale of a tract of unseated land to the said J. M., situate in Rye township, in the county of Perry, containing twenty acres," is sufficiently descriptive of the land.

ERROR to the Common Pleas of *Perry* county.

John M'Clintock against James H. Devor, Esq. This was an action of ejectment for twenty acres of land, in which each party claimed under the same original title.

The land was originally in Cumberland county, and that part of it which was erected into a new county, called Perry, in 1820. Taxes were regularly assessed upon it in Cumberland county from 1796 to 1809, and in 1824 it was sold for their payment by the treasurer of Cumberland county, and the commissioners became the purchasers. In 1831 they sold the land and the defendant became the owner of that title.

Taxes were also assessed upon it in 1823-4-5, by the commissioners of Perry county, and their treasurer sold it for their payment, in 1830, to John M'Clintock, the plaintiff, who received a deed therefor, and gave a bond for the surplus purchase money, which thus described the land: "being the surplus money arising from the sale of a tract of unseated land situate in Rye township, in the county of Perry, containing twenty acres."

The positions taken by the defendant below were: that the land was not subject to assessment and sale while it belonged to the county of Cumberland, and that the surplus bond should not have been received in evidence, because it was not sufficiently descriptive of the land.

HEPBURN, President, ruled both these points in favour of the plaintiff, for whom the jury rendered a verdict.

Tod and *Devor*, for plaintiff in error, on the first point referred to the Act of 1820, dividing Cumberland county, *Pamph. Laws* 92, sec. 5; 5 *Watts & Serg.* 540, 426; 4 *Serg. & Rawle* 355; 6 *Watts & Serg.* 475; 3 *Watts & Serg.* 328; 6 *Watts & Serg.* 520. As to the bond not being sufficiently descriptive, 7 *Watts* 474.

Watts, for defendant in error, cited 6 *Watts & Serg.* 520; 13 *Serg. & Rawle* 360; 1 *Watts & Serg.* 166.

[Devor v. M'Clintock.]

The opinion of the Court was delivered by

GIBSON, C. J. — The land in dispute was sold by the treasurer of Perry county, for taxes assessed on it after the organization of that county; and *primâ facie* the plaintiff, who became the purchaser, therefore has a title. Against it the defendant sets up a previous sale by the treasurer of Cumberland to the commissioners of that county, who had bid the land off under the fifth section of the Act of 1815; and a conveyance from those commissioners to the defendant's vendor, a short time subsequent to the conveyance by the treasurer of Perry to the plaintiff. Thus, it is seen, the sale to the plaintiff was for taxes assessed by Perry while the land was the property of Cumberland; and why shall it not prevail against Cumberland or its vendee? It is not disputed that it would have prevailed had Cumberland conveyed before the taxes were assessed; but what matters it whether the land, at the time of assignment, was the property of a county or of an individual? A county is not even a quasi sovereign in matters beyond its confines; and when it owns land, as it may, within another jurisdiction, it is bound to pay the charges on it, like any other corporation. What, then, was to be done? Cumberland was bound to pay the taxes due on its land to Perry; and having done so, it would have been at liberty to charge the land with the amount, in addition to the taxes due to itself. But it is said the words of the statute authorize the commissioners to charge lands bid off by them for the county with no other taxes than those assessed by themselves. It is certain that the present case has not been provided for by the letter of the enactment, but it is decisively within the spirit and meaning of it. In point of reason, it is indifferent which county has assessed the tax, as the land must bear its burthen somewhere; and by charging it in Cumberland, it would have been discharged of just so much in Perry. A disbursement by Cumberland in ease of the land in Perry would not have been officious, but a payment on compulsion, which is equivalent to previous request; for it was absolutely necessary to the preservation of Cumberland's title that it should discharge the taxes owing to Perry; and justice would have required the land to be charged with so much as taxes due to Cumberland. We have determined that a county may sell for taxes after the land has passed from its jurisdiction; and as it may sell, so may it buy. But it would be of little use to buy, by paying out of its treasury more than could be brought into it on a resale. Cumberland, therefore, was bound to pay the taxes assessed on its land by Perry; and having failed to do so, its title passed by the sale to the plaintiff.

The objection that the bond is not sufficiently descriptive of the land is unfounded. The condition is to pay the surplus money "arising from the sale of a tract of unseated land to the said John M'Clintock, situate in Rye township, in the county of Perry, containing twenty acres." This description is

[Devor v. M'Clintock.]

conveniently certain, and policy requires that no more should be exacted. The bond which was held insufficient in *Bartholemew v. Leech*, (7 *Watts* 472,) had nothing in it which could be referred even remotely to the land for purposes either of notice or of lien; here it can be traced to the land with certainty, which is all that would be necessary to put a purchaser on inquiry.

Judgment affirmed.

Creigh against Shatto.

IN an action of ejectment by a vendor against a vendee, to compel the payment of the purchase money, it is essential to the plaintiff's right to recover that he show a good title to the land vested in himself.

A sheriff's sale of land as the property of a vendee who has not paid the whole amount of his purchase money or received a deed of conveyance, will not divest the lien of a judgment against the vendor.

ERROR to the Common Pleas of *Perry* county.

This was an action of ejectment by Solomon Shatto against John D. Creigh, to compel the payment of a balance of purchase money by the defendant, who purchased the land from the plaintiff.

The plaintiff gave in evidence the articles of agreement between the parties and settlement, by which the defendant agreed to pay a judgment which was against the plaintiff, and a lien on the land amounting to \$185, but which he did not pay, and it was collected from the plaintiff by execution. The plaintiff brought into court a deed of conveyance for the land, which he filed, and claimed to recover a verdict for the land to be released upon the payment of the \$185. The land had been sold by the sheriff as the property of John D. Creigh, and purchased by S. Alexander, who contended that the plaintiff was not entitled to recover: first, because he had not proved that he had a perfect title to the land; and second, because the lien of the judgment, the payment of which was sought to be enforced, was divested by the sheriff's sale.

The court below ruled both these points against the defendant, and the jury rendered a verdict for the plaintiff to be released upon the payment of \$185.

Todd and *Reed*, for plaintiff in error, cited 14 *Serg. & Rawl* 257.

Watts, contra, cited 8 *Serg. & Rawl* 425, 440; 8 *Watts* 422 2 *Watts* 478.

[Creigh v. Shatto.]

The opinion of the Court was delivered by

ROGERS, J. — This is a proceeding in the nature of a bill in chancery to compel the payment of purchase money. The plaintiff proceeds by ejectment on his legal title, the defendant defends on his equitable title, as by bill for an injunction. In all cases of a similar kind, in analogy to the rule in chancery, we deem it sufficient to entitle the vendor to a decree that the title be good at the trial, without regard to its condition when suit is commenced. In this way justice is done to both parties, without the delay and vexation arising from turning the parties round to a new suit, the court taking care to order the party in default to pay the costs. In chancery, before decree the title is referred to a master; and if, on coming in of his report, the title be found to be incurably defective, it is an answer to the bill; for it is a settled and invariable rule, that a purchaser shall not be compelled to accept a doubtful title, nor inequitable terms; nor will a court of equity compel a person to take an estate which it cannot warrant to him. No title having been shown in the vendor, none produced or tendered on the trial, the court was asked to instruct the jury that the plaintiff could not recover; but this instruction they refused, because the plaintiff had deposited his deed for the land, to be delivered in payment of the purchase money: they supposed it was all the purchaser had a right, under the circumstances, to demand. There is nothing that I can conceive peculiar in this case, to make it an exception. It is the ordinary case of an agreement to convey by a good and sufficient deed, at a certain fixed time, for a given sum of money. The vendee took possession of the tract, but there is nothing appearing by which he waives his undoubted right to a good title. Indeed, so far as appears, the default is in the vendor, who was not in a condition to perform his part of the agreement at the time fixed, on account of incumbrances existing on the land. There is, therefore, nothing in the way of the purchaser to prevent him from insisting upon a strict performance of the contract. It must be observed that the question is not whether the plaintiff is bound to tender a deed before suit brought, but whether, before the decree, the vendee is entitled to receive from the vendor an indefeasible title, clear of all incumbrances. Now, that he is entitled to such a title cannot be doubted: and how can the Court assure him a title unless the title deeds are produced for inspection? By this means only can they tell whether the title be good or bad. It may be that the vendor's title is unexceptionable, but the mistake is in supposing that the deed from Shatto to Creigh was all that was required, whereas the vendee had a right to inspect the title to Shatto. The deed from him would be of little service if it should turn out that he had no title. It would be an extraordinary proceeding, as is said by Mr Sugden, in his *Treatise on Vendors* 230, for a Court of Equity to compel a purchaser to take an estate which it cannot warrant to

[Creigh v. Shatto.]

him. It hath, therefore, become a settled rule, that a purchaser shall not be compelled to accept a doubtful title; nor will he be forced to take an equitable title: nor will a case be directed to the judges as to the title, unless the purchaser be willing that it should; and even if a case should be directed, and the judges were to certify in favour of the title, yet a specific performance would not be decreed unless the court itself were satisfied of the equitable as well as the legal title of the vendor. And so careful is a Court of Chancery to assure the title of the vendee, that although the judges certify in favour of the title, and there is no equitable objection to it, yet if the point of law is very doubtful, the purchaser may require another case to be directed, which, it seems, will not be sent back to the same court. It is, however, proper to say that the purchaser must show in what particular the title is defective. And the justice of these rules is apparent; for it may be, if the judgment be affirmed, the defendant may be compelled to pay for land for which he gets no title whatever, in direct contravention of the contract. The plaintiff having deposited his deed with the prothonotary, to be delivered on payment of the balance of the purchase money, the jury, under the direction of the court, gave a verdict for the plaintiff to be released on payment of \$170.15 debt, with six cents damages and six cents costs, by the 1st April 1845, with interest from the date of the verdict. On this verdict a judgment is rendered, the effect of which is to vest an absolute title to the land in the plaintiff, provided the defendant fails to pay the amount of the verdict within the stipulated period. Time is the essence of the verdict and judgment, and becomes a material part. Care, however, should be taken to prevent oppression, and against this the Court will studiously guard. But how will it be in case a writ of error is taken within the period fixed for the payment, and the time expires before it is disposed of by the Supreme Court, and the judgment should, unexpectedly to the defendant, be affirmed? Will the defendant be estopped from avoiding the forfeiture by payment of the money due? It is proper to say that in such case the court can prevent injustice by giving further time for payment. As this is a case in equity, we can so modify the decree as to prevent the injustice which would arise from an absolute affirmance of the judgment. As where, for example, the amount remaining unpaid is inconsiderable in comparison with the value of the land.

With the exception already noted, we see nothing wrong in the direction of the court. The case comes directly within the principle of *Auwerker v. Mathiot*, (9 Serg. & Rawle 397,) where it is ruled that the judgment creditors of a vendee of land who has paid part of the purchase money, and has possession of the land, but has received no deed, are entitled to the proceeds of the sale of his title under an execution, in preference to the vendor. The property was sold on a judgment against the purchaser, and as

[Creigh v. Shatto.]

he had but an equitable title, that only passed to the sheriff's vendee. The case of *Auwerter v. Mathiot* decides that the creditors of the purchaser alone are entitled to the proceeds. From this it follows that, as the prior judgment creditor could claim none of the money arising from the sheriff's sale, his lien is not discharged. The prior judgment creditor is only entitled to participate in the proceeds when the whole interest is sold, and passes to the sheriff's vendee.

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

Stoner *against* Stroman.

A *scire facias* will not lie against the personal representative of a deceased defendant in a joint judgment, although it may be suggested in the writ that a surviving defendant in the same judgment is utterly insolvent.

ERROR to the Common Pleas of *York* county.

The Commonwealth of Pennsylvania for the use of the administrator of Christian Stoner, deceased, against Peter Ahl, administrator of John Stroman, deceased. This was a *scire facias* upon a judgment, and the question presented was raised by a general demurrer to the writ, which was as follows :

York County, ss.—The Commonwealth of Pennsylvania to the sheriff of York county, greeting :

Whereas, the Commonwealth of Pennsylvania, heretofore, to wit, in August Term, in the year 1824, in our Court of Common Pleas of said county, and by the judgment of the same court, recovered against Martin Gardner, David Gardner, George Spangler and John Stroman, a certain debt of \$7000, and also the sum of \$13.09 for said Commonwealth's damages, which said Commonwealth had sustained, as well by reason of the detention of said debt, as well as for costs and charges by said Commonwealth in the suit in that behalf expended, whereof said Martin Gardner, David Gardner, George Spangler and John Stroman were convicted, as by the record and proceedings thereof remaining in the same court may appear ; which said judgment so recovered against said Martin Gardner, David Gardner, George Spangler and John Stroman, as aforesaid, was had and obtained upon a certain writing obligatory, bearing date the 25th day of March, in the year 1818, and sealed with the seals of said Martin Gardner, David Gardner, George Spangler and John Stroman, whereby they became held and bound unto said Commonwealth in said sum of \$7000, to be paid to said Commonwealth when they should

[Stoner v. Stromac.]

be thereunto afterwards requested, with and under a certain condition to said writing obligatory subscribed, whereby it was declared that if said Martin Gardner and David Gardner, the administrators of all and singular the goods, chattels and credits of Martin Gardner, the elder, late of Hellam township, deceased, should make or cause to be made a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which had or should come to the hands, possession or knowledge of them, the said Martin Gardner and David Gardner, or into the hands and possession of any other person or persons for them, and the same so made did exhibit or caused to be exhibited into the Register's office, in the county of York, at or before the 25th day of April then next ensuing; and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased, at the time of his death, which at any time after should come to the hands or possession of the said Martin Gardner and David Gardner, or into the hands and possession of any person or persons for them, did well and truly administer according to law: and further did make or cause to be made a true and just account of their said administration at or before the 25th day of March, in the year 1819, and all the rest and residue of said goods, chattels and credits, which shall be found remaining upon said administration account, the same being first examined and allowed of by the Orphans' Court of the county of York, should deliver and pay unto such person or persons respectively as said Orphans' Court by their decree and sentence, pursuant to the true intent and meaning of the law now in force in this Commonwealth should limit and appoint: and if it should thereafter appear that any last will and testament was made by said deceased, and the executor or executors therein named, did exhibit the same into said Register's office, making request to have allowed and approved accordingly, if the said Martin Gardner and David Gardner, being thereunto required, did surrender and deliver the said letters of administration, approbation of such last will and testament being first had and made in said Register's office, then the said obligation was to be void and of none effect, or else to be and remain in full force and virtue. And whereas said Commonwealth of Pennsylvania for the use of Henry Stoner and Daniel Dietz, administrators of Christian Stoner, deceased, hath suggested a certain breach in the said condition of the said writing obligatory, to wit, that said Martin Gardner and David Gardner, administrators as aforesaid of said Martin Gardner, the elder, deceased, did not well and truly administer according to law the said goods, chattels and credits of said Martin Gardner, the elder, deceased, at the time of his death, which came to the hands and possession of them the said Martin Gardner and David Gardner, administrators as aforesaid of said Martin Gardner, the elder, deceased, in this, that said Henry Stoner and Daniel Dietz, admi-

[Stoner v. Stroman.]

nistrators as aforesaid, in the term of November, in the year 1841, in our said Court of Common Pleas of York county, and by the judgment of said court, recovered against said David Gardner, who survived said Martin Gardner, administrator of said Martin Gardner, the elder, deceased, for the proper debt of said Martin Gardner, the elder, deceased, as well a certain debt of \$749.21 as also \$44.17½, which in and by the same court were then and there adjudged to said Henry Stoner and Daniel Dietz, administrators of said Christian Stoner, deceased, as aforesaid, for the damages sustained by the detention of said debt, as for their costs and charges, by them in their suit in that behalf expended, whereof said David Gardner, surviving administrator of said Martin Gardner, the elder, deceased, was convicted, as by the record and proceedings thereof remaining in the same court may appear, which said judgment and record remain in full force and effect: and thereupon afterwards, that is to say, in the Term of January 1842, it was considered, in and by the same court, that said Henry Stoner and Daniel Dietz, administrators of said Christian Stoner, deceased, should have execution against said David Gardner, surviving administrator of said Martin Gardner, the elder, deceased, to be levied of the goods and chattels which were of said Martin Gardner, the elder, deceased, at the time of his death, in the hands of said David Gardner, surviving administrator of said Martin Gardner, the elder, deceased, to be administered, as by the record and proceedings thereof remaining in the same court more fully appears; and said Commonwealth for the use aforesaid, in fact says, that at the time of the award of said execution as aforesaid, to wit, on the 18th day of December, in the year 1841, at York county aforesaid, divers goods and chattels, which were of said Martin Gardner, the elder, deceased, at the time of his death, of great value, to wit, of the value of the debt and damages last aforesaid, had come to the hands of said David Gardner, administrator as aforesaid, to be administered, and which said goods and chattels, said David Gardner, administrator as aforesaid, afterwards, to wit, on the day and year last aforesaid, at York county aforesaid, eloiigned, wasted and converted to his own use: and said Commonwealth, for the use aforesaid, further says that said David Gardner and said John Stroman survived said Martin Gardner and said George Spangler, they, the said Martin Gardner and George Spangler, having died since the date of said writing obligatory, and said John Stroman has died since the death of said Martin Gardner and George Spangler, and said David Gardner survives said John Stroman, and is insolvent; and that said suit to August Term 1824, was not prosecuted by nor at the instance of said Christian Stoner, nor his administrators, but by another creditor. And by said breach of the aforesaid condition of said writing obligatory, said Commonwealth for the use aforesaid, says that said Henry Stoner and Daniel Dietz, administrators as afore-

[Stoner v. Stroman.]

said of said Christian Stoner, deceased, have been aggrieved and sustained damage, to wit, the sum of \$7000, and for the same said Commonwealth for the use aforesaid, hath besought us to provide a proper remedy; and we being willing that what is just in this behalf should be done, according to the form of the Act in such case made and provided, do command you that by honest and lawful men of your bailiwick, you summon Peter Ahl, administrator of said John Stroman, deceased, to appear before our Judges at York, at our Court of Common Pleas, to be held on the first Monday of April next, to show cause why execution should not issue on said first mentioned judgment, so obtained as aforesaid in August Term, in the year 1824, to be levied of the goods and chattels of said John Stroman, deceased, in the hands of him the said Peter Ahl, administrator as aforesaid, to be administered, for the damages to be assessed by reason of the said breach of said writing obligatory, if it shall seem expedient to said Peter Ahl, administrator as aforesaid, so to do, and further to do and receive what our said court shall then and there consider of him in this behalf. And have you then and there this writ. Witness, the Honourable DANIEL DURKEE, at York, the 6th day of January 1845.

The court below, (DURKEE, President), rendered a judgment on the demurrer for the defendant.

Hambly, for plaintiff in error, in support of the writ, cited 1 Binn. 123; 7 Serg. & Rawle 354; 6 Serg. & Rawle 266.

Fisher and Mayer, contra, cited 6 Serg. & Rawle 266; 8 Serg. & Rawle 457; 16 Serg. & Rawle 416; 4 Watts 325; 2 Watts 110; 1 Watts 437; 8 Watts 159.

The opinion of the Court was delivered by

KENNEDY, J.—It cannot be questioned that the judgment obtained against the obligors in an action brought against them jointly on the bond in 1824, as recited in the *scire facias* sued out in this case against the personal representatives of John Stroman, a surety in the bond, who has died since the judgment, leaving David Gardner only, one of the principals named in the bond, surviving, and who still survives, merged the bond so that no subsequent action against the obligors, either jointly or severally, could be maintained thereon, and judgment had against them in it. *Higgins' case*, (6 Co. 44); *Putt v. Rawstern*, (Pollex. 641); *Cro. Jac.* 73; *Brown v. Wootton*; *quia transit in rem judicatam*; 2 Ventris 348. This being the case, it is therefore clear that a person for whose benefit the bond may have been originally taken, must be confined to the judgment, and proceed by writ of *scire facias* upon it for redress, if he has been injured by the conduct or neglect of the principal or principals in the bond. This, in-

[Stoner v. Stroman.]

deed, would seem to be the course which is directed to be pursued in suing and proceeding afterwards upon administrators' bonds by the fifteenth section of the Act of the 27th of March 1713, entitled "An Act for establishing Orphans' Courts," 1 *Smith L.* 81. And hence it is, if there be a judgment against two, and one die, a *scire facias* lies against the *other alone*, reciting the death; and he cannot plead that the heir of him that is dead has assets by descent, and demand judgment if he ought to be charged alone; for, at common law, the charge upon the judgment being personal survived; and the statute of *Westm. 2. 13 Ed. I. c. 45*, that gives the *elegit*, does not take away the remedy of the plaintiff at the common law, and therefore the party may take out his execution which way he pleases, for the words of the statute are *sit in electione*. But if he should, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or *audita querela*. 5 *Bac. Abr. Tit. "Obligations," p. 165 (Wilson's ed.)*, and the cases there cited. Also *Sergeant Williams' note* (4) in *Underhill v. Devereux*, (2 *Saund. 72, h. 72, i.*) In this same note, page 72, *n.*, Sergeant Williams lays it down, that where there are several defendants, and one of them dies before execution, since the charge upon the judgment survives as to the personalty, though not to the realty, as we have already shown, the plaintiff may have a *scire facias* framed upon the special matter, namely, against the survivor, to show cause why the plaintiff should not have execution against him of his goods and chattels, and of the moiety of his lands; and against the heir and terre-tenants of the deceased, to show why the plaintiff should not have execution of a moiety of the lands of the deceased, without mentioning any goods; for which he cites Chief Justice Holt, in *Paxton v. Hall*, (*Carth. 107.*) In which case it was held by the court that the *scire facias* ought to be joint against the survivor and the heir and terre-tenants of the deceased defendant, when the plaintiff intended to charge the land, and would not lie against the heir and terre-tenants alone of the deceased defendant. And according to the doctrine laid down above, it was held by this Court, in *The Commonwealth for the use of Bellas v. Miller's Administrators*, that a *scire facias* to revive a judgment against the administrator of a joint defendant therein, who died first, could not be supported; for, as it was said by the Court, it is clear law that a plaintiff who has recovered against a number can have execution only against the survivors, the goods of those who have died being discharged. And in *The Commonwealth for the use of Huston v. Mateer*, (16 *Serg. & Rawle 416.*) where a judgment had been obtained upon an administration bond against three jointly, one of whom died after judgment, it was ruled that, as the judgment bound their real estate, a *scire facias* would lie against the survivors and the executors of the deceased; not, however, to charge

[Stoner v. Stroman.]

the personal estate of the deceased, but the real estate merely, in regard to which the terre-tenants might come in and defend, as it was said; but now, since the passage of the Act of the 24th of February 1834, requiring the widow, heirs or devisees, and the guardians of such as are minors, to be made parties, where the plaintiff intends to charge the real estate of a deceased, it may perhaps be indispensably necessary to make them parties to the *scire facias*, according to the 34th section of the Act.

But the object of the proceeding in the present case is to charge the personal estate of the deceased defendant in the judgment, if not the real estate also, without any regard to the survivor in the judgment; and with this view the *scire facias* has been sued out against the administrator, the personal representative of John Stroman, the deceased, alone, alleging as a reason for looking to his estate generally for the recovery of the debt demanded, that David Gardner, the only survivor in the judgment, is insolvent. But it appears, also, from the plaintiff's own showing in the *scire facias*, that the deceased John Stroman was a surety merely in the bond upon which the judgment was obtained, and that the judgment was obtained in an action brought on it against him and the obligors therein named jointly. And it also further appears by the plaintiff's showing in the *scire facias*, that the judgment upon which the *scire facias* is founded was not obtained in a suit brought by him on the bond, for or on account of any neglect or refusal on the part of the principals therein, being the administrators of Martin Gardner the elder, deceased, to pay the debt demanded in this suit, but instituted by another person, claiming to be a creditor of the said Martin Gardner the elder. The circumstance that the original suit was brought by a third person for his exclusive benefit, without any advice or direction on the part of the present plaintiff, was introduced into the *scire facias*, I presume, for the purpose of showing that he ought not to be bound by the judgment as a joint judgment against the obligors in the bond, but have the right, if more advantageous to him, of considering it as a judgment against each severally. It has, at least, been made the ground of an argument to this effect. To admit and sanction such position, however, would be to overturn the settled rule of law in that behalf, which allows the party who has a right to sue upon such bond, executed by several persons binding themselves jointly and severally, either to sue them jointly or severally at his election: but having made his election by suing them jointly in one and the same writ, and having obtained a joint judgment against all, he is thereby concluded, and cannot afterwards proceed against them severally. The character of the judgment being thus fixed, becomes irrevocable, unless it can be reversed for error. And it must of necessity belong to the person who first sues upon the bond, that has a right to do so, to elect and determine whether the obligors shall be sued

[Stoner v. Stroman.]

jointly or severally; for it may be that he is the only person in being at the time who has a right to sue; or if there be others, he may not know them, or any thing of their claims; and it is their own neglect that they do not sue first, if they had the right to do so. But the original suit, in which the judgment was had, was brought as long ago as August 1824, upwards of twenty years before the suing out of the *scire facias* by the present plaintiff, which was not returnable in the court below until the first Monday of April 1845. Although the judgment, when obtained, may have bound the real estate of John Stroman, the intestate of the defendant, if he had any, yet, as it does not appear that any means were used to preserve and continue the lien of it longer than five years, when, by the Act of Assembly passed in that behalf, it would have expired, that may possibly be the reason why the plaintiff did not pursue the usual, and, indeed, the only approved course, as it would seem, by suing out a writ of *scire facias* against the survivor, and the widow, heirs, devisees or terre-tenants of the deceased, so as to charge the real estate of the deceased, if there were any bound by it at the time of his death. Though it is admitted that this is the usual as well as the correct course generally, yet it is claimed that the insolvency of the surviving defendant in the judgment furnishes good ground for an exception to such general course. It is not necessary to decide whether, if John Stroman had been a principal in the bond on which the judgment was had, and had participated in the benefits which were expected to be derived from the administration of the estate of Martin Gardner the elder, his personal representatives could be properly called on for payment of the debt in question or not; for, as he was only a surety, and could derive no possible advantage from the giving of the bond, it is clear that his death discharged his personal estate from all liability to the judgment.

This principle is established by the decision of this Court in *Weaver et al. v. Skryock, executor of Brotherton*, (6 Serg. & Rawle 262.) There it was held that by the death of the surety, the principal being still in full life, who had executed a joint bond with the principal, the debt survived as well in equity as at law against the survivor, and that no suit could be maintained against the executor of the surety for the recovery of a balance of the debt which remained unpaid by the principal, who had become insolvent. It is true the case just cited was a case of a joint bond, where the charge upon it was merely personal; but it has been shown by the authorities already cited, that the charge upon a judgment at common law is also merely personal, and therefore survives against the surviving defendant in a joint judgment, the same as against a surviving joint obligor in a joint bond. The *Statute of Westm. 2, 13 Ed. 1, c. 45*, does not alter or change the common law in this respect; it only gives the plaintiff in the judgment a remedy by writ of *elegit* against the lands of the survivor

[Stoner v. Stromen.]

and the deceased, but not against the goods or personal estate of the latter. And even as regards the real estate, the plaintiff is not at liberty, as it would seem, to proceed against the lands of the deceased alone; and hence the *scire facias* sued out with a view to charge the lands of the deceased defendant must also be against the survivor as well as the terre-tenants of the lands of the deceased bound by the judgment. For it seems that where the lands of several are charged jointly with a debt, it shall not lie wholly upon the survivor; as in the case of a recognizance binding the lands of the recognizers. See *Sergeant Williams's Note* (4), 2 *Saund.* 51. But it is otherwise in the case of a bond given by two, where one dies before judgment: there the survivor shall be charged alone. *Lompton v. Collingwood*, (4 *Mod.* 315). And so when a judgment in debt is had against two, one of whom died, the plaintiff may proceed by *scire facias* against the survivor alone, so as to have execution of his personal property at least, though possibly not of his lands, in England, according to *Mr Williams's Note* (4), 2 *Saund.* 51, and the authorities there cited by him. But it was said, if the plaintiff brings a *scire facias* against both, and has judgment upon it, he may have a *feri facias* against the survivor only, or an *elegit* against both. *Ibid.* In Pennsylvania, however, I am inclined to think that the plaintiff may proceed against the survivor alone, and take his lands in execution upon a *feri facias*, if personal property cannot be found by the sheriff; for such has been the practice, I apprehend, time nearly if not altogether out of mind.

Upon the whole, we are satisfied, from the facts recited, and shown by the plaintiff himself in his *scire facias*, that he cannot maintain this suit, and that the court below was right in giving judgment against him upon the demurrer to the writ. Pleading in abatement, as suggested by the counsel for the plaintiff, was wholly unnecessary, for the plaintiff had set out and admitted, in the *scire facias* sued out by him, all the facts that were necessary. and that could have been pleaded either in abatement or in bar to his writ, for the purpose of showing that it could not be sustained.

Judgment affirmed

Kauffelt *against* Leber.

An *ex parte* affidavit made to lay the ground for a rule to show cause why a judgment should not be opened and the defendant let into a defence, may be given in evidence in a trial of an issue between other parties, where the record of that judgment itself is pertinent evidence, for the mere purpose of showing the grounds upon which it was opened.

An administrator having sold the real estate of his intestate by an order of the Orphans' Court, gave a bond to the purchaser, to indemnify him against an outstanding incumbrance or defect in the title: and it was held that he was bound by his obligation.

A suit erroneously brought in the name of A, upon a bond of indemnity, can not be given in evidence in a suit rightly brought upon the same instrument in the name of B.

If the assignee of a bond fail to recover it from the obligor by reason of the consideration of it having failed before the assignment of it was made, he may recover back from the assignor the money he paid for the assignment, whether he hold his guaranty or not.

ERROR to the Common Pleas of York county.

This was an action of debt by Jacob Leber, administrator of Nicholas Leber, against John Kauffelt and Jacob Kauffelt, founded upon a bond in the penalty of \$1000, with the following condition annexed:—

“Whereas the said Jacob Kauffelt, administrator of the estate of Michael Kauffelt, did sell the remaining part of the real estate, being a tract of land of 120 acres and 142 perches and allowance, of which a part thereof is situate, lying and being within the manor of Springetsbury, and patented by Thomas Cadwallader, as by deed, bearing date the 18th December 1829, to the said Michael Kauffelt, &c. Now the condition of the above obligation is such, that if the above bounden John Kauffelt and Jacob Kauffelt shall and will from time to time, and at all times hereafter, save, keep harmless and indemnify the said Nicholas Leber of and from all claims which the proprietor, Thomas Cadwallader, or any other person in his right, may have challenge, claim and demand of and from the said tract aforesaid granted and sold to said Nicholas Leber, his heirs and assigns, then this obligation to be void and of none effect, or else to be and remain in full force and virtue.”

Nicholas Leber subsequently sold the land to Zachariah Hengst, and took his judgment bonds for the purchase money. Judgment was entered upon one of these bonds, and it was assigned to Jacob Hoover, who issued a *scire facias* to revive it, whereupon the defendant came into court and made the following affidavit:—

York County, ss.—Before me, a Justice of Peace of said county, came Zachariah Hengst, and on his solemn affirmation saith that

[Kauffelt v. Leber.]

he gave a judgment bond four years ago to Nicholas Leber, for \$350, payable the 1st April, 1835.—That said judgment was for the last payment of a tract of land, which said Nicholas sold to said Zachariah, and agreed to give a deed clear of all incumbrances, and said deponent now finds that part of said land was never patented, and part is in the Springetsbury manor, and that it will require more to patent it than the whole of said sum yet in arrear, as he believes; and when the said deed was given and judgment, said Nicholas affirmed that there were no incumbrances or liens, or defects of title, and there is therefore a full defence to the whole of said judgment.

The judgment was opened and the defendant let into a defence; the case was tried and a verdict and judgment rendered for the defendant. The plaintiff offered the record in evidence, together with parol proof that the ground of the defence was the defect of title, and also to prove by Jacob Hoover that the assignment of the bond by Leber to him was for a full consideration. This evidence was objected to by the defendant and admitted by the court, who sealed a bill of exception.

The assignment of the bond was in these words:

“I do hereby oversign my right, title and interest, claim on the within judgment bond to Jacob Hoover.

(Signed) “NICHOLAS LEBER.”

The plaintiff then offered to prove by Jacob Hoover that the contract was that Leber was to guarantee the bond, but that the guaranty was omitted by the scrivener who drew the assignment, and that the money was refunded to him. This was objected to by defendants, but admitted by the court, who sealed an exception.

The defendants offered evidence that on the day on which the bond was executed on which this suit was brought, Nicholas Leber and the administrator of the estate of Michael Kauffelt met by appointment, for the purpose of having a deed executed by said administrator to said Leber, for the land sold to him by the order of the Orphans' Court, and of paying the purchase money according to the terms of that sale; that when the parties met, Leber refused to pay the purchase money; that the parties were together a long time about the matter, Leber still refusing to comply with the terms of the sale, and the administrator demanding compliance. Leber refused to pay the purchase money unless a bond of indemnity would be given to him: the bond on which this suit was brought was then drawn and executed, the parties being ignorant of their rights.

The court rejected the evidence and sealed an exception.

The defendant then offered the record of an action of debt, brought upon the same bond of indemnity by Jacob Leber, who was the son and heir-at-law of Nicholas Leber, in his own name, against John and Jacob Kauffelt, in which there was a trial, &c.:-

[Kauffelt v. Leber.]

dict and judgment for the defendant. The court rejected the evidence and sealed an exception.

The defendants presented several points to the court, which were thus answered by DURKEE (President):

1. That Nicholas Leber having become the purchaser at the sale of the administrator of Michael Kauffelt, under the order of the Orphans' Court, for the payment of debts, and the sale having been confirmed to him, he was bound to take the property as it was, whatever the title may have been; and if when the parties met as testified to, for the purpose of executing the deed, and receiving the purchase money, Leber refused to pay it, on account of an alleged defect of title, and induced the defendants, in ignorance of the rights and obligations of the parties, to sign the bond on which this suit is brought, it is not such an obligation as can be enforced, and therefore the plaintiff cannot recover.

Ans. There is no evidence in the cause to impeach the validity of the obligation, or prevent it from being enforced.

6. That the assignment of the obligee's "right, title and interest" in a bond or chose in action, contains no express warranty that the money is due, and excludes the idea of an implied one; that where the assignment is in writing, it cannot be contradicted or varied by parol evidence in the absence of fraud, and that in such case, if the assignee fails to recover the money, he can have no recourse to the assignor.

Ans. There is no express warranty in the written assignment of the bond of Zachariah Hengst, from Nicholas Leber to Jacob Hoover, that the money was due or recoverable; and if the money was not in fact recoverable, Hoover's right to recover back from Leber, or his estate, the money which he paid him for the bond, depended on the understanding of the parties at the time of the purchase. If Hoover knew at that time that there was or would be a defence to the bond, or agreed to take it at his own risk, he could not have resorted to Leber for the money he paid for it. If on the other hand he supposed he was purchasing a good and valid bond, and there was no understanding that he should take it at his own risk, and the bond was not in truth good and valid, then he had a legal right to look to Leber for the money he paid, and could have recovered it back, and that, whether Leber guaranteed the bond, as testified by Hoover, or not.

7. That the assignment of the bond, in this case, from Leber to Hoover, does not contain an express warranty that the money is due, and excludes the idea of an implied one; and if Hoover failed to recover the money, for the reason alleged of a failure of consideration, he had no recourse to Leber, but must bear the loss, and if the plaintiff notwithstanding paid him the amount of the bond, it was a voluntary payment, and he cannot recover in this suit.

Ans. The answer to the last point is an answer to this.

[Kauffelt v. Leber.]

Mayer, for plaintiff in error, argued that there was no consideration for the bond which was the foundation of the action; it was obtained by a surprise upon the defendants, and they should be protected against it by this equitable defence; besides, the contract is void, as being against the policy of the law. 2 *Watts* 381; 6 *Watts* 148; 6 *Har. & Johns.* 500; 3 *Con.* 299; *Newl. Con.* 412, 3 *Watts & Serg.* 444, 261; 1 *Sug. Vend.* 254; 1 *Story's Eq., sec.* 149; 1 *Hill* 250. There was no guaranty of the bond to Hoover; it was a mere equitable assignment; the repayment of the money, therefore, to him was voluntary, and there was no proof of a consideration paid by him for it but his own testimony; and he was interested because of his liability even to the plaintiff. 3 *Mezcalf* 513; 2 *Sto. Eq.* 1040; 5 *Watts & Serg.* 425; 17 *Serg. & Rawle* 402; 6 *Serg. & Rawle* 555; 13 *Serg. & Rawle* 268; 1 *Stark. Ev.* 110; 2 *Phil. Ev.* 108. The *ex parte* deposition of Hengst should not have been received; it must now be presumed to have been offered for all the purposes which its contents exhibit, and to have had an influence upon the cause; it was a matter in dispute where the location of the land was, and this deposition proved the fact. 8 *Watts* 46; 1 *Binn.* 145; 2 *P. R.* 495.

Fisher, for defendant in error, was requested to confine himself to the last point, on which he remarked that the *ex parte* affidavit was merely offered as part of the record given in evidence to show the ground on which the judgment was opened; on the subject of the rejection of the record of the former suit on the bond, he cited 6 *Serg. & Rawle* 280; 4 *Serg. & Rawle* 249; 4 *Rawle* 257.

The opinion of the Court was delivered by

SERGEANT, J. — The merits of this case were considered on the hearing of the former writ of error between the same parties, reported 5 *Watts & Serg.* 440. On the present trial, various exceptions to evidence and to the answers of the court were taken in the court below, and have been assigned for error, of which only a few have been relied upon in the argument, and therefore I shall confine my attention to them.

1. The first of these exceptions is to the admission of the *ex parte* affidavit of Zachariah Hengst, filed by him on the 19th March 1831, to prevent the entry of judgment. Had this affidavit, as the plaintiff in error alleges, been offered and read in evidence in this cause upon the merits, as going to prove that a portion of the land sold by Jacob Kauffelt to Leber lay in Springetsbury manor, it would not have been proper evidence. But it would rather seem that this affidavit was offered and received to show the ground of the defence taken by Hengst in the suit against him by Hoover; and if so, it was properly received for that purpose merely. If it was really offered by the plaintiff in the broad point of view asserted by the defendants, it was their duty to require

[Kauffelt v. Leber.]

the purpose for which it was offered to be specially designated, and by not doing so they waived this objection. Besides, it would rather seem by the memorandum of the court which immediately follows on the record of the admission, viz., "read stating the outstanding title," &c., that it was in fact received merely to show the grounds of Hengst's defence.

2. The defendants offered the evidence contained in the offer C, which the court rejected. This we think the court below were right in rejecting, as, if proved, it led to no result. The defendants, in order to terminate a dispute in which the plaintiff's intestate refused to accept the deed without a guaranty against a known incumbrance on the title, chose to give a bond of indemnity against the incumbrance in their individual capacities, and on the faith of it the plaintiff paid his money and received the deed. This was a good consideration for the bond. Whether the defendants were bound to give such bond was for themselves to decide at the time, and it is not necessary it should appear that they were, since if they voluntarily agreed to do so in order to compromise the controversy, and the administrator received the benefit of it, they would be held to their agreement, both at law and equity. In *Lasere v. Johnson*, (2 Str. 745), bail in error was given by an executor, and it was objected that it was not required by the statute, and was therefore taken without authority; but the court say, though they could not require the defendant to give bail, yet if he will submit to do it as other defendants do, the court may do it, and it will bind the parties. The defendant in the action might for some advantage agree to give bail on the writ of error; but be that as it will, here is a recognizance which is not fulfilled. The present case is still stronger, for it is the bond of the defendants as third persons in the nature of a collateral security voluntarily given, and to settle a dispute. I perceive nothing in this against the policy of the law, or that brings it within the class of cases cited on that point.

3. The record of the suit, No. 26, January Term 1839, brought by Jacob Leber against John and Jacob Kauffelt, was not evidence. That suit was brought by Jacob Leber in his capacity of son and heir at law of Nicholas Leber; the present in his character of administrator. The suits were not between the same parties, nor was the title the same in both. In the first the plaintiff must needs fail, because the right to recover on the bond being a personal right, did not pass to him as son and heir at law of Nicholas Leber. But a judgment in a suit brought on a different title which is bad, ought not to have any legitimate effect in a subsequent suit brought upon a good title.

4. The answers of the court to the 6th and 7th points are assigned as errors; but they appear to us to be correct, and as favourable to the defendant as he was entitled to. For, if the guaranty was proved by Hoover to have been expressly made at

[Kauffelt v. Leber.]

the time of the assignment of the bond by Nicholas Leber to Hoover, and omitted by mistake of the scrivener, Hoover having no interest in the result of the present contest, was a competent witness to prove it.

Judgment affirmed.

Scott's Estate.

An executor is entitled to a credit in his administration account for fees paid to counsel for their professional services in establishing the validity of the will and the bequests therein contained, when the legatees entitled to the estate are the parties in interest.

APPEAL from the decree of the Orphans' Court of *Lancaster* county in the matter of the administration account of Peter Kraybill, executor of John Scott, deceased.

On the 3d February 1820, John Scott made a will, by which, after directing the payment of his debts and certain legacies, and providing grave-stones for himself and mother, it was ordered that all "the remainder of his real and personal estate be applied to the education of poor children of all denominations to read the bible the best of all books." Peter Kraybill and another were appointed executors, with power "to sell the real and personal property and apply the same to the use above mentioned." John Scott died in 1842, leaving an estate amounting to \$8324.08, all of which was personal, except a house and lot in Maytown which sold for \$404. He died without leaving any known heirs or kindred, and information thereof was lodged with the Auditor-General by two individuals, who, in case they procured the escheat and succeeded in invalidating the will, would have been entitled under the Act of Assembly to one-third of the personal estate, and one-fifth of the real estate, as a reward for so doing, which reward would amount to the sum of \$2720.82.

On the 12th October and 10th November 1842, Thomas Johnston and W. S. Campbell, the two individuals referred to, entered caveats against the probate of the will, and on the 22d March 1842, the Register's Court directed an issue, in which Peter Kraybill, one executor, was made plaintiff, and the said Johnston and Campbell defendants, for the purpose of determining whether the instrument produced was the last will of said Scott. On the day on which this issue was directed, in which Kraybill was made a party, he employed counsel to support the will, and to establish the charitable intentions of the testator. According to the report of the auditors, it appeared that "the counsel offered to try it

[Scott's Estate.]

through all the courts, both on the question of establishing the will, and of enforcing the legacy, for \$500. The executor would not and indeed could not agree to this proposition, because if he lost, he would have to pay it himself, as there would be no funds applicable to the purpose." He then entered into an agreement, by which the counsel was to have one-fourth part (twenty-five per cent.) of all the estate, if the will should be established, so as to carry the estate according to the will, and to have nothing for all his services, if it were not established. It was shown in the evidence that the services of the counsel could not have been obtained upon more favourable terms, if his fee was left to depend upon the result; to have nothing if he failed. The issue was tried, the will was established, and the supposed uncertainty respecting the objects of the testator's bounty was cured by an Act of Assembly, by which the estate was directed to be paid to the Treasurers of the townships of East Donegal and Conoy, in trust for the support of the schools of said townships. The executor settled his account, paid the counsel the one-fourth according to the agreement in writing, and paid the remainder to the treasurers of the said townships, according to the directions of the Act of Assembly, they receipting for the same, "in full of the amount due from said executor" to the treasurers of said townships respectively, pursuant to the Act of Assembly passed 4th April 1843. These payments to the treasurers were made on the 14th October 1843, and the administration account was read and confirmed *nisi* on the 18th December 1843. On the 28th December 1843, petitions were presented by sundry citizens of the townships of East Donegal and Conoy, objecting to the compensation given to the counsel, and the court, considering the petitions as exceptions, appointed auditors. Those auditors, after hearing, reported in favour of the compensation, and that the accountant ought to be allowed credit for the same.

Exceptions were filed to the report of the auditor, and the court below delivered the following opinion:

LEWIS (President).—It has not been contended that the counsel was bound to render his professional services for a less sum than the price specified in the written contract. Nor is it alleged that Kraybill can repudiate the contract and recover back the money paid under it, should he fail in receiving an allowance for those payments. The question on these exceptions to the auditor's report is, whether the accountant shall be allowed credit for payments actually made in establishing the will and the charity referred to. Since the report of the auditors and the evidence attached, it appears that the compensation, under all the circumstances, is not unreasonable in amount, inasmuch as it was entirely dependent upon success, and does not equal the reward offered by the Legislature to the parties opposing the will. The compensation to the counsel was \$2050; the sum to be given to the other party,

[Scott's Estate.]

in case of success, is \$2720.82. The compensation for which credit is claimed is therefore \$670.82 less than the sum which would have been received by the party opposing the objects of the testator's bounty.

The only objection then is, whether the credit can be properly given in this account. The cases of *Deitrick's Appeal*, (2 *Watts* 332); *Koppenhaffer v. Isaacs*, (7 *Watts* 170); and *Mumper's Appeal*, (3 *Watts & Serg.* 443), settle the principle that the counsel fees paid by an executor or by an administrator *pendente lite*, for the trial of an issue of *devisavit vel non* cannot be allowed, where the effect of such allowance is to throw any part of those expenses upon "distributees," "creditors," and others, who had no interest whatever in the question, or whose interests were opposed to the course adopted by the executor in supporting the will. But the same cases also affirm the principle, that the parties to such a contest must pay their expenses out of their own pockets. 2 *Watts* 332. "That those who have a direct interest in the question should bear all the charges attending it." 3 *Watts & Serg.* 443. And "that the only persons interested in establishing the will are the devisees and legatees." *Ibid.* It is declared to be "just and equitable" that those persons thus interested should pay the charges of the contest. It will be remembered, that in this case there is a power to sell and apply the funds thus raised to the uses directed by the will. A power given to an executor to sell real estate is by Act of Assembly an estate in the land, and gives the same powers and authorities over such estate, for all purposes of sale, conveyance, remedy by entry, *by action*, or otherwise, as if the same had been devised to such executor. This executor was the proper person to prosecute or defend actions concerning the real and personal estate, and is entitled to an allowance for fees paid counsel in respect to the execution of the will where such allowance works no injustice to others not interested in the question. *Burr v. M'Ewen*, (1 *Baldw.* 154). It is manifest that the allowance in this case works no such injustice. The creditors are all paid; the legatees and devisees, not interested in the question, are not affected; the charge is thus made payable by the parties for whose especial benefit the contest was conducted, and who have hereby secured a large sum of money which otherwise might have been lost to them. By allowing the credit in this account, the expense of the contest will fall upon "the legatees and devisees interested in establishing the will;" and those whose "direct interest" makes it "just and equitable" that they should pay the expenses, will thus be compelled to bear the charges of a contest conducted for their benefit. This is precisely according to the spirit and language of the decisions which have been cited.

It frequently happens that an executor fills the double capacity of executor and trustee; and this is the case with the accountant, who is made a trustee by virtue of the power to sell the real estate

[Scott's Estate.]

and the direction to apply the proceeds to the education of poor children. When this double capacity exists, the executor is allowed costs wherever a trustee would be allowed such disbursements. In an old case, the extra costs incurred by a trustee in defending a suit respecting his trust, were allowed him in his account, against his *cestui que trust*. *Amand v. Brodburn*, (2 Ch. Ca. 138). In a more recent case, where a testamentary paper was held void for uncertainty, it was suggested, that some of the defendants, being trustees, were entitled to costs as *between solicitor and client*. The court gave them costs as between party and party, but refused the more enlarged order for costs, as between solicitor and client, upon the ground "that the paper purporting to be a will had been declared void for uncertainty, that they were therefore trustees nullity, and that there was no fund out of which costs could come." *Mohan v. Mohan*, (1 Swinst. 201); *Beame on Costs* 158. It is plain from the case of *Mohan v. Mohan*, that if the paper purporting to be a will had been sustained, and a fund secured out of which costs could come, as in the present case, the charges, similar to those in this case would have been allowed. And this very thing was done in the case of *Moggridge v. Mackwell*, (7 Ves. 36), where, in a case respecting a *residue disposed of to charitable purposes*, costs as between solicitor and client were given, not only to the executor, but to the next of kin, and the Attorney General to be paid out of the fund. The King in England is *parens patriæ*, and has the general superintendence of all charities, which he exercises by the Lord Chancellor; and therefore, wherever it is necessary, the Attorney General, at the relation of some informant, who is called the *Relator*, files an information in Chancery, to have the charity properly established. A bequest for the education of poor children is such a charity as requires the parental protection of the King in England; the Government of the Commonwealth here. In charity cases, the court often gives the relators costs "*beyond their taxed costs*, as otherwise people would not come forward to file informations." 7 Ves. 424. In a suit purely for establishing the charity, the court gave the relators their costs, *as between solicitor and client*, because of the benevolent object of the suit, and because the fund was ample for the purpose. *Attorney General v. Carte*, (*Appendix to Beame on Costs*). In *Cume v. Pye*, (17 Ves. 462), similar costs were given to the heir, the Lord Chancellor observing that it was frequently done in charity causes. In the *Attorney General v. Tonna*, (4 Bro. C. C. 177), which was a suit instituted to carry a charity into effect, the costs of the cause, as between attorney and client, were ordered to be paid out of the trust funds.

The case under consideration is the case of a charity; the services of able counsel in establishing it were not to be obtained upon better terms, unless some one stood ready to make himself personally liable for the compensation, and no one was found ready

[Scott's Estate.]

to incur such risk. The contract was fairly made; it has been performed by the attorney, and the money has been paid by the executor in good faith. The auditors find it to be reasonable under the circumstances. The treasurers have settled with the executor and given him receipts in full. It is the opinion of the court that the executor had a right to incur the expenses in establishing the charitable bequest of his testator; that it would be unjust to make him bear the charges of the contest, when there is a fund amply sufficient for the purpose. It is also the opinion of the court, that the credit may be properly allowed in this account.

It is ordered that the report of the auditors be confirmed.

Ford, for appellants, cited 2 *Watts* 333; 7 *Watts* 170; 3 *Watts & Serg.* 441.

Fordney, for appellees.

PER CURIAM. — It is not disputed that the fee paid to counsel was a reasonable and proper compensation; and the question is whether the executor or the charity shall bear the charge of it. An executor is bound to prove the will and certainly not at his own expense. When he meets with obstruction, it is his duty to remove it if he can; and he is unfaithful when he omits to attempt it. A contest between litigants for their individual interests, and not for the benefit of the estate, as was held in *Koppenhæffer v. Isaacs*, stands on different ground; but is this such a case? The executor litigated not for his own interest, but for the interest of the party who got the whole estate by the litigation, and now refuses to reimburse him his expenses. Devisees might just as reasonably object to allow him the costs of an ejectment for recovering their land. The case is too plain for argument.

Decree affirmed.

Tower's Appropriation.

"To my nephew T, I give and bequeath all my estate, real and personal, he paying the legacies hereinafter mentioned:" *Held*, to create a charge upon the land devised; and upon a sale of it by the sheriff as the property of the devisee, the legacies are payable out of the proceeds.

Land may be sold subject to a mortgage, although it be not the first incumbrance, if it be so understood and agreed to by the purchaser at the time of sale.

APPEAL from the decree of the Court of Common Pleas of *Juniata* county, appropriating the proceeds of the sale of the real estate of Jeremiah Tower. The proceeds of the sale by the sheriff, \$2500, were brought into court and claimed, first, by Jane Tower, the amount of legacy bequeathed to her by the will of Charles Tower, deceased, under which Jeremiah Tower derived his title: the terms of the will were as follows:—"To my nephew, Jeremiah Tower, I give and bequeath all my estate, real and personal, he paying the legacies hereinafter mentioned:" then followed a legacy of \$700 to his sister, Jane Tower, the amount of which, with interest, was claimed.

The next claim was by the trustees of the Tuscarora Academy, upon a mortgage to secure the payment of \$1500, executed by the said Jeremiah Tower to them. On the subject of this claim it was contended by the subsequent judgment creditors that the land was sold subject to the mortgage, and much testimony was taken and read on this subject, the substance of which is contained in the deposition of Jacob A. Christy, as follows:—

"I was present at the time of the sale of the real estate of Jeremiah Tower by the sheriff. Some time after the biddings commenced, sheriff Wilson, who was standing not far from where I was, bid \$3000. I mentioned to him that there was a mortgage on the property; he made some inquiry with regard to the fact of me and others present, and when he ascertained that such was the fact, he withdrew his bid, and said he would not stand to it, for the reason that there was a mortgage on it. If my recollection serves me, the crier then proclaimed that it was selling subject to a \$1500 mortgage: previous to that Captain Aitken had bid \$2500, and said he would stand to his bid, and got it at that price, there being no other bid after it was ascertained there was a mortgage on it."

Two questions arose in this court; first, whether the legacy was a lien upon the land, and payable out of the proceeds of the sale; and, second, whether the facts and circumstances proved to have occurred at the time of the sale, gave to the purchaser a title

[Tower's Appropriation.]

clear of the incumbrance of the mortgage, or whether he took it subject to it.

The court below (HEPBURN, President) ruled that the legacy was charged upon the land, and payable out of the money in court; and that the purchaser took the land charged with the incumbrance of the mortgage, and therefore rejected the claim of the mortgagee.

Benedict, for appellants, argued that the legacy was not a lien upon the land, and cited 8 *Watts* 198; 3 *Watts & Serg.* 370; 4 *Watts & Serg.* 423; 5 *Watts* 272; 7 *Watts* 316; 2 *Penn. Rep.* 277; 16 *Serg. & Rawle* 162; 2 *Rawle* 166.

Parker, contra, cited 1 *Penn. Rep.* 96, 112; 4 *Rawle* 440; 4 *Watts* 396; 1 *Watts & Serg.* 235; 8 *Watts* 48; 2 *Penn. Rep.* 340; 6 *Watts* 140; 6 *Watts & Serg.* 281; 7 *Watts* 416.

The opinion of the Court was delivered by

GIBSON, C. J. — To distinguish this case from *Mix v. Ackla*, (7 *Watts* 316,) it is necessary to state the principle of that case more clearly than was done in delivering the opinion of the Court. But to do so, it is necessary to premise that it had been settled, in the *Presbyterian Congregation v. Wallace*, (3 *Rawle* 109,) that a lien creditor cannot claim both under the sheriff's sale and paramount to it; nor take the proceeds or the land at his election. To speak more plainly, he shall not take the proceeds of a judicial sale in part, and sell the land over again for the residue: or take satisfaction of the whole out of the proceeds or the land at his option. It results that the land is sold either discharged of his lien or subject to it. If discharged, he comes into court for his money, or loses it: if subject, his recourse is to the land in the hands of the sheriff's vendee, and to nothing else. Now, a paramount execution creditor sells clear of all incumbrances; and he takes the proceeds entire, if so much be necessary to satisfy his debt. His sale turns the whole estate into money; and of the benefit of all its productive capacity he is not to be deprived by the sale of a junior judgment creditor who is prevented, by the intervention of a lien which his execution cannot discharge, from likewise turning the whole into money for the benefit of all in their order. If, then, a junior creditor is compelled to leave a particular incumbrance standing on the land, he is necessarily compelled to leave standing any other incumbrance which precedes it; and on a judgment subsequent to a fixed lien, the sheriff consequently sells the estate subject to incumbrances which the proceeds might not satisfy, nor the sale dissolve: in other words, a judgment creditor shall not turn the land into money, where he cannot do it as beneficially for a paramount incumbrancer as that incumbrancer could do it for himself; and he consequently can sell no more than his

[Tower's Appropriation.]

own contingent or resulting interest. Now, in *Mix v. Ackla*, there was, first, a judgment against the ancestor which was entitled, should need be, to the unincumbered value of the whole estate; next an indefinite incumbrance on the land in the hands of the ancestor's devisee for the maintenance of the widow, which could not be taken out of the purchase money; and last, a judgment against the devisee, on which the land was sold, and consequently subject to the judgment against the ancestor, which would otherwise have been postponed to a subsequent incumbrance, and might have failed of effect had it been thrown on the price of the land, sold, as it was, subject to an intermediate incumbrance. To prevent the possibility of such an occurrence, we held that a younger judgment creditor, in that predicament, sells subject to the preceding liens, and comes in with the other subsequent lien creditors, according to order of priority.

It will be perceived that the case before us is different in an essential particular. As the preceding mortgage was not the first incumbrance, and was consequently not guarded by the statute of 1630, the subsequent creditor had power to sell clear of it; but did not. It is argued that he was, notwithstanding, bound to sell according to the terms of the levy which was not subject to the mortgage; but the contrary was held in *Stakpole v. Glassford*, (15 *Serg. & Rawle* 163,) where neither the levy, the return of sale, nor the deed was subject to the mortgage; yet it was ruled that the purchaser was bound by his agreement to take subject to it, proved before the jury as a matter of fact. And that there is neither discrepance nor contradiction between the levy and such proof is evident from the consideration that the whole is, in effect, sold as well as levied, a part of the price sufficient to answer the mortgage debt being left on the land. In the case at bar, the land was at first offered as unincumbered, but eventually sold expressly subject to the mortgage which was discovered in the course of the biddings, and consequently to nothing else. Had it produced less than enough to satisfy the legacy, the legatee might have had the sale set aside; but the execution creditor cannot complain that she has acquiesced in it, and come into court for her money on his own terms. In fact, the same result has been produced by selling subject to the mortgage that would have been produced by selling free from it, except that the mortgage money, instead of being in court, is in the land; and whatever remains after payment of the legacy is distributable among the judgment creditors, just as if the mortgage money had been paid into court in the first instance, and taken out by the mortgagee.

The only room for doubt is, whether the legacy is actually charged on the land. An intent to charge has been implied by the English courts from a devise of the residue, real and personal, after payment of legacies; whence a supposed design that the devisee should have nothing till the legacies were first taken out of

[Tower's Appropriation.]

the land. We went a step further, in *M'Lanahan v. M'Lanahan*, (1 P. R. 9,) where we inferred a design to charge a particular legacy, from a blending of the real and personal estates in a devise not of the residue, particular parts of the estate being excepted; and this, too, though other legacies were expressly charged. That case has become a rule of property, and it is, therefore, not to be shaken. Nor ought there to be a desire to shake it. That the devisee of a residue is to have nothing till the legacies are paid, is certainly a legal inference; but it would seem to follow as naturally from any devise that confounds the land with the personal estate, which is the natural fund. Nor is such an inference destitute of support from authority; for legacies were declared to be payable out of the land in *Muddle v. Fry*, (6 Madd. 270,) where there was no residue, and the will contained no devise or mention of the land at all, except under the words "worldly estate." There is certainly no substantive difference, in respect to the actual meaning, between a devise, like the present, of all the testator's real and personal estate, the devisee "paying the several legacies hereinafter mentioned," and a devise of the residue, the legacies being first paid. In practice they are usually accidental forms of saying the same thing, which imply a difference of time rather than of meaning; and which have often borne hard on daughters and younger sons, contrary to the testator's actual intention. To say, in a case like the present, where money is given in lieu of land merely for the convenience of partition, that there is no more than a personal charge, would be fraught with injustice. The common law charges a duty of partition on the land for which it is substituted, in the shape of a rent; and in a vast majority of cases the testator intends to make the land a security for the equivalent given for it, and we are bound to give effect to his intention where we may do so without violating an established principle. In this instance we are at liberty to say that the legacy was charged on the land.

Decree affirmed.

Johnston's Estate.

If the administrators of an estate take a note, with security, payable in six months, for the assets of the intestate sold at vendue, and the payors fail before it becomes due, they will be exonerated from liability for it: but if the payors are able to pay when the note becomes due, and the administrators make no effort to collect it, and it becomes lost by the subsequent insolvency of the payors, they will be chargeable with the loss.

APPEAL from the decree of the Orphans' Court of *Lancaster* county by John Lang and James Perry, administrators of Dr Samuel A. Johnston, deceased. The Orphans' Court made the following decision and decree:—

LEWIS (President). — The intestate died on the 26th November 1839, and letters of administration were taken out by the accountants on the 11th December 1839. On the 2d of January 1840, the accountants having sold to Benjamin Barr a portion of the assets of the estate, took his single bill, with that of John Barr as surety, for the sum of \$201.48, payable six months after date. The debtor and his surety were good at the time, and if the demand had been pressed with proper diligence, it might have been recovered; but it appears that the principal debtor was not called upon for the payment until six months after the money was due, and that the surety has never been called upon for payment. That both were of ability to pay at the time the note fell due, on the 2d July 1840, and that both principal and surety made an assignment in April 1841, and subsequently took the benefit of the bankrupt law. In the first place, the accountants gave a credit of six months by the contract; they then, by their negligence, gave an additional credit of six months by omitting to call upon the principal debtor for payment. They have never demanded payment of the surety, who testifies that he would have paid it if demand had been made at the maturity of the note. No legal proceedings were instituted for the recovery. No reasons have been given for this delay.

Executors and administrators are sworn well and truly to administer according to law. The law requires them to file an account of their administration in one year from administration granted (14 section Act 15th March 1832), and the condition of the administration bond is to the same effect. From all these enactments it may be inferred that the duty of their office required that the accountants should make use of some efforts to collect the money within a year from the time of entering upon the trust. But no efforts whatever were used within that time, and no proper efforts afterwards. A mere application for payment without

[Johnston's Estate.]

legal proceedings will not excuse. It is the opinion of the court, that with proper diligence the debt might have been collected, and for this reason accountants ought to be charged with the amount lost by their neglect.

N. Ellmaker, for appellants, argued that trustees should only be charged with gross negligence, and cited 1 *P. Wms.* 142; 11 *Serg. & Rawle* 71; 12 *Serg. & Rawle* 334; 2 *Rawle* 122; 1 *P. R.* 207; 5 *Whart.* 476; 3 *Watts* 443; 6 *Watts* 188, 253; 8 *Watts* 21; 1 *Johns. Chan.* 628.

Frazier, contra, argued that there was such gross negligence that the administrators were liable.

The opinion of the Court was delivered by

ROGERS, J.—An executor is *prima facie* liable for the appraised value of the personal estate, and it is his duty, within one year, at most, from the death of the testator, to sell or dispose of the deceased's effects, and convert them into ready money, to answer the purposes of the trust. In England the property is sold for cash, and, of course, the executor is immediately chargeable with the price; but in Pennsylvania, for reasons arising out of a different state of circumstances, another rule has been adopted. The practice is to sell at a short credit, taking notes, with security, over a certain amount, payable in three and six months. This is discretionary with the executor; and when the latter mode is adopted, he is not chargeable, when he acts with good faith and ordinary care, immediately on the sale, but he becomes liable at the expiration of the time of credit; and, to discharge himself, he must show that the money, if not received, was lost without any default or negligence on his part. Thus, if he is able to prove the solvency of the purchaser and surety at the time of sale, and that, in the intermediate time, he became insolvent, or that he used ordinary diligence to obtain payment, and failed, he is entitled to an exoneration. But this it is incumbent on the executor to prove, as he is *prima facie* liable, and the burthen of proof is thrown on him. The intestate died on the 22d November 1839, and letters of administration were granted the 11th December 1839. On the 2d January 1840, the administrator sold to Benjamin Barr some articles belonging to the estate, and took his note for the amount, with security, payable six months after date. It is conceded the debtor and security were good at the time of the sale, so that the case depends on the question, whether the administrator has shown that the loss has arisen from circumstances over which he had no control, and not in consequence of any default of his.

The facts are, that he gives a credit of six months, and, so far as appears, takes no further steps to collect the amount due. He

[Johnston's Estate.]

neither commences suit, nor does he even demand payment until six months after the note arrived at maturity, and after the time given for the settlement of the estate. It is a case, not of ordinary care, but of gross negligence, for he has failed to show that he made any efforts whatever, in proper time, to recover the money. A mere application for payment, without more, would not have availed him. To entitle him to a credit, he must, in addition, prove that he took legal steps to recover the sum due, or that, from the notorious insolvency of the debtors, a suit would have been useless. But, so far from this being true, the probability is, that if ordinary diligence had been used, the money would have been recovered; as the proof is positive that the principal and surety were able to pay when the note fell due.

Decree affirmed

Commonwealth *against* Reitzel.

A settlement of the account of a public officer, made by the accounting officers of the government, in pursuance of the Act of the 30th March 1811, is conclusive evidence of the amount due, in an action upon the official bond, as well against the sureties as the principal, if that account purports to embrace only the moneys received and paid by the officer during the time the defendant was a surety: but it is competent for the surety to prove that the moneys charged in that settlement were received before the time when he became the surety.

In an action against the surety of a receiving officer of the government upon his official bond, the defendant is entitled to have the moneys received and paid by the officer, during the year he was the surety, appropriated to his relief, although it may appear that the officer was a defaulter for several preceding years.

In an action by the Commonwealth against the surety of a defaulting officer, the principal becomes a competent witness by being released by the defendant from his liability for the costs of the action.

ERROR to the District Court of *Lancaster* county.

The Commonwealth of Pennsylvania against Philip Reitzel, obligor in a bond with Frederick Hambright and others. This was an action of debt upon the official bond of Frederick Hambright and others. Frederick Hambright had been appointed collector of tolls upon the Columbia railroad at Lancaster in 1839, and every year thereafter until 1843. Each year he was appointed he gave a new bond with different sureties; and on the 19th April 1843, when he was appointed, Philip Reitzel and others became his sureties. On the 25th March 1844, the account of the receipt and payment of tolls by Hambright, from 1839 up to the time when he went out of office, was made by the Auditor General, and a balance struck of \$10,095.80, which was duly certified

[Commonwealth v. Reitzel.]

and the Commonwealth claimed to recover this balance. The defence was that the defendant was only liable for the defalcation of Hambright during the one year in which he was his surety; and he offered evidence to show what that amount was. The plaintiff objected, on the ground that the settlement by the accountant officers of the Commonwealth was final and conclusive, if not appealed from in pursuance of the Act of 30th March 1811. But the court below (HAYES, President) was of opinion that the defendant's liability could only be for the defalcation which accrued during the time he was the surety, and therefore admitted the evidence, and sealed a bill of exception at the instance of the plaintiff.

The defendant, having first released Frederick Hambright, the principal in the bond, from all liability to him for the costs of this action, offered him as a witness. The plaintiff objected to his competency, but the court overruled the objection, and sealed a bill of exception.

It also appeared on the trial, that during the year when the defendant was surety several payments were made to the Commonwealth out of moneys collected during the year; the plaintiffs contended that such payments should be applied to the discharge of the previous indebtedness of the officer; but the court was of a different opinion, and instructed the jury to apply such payments to the relief of the defendant. The jury rendered a verdict for the plaintiff for \$2342.

Boas and Frazer, for plaintiff in error, contended that the settlement made by the Auditor General was conclusive, and cited the *Act of 30th March 1811*; 3 *Yeates* 543; 4 *Yeates* 361; 8 *Watts* 37; that Hambright was not a competent witness; 5 *Watts & Serg.* 509; 6 *Watts & Serg.* 514; and as to the appropriation of payments, 3 *Watts & Serg.* 324.

Fordney and Stevens, contra, argued that the settlement of the account did not purport to be a settlement of the liability of the officer for the time when the defendant was surety, and he could only be charged for the defalcation of one year. 4 *Dall.* 282; 1 *Peters* 46. The Commonwealth made no appropriation of the payments; they were simply credited to the officer; the law will therefore appropriate them so that justice may be done to the surety. 7 *Cranch* 572; 9 *Cow.* 42; 4 *Dall.* 282; 15 *Wend.* 19 8 *Wend.* 403; 1 *Esp. N. P.* 229.

The opinion of the Court was delivered by

KENNEDY, J.—This action was instituted in the court below by the Commonwealth of Pennsylvania against the defendant, Philip Reitzel, upon his bond as one of the sureties of Frederick Hambright, late collector of tolls at Lancaster. to recover two several

[Commonwealth v. Reitzel.]

sums of money alleged to be due from him, according to a settlement made thereof by the Auditor General on the 25th day of March 1844; the first sum being \$5859.41, received and due for motive power, and the second sum \$4236.39, received for railroad tolls, forming an aggregate sum of \$10,095.80. Hambright had been appointed first to the office in 1839, and continued in it, by a reappointment annually, until the latter end of 1843. He gave a new bond every year, with sureties, conditioned for the faithful discharge of the duties of the office. The Auditor General, in settling and stating the accounts of Hambright, blended them together for the several years that he had been in office; first, by charging him in chronological order with the various sums received from time to time, as collector, throughout the several years he was in office, as if they were to be considered constituent parts of the same account; and again, by giving credit on the other side of the account for the various sums of money paid over as collector, in the order of time that they were so paid. Thus making one general account, by commencing with the time that Hambright came into office under his first appointment, and terminating it with the close of the last year that he was in office; so that, in the final balance, he was charged with the difference between the amount of the whole of the moneys received, and the amount of the moneys paid over by him during the whole of the time that he was collector. The defendant was surety for the last year, and as such was sued on his bond for the default of Hambright in that year alone, and on the trial of the cause was permitted by the court to give evidence showing the actual amount of the moneys received by Hambright as collector, and the amounts of the same moneys paid over by him during the year for which the defendant was bound as his surety, making the difference only of \$2342 against the defendant, instead of \$10,095.80. The evidence given for this purpose was all objected to on the part of the Commonwealth, and exception taken to the opinion of the court receiving it. The counsel for the Commonwealth claim that the settlement made by the Auditor General, and given in evidence in support of her claim, was conclusive in regard to the amount for which the defendant was liable, and hence the court erred in admitting the evidence offered for the purpose of repudiating it. In order to show that the settlement of the Auditor General, given in evidence and in support of the plaintiff's claim, was binding and conclusive upon the defendant, the Act of the 30th of March 1811, is relied on. 5 *Smith. L.* 228. By the first section it is enacted that "all accounts between the Commonwealth and any person or persons, body politic or corporate, as well those with the officers of the revenue as other persons entrusted with the receipt of, or who have or hereafter may become possessed of public money, also the accounts of all persons having claims on the Commonwealth, except as hereafter are

[Commonwealth v. Reitzel.]

excepted, shall be examined and adjusted by the Auditor General according to law and equity." By the 11th section, "if any person or persons, body politic or corporate, be dissatisfied with the settlement of his, her or their account by the Auditor General and State Treasurer, he, she or they may appeal therefrom to the Court of Common Pleas of the county in which the seat of government shall then be, and such appeal shall be transmitted by the Auditor General to the clerk of said court, to be by him entered of record, subject to the like proceedings under the directions of the State Treasurer as in common suits: Provided, however, that the appeal be filed in the office of the Auditor General within sixty days after notice of such settlement (which is required, by the 9th section of the Act, to be given to the party by the Auditor General in thirty days after the settlement), and be accompanied with a specification of objections to said settlement," &c. The 12th section declares that "the amount or balance of every account settled agreeably to the Act, due to the Commonwealth, shall be deemed and adjudged to be a lien, from the date of the settlement of such account, on all the real estate of the *person* or *persons indebted*, and on his or their *securities*, throughout this Commonwealth."

It is very apparent from the various provisions of the act, that the Legislature intended to make a settlement of the accounts mentioned in it by the Auditor General and State Treasurer in the manner therein directed, final and conclusive unless appealed from within the time allowed by the Act for that purpose, and conclusive, too, as I conceive, upon the sureties, though the right of appeal, as it appears to me, is only given to the principal debtors. But then, in order to make it binding and conclusive upon the surety, it ought to appear in some way that it is exclusively applicable to the time for which he was bound as surety, and not made to include accounts against the principal debtor which accrued either before the suretyship of the defendant commenced, or after it ceased. To make a surety responsible for moneys received by the principal, it ought to be that they were received, at least, during the time for which the obligation of his suretyship made him answerable as such. For it is not the settlement of the account alone that renders him liable; his obligation lies at the bottom of his liability, and if the accounts charged against the principal are not embraced by the obligation of the surety, it is very clear that the latter cannot be made liable by any thing that the Auditor General and State Treasurer can do, who are expressly required to adjust and settle the account according to law and equity. The evidence, therefore, objected to was admissible, for the purpose of showing that the money demanded of the defendant in this action, and charged to his principal in his general account by the Auditor General and State Treasurer, was not received by the principal during the time for which the defendant

[Commonwealth v. Reitzel.]

was bound as his surety, but that much the greater portion of it had been received long before.

It is also alleged that the court below erred in admitting Hambright himself to testify on behalf of the defendant; that he was interested in the event of the suit, and therefore incompetent. The defendant, before he adduced Hambright as a witness on his behalf, executed and delivered to him a release, discharging him from all liability that he might be under to him, for and on account of the costs to which he, the defendant, might be subjected, and have to pay in this action. This, as it would appear, is the only interest which Hambright had or could have in this suit; for his liability to the Commonwealth for the payment of the debt that might be recovered from the defendant in this action, was at least as strong and as certain as any liability he was under to the defendant to keep him indemnified, or to reimburse him in case he should be compelled to pay it, could be. As between the Commonwealth and the defendant, he stood indifferent as regarded the debt owing by him to the Commonwealth. He was bound to pay it, at all events, either to the Commonwealth, or if the defendant was made to pay it for him, then to the latter. But, in no event of this suit, whether the result should be in favour of or against the defendant, could the liability of Hambright be diminished or increased, except as to the costs of it, from which he was released. The verdict and judgment in this action could not be made evidence, either for or against Hambright, in an action brought by the Commonwealth against him to recover the debt claimed here. It is clear, therefore, that after being released by the defendant from all claim which the latter might or should have against him, at any time, for or on account of the costs of this suit, he could not be affected in any way whatever by the result of it, and consequently was competent to give testimony.

There are also exceptions to the answers given by the court to certain points submitted by the counsel for the Commonwealth, in which it is alleged that the court erred. By the first point the court was requested to instruct the jury, that as the defendant had neglected to attend to the settlement of Mr. Hambright's account, or had not appealed therefrom, after it was settled, in the manner prescribed by the 11th section of the Act recited above, the settlement, as made, became binding and conclusive on all the parties, as well the sureties as the principal, and therefore could not be contradicted or impeached in this suit, or inquired into collaterally. To which the court answered, that the fact of the defendant's not having attended to the settlement of Mr. Hambright's account, nor having appealed therefrom, could not preclude him from showing that the very moneys received by the collector, after the bond of the 19th April 1843, (meaning the bond in suit,) were all paid over to the State Treasurer, and availing himself of that circumstance, so far as it has been proved.

[Commonwealth v. Reitzel.]

to establish his defence. Although the answer of the court may not have been altogether correct in the abstract, yet we think it was so, as applicable to the circumstances of this case. Had an account been adjusted and settled by the Auditor-General and State Treasurer for the time merely covered by the bond of the defendant in suit, showing a particular sum of money due by the principal to the Commonwealth, and the settlement had remained unappealed from, after notice given of its having been made, until the time allowed by the Act for appealing had expired, the settlement would thereby have become conclusive on both principal and sureties, though it might have been full of errors. But the account given in evidence, showing the sum or balance claimed by the Commonwealth to be due from Mr. Hambright, included some four years, at least, not embraced by the bond of the defendant, upon which he is sued here. It cannot be said, therefore, with any propriety, that such a settlement could have been meant or intended to have been made, for the purpose of showing the amount for which the defendant had become liable to pay under his bond, by reason of the delinquency of the principal in regard to it. It may show the true state of the indebtedness of the principal at the close of the whole period for which he was collector, and therefore becomes binding and conclusive upon him, if not appealed from in due time; but it would be the most flagrant injustice imaginable to hold it so as to the surety. This would be shifting, by the process of appropriation, as the court say in *The Postmaster General v. Norvell*, (*Gilp.* 126), the burthen of payment, resting on the shoulders of the sureties in the several bonds given for the preceding years, on that of the defendant, who is a surety in the bond given for the last year, which the court say most clearly cannot be. The court also say that each set of sureties must answer for its own defaults, and is entitled to be credited with its own payments. This also is all in accordance with the principles laid down in the *United States v. January*, (7 *Cranch* 575); where the court say, "it will be generally admitted that moneys arising, due, and collected subsequently to the execution of the second bond, cannot be applied to the discharge of the first bond, without manifest injury to the surety of the second bond, and *vice versâ*;" justice between the different sureties can only be done by reference to the collector's books, and the evidence which they contain may be supported by parol testimony, if any in the possession of the parties interested. In *The Postmaster General v. Norvell*, (*Gilp.* 126), the court determined that the government, for whose security both bonds were given, could not apply the moneys collected by the officer after and under the second bond, and on the responsibility of the sureties in a second bond, to the payment or credit of the balance due on moneys collected, and which ought to have been paid, by and under the first bond. Again, in page 130, the court say, "the principle of law is, that

[Commonwealth v. Reitzel.]

you shall not take the moneys due and collected subsequently to the execution of the second bond, and apply them to the discharge of the first bond."

In opposition then to principles so equitable and just, it is not to be supposed that the account of Mr Hambright, as stated by the Auditor General, which was a general account, embracing the whole time that he had been in office, from 1839 to 1844, though appointed and reappointed annually, when new bonds and sureties were given for each year, was designed to show the actual liability of the different sets of sureties under their respective bonds. The form and manner of making out and stating the account shows nothing of the kind, and could not possibly have been intended to show it, for it shows most clearly the contrary on its face. Had such been the intention, a separate and distinct account would have been made out and stated for each year, commencing with the date of the appointment or reappointment for the same, and showing the moneys received and paid away during each year. Had this been done, I have not a doubt but the sureties respectively for each year would have been bound and concluded by the settlement, if not appealed from within due time. But the account being made out in the form of a general account current, commencing with the year 1839 and closing with the year 1843-4, throws the accumulated balance for this whole period upon the defendant, who was surety only for the last year. This would be so abhorrent to every principle of justice, and even contrary to what was intended, as it would appear from the form and manner of stating and settling the account, that it can and ought not to be allowed or sanctioned.

The discussion of this first point, submitted to the court below, and the principles referred to and brought to bear upon it, solve the questions raised in the second and third points, the answers to which were excepted to. It is therefore unnecessary to notice them specially.

Judgment affirmed.

Morrison's Case.

Upon a sale by the sheriff of the real estate of one who died intestate, and after the payment of liens entered in his lifetime, the residue must be paid to the administrator, to be paid and distributed according to law, upon his giving such security as the court may decree.

APPEAL from the decree of the Court of Common Pleas of Perry county, appropriating the proceeds of the sale of the real estate of James Morrison, deceased.

James Morrison died intestate, seised of the real estate which was the subject of sheriff's sale. By a proceeding in the Orphans' Court partition was made of the estate into three parts, which were severally taken at the valuation by three of the sons, each of whom entered into recognizances, with securities, for the payment of the shares of their sisters, Rebecca, married to John L. Lamareux, Margaret, Eliza, Mary, Jane and Horabella Morrison. At the death of James Morrison there were judgments against him. Upon one of them in favour of Anderson's executors, which had been revived with notice to the heirs of James Morrison in possession of the land, a *feri facias* was issued and levied on the estate, and it was afterwards sold on a *venditioni exponas*, and the proceeds of that sale was the money now in court.

After paying all the judgments which were liens in the lifetime of James Morrison, there remained about \$1200 to be appropriated. Ralph Ewing claimed the money upon a judgment obtained against the administrator of James Morrison for \$169.07. The court rejected this claim on the ground that it had not been prosecuted to judgment with notice to the widow and heirs. P. Stambaugh claimed \$26.03, the amount of a judgment obtained against the administrator of James Morrison, deceased. The court refused to decree the payment of this judgment.

The administrator *de bonis non* of James Morrison claimed the whole fund, after deducting liens in the lifetime of the intestate, and tendered a bond with sufficient sureties, which was approved by the court, for a legal appropriation of it, and exhibited a claim of John Stambaugh for \$5.90, and of John Carns for \$33.84 against the estate.

Lamareux and wife, and the other heirs of James Morrison, deceased, claimed that the money should be appropriated by the court, and after the payment of the just debts of James Morrison, deceased, that the residue should be paid to them on their recognizances. But the court decreed that the money should be paid to the administrator *de bonis non*. From this decree all the

[Morrison's Case.]

recognizees appealed, and assigned for error that the court decreed the money to the administrator *de bonis non*.

Watts, for appellants.

Reed, for appellees.

The opinion of the Court was delivered by

SERGEANT, J.—This case seems to fall within the express provision of the 33d section of the Act of 24th February 1834, that in all cases where property, real or personal, of a decedent is sold upon an execution, and more money raised than is sufficient to pay off liens of record, the balance shall be paid over to the executor or administrator for distribution, he giving bond; and provided, also, that it is to be distributed as real estate. In the case before us the real estate of the decedent has been sold by execution on a judgment against him revived by *scire facias*, with notice to the heirs, and the money brought into court by the sheriff. The judgments which were liens have been paid out of this money, and there remain other demands against the administrator not payable by him out of this fund, and heirs, also, claimants. The surplus, therefore, goes into the hands of the administrator, to be applied according to law, he giving bond pursuant to the Act of Assembly. This was the decree of the court below, and is, in our opinion, right.

Decree affirmed.

The Commonwealth *against* Lightner.

In an action upon a recognizance taken by the Orphans' Court, in the name of the Commonwealth, to secure the payment of money, brought for the use of another, proof by the defendant that the person for whose use the suit is brought is not entitled to the money, furnishes no defence to the recovery by the legal party. The right to the money will be determined when it is recovered from the defendant.

ERROR to the District Court of *Lancaster* county.

The Commonwealth for the use of Rachel E. Lightner, administratrix of Isaac F. Lightner, against Joel Lightner, with notice to Nathan F. Lightner, terre-tenant. This was an action upon a recognizance entered into to the Commonwealth by Joel Lightner, in 1809, conditioned for the payment of the shares of the several heirs of Adam Lightner, deceased, out of land taken by the defendant in a proceeding in partition. The amount now claimed was the share of Isaac F. Lightner, which became payable after the death of the widow, who died in 1842.

[The Commonwealth v. Lightner.]

The defendant gave in evidence a voluntary deed of assignment by Isaac F. Lightner to trustees, for the benefit of his creditors of all his estate, real and personal, dated the 16th November 1819. Also, an assignment by him under the insolvent laws of Maryland, dated 22d March 1826. And upon which evidence the defendant contended that the administratrix of Isaac F. Lightner had no title to the money claimed, nor right to maintain this action. The court below sustained this position, and directed a verdict for the defendant.

Franklin, for plaintiff in error, argued that it was only necessary to show the title of the legal party to recover, and the defendant had nothing to do with what became of the money; if there be any dispute about that, the court will take care of the rights of the claimants. 6 *Serg. & Rawle* 44; 13 *Serg. & Rawle* 265; 7 *Watts* 159.

Stevens, contra. The suit is not alone in the name of the legal party, but is for the use of one who has no title to the money sued for. She ought not to be permitted to intermeddle with a matter in which she has no interest. Cited 2 *Watts* 221; 1 *P. R.* 322; 9 *Serg. & Rawle* 434.

PER CURIAM.—It would be strange if the legal title to sue were not enough to support an action at law in the name of the trustee, without proof that the suit was brought at the instigation of the true *cestui que trust*. What has the defendant to do with that? The recovery will protect him from a repetition of the demand, and he can ask no more. Such is the principle of *Armstrong v. Lancaster*, (5 *Watts* 68), and it is discouraging to find the professional mind still persisting in the old notion. Here there was no conflict of claims to the cause of action; and if there had been, the defendant would have had nothing to do with it. It would have been determinable by an issue between the parties, as soon as the money was brought into court. The Commonwealth might recover for the benefit of the concerned. If the defendant were vexed by the instigation of an intruder, he might rule him to file his warrant; and that would be protection enough. But the right to sue on a recognizance like this is not regulated by statute like the right to sue on a sheriff's recognizance, on which the party must declare for his particular grievance. As to that, he is in effect the legal party. This is the ordinary case of an action by a trustee; and the plaintiff ought not to have been precluded.

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

Bruner *against* Sheik.

One who furnishes lumber, at the instance of a contractor, for a building on the ground of a stranger, must provide for his security by the terms of his bargain : hence a house rebuilt by an insurance company, in discharge of their liability upon a policy, is not liable to a lien for materials furnished to the contractor.

ERROR to the Common Pleas of *Lancaster* county.

Scire facias sur mechanic's lien at the suit of Abraham Bruner against Joseph Sheik and David Royer owners, Israel Cooper contractor as the employee of the Lancaster City and County Insurance Company.

The facts of this case were that the warehouse of Sheik and Royer was burned, and rebuilt by Israel Cooper upon a contract with the Lancaster City and County Insurance Company, who had it done in discharge of their liability upon the policy of insurance. The plaintiff, who furnished lumber and materials therefor to the amount of \$203, filed a lien, and issued this *scire facias* to enforce its payment.

LEWIS (President) instructed the jury that the plaintiff was not entitled to recover.

Stevens, for plaintiff in error, cited 2 *P. A. Browne's Rep.* 275, 284.

Frazer, contra, cited 2 *Miles* 259; 16 *Serg. & Rawle* 56; 8 *Watts* 514; 4 *Watts & Serg.* 257; 5 *Watts & Serg.* 537; 1 *Ashm.* 377.

The opinion of the Court was delivered by

GIBSON, C. J. — Independent of the question which the late fire that has laid a third part of Pittsburgh in ashes, has made so important in its consequences for present decision — whether this building was a new erection, or the repair of an old one — there is a ground on which the judgment is clearly sustainable. By the Act of 28th April 1840, the lien of a mechanic or material man “shall not be construed to extend to any other or greater estate on the ground on which any building may be erected, than that of the person in possession at the time of commencing the said building, and at whose instance the same is erected; nor shall any other or greater estate than that above described be sold by virtue of any execution authorized or directed in the said Act.” At whose instance, and for whose benefit was this building erected? Not at the instance, nor for the benefit of the persons in posses-

[Bruner v. Sheik.]

sion. The claim was filed for lumber furnished to a warehouse "erected by Joseph Cooper, contractor, architect or builder, as the employee of the Lancaster City and County Fire Insurance Company, for Joseph Sheik and David Royer, the owners or reputed owners of the said building." By the plaintiff's own showing, therefore, it is seen that the articles were furnished at the instance of the company's agent for its use in performance of its covenant to rebuild at its election instead of paying the loss. But it would be a deceptive performance of the contract of indemnity to rebuild to the prejudice of the owner's title. The framers of the statute meant to sanction no such consequence. In *Siner v. Moore*, it was determined at the last term in Philadelphia, that the possession of the person whose title is to be incumbered, must be an actual, and not a constructive one; but here the company, at whose instance the lumber was furnished, had neither possession nor colour of title. It had no more than an incidental right to enter in order to rebuild, without, in the least degree, displacing the possession of the insured. Nor were the articles furnished for their benefit, but for the benefit of the company which was bound by its election to rebuild. The transaction was an affair of the company, and not of the insured who had nothing to do with it. Cooper, the actual builder at whose instance the lumber was furnished, was the agent of the company, and not of the insured who were strangers to the matter, and not to be affected by it. So well were the parties aware of this, that only the company was required to appear and plead; and by not ruling the other defendants to appear and plead also, the plaintiff evinced a consciousness that they were not answerable. For want of it, a judgment in his favour would, at all events, have been erroneous; but even were the company deemed to have been the possessor and builder, nothing but an interest held by it in the ground could have been sold even on a regular judgment, and it had no interest whatever. The case therefore is plainly not within the purview of these lien laws; and when a party furnishes, at the instance of a contractor, materials or labour to a building on a stranger's ground, it concerns him to provide for his security by the terms of the bargain.

Judgment affirmed.

May against Kornhaus.

A workman who contracts with the Commonwealth for the construction of a piece of work upon the Pennsylvania Canal for a stipulated price, is liable upon an implied assumpsit to pay the owner of the land on the line of the work from whom he takes the materials used in its construction.

One who contracts to do work for the Commonwealth is entitled to any peculiar advantage which the law provides for the Commonwealth, as if by its own agents it were doing the work; and, therefore, in estimating the damages done to the owner of land from which materials were taken, it is a legitimate inquiry, whether, upon the whole, an injury was done to the land of the plaintiff.

ERROR to the Common Pleas of Lancaster county.

The administrators of Jacob Kornhaus against Michael W. May, surviving partner of May & Jones. This was an action of assumpsit in which the plaintiff declared for goods sold and delivered. It appeared that the defendant, with his partner, were contractors for rebuilding a lock on the Pennsylvania Canal for the State, at and for a stipulated price. They obtained materials, stone and sand from the land of the plaintiff's intestate, and this suit was brought to recover the price. Independent of some proof that was given of a special contract between the parties with regard to the materials, two questions arose on the trial:

1st. Whether an action would lie at all against the defendant he being a contractor with the State, who by law had a right to enter upon land along the line of canal and take materials, and for which another mode of assessing the damages was provided.

2d. Whether the amount that the plaintiff was entitled to recover was to be measured exclusively by the value of the materials which the defendant received, or whether it was not a legitimate subject of inquiry before the jury what amount of damage was done to the land of the plaintiff by taking the materials from it; and this latter question arose out of an offer of the defendant to prove that the taking of the materials was rather a benefit to the plaintiff's land than otherwise.

The court below ruled both points against the defendant, and they came before this court on bills of exception.

Stevens, for plaintiff in error.

Frazer, for defendant in error.

The opinion of the Court was delivered by

ROGERS, J. — This is an action of assumpsit on the common money counts, for goods sold and delivered. The materials, which consisted of stone, locust timber, and sand, were used by the de

[May v. Kornhaus.]

defendants in the construction of a lock on the public works. The defendants, who were contractors, agreed to build the lock for a certain stipulated price; and it has been ruled in a case not yet reported, that they are personally liable to the owner of the land for the materials taken for its construction on an implied assumption. Moreover, it would seem (if the witnesses are to be believed) that the defendants made an express promise to pay for the materials so used, so that the action is well brought against the defendants; and the only matter of doubt is as to the measure of damages. The action is in substance to recover the value of the privilege to quarry stone, cut timber, and take sand from land of the plaintiff contiguous to the public works. The defendants, it must be observed, stood in the place of the Commonwealth, and the question therefore must be viewed in the same manner as if the claim had been preferred against them. The contractors had the right by force of the contract to go on the plaintiff's land to procure the materials necessary for the prosecution of the work; and in estimating the damages they are entitled to every advantage and any defence which would have availed the latter. We must presume that these matters were taken into consideration in making the agreement; and if they were, any advantage peculiar to the public was so considered that the price of construction was so much less on that account. They form part and parcel of the contract itself. The plaintiff, having given evidence of the quantity and value of the stone, &c., used, the defendant then offered to prove that in taking them he did no injury to the plaintiff, but that on the whole it was an advantage rather than a disadvantage to his estate; and further, that in taking off the knob of stone, he did not render the land less valuable. The evidence was offered for the avowed purpose of lessening the value of the materials for which the action is brought, and in this point of view it ought to be received. In estimating the value of a privilege, a license to quarry stone or take sand from another's land, it would be right to take into the calculation whether it would be a benefit rather than an injury to the owner. It is obvious that if a man is about to sell the right to quarry stone on meadow or arable land in itself valuable, he will ask and be entitled to receive more for it than for quarry leave on land not susceptible of tillage or capable of being used for any agricultural purposes. As against the Commonwealth it cannot be doubted that the owner would be entitled to compensation only in proportion to the value of the article to the owner himself. If worth nothing, he would be entitled to nothing, whatever might be the benefit which would arise to the public from the use of the material. The compensation which in justice should be allowed is more or less as it is injurious or beneficial to the owner. In fixing the amount of damages we do not perceive the justice of the rule allowing the plaintiff the difference between the expense of transporting the stone from his quarry and the

[May v. Kornhaus.]

charges of conveying it from the neighbouring quarries. The whole policy of the law is to give the owner of land a fair compensation and no more for any injury he may sustain by reason of the construction of the public works. They are entitled to a fair equivalent only, and this they owe as much to the generosity of the Commonwealth as to any legal title to remuneration as to the land itself from strict principles of law. If individuals get the price which it is worth to them, it is all they in justice can require; and this principle, as has been before said, is applicable as well to works constructed by contracts, as under the immediate superintendence and directions of agents specially appointed for that purpose. It cannot be permitted that individuals should speculate on the necessities of the Commonwealth, exacting an exorbitant price for articles indispensable to the erection of works constructed alone for the general welfare. We think the court erred in ruling out evidence offered in the first and second bills, and in the charge on the subject of damages. In other respects we perceive no error. We also think it right to observe that the general advantage or benefit derived to the owner of the land forms no part of the case, as that applies only to the original construction, and not to that which properly comes under the head of repairs. The presumption is that it has been allowed in previous settlements; and to allow it now would make the owner pay twice for the same thing.

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

Brown against Boyd.

A testator devised "unto my son W, all the houses and buildings of what nature and kind soever, that are situate at or about 'Peach Bottom,' on my lands there, and the land whereon they stand, and as much land adjoining as is absolutely necessary for egress and regress, and also the land occupied by the saw-mill. And the residue of all the 'Peach Bottom' lands I give and bequeath to my sons W and A, their heirs and assigns for ever, as tenants in common." *Held*, to vest a life estate in the houses and land specifically devised in W, and the remainder in fee in W and A as tenants in common: and upon a proceeding in partition between W and A, whereby the said houses and land were allotted to W, he became seised of the absolute estate in fee.

ERROR to the District Court of Lancaster county.

Slater Brown against John O. Boyd and others, heirs at law of Mary Boyd, deceased. This was an action of ejectment for 15 acres of land, in which the parties agreed to the following facts to be considered in the nature of a special verdict:

[Brown v. Boyd.]

James Porter died in the year 1797, seised in fee of a large tract of land at Peach Bottom, in Little Britain township, Lancaster county, including the land in dispute: having on the 3d day of January 1775, made his last will and testament, in which is the following clause:

"I give and bequeath unto my son William all the houses and buildings of what nature and kind soever, that are situate at or about Peach Bottom, on my lands there, whether held by Maryland or Pennsylvania titles, and the land whereon they stand: and also as much land adjoining as is absolutely necessary for egress and regress: and also the land now occupied with the saw-mill, dam, and the races: and also all the advantages of the ferry, save what use my son Andrew may make thereof for his own private conveniency. And the residue of all the said Peach Bottom lands I give and bequeath to my sons William and Andrew, their heirs and assigns for ever, as tenants in common, to be equally divided betwixt them according to quantity and quality, share and share alike."

To December Term 1798, No. 4, in the Circuit Court of Lancaster county, William Porter, devisee above named, prosecuted an action of partition against Andrew Porter, the other devisee, demanding partition of all the lands at Peach Bottom devised to them by the will of their father; in which action on 24th April 1800, there was judgment *quod partitio fiat*. To September Term 1800, No. 1, a *breve de partitione facienda* duly issued thereon: whereupon, by inquisition taken 7th June 1800, before Christian Carpenter, Esq., sheriff, the inquest allotted and assigned 192 acres and allowance, part of the said lands, in the said inquisition particularly described by metes and bounds, together with a lot for a garden, containing part of an acre, in the said inquisition described, and cut off from the eight-acre tract hereinafter mentioned, to Andrew Porter in severalty, to hold to the said Andrew Porter and to his heirs and assigns for ever, in full for his equal half part or share of the premises in the said writ mentioned, being part thereof: and the said inquest allotted and assigned 168 acres and allowance, other part of the said lands, in the said inquisition particularly described by metes and bounds, together with two tracts of warranted land adjoining Oliver Caldwell's land and the river Susquehanna, the one containing 8 acres, more or less, and the other containing 15 acres, more or less, (reserving out of said eight-acre tract the garden lot therein before allotted to Andrew Porter, and the ground on which Andrew Porter built a house on the river-side), to William Porter in severalty; to hold to the said William Porter and to his heirs and assigns for ever, in full for his equal share or half part of the premises in the said writ mentioned, being the residue thereof: which inquisition was duly confirmed by said court.

William Porter and Andrew Porter entered upon and took pos-

[*Brown v. Boyd.*]

session of the different tracts of land thus allotted and assigned to them respectively in severalty; and by deed of indenture made 23d June 1800, between the said William Porter and Nicholas Boyd, the said William Porter, referring to the said clause in the will of James Porter, deceased, and the above writ of partition and proceedings thereon, conveyed to the said Nicholas Boyd and his heirs the tract of 168 acres and the two tracts above described, containing together 23 acres, with the houses, buildings and appurtenances: being the whole purpart allotted and assigned by the inquest to the said William Porter. Nicholas Boyd, at the time of this conveyance to him, was the son-in-law of William Porter, having previous thereto married Mary, his only daughter, and had been put in possession by William Porter, his father-in-law, of the property conveyed, before the execution of the deed to him. Nicholas Boyd remained in possession till his death; his wife continuing to live with him on the property till her death. After his death (in 1840) his children, the defendants in this suit, came into and continue in the possession thereof. By deed poll dated 22d December 1800, the said Andrew Porter conveyed to Vincent Stubbs and his heirs the tract of 192 acres allotted and assigned to him by the inquest.

William Porter died in the year 1804, leaving Mary Boyd, wife of Nicholas Boyd above named, his only child and heir. Andrew Porter died in the year 1813, leaving two children, John Porter, who has since died, leaving issue, and Eleanor, since married to Edward Hickley, who is still living. Mary Boyd died 30th January 1840, leaving her husband Nicholas Boyd surviving her, and five children by him, John Oliver Boyd, Nicholas A. Boyd, Ann, since married to William A. Brown, Alice Boyd and Stephen W. P. Boyd, who are defendants in this suit. Nicholas Boyd died 22d December 1840; and after his death, on 7th December 1844, by deed poll of that date, John Ehler, Esq., sheriff of Lancaster county, having levied thereon by virtue of due process of law, conveyed to Slater Brown, the plaintiff, and his heirs, all the right, title and interest of the said Nicholas Boyd, of, in and to the tract of 15 acres above described, with the appurtenances.

At the date of the will of James Porter and at the time of his death, all the houses and buildings on his lands at Peach Bottom were erected on the two tracts, one of 8 acres and the other of 15 acres, allotted and assigned as above to William Porter. The land claimed in this action is the said tract of 15 acres above described. The following persons claim to be co-defendants with those already named in the record: Eleanor Hickley, Patrick Ewing, John M. Porter, J. H. Porter, Robert E. Porter, Elizabeth M'Cardle, Ellen Harris, Margaret A. Harland and Sarah Hutton; being, with those already named, heirs of James Porter the testator. The judgment to be entered on the supposition of the necessity of the whole tract of 15 acres being necessary for the enjoy-

[Brown v. Boyd.]

ment of the buildings; their actual necessity for that purpose being reserved as a question for future adjustment.

If under the above statement of facts the plaintiff is entitled to recover, then judgment for the plaintiff with costs; otherwise judgment for the defendants.

That part of the will of James Porter which related to the subject, was as follows:—“Thirdly, I give and bequeath unto my son William all the houses and buildings of what nature and kind soever that are situate at or about Peach Bottom on my lands there, whether held by Maryland or Pennsylvania titles, and the land whereon they stand, and also as much land adjoining as is absolutely necessary for egress and regress; and also the land now occupied with the saw-mill dam and the races; and also all the advantages of the ferry save what use my son Andrew may make thereof for his own private conveniency. And the residue of all the said Peach Bottom lands I give and bequeath to my sons William and Andrew, their heirs and assigns for ever, as tenants in common, to be equally divided betwixt them, according to quantity and quality, share and share alike.”

Then after certain specific devises and bequests, and directing his lands in Cumberland county to be sold by his executors, he concluded his will thus:—“I give and bequeath all the residue of my estate, not already bequeathed or hereafter bequeathed, together with the cash arising from the sale of the lands in Cumberland, to be equally divided amongst all my children, whether male or female, married or single. Lastly, I give and bequeath to my daughter Mary Ewing 150 pounds Pennsylvania currency. And finally, I appoint my sons William and Stephen Porter, to be my executors of this my last will and testament, and do hereby revoke and disannul all other wills by me made.”

The court below was of opinion that the plaintiff was not entitled to recover, and therefore rendered a judgment for defendants.

Franklin, for plaintiffs in error, argued that the will created a life estate in the land in controversy in William, with remainder in fee to William and Andrew; and in support of this position cited 2 *Vent.* 285; 3 *Atk.* 492; 2 *Vern.* 461; 2 *Saun.* 380; 13 *Ves. Jun.* 396; 1 *East* 456; 11 *East* 322. The plaintiff was entitled to recover upon the Statute of Limitations.

Burrows, contra. The question depends upon the construction to be given to the word “residue;” and we contend it is but descriptive of the balance of the land, and not the quantity of estate. 4 *Watts* 90; 4 *Kent* 537. The act of the tenant for life will not affect the reversioner so as to bar his right by lapse of time. 4 *Watts* 221; 3 *Watts & Serg.* 520. But the possession of Boyd, who was entitled to the one-eighth, and therefore a tenant in com-

[Brown v. Boyd.]

mon, would protect the other heirs from the bar of the Act of Limitations. 10 *Watts* 296; 2 *Watts & Serg.* 294; 5 *Burr.* 2604; 1 *Salk.* 285; *Roper on Husband and Wife* 3; *Co. Lit.* 42 a; 1 *Term Rep.* 86.

The opinion of the Court was delivered by

KENNEDY, J.—The point presented for our consideration arises out of the will of James Porter, made on the 3d day of January 1775. Among other things, he thereby “gave and devised to his son William all the houses and buildings, of what nature and kind soever, that were situate at or about Peach Bottom, on his lands there, whether held by Maryland or Pennsylvania titles, and the land whereon they stood; and also as much land adjoining as was absolutely necessary for egress and regress; and also the land then occupied with the saw-mill, dam and races; and also all the advantages of the ferry, save what use his son Andrew might make thereof for his own private conveniency. And the *residue* of all the said Peach Bottom lands he gave and devised to his sons William and Andrew, their heirs and assigns for ever, as tenants in common, to be equally divided betwixt them according to quantity and quality, share and share alike.” The testator had other lands mentioned in his will, some of which he thereby disposed of specifically, and others he directed to be sold, and the proceeds thereof to be divided equally among his children. He also gave a number of money legacies; and after directing his executors to sell and convey his lands situate in Cumberland county, in Pennsylvania, for cash to the best advantage, he gives and bequeathes, in the close of his will, all the residue of his estate not already bequeathed or thereafter bequeathed, together with the cash arising from the sale of the lands in Cumberland, to be equally divided amongst all his children, whether male or female, married or single. After this residuary clause he gave to his daughter, Mary Ewing, £150, Pennsylvania currency, which is the only gift thereby made afterwards. The Peach Bottom lands devised to William and Andrew lay in Lancaster county, Pennsylvania, where William sued out a writ of partition from the Circuit Court thereof against Andrew, to December Term 1798, claiming partition to be made between them of all the Peach Bottom lands devised to them in their father's will. A judgment of partition was obtained, and partition accordingly made thereof by the sheriff, with the aid of an inquest organized for that purpose, allotting and setting out by metes and bounds in severalty to Andrew and his heirs and assigns, 192 acres and allowance, part of the lands described in the writ of partition, together with a lot for a garden, containing part of an acre, and cut off from the eight-acre tract thereby allotted to William as part of his portion, in full of Andrew's equal half or moiety of the premises described in the writ, and allotting and setting out also, in like manner, by metes and bounds

[Brown v. Boyd.]

in severalty, to William and his heirs and assigns, 168 acres and allowance, other part of the lands in the writ described, together with two tracts, one of eight acres, more or less, reserving thereout that part thereof allotted to Andrew for a garden, and the *other containing fifteen acres, more or less* (being the same with the houses and buildings thereon, devised first above to William by the will of his father), to hold the same as his half or moiety of the premises described in the writ. William and Andrew took the exclusive possession of their respective shares thus parted and allotted to them; and William afterwards, on the 23d of June 1800, by his deed reciting the devises aforesaid to him, and to him and Andrew, by the will of his father, and the partition thereof made as above stated between them, for the consideration therein mentioned sold and conveyed to Nicholas Boyd in fee the said 168 acres, and the said two tracts of eight acres and of fifteen acres, containing together twenty-three acres, with the houses, buildings and appurtenances thereunto belonging. Nicholas Boyd, at the time of this conveyance, was married to the daughter of William, an only child, and had been put in possession of the property by William some time before the execution of the conveyance thereof to him. He held the same and remained in the possession until his death, in 1840, when his children, the defendants below, succeeded to the possession. On the 22d December 1800, Andrew sold and conveyed in fee all his portion of the Peach Bottom lands, allotted to him by the partition, to Vincent Stubbs. William Porter died in 1804, leaving Mary, the wife of Nicholas Boyd, his only child and heir at law, who died on the 30th of January 1840, leaving Nicholas Boyd, her husband, and five children by him, surviving. Nicholas Boyd died the 22d of December 1840, after which the fifteen acres, with the appurtenances thereunto belonging, were taken in execution and sold as his property, for the payment of his debts, as appears by the deed of John Eshler, Esq., then sheriff of Lancaster county, dated the 7th day of December 1844, to Slater Brown, the plaintiff in this case, who, by virtue thereof, claims to recover the same.

The principal objection made by the defendants to the plaintiff's recovery is, that the fifteen acres claimed by him composed and embraced merely that part of the testator's lands situate at or about Peach Bottom, with all the houses and buildings thereon, which were devised to his son William by the first clause of the will recited above, and vested in him, at most, only a life estate, seeing no words of inheritance are superadded thereto, or other words used expressive of a greater interest than a life estate; and that the remainder or reversion of the testator's estate therein, if disposed of at all by the will, was given by the last residuary clause therein, as above recited, to be equally divided amongst all his children. Indeed, it was at first said that it was not disposed of at all by the will; but that was not much pressed. But

[Brown v. Boyd.]

we are of opinion that the reversion in fee of the land in question passed by the clause which followed the devise of it to William immediately, whereby the testator declares, "And the residue of *all* the Peach Bottom lands I give and bequeath to my sons William and Andrew, their heirs and assigns forever, as tenants in common, to be equally divided betwixt them according to quantity and quality, share and share alike." Now it is clear that the fifteen acres in dispute formed a part of what the testator called his Peach Bottom lands, and as he had only given a life estate in the fifteen acres to William, there remained a residue thereof, that is, the reversion in fee, to be disposed of; and when he declares, by the immediately succeeding clause, "the residue of *all* the *said* Peach Bottom lands I give and bequeath to my sons William and Andrew, their heirs and assigns forever," &c., it not only appears to me that the reversion in fee in the fifteen acres is thereby passed to William and Andrew as tenants in common, but that it was intended by the testator that it should be so. It has been argued that by the term "residue" the testator only intended to designate and give that portion of his Peach Bottom lands which had not been disposed of previously in any way by his will; but giving the residue of *all* the Peach Bottom lands to his two sons in fee would seem to embrace *all* interest in the whole of them which he had remaining to dispose of; and so include the reversion in the fifteen acres, as well as his entire interest in all the other Peach Bottom lands belonging to him. If authority be wanting to support this construction, we have it in *Wheeler v. Wolroon*, (*Alleyn's Rep.* 28), where the testator, seised of the manor of D, in Somersetshire, devised the manor to A for six years, and part of his other lands in fee; and then devised as follows: "And the *rest* of *all* my lands in Somersetshire, or elsewhere, I give to my brother and to the heirs of his body." It was objected that the word "rest" extended only to such lands as were not devised before. But it was adjudged by the court that the reversion of the manor passed by the devise "of the *rest* of *all* my lands," &c. Now it will scarcely be imagined that if the term "residue," instead of "rest," had been used by the testator in the case just cited, the decision of the court would have been different from what it was. In truth, the two cases are so strikingly alike, that it is seldom we meet with two so much so.

The same principle has been adopted and followed in other cases, vide *Willowes v. Lidcot*, (2 Vent. 285, 286); *S. C.*, (*Carth.* 50); 3 Mod. 229; *Litton v. Faulkland*, (2 Vern. 621). So in *Cooke v. Gerrard*, (1 Lev. 212), it was admitted distinctly that the *reversion* passed by the devise of "all other his lands not before devised or otherwise settled." And in *Harper v. Bean*, (8 Watts 471), where the testator devised to his wife the farm, fulling-mill and carding-machines on which he lived; then all his personal property; next, two lots of ground; and immediately, by a sweep

[Brown v. Boyd.]

ing clause, he gave to her "all his cash, notes and book accounts, with *whatsoever is not named* that he has any *right or claim to*, either in law or equity," and closed by appointing an executor; he had no real estate beside that described in his will: this Court held that the fee simple estate passed in the lands given to the wife by the last recited clause. (See the cases there cited.) The whole tenor of the will, in the present case, would seem to favour this construction of it, as it appears therefrom that it was the intention of the testator to give and divide the whole of his Peach Bottom lands between his two sons, William and Andrew, to the exclusion of all his other children. It can scarcely be believed that he could have intended to include the land and buildings in dispute in the last residuary clause of his will, which divides all equally that is thereby given among his children generally; a thing which could not have been effected well, as to the property in question, without converting it first into money by a sale thereof, as he directed in regard to his Cumberland lands. But, having ordered no sale thereof, the presumption would seem to be, that he did not intend to include it in his last residuary devise. It is also apparent, from the partition made between William and Andrew, that they considered themselves tenants in common of the fee in the whole of the Peach Bottom lands, in reversion at least, if not in possession, and as such had partition made of the whole between them. Each accordingly took exclusive possession of his moiety as divided and set apart by metes and bounds. William, in 1800, sold and conveyed all he got by the partition, including the land in dispute here, to his son-in-law, Nicholas Boyd, who held the same in possession as the absolute owner thereof in fee until his death, in December 1840, a period of upwards of forty years. It would seem to be strange if, after such a holding of the land as the owner thereof, it would or could not be made liable for the payment of his debts. For anything that appears to the contrary in the case, the Statute of Limitations would have given him an indefeasible title in fee to the property, and have rendered it liable for the payment of any debts owing by him at the time of his death. It was contended by the counsel for the defendants, that they, being the heirs at law of Mrs Boyd, the wife of Nicholas Boyd, and the heir at law of William Porter, had a title paramount to that which Nicholas Boyd derived by his deed of conveyance from William Porter. But it cannot be, according to the construction given by us to the will of James Porter, the testator, the original owner of the property, that the defendants can have any claim or title paramount to that which Nicholas Boyd derived from William Porter; for they have no claim except what must have descended from their mother who certainly had none unless it descended from her father, William Porter; but he conveyed all the right which he had or was vested with, as to the fee, either in reversion or in possession, in

[Brown v. Boyd.]

1800, to Nicholas Boyd, and consequently nothing remained in him to descend to Mrs Boyd or anybody else. We therefore consider the plaintiff entitled to recover the possession of the property in dispute. The judgment rendered by the court in favour of the defendant is reversed, and judgment given by this Court for the plaintiff.

Judgment reversed.

Kaufman *against* Crawford.

A testator devised his real estate to his executors to be sold, and directed that the proceeds should be divided between his two daughters. The guardians of the legatees became the purchasers in trust for their wards, and upon their marriage made a conveyance to their husbands of the tract of land. The husbands subsequently divided the land, and mutually executed deeds to each other. *Held*, that the husbands took nothing by the deeds from the guardians to them but the naked legal title, and upon their death the fee remained in the wives.

ERROR to the Common Pleas of *Juniata* county.

David Crawford and others, heirs at law of Daniel Crawford, deceased, against Daniel Kaufman. This was an action of ejectment for 89 acres of land. Both parties claimed under Henry Bitner, who by his will devised a tract of land containing 195 acres to his executors, to be sold, and the proceeds to be divided between his children. At that sale, in 1808, John Rice and John Shively, guardians of Barbara and Elizabeth, two daughters of the testator, became the purchasers, and took a deed therefor to themselves in trust for their said wards. One of these wards subsequently married Henry Mattocks, and the other Daniel Crawford. In 1811 the guardians endorsed and executed the following deed to Mattocks and Crawford upon the deed which they had obtained from the executors:—

“ Know all men by these presents, that we, the within named John Shively and John Rice, as guardians within named, having no other interest in the within deed of conveyance, or the property therein granted, than as guardians for the within named Barbara Bitner, now intermarried with Henry Mattocks, and Elizabeth Bitner, now intermarried with Daniel Crawford, and having settled our accounts as guardians for the said Barbara and Elizabeth with the said Henry Mattocks and Daniel Crawford, and being fully paid and satisfied, and paid by the said Henry Mattocks and Daniel Crawford for all expenses, bills, charges and demands whatsoever of us the said John Shively and John Rice against the said Barbara Mattocks and Elizabeth Crawford, or against the

[Kaufman v. Crawford.]

said within granted, bargained and sold tract of land, hereditaments and premises, do grant, bargain and transfer. and have hereby granted, bargained and transferred the said within described and granted tract of land unto them, the said Henry Mattocks and Daniel Crawford, and to their heirs and assigns for ever. In witness, &c."

In 1813 Mattocks and Crawford divided the land, and they and their wives executed deeds of partition to each other. Subsequently Crawford died, leaving issue, and his widow married Abraham Fry, and they, by deed dated 6th August 1824, sold and conveyed the land in dispute to Isabella Wilson, who, on the 15th November 1839, devised the same to her daughter, Mrs Cummings, whose tenant was Daniel Kaufman, the defendant.

The plaintiffs were the children and heirs at law of Daniel Crawford, and claimed to recover upon the ground that the conveyance of the land to their ancestor by the guardians of his wife, under the circumstances of the case, and subsequent partition thereof between him and Mattocks, vested the fee simple in him, and upon his death the same descended to them, as his heirs at law.

The defendants requested the instruction of the court upon the following points:—

1. The sale by Monohon, the administrator with the will annexed, of the lands in controversy, by deed dated 4th March 1808, to John Shively and John Rice, guardians of Barbara Bitner and Elizabeth Bitner, in trust for the use of the said Barbara and Elizabeth, vested in them the equitable and beneficial estate; particularly so, if the said lands were paid for by the guardians out of the proportion of the sales of Henry Bitner's real estate to which the said Barbara and Elizabeth were entitled; and the deed from Shively and Rice as guardians, reciting the fact of the trust, to Daniel Crawford and Henry Mattocks, would constitute the said husbands of Barbara and Elizabeth trustees for their respective uses. And the deed of partition from Mattocks and wife to Daniel Crawford would not divest the wife of D. Crawford of her interest in said land; and if Daniel Crawford was in this way trustee for his wife, after his death the plaintiffs, as heirs of Daniel Crawford, would have no right to recover the lands.

Answer. The sale by Monohon, administrator with the will annexed, of the land in controversy, by deed dated 4th March 1808, to John Shively and John Rice, guardians of Barbara and Elizabeth Bitner, in trust for the use of Barbara and Elizabeth, vested in them the equitable and beneficial estate; particularly so if the said lands were paid for by the guardians out of the proportion of the sales of Henry Bitner's real estate, to which Barbara and Elizabeth were entitled, and which they, on arriving at age, could have enforced against their guardians, if they chose to do so. The sale by Monohon to the guardians was binding both upon the administrator and guardian; but, being made during

[Kaufman v. Crawford.]

the minority of their wards, they were not then bound; and, until they arrived at an age when they could legally assent to a reconversion of the property from money to land, it must, as to them, be considered in the same character it was bequeathed to them by their father. See cases referred to in *Craig v. Leslie*, (3 *Wheaton* 563). We cannot say to you, in the language of the point just read, that the deed from Shively and Rice to Daniel Crawford and Henry Mattocks constituted them trustees for the respective uses of their wives, and that the deed of partition from Mattocks and wife to Crawford would not divest her interest in the land under the facts and circumstances in evidence. Nor can we instruct you as desired by the defendants in the latter part of this point.

2d Point. If the title was not in Daniel Crawford at his death, but in his wife, the plaintiff can in no event recover; whether Elizabeth Crawford executed the deed to Mrs Wilson legally or not.

Answer. This is true. If the title was not in Crawford at his death, the plaintiffs cannot recover.

3d Point. If the title to the land were beneficially vested in Elizabeth Crawford by the deed to her husband, Crawford had no power to elect to take the land in place of money, other than as trustee for his wife.

Answer. This would be so if that deed vested the interest in Elizabeth. But that deed had not this effect, as we have already instructed you. We decline, therefore, answering this point as requested.

Parker and Reed, for plaintiff in error, argued that the conveyance to the guardians vested the estate absolutely in their wards, and the subsequent conveyance by the guardians to the husbands vested in them nothing but the legal estate, for that was all they had to convey. The estate, therefore, being thus vested in the ward upon her marriage, she could only part with it in the form prescribed by which married women may convey their estates. This is a mere question of conveyance. In whom is the estate under the deeds and facts in evidence? Clearly it was in the wife. 3 *Watts & Serg.* 520; 1 *Johns. Chan.* 565; 4 *Johns.* 136; 1 *Johns. Chan.* 450; 1 *M'Cord's Chan.* 119; 6 *Serg. & Rawle* 267; 1 *Serg. & Rawle* 460; 7 *Watts* 217; 3 *Watts & Serg.* 231; 2 *P. R.* 346.

Benedict, for defendant in error. By the will of Bitner his two daughters were entitled to a pecuniary legacy, and the guardians had no power to convert that legacy into land. Upon the marriage of the legatee, her husband might elect to take the money as bequeathed to his wife, or, in lieu thereof, the land as purchased by the guardian. Having elected to take the land, the

[Kaufman v. Crawford.]

conveyance of it to him was as absolute as the payment of the money would have been. 8 *Watts* 252; 1 *Whart.* 252; 3 *Whart.* 65; 13 *Serg. & Rawle* 330; 3 *Watts & Serg.* 223; 3 *Wheat.* 563; 2 *Watts & Serg.* 27.

The opinion of the Court was delivered by

SERGEANT, J. — It is clear that a trustee not specially authorized cannot go beyond the line of duty prescribed by law, and make changes of property from money into land, or from land into money. If he invest money in land, the *cestui que trust* may, at his option, accept of the land, or refuse it and demand the money. *Bonsall's Appeal*, (1 *Watts* 274). The guardians are such trustees, and the wards here had the right, on coming of age, to exercise this option. For it is not a case where the guardian took the land at a valuation, or even bought it in at a public sale made in consequence of the refusal of the heirs to accept, as in *Bowman's Appeal*, (3 *Watts* 369). It was a volunteer purchase by the guardians at a public sale made by the administrator *de bonis non* in pursuance of the direction of the will, and was properly considered by the guardians as a purchase subject to the assent or dissent of the wards on their coming of age. The ward in question, then, might have exercised this right. When she married, her husband had the right to demand the money, and to make it his own by reducing it to possession, or by some equivalent act. It is contended that, being entitled to the money as his own exclusive property, if he relinquished that to the guardians, he stood in the place of his wife, and had the right to take the land as his own; and that he thus became a purchaser by a new acquisition. But that is not the case before us. The guardians purchased and paid for the land, and took the deed not to themselves, but in trust for the wards; so that the estate became vested in the wards by the deed from the administrator. There was no beneficial interest left in the guardians afterwards to convey, and their deed to the husbands transferred nothing, or, at most, the dry legal estate. After the estate had become vested in the wards, it could not be divested out of them by the will or act of the guardians or the husbands; nor otherwise than by the conveyance of the wives, executed according to the forms prescribed by law. The husband's relinquishment of the money could not of itself give the guardian power to convey an estate which belonged to his wife: it still remained in her, notwithstanding, precisely as it did before such conveyance, and unaffected by it.

This is not a question of election, properly speaking, but on the operation of conveyances, and must be governed by their legal effect. The case that comes nearest to it is that of *Hannah v. Swarner*, (3 *Watts & Serg.* 233), with the difference that there was no intervention of guardian in that case. The conduct of the guardians appears to have been fair, and they intended, perhaps.

[Kaufman v. Crawford.]

the security of the wards. Still I should say, as a general principle, that this kind of transaction by guardian, of converting the property of the ward, is one that ought not to be encouraged, as it has a tendency to produce subsequent confusion and litigation as to the title.

We think the court below erred in holding that the husbands became purchasers of the land in their own right: we are of opinion that the estate continued vested in the wives by virtue of the conveyance from the administrator; and she and her subsequent husband could lawfully convey it, if not otherwise divested.

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

Spangler's Estate.

Where the corpus of a legacy is interest accruing on a residue after payment of debts, and not the residue itself, unless a contrary intent is collectable from the tenor of the will, the legatee is entitled to all that is made from the death of the testator.

APPEAL from the decree of the Orphans' Court of York county.

The questions which presented themselves in this case arose out of the construction of the will and settlement of the estate of Jacob Spangler, deceased. The material parts of the will are as follows:—

Item, it is my will, and I order and direct that my plantation and tract of land, situate part in Spring Garden township, and part in the borough of York, in the county of York and state of Pennsylvania, whereon Daniel Gotwalt now lives, adjoining lands of Henry Smyser, Dr Luke Rouse, Joseph Small, the heirs of George Kuntz, deceased, lands of Thomas Baumgardner, my other lands, lands of Christian Hildebrand, Benjamin Weiser and others, &c., containing about 142 acres, more or less, shall be laid out in small lots so as to suit purchasers, and sold at public sale for the highest and best price that can be gotten for the same, at a time when most suitable and convenient after my decease. This whole tract of land, with the appurtenances, I order shall be sold to purchasers for cash, clear of incumbrances, and free from any dower fund; and I do hereby empower my executors hereafter named, or the survivor or survivors of them, to make good deed or deeds for the same, as good as if I were personally present. *Item*, I further give and bequeath unto my son, Jacob Rudolph Spangler, my gold watch, as a specific legacy. *Item*, I also give and bequeath to my only son, Jacob Rudolph Spangler, and to his heirs

[Spangler's Estate.]

and assigns for ever, my plantation and tract of land situate in Spring Garden township, in the county of York aforesaid, whereon John Waggoner now lives, adjoining my other lands, lands of Thomas Baumgardner, lands of widow Irwin, lands of Michael Shellenberger, lands of Charles Nes, the Peachbottom road, &c., containing about 180 acres, be the same more or less, which I value at \$9000. Should he, however, when he shall arrive at full age, judge that sum more than the value of said farm, then, in that case, I order that the Orphans' Court of said county appoint five disinterested men to value the same on their oath or affirmation, whose report shall be final, and my son Jacob shall account in the distribution of my estate for the same as follows, viz: two-thirds thereof at the first distribution equally amongst all my children by my executors, and the remaining one-third I order and direct he shall pay the interest annually to his mother during her life or widowhood, and at her death to pay or account for the principal of the said third or dower fund with my executors in the final distribution of my estate amongst my heirs or legatees.

Item, I further will and direct that in case my son Jacob should die before he arrives at lawful age, then and in such case the said plantation and tract of land shall be sold at public sale by my executors, or the survivor or survivors of them, and the proceeds of such sale be equally divided amongst my surviving heirs, share and share alike, as I shall hereafter direct, my wife's dower fund to remain a lien on the said premises during her life, and the interest to be paid her annually, as directed in case my son Jacob accepting said farm; but should my son Jacob, when he arrives at full age, not be willing to accept the said farm, then I order and direct my executors to sell the same at public sale as within mentioned, my wife to have the interest of one-third of the proceeds of such sale during life or widowhood. I further order and direct that all the rest, residue and remaining part of my real and personal estate not hereinbefore willed and disposed of, situate either in the borough of York or in the county of York, including all that situate in Harrisburg, in the county of Dauphin, or elsewhere in Pennsylvania, including my chestnut land in York county, shall be sold (in small lots) by my executors, or the survivors of them, at public sale, who shall make good deeds or titles for the same to the purchasers thereof.

Item, I further order and direct that my executors shall sell all my stocks, bank and road stocks, and the proceeds thereof shall be collected, including all moneys due me on book accounts, bonds, notes, judgments, mortgages and other evidences of debt, and one total sum made thereof, after deducting the necessary expenses incident to settling my estate; the balance then remaining upon my executors' account shall by them be divided as follows, viz: my wife Catherine shall have the interest of the dower fund, or third part of the whole; the real estate, when sold, shall be sub-

[Spangler's Estate.]

ject to my wife's dower fund, which shall be a lien on the same, except the land which is to be sold in lots to be free of the dower fund, as mentioned in the within parts of my will, which said interest shall be paid my said wife annually during her natural life or widowhood, which said dower fund shall be vested out on good real estate, and the other two-thirds of all my real and personal estate shall be equally divided amongst all of my children, share and share alike, my son Jacob to account for the two-thirds of the valuation of his land, as hereinbefore mentioned, provided he accepts it.

Item, my will is, and I do further order and direct that after the death or intermarriage of my said wife Catharine, the house and lot of ground that she may hold by virtue of this my will at that time shall, as soon as convenient, be sold at public sale, together with all the furniture and personal estate then left, as herein willed to her, by my executors, or the survivors or survivor of them, and all dower funds shall be collected, and the whole amount of moneys arising out of the same, after final settlement made with the Orphans' Court, the balance shall then be equally distributed and divided amongst all my children, share and share alike; but if any of them should be dead at that time, having left issue, their children shall inherit their parent's share; but if any of them should have died without issue, then their shares shall be equally divided amongst the surviving brother and sisters, my son Jacob to account for the dower fund charged upon his farm, provided he accepts it.

Item, I further give and bequeath to Catharine M'Cleane, my wife's niece, the sum of \$200, as a specific legacy, and to be in full for any services rendered to me or my family since she became of lawful age; and I further order and direct that the one equal half part of the share of all my estate so as aforesaid willed to my daughter Margaret shall be put at interest by my executors in real security, such security to be double in value to the money loaned thereon, during the life of my said daughter, the interest of which shall be annually paid to her so long as she remains single, and if she marries, the said interest shall be employed in her support and maintenance, and is to be paid to her, to be by her disbursed for that purpose, and over which her husband is to have no control; and after her death the principal of said half share shall be equally divided amongst her children; and if she dies without children, then the same shall be divided equally amongst my other children; the other half or residue of my said daughter Margaret's share shall be paid her agreeably to the first distribution mentioned in this my will. The one equal half part of the share of all my estate so as aforesaid willed to my daughter Jane shall be put at interest on real security, as aforesaid, during the lifetime of my said daughter Jane, the interest of which shall be annually paid to her so long as she remains single; and if she

[Spangler's Estate.]

marries, the interest of her said half share shall be employed in her support and maintenance, and is to be paid to her, to be by her disbursed for that purpose, and over which her husband is to have no control; and after her death the principal of said half share shall be equally divided amongst her children; and if she dies without children, then the same shall be equally divided amongst my other children; and the other half of my said daughter's share shall be paid her agreeably to the first distribution mentioned in this my will. The one equal half part of the share of all my estate so as aforesaid given to my daughter Susan shall be put at interest on real security as aforesaid during the lifetime of my said daughter Susan, the interest of which shall be annually paid to her so long as she remains single; and if she marries, the interest of her said half share shall be employed in her support and maintenance, and is to be paid to her to be disbursed for that purpose, and over which her husband shall have no control; and after her death the principal of said half share shall be equally divided amongst her children; and if she dies without children, then the said half share shall be equally divided amongst my other children; and the other half of my said daughter Susan's share shall be paid her agreeably to the first distribution in my will. If any one of my daughters are under age at the time of my death, my wife Catharine shall receive the interest coming to such daughter until she arrives at age, and employ such interest in the support and education of such daughter. And I do further direct, that in case the purchase of a house and piece of ground for any of my three last named daughters, after their marriage, should be deemed by my executors as required by their circumstances, my executors, or the survivor of them, are authorized, at the request of such daughter, to make such purchase out of the principal of the half share willed to such daughter during life, the deed therefor to be taken in the names of the executors making the purchase in trust for such daughter and her heirs, and to be expressed so in the deed that is for her separate use. Provided my wife is living, such purchase must previously receive her approbation; and provided further, that in case there should be any difference of opinion amongst my executors touching the execution of this will, my wife shall be consulted, and her decision in relation to the said difference shall prevail; and provided, also, that my said daughters, Margaret, Jane and Susan, after arriving at full age, shall respectively have power to dispose of the principal of their respective half shares of my whole estate by this will given during life, which said disposition by will shall only take effect on the daughters making it dying without issue, and the principle of law which prevents a married woman from making a will shall not apply in such case.

The court below referred the settlement of the account to an auditor, who thus stated and disposed of the several questions:

[Spangler's Estate.]

That in making such distribution several questions arose, depending upon the construction of the testator's will, affecting the distribution which it was necessary to decide; and in making the examinations the parties were heard by their counsel, and their views were submitted to the auditor. One principal question was, whether the testator's widow (she having accepted the provisions of the will in lieu of dower) is entitled to the interest, rents and profits arising on the third allotted for her use, during the first year after the testator's death; or whether the same interest, rents and profits are to be added to the third of the principal, and she to have the interest on the aggregate at the end of the second year. The opinion of the auditor is, that the said widow is entitled to receive the one-third of the interest, dividends, rents and profits actually derived from the one-third of the whole estate, real and personal, at the end of the first year from the testator's death.

The testator, although possessed of a large estate, provides no fund in express terms for the support of his widow during the first year after his decease. She has a house and furniture provided, but nothing further, nothing expressly for maintenance; and to suppose that the testator intended she should be destitute of support until the end of the second year would be an unnatural conclusion, and at variance with his known kindness and concern for his family; and even if not distinctly expressed, the intention of the testator would be presumed to be in accordance with the construction of the auditor in such a case. It is now well settled by the decisions of the Courts of Chancery in England, as well as of our own courts, that where an annuity or annual provision is given by will, and no intention expressed to the contrary, the legatees shall have the interest from the death of the testator. See *2 Roper on Legacies*, (2d London Edition 172); *5 Binn.* 475; *Hilyard's Estate*, (5 *Watts & Serg.* 30). In the cases in *Binney* and *Watts and Sergeant*, the annuity is described as the interest or profits arising from time to time during the year from the corpus or principal fund, and payable annually; and in the will of Mr Spangler, referring to the interest of the third given to his wife, he says, "which said interest shall be paid my said wife annually during life or widowhood." These are the terms used in the case in *5 Binn.*, upon which the case was decided as showing not merely a presumed but an expressed intention that the legatee should have the interest accruing the first year. But it is also a rule in Chancery that when a legacy in gross is given payable at a future day in favour of a child having no maintenance provided, it shall carry interest to the child from the testator's death; and the rule is said to be the same in case of a widow, unprovided with support. See *2d Roper* 180-186. Upon the reason of the thing, as well as the authorities, your auditor therefore concludes that the actual interest, dividends, rents and profits received or

[Spangler's Estate.]

accruing in the first year after the testator's death, are due to the widow as at the end of that time; and it appears further, that the situation of the funds of Mr Spangler's estate was similar to that in *Hilyard's Estate* above cited, and *Hewitt's* there cited, and which appear to be conclusive authorities. That the rents and profits of real estate ordered to be sold are to follow the same rule as the interest on personal funds appears as well from the reason of the case as the express authorities. The rule is fully stated in *2d P. Wms.* 26-7, and is, that where legacies are charged or to be raised out of real estate, which bears profits, the legatee shall have the previously accruing interest equal to the profits, just as in the case of mortgages and stocks bearing interest. Another reason may be added; the testator directs his real estate to be sold. This direction converts the whole into personalty, as at his death, and from that time all rights of legatees are considered as vested for their benefit, just as in the case of personal estate uncollected or unconverted.

Another question arises connected with this distribution as regards a devise by the testator to his son Jacob of the Wagner farm. Your auditor is of opinion that the devise is an immediate devise in fee with defeasances or rather executory devises over on certain events; which are the refusal or death of the devisee at certain times. The law on this subject is stated in the case of *Shepperd v. Ingram*, (*Ambler* 450). It is that "where real estate is devised with a clause of defeasance on a future event, the devisee is entitled to the rents and profits until the contingency happens." It is also a general rule that where real estate is devised, unless otherwise directed, the devisee takes it at the testator's death with all subsequent profits. The opinion of the auditor therefore is as to the Wagner farm, that Jacob R. Spangler was entitled to all the profits from the testator's death, and that they did not belong to the general fund, and the executor as executor was not chargeable with them, but is to account for them to the devisee, (he having as is alleged agreed to the first terms stated in the will). In regard to the widow's claim from the Wagner farm, that is considered a matter between her and Jacob, and does not enter into the auditor's decision, although her rights in that respect will, it is believed, be governed by the foregoing principles as to the first year's profits.

Another question arises in the distribution in regard to the shares of the two minor daughters, Jane and Susan, out of the first year's interest, rents and profits. By the will the widow has the charge of their support and education, and is to receive the interest on their funds. This in effect constitutes her the testamentary guardian of these minors, and she is of course entitled to their shares of the interest, rents and profits for the first year under the principles and authorities before stated.

According to the foregoing views, the auditor reports a distri-

[Spangler's Estate.]

bution account of the estate charged on the separate account of Charles Weiser, one of the executors, confirmed by the court.

To which report the following exceptions were filed :

1. The auditor erred in giving to Jacob R. Spangler the net produce of the Wagner farm.

2. Also in not including the net produce of the Wagner farm in the distribution among all the legatees.

3. Also in giving the widow absolutely one-third of the net produce of the real estate, including the Wagner farm, and the one-third of the increase of the personal property realized during the first year after the testator's death ; and in not including said one-third of produce and increase in the fund, one-third of which according to the will is to be vested for the widow.

4. Also in giving to Mrs Roberts, Jane and Susan, absolutely, the whole of their share of the increase of the real and personal estate realized during the first year after the testator's death.

5. Also in deciding that the sum of \$6654, in Charles Weiser's account, and \$496.54 in the account of H. Alrick's, should be funded for Jane and Susan Spangler respectively, being their whole shares.

The court below overruled the exceptions and confirmed the report of the auditor. The same questions were argued in this court by

Campbell and Fisher, for appellants.

Mayer and Evans, for appellees.

The opinion of the Court was delivered by

GIBSON, C. J. — The widow would not be entitled to interest from the death on the ground that no provision was made for her immediate support, for she was amply provided for; and it is besides entirely settled by the later decisions that a wife does not stand, as to that, on the footing of a child. She may, in one sense, be said to be a purchaser of a legacy in lieu of dower, inasmuch as it is not entirely gratuitous; but that regards not a question like the present. It is a circumstance of decisive importance in a question of abatement between her and collaterals or perhaps children; as was held in *Reed v. Reed*, (9 *Watts* 263), and in many cases there quoted. But where the corpus of a legacy is interest accruing on a residue after payment of debts, and not the residue itself, it is well settled that unless a contrary intent is collectible from the tenor of the will, the legatee is entitled to all that is made from the death of the testator for the palpable reason that less would otherwise be got than was given. On the other hand, where nothing is accruing, nothing is given in the mean time; and the bequest begins to operate actively only when the fund begins to be productive; and this, in either case, without relation to the rule for the commencement of interest on a pecuniary bequest of

[Spangler's Estate.]

principal and not interest. Here the corpus of the bequest is interest itself; but how much of the widow's third made interest from the death, or any later period, does not appear. Part of it, consisting of her proportion of the stocks, bonds, notes, judgments, mortgages and simple contract debts, must have been immediately productive, and so far she was certainly entitled; but for all besides, she is entitled from the time when interest was, or ought to have been made. The auditor proceeded on the right principle, but there is reason to think he has given it too wide a sweep. The matter is therefore referred back to him to allow the widow whatever interest, specifically so called, accrued from the time of the death or any subsequent period; and the residue of the report stands affirmed in the mean time.

Referred accordingly

Okeson *against* Shirlock.

"W. S. appears and enters into recognizance in double the debt and costs as special bail in the above suit, for an appeal according to the Act of Assembly of 1842." Held to be a sufficient minute made by a Justice of the Peace upon an appeal, to support a *scire facias* reciting a recognizance in the form prescribed by the Act of Assembly.

ERROR to the Common Pleas of Juniata county.

William Okeson against William Shirlock. *Scire facias* *sur* recognizance of bail; to which the defendant pleaded *nul tiel record*.

The plaintiff gave in evidence the transcript of a judgment of a Justice of the Peace for \$71.09, at the suit of William Okeson against James Shirlock, from which the defendant appealed, and this entry of a recognizance was made by the Justice:

"5th March 1843, William Shirlock appears and enters into recognizance in double the debt and costs as special bail in the above suit, for an appeal according to the Act of Assembly of 1842."

The writ in this case recited a recognizance in the form prescribed by the Act of Assembly.

The court below was of opinion that the recognizance as contained upon the Justice's record was wholly insufficient to support the writ, and therefore rendered a judgment for the defendant upon the plea of *nul tiel record*.

Reed and Parker, for plaintiff in error, argued that the minute made by the Justice was sufficient to enable him to draw the re-

[Okeson v. Shirlock.]

cognizance out at length, and it signified everything which the law required; and referred to the Act of 12th July 1842, *Pam. Laws* 347, sec. 33; 6 *Wheat.* 359; 5 *Watts* 333.

• *Watts, contra*, argued that the law required that a recognizance should be taken in a sum certain, and it was not competent to make the recognizance good by anything *dehors* the record. 6 *Watts & Serg.* 50.

The opinion of the Court was delivered by

KENNEDY, J.—This suit was commenced by a *scire facias* sued out by the plaintiff in error, upon a recognizance alleged to have been entered into by the defendant, before Samuel Sterrett, Esq., a Justice of the Peace, as bail of James M'Kinley, to prosecute an appeal taken by M'Kinley from a judgment given by the Justice against him for \$71.09, with costs of suit, in favour of the plaintiff in error. According to the recital contained in the *scire facias*, the recognizance was taken on the 8th day of March 1843, in the sum of \$142.68, conditioned that if James M'Kinley should appear at the next Court of Common Pleas of Juniata county, and then and there prosecute his suit with effect, according to the Act of Assembly of 1842, then the recognizance to be void, otherwise to be and remain in full force and virtue. The transcript returned by the Justice, showing the judgment rendered by him for the plaintiff against M'Kinley to be \$72.09, with costs of suit, and the appeal taken therefrom, contained also the following entry of the recognizance taken to prosecute it:—"8th March 1843, William Shirlock appears and enters into recognizance in double the debt and costs, as special bail in the above suit, for an appeal, according to the Act of Assembly of 1842." The defendant in error appeared by attorney to the *scire facias*, and put in the plea of *nul tiel record*, upon which the plaintiff took issue; and the court rendered judgment thereon in favour of the defendant. In this the plaintiff alleges that the court erred.

The only question presented by the case is, whether the minute made by the Justice of the recognizance taken and certified by him on the transcript returning the appeal to the court, be not sufficient to warrant the recital of the recognizance set forth by the Prothonotary in the *scire facias*. There is no objection to the form of the recognizance, as recited in the *scire facias*, provided the return of the Justice be sufficient to warrant it; nor indeed can there be, for it is substantially such as the Act of Assembly in that behalf directs. In *Frost v. Roatch*, (6 *Whart.* 359), the following entry, "I become special bail in \$90," signed by J. W. upon an alderman's docket, was held a sufficient recognizance for a stay of execution under the 9th section of the Act of 1820, there being no entry of an appeal; but had it followed immediately the entry of an appeal, it is perhaps fair to infer that the court would

[Okeson v. Shirlock.]

have held it sufficient for the prosecution of the appeal. In *Ingham v. Tracy*, (5 Watts 383), a recognizance taken before a Justice of the Peace upon an appeal in these words:—"G. T. bound in the sum of \$145 that the defendant do prosecute his appeal to effect," was held sufficient to support a *scire facias* reciting a recognizance in the form prescribed by the Act of Assembly; because it was sufficient, as the court said, to enable the Prothonotary, if requisite, to make out a perfect recognizance in form, so as to support the recital in the writ. And why was it held sufficient to enable the Prothonotary to do so? Because it indicated the name of the person bound as bail, the sum of money in which he was bound, and the purpose for which he was bound. Now that is all set forth pretty distinctly in the case before us, and certainly at more length and in better form than in *Ingham v. Tracy*. In one particular only can it even be pretended to be less specifically certain, which is in this, that the sum is specifically mentioned in *Ingham v. Tracy*; whereas, in the case before us, it is stated to be in *double the debt and costs*; but then the amount of the debt is specifically stated in the transcript returned by the Justice at \$71.09, the double of which would be \$142.18, and the amount of the recognizance, recited by the Prothonotary, being \$142.68, the difference between the two sums may be fairly regarded as being double the amount of the costs, which had accrued at the time the Justice rendered his judgment. The reference by the Justice to the amount of the debt and costs, which appeared on his docket in the entry of the action, making double the amount thereof the sum of money in which he bound the bail, was certain enough as to the sum in which the recognizance was taken, because it was capable of being rendered certain by an inspection of the whole transcript, returned by the Justice to the court for the purpose of entering the appeal, that the court might proceed thereon. *Id certum est, quod certum reddi potest*. Under this view of the case, the recognizance, recited in the *scire facias*, corresponds, both in substance and in form, with the recognizance prescribed by the Act of Assembly, and is such as the Prothonotary would have been authorized to make out, had it been necessary, from the memorandum or minutes thereof on the transcript originally filed and entered with him. Such is sufficient according to the decision of this court in *Ingham v. Tracy*, cited above. The court below, therefore, erred in giving judgment for the defendant. But even if the Prothonotary, in making out the *scire facias*, had fallen into a mistake in stating exactly the amount of the recognizance to be double the amount of the debt and costs for which the Justice rendered a judgment, and therefore have misrecited it; and that had appeared to the court on the trial, it would have been right, if not the duty of the court to direct the Prothonotary to correct and amend his error, it being merely clerical. In thus delivering the opinion of the court, it must be observed,

[Okeson v. Shirlock.]

that for the evidence of such recognizance having been taken as is recited in the *scire facias*, I have confined myself entirely to that which appears on the transcript originally obtained from the Justice and filed with the Prothonotary by the appellant. The paper not filed, which was produced at the trial and offered in evidence in connection with the proof of the Justice, that it was the recognizance taken at the time of the appeal, I have left entirely out of view, as not being admissible according to the decision in *Bell v Murphy*, (6 *Watts & Serg.* 50).

Judgment reversed, and judgment for plaintiff.

Eby's Case.

If a judgment be opened, and the defendant let into a defence upon the merits and pleads to issue, and the plaintiff afterwards issues a *scire facias quare executio non*, to which the defendant appeared and confessed judgment of revival, and pleaded the proceedings on the original judgment, whereupon a judgment was entered for want of a sufficient plea, a writ of inquiry of damages issued and was returned finding the amount due, which was collected by execution: *Held*, that the original suit was no longer pending.

THIS was an application at the instance of John Eby to make absolute a rule to show cause why a peremptory mandamus should not issue directed to DANIEL DURKEE, Esquire, President Judge of the Nineteenth Judicial District, commanding him to proceed with the trial of suit No. 45, January Term 1830, John Eby against John Bucher. The facts of the case are all stated in the opinion of the court.

Hambly, for the rule.

Mayer, contra, whom the court declined to hear.

The opinion of the Court was delivered by

SERGEANT, J.—An action of debt by assumpsit was brought in the Common Pleas of York county by John Eby against John Bucher, No. 45, to January Term 1830, and narr. filed 4th December 1829, claiming the sum of \$10,801.50, for money paid and for rent due for his share of a grist mill, and the summons was returned served. At January Term 1830, judgment was entered. On the 8th August 1832, a rule obtained by the defendant was made absolute that the judgment should be opened and the defendant allowed to make defence; the judgment to remain as security for such sum as the plaintiff may recover. A *scire facias*

[Eby's Case.]

was issued by the plaintiff to January Term 1835, No. 3, reciting that the plaintiff had recovered against the defendant a debt \$10,801.50, and \$9.44 costs, at the Term of January 1830; that execution remained to be made and commanding notice to the defendant to appear to show why the plaintiff should not have execution for the debt and damages aforesaid. This writ was returned made known. On the 24th November 1834, the defendant pleaded payment with leave, to which on the 22d March 1835 the plaintiff replied *non solvit*; issue and rule for trial. July 1836, death of defendant suggested, and Philip Fetion, his administrator, substituted. "November 2d, 1836, defendant withdraws the plea of payment, and confesses that the judgment be revived so as to continue the lien of the original judgment mentioned in the *scire facias*, and pleads that the original judgment mentioned in the *scire facias* was opened by the court, and the defendant let into a defence, which matter is still depending and undetermined, as by the record of the said court remaining appears." June 5th, 1837, plaintiff enters a rule to refer, &c. On the 23d June 1837, attorneys appointed arbitrators, who reported in favour of the plaintiff for the sum of \$10,387.23½, with costs. The defendant appealed. On the 13th April 1838, judgment was entered for want of a plea, which the court afterwards refused to strike off. A motion was afterwards made by defendant to show cause why the judgment should not be opened, &c., which the court refused. A writ of inquiry issued finding damages \$2678.78, with costs, and a *fieri facias* to April Term 1841, and a levy and condemnation was had of defendant's real estate. Court directed administrator to apply to the Orphans' Court for sale of real estate, and plaintiff subsequently received \$3332.51, debt, interest and costs, 27th March 1843.

On the 19th February 1839, on the record of the original suit the death of John Bucher was suggested, and his administrator substituted and defendant pleaded *non assumpsit* and payment with leave. Plaintiff replied he did assume, and had not paid. In August 1843, the plaintiff asked that a jury might be called and sworn to try these issues, which the court refused. On a return to the mandamus from this court, the President of the court below returns as the cause of this refusal that the suit is no longer pending in that court; and we are of opinion that the return corresponds with the facts. After issuing a *scire facias quod recuperet* and recovering judgment on it for a specific sum, and issuing execution and receiving thereon the full amount of the debt, interest and costs *really* due on that judgment, the case is concluded; the plaintiff can no longer go back upon the original suit. *Transit rem judicatam* by his own acts and proceedings to try the matter on the *scire facias*, and obtaining judgment thereon. We think therefore, the return sufficient, and refuse further proceedings.

Motion discharged.

Erb against Erb.

Upon a sale of the real estate of an intestate by an order of the Orphans' Court for the payment of debts, the title remains in the heir until the contract of sale be executed by the payment of the purchase money and execution of the deed : hence, upon the death of the heir subsequently to the confirmation of the sale by the court, and prior to the execution and delivery of the deed, his interest will descend as land and not as money.

ERROR to the Common Pleas of *Lancaster* county.

Magdalena Erb, administratrix of Christian Erb, deceased, against the administrators of Christian Erb, deceased. The parties stated the following case, and agreed to consider it as a special verdict :

Christian Erb of Warwick township died 4th October 1842, intestate, leaving a widow Magdalena and five children, Harriet, Henry, Nancy, Peter and Catharine. The administrators of the estate of Christian Erb, deceased, are Isaac Erb and Jacob Erb, who, on the 10th May 1844, filed their account, which exhibited a balance in their favour of \$1150.38½. On the 19th August 1844, the administrators obtained an order from the Orphans' Court to sell for debts the real estate of Christian Erb, deceased, consisting of about 103 acres of land in Warwick township, adjoining lands of Jacob Erb, Abraham Minnick, Peter Eaby and others. Also about 3 acres of woodland in same township adjoining lands of Adam Hollinger, Jacob Shitz and others. In pursuance of said order of the Orphans' Court, the administrators, on the 12th October 1844, exposed the premises (the whole of the real estate) to public sale, and sold the same to Jacob Erb of Cumberland county for \$7957.03. Terms, one-third of the balance that may remain after paying debts and expenses, according to an administration account to be hereafter filed and confirmed, to be charged on the premises. The interest of said third to be paid to Magdalena the widow of said Christian Erb, deceased, annually, from 1st April 1845, during her life ; and after her death, said third to be paid to the heirs and legal representatives of Christian Erb, deceased. The rest of the purchase money to be paid 1st April 1845. This sale was confirmed by the court on the 18th November 1844. Catharine, the youngest child of said Christian Erb, deceased, died when about three years old, in February 1845, her mother, two brothers, and two sisters surviving. Isaac Stauffer, who was duly appointed on the 19th December 1842 the guardian of said Catharine, received no part of the proceeds of the sale of the real estate. The administrators of Christian Erb claim that Catharine's share

[Erb v. Erb.]

in the proceeds of the sale of said real estate goes to her mother for life only; that it is to be considered as real estate. And Magdalena Erb, the mother of said Catharine, claims the said share as her's absolutely; that it is personal estate.

The matter is therefore referred to the court for their opinion, whether the share of Catharine Erb in the proceeds of sale of the real estate of her father, Christian Erb, deceased, is to be considered by the administrators as real or personal estate. If real estate, judgment to be rendered for plaintiff for \$1; and if personal, judgment for plaintiff for \$100. Either party to have the right to take a writ of error to the Supreme Court without affidavit or recognizance.

The court below was of opinion that the proceedings to sell by order of the Orphans' Court, and the sale and confirmation converted the real estate of the heir into personal, and therefore rendered a judgment for the plaintiff for \$100.

N. Ellmaker, for plaintiff in error, argued that the legal and equitable estate remained in the heir until it was actually conveyed to the purchaser: it would have been in the power of the Orphans' Court to have opened the decree of confirmation at any time before money paid or deed made. The purchaser certainly had not the legal title, for none was conveyed; he had not any equitable title, for he had paid no purchase money. Cited *Act of 19th April 1794*; 2 *Yeates* 261; 11 *Serg. & Rawle* 230; *Act of 1833*, sec. 3; 5 *Watts* 113; 8 *Serg. & Rawle* 312; 3 *Watts* 399; 6 *Watts* 32; 3 *Watts & Serg.* 314.

Stevens, contra, contended that the decree of sale, the sale actually made and confirmed by the court, vested the title in the purchaser, and made the administrator and his security responsible for the purchase money; the postponement by the administrator of the time of making the deed could not affect the title, for he was a mere instrument to carry into effect the decree of the court. The right was a vested right to the land in the purchaser which would have been the subject of levy and sale, and a purchaser of his title might have demanded the possession of the land upon complying with the terms of sale. Cited 11 *Serg. & Rawle* 230; 5 *Watts* 115; 14 *Serg. & Rawle* 185.

The opinion of the Court was delivered by

KENNEDY, J. — According to the case, as stated by the counsel of the parties, it became necessary to apply to the Orphans' Court of the county for an order, authorizing the administrators of Christian Erb, who died intestate, to sell his real estate to raise money thereby for the purpose of paying his debts, which order was made on the 19th August 1844. The administrators, pursuant thereto, sold the estate at auction on the 12th October 1844. to

[Erb v. Erb.]

Jacob Erb, for \$7957.03; one-third thereof, after paying the debts of the intestate and the expenses of the sale, was to remain in the hands of the purchaser, a charge upon the estate until the death of the widow of the intestate, and the interest thereof in the mean time to be paid to her annually from the 1st of April then next following; and after her death, the principal to be paid to the heirs and legal representatives of the intestate; and the residue of the purchase money to be paid on the 1st of April 1845. The sale was confirmed by the Orphans' Court on the 18th day of November 1844. The intestate died leaving five children, named Harriet, Henry, Nancy, Peter and Catharine, the last of which died about three years old in February 1845, leaving the others and her mother surviving. The only question raised by the facts of the case is, whether the estate, at the time of Catharine's death, was real or personal estate. The court below considered it personal, and gave judgment accordingly. In this it is alleged that the court erred. It is certain that, at the death of Catharine, nothing more than a contract had been made for the sale of the estate, and approved by the Orphans' Court. It had been, in no respect, carried into execution; everything necessary for this purpose remained *in fieri*; the time for the payment of the first of the purchase money and the making of the deed of conveyance had not come around; nor does it appear that any part thereof whatever was paid. The legal title to the estate, therefore, still remained in the heirs, the same as before the order for the sale of it was made; and as no part of the purchase money was paid, I do not see any good or sufficient ground upon which the character of the estate could be considered as changed, either in law or equity, from real into personal. No portion of the purchase money having been paid by the purchaser, it could not be said with the least shadow of truth or propriety, that the estate, which consisted of land at the time of the sale, was thereby converted into money or anything like personalty. Notwithstanding the sale had been confirmed by the Orphans' Court, still it was liable to be defeated from more causes, perhaps, than one. Had the purchaser proved wholly unable to pay the purchase money, it will not be pretended, I apprehend, that all that was done towards effecting a sale of the estate could have had the least influence whatever in converting it into personalty. It is material to observe that the contract for the sale was made under the authority and operation of law; and, therefore, without being consummated and carried into full execution, ought not to be considered as changing the primitive character of the estate. Nothing will be considered as if done, in such case, until it is actually accomplished; for, if it were to be so considered, it might, in some instances at least, operate to the prejudice of those interested in the estate. The law, therefore, when it directs the sale of an estate, will take all possible care that the rights of those concerned in it shall not be prejudiced

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[Erb v. Erb.]

thereby more than can *be avoided*. It bears no resemblance to the case where by deed or *devise* it has been agreed or ordered that land shall be converted into money, or money invested in land. There the governing principle is, that what ought to have been done, or is even ordered to be done, shall be considered as if done; because it was the will of the owner of the estate that it should be so. We therefore think that the court below erred in rendering judgment, as if the estate had been converted into personality. The judgment is reversed, and judgment given in favour of the plaintiff below, Magdalena Erb, for \$1, according to the agreement of the parties in the case stated.

Judgment reversed.

CASES

THE SUPREME COURT

PENNSYLVANIA.

EASTERN DISTRICT — DECEMBER TERM 1844 — CONTINUED.

Chew's Appeal.

The Orphans' Court may amend an order for the amount of bail on appeal while the record remains with them and the *certiorari* has not been returned.

THIS was a rule to show cause why the appeal of B. Chew from the decree of the Orphans' Court of *Philadelphia* county, dismissing him as executor of B. Chew, deceased, should not be quashed. On the 23d November 1844, the Orphans' Court decreed as follows:—"And now, November 23d, 1844, the court having fully considered the case, do decide that in their opinion said Benjamin Chew, one of the executors of B. Chew, deceased, is mismanaging the estate, and therefore order that he give bail in the sum of \$50,000, on or before Saturday morning next, the 30th inst., as required; and in default of such security, that the letters testamentary issued to him on said estate be vacated." On the 7th December the Orphans' Court dismissed B. Chew, he not having given the required security in \$50,000. Same day the court fixed the amount of bail at \$100, on the appeal of B. Chew, and Chew made the necessary oath. On the 9th December a *certiorari* issued from Supreme Court, returnable the last Saturday of December. On the 14th December the record was

(151)

[Chew's Appeal.]

returned. On the 18th December the Orphans' Court made a further order, as follows:— "It appearing to the court, on advisement, that surety in the sum of \$100 heretofore entered in this case on the appeal from the decision of this court to the Supreme Court, is not 'sufficient security,' as is required by law on such appeal; it is ordered that Benjamin Chew, the appellant, enter into recognizance, with sufficient sureties, to prosecute his said appeal according to law, in the sum of \$50,000, on or before Saturday, the 21st inst., on default of which the court will proceed to carry its decree of the 7th inst. into effect by the process and proceeding authorized by law in such cases." This last required security was not entered by Mr Chew. On the 31st December the assignment of errors was filed. On the 4th February 1845, the *certiorari* was certified by the judges of the Orphans' Court, Same day the record was refiled.

Fallon and Dallas, for the rule, referred to *Koch's Estate*, (4 *Rawle* 268); *Walker's Appeal*, (2 *Dall.* 190); *Cooke v. Reinhart* (1 *Rawle* 321); *Commonwealth v. M'Allister*, (1 *Watts* 308).

Price and Meredith, contra, cited 9 *Wheat.* 526; *Hess's Appeal*, (1 *Watts* 255); 20 *Vin.* 90; 2 *Bac. Abr.* 179; *Act 14th April* 1835, sec. 4; *M'Coy v. Porter*, (17 *Serg. & Rawle* 60); 5 *Mass.* 377; *Penhallow v. Doane's Administrators*, (3 *Dall.* 87, 119); *Yeaton v. U. States*, (5 *Cranch* 283); 1 *Ashm.* 170.

The opinion of the Court was delivered by

SERGEANT, J.— If the court below had authority to make the order of the 18th December 1844, as it has not been complied with, the appeal has not been perfected, and it is the duty of this court to dismiss it. It seems the court below at first ordered the bail on appeal to be given in the sum of \$100. They afterwards considered that the justice of the case required the bail on the appeal to be as large as that which they had previously required to be given by the executor, and they ordered it. This order is in the nature of an amendment of the former one. And, it seems to us, the only question is, whether the court had power to make the amendment. It is not a question, as has been supposed, whether they could proceed further in the cause after an appeal; for this was not properly a further proceeding in the cause, but an amendment of a prior proceeding in the nature of an interlocutory order, fixing the amount of bail. Nothing is now more common than the allowance of amendments in the court below, after error brought, to effect the purposes of justice and prevent advantage being taken by technical objections or by surprise. In *Short v. Coffin*, (5 *Burr.* 273), after error brought, and *in nullo est erratum* pleaded, the judgment was amended. In *Burrows v. Heysham*, (1 *Dall.* 133), judgment on a *scire facias* against special bail

[Chew's Appeal.]

was removed into the Supreme Court by writ of error. On issuing a *certiorari* to bring up the record, the *scire facias* was amended in C. P. These cases, with others, are cited by Mr Justice YEATES in *Berryhill v. Wells*, (5 Binn. 60), who also states that it was declared by the Chief Justice, in *Douglas v. Bearne's Executors*, that after error brought, the court where the record remained might order an amendment on proper grounds. So, in *Spakeman v. Byers*, (6 Serg. & Rawle 385), the court sent the record back to be amended after the case was called up for argument in this court on the writ of error, and being again returned amended, the judgment was affirmed. There is no difference in principle between a writ of error and an appeal: and the record here for the purposes of amendment, at least, seems to have remained with the court below till the 4th February 1845, when it is marked refiled in the docket of this court, and when the *certiorari* was returned by the judges of the Orphans' Court, who were the proper persons to do so.

We, therefore, think the court below had power to make the order of the 18th December; and that, as the appellant has not given the bail required, the appeal has not been duly entered, and must be dismissed.

Appeal dismissed.

Easton Bank *against* Coryell.

The jury, after the charge of the court, retired to deliberate, and returned into court to give their verdict. After they had entered the jury-box, and nine of them had been called, the plaintiff requested to take a nonsuit. *Held*, that he was entitled to do so.

ERROR to the Common Pleas of Bucks county.

This was an action of assumpsit on a promissory note, brought by the Easton Bank against Coryell and Murray. After the charge of the court, the jury retired to deliberate upon their verdict, and after the lapse of some time came into court. After they had entered the jury-box and nine of them had been called, and before the clerk had finished calling them, the plaintiff asked to suffer a nonsuit. The court decided that it was too late, and refused to allow it, and the plaintiff excepted. This refusal was one of the assignments of error.

Ross, for the plaintiff in error, cited *M'Lughan v. Bovard*, (4 Watts 308); *M'Credy v. Fey*, (7 Watts 496).

Chapman, contra.

VOL. IX. — 20

[Easton Bank v. Coryell.]

PER CURIAM.—There is no apparent error in the charge; but the plaintiff was erroneously compelled to submit to a verdict. It was ruled in *M'Lughan v. Bovard*, for reasons not necessarily to be repeated, that a plaintiff is entitled to become nonsuit at any time before the jury have declared their readiness to give their verdict in answer to the prothonotary's formal inquiry; but in this instance they were not ready, for they had not all been called and counted, in compliance with the ceremony that precedes the question of readiness. It is better to hold fast to the established criterion, whatever it may be, than introduce uncertainty by departing from it.

Judgment reversed.

Payran *Against* M'Williams.*

A prothonotary is not entitled to a separate attachment fee for every witness whose name is inserted in the writ.

After a plea in bar, it is in the discretion of the court to allow a defendant to withdraw his plea and demur.

ERROR to the Common Pleas of Philadelphia county.

Mary M'Williams, administratrix, &c., sued Stephen Payran, Jun., before a justice of the peace, who gave judgment for the defendant, from which the plaintiff appealed. To September Term 1836, No. 19, the plaintiff filed a declaration in debt for a penalty for taking an illegal fee, viz: the sum of fifty cents for an attachment against witnesses, and subsequently the plaintiff filed an amended declaration, to which the defendant pleaded, and issue was joined. To the same Term, No. 126, the plaintiff filed the following statement:—

"The plaintiff claims \$50 penalty from defendant for taking, as Prothonotary of Supreme Court for eastern district, other and greater fees than the law allows, for a writ of attachment against Isaac Billings, on the trial of cause of M'Williams' Administratrix v. Hopkins' Administrator.

"Also, another penalty of \$50 for taking other and greater fees than the law allows for taking proof of service of subpoenas; by each of which acts of defendant the plaintiff was aggrieved, &c. The said acts were done within six months next preceding the commencement of this suit."

The defendant pleaded not guilty. It was agreed that both cases should be tried at the same time, whenever either of them should come on for trial. After issue joined the defendant filed a demurrer to the amended declaration in the case No. 19.

* This case was argued in 1838.

[Payran v. M'Williams.]

Before the jury were sworn to try the said issues, the defendant informed the court that a demurrer had been filed by him to the amended declaration in the case No. 19, and denied the right of the plaintiff to proceed to the trial of the case upon such amended declaration. But the court decided that the demurrer could not prevail, as it was too late to file the same after issue joined, and without previous application made to withdraw the existing plea in the case.

The defendant, after the jury were sworn, and during the trial of the cause, contended that the cause No. 126 was not at issue, and therefore could not then be tried, because the plea was "not guilty," which, in a suit in form of debt for a penalty, was a nullity. But the court decided that this error or defect in the pleading could not be taken advantage of by the defendant, the party who tendered the informal plea, at that stage of the cause, viz: after the jury was sworn and evidence given.

After the rejection of the demurrer, and as the plaintiff commenced his evidence in the first case, and during the giving of the testimony in the second case, the defendant objected to the admission of any evidence in either of the cases, upon the ground of there being no legal declaration filed in either; the amended declaration in No. 19 being in its form and parts a statement which, together with the statement in No. 126, were mere nullities, as said cases were suits for a penalty. But the court decided that the objection was not sufficient to exclude the evidence in this case, where the defendant had taken issue on the pleadings of the plaintiff, instead of demurring to their sufficiency.

The court charged, as to case No. 19, in which the plaintiff claimed a penalty from the defendant for taking an illegal fee, viz: the sum of fifty cents, for an attachment against witnesses, and which attachment, it appeared in evidence, contained the names of two witnesses, that if the attachment contained more than one name, the defendant was authorized to demand and receive no more for it than the fee for one attachment.

The defendant excepted to the opinions and charge of the court.

Errors assigned:—

1. In admitting the plaintiff's evidence when no declaration or legal specification of plaintiff's cause of action had been filed.

2. In admitting the plaintiff's evidence when no legal issue was joined.

PER CURIAM.—Had the defendant objected in time to the filing of a statement, the plaintiff would have been driven to a declaration. But having pleaded in bar, it was in the discretion of the court to refuse him its leave to withdraw his plea and demur, and consequently not a subject of inquiry on a writ of error. Neither do we agree that the admissibility of the evidence depended upon the specific character of the pleadings; or that the court erred in

[Payran v. M'Williams.]

charging that a prothonotary is not entitled to a separate attachment fee for every witness whose name is inserted in the writ. The statements filed, however, are miserably defective in substance and form, for which judgment ought to have been arrested; and had that been assigned for error here, it must have prevailed.

Judgment affirmed.

Okie's Appeal.*

An auditor appointed to adjust and settle the accounts of a voluntary assignee, under the Act of 14th April 1836, is confined to the account between the assignee and the *cestui que trust*. Third persons claiming adversely cannot interfere in the settlement, but must resort to adversary proceedings.

The accountant may, however, if he chooses, pay over to adversary claimants, or claim to hold as a stakeholder for his indemnity; and if he does so, the propriety of it will be for the auditor to determine in the first instance.

APPEAL of J. B. Okie, trustee, Paul Farnham, and others, releasing creditors, and Thomas Sheepshanks, from the decree of the Court of Common Pleas of *Philadelphia* county confirming the auditor's reports in the matter of the accounts of David Knox and William Wilson, assignees, and William Wilson, surviving assignee, under an assignment executed by John Knox and James Boggs.

In 1831 John Knox and James Boggs formed the firm of Knox & Boggs, on the retirement of David Knox, a former partner. In January 1836, George G. Wells and James A. Knox became partners of the firm, which then took the firm name of Knox, Boggs & Co. On 21st April 1836, George G. Wells retired, the firm remaining as Knox, Boggs & Co.; the new firms in each instance being merely continuances of the old ones, taking their assets and assuming their liabilities. On May 10th 1837, John Knox and James Boggs, with their respective wives, executed a deed of assignment to David Knox and William Wilson, (see *Hennessy v. The Western Bank*, 6 *Watts & Serg.* 301,) purporting to convey the estates, joint and separate, of John Knox, James Boggs and James A. Knox, in trust for certain preferred creditors, then for such creditors as should execute and deliver, in favour of John Knox, James Boggs and James A. Knox, and of each and every of them, a full, absolute and effectual release of all debts, dues, claims and demands upon them, and upon each and all of them.

On March 6th, 1839, David Knox and William Wilson filed their first account, charging themselves with \$269,721.30, re-

* This case was argued at March Term 1845.

[Okie's Appeal.]

ceived as well from the separate estates of John Knox and James Boggs, as also from the estates formerly of Knox & Boggs, and Knox, Boggs & Co., and claiming credit for nearly an equal amount, as previously paid by them to preferred creditors. This account was referred to an auditor, whose report, allowing the credits asked, was afterwards, Sept. 20th 1839, confirmed by the Court of Common Pleas.

On the 12th June 1840, they filed a second account, charging themselves with \$48,613.36, received from the same sources, and claiming credit for about \$36,000, as paid to preferred creditors.

On the 3d October 1840, William Wilson, as surviving assignee, filed a third account, which showed a balance in his hands, including the balance on the second account, of \$32,702.02; both these accounts were referred to an auditor, by whom the credit for moneys paid to preferred creditors was allowed; and of the balance \$9,772.82 was awarded to preferred creditors, and the remaining \$22,354.45 distributed among releasing creditors. This report was confirmed by the Court of Common Pleas, on May 1st 1841.

On the 6th February 1841, Mr Wilson filed a fourth account, showing a balance of \$12,402.44, which was referred to an auditor, and by him ordered to be distributed among releasing creditors. This report was confirmed by the Court of Common Pleas on July 17th 1841.*

No exceptions were filed to any of the above accounts, or the reports thereon, previous to their being confirmed as aforesaid.

A fifth account was filed by Mr Wilson on Dec. 8th 1841, which was referred to an auditor, and pending the audit, a sixth account was filed on Nov. 15th 1842; and afterwards, on Nov. 12th 1844, a seventh and final account; both which last were referred to the same auditor before whom was pending the fifth account.

The balance on these accounts was claimed by the releasing creditors, &c., claiming under the assignment on the one hand, and by J. B. Okie, trustee, &c., on the other. The auditor awarded to Mr Okie the balance with which he charged the accountant, including some unpaid dividends, which had been awarded at audits of former accounts to preferred creditors. Exceptions were filed by the releasing and preferred creditors, and by Mr Okie, who also excepted to the former reports. All the exceptions were dismissed, and the last report confirmed by the court.

Before the auditor it appeared that, in September 1837, John Knox and James Boggs respectively presented petitions to the Court of Common Pleas of Philadelphia for the benefit of the insolvent laws, and in October 1837, were discharged as insolvents, having first executed assignments as required by law. Philip

* Said accounts were continuations of one another; in each the accountants commenced by charging themselves with the balance on the account immediately preceding.

[Okie's Appeal.]

Kelly and Hosea J. Levis, who were largely preferred creditors under the deed of assignment of May 1837, were appointed trustees, but never acted as such; nor did they appear or claim as insolvent trustees upon the settlement of the prior accounts. In May 1842, they were removed, and J. B. Okie appointed in their stead. After Mr Okie's appointment he filed a bill in equity in the Supreme Court of Nisi Prius against Mr Wilson, to March Term 1843, No. 1, praying that Mr Wilson might be decreed to account to him for the estate previously converted to cash and distributed, and to pay over the remaining assets and money, and all books and vouchers belonging to the estate. This bill was dismissed for want of jurisdiction. And on the 27th June 1843, the first business meeting at the audit since the fall of 1842, which in the mean time had been suspended to allow new books of account to be made out, Mr Okie appeared to assert his claims as trustee aforesaid.

On the 7th April 1842, James A. Knox was decreed a bankrupt by the United States District Court in Louisiana; and on the 5th April 1842, Mr Okie was appointed his assignee, and as such renewed his claim before the auditor. The releasing creditors gave in evidence, under objection, a letter of attorney, James A. Knox to John Knox, dated Nashville, June 2, 1837, authorizing him to join his copartners in an assignment of the estate of Knox, Boggs & Co. for the benefit of the creditors of the firm; this letter of attorney had not been recorded. Also letters alluding to the letter of attorney of James A. Knox, who was absent in some of the western states when the assignment was made, and had never since returned.

On the part of Mr Okie it was proved that the pew of James A. Knox in the Tenth Presbyterian Church, mentioned in the schedule of property conveyed by the assignment of May 1837, was transferable and valuable property, and that among the debts paid by the assignees, and allowed in their first account, were various sums paid to the individual creditors of James A. Knox; among others, \$135 paid for a watch bought by him from Samuel Hildeburn on 11th April 1837. Mr Okie also gave in evidence a record of a suit in Missouri, to which the assignees became parties, 10th April 1838, and which resulted in a decree deciding the assignment to be invalid. It further appeared that with like object, to avoid the assignment, Wm. M'Kee issued an attachment sur execution from the District Court of the city of Philadelphia, on the 10th December 1838, on a judgment obtained against the assignors, in which the assignees were summoned as garnishees; and that divers other similar attachments were issued about March 1841, all of which were still pending.

The first error assigned on the part of J. B. Okie consisted in that the court did not award to him the several sums (or any part thereof) admitted and found to have been received by the assignee,

[Okie's Appeal.]

and alleged to have been paid to preferred and releasing creditors prior to the appointment of Mr Okie as trustee aforesaid.

2 and 3. Among the credits claimed and allowed in former accounts were \$19,455 paid to or retained by William Wilson himself as preferred creditor, and \$20,960 to Samuel Hildeburn, Thomas Kelly and William Wilson jointly as preferred creditors. The rejection of Mr Okie's claim to charge the accountant with these amounts formed the subject of the 2d and 3d errors on his part.

4 and 5. Among the credits claimed by Mr Wilson in the 6th account, filed Nov. 15th 1842, were \$1629.85, errors made by the assignee against himself in accounts filed prior to 1841; and \$4267.65, alleged errors in such accounts. As to the latter sum, Mr Wilson, in 1838, charged himself with the several sums composing it as so much money received by him from divers collecting agents in the west, principally from James A. Knox. The largest item, \$2179, was charged in the assignee's books as to the proceeds, less discount of \$2300, received in bills or notes on the 15th of Nov. 1838, from James A. Knox, and discounted for the assignee by J. W. Tilford. The only testimony produced to show that these several charges were errors was that of Mr Warrin, who testified that in examining the accounts in the winter of 1842, he could not find any corresponding credits claimed by J. A. Knox in the accounts furnished by him, and for that reason he believed the assignee had erroneously charged himself with said sums. He also testified, however, and it appeared by the assignee's books, that in 1837 and 1838 they had erroneously charged themselves and credited J. A. Knox's collecting account with divers sums, together over \$1500, as received from him, which in fact had not been received from J. A. Knox, but were received by the assignees from other sources. And that like mistakes appear to have been made in the accounts of other agents. These mistakes were none of them discovered by Mr Warrin till the winter of 1842. J. W. Tilford was a broker, now residing in New York, a short time since in Philadelphia. The allowance as against Mr Okie of the credit claimed for these sums of \$1629 and \$4267, formed the subject matter of the 4th and 5th errors on his behalf.

6. While the 5th general account was before the auditor, Mr Warrin and Mr Morris were, at the instance of the releasing creditors, employed to make a new set of books, and for their services were paid \$1135; the allowance of a credit for which was the basis of the 6th error.

7 and 8. In March 1844, the Supreme Court having decided the assignment of May 10th, 1837, to be void, (6 *Watts & Serg.* 310), Mr Okie addressed to Mr Wilson a letter dated March 5th 1844, demanding from him a surrender of all the estate and effects, books and papers, held by him under the assignment; which letter resulted in a correspondence, the last letter and demand from

[Okie's Appeal.]

Mr Okie being on the 17th April 1844, after his appointment as bankrupt assignee of James A. Knox. Mr Wilson thereupon availed himself of the professional services of Mr Binney and Mr Gilpin, in addition to that of Mr Meredith, who had previously been the counsel of the assignees, as appears by their accounts, and on the 4th of May 1844, he filed a bill of interpleader in the Supreme Court, in which he set forth that he had in his hands as assignee, or deposited in bank, a large sum of money, amounting to \$16,059.88, the proceeds of the assigned estate, which he was willing to pay to whoever was entitled to it; and prayed an injunction against Mr Okie and the other counter claimants. On May 9th 1844, the court (Judge KENNEDY sitting as Judge) granted the injunction, directed an interpleader, and appointed C. T. Jones receiver. No security was required by the Court or entered into by the plaintiff before the injunction was granted. On July 24th 1844, Mr Wilson paid to Mr Jones, as receiver, \$11,138.88, and gave to him checks on the Western Bank for \$3740.92, which the bank refused to pay.

The assignee had kept a general account as assignee in the bank, and on March 5th 1841, three attachments *sur judgments* against Knox, Boggs & Co. were issued, and the bank made garnishee. At this time there was in bank \$7251.01, of which Mr Wilson drew \$3982.82 on March 7th, leaving \$3268.19 in bank, being a balance arising from the general account of moneys received on and after December 19th 1840. The money now in hands of accountant included \$5456.22, formerly awarded to preferred or releasing creditors, but not paid over, of which \$817.42 was awarded to Thomas Sheepshanks, a preferred creditor, on May 1st 1841. No particular fund was set apart to make these payments, nor was there any specific deposit in bank to their credit.

A written agreement between Wm. Wilson and J. B. Okie was given in evidence before the auditor, dated October 16th 1844, by which it was agreed, *inter alia*, that the balance arising from the accounts before the auditor, and the remaining assets and effects of the estate, if ultimately decreed to be paid to J. B. Okie, should remain in his hands, subject to the extent they then were to the several attachments laid in the hands of the said Wilson, severally, or jointly with any co-garnishee; and that the pendency of said attachments should not be interposed as an objection to a decree being made, nor to the payment of said Okie of the money that might be awarded to him.

The auditor allowed the credits for costs and counsel fees about the bill of interpleader, &c., and also commissions of Mr Jones as receiver, and decreed that of the money awarded to Mr Okie. \$3740.92 should be paid in checks on the Western Bank for moneys attached therein. Exceptions to which formed the subject of the 7th and 8th errors.

[Okie's Appeal]

Errors assigned by J. B. Okie, trustee, &c. :—

1. The court erred in not awarding to J. B. Okie, trustee, &c., the several sums, or any part thereof, admitted and found to have been received by the assignees, or the surviving assignee, and alleged to have been paid to preferred or releasing creditors prior to the appointment of Mr Okie as trustee; and in confirming the auditor's report on the 1st, 2d, 3d and 4th accounts, as respects these sums, and dismissing the exceptions thereto.

2. In not charging accountant and awarding to exceptant the amount of \$19,455, or any part thereof, with interest, being the amount retained by Mr Wilson as a preferred creditor out of the moneys received by him under the assignment, and for which he has claimed a credit in the 1st and 2d accounts.

3. In not charging accountant and awarding to J. B. Okie the sum of \$20,960, with interest, being so much paid by accountant on account of a preference in the assignment in favour of himself, jointly with Thomas Kelly and Samuel Hildeburn.

4. In allowing to accountant, as against the said J. B. Okie, a credit for \$1629.85, claimed in the 6th account for errors made in the 1st account, and also \$4267.65 for alleged errors in said 1st account.

5. In finding, on the testimony given before the auditor, that the accountant had erroneously charged himself with the said sum of \$4267.65 in the first account.

6. In allowing to accountant, as against the said J. B. Okie, credit for the sums of \$235 and \$900, paid to W. H. Morris and James Warrin for services done for the releasing creditors.

7. In allowing to accountant the sum of \$200 paid to Mr Binney, and \$100 paid to Mr Gilpin; also, in allowing to Mr C. T. Jones, out of the funds payable to J. B. Okie, the sum of \$300 for commissions, and to Mr Wilson the costs and charges about the interpleader.

8. In awarding that \$3740.92, part of the money awarded to J. B. Okie, should be paid to him by checks for funds said to be under attachment in the Western Bank.

Errors assigned by releasing creditors :—

1. The court erred in awarding the undistributed funds to J. B. Okie.

2. In not awarding the said funds to be distributed among the creditors, according to the assignment of 10th May 1837.

3. In not distributing so much of said funds as resulted from the assets of Knox & Boggs among the creditors, agreeably to said assignment.

Error assigned by Thomas Sheepshanks :—

The court erred in not allowing to him the claim awarded to him in the previous report of the auditor, and admitted by the assignee to be in his hands.

[Okie's Appeal.]

The following was the report of the auditor:—

The assignment under which the present accounts were filed was made on the 10th May 1837, to William Wilson and David Knox, who accepted the trust; they filed two accounts, which were audited and confirmed; afterwards David Knox died, and Mr Wilson filed his first and second accounts as surviving assignee, being the third and fourth general accounts; which were also audited and confirmed. In these four accounts full payments were made, or awarded to be made, to the preferred creditors, and two dividends to the releasing creditors. In this place your auditor, at the request of one of the parties before him, reports the following facts as existing before and after the assignment.

On February 15th 1825, John Knox and James Boggs, two of the assignors, commenced business under the firm of Knox & Boggs, and continued in partnership until July 24th 1828, when David Knox was taken into the new firm of Knox, Boggs & Co., and remained until April 12th 1831, when he retired without any settlement of the firm affairs, but receiving for his interest from the remaining parties \$2000 or \$3000, and the old firm of Knox & Boggs was resumed, and continued until January 13th 1836, when James A. Knox and George Griffin Welles were introduced into the new firm of Knox, Boggs & Co. On April 21st 1836, G. G. Welles retired; and without any other alteration, the firm of Knox, Boggs & Co. remained till it expired by its insolvency. The new concerns were not formations of new partnerships, but continuances of the old ones, taking their assets and assuming their liabilities. John Knox, James Boggs and David Knox, while in partnership, were entitled to equal shares of the profits. When G. G. Welles and James A. Knox were taken into partnership, they were each to receive one-tenth of the profits; the remaining eight-tenths being equally divided between John Knox and James Boggs. On Welles retiring, J. A. Knox's interest remained one-tenth of the profits of the business. No capital was put into the business by either or any of the partners. John Knox and James Boggs married daughters of Thomas Kelly. David Knox was brother of John Knox, and James A. Knox was a cousin of John and David Knox, and brought up by John Knox from his infancy. Immediately after the assignment, the assignees executed a power of attorney, dated May 12th 1837, empowering John Knox, James Boggs, and James A. Knox, jointly and severally to act for them in the fulfilment of their trusts; and this instrument was duly acknowledged and recorded. The three attorneys acted under it in the collection and disbursement of the assets of the estate, and in the general transaction of its business, until the death of John Knox, in the year 1841, when the surviving attorneys continued to act as usual. At the September Term of this court, in the year 1837, John Knox and James Boggs were discharged as insolvent debtors. Thos. Kelly and H. J. Levis were named as

[Okie's Appeal.]

their trustees, but never acted; and on May 28th 1842, J. B. Okie was appointed trustee in their place, and gave the required security. James A. Knox was, in the year 1842, discharged as a bankrupt by the U. S. District Court of Louisiana; and on the 5th April 1844, J. B. Okie was by that court appointed his assignee.

Pursuant to public notice, your auditor held his first meeting to audit the fifth general account on the 4th February 1842, and at sundry other times, by adjournment, when he was attended by W. M. Meredith, Esq., for the assignee, by E. K. Price, Esq., for certain of the releasing creditors, and by some of the said creditors in person. The account was examined and vouched, and no objections were made to any part of it. But before the audit on this account was closed, some of the creditors present expressed a wish for a thorough examination of the affairs of the estate, which was acquiesced in on behalf of Mr Wilson; and it was accordingly agreed that James Warrin, who had been book-keeper to Knox, Boggs & Co., before their insolvency, and subsequently kept the books of the estate for the assignees, should make a complete set of books, showing all the affairs of the estate, and that William H. Morris, an accountant, should examine the books and accounts on behalf of the creditors; that the audit should in the mean time be suspended, and that the balance in hand, as well as the moneys received since the filing of this account, should be rateably divided among the releasing creditors, who had, on the former audits, made proofs of their claims. Mr Okie was not present at any of these meetings, all these arrangements having taken place before his appointment as trustee or assignee, and no person having up to this period appeared before the auditor, either to contest the assignment or the claims of those claiming under it. Accordingly Mr Wilson, as surviving assignee, declared a dividend of 8 per cent. to the releasing creditors, and paid it to them with one or two exceptions; he then filed his fourth account as surviving assignee, or the sixth general account, in which, among other things, he claimed credit for the payment of this last dividend to and among the releasing creditors, and also certain credits for errors, omissions, and overcharges in former accounts.

This account was filed on the 16th November 1842, and was referred to the same auditor, who, after due notice, held his first meeting thereon on the 24th January 1843, when he was attended by the same parties who had previously attended before him. The account was vouched, but the general examination by the creditors not being completed, nothing else was done, and after a few abortive meetings, the audit was suspended until June 27th 1843, when the auditor, in addition to the parties heretofore represented, was attended by Messrs C. & J. Fallon, as counsel for Mr Okie, trustee and assignee as aforesaid, or, more correctly speaking, in the first instance, as trustee only, Mr Okie not being at

[Okie's Appeal.]

that time the assignee in bankruptcy, but subsequently appointed: they claimed for the trustee the whole fund received by Mr Wilson, the assignee, without regard to the claims of the preferred creditors, on the ground that the assignment was invalid, and offered evidence to prove its invalidity; they also, without waiving any rights or admitting the validity of the assignment, asked that the accounts before the auditor should be vouched. Subsequently, to wit, on the 18th April 1844, they renewed this claim for Mr Okie as assignee in bankruptcy of James A. Knox. After the accounts had been examined, and many objections made, which will be hereinafter considered, the counsel of Mr Okie required the releasing creditors to make proof of their claims; they accordingly made the proofs. All these creditors executed the release to the members of the firms of Knox, Boggs & Co., and of Knox & Boggs, as called for in the assignment, and the release was given in evidence, executed also by John Peterson, who never on any occasion appears to have made or proved any claim, or received any dividend. The taking of the proofs of these claims occupied several meetings, and after many of them had been proved, the auditor held a meeting on the 23d May 1844, when he was attended by Mr Price and Messrs Fallon, and also by Charles Gilpin, Esq., who stated that he appeared by directions of Charles Thomson Jones, a receiver appointed by the Hon. John Kennedy, a judge of the Supreme Court of Pennsylvania, sitting at Nisi Prius, under an injunction issued by him on a bill of interpleader filed by Mr Wilson, and to which he referred the auditor. The counsel for Mr Okie, in reply, objected that the injunction expressly restrained proceedings at law, and contended that the audit of the accounts was not a proceeding at law, but in equity, and could not be enjoined; and insisted that Mr Wilson should go through with the matters of account he had voluntarily commenced. At the next meeting, Mr Gilpin stated that he had no further instructions from Mr Jones, and now, on behalf of Mr Wilson, gave in evidence, under objection from Messrs Fallon, the record of the bill of interpleader, &c., in the Supreme Court, to March Term 1844, No. 3, in equity, exhibited by William Wilson as plaintiff against the following defendants, viz: Thomas Sheepshanks, G. & W. S. Gray, and William Railey, preferred creditors, to whom dividends had been awarded on former audits, but who had not as yet received them, all the releasing creditors, and Thomas Kelly, the holder by transfer of many of their claims, J. B. Okie as trustee and assignee, and William M'Kee & Co., James Hennessy & Co., J. B. Okie and his *cestui que use*, J. B. M'Mullin and Maberry, Giller and Watkin, non-releasing creditors, who had issued attachments of execution and summoned Mr Wilson as garnishee. The bill was filed on May 6th 1844, and after setting forth the assignment and actings under it, states that the complainant had in his hands cash and unadministered assets;

[Okie's Appeal.]

that the preferred and releasing creditors require him to pay them the cash, and collect the outstanding assets, while Mr Okie, as assignee and trustee, and the attaching creditors forbid him to do so, but claim the same for themselves, treating the assignment as a nullity; that the trustee and assignee had also commenced two suits against him. He avers his readiness to pay over the moneys, &c., or pay them into court, and prays for a receiver, and that the antagonist claimants interplead, that their rights may be determined and he protected; and he further prays for an injunction to restrain adverse proceedings against him.

To this bill J. B. Okie, as trustee and assignee, demurred specially as to part, pleaded as to part, and made answer as to the residue; and the case having been argued on the bill and answer, &c., and on a motion for the appointment of a receiver, the judge on the 20th May 1844, made a decree appointing Mr Jones receiver, according to the prayer of the bill, ordering the antagonist claimants to interplead under future orders of the court, enjoining the attaching creditors and insolvent trustee and bankrupt assignee from prosecuting the actions at law mentioned in the bill, or any other action against the plaintiff in respect of the said cash and assets, until further order, and enjoining the preferred and releasing creditors from pursuing complainant at law to compel him to account to them for the cash or assets or any other proceedings at law. On 27th May, Mr Okie appealed from this decree to the court in banc. At a subsequent meeting, Mr Fallon gave in evidence the record of the case of *Hennessy v. The Western Bank*, and referred to the opinion of the Supreme Court in that case, reported in 6 *Watts & Serg.* 300, as fully establishing the invalidity of the assignment. He also gave in evidence an exemplified record of a suit in St. Louis brought by George Brown, *et al.*, citizens of Maryland, on 19th December 1837, against Knox Boggs & Co., wherein several debtors to the late firm were summoned as garnishees. On the 10th April, 1838, Messrs William Wilson and David Knox interpleaded and claimed the debts attached as passing to them under the assignment of 10th May, 1837. On the same day plaintiffs denied the interpleader and joined issue. On the 8th May 1838, the court made an order of publication with a view of notifying the defendants, all of whom lived out of the State of Missouri. On 9th July 1838, answers were filed by the garnishees, admitting their indebtedness to Knox, Boggs & Co. at the time of the assignment, and that notice of it had been given by the assignees. The plaintiff denied these answers, averred that the assignment was fraudulent, and joined issue. On these pleadings the court on 19th January 1839, entered judgment for the claimants William Wilson and David Knox, and the plaintiff moved for a new trial, assigning for reasons: 1st, that the verdict was against law; 2d, against evidence; 3d, against the weight of evidence; and 4th, because the deed of assignment

[Okie's Appeal.]

given in evidence by the interpleader is fraudulent and void as to plaintiff; but the court overruled this motion and sealed a bill of exceptions.

The bill of exceptions embodies copies of the assignment, schedules and release, and of a power of attorney from James A. Knox in Tennessee to John Knox, authorizing him to join in any deed of assignment of partnership estate, and ratifying any such assignment if previously made: it bore date 2d June 1837, and was received in Philadelphia on the 13th day of that month, having been acknowledged before a Notary Public in Tennessee. Depositions in support of the interpleader were taken in Philadelphia, and read on the trial, to show the validity of the assignment by the laws of Pennsylvania. On 23d April 1839, judgment was entered against defendants for \$20,192.51; and on 25th May 1840, the Supreme Court for the Third Judicial Circuit of Missouri reversed the judgment of the court below, given on 19th January 1839, and the opinion is set forth deciding the assignment to be invalid, principally because it stipulated for a release to the assignors, which the court in this case held could not be done in Missouri, whatever might be the decisions or practice in other states: the court appeared also to think that the want of a list of amounts due to creditors in the schedule formed, in connection with other circumstances, an objection to the assignment; and a majority of the court thought that proof of the genuineness of the claims under the assignment should have been given, and the case was accordingly remanded to the court below for further proceedings.

As respects the bill of interpleader, the judge at Nisi Prius appointed Charles T. Jones, Esq., receiver, and he gave security approved by the court; after his appointment Mr Wilson paid over to him the moneys in his hands, but subsequently an agreement was entered into between Messrs Wilson and Okie, whereupon the interpleader was withdrawn, the moneys paid back by Mr Jones to Mr Wilson, and a fifth account filed by Mr Wilson as surviving assignee (being the seventh general account of the estate); it was also referred to the undersigned; and he was attended by the parties and counsel who had previously attended, and also by H. Chester, Esq., for Brown, Hanson & Co., non-releasing creditors, and F. E. Brewster, Esq. for Maberry, Giller and Watkin, non-releasing and attaching creditors, who claimed payment from the funds in hand and proved their claims: that of Brown, Hanson & Co. being on a judgment obtained 26th January 1839, for \$2,188.17, in the District Court for the city and county of Philadelphia, to December Term 1838, No. 730, and that of Maberry, Giller and Watkin being on a judgment in the same court, to September Term 1837, No. 1145, for \$879.59, obtained 27th December 1837, on which an attachment *sur* judgment was issued to June Term 1844, No. 2, and the Western Bank summoned as garnishee. William Smith, Esq. appeared for York &

[Okie's Appeal.]

Sheepshanks and Thomas Sheepshanks preferred and releasing creditors, and claimed the amounts heretofore awarded but not paid to them, and any future dividends for York & Sheepshanks as releasing creditors.

The last account was examined and vouched, and the parties respectively gave evidence to sustain or to invalidate the assignment; but without noticing in detail the various objections to the testimony, it is sufficient here to state that all testimony as offered by or on behalf of the assignee under the assignment or the releasing creditors, was objected to by Mr Okie, and received under his protest, while the same course was pursued by the other side as to all evidence offered by him, these objections being made as well to all the evidence hereinbefore stated, as to that hereinafter to be set forth.

To sustain the assignment, James Warrin, the book-keeper of Knox, Boggs & Co., was examined, and he testified that he had every reason to believe James A. Knox had no individual property at the time of the assignment; that he had known him for twelve years, first, as a boy in the store of Knox & Boggs, sweeping it, lighting the fire, carrying out parcels, &c.; that he was then entirely without means, and when taken into the firm, he put in no capital. On cross-examination, he said that at the time of the assignment James A. Knox was travelling, but lived in John Knox's family, and has not since returned; that he travelled on behalf of the estate till the end of 1841 or beginning of 1842; that he started but a few weeks before the assignment; that witness saw him the night before he went, he taking only a trunk of clothes, and not expecting to be long absent. In answer to a question from Mr Fallon, whether it was not possible that James A. Knox might have acquired individual property otherwise than through the firm, without the knowledge of the witness, he stated that he had no knowledge of any source from which James A. Knox could have derived any money, and therefore could not answer the question but by saying he knew nothing about it; that it was possible property might have been given to him without the witness's knowledge; that he knew nothing of his owning a horse and sulkey, but that his accounts showed that while travelling he bought a horse for the estate, and charged it to the estate, and afterwards sold it and credited the proceeds to the estate. On re-examination, he stated that for the first three or four years James A. Knox drew nothing from the firm, John Knox supplying him with board, lodging, clothing and pocket-money: that the first salary he drew was about the fifth year, and was \$100, and as he grew bigger his services were more valuable: that if he had bought separate property, or it had been given to him, it would have been likely to have been known by the witness, who enjoyed his confidence.

The release was also given in evidence executed by the releasing

[Okie's Appeal.]

creditors, to John Knox, James Boggs and James A. Knox; also three letters from James A. Knox; and these letters with the power of attorney from James A. Knox to John Knox, and that from the assignees hereinbefore mentioned, were relied on to sustain the assignment. Mr Okie gave in evidence certain correspondence between him and Mr Wilson; also an account from the assignee's ledger, being of James A. Knox's personal debts, and proved that the second item thereof, \$135, was paid by the assignee to Samuel Hildeburn on 5th October 1837, being for a gold watch and key bought by James A. Knox on 11th April 1837, and that the receipt specified the payment to be in full for a bill due by James A. Knox. He also gave in evidence all the previous accounts filed by the assignee and audited. The schedule annexed to the assignment showed that James A. Knox owned a pew in the Tenth Presbyterian Church, and a witness was called who testified to the form of the deed for the pews of that church, and gave a deed in evidence: the witness stated that these transfers are subject to the approval of the trustees of the church, and that pews in the aisle of the church where James A. Knox's was, were worth from \$400 to \$600 each. The constitution and by-laws of the church were given in evidence.

Under the assignment the releasing creditors claimed all the funds in hand, while Mr Okie, contending that it was void, claimed all such funds, and as much more as should be disallowed the accountant in settlement. The auditor, considering himself bound by the decision of the Supreme Court in the case of *Hennessy v. The Western Bank*, decides in accordance therewith, that the assignment is invalid, and awards to J. B. Okie all the funds he may find in hand, and that the same be paid to the said J. B. Okie, in his character and capacity of trustee under said proceedings in insolvency; and the only remaining question is as to the amount so to be paid by the assignee.

1. The cash balance of the seventh account is \$10,277.66, all of which was claimed by Mr Okie; the accountant, however, claimed a credit therefrom of \$500, commissions of Mr Jones, the receiver; this claim was objected to by Mr Okie, not only as excessive, but because Mr Okie should not pay them. When Mr Jones was appointed, he gave security in the sum of \$50,000, received from Mr Wilson over \$11,000 in cash, which he deposited in bank in a separate account as receiver, received checks and uncurrent funds, which he kept separate, and notified all the debtors of the estate to make payments to him; under these circumstances the auditor allows \$300 for his compensation, which leaves of this balance \$9,977.66 in cash to be paid to the trustee.

2. In the same account the sums paid as fees to Messrs Gilpin and Binney, and for costs of interpleader, amounting to \$343.75, were objected to, but are allowed as proper expenses in the peculiar position of Mr Wilson.

[Okie's Appeal.]

3. There is a note to the statement of unadministered assets accompanying said account, showing also in the hands of Mr Wilson the sum of \$5456.22, being the amounts awarded to certain preferred and releasing creditors, but not paid over; and this sum is made up as follows, viz:—

Deposits attached in the Western Bank,	-	-	\$3740.92
Cash,	-	-	795.30
United States Bank notes,	-	-	900.00
Florida notes,	-	-	20.00
			<hr/>
			\$5456.22

The assignee will make payment of these sums by handing over to the trustee the cash, the United States Bank notes, and the Florida notes, and by giving checks on the Western Bank for the funds therein.

4. The commissions in the last account are disallowed by agreement, the amount whereof, \$513.37, is to be paid to the trustee.

5. The trustee desired the auditor to charge the accountant with all former payments to creditors under the assignment, which the auditor refuses to do.

6. He claimed to charge the accountant with sums heretofore paid to or retained by himself in former settlements as a preferred creditor, which sums, amounting to \$19,455.00, he claimed, with interest thereon; the auditor refuses to accede to this request, as the claim has long since been judicially settled and passed upon by the audit, and subsequent confirmation.

7. He claimed to charge him with \$20,960 and interest, being a credit in former accounts, for payment of a preference to Samuel Hildeburn, Thomas Kelly and the accountant, being on their joint note; this claim is rejected for the reason last stated.

8. In the sixth account, the credits claimed of \$235, paid William H. Morris for services to releasing creditors, and \$900 paid James Warrin for making a set of books for them and at their request, were objected to, but are allowed, being on the footing of so much moneys paid to or on account of the releasing creditors themselves.

9. In the same account, the following credits, claimed for errors in former accounts, were objected to, viz:—

1837, May 11.	Erroneous credit to J. R. Brown,	\$100.00
" July 17.	do. do. Grondyke & Coffin,	100.00
1838, Sep. 18.	do. do. Mdze., - - -	305.84
" " "	do. do. do. - - -	725.72
" " 28.	do. do. do. - - -	50.97
" " "	do. do. do. - - -	29.32
		<hr/>
		\$1311.85

[Okie's Appeal.]

And the credit claimed for interest on this sum of
\$1311.85, to November 1842, being a proportion-
able part of the interest claimed on \$5272.65,

318.00

\$1629.85

These errors were manifest, but the only objection made was to their allowance as against Mr Okie; but the auditor deems the credits rightfully claimed.

10. In the same account the following credits claimed were objected to for the same reason; and it was also denied that they were errors, viz:—

1838, Nov. 15. Erroneous credit in James A. Knox's collections, \$2300 (part of \$4000),	
less discount, \$120.17, - - - -	\$2179.83
1839, June 19. do. do. in do. \$500, less dis. \$11.25,	488.75
“ Sep. 27. do. do. in do. - - - -	600.00
1841, Mar. 20. do. do. Jas. M'Garvey, in am't \$665.16,	166.07
	<hr/> \$3434.65
Credit for interest on do., - - -	833.00
	<hr/> \$4267.65

Mr Warrin was examined to sustain these credits, and testified as follows:—“I found, in preparing this statement, Abstract No. 2, to correspond with James A. Knox's collection account for 1838, that the assignees, in November 1838, had credited proceeds of one post note of the Planters' Bank for \$1500; one of the Union Bank for \$900; and two others of the same bank for \$800 each; making in all \$4000; which appear to have been sold to J. W. Tilford (as appears by the cash-book), who charged for commission and exchange \$209; leaving the net sum of \$3791, which the assignee credited the estate in his first account under that date; and that the \$1500 draft and one of the \$800 drafts so credited were not required to complete or reconcile James A. Knox's account. The difference, \$120.17, I deducted as its proportionate part of the exchange and commissions; but I found that the assignees had not credited \$1400, which James A. Knox claimed by said account, and I introduced them in this account, as of 1839, which made the cash agree and his accounts also. The \$488.75 arises from a similar excess of credit given by the assignees on June 19th 1839, \$500 less \$11.25 discount; and the \$600 of September 27th 1839, is precisely the same; but in the same account there is a charge.” On cross-examination by Mr Fallon he said: “I take from the cash-book these remittances of \$1500 and \$800. [Mr Fallon then called for a copy of the page or pages of the cash-book of the entries of all these sums for which the credits are claimed as errors in James A. Knox's collections, and the same was afterwards furnished by Mr Warrin.] The cross-

[Okie's Appeal.]

examination being continued, the witness proceeded as follows: "I have before me James A. Knox's collecting accounts; this abstract No. 2, containing all credits for remittances claimed to be made by him in 1838; the same as to abstract No. 3, which is for 1839. All I know about these remittances is contained in these abstracts and the cash-book, and by which I have balanced all his accounts. The reason I believe these remittances of \$1500 and \$800 were not made, is because they are not contained in James A. Knox's account, of which No. 2 is an abstract; also, that from the perusal of his letters to the assignees, I do not find any credits claimed beyond what he has received." [Mr Fallon objects to all after the word "also."] "The \$1400 I have spoken of is no part of the \$2179.83 claimed as an error under date Nov. 15, it being two drafts of \$700 each, appearing to have been remitted by James A. Knox, and not before credited. The only knowledge I have of the item of \$488.75 and \$600 is precisely from the same sources, viz: the entries, a copy of which I gave you, and James A. Knox's account of remittances, which does not appear therein, as per abstract No. 3, for 1839."

Mr Warrin had previously testified that the charges and credits of the assignee's collecting agents had been by him tested, tried and proved with their accounts, and balanced to a cent; that in former accounts the assignees charged themselves with all the moneys received from James A. Knox, and stated on the account the names of the persons from whom the collections had been made, but took no credits for travelling expenses or other items embraced in the sixth account, and the reason was that they had not the accounts with them; he afterwards testified on the subject of the \$166.07 (the M'Garvey item), that it arose from his having, by direction of one of the agents of the assignee, set down this item as received, when it had already been previously credited to the estate; and he stated generally that he had discovered and corrected all the errors on both sides of this account when he came to make the set of books for the releasing creditors in the fall of 1842; that he had no reason to believe the assignees did not receive the several sums originally charged as received from James A. Knox, except that they are not contained in any of the accounts he rendered; that Tilford was a broker, who then lived here, but now in New York, and had been here lately. The auditor, on this testimony, considers these items as sufficiently established, and allows them.

11. The credit for S. P. Walker's draft, now claimed, was objected to, but is allowed: it was a preferred debt under the assignment, being Walker's draft on Knox, Boggs & Co., by them accepted, and payable to the order of Robert Steen, protested for nonpayment, and, after John Knox's death, found with his other papers and vouchers as attorney for the estate, with the indorsement of Steen.

[Okie's Appeal.]

Whereupon, after deduction of the auditor's fee and expenses, and of a counsel fee to Mr Gilpin for services as counsel for the assignee in attending the audit, the auditor awards payment to be made to J. B. Okie, trustee, &c., as follows, viz:—

Balance of last account,	-	-	\$10,277.67	
Less Jones's commissions,	\$300			
Counsel fee at audit,	100			
Auditor's fee and expenses,	263	663.00		
				\$9,614.66
Amounts in hand of former awards to preferred and releasing creditors not paid over to them,	-			5,456.22
Disallowed commissions in last account,	-			513.27
Sum total payable to J. B. Okie, trustee,	-			\$15,584.15

Of which \$900 will be paid in notes of the U. S. Bank, \$20 in Florida notes, \$3,740.92 by checks for funds under attachment in the Western Bank, and the residue in cash.

N. B.—Under the foregoing decision the outstanding debts and other unadministered assets of the estate are to be transferred to said J. B. Okie, trustee, &c.

Supplemental report:—

The auditor appointed to audit, settle and adjust the 5th, 6th and 7th accounts of the assignee of the estates of Knox & Boggs and of Knox, Boggs & Co., and to report distribution, &c., having lately filed his report, has been since requested by the parties interested to report certain testimony in the case that he had omitted in his report, or had not, as was thought, stated sufficiently at length, and he herewith returns the same in this supplemental report.

1. He herewith annexes a copy of the power of attorney from James A. Knox to John Knox, the original of which was given in evidence in support of the assignment.

2. He herewith annexes copies of the receipts of Messrs. Gilpin and Binney for fees, and states that no evidence on the subject of said fees was given beyond the contents of said receipts exhibited as vouchers.

3. The two items of \$22.50 and \$21.25 in the last account are for costs in and about the bill of interpleader, the first being for costs paid to the sheriff, the second for a copy of the record in that case.

4. He stated in said report, that on the injunction being granted and Mr Jones becoming the receiver, Mr Wilson paid over to him the moneys in his hands; he now reports, in addition, that said payment took place on the 24th July 1844, and was made in the following manner, viz:—

[Okie's Appeal.]

Checks on the Western Bank,	- - -	\$3740.92
Henry Ewing's draft, due Aug. 17, 1844,	- - -	500.00
Cash,	- - -	11,138.88
United States Bank paper,	- - -	900.00
Florida Bank notes,	- - -	20.00
		<hr/>
		\$16,299.80

Mr Jones, who was examined, testified that he presented the checks at the Western Bank, and that the bank refused to pay them; that one check was for \$472.73, and was drawn on said bank by James Boggs, attorney for William Wilson; the other for \$3268.19, drawn by Mr Wilson himself; that he tried to collect them, but without success.

5. Mr Jones also testified that after his appointment as receiver, he was notified by one of the Messrs Fallon that Mr Okie denied his authority to act, and would not be responsible for any expenses.

6. Mr Warrin's testimony has been stated on the subject of errors, &c.; he also testified that credits had been given to James A. Knox's collecting account which belonged to other collections, and referred to the assignee's ledger; that the several credits before which the name of "D. J. Cochran's collections" is written *in red ink*, were moneys collected by him, said Cochran, and credited by mistake to James A. Knox; the charge on the other side of the account, dated December 30, 1837, \$13,888.41, is inserted for the purpose of balancing those erroneous credits to J. A. Knox, and agreeing with an entry made of Cochran's collections. That there were several similar errors of credits given to J. A. Knox's accounts for moneys collected by James Boggs, and which were corrected by a similar debit to J. A. Knox's account. And that it was when Mr Warrin made those books, in 1842, that he discovered these errors. He also gave various explanations in regard to corrections made by him, reconciling the collecting accounts of J. A. Knox, and respecting certain items of debit and credit in the assignee's account, and showing that they resulted in a benefit to the estate.

The case was argued by

Fallon and Dallas, for Okie.

Price, Meredith and Sergeant, for Wilson and the releasing creditors.

The opinion of the Court was delivered by

SERGEANT, J.—It appears that the accountant, William Wilson, became assignee with another person under a voluntary assignment made by Knox, Boggs & Co. in May 1837, and having accepted the trust, they went on and received large sums of money

[Okie's Appeal.]

belonging to the estate, and disposed of property, and paid the creditors under the assignment. They filed accounts of receipts and payments of the bulk of the estate in March 1839, and June 1840. By the death of the other assignee Wilson became sole assignee, and continued the execution of the trust in the same manner. In October 1840, he filed a third account, and in February 1841, a fourth. All these accounts were audited, and the moneys distributed among the creditors by decree of the court. In December 1841, Wilson filed a fifth account; and whilst this was before an auditor, in November 1842, he filed a sixth account, and in November 1844, a seventh and final account. All these accounts were between the assignees and the respective preferred or releasing creditors claiming under the assignment. Mr Okie was not present at any of the meetings; nor did any person contest the assignment, or the claims of the creditors under it, till the 27th June 1843, when Mr Okie appeared before the auditor, claiming the whole fund received by the assignee. Wilson, without regard to the claims of creditors, on the ground that the assignment was null and void. It further appears that, in October 1837, John Knox and James Boggs were discharged as insolvents by the Court of Common Pleas of Philadelphia county, having first executed assignments to Philip Kelly and Hosea J. Levis; they, however, never acted and never appeared as claimants on any occasion. In May 1842, they were removed, and Mr Okie was appointed in their stead.

The present case is an appeal from the decree of the court below confirming the report of an auditor appointed by that court to audit, settle and adjust the 5th, 6th and 7th accounts before mentioned. The auditor decided, on the authority of *Hennessy v. The Western Bank*, (6 Watts & Serg. 300), that the assignment was invalid. He refused to charge the accountant, as was desired by Mr Okie, with all former payments to creditors under the assignment, or retained by himself as a preferred creditor individually or jointly with others; but awarded to Mr Okie all the funds in the hands of the accountant, consisting of the balance of the last account, \$10,277.67 and \$5456.22, amounts in former accounts awarded to preferred and releasing creditors, but not paid over by the accountant, and disallowed commissions, \$513.27—total \$15,584.15—to be paid to Mr Okie, in his character of trustee under the proceedings in insolvency, subject to deductions for charges and expenses.

It thus appears that this case, which was originally merely an account between an assignee under a voluntary assignment and his *cestuis que trust*, filed by the assignee, and referred to an auditor to audit, settle and adjust, that is to say, to ascertain the correctness of the debts and credits, and strike a balance, under the trust and as between the assignee and the *cestui que trusts* solely, was turned into the trial and determination of an issue between

[Okie's Appeal.]

Mr Okie, the assignee under the insolvent act, asserting the trust to be a nullity, and Mr Wilson, the voluntary assignee. In going into this question it seems to us plain that the auditor exceeded his authority, and undertook to try and determine questions not submitted to him. His duty was limited to the auditing and adjusting the accounts between Mr Wilson, the assignee in trust, of the one part, and the claimants under that trust, of the other part. Now, Mr Okie is not one of these. He does not claim under the trust, nor is in any wise interested in it: on the contrary, he comes to overthrow it entirely, and set it aside. He may have a right to do so, but this is not the mode in which he can assert that right. Nor had the court jurisdiction in this proceeding to make a decree affecting his rights, or those of third persons not comprised within the trust, but claiming in opposition to it; nor would even consent give jurisdiction. This is a proceeding between other parties, and for a different purpose. On the one hand, the creditors under the trust have been paid or claim their debts; on the other, the accountant claims credit; and the litigation is between them alone. The accountant might originally have renounced the trust, and thereby got rid of it; but having accepted it, and proceeded in the execution, sold the assets, and received the proceeds, he was bound to pay those assets over according to the trust, or show some legal reason for not doing so. But that was entirely his own concern; and he has actually paid over the much larger part according to the trust. He is, of course, bound by that payment, and it is too late for him to question its propriety. Nor does he, but asks a credit for them. And why should he not receive such credit in the settlement of his accounts with the creditors? That he may be ultimately responsible to others for so doing, is no reason, that I can perceive, why he should not have this credit, nor why he should not have his accounts with his *cestui que trusts* settled. If Mr Okie, or any other person, has a claim against the accountant for the sums he has received at any time, they must assert it by adversary process, and then the question will fairly arise between the proper parties, and disputed facts can be tried by jury in the usual manner, and it can be legally ascertained how far this assignment was void under the statute 13 Eliz.; and as to what description of creditors; and what steps they were bound to take to avail themselves of their rights; and how far the general creditors under the insolvent law are now precluded by laches, neglect or acquiescence, from coming forward, after lying by without proceeding against the property or the accountant, and suffering him to go on and execute the trust, make titles to property, receive and pay over large sums of money under and in pursuance of the trust without notice claim, suit, judgment execution, or otherwise. All these are very grave questions, of immense moment to the parties concerned, and not to be thrust into a proceeding between parties litigating mat-

[Okie's Appeal.]

ters amongst themselves with which these questions have no concern, and where the mode of trial and course of proceeding are different; and the object in view by the Legislature in giving the Court of Common Pleas a summary, equitable, special jurisdiction, was simply to settle the accounts between the trustee and the *cestui que trusts*, and not to try all these questions, foreign to the subject of the accounts, and in derogation of the trust. It was for this reason, no doubt, that, by the Act of 14th April 1836, sec. 19, it is only a co-trustee or co-assignee, or person interested in the trust estate or fund, that can issue a citation. Besides, we should hesitate to say that an assignee under a voluntary assignment, duly recorded, who has entered on the trust and given security to perform its duties, after selling the estate and collecting the assets, is then, without adversary suit or process against him, to come to a dead pause, and refuse to distribute them under the trust, because possibly, at some distant day, it might be made to appear that there was some flaw or defect in the assignment; and that he cannot be permitted to file his accounts for settlement, or be cited to file them, nor distribute them according to the trust. And if he cannot take this ground, it follows that he must proceed in the discharge of the duties he has undertaken, subject to all the requisitions of the law, until he is checked or stopped by some adversary process, and then he must abide the legal results of that process, whatever they may be. But that is a matter in which third persons are concerned, and is between him personally and them; whereas the matter of the accounts between him and his *cestui que trusts* remains the same, with all the liabilities and duties of the trustee and *cestui que trusts* under the law, to file and settle them between themselves.

So far, then, as regards the money already paid over by Mr Wilson under the trust, or retained by him for his own debts, he is to receive a credit for it, as it does not appear that there is any appeal or exception, on the part of the accountant or the creditors under the assignment, in regard to it.

So far as respects the money in hand, and not paid over, it will be for the accountant either to pay and ask credit, or to object to payment under the trust, and claim to pay it to others, or hold it as stakeholder, to respond to adverse claims that may exist against it, for his own security; and it will be for an auditor to state the account of it, and decide, in the first instance, what course the accountant is legally bound to pursue; and these will be matters entirely between the accountant and the persons interested in the trust, with which third persons claiming against the trust have nothing to do in the present proceedings.

Decree reversed, and case referred again to an auditor, to adjust and settle the accounts accordingly.

Wetherill *against* Seitzinger.*

The Act of 31st March 1792, "to enable executors and administrators by leave of court to convey lands and tenements contracted for with their decedents," &c. is applicable to a case in which a decedent received from his debtor a conveyance in fee of certain land, absolute on its face, and at the request of the debtor, received from another person a conveyance in fee of other real estate, and afterwards wrote letters, referring to the whole as the debtor's property, which he was ready to re-convey to him upon the repayment of the debt.

ON the 1st April 1830, Jacob W. Seitzinger conveyed to Samuel P. Wetherill in fee, an undivided third of 8182 $\frac{1}{4}$ acres and allowance, part of the Broad Mountain tract in Schuylkill county. In the following spring, under two deeds from Nathaniel P. Hobart and wife, the said Samuel P. Wetherill, at the request of the said J. W. Seitzinger, acquired the legal fee in four undivided fifths of a "coal reserve" or privilege of mining for coal in (inter alia) 91 acres 16 perches strict measure, in Norwegian township, in the same county. By three letters written and signed by Wetherill in his lifetime, he recognised Seitzinger as entitled of right to receive from him a re-conveyance of the lands and hereditaments included in the above conveyances, upon the repayment of the moneys due to him by Seitzinger; and in one of the letters engaged to re-convey them to Seitzinger upon the repayment of such moneys, or upon the substitution of any other security sufficient to secure the amount of Seitzinger's debt to him. After the death of Wetherill, there was a final settlement of accounts between his representative and Seitzinger, by which the amount due by Seitzinger to the estate of Wetherill was ascertained, and fixed at a sum which he was ready to pay on receiving a conveyance of the said lands and hereditaments, which by reason of the minority of some of the representatives of Wetherill, could not be made in the usual manner.

Seitzinger presented a petition to this court, and was permitted to make proof of the contract, of which the abovementioned letters were the evidence. Upon the return of the proofs, the Prothonotary was directed by the court to annex and certify the same for record in Schuylkill county, according to the provisions of the Act of 31st March 1792 and its supplements. The proofs having been recorded in Schuylkill county, the administratrix of Wetherill presented a petition, praying leave to execute a deed to Seitzinger and his heirs. To this petition Seitzinger demurred, assigning for cause, that the court had no jurisdiction, because there was not

* The reporters are indebted to Mr Cadwalader for the report of this case.

[Wetherill v. Seitzinger.]

such a contract of the deceased Wetherill, as is within the purview or meaning of the Act of 31st March 1792 or its supplements, praying that if the demurrer be overruled, the paper containing it might stand as an answer, and in that case, admitting the allegations of the petition, averring his readiness, &c. and submitting to the order of the court.

Cadwalader, in support of the demurrer, contended that the preamble, as well as the body of the Act of 31st March 1792, *Purd.* (1841) 176, contained language restricting its application to contracts falling within the proper legal definition of a sale and purchase. He also relied upon the contents of the supplementary Act of 14th April 1794, (3 *Sm. L.* 129, 130), as sustaining in all its parts this construction of the original act; and referred for the same purpose to portions of the first and second sections of the farther supplement of 10th March 1818, (7 *Sm. L.* 79). He cited *Young v. Pleasants*, (3 *Yeates* 317), and *Park v. Marshall*, (4 *Watts* 383), as cases in which the court used language tending thus to restrict the application of the Act of 1792, and referred to *Hagerty's Case*, (4 *Watts* 305), in which it was held that the Act of 1792 was not applicable to the case of a voluntary conveyance, and that the supplement of 1818 was not applicable to the case of a parol gift from a father to a son, under which possession had been taken and improvements made upon the land.

Randall, for the petitioner, observed that this was not the case of a voluntary conveyance, and therefore *Hagerty's Case* was not in point. In that case, the gift would not have been enforced in a Court of Chancery. The other cases cited were those of actual sales, and the language incidentally used by the judges was to be explained by thus referring to its application. In the present case, although the contract, strictly speaking, was not a sale and purchase, it was one of binding obligation founded upon a sufficient legal consideration. It is one which a Court of Equity would enforce. All such contracts of deceased persons relating to lands are within the enactments of the Act of 1792. Its enacting clauses are not to be controlled by the preamble. *Seidenbender v. Charles*, (4 *Serg. & Rawle* 166), and cases cited. Examples of the application of this rule to cases analogous to the present are to be found in *Bank of North America v. Fitzsimmons*, (3 *Binn.* 356), and (1 *Watts* 15, 335). In *Mercer v. Watson*, (1 *Watts* 355), Chief Justice GIBSON says of another Act of the Legislature: "Undoubtedly a sale is put as an instance in the preamble; but the enacting clause is applicable in its terms to every *bonâ fide* conveyance whatever." So here, although the evil of an unexecuted sale is mentioned in the preamble of the Act of 1792, as that of most frequent occurrence, yet the enactments are broad enough to cover all contracts relating to lands, of which the consideration was such as to render

[Wetherill v. Seitzinger.]

them binding between the parties. All such contracts are within the mischief to be remedied. Statutes are to be construed according to the state of things existing at the time of their enactment. At the date of this Act there was in Pennsylvania no remedy to compel the execution of trusts express or implied, and no case can be imagined in which legislative remedy was more needed than it was at that date in the case of a party bound to convey or reconvey lands on the repayment of a debt. [Judge ROGERS. Is this case anything more or less than a mortgage?] In regard to the Broad Mountain lands, it is perhaps, a transaction of the nature of a mortgage. This does not affect the argument. A defeasance not recorded or proved or acknowledged, if signed according to the requisitions of the Statute of Frauds, however void it may be as to third persons under the recording Acts, will be binding upon the party subscribing it and his heirs, and perhaps also upon strangers having notice of it. This sort of case was one which especially required legislation in 1792. As to the use of the word "purchaser" and "consideration money" in the Act of 1792 and the supplement of 1818, they are, in their technical sense, applicable to any person having a right to acquire a title on the payment of a sum of money. The supplemental Act of 1794 is applicable to the case of lunatics only, and if of more limited scope than the other Acts, ought not to be permitted to narrow their meaning so as to exclude cases within the scope and operation of the broader terms contained in them.

Cadwalader in reply. The Act of 1794, being a supplement to and in *pari materiâ* with the Act of 1792, is to be read with it as if it formed a part of it. Thus read, it is conclusive of the present question. We admit the doctrine that the enactments of a statute are not to be controlled by prefatory recitals in the preamble, but contend that the enactments of the Act of 1792 are such as necessarily connect themselves with this part of the preamble. The use of the word "purchaser" and "consideration money" in the enacting clauses, serves to define the purpose and objects of the Act and to limit its application. Without the clauses which contain these words, the portions of the act relied on by the petitioner's counsel are incomplete, and their provisions would result in nothing practical. They therefore cannot be detached and considered separately. The words are obviously used in their popular and ordinary sense, and not in the artificial legal sense imputed to them on the other side. There is no evidence that the Act of 1792 has ever received the construction contended for on the part of the petitioner, while there is both legislative and judicial authority in favour of that construction which will sustain the demurrer.

PER CURIAM.—The court are of opinion that under the statutes

[Wetherill v. Seitzinger.]

of this Commonwealth in that behalf provided, the court is possessed of jurisdiction of the contract in the petition mentioned, upon the proofs therein mentioned heretofore certified for record in the county of Schuylkill. Whereupon it is ordered, decreed and considered, that the demurrer of Jacob W. Seitzinger be overruled, and that the petitioner, Charlotte W. Wetherill, have leave to execute a conveyance to the said Jacob W. Seitzinger and his heirs, of the lands, tenements and hereditaments in the petition mentioned, according to the prayer therein contained.

Demurrer overruled.

Pattison *against* M'Gregor.*

Under the Act of 1772, a ground-rent landlord is not entitled to be paid his ground-rent out of goods on the premises sold by the sheriff on execution against the owner of the ground in possession.

PATTISON and others against Macgregor. This was a rule to show cause why the plaintiffs, seven in number, should not take out of this court the sum of \$222, balance of proceeds of a sale of the defendant's goods under their writs.

On the 20th December 1844, seven writs of *fiery facias* were delivered by the plaintiffs to the sheriff, who levied on the defendant's goods and chattels. On the 16th January 1845, the sheriff sold the goods for between 2000 and \$3000. At the time of the levies, the goods and chattels were in and upon certain houses and lands, owned in fee simple by the defendant, under and subject to two ground-rents, one of \$185 per annum, payable to Joseph Johnson and his heirs, and the other of \$259 a year, payable to David S. Brown and heirs. Both the deeds were in the ordinary form of ground-rent deeds, and the rents were payable half-yearly on the 1st days of July and January, with the usual clauses of distress and re-entry.

The ground landlords claimed the sum in controversy, \$222, for the half-year's rents falling due on the 1st January 1845. The plaintiffs denied their claim for arrears of ground-rent, and took the above rule.

J. A. Phillips, for the execution creditors, referring to the 83d section of the revised law of 1836 relating to executions, the Act

* We are indebted to J. A. Phillips, Esq., for the report of this case, which was argued at March Term 1845.

[Pattison v. M'Gregor.]

of 21st March 1772, and the Statute of 8 *Anne*, ch. 14, contended that the "landlord" referred to in these laws meant the ordinary landlord who owned the fee simple, and did not include the ground landlord; that at common law on a judicial sale the landlord lost his rent, and that it required these statutes to save his right, and they were expressly and in terms confined to leases or demises, and excluded grants in fee with reservation of ground-rent.

G. M. Wharton and *Randall*, for the ground landlords, admitted that the point now in issue had never been decided, but referred to the case of *Franciscus v. Reigart*, (4 *Watts* 98), to show that this court had decided that the Act of 1772 did apply to ground-rents and ground-rent landlords. Reference was also made to a number of other cases, American and English, to show that no distinction had been made between the ground-rent landlord and the ordinary landlord, as to their remedies for the recovery of arrears of rent.

PER CURIAM.

Rule absolute and fund awarded to plaintiffs

Darlington *against* Speakman.*

It is not regular to issue an execution on a judgment after the death of the plaintiff, in the name of his executor, without previously suggesting the death of the plaintiff, and substituting the executor upon the record. Where it was done, however, and the money levied, this court, on writ of error, remitted the record, with direction to suggest the death and substitute the name of the executor upon the record *nunc pro tunc*.

ERROR to the Common Pleas of *Delaware* county.

On the 12th July 1842, judgment was entered in the Common Pleas of Delaware county in favour of William Speakman, Sen., against William Speakman, Jun., on a bond and warrant of attorney given by the latter to the former for a debt of \$3000. After the death of William Speakman, Sen., to wit, on the 2d June 1843, an execution was issued on said judgment in the name of the executors of William Speakman, Sen., upon the following præcipe, filed in the prothonotary's office:—

<p>“Clement Darlington and Azariah Thomas, executors of William Speakman, Sen., deceased, v. William Speakman, Jun.</p>	{	<p>See judgment entered in favour of William Speakman, Sen., July 12, 1842. Issue <i>feri facias</i>. Debt \$3000, &c.”</p>
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Under this execution the personal property of the defendant was levied on and sold, and the money paid over to the plaintiffs. On the 12th of September 1843, upon application of the defendant, the court granted a rule to show cause why the execution should not be set aside, on the ground that there was no suggestion of the death of William Speakman, Sen., and substitution of his executors upon the record, prior to issuing the execution. On the 27th of February 1844, the Court of Common Pleas made the rule absolute, and set aside the execution. The plaintiffs took a writ of error.

W. Darlington, for the plaintiffs in error, argued that the præcipe for the execution was a substantial suggestion of death and substitution of the executors, and was sufficient to connect the execution with the judgment.

E. Darlington and Perkins, contra.

This Court ordered the record to be remitted to the Court of Common Pleas of Delaware county, with directions to permit the

* The reporters are indebted to William Darlington, Esq., for the report of this case.

[Darlington v. Speakman.]

plaintiffs to suggest the death of William Speakman, Sen., and substitute the names of Clement Darlington and Azariah Thomas, his executors, as parties to the judgment, *nunc pro tunc*; and to reinstate the execution.

Witman *against* Walker.

Under the Act of 16th June 1836, relating to the lien of mechanics, &c., the time at which the work was done, or the materials were furnished, must be stated in the claim or bill appended to it; otherwise the claim is defective.

A contractor who furnishes the whole or part of the work and materials at a certain price is not entitled to a lien against the building.

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

This was a *scire facias* upon the following claim, filed the 16th September 1840:—

In the District Court for the city and county of Philadelphia and state of Pennsylvania. Thomas Walker, stone-cutter, of said city, files his claim, a lien for \$808.80, against all that certain three-story brick building, piazza and back buildings, together with the lot of ground on which the same is erected, and belonging or said to belong to George Witman, brickmaker, situated, &c., (particularly describing its locality); it being for work and labour done, and materials furnished and bestowed in the erection and construction of said building by the said Thomas, employed in the erection and construction and furnishing materials for said building, within six months last past; a bill, or more particular statement whereof, is hereunto annexed.

Philadelphia, April 1st, 1840.

Mr George Witman,

To Thomas Walker,

For marble-work outside, water table, Ashler step,									
door front, and other work as per agreement,									\$519.00
2 parlor mantels, at \$75 each,	-	-	-	-	-	-	-	-	150.00
1 do. do. at	-	-	-	-	-	-	-	-	50.00
2 do. do. at \$35 each,	-	-	-	-	-	-	-	-	70.00
2 fire-boards, at \$9.90 each,	-	-	-	-	-	-	-	-	19.80
									<hr/>
									\$808.80

I do therefore require the prothonotary of said court to file this claim, my lien against the said premises, according to the Act of Assembly in such cases made and provided.

THOMAS WALKER.

Philadelphia, September 16th, 1840.

[Witman v. Walker.]

The plaintiff proved that he did all the marble-work in front of the building, except the frontispiece, and furnished mantelpiece and marble fire-boards, in the spring of 1840.

The defendant gave in evidence a contract dated 6th April 1839, between Witman and Walker, by which Walker agreed to execute the marble-work for the house in question and one adjoining it by a certain day, and Witman agreed to pay him a fixed sum, by different payments, at specified periods in the progress of the work.

It was not denied that the work was done; nor was the price of the work and the materials furnished disputed. A number of questions were made in the court below, and noticed in their charge, but which are immaterial to the grounds of the decision of this court.

The court below charged *inter alia* as follows:—

The defendant relies upon different grounds. He says, in the first place, that the claim was not filed according to law, and therefore no lien now exists. The law, it is said, requires that the claim should set forth the time when the materials were furnished or the work was done. Upon the face of the claim there is a day given to the time of furnishing the materials and work, viz: 1st April 1840. This claim must be understood as setting forth the 1st April 1840, as the time at which the work and materials were furnished. And in that view the claim is sufficient in point of form.

But it is said that the evidence shows that the work was not furnished on the day of this date, and therefore the lien is invalid. This raises a question whether the plaintiff was bound to state the time truly, and prove it as he states it. There may be some difficulty on this point. It has not been decided, so far as I know, or even raised. It seems to me (and you will take what I now say as law) that it is sufficient if the plaintiff has proved the work as done, and the materials as furnished, within a reasonable period before or after that date. This raises a question of fact for you to decide. You will say, therefore, from the evidence, whether this work and materials was done on or about that day; that is, within a reasonable time, to be judged of by the nature and customary mode of doing such work.

But it is further objected, that the plaintiff, in this case, was the contractor by a written, special contract, and therefore he must look to his contract merely for compensation, and not to the building. The law, it is said, means to give a lien only to the other persons who furnish work and materials for the building under the contractor, and who act under his superintendence.

In this case Walker was not the contractor for the whole building. He contracted for the frontispieces, steps, &c., the marble-work only, and this raises a different question. It seems to me

[Witman v. Walker.]

that if a person makes a special contract to do a particular part of the material, and he does the work and furnishes the materials, he has a lien by the Act of Assembly, and may file his claim. For example, a man who contracts to furnish all the bricks from his yard, or all the ironmongery, and does so; or to furnish the frontispieces, steps and marble-work, as in this case, if he furnishes it under the contract, he has a lien. The point of the decision relied on in support of this ground of defence is, that when one person contracts for the building, but does not actually supply the materials or perform the work, but merely orders them, the persons entitled to the lien under the law are the persons who actually find the materials and work, not the contractor who orders them on the credit of the building.

The court, in *Hoatz v. Patterson*, (5 *Watts & Serg.* 538), do not deny that when there is a special contract, a person who actually furnishes (in pursuance of the contract) the materials or finds the labour may have a lien notwithstanding. But only that when one man as contractor orders materials from other persons, or employs other persons to do the work, then the latter have the right of lien, and not the contractors. And that as it would be unjust to allow both to have liens for the same thing, the contractor shall look to his contract, while they who furnish the materials and labour may look to the building. The question of fact, therefore, which arises in this point is, whether the plaintiff did, in point of fact, furnish the work and materials which he agreed to furnish by the contract in evidence.

The defendant excepted to the charge, and assigned the following among other errors:—

The court erred in charging the jury, 1st. That the designation of time in the claim filed was sufficient, and that the doing of the work on or about the day specified in the claim would entitle plaintiff to recover.

2d. That although the evidence proved the time in the lien was untruly stated, nevertheless the lien was sufficient under the Act of Assembly.

3d. That the statement of the amount, kinds and nature of the work done and materials furnished was sufficiently set out in this lien filed.

Guillou and Dunlap, for the plaintiff in error, referred to *Hoatz v. Patterson*, (5 *Watts & Serg.* 537); *Rehrer v. Zeigler*, (3 *Ib.* 258); *Lehman v. Thomas*, (5 *Ib.* 262).

St. G. T. Campbell, contra, cited *Ewing v. Barras*, (4 *Watts & Serg.* 467); *Kinsley v. Buchanan*, (5 *Watts* 118); *Hinchman v. Lybrand*, (14 *Serg. & Rawle* 32); *Harker v. Conrad*, (12 *Ib.* 301).

[Witman v. Walker.]

The opinion of the Court was delivered by

SERGEANT, J.—The Act of 16th June 1836, section 12, prescribes three requisites which a claim filed under it must have in order to create a lien on the building. The *second* of these is “the amount or sum claimed to be due and the nature or kind of the work done or the kind and amount of materials furnished and the *time* when the materials were furnished or the work was done, as the case may be.” All of these are or ought to be within the peculiar knowledge of the claimant from his books or otherwise, and must be furnished by him when filing his claim. When dispute arises they are essential to the owner of the building, the purchaser and lien creditor, to enable them to trace out the truth of the claim and guard against error or imposition. The right to obtain a lien is given by the Act of Assembly to all debts contracted for work done or materials furnished for or about the erection or construction of the building, and that whether the materials are actually used in it or not. Where, as is often the case, a contractor carries on several dispersed buildings, and work is done and materials furnished for them by the same mechanic or material-man, the enumeration in the claim of these items furnishes the best means of ascertaining how far the particular building in question is liable. In relation to the *third* class of requisites, the locality of the building, there is some latitude given; the Act allows “the size and number of the stories or *such other matters of description* as shall be sufficient to identify it,” and this was the ground of the decision in *Ewing v. Barras*, (4 *Watts & Serg.* 467). But no such latitude is permitted in the first and second classes. The items are positively required; and this imperative requisition of the law we are not at liberty to dispense with or impair by a strained construction. The claim filed in the present case is in this respect defective. There is no time stated in the claim or bill appended to it, at which the work was done or materials furnished, as the Act of Assembly requires. The date of the 1st April 1840 is obviously the date of the bill and nothing else; the claim does not purport to state that as the time when the work was done or materials furnished, and a forced interpretation of this kind to sustain a claim would establish a precedent that would defeat the object which the Legislature had in view in requiring the time to be stated. As a general rule, the requisites to constitute a record lien must be substantially complied with, especially where, as here, a purchaser is to be affected who paid the full consideration money for the house on receiving his deed, without notice. In *Rehrer v. Zeigler*, (3 *Watts & Serg.* 258), the claim stated the month and day of the month when the materials were delivered, but omitted the year, and it was held defective. In *Lehman v. Thomas*, (5 *Watts & Serg.* 262), an allegation that the work was done within six months past was held not to be a com-

[Witman v. Walker.]

pliance with the Act. These cases rule the present point, and we think the claim is for these reasons defective.

Another question is, whether the plaintiff is such a person as is authorized to acquire a lien on the building by filing a claim. In the cases of *Jones v. Shawhan*, (4 *Watts & Serg.* 417), and *Hoatz v. Patterson*, (5 *Ibid.* 537), it was decided that a contractor who agrees with the owner to furnish all the materials and erect the building for a fixed price, is not such a mechanic or material-man as is entitled to acquire a lien by filing a claim against the building. He cannot stand in the double character of contractor and mechanic or material-man. The former deals directly with the owner and trusts his personal responsibility or may require security; the latter need know nothing of the owner, but trusts to the security of the building in default of payment. It is said in the latter case, it makes no difference that the contractor furnished the materials in whole or in part from his own stores. It is not easy to perceive any difference in principle in the circumstance that the contract is not for the whole building, but for a particular job or piece of work, as here, to put up the marble work of two houses, and furnish marble mantels. The relation of the parties is the same, and similar inconveniences and incongruities would ensue to those pointed out in the opinion delivered by Mr Justice ROGERS in *Jones v. Shawhan*, if the same individual might stand in the double capacity of contractor and material-man.

Judgment reversed.

Bevan *against* The Insurance Company.

Under the Nisi Prius Act of the 26th July 1842, where the judge directs a nonsuit on the trial of a cause, it comes up to the Supreme Court by certificate in the same manner as it does by writ of error from the District Court under the 7th section of the Act of 11th March 1836; and therefore it is to be considered as if it were a demurrer to evidence, except that the judge is not at liberty to give judgment for the plaintiff should he think the case made out, but should refuse the nonsuit.

If, therefore, there be some evidence, though slight, from which a jury might draw an inference favourable to the plaintiff, the case should be left to the jury.

THIS was an action of debt brought by Matthew L. Bevan and others, trading under the firm of Bevan and Humphreys, against The Insurance Company of the State of Pennsylvania on a policy of insurance on freight per ship Liberty, tried before Judge SERGEANT at Nisi Prius in November 1842, in which on motion of the defendants, after a large mass of evidence had been gone

[Bevan v. The Insurance Company.]

through on the part of the plaintiffs, the court granted a nonsuit, and now the case came up by writ of error, and was argued by

Dunlap and Meredith, for plaintiffs in error.
F. W. Hubbell and J. M. Scott, contra.

The opinion of the Court was delivered by

SERGEANT, J.—By the 7th section of the Act of 28th July 1842, establishing the Nisi Prius Court, the provisions of the 7th section (among others) of the Act of 11th March 1836 are extended to original actions brought in the Supreme Court in the city and county of Philadelphia. The 7th section of the Act of 11th March 1836 enacts that whenever the defendant upon the trial of a cause in the District Court shall offer no evidence, it shall be lawful for the judge presiding at the trial to order a judgment of nonsuit to be entered, if in his opinion the plaintiff shall have given no such evidence as is in law sufficient to maintain the action; with leave, nevertheless, to move the court in banc to set aside such judgment of nonsuit. And in case the said court in banc shall refuse to set aside the nonsuit, the plaintiff may remove the record by a writ of error into the Supreme Court for revision and revisal, in like manner and with like effect as he might remove a judgment rendered against him upon a demurrer to evidence.

The case, therefore, seems to come up to this court by certificate from the Nisi Prius judge in the same manner as it does by writ of error from the District Court; and there, although the first part of the clause requires the judge on motion for nonsuit to grant it if the plaintiff has given insufficient evidence, yet by the latter which controls it, the motion for nonsuit is in effect a demurrer to evidence, with the exception noticed in *Smyth v. Craig*, (3 *Watts & Serg.* 18), that the judge is not at liberty to give judgment for the plaintiff, should he think the case made out, but should refuse the nonsuit and put the case to the jury. Considered, therefore, as a demurrer to evidence, the rule is that the plaintiff is entitled to the benefit of every inference of fact which the jury might draw from the evidence, the defendant being considered as admitting every fact which the evidence tends to prove. The law arises on the facts, not on the evidence. In the present case there was some evidence, though slight, on the part of the plaintiff, on which he had a right to an inference by the jury, if they chose to make it. and therefore the case ought, we think, to have gone to the jury. It is proper to say that this point was not made in the court below, on the motion for a nonsuit.

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

Dougherty's Estate.*

An amount of ground-rent, the arrears of several years, is payable out of the proceeds of a sale by the sheriff of the premises out of which the rent is payable although during all the time the rent was accruing there was property on the premises which might have been distrained; but it does not follow that interest will be allowed upon such arrearages.

A *scire facias* will lie in the Common Pleas of Alleghany county, and may be there prosecuted to judgment, after the original jurisdiction of that court was transferred to the District Court.

A substantial variance between the recital in a writ of *scire facias* and the judgment to be revived, would break the continuity of the lien; but if the objection be formal and technical only, it will not affect the lien of the original.

A judgment upon a writ of *scire facias quare executio non* has the effect of a judgment to continue the lien.

Informalities in a writ of *scire facias* to revive a judgment cannot be taken advantage of by a stranger to the judgment.

On an appropriation of the proceeds of a sale of real estate by the sheriff, judgment creditors may avail themselves of a right to set aside a judgment given and obtained by collusion for the purpose of defrauding them; but they cannot thus attack a judgment on the ground that the defendant in it was overreached or taken advantage of by the plaintiff with regard to its consideration.

THIS case came up on an appeal by Tiernan, Campbell & Co. from the decree of the District Court of Alleghany county, appropriating the proceeds of the sale of the real estate of John Dougherty, deceased.

The report of the auditor to whom the case was referred, presents clearly the facts and questions of law which arose.

The real estate of John Dougherty, situate in the city of Pittsburgh, on the corner of Wood street and Virgin alley, was levied on at the suit of Tiernan, Campbell & Co. against the administratrix of said Dougherty, and sold to George Bailly on the 16th October 1843, by sheriff Weaver, for the sum of \$4000. The costs of said sale amounted to \$47.25. John Dougherty died the 21st January 1841, in the actual possession of the said real estate, leaving a widow and five children in their minority. In 1834 he purchased the said real estate from William Leekey, who had purchased the same from William Porter, as appears by the following deed dated 23d September 1806, and recorded:—"The said William Porter, for the consideration therein mentioned, grants unto the said William Leekey, his heirs and assigns, the before described lot of ground, and reserving nevertheless unto him the said William Porter, his heirs and assigns, the sum of \$50

* This case was argued at September Term 1844.

[Dougherty's Estate.]

annually, with the usual clause of distress, &c.; and that if goods and chattels cannot be found on the described premises sufficient to pay the arrearages of rent, to enter into all the houses, buildings and enclosures on the premises, or any part thereof, and to rent to any person or persons for such length of time as may be sufficient to discharge the said rents; but in case of neither goods and chattels nor buildings being found on the said premises for the purposes aforesaid, and the said rent happens to be in arrear to the amount of \$100, then and in that case it shall and may be lawful to and for the said William Porter, his heirs and assigns, to take possession of said premises, and to hold, occupy, possess and enjoy the same, or dispose thereof at pleasure, without let, hindrance or molestation of the said William Leekey, his heirs or assigns, as though this indenture had never been made."

Dougherty had full notice of this reservation, and bought subject to it. From and after the purchase by Dougherty until the time of sale (16th October 1843) by the sheriff, and until the present time, houses and buildings were erected on the before described premises; and the witnesses produced before the auditor also proved "that from the time Dougherty purchased until his death in January 1841, there were at all times sufficient goods and chattels on the premises to pay the annual rent." After the death of Dougherty, the widow and heirs continued to occupy the same premises until the sale to George Bailly. A warrant of distress was issued by the heirs of William Porter on the 2d October 1841, to collect the arrears of rent owing on said deed, and goods and chattels to the amount of \$25.86, after deducting costs of sale, could only be found on the premises.

The heirs of the said William Porter, by A. Brackenridge, Esq. now claim out of the proceeds of the sheriff's sale to Bailly, and in pursuance of the reservation as aforesaid, the following amount to wit:

From 1st January 1834, to 1st October 1843, the annual rent of \$50 per annum, amounting to	-	-	-	\$487.50
And give credit for (as paid by Dougherty)	-	\$163.00		
Raised on aforesaid distress,	-	-	25.86	188.80
Balance of rent due,	-	-	-	\$298.60
Interest on \$187.00 from 1st January 1841, to 16th October 1843, time of sale,	-	-	\$31.31	
Interest on half yearly payment since,	-	-	12.60	43.90
Total amount of claim,	-	-	-	\$342.50

The creditors object to the payment and allowance of said claim:

1. That no part of the said claim ought to be allowed out of the proceeds of sale; that resort ought to have been had to the premises

[Dougherty's Estate.]

2. That (if any) not more than one year's rent should be allowed.

3. That interest ought not to be allowed.

After hearing the creditors and claimant by their counsel, the auditor allows the amount of rent claimed, being \$298.64, and rejects the claim for interest.

No. 2. That the judgment entered No. 192 of December Term 1833 in the Common Pleas, in favour of William Leekey and Robert Davis against John Dougherty, on the 4th February 1834, is the first lien, and is a conditional judgment to secure the payment of two notes and interest, as appears by the bond upon which the said judgment was entered; that the judgment was revived and lien continued until the time of sale aforesaid; that plaintiff assigned one of the notes to Alexander Brackenridge, Esq., and a part of the other to James S. Craft, Esq.; that there is now due and owing on the said judgment to the assignees the sum of \$954.58, and costs \$17.17. There being no objection made, this amount is allowed, and the respective amounts due claimants appears in annexed statement.

No. 3. That the judgment No. 193, December Term 1833, of Common Pleas in favour of William Leekey for use of James S. Craft against John Dougherty, was entered on the 4th February 1834, and regularly revived and lien continued until time of sale aforesaid, if the return of sheriff is not satisfaction; that on the 4th November 1841, the same was liquidated, and after deducting credits, judgment was entered for \$54 and costs; that the costs then and since accrued amount to \$25.79, and that a *feri facias* issued to December Term 1841, and a levy made on the before described premises, and inquisition held and extended, and rent assessed at \$400 per annum; and to March Term 1842, No. 490, *Lev. Fas.* issued, and sheriff Weaver returns on the writ endorsed —“Property delivered to plaintiff, and prothonotary's and sheriff's costs paid by plaintiff, 8th March 1842.”

James S. Craft, Esq. claims to be allowed the amount of this judgment, (being \$62.48, debt, interest and costs), alleging that he has not received the same or any part of the above amount; that he did not receive the actual possession of the premises from the sheriff; that the widow and heirs of John Dougherty were then in possession as heirs; the deputy sheriff being called on corroborates the statement of Mr Craft that he did not deliver the actual possession, as Mrs Dougherty and her children (heirs aforesaid) were then in possession.

Having heard the party, &c., the claim of Mr Craft for amount of this judgment is rejected; the return of the sheriff is conclusive evidence upon the auditor.

No. 4. The next judgment in its order is in favour of George Bailly against John Dougherty, No. 249, of October Term 1838

[Dougherty's Estate.]

and revived and lien continued until sale aforesaid. On 4th November 1839, the said judgment was liquidated at \$2746.86, and the costs \$18.50.

Tiernan, Campbell & Co. appear by their counsel, and object to the above judgment of George Bailly being allowed, &c.; that it is not valid; that it is fraudulent, &c., and given without consideration, and ask that it be rejected, and that the proceeds be applied to the judgment of Tiernan, Campbell & Co. against John Dougherty, No. 474, July Term 1839, and entered on the 21st August 1839, in the District Court, the debt and interest being at the time of the sale (16th October 1843) \$2595.15, and being the next lien to that of Bailly; and that if there be any surplus it be applied to the subsequent judgment in their proper order, &c.

After hearing the claim of Tiernan, Campbell & Co., it is rejected, the auditor not having authority to try the matters alleged by claimants; and allows the judgment of Bailly so far as there are assets to pay the same, to wit: the sum of \$2653.86, and remaining unpaid \$762.60, and interest from 16th October 1843.

Tiernan, Campbell & Co. filed exceptions to the report:

1. That the auditor erred in applying the proceeds of the sale to the payment of the ground-rent.
2. In allowing the judgment of Bailly to be paid.
3. In refusing to apply the proceeds to the payment of the judgment of Tiernan, Campbell & Co.

On the hearing of these exceptions the following proceedings were had:

In the matter of the distribution of the proceeds of the sheriff's sale of the real estate of John Dougherty, deceased:

And now, viz: January 27th, 1844, upon motion of James Dunlop for Tiernan, Campbell & Co. and Paul Morrow, and on the annexed affidavit of Margaret Dougherty, the administratrix of said John Dougherty, the said Tiernan, Campbell & Co. and Paul Morrow, being judgment creditors of said Dougherty, the court are requested to grant the said creditors a feigned issue to ascertain if the said judgment of George Bailly against the said John Dougherty, and the judgments of revival thereon, were not covinous as regards creditors, and obtained without consideration, or whether they or the judgment of George Bailly are entitled to be paid out of the proceeds of the sale of the real estate of the said John Dougherty, the said judgment of George Bailly being a judgment of the Court of Common Pleas.

Court refused to make the order requested, as the validity of said judgment had already been twice adjudicated and passed upon in the Court of Common Pleas.

Mrs Dougherty's Deposition.—That the bond on which the above

[Dougherty's Estate.]

judgment was entered was written by George Bailly in the store of my husband, John Dougherty the defendant. No one was present when they were about doing so but Bailly, Dougherty and deponent. That Dougherty requested defendant to withdraw, which she did, and afterwards looking through the glass door opening into the back room, saw Bailly writing a paper with a pen and another paper with a pencil. That Bailly and Dougherty immediately after went out, taking the paper writing with them, and leaving the one written with pencil, which had fallen on the floor, and which deponent supposes they forgot. They were gone about an hour and a half, and on his return deponent showed her husband the paper in pencil, which was an agreement to pay a debt due to Shipton & Taylor, or some such firm, by Dougherty naming the amount of the debt as \$900. Dougherty said that was the consideration of the bond, and that Bailly was to pay that and some other debt deponent don't recollect. Dougherty often complained to Bailly in deponent's presence that he had not paid Shipton, Taylor & Co. At one of their conversations, Bailly denied that Dougherty had such paper requiring him to pay such debt, and on Dougherty's producing the paper, he said that's right, that's all very well. This was after Shipton, Taylor & Co. had sold the goods of Dougherty on an execution.

Deponent carefully kept the paper, and showed it to Job Patterson the deputy sheriff, when he made the levy, and complained of Bailly not paying the debt. Deponent also showed the paper to Joseph O'Brian. After Dougherty's death, Bailly opened the secretary at deponent's dwelling by force, and took away a bundle of notes that Dougherty had paid, and this paper in pencil spoken of. Deponent protested against his doing so, and he got into such a passion as alarmed deponent very much, and caused her to desist. Deponent charged Bailly afterwards with taking away the papers before Joseph O'Brian two or three times. Deponent has heard that Bailly paid part of the Shipton, Taylor & Co.'s debt in the life of Dougherty.

Deponent further states that Dougherty was a good, easy man, who confided entirely in Bailly, who imposed on him to a great extent, and that Dougherty was a man given to intemperance. The Tuesday before Mr Tiernan's application to open the judgments of Bailly *v.* Dougherty, Bailly desired deponent in her own house not to appear against him, and not to say all deponent could say on the subject, and that he would release the judgment to deponent and her children if it do them any good."

The following is a copy of the writ of *scire facias* which was the subject of objection.

Alleghany County, ss.

The Commonwealth of Pennsylvania to the Sheriff of Alleghany county, greeting:

VOL. IX. — 25

R

[Dougherty's Estate.]

Whereas, William Leekey and Robert Davis, lately in our Court of Common Pleas, before, &c., at, &c., to wit: February 4th, 1834, by the judgment of our said court recovered against John Dougherty, \$2000 of debt and \$10 for their costs, &c.

And whereas, by the said William and Robert, we have in our said court understood, &c. Yet the execution thereof remains to be made, &c.

We do command you that by good and lawful men of your bailiwick you give notice to the said John Dougherty that he be and appear before, &c., to show cause why the said William and Robert ought not to have their execution against him for their debt and costs aforesaid, according to the form and effect of the recovery aforesaid, if they still think fit, and further to do and receive whatsoever our said court shall then and there of and concerning him in this behalf consider.

The court below (GRIER, President) overruled the exceptions, and confirmed the report of the auditor.

Dunlop, for appellants.

M'Candless, for appellees.

The opinion of the Court was delivered by

GIBSON, C. J. — The arrears of ground-rent due to the heirs of William Porter were properly allowed to be taken out of the fund in the first instance. *Bantleon v. Smith* has never been shaken as a precedent, but more than once affirmed. Nor does a reservation of rent in a conveyance in fee stand on the foot of a reservation in a lease, which has no other preference than is given to it by the Act of 1772. That Act allows the landlord to come in for a year's rent before execution creditors, and it is consequently an enabling one; but it would be the reverse were it applied to a ground-rent landlord, who is preferred even to judgment creditors. A lessor's preference regards the proceeds of chattels; a ground-rent landlord's regards the proceeds of land; the one is limited to the rent of a single year; the other extends to all the arrears without stint.

The exceptions to Leekey's judgment are multifarious.

It is alleged that no *scire facias* to revive it lay in the Common Pleas after the original jurisdiction of that court was transferred to the District Court. The writ was a *scire facias* on the *Stat. West.* 2; and as it was pending in the Common Pleas when the Act to transfer "all suits and causes pending" in that court went into effect, it is argued that, being a pending suit, it was removed to the District Court in contemplation of law; consequently that the Common Pleas had no jurisdiction to proceed on it. If that be so, the original judgment has lost its lien. But though a *scire facias* is said to be so far an action that the parties to it may

[Dougherty's Estate.]

plead to issue, it is in truth no more than a judicial writ which lies only in the court where the record remains. 2 *Bac. Abr.* 356. In *Wright v. M'Nutt*, (1 *T. R.* 389), it is said not to be a new suit, but a continuation of the old one; in *Phillips v. Brown*, (6 *T. R.* 282), that it is a step towards execution; and in *Dixon v. Heslop*, (*Ibid.* 366), that it is merely the handmaid of the original cause. Where an execution would be out of time, a *scire facias*, being the precursor of it, is necessarily in the same court; for it would be strange if the execution was awarded by the one court and issued by the other; or if the Court of Common Pleas was at liberty to execute its own judgments within the year and a day, but necessitated to send them to the District Court for execution at a later period. If the judgment remains in the Common Pleas, a step preparatory to execution of it, taken in another court, would be an incongruity which ought, where it may, to be avoided. It is doubtless true that our judgment on a *scire facias post annum et diem*, is not, as in England, a bare award of execution; but that it is itself a judgment *quod recuperet* on which the execution commonly issues as on an original one; still an accidental difference of practices ought not to be allowed to change the nature of the process. If the Common Pleas had power to execute its judgments in any case, it must have had all the ancillary powers necessary to the exercise of it in every case; for it would be strange if that court might have tried an issue on a *scire facias* sued out after the Act which constituted the District Court had gone into effect, and yet could not have tried such an issue if the writ had been sued out before it. The true interpretation of the statute is that it removed causes pending on original process; not those that had been proceeded in to judgment.

It is objected, also, that the *scire facias* did not accurately recite the judgment to be revived; and it is certain that a substantial variance in that matter would break the continuity of the lien. The judgment was for \$4000, the penalty of a bond with condition to secure a note for \$1590, and another for \$400; and the award of execution was for \$2000. Thus the record was described as what it actually, though not technically, was—a judgment for the real, not the nominal debt; so that the variance, though formal, was unsubstantial. The framing of our writs is injudiciously left to the prothonotaries, who have seldom any knowledge of forms; and all that we can do in these matters without injustice to suitors, is to hold fast to substance. In *Arrison v. The Commonwealth*, (1 *Watts* 374), the name of a different plaintiff was introduced, and the variance was necessarily held to be substantial; in the case before us, the judgment is in substance what it was recited to be.

It is further objected that the writ was not in the form prescribed by the Act of 1798; and that the judgment on it was that the plaintiff should have execution for the sum recovered; not

[Dougherty's Estate.]

that the lien should be continued, according to the exigence of that statute. To say nothing of the principle which precludes a creditor from taking advantage of an irregularity in an antagonist lien, it is enough for the latter part of the objection that the continuance of the lien is an incident of the judgment. The writ is a *scire facias quare executio non*; and, as the judgment is general, it is to be taken for the appropriate one. Now, though there is no reported decision directly on the point, we have always allowed to a judgment of revival the effect of a judgment to continue the lien; as may be seen in *Pennock v. Hart*, (8 Serg. & Rawle 369). It is notorious, that by reason of the slowness of the profession to leave a beaten track, no alteration was made for a long time in the form of the process and judgment, and that any alteration was made at all, is perhaps owing to what fell from me in that case. For twenty years the attention of the profession had not been drawn to it, and judgments continued to be revived in the old way, so that to doubt the efficacy of the practice now would produce a scene of wild and strange confusion. If ever there was a practice to which the maxim of *communis error* should be applied with conclusive force, it is this. The statute is only directory as to the form; and at the end of half a century we are not going to overwhelm the holders of titles in dismay, by overturning all that has been informally done under it, when there is not even a precedent the other way. No more was determined in *Gasche v. Fetterman*, (3 Watts & Serg. 351), than that a plaintiff who proceeds by *scire facias quare executio non*, before he has a right to execution at all, shall not elude his want of a case by turning his writ into a *scire facias* to continue the lien, and have judgment for that, when he could not have an award of execution. That was a question of error, however—not of lien—for had the judgment been allowed to stand, there is no doubt that the error would not have deprived it of its effect as a judgment to continue the lien, and that a stranger could not have taken advantage of it.

The objection to Bailly's judgment is unfounded; not because the matter had been twice examined, but because it is not pretended that the judgment was *collusive*. The application of the administratrix was to *open* it on the ground that the intestate had been *overreached*; and the application of the creditors to *vacate* it was founded on no principle whatever. With the application of the administratrix the creditors had nothing to do; but if the judgment were *collusive*, they might abate it collaterally; and though they have sometimes been allowed to intervene directly, such a practice is irregular. Where a *collusive* judgment comes into collision with their interests, they may avoid the effect of it by showing it to be a nullity as to themselves; and in doing so they do not impair its obligation between the original parties, upon whom it is undoubtedly binding, a fraudulent judgment, like a fraudulent deed, being good against all but the interests intend-

[Dougherty's Estate.]

ed to be defrauded by it. But they cannot call upon the court to vacate it on the record, which would annul it as to the whole world. It is contended, however, that the judgment is fraudulent, because he who confessed it was defrauded. A surreptitious judgment, however, is fraudulent only as to the immediate parties; not by the 13 *Eliz.* against creditors, who certainly cannot go behind it to try over again a defence which their debtor had made, or was competent to make. There was no pretence that this judgment was collusive; and as the appellant had not laid a ground for an issue, it would have been irregular to award it.

Decree affirmed.

Gregg against Patterson.

Strictly and properly speaking, a warrant and survey thereon, although the purchase money be paid to the state, does not constitute a *legal* in contradistinction to an *equitable* title for the land embraced by it. The warrant is a mere authority to survey the land for the benefit of the warrantee or the owner thereof. It contains no grant or conveyance of the land. This is effected by the execution of a patent-deed on the part of the state, after the survey shall have been made and returned on the warrant. But a patent does not give the patentee any superior advantage, in respect to the land, unless he be legally entitled to it. For a warrantee, without a patent, if he be legally and equitably entitled to a patent, may recover the land in ejectment from the patentee, who is not entitled thereto, as he had no right to obtain it.

If the vendor of lands, holding them under warrants and surveys, without patents, agrees by articles of agreement made with the vendee, to give the vendee immediate possession of them, which is done, and agrees also well and sufficiently, on or before a certain future day, to convey them in fee, by such deed or deeds as the counsel of the vendee shall reasonably advise and devise, on the vendee paying the one-half of the purchase money, and securing the other half, by giving bonds and mortgage on the lands, to be paid in two annual instalments, with the interest thereon semi-annually; and upon the vendee failing to pay, and secure the purchase money, the vendor or his heirs or devisees take possession of the lands again without legal process or the consent of the vendee, or those claiming from him, they cannot retain the possession until the vendee or those claiming from him tender or pay the purchase money due; but the vendee or those claiming from him may recover in ejectment the possession without tendering or paying the purchase money, or bringing it into court.

But if the vendor or those claiming from him recover the possession by legal process, or by the consent of the vendee or of those claiming under him, he or they may retain the possession until they are paid the purchase money due or it is tendered, which must be done before the institution of an ejectment to recover the possession.

Also, if after the vendor, or his heirs or devisees, have recovered possession by ejectment after failure to pay the purchase money, and the claim of the vendee has become vested by successive mesne conveyances, in two persons, as tenants in common, one of whom conceiving himself entitled to the whole claim of the

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[*Gregg v. Patterson.*]

original vendee exclusively, pays the whole of the purchase money, which had become payable, to the heirs or devisees of the original vendor, and takes conveyances from them, whereby he acquires their possession and right to the land, he may retain the possession of the whole against the other tenant in common, or his heirs, until they pay or tender the one-half of the purchase money paid by him, which must be paid or tendered before they can maintain an ejectment to recover the possession.

So if the tenant in common, after paying the whole of the purchase money, is compelled to bring an action of ejectment against persons in possession and claiming a portion of the land under an adverse title, for the purpose of recovering the possession thereof, in which he succeeds, but has been obliged to expend about \$400 in prosecuting the suit and effecting a recovery of the possession, he will not be compelled to let the heirs of the other tenant in common into the possession of their undivided moiety until they pay or tender him the one-half of such expense, which if it cannot be agreed on, as to amount, by the parties, may be ascertained and fixed by the jury who try the cause; and the court, though the verdict be in favour of the plaintiffs, will take care that execution shall not be had until one-half of such expense be paid.

But where such tenant in common, in possession of the land, erects buildings and makes substantial and valuable improvements thereon, without the consent of the heirs of the other tenant in common, though done under the impression, most probably, that he was sole owner of the land, and the heirs of the other tenant in common most probably ignorant of their right and claim to it, he cannot claim to be reimbursed one-half of the cost and expense of erecting such buildings and making such improvements, by the heirs of the other tenant in common. For this he is without a remedy, further than the rents, issues and profits received by him from the property may reimburse him.

ERROR to the Common Pleas of *Beaver* county.

This was an action of ejectment brought by Oliver Ormsby Gregg, Isaac Gregg, Sidney J. Gregg, Moses F. Eaton and Sarah E. his wife (late Sarah E. Gregg), heirs at law of Isaac Gregg, deceased, against James Patterson, Robert Saddler, James Richards, Henry Maloy and Jeremiah Mead, to recover the possession of the undivided half of a tract of land, situate in Brighton township, Beaver county, containing 440 acres and allowance, being a tract surveyed on a warrant in the name of William Barker. The facts of the case are fully set forth in the opinion of this court.

The case was argued here by

Agnew and Biddle, for the plaintiffs in error, who cited 3 *Watts* 238; 7 *Serg. & Rawle* 154; 5 *Binn.* 120; 3 *Binn.* 7; 3 *Watts & Serg.* 435; 10 *Serg. & Rawle* 43; 2 *Ibid.* 355; 3 *P. R.* 425; 8 *Serg. & Rawle* 390; 4 *Watts & Serg.* 22; 2 *Serg. & Rawle* 500; 5 *Binn.* 504; 3 *Watts & Serg.* 484; 2 *Ibid.* 100; 5 *Watts* 394; *Serg. Const. Law* 149 *et seq.*; 2 *P. R.* 507; 2 *Rawle* 90; 2 *P. R.* 22; 4 *Watts* 464; 13 *Serg. & Rawle* 14.

Pearson and Metcalf, for the defendants in error, referred to 2 *Wash. C. C.* 33, 448; 1 *Stor. Eq.* 375; 2 *Sug. Vend.* 295, 305 327; 2 *Binn.* 40; 3 *Rawle* 334; 4 *Watts* 464; 6 *Watts* 137; 16 *Serg. & Rawle* 269; 4 *Serg. & Rawle* 301; 3 *Ibid.* 432; 4 *Binn.* 41; 8 *Serg. & Rawle* 496; 10 *Watts* 140; 2 *Yeates* 346 5 *Watts* 95

[Gregg v. Patterson.]

KENNEDY, J.—From an abstract given of the evidence it appears that Daniel Brodhead was the owner of two land warrants, bearing date the 3d April 1792, for 400 acres each, one in the name of Joseph Williams, and the other in the name of William Barker. They were surveyed on land adjoining each other, in the month of April 1794, on the west side of Big Beaver Creek, opposite the Middle Falls. That by an article of agreement, dated the 18th August 1801, Daniel Brodhead contracted to sell the two tracts of land surveyed upon the warrants aforesaid to David Hoops for the consideration of \$3200, payable one-half thereof on the delivery of the deed of conveyance, and the other half in two equal annual instalments with interest, and agreed to convey the same by a good and sufficient deed to the said Hoops, his heirs and assigns, in fee, on or before the 1st day of May next ensuing the date of the article. If the tracts should be found to contain together more than 800 acres, it was agreed that Hoops should pay in proportion for the excess; and it was further agreed that Hoops should enter into and take immediate possession, and enjoy the profits; and upon this contract Hoops paid, on the day of the date, \$100, for which a receipt was endorsed on the articles.

David Hoops shortly afterwards entered into possession, and subsequently his right and title under this contract became vested, by sundry successive conveyances, in Isaac Wilson, who, by deed dated the 27th August 1810, conveyed the undivided moiety of the warrant claims to the above mentioned tracts, containing 800 acres, derived as aforesaid, to Jeremiah Barker and Isaac Gregg in fee, as tenants in common, and not as joint tenants. He also formed a partnership in the iron-making business with Jeremiah Barker and Isaac Gregg, and with them carried on the furnace and forge, which had been erected on the premises. The business continued between one and two years, and was found unprofitable, the firm of Wilson, Barker & Gregg having sunk about \$13,000.

Isaac Wilson, by deed dated the 25th April 1812, conveyed the remaining moiety of the said tracts of land to Jeremiah Barker and Isaac Gregg as tenants in common, and not as joint tenants, for the consideration of \$15,000, of which \$1000 was paid in hand, and fourteen judgment bonds of \$1000 each taken for the balance, and judgments thereupon entered in the Court of Common Pleas of Beaver county on the 11th May 1812. These judgments were paid after the death of Isaac Gregg, by Jeremiah Barker (upon executions and otherwise) to Isaac Wilson and his assignees, at various times and in various manners (excepting \$900 of the last bond, which was not shown to have been paid), a considerable portion whereof was paid by Oliver Ormsby. At the time Isaac Wilson sold the remaining moiety of the lands, he also sold his interest in the personal property, stock and debts of the firm, to Barker and Gregg, who undertook to settle and pay

[Gregg v. Patterson.]

the claims against the firm. The individual accounts of the several partners stood as follows, on closing the books of the firm, to wit:

To Isaac Wilson there was due	-	-	\$5466.93
“ Isaac Gregg there was due	-	-	1954.85
“ Jeremiah Barker there was due	-	-	4967.31

By the agreement of Wilson, Barker and Gregg, the books of the firm were to be settled by Barker and Gregg, and the balance due to Wilson to be paid to him in one year. Of this balance Wilson never received any part, except the sum of \$28. After the second sale of Wilson to Barker and Gregg last mentioned, the iron-making business was continued by Barker and Gregg upon the premises until the death of Gregg, which occurred in the month of April 1813. The business proved unprofitable, and they sunk money. After the death of Gregg, Barker continued in possession until he sold the premises to Oliver Ormsby in the year 1815.

On the 7th May 1813, letters of administration were taken out, upon the estate of Isaac Gregg, from the register's office of Beaver county, by Lydia Gregg, his widow, and Oliver Ormsby her brother. On the 25th September 1824, Oliver Ormsby settled his administration account of the estate of Isaac Gregg, which was confirmed at April Term 1825, leaving a balance in favour of the accountant of \$982.13. By that account it further appears, that no assets of the firm of Barker and Gregg came into the hands of the administrator on account of the interest of Gregg in that firm.

By an article of agreement, dated 15th January 1815, Jeremiah Barker contracted with Oliver Ormsby to sell and convey to him the two tracts of land aforesaid, situate on the west bank of the Big Beaver, opposite the middle falls, surveyed for Daniel Brod head (along with other property) for the consideration of \$32,000, payable \$2000 thereof 1st April 1815; \$3000 thereof on the 1st January 1816; and \$3000 thereof annually thereafter until all should be paid. Five thousand of the purchase money were contingent, and only to be paid on the perfecting of the warrant title against the claims of the adverse settlers. This agreement recites that the liens against the real estate of Barker and Gregg are sufficient to condemn the same; and Barker covenants to make arrangements at an approaching sheriff's sale, to enable him to sell and convey to Ormsby; and Ormsby agrees to throw no obstacles in the way whatever to Jeremiah Barker purchasing at sheriff's sale, and making a complete title to Ormsby. Also, that the bonds to be given by Oliver Ormsby for the purchase money were to be framed so that they should be applied to the payment of the liens against the property, and the balance (after payment of the liens) to Jeremiah Barker and the administrators or guar

[Gregg v. Patterson.]

dians of the children of Isaac Gregg, according to their respective interests in the property.

On the 24th February 1813, an amicable action in case was entered in the Court of Common Pleas of Alleghany county, No. 35, of April Term 1813, between Samuel Carswell and Isaac Wilson, Jeremiah Barker and Isaac Gregg, partners, under the firm of Isaac Wilson & Co. Upon the record, the death of Isaac Gregg was suggested, and on the 14th of April 1814, judgment was confessed therein by Jeremiah Barker, one of the defendants, as per writing filed, for \$1361.72, in full of the original account and interest. In this case, a *testatum fieri facias*, No. 1, of April Term 1815, was issued to the sheriff of Beaver county against all the defendants, Isaac Wilson, Jeremiah Barker and Isaac Gregg, reciting the judgment of \$1361.72, as against them all; and upon this writ, the sheriff of Beaver county levied upon the right and title of the defendants to the aforesaid two tracts of land, described in the levy as 100 acres of land on the west side of Big Beaver, adjoining the falls, Brighton, on which were erected one furnace, &c. &c.; also, the warrant claim of 700 acres adjoining, (besides other tracts of land). Inquisition was held, and the property condemned. A *testatum venditioni exponas* to the sheriff of Beaver county was thereupon issued, No. 45, of August Term 1815, in the same case against all the defendants, reciting the aforesaid *fieri facias*. To this writ the sheriff of Beaver county returned, "Land sold to Jeremiah Barker for the sum of \$16,500. Received. James Ross, Esq. receipt in full for debt, interest and attorney's fee, he being the attorney for plaintiff. The balance of the costs paid to me by Mr Barker. J. Coulter, sheriff."

In pursuance of this sale, Jonathan Coulter, Esq., sheriff of Beaver county, executed and delivered a deed to Jeremiah Barker, dated 5th September 1815, for the said 100 acres, and warrant claim of 700 acres adjoining the two tracts aforesaid, sold as the property of Isaac Wilson, Jeremiah Barker and Isaac Gregg, at the suit of Samuel Carswell, for \$15,000, acknowledged on the 5th September 1815, before the judges of the Court of Common Pleas of Beaver county.

In part execution of this contract, Jeremiah Barker by deed, dated 7th February 1817, for the consideration of \$22,900, conveyed to Oliver Ormsby, in fee, 100 acres of the land, lying within the survey on the warrant of Joseph Williams, except about half an acre, which, according to the testimony of Francis Hoops, lies within the survey on the warrant of William Barker. The remainder of the 800 acres was not conveyed by Jeremiah Barker until the year 1831, when by deed, dated 5th December of that year, he conveyed to Oliver Ormsby "all the right, title, interest, property and claim of him, the said Jeremiah, of, in, to and out the said article of agreement, entered into between the said Daniel Brodhead and David Hoops, and of, in and to the said two tracts

[Gregg v. Patterson.]

of land therein mentioned and described," to have and to hold to him, his heirs and assigns for ever.

In 1815, Oliver Ormsby went into possession of the 100 acres and with Robert Black, a partner, carried on the forge and furnace until 1816. In 1816, he went into partnership with John Dickey, and continued in himself until 1827. When Ormsby purchased, the remainder of the 800 acres was in the adverse possession of settlers, who had gone into possession to make actual settlements under the law of the 3d April 1792. In 1817, — Johnson claiming under the title of Daniel Brodhead, upon a recovery in an ejectment brought in the United States' Circuit Court, dispossessed all who were in the possession of the two tracts. John Dickey, on behalf of Mr Ormsby, without going out, took a lease, and remained in possession of that portion which he had in occupancy. In 1819, Thomas Ross and Samuel Jackson, the adverse settlers, brought their ejectment, recovered, and on the 20th May 1820, retook possession under a writ of *habere facias possessionem*. This recovery and possession did not embrace the 100 acres. In 1827, Mr Dickey rented the premises of Oliver Ormsby, and continued thereon till 1829, when James Patterson, one of the defendants, came into the possession.

On the 17th January 1804, Nathan Storkman obtained a vacating warrant, upon which he had a survey made of 411 acres 96 perches, including about 200 acres of the upper portion of the warrant of Joseph Williams. A patent was obtained thereon, dated 15th June 1804. That portion of the Storkman survey which lay above the Joseph Williams' tract, became vested in Oliver Ormsby, by a deed from Thomas Ross, dated 2d April 1816, calling it 210 acres and allowance, for the sum of \$3200. That portion which lay within the Joseph Williams' survey, became vested in Oliver Ormsby, by deed from James Allison, Esq., dated 1st July 1829, calling it 200 acres, for \$400. William Williams, the adverse settler, from whom Thomas Ross and Samuel Jackson derived their claim, conveyed to David Hoops and David Townsend 50 acres (the one-half of the 100 acres before mentioned) by deed, dated 8th June 1811; and David Townsend conveyed his interest therein to Oliver Ormsby by deed, dated 27th June 1820.

In the year 1829, James Patterson, one of the defendants, purchased (with other property) of Oliver Ormsby, the 800 acres, the tracts surveyed under the warrants of Joseph Williams and William Barker, mentioned in the contract between Brodhead and Hoops. By his deed, dated 3d July 1829, Oliver Ormsby conveyed to James Patterson, for the consideration of \$30,000, the said two tracts of land, subject to the claim of Daniel Brodhead for the purchase money unpaid on the contract made with David Hoops, and subject to the legal claims of actual settlers on the land. After his purchase, James Patterson acquired the title of

[Gregg v. Patterson.]

the devisees of Daniel Brodhead to the warrant claims, and their heirs and alienees. Daniel Brodhead died in the year 1809, after having made his last will, dated the 8th of August 1809, and proved before the register of Pike county November 1809, by which he devised the rest and residue of his estate to the children of his daughter, Ann Heiner. Under this clause, it is thought, the warrants of Joseph Williams and William Barker passed. The title of the devisees became vested in James Patterson at the following dates, and for the following sums of money:

By deed from Daniel B. Heiner, 5th Nov. 1831, $\frac{1}{4}$ part, for	\$750.00
" " " George B. Brodhead, 10th Nov. 1831, $\frac{1}{4}$ ths of $\frac{1}{4}$, for	321.42
" " " Daniel W. Brodhead, <i>et al.</i> , 23d March 1833, $\frac{1}{4}$ ths of $\frac{1}{4}$, for	428.56
" " " Charles S. Bradford, 25th Nov. 1835, $\frac{1}{4}$ part, for	1676.00
	<hr/>
	\$3175.98
Deduct share of Henry R. Brodhead, a minor,	107.14
	<hr/>
	\$3068.84

In these deeds it is recited, that James Patterson had become duly vested with the right and title of David Hoops, under the contract made by him with Daniel Brodhead, the testator, and that the grantors convey in pursuance of said contract.

On the 12th March 1831, James Patterson commenced an action of ejectment, No. 22, of April Term 1831, in the name of William Barker, for the tract surveyed on the warrant in that name, against Thomas Ross and others, the adverse settlers upon that tract. This ejectment was prosecuted to verdict and judgment, 5th December 1834. The expense of prosecuting this suit is estimated by James Allison, Esq. at \$400. After he came into the possession, Mr Patterson made extensive and valuable improvements upon these tracts, variously estimated by the witnesses at from \$30,000 to \$80,000. The improvements were principally made after the year 1831, at different periods of time. It was further known, that during this time the plaintiffs resided in and in the vicinity of the city of Pittsburgh, about 34 miles distant from the land in controversy. The rents of the property were estimated as worth \$700 per annum from the time Mr Patterson came into the possession till within four years of this time (June 1843); afterwards at \$900 per annum. Exclusive of Mr Patterson's improvement, the rents were worth \$250 for the 100 acres of the upper tract, and \$100 for the lower tract; the taxes to be deducted.

The defendants gave in evidence a deed of assignment by O. O. Gregg, one of the plaintiffs, and John G. B. Robinson, dated 7th July 1837, to John M'Fadden, in trust for the benefit of their

[*Gregg v. Patterson.*]

creditors, and proved that M'Fadden accepted the trust, and had acted upon it. Also, that the firm of Gregg and Robinson did not own real estate. Also, the application of Isaac Gregg, one of the plaintiffs, for the benefit of the insolvent laws, affirmed and subscribed to, 4th October 1840, in which the property in dispute was not returned. The petition was not prosecuted. A certificate of a decree of the District Court of the United States for the western district of Pennsylvania, declaring Oliver Ormsby Gregg a bankrupt, on the 22d August 1842, was given in evidence. Also another declaring Isaac Gregg a bankrupt, 15th August 1842. Samuel W. Black was appointed the assignee of each, who in December 1842 gave an authority to the plaintiff to prosecute this suit. The defendants further proved that Sidney T. Gregg was married to John G. B. Robinson in the year 1835; and that the said Robinson was still in full life.

On the part of the plaintiffs, James Allison, Esq. was called, who proved that he had been the counsel of Mr Patterson since he came to the county of Beaver, and was conversant with his titles, and that he had never known or heard of the fact that there was no judgment against Isaac Wilson and Isaac Gregg in the case of Carswell, until he was informed of it by one of the counsel of the plaintiffs in the year 1841; that until then, the sheriff's sale of Gregg's title had been conceived good by all parties, so far as he knew.

Upon the facts and circumstances thus given in evidence, the defendants submitted several points to the court for their instruction thereon to the jury; the first of which is, that the warrants and surveys for Brodhead conferred in Pennsylvania what is to be considered and treated for every purpose, as a legal title. The court answered this point in the affirmative. The second point is, if Mr Patterson obtained the title in the warrants and surveys before the institution of this suit, he has the right to avail himself of the title thus acquired against the equitable title, upon which the plaintiffs predicate their right to recover; and the plaintiffs, if not prevented by other causes from recovering, would not be entitled to recover until they do equity, by paying the one-half of the moneys advanced and paid by Mr Patterson in obtaining the legal title, and the one-half of the money expended in recovering the land from the adverse holders, and one-half of the amount expended by him, in good faith, in making substantial and valuable improvements. This second point the court also answered in the affirmative. The third point is, that if the jury believe Mr Patterson purchased in good faith what appeared to be a regular title, and made expensive and valuable improvements, and from 1827 (two years before the defendants purchased from Ormsby) the plaintiffs resided within 30 miles of the premises and continued so to reside till the present time, and during all that time gave no notice of their claim, they can have no equitable title to recover.

[Gregg v. Patterson.]

To this the court answered, if the jury believe that Mr Patterson purchased in good faith, what appeared to be a regular title, and that the plaintiffs had a knowledge of their title and permitted valuable improvements to be made, without giving any notice or intimation of their claim or title, this would prevent their recovery; but if they had no knowledge of their claim or title to the land, the improvements made would not prevent their recovery, and on doing equity by paying or offering to pay their reasonable part of the expenses in making the improvements, they would be entitled to recover. The fourth point is, if one claiming the legal title under Brodhead, turned Ormsby and all others claiming adversely to the warrants out of possession, and Ormsby and his tenants took a lease, and thus acknowledged the title of Brodhead, which has since become vested in Patterson, Gregg's heirs, claiming under the equitable title, cannot be restored to the possession without tendering the money due on the article before bringing suit. This point the court answered in the affirmative. It is unnecessary to notice the other points, as the answers to them, by the court, do not appear to be excepted to in the errors assigned.

The first matter complained of by the plaintiffs is, that the court, in their instruction to the jury, gave to the defendants an advantage from their having become invested with the legal title, as the defendants called it and the court seemed to consider it, that is not sanctioned or sustained by law; and further, that supposing Brodhead to have been the owner of the warrants, they did not invest him with such a title as the law requires, in order to distinguish it as a *legal* title, from what is technically denominated an *equitable* title; but the court seemed to think otherwise. Strictly and properly speaking, a warrant, though the purchase money of the land mentioned in it has been paid, is a mere authority to survey the land for the benefit of the warrantee, and not a grant by the State of the land itself. The grant of the land is made afterwards by the execution of a deed on the part of the State to the warrantee, usually called a "patent," whereby the State divests herself of the *legal* title, which remains in her until then, and vests it in the warrantee or whoever may be the owner thereof at the time. Yet the mere circumstance of having obtained a patent for land from the State gives no advantage to the patentee as against the warrantee entitled by law to it; and hence the warrantee, so entitled, may recover the land in an action of ejectment from a patentee under a junior warrant, or him who has improperly obtained a patent under the prior warrant belonging to the plaintiff. And I cannot perceive, if Brodhead had obtained patents from the State for the lands, that it would have entitled him, his devisees or their assignee, to have claimed any advantage that they would not have been entitled to without such patents having been obtained. Brodhead, although he contracted to sell and

[*Gregg v. Patterson.*]

convey the lands to David Hoops, was to retain the title he had for them, whatever it was, until he should receive one-half of the purchase money agreed on between them. He had only received \$100 thereof; and although he had parted with the possession of the lands, and agreed that Hoops should take the possession of them, without paying any more of the purchase money, until Brodhead should well and sufficiently grant and convey them by such deed or deeds as the counsel of Hoops should reasonably advise and require, at the proper costs and charges of the said Hoops, which was to be done on or before the 1st of May then next following the date of the agreement (1st of May 1802); yet if Hoops failed in paying any more of the purchase money, and Brodhead was ready and willing to make such deed or deeds as were required by the agreement, it was lawful for Brodhead, his heirs, devisees or assignees, to claim and retake the possession of the lands by bringing an action of ejectment against Hoops, or any other in possession claiming from or under him. Ormsby was in possession under the right which Hoops acquired to it by his contract with Brodhead, and certainly was entitled to claim to be protected in it, in the same manner and to the same extent that Hoops would have been had he not parted with his interest in the contract made with Brodhead. Brodhead, his heirs or devisees, could only have turned him or Ormsby, who claimed under and from him, out of the possession, upon their failure to pay and secure the payment of the purchase money according to the terms of the contract.

But Ormsby, after the purchase money had become payable was removed, as it would seem, from the possession by means of an ejectment brought after the death of Brodhead by those claiming as his representatives. This goes to show that there must have been a failure on the part of Hoops and those who succeeded to his right after he parted with it, to pay to Brodhead or his legal representatives the purchase money as it fell due, otherwise there could not have been, as we must take it, a recovery of the possession from Mr Ormsby. The representatives of Brodhead having recovered the possession of the lands by legal process, were entitled to hold it from Ormsby as well as all those who had gone before him, claiming from or under Hoops, until they were paid all arrearages of the purchase money due upon the contract made with Hoops. Mr James Patterson, one of the defendants, conceiving, as it would seem, that he had become invested with the entire interest in the lands which David Hoops acquired by his contract made with Brodhead, came forward to the representatives of Brodhead, claiming the benefit of the contract made with Hoops, and paid the balance of the purchase money, with the interest due thereon, amounting to \$3175.98 with the exception, perhaps, of \$107.14, coming to a minor, who was, therefore, incapable of releasing, as it was thought, his in

[Gregg v. Patterson.]

terest in the title to the lands. But from all the other representatives he obtained deeds conveying and releasing their respective interests and rights to the lands. It is clear that the plaintiffs could not have recovered the possession from the representatives of Brodhead without having paid, or at least tendered the balance of the purchase money, with the interest due thereon. That right, however, which they had to hold the possession, they transferred to Mr Patterson upon being paid the amount thereof by him; then upon what principle of reason, equity or justice, can the plaintiffs claim to recover the possession of an undivided moiety of the lands, which they allege that they are entitled to, without first paying or tendering to Mr Patterson the one-half of what he paid upon the contract of Hoops? It must be admitted by all, that he has an indisputable right to be reimbursed by them the money which they would have been compelled to pay on account of their own interest, before they could have demanded and recovered possession of it. Justice, reason and common sense, seem to require that he should be protected in the possession of the moiety claimed by the plaintiffs, until they reimburse him the one-half of what he paid the representatives of Brodhead, in pursuance and performance of the contract made by Hoops for the purchase of the whole of the lands. Mr Patterson must be considered as having derived his present possession of the lands immediately from the representatives of Brodhead, and as being the same possession which they acquired by their recovery in the action of ejectment, instituted by them for that purpose; for he first got possession from Mr Ormsby, who obtained it by taking a lease of them, after he became liable to be removed by reason of their recovery, from that possession of the lands which he had derived from Hoops; and next by paying to the representatives the balance of the purchase money, he acquired their interest and possession as the lessors thereof. The case would have presented a different aspect if there had never been a recovery of the possession by Brodhead or his representatives, by means of legal process, and James Patterson had voluntarily paid the whole of the purchase money remaining unpaid upon the contract of Hoops. He, though in the possession of the whole of the land, could not have claimed to hold it to the exclusion of the plaintiffs until he was repaid by them the one-half of what he had paid. He doubtless, in such case, might recover it by suit, but he would have no right to hold and keep possession of the plaintiff's moiety of the land, as a pledge for the payment of it.

In *Bossler v. Neesly*, (2 *Serg. & Rawle* 352), though the facts are imperfectly stated, yet enough appears to show that the vendee of the land, having obtained possession thereof under his contract for the purchase of it, and after having paid part of the purchase money, died, whereupon the vendor took possession of the land without any legal proceeding, and without the consent of the heirs

[*Gregg v. Patterson.*]

of the vendee, who brought an action of ejectment against the tenant of the vendor, without tendering the balance of the purchase money, which had become payable; and held that they were entitled to recover the possession. The same principle was decided in *Harris v. Bell*, (10 *Serg. & Rawle* 39), where, by the articles of agreement, no time was fixed for the delivery of the possession of the house and lot contracted for, to the vendee; but before the day for payment of the purchase money, the vendee went into possession by the consent of the vendor, after the purchase money became payable, and a part of it remaining unpaid. The vendor obtained the possession by the act of a third person, who had no right to give it; it was held that the vendee or the heir of the vendee, the latter being dead, was entitled to recover the possession, without tendering the balance due of the purchase money, or bringing it into court. Also in *Vincent v. Huff*, (3 *Serg. & Rawle* 381), it was ruled, where A purchased the right of B to land, under an application and survey, that he is answerable to the Commonwealth for the purchase money, but was not bound to pay till called upon; and if the representatives of B obtain a patent, not at the request of A, or for his benefit, but for the purpose of vesting the title in themselves, A may recover in ejectment against them, or those claiming under them, without previously tendering the money expended in procuring the patent.

It is true that, in the case under consideration, the balance of the purchase money was paid by Mr Patterson, not with a view to secure the title to any portion of the property for the use or benefit of the plaintiffs, but for the purpose of securing the title to the whole of it for himself; and no doubt honestly too, but negligently; for it would seem that he purchased the whole of it from Ormsby, and paid a full price for it, and rested under a complete conviction that he was vested with all the right and interest which the plaintiffs or their ancestor, Mr Isaac Gregg, ever had in or to the property. In this, however, he was clearly mistaken; for the sheriff's sale caused to be made by Mr Jeremiah Barker, though it embraced the whole, did not affect the rights of the plaintiffs to it, or divest them of the same. For there was no judgment against Mr Gregg or his representatives, or against Isaac Wilson, under which such a sale could be made; and it was, therefore, as regarded the interest of the plaintiffs in the property, a nullity. And besides, the purchase money paid by Mr Patterson had become payable long before, and had actually been called for and demanded, so that the payment of it could not be properly said to be voluntary, as in the case of *Vincent v. Huff*. We also think that Mr Patterson is entitled to be repaid the one-half of the amount of all the expenses which attended the recovery of the possession of that portion of the lands from those who held it, and claimed to be entitled to it under an actual settlement, vacating warrant and patent founded thereon. But as it was almost if not altoge-

[Gregg v. Patterson.]

ther impossible for the plaintiffs to ascertain what these expenses were or ought to be, we do not think that they were bound to have paid or tendered the one-half thereof before instituting this suit, as they were in the case of the one-half of the balance of the purchase money. It may be sufficient, on the trial of the cause, to have the one-half of the amount of those expenses ascertained by the jury, if the parties cannot agree on the same; and the court can stay execution of the judgment in case it shall be for the plaintiffs, until the one-half of such expenses shall be paid.

But that part of the answer given by the court to the defendants' second point, whereby the jury were instructed that the plaintiffs could not recover until one-half of all that was expended in good faith by the defendants in making substantial and valuable improvements, were paid by them to the defendants, in our opinion cannot be sustained. This instruction of the court below we think is clearly erroneous. If such a principle were to be sanctioned, it would put it in the power of any one who got into the possession of land under the belief that he had a good title to it, to improve the real owner, in effect, out of all right and claim to it, by expending money and labour in the erection of buildings, and in making other improvements thereon, beyond what all were worth when perfected. This idea, however, has ever been repudiated, and cannot be maintained under any circumstances, unless, perhaps, where the owner, having a full knowledge of his right, stands by, seeing the improvements as they are being made, without making known his right or claim to the ownership of the land, when he has reason to believe that the improver is ignorant of it, and considers himself the real owner thereof. It is true as between tenants in common, or joint tenants of a house or mill which falls into decay, and the one is willing to repair the same, but the other is not, he that is willing shall have a writ *de reparatione faciendâ*; and the writ saith *ad reparationem et sustentationem ejusdem domus tenetur*; whereby it appeareth, as Sir Edward COKE saith, that owners are, in *that case*, bound *pro bono publico* to maintain houses and mills which are for the use and habitation of men. *Co. Lit.* 200 *b*, 54 *b*; *Fitz. N. B.* 127. But it is only to houses and mills already erected and in being, that this right extends, even as between tenants in common or joint tenants, and not to wood land or arable land, for there the one has no remedy against the other to make enclosure or reparations for safeguard of the wood or corn. *Bowles' Case*, 11 *Co.* 82 *b*. And it may be that a tenant in common or joint tenant who repairs a house or mill held by him in common or jointly with another, after a refusal by the latter to join in making necessary and suitable repairs, might recover in an action on the case one-half of the expense incurred in making the repairs. But the writ *de reparatione faciendâ* never was extended to such as were strangers to each other in regard to holding *houses* or *mills* where each claimed exclusively

[Gregg v. Patterson.]

the right to the whole; and never in any case to the building of new houses or mills upon lands; not even as between tenants in common or joint tenants. So that the claim of Mr Patterson and the other defendants in this case to be reimbursed by the plaintiffs the one-half of the moneys and labour expended in making substantial and valuable improvements, whether they consist of houses, mills, or any other description of improvements, is entirely out of the question; for they have not even the shadow or colour of claim to be reimbursed the same, though they may have made them all in good faith, and under the conviction that they were the only owners of the land, at the time, on which they were made.

The answer of the court to the third point of the defendants has just been shown to be erroneous, so far as it affirms that the plaintiffs cannot recover, though their title otherwise be good, without paying first the one-half of the expense incurred by the defendants in making the improvement, if it was believed by them that Mr Patterson had a good title to the land in question. And the circumstance of the plaintiffs residing within 30 miles of the property, from 1827 to the time of trial, was wholly immaterial, if they were ignorant of their right and title to an undivided moiety of it. There is no evidence going to show that they came to the knowledge that they were not divested of all their right to the property by the sheriff's sale, until shortly before the institution of this action; and that until then they were quite as ignorant of it as Mr Patterson or any other of the defendants. But it would seem as if there was less excuse for Mr Patterson being ignorant of the plaintiffs' right than there was for the plaintiffs themselves. Mr Patterson having purchased the property and paid a full price for it, must be presumed to have seen and examined the title which he got of Mr Ormsby for it, or if he did not, it was a great neglect on his part. *Caveat emptor* is the maxim in such case. And certainly if he had examined into the title, as he ought to have done, he would have seen that the levy and sale of the property made by the sheriff was made under a judgment against Jeremiah Barker alone, and not upon a judgment, as recited in the writs of *feri facias* and *venditioni exponas*, against Isaac Gregg, the father of the plaintiffs, and Isaac Wilson in conjunction with Jeremiah Barker; and seeing this fact, he was bound to know that in law the sale was void as to Isaac Gregg's right and interest in the premises purchased by him and those vested in his heirs; for the maxim of law in this respect is, *ignorantia legis neminem excusat*. The plaintiffs were young and inexperienced in business at the time the property was sold by the sheriff; and as the settlement of their father's estate had been undertaken by their mother and their uncle, her brother, to whom the administration of it had been granted by the register, it was natural for them to suppose and believe that everything done under their inspection and with their knowledge would be and was done rightly. So that it is

[Gregg v. Patterson.]

not at all surprising that many years should have elapsed after the sheriff's sale before they came to a knowledge of the fatal defect in it as to their interest in the property. There does not, therefore, appear to be the least ground for raising an objection to their claim on the ground of delay, either in law or equity.

In regard to the fourth point submitted by the defendants, which was answered in the affirmative by the court, enough has been said on the points already noticed to show that we consider the answer to the fourth point correct, and that there is no error in it. But having shown that the court erred in matters embraced in the preceding points, the judgment is reversed, and a *venire de novo* awarded.

Judgment reversed, and *venire de novo* awarded.

GENERAL INDEX

TO THE

PRINCIPAL MATTERS IN THE NINE VOLUMES OF WATTS AND SERGEANT'S REPORTS.

ABANDONMENT.

BOARD OF PROPERTY, 1.

SETTLEMENT, 1.

UNSEATED LAND, 4.

WARRANT AND SURVEY, 5, 28.

1. A title may be lost by abandonment; and if so, it falls back to the State; but is never thereby transferred to an adverse claimant. Nor can a stranger who discovers another's unsatisfied warrant in the hands of the deputy-surveyor, or elsewhere, after any lapse of time from its date, assume the ownership of it, and have it surveyed for himself. *Orr v. Cunningham*, IV. 294.

2. Abandonment is not to be presumed from lapse of time against one who had warrants and surveys, and paid the whole purchase money for the land to the Commonwealth; nothing will do short of actual ouster for twenty-one years. *Urket v. Coryell*, V. 60.

3. Abandonment of land by a settler is not in all cases a matter of fact; it may be a conclusion of law from facts. *Miller v. Cresson*, V. 284.

4. To constitute an abandonment, there must be an actual relinquishment of possession by the settler, without the intention of returning. *Ibid.*

5. It is error to submit to the jury the question of abandonment, when there is no evidence of a relinquishment of possession. *Ibid.*

6. As to land which has been once improved and cultivated, abandonment may be matter of law to be decided by the court, or of fact to be determined by the jury; but when the facts with respect to it are doubtful, it must be referred to the jury. *Forster v. M'Divit*, V. 359.

ABATEMENT.

FOREIGN ATTACHMENT, 1, 2.

PLEADING, 3, 7, 8, 9.

1. A misnomer of the plaintiff, in an action by a corporation, must be taken advantage of by a plea in abatement. *Gray v. The Monongahela Navigation Company*, II. 156.

ABATEMENT.

2. *Quære?* May the pendency of a personal action for the same cause in a foreign state be pleaded in abatement? *Irvine v. Lumbermen's Bank*, II. 190.

ACCOUNTS.

COUNTY TREASURER, I. 2.

EXECUTORS, &c., 12.

PARTNERSHIP, 14.

1. When there are mutual accounts between parties, the items of credit and charge in such accounts, within six years before the commencement of the action, are deemed equivalent to a subsequent promise reviving the debt. *Van Swearingen v. Harris*, I. 356
Thompson v. Hopper, I. 467.

2. If part of an account, filed as a mechanic's lien, be for lumber furnished to the contractor before he entered into the contract, which could not be a lien, and a part afterwards which was used in the building, and there be a credit in the account of the lumber-man for a payment, it may be referred to the jury to determine whether the payment shall be applied to that part of the account which was a lien, or that which was not. *Dickinson College v. Church*, I. 462.

3. If one who, by the nature of his agreement, is bound to keep an account of profits, refuses or neglects to produce it upon the trial of a cause involving a settlement of his accounts, the jury will be justified in charging him beyond what it can be shown he received. *Dickey v. M'Cullough*, II. 88.

4. Receiving an account rendered without objection, does not preclude the party from afterwards showing an unobserved error which passed without notice, by the common blunder of all parties.

Such an error might be corrected even in a settled account, where neither party had been prejudiced by the acquiescence. *Jones v. Dunn*, III. 109.

5. *It seems*, questions may be asked to support the character and standing of third persons called in to assist others in a settlement of accounts, though they have not been first attacked, if the opposite party has previously asked questions indirectly reflecting on them.

An answer, however, that their characters stood fair, being no more than the law implies, is not error. *Postens v. Postens*, III. 127

ACCOUNT RENDER.

PARTNERSHIP, 40.

1. If an agreement of settlement between partners be set aside, in an action upon it, on the ground of fraud in obtaining it, the parties are thereby restored to their original rights and liabilities, and an action of account-render will afterwards lie by one against the other. *Leonard v. Leonard*, I. 342.

2. An action of account-render will lie upon a contract of lease by the landlord against the tenant, to recover that portion of the profits of the property leased which, by his contract, he was bound to render as rent. *Long v. Fitzsimmons*, I. 530.

ACCOUNT RENDER.

3. In account render a count charging the defendant as bailiff of the plaintiff's land may be joined to a count charging him as tenant in common with the plaintiff. *M'Adam v. Orr*, IV. 550.

4. And such count may be added on the trial as an amendment *Ibid.*

ACCOUNT STATED.

1. The acknowledgment of a defendant that a certain sum is due, raises an implied promise to pay the amount, and it is recoverable under a count for account stated. *Tassey v. Church*, IV. 141.

ACT OF ASSEMBLY.

ASSIGNMENT, 16.

CONTRACT, 13.

EVIDENCE, 22.

VENDOR, &c., 41.

1. An Act of Assembly directing a judgment to be opened, and the defendant let into a defence upon the plea of payment, is the exercise of a jurisdiction of a remedial character, partly legislative and partly judicial, and not in violation of the constitution.

Legislative and judicial powers sometimes so commingle, that the exercise of a certain kind of judicial authority in the passage of a law is in accordance with precedents, and not contrary to received constitutional principles, nor such as a court could annul. *Braddee v. Brownfield*, II. 271.

2. An Act of Assembly authorized a sale of real estate by a trustee to be appointed by the Orphans' Court, the court to prescribe the time, place, and manner of his sale. *Held*, that this contemplated a future sale, and also a public sale, and that a private sale before the passage of the Act was invalid, notwithstanding it was approved of by the Orphans' Court.

The suit to enforce payment of the purchase money in such case, can only be brought by the trustee, and not in the name of the *cestui que trust*. *Ellet v. Paxson*, II. 418.

3. The Commonwealth may pass a retrospective law impairing her own right: and therefore a supplementary Act passed after a forfeiture incurred to the Commonwealth under a former Act, declaring it not to be incurred by the true intent and meaning of the former Act, releases the penalty. *Davis v. Daves*, IV. 401.

4. An Act of Assembly declaring the children of a bastard child able and capable to inherit and transmit the estate of their deceased mother, as fully as if the said bastard child had been born in wedlock, does not divest real estate which had previously passed by descent from the mother to her brothers, so as to vest it in the children of the deceased bastard child. *Norman v. Heist*, V. 171.

5. The Legislature cannot take the property of one individual, with or without compensation, in order to give it to another. *Ibid.*

6. An Act of Assembly will not be construed to repeal by impli-

ACT OF ASSEMBLY.

cation an express enactment, unless there be a clear and strong inconsistency between them. *Street v. Commonwealth*, VI. 209.

7. *Quære*, whether if land be conveyed to trustees in trust for an academy which is afterwards incorporated by an Act of Assembly directing the property to vest in the corporation, the Act is, so far as respects the vesting of the land, unconstitutional and void. *Fox v. The Union Academy*, VI. 353.

8. One, however, who contracts with the corporation to pay money for land obtained from them and held by him, not having notice not to pay, and there being no adverse claimant who could again recover the money, cannot raise this question of the invalidity of the transfer in an action of assumpsit by the corporation to recover the money. *Ibid.*

9. It seems it might be otherwise in an ejectment for the land *Ibid.*

ACTION.

ACT OF ASSEMBLY, 2.

ATTORNEY AT LAW, 1.

BILLS OF EXCHANGE, 10, 17.

BOND, 12.

COMMON INFORMER, 1.

CONTRACT, 6.

COSTS, 4.

DOWER, 2, 3.

EQUITY, 1.

EXECUTORS, &c., 15.

HUSBAND, &c., 19.

INTESTATE, 6, 7, 8, 9.

PARTITION, 8.

PARTNERSHIP, 22, 27, 35, 40.

PRINCIPAL AND AGENT, 2, 35.

STAKEHOLDER, 3.

TOWNSHIP, 1.

VENDOR, &c., 63.

WORK AND LABOUR, 1.

1. R., against whom a domestic attachment had issued, transferred to G. a check for the payment of money, which G. applied to the payment of a debt for which he was security for R. *Held*, that an action for money had and received would not lie by the trustees under the domestic attachment against G. to recover the amount of the check. *Rutter v. Gable*, I. 108.

2. If a joint suit be brought against two obligors, one of whom dies pending the action, and the plaintiff takes a judgment against the survivor, the estate of the deceased obligor is thereby discharged from liability. *Finney v. Cochran*, I. 112.

3. A claim which is founded upon a transaction which is either *malum prohibitum* or *malum in se*, cannot be enforced by an action of any kind.

A contract of purchase of a prize lottery-ticket, the sale of which

ACTION.

was prohibited by law, cannot be enforced by action, nor will the purchaser be entitled to recover in an action for money had and received, upon proof that the seller of the ticket received the amount of the prize-money. *Eberman v. Reitzel*, I. 181.

4. He who has performed a special agreement to do a particular thing, may recover the stipulated price of it, by an action of *indebitatus assumpsit*, and use the agreement as evidence of the amount of compensation due. But if there be but part performance by the plaintiff of his part of the contract, and he may be excused from an entire performance by the act or agreement of the defendant, the action to recover compensation must be on the special agreement, with an averment of the plaintiff's readiness to perform, as an excuse for the want of actual performance. *Harris v. Ligget*, I. 301.

5. An action may be maintained by the legal authorities of a borough against a collector of school-tax, to recover the amount of a duplicate, put into his hands for collection by the same authorities. *Wilson v. Borough of Lewiston*, I. 428.

6. The disturbance of a member of a religious congregation, while engaged in religious exercises in the church, by making loud noises in singing, reading, and talking, is an injury for which no action can be maintained by him. *Owen v. Henman*, I. 548.

7. S. A. & W. E. and the firm of I. C. J., O. & Co., merchants, residing in Philadelphia, agreed with N. D. and with each other, to enter into the Chinese trade, for not less than three nor more than five years: the first named parties furnishing capital to send two ships annually to Canton *via* England; and N. D. giving his services in selling the goods at Canton and investing the proceeds in return cargoes, separately consigned to the parties in Philadelphia, in proportion to their respective shares. N. D. was not to bear any part of the loss on dry goods, but was to share equally with the others the profits on their sales and to receive a commission on specie as well as other parts of each cargo. His profits and commissions were to be taken out at Canton and shipped on his separate account in one of the company's vessels; and the funds of the other parties were to be invested for each of them on separate account; and Chinese goods separately invoiced and consigned to them in proportion to their shares, without regard to the state of the partnership accounts. This arrangement continued during the contemplated period of five years, and was succeeded by another between N. D., on the one hand, who was to receive a commission on dry goods instead of profits, and the other parties, on the other hand, except W. E. who had retired. It was succeeded by another on the same terms, except that the concern guaranteed that the commissions should not fall short of \$25,000 per year. *Held*, that a joint action for money had and received, to recover the proceeds of sales made in the second and third periods, might be maintained by S. A. & I. C. J., O. & Co. against N. D.

Held also, that N. D. could not set-off in such suit a debt due to him by S. A. *Archer v. Dunn*, II. 327.

8. An action against the Bank of Pennsylvania, which is located
IX. — 28

T

ACTION.

in Philadelphia, cannot be instituted in the county of Berks by a service of the process upon the cashier of the branch of the bank located in that county. *Brobst v. Bank of Pennsylvania*, V. 379.

9. Money voluntarily paid in discharge of a void obligation cannot be recovered back. *Speise v. M' Coy*, VI. 485.

10. An attorney-at-law, who, in purchasing a writ for his client, is charged and pays more for it than the law allows, cannot maintain in his own name an action against the officer to recover the penalty imposed for taking illegal fees. *Baldwin v. Cash*, VII. 425.

11. For an act which happens to be both a public and a private wrong, the public and the party aggrieved each has a distinct concurrent remedy, the former by indictment, and the latter by an action suited to the particular circumstances of his case: the 26th and 27th sections of the Act of 16th June 1836, which provides the remedy and punishment for publications respecting the conduct of Judges of the court, does not alter this principle with regard to offences of that kind. *Foster v. The Commonwealth*, VIII. 77.

12. For an injury done to the horse of a customer by the bursting of a steam-boiler at a mill, case and not trespass is the proper form of action, and it may be maintained by the owner of the horse which was at the time in the possession of another person. *Spencer v. Campbell*, IX. 32.

13. One who is exercising a public trade or business which requires the use of a steam-engine, is responsible for any injury to another which is the consequence of its insufficiency. *Ibid.*

14. The owner of a raft, although not present, is liable for any damage which may be done to the property of others upon the river, occasioned by negligence or unskilful management of his pilot. *Shaw v. Reed*, IX. 72.

15. A covenant of F to become the surety of O to M in a certain note in which G was then the surety, and thereby "relieve and exonerate" the said G as surety, is rightly sued in the name of G. *Flinn v. M'Gonigle*, IX. 75.

16. A workman who contracts with the Commonwealth for the construction of a piece of work upon the Pennsylvania Canal for a stipulated price, is liable upon an implied assumpsit to pay the owner of the land on the line of the work from whom he takes the materials used in its construction. *May v. Kornhaus*, IX. 121.

ADMINISTRATION ACCOUNT.

Each of several co-administrators has a right to settle a separate account of his administration, but this will not affect his joint liability on his official bond for the acts of his co-administrator. *Case of Patterson's Estate*, I. 291.

ADMIRALTY.

On a libel filed in the District Court of the United States, to recover damages against the master of a brig then lying in the port of Philadelphia, for non-delivery of goods on a former voyage, at the

ADMIRALTY.

port of New Orleans, the district Judge ordered process to issue according to the prayer of the petition, without prejudice to the question of jurisdiction. Under this process the brig was seized and detained. Afterwards, on a plea to the jurisdiction, the district Judge dismissed the libel. *Held*, that the order of the Judge was a sufficient justification to the defendants for the seizure and detention of the vessel. *Thompson v. Lyle*, III. 166.

ADVANCEMENT.**EXECUTORS, &c., 16.**

1. Loose declarations of a parent that he intended an existing debt should be an advancement, not substantiated by writing, not made to the child nor assented to by him, nor accompanied by any act, are not sufficient to destroy a debt secured by a legal instrument in full force, and change it into a gift by way of advancement, whether offered by the son to defeat the recovery of the debt, or by the representatives of the father against the son to defeat his claim for a distributive share. *Haverstock v. Sarbach*, I. 390.

2. In an issue between a father and a creditor of his deceased son, to try whether a sum of money given by the father to the son was a loan or an advancement, it is competent for the latter to prove that the son worked for the father after he arrived at full age. *Christman v. Siegfried*, V. 400.

3. It is also competent in such case to prove that the father had made advancements to his other children. *Ibid*.

4. Testator, after giving his wife an annuity, directed his executors "to ascertain how much has been advanced by me to each and every of my children, &c., and how much each of them may be indebted to me on bond, note, book-account or otherwise, and to so divide the residue of my said property among my said children, &c., as that each child may have an equal share of my estate; that is, that the monies so advanced to any of my said children, &c., and for which they shall be indebted to me as aforesaid, be counted as so much paid on account of the share of such child in my estate," &c. The testator at his death held notes of each of his sons, a book-account against one, and a bond and warrant of his son-in-law never entered up. On one of the notes he had received a year's interest eight years before the date of the will; on the others no interest was ever paid. *Held*, that the will converted the notes and bond and book-account from debts into advancements, and that no interest was chargeable on them. *Green v. Howell*, VI. 203.

AFFIDAVIT.**EVIDENCE, 117.****AFFIDAVIT OF DEFENCE.****BILLS, &c., 40, 41, 42.****DISTRICT COURT OF MERCER COUNTY.**

1. The Act of 23th March 1835, establishing the affidavit system

AFFIDAVIT OF DEFENCE.

in the District Court, applies to an action on a bank note, in which the plaintiff seeks to recover the amount, with twelve per cent. in interest, for refusal to pay on demand at the banking-house.

If averments, beyond the instrument of which a copy is filed, are set forth by the plaintiff in a statement or memorandum, the defendant may deny them in his affidavit; if not denied, they are admitted.

If the averment is obscure, on the defendant's pointing it out, the plaintiff may amend.

In a suit on a note the court may give judgment for the plaintiff by default for want of a sufficient affidavit of defence, without requiring the plaintiff to surrender the note, and assess the damages without writ of inquiry. *Bank of the United States v. Thayer*, II. 443. *Same v. Lockhart*, II. 443.

2. It is not necessary, under the affidavit system established by the Act of 28th of March 1835, for the District Court, that a declaration or statement should be filed in all cases, though the court may direct it to be done.

The lessee is not discharged from an express covenant to pay rent, by the lessor's recognising the assignee of the lease as tenant, and receiving rent from him, though the lessee never entered.

An affidavit that the defendant did not enjoy the privileges covenanted for by the lessor, is not an averment that the lessor had prevented him from the enjoyment of them.

It seems that if two defendants are sued, and one only is served with process, and appears and makes defence, a judgment entered generally is a judgment against such defendant only. *Dewey v. Dupuy*, II. 553.

3. If a judgment be opened upon an affidavit of defence, and the defendant let into a defence upon the merits, he will not, upon the trial, be permitted to take advantage of a technical exception to the form of action. *Ekel v. Snevily*, III. 272.

4. Upon an affidavit of defence to part of a claim, the plaintiff may take judgment for the residue and receive it; and proceed to issue, trial and judgment for that which was disputed. *M'Kinney v. Mitchell*, IV. 25.

5. An affidavit of defence to a bond given for the purchase money of land conveyed by deed with general warranty, stated that adverse outstanding claims existed prior to the purchase. *Held*, insufficient, for not alleging that these claims were good or believed by the defendant to be so. *Brick v. Coster*, IV. 494.

6. The defendant in his affidavit of defence must swear to facts: presumptions in his favour will not supply the want of them. *Moore v. Somerset*, VI. 262.

7. A rule of court which requires the defendant, on notice, to file an affidavit of defence, is sufficiently complied with by an affidavit made by a third person in the absence of the defendant, that he has a just defence to the plaintiff's cause of action, without setting out the particulars of it, or the deponent's knowledge on the subject. *Burkhart v. Parker*, VI. 480.

AGENT.

MORTGAGE, 2.
 PARTNERSHIP, 17.
 PRINCIPAL AND AGENT.

AGREEMENT.

BOND, 3.
 CONTRACT, 7.
 DEED, 12.
 HUSBAND, &c., 19.
 LEASE, 4, 5.
 MERGER, 2.
 PAROL EVIDENCE, 1.
 VENDOR AND VENDEE, 9.
 VENDOR, &c., 20.
 WORK AND LABOUR, 1.

1. Articles of agreement for the purchase of land become merged in the conveyance and thenceforth null and void: there being no allegation of fraud or mistake in the execution of the conveyance. *Creigh v. Beelin*, I. 83.

2. Where an agreement in writing, without date, altogether executory in its terms, contains, among other things, a stipulation that a certain sum of money shall be paid on the 1st of May 1838, the necessary inference is, that it was made before that day; and the agreement being in writing, it is not error in the court to draw this inference and to instruct the jury accordingly. *Cleavinger v. Reimar*, III. 486.

3. To construe a written agreement, the whole instrument must be taken into view, and not merely particular expressions. Hence the words "on condition" may be construed to mean "on the terms," in order to effectuate the intention of the parties. *Meanor v. M'Kowan*, IV. 302.

4. K & S were joint contractors for the purchase of lands called "Lee's lands," to hold as tenants in common, and by agreement the seller was to convey to K to hold an undivided moiety for himself, and the other moiety for S. S agreed with R that he should have one-third of the nett proceeds or profits of the said lands (describing them as lying on and about the Mine Hill in Schuylkill county, containing about 1400 acres) in consideration of his services in their sale. About three months afterwards, by another agreement between K & R, K bound himself to convey to R, his heirs and assigns, the one-sixth part of a certain tract of land, situate on the waters of Mill Creek, in Schuylkill county, adjoining lands of Francis B. Nichols, Kettle & Wagner, Potts & Bannan, and others, containing by estimation 1200 acres, being the same tracts of land which were known by the name of Lee's lands, to be conveyed to said R when the title to said land shall be arranged and settled agreeably to the understanding and agreement made with S, and also to account with said R for one-third of the nett profits of sale of one moiety already made to S W. The original agreement with S was in the possession of R when the last agreement was made,

AGREEMENT.

and not produced or shown to K ; and there were older claims to the land by third persons not settled or arranged.

Held, 1. That the last agreement was executory even if it embraced lands.

2. That in the absence of evidence to show any other agreement in writing than the two above-mentioned, the latter agreement must be taken as referring to the former, so as to make the former a part of it, and bound K only to the extent of the former agreement with S ; and that R had no right to the lands themselves so as to be able to maintain partition or ejectment, but only an interest in the proceeds after sales made.

3. It appearing that Lee had been the owner of three contiguous tracts at or near the neighbourhood of the above description, containing 1200 acres 85 perches, that K & S had agreed with him for those tracts before the first agreement, and that he had conveyed them to K just before the last agreement, and that they were the only lands K & S had any right to when they agreed with R, all evidence that any other lands were meant was irrelevant and inadmissible. *Scitzinger v. Ridgway*, IV. 472.

5. If the matter in dispute and object of a written agreement, whether under seal or not, can be discovered, it will be construed so as to effect that object. *Worrall's Accounts*, V. 111.

6. Where a suit has been compromised and a doubtful question settled, it will not be opened unless there has been fraud or imposition, especially where the agreement of compromise indicates an intention to end the matters in dispute. *Ibid*.

7. Therefore a release of demands executed on the settlement of a family dispute will be construed according to the design and intent of the parties, and not by technical expressions. *Ibid*.

8. A judgment for \$91,500 was amicably revived, with an agreement annexed that it was "revived for the sum of \$9240, the whole amount for which the same was given having been fully paid and satisfied, except the debt due to the Bank of North America, of which the principal is \$4620." *Held*, it was revived as security for the debt due the bank, and that debt was the principal of \$4620, and interest due on it at the time of the agreement. *Nixon v. M'Callmont*, VI. 159.

9. Such agreement is collateral to the judgment, and is to be construed as if distinct and separate from it, and parol evidence is admissible to explain its meaning, but not to contradict it. *Ibid*.

10. The defendant executed an agreement under seal, reciting a bond and mortgage for \$4000, from B to the plaintiffs, by which he covenanted, in case a sheriff's sale of the mortgaged premises should not satisfy the amount of the bond with interest and costs, over and above all liens, claims and demands, to pay the difference ; and guaranteed the premises free from mechanics' liens. Appended to the specialty was a parol agreement of same date by the plaintiffs, that when and so soon as \$750 should be paid them in part satisfaction of the bond, the guaranty should be cancelled, provided sufficient releases of the mechanics' liens on the premises should be previously

AGREEMENT.

given to them. The plaintiffs afterwards sued out the bond, on which the premises were sold for \$2000, and distribution made by an auditor of \$552.64 for mechanics' liens, &c., and the balance to the plaintiffs on their mortgage. The plaintiffs brought covenant against the defendant on the specialty to recover the balance of the bond.

Held, 1. That covenant was the proper form of action, and that the plaintiffs might give the specialty in evidence without the parol memorandum.

2. That the report of the auditor was evidence to show how much was awarded to the plaintiffs.

3. That the parol agreement, depending, as it did, on an unperformed condition, was not an obstacle to the plaintiffs' demand.

4. That in such action the defendant might set off a loss under a policy of insurance on the mortgaged premises executed by the plaintiffs to a third person and assigned by him to the defendant.

5. That the want of a direct averment in such plea of interest in the property insured, could only be taken advantage of on special demurrer. *Ellmaker v. The Franklin Fire Ins. Company*, VI. 439.

11. An agreement by one of several heirs of an intestate to sell and convey all his interest in the real estate, "except so much of said estate as shall be coming to the said E at the decease of the widow," is to be construed to mean an agreement to sell and convey two-thirds of the interest of the vendor in his father's estate. *Ludwig v. Leonard*, IX. 44.

AGREEMENT OF PARTIES.

1. If the parties to an action enter into an agreement that the cause shall be tried upon a certain plea, it is not in the power of the court afterwards to admit any other plea without the consent of both parties. *Fursh v. Overdeer*, III. 470.

ALIEN.

1. An alien, by the law of Pennsylvania, acquires no title in his wife's estate of inheritance, as tenant by the curtesy initiate. *Reese v. Waters*, IV. 145.

ALIEN ENEMY.

BANKRUPT, 1.

ALLEGHENY COUNTY, COMMON PLEAS OF

SCIRE FACIAS.

AMENDMENT.

ACCOUNT RENDER, 4.

APPEAL, 13.

COMMON INFORMER, 2.

RECOGNIZANCE, 7.

SCHOOL, 4.

AMENDMENT.

1. An amendment at common law is not the subject of a writ of error. *Davis v. Church*, I. 240.

2. A declaration may be amended in matter of form after verdict and judgment and writ of error sued out, where substantial justice has been done in the trial of the cause, and the defendant was not prejudiced by the informality. *Wampler v. Shissler*, I. 365.

3. Upon a motion to quash an appeal from the judgment of a justice of the peace on the ground of a defective recognizance, the appellant should be permitted to amend it, and thus perfect the appeal. *Bream v. Spangler*, I. 378.

4. A plaintiff, in an action on the case in *assumpsit*, may amend his declaration on the trial of the cause, by increasing the amount of his claim in the several counts, and making a corresponding alteration in the amount of damages; and whether this be a sufficient cause to entitle the defendant to a continuance of the cause, is a matter of discretion with the court. *Tassey v. Church*, IV. 141.

5. After an appeal by a defendant from an award of arbitrators against him, the plaintiff cannot file an additional count containing a new and distinct cause of action from that tried by the arbitrators. *Hilyard's Estate*, V. 32.

6. If the narr. sets out a contract with the plaintiff alone, a new count averring a contract with the plaintiff and another since deceased, contains a new and distinct cause of action. *Ibid.*

7. If a suit be brought in the name of A B, and "others," the record cannot be amended by striking out "others," and inserting the name of another party, more especially when the cause had been previously referred to arbitrators, from whose award there had been an appeal. *Caraskadden v. M'Gee*, VII. 140.

8. It is not in the power of the Court of Common Pleas to permit an amendment after suit brought, by which the christian name of one of the plaintiffs should be changed. *Horbach v. Knox*, VIII. 30.

ANCIENT DEEDS.

EVIDENCE, 58.

ANNUITY.

LOAN, 1.

ANTENUPTIAL SETTLEMENT.

HUSBAND AND WIFE, 5.

APPEAL.

AMENDMENT, 5.

ARBITRATION, &c., 4, 7, 8, 22.

BAIL, 5.

CORPORATION, 8, 9.

COSTS, 8.

DECLARATION, 3.

APPEAL.

FOREIGN ATTACHMENT, 8.

INSOLVENT, 3.

NISI PRIUS.

SEQUESTRATOR, 1.

1. The forms of pleading must be adapted to the cause of action with the same strictness, whether the cause originate by writ, or be brought into court by appeal from the judgment of a justice of the peace. *Harris v. Ligget*, I. 301.

2. If a joint suit against two be referred to arbitrators, and an award made against both, from which one appeals, the judgment remains against him who does not appeal, and the cause is tried as to the other alone. *Anderson v. Levan*, I. 334.

3. Upon a motion to quash an appeal from a judgment of a justice of the peace, on the ground of a defective recognizance, the appellant should be permitted to amend it, and thus perfect the appeal. *Bream v. Spangler*, I. 378.

4. The court will not grant a rule to an appellant from a decree of an Orphans' Court, to take depositions to supply matters not heard by the court below, unless after a hearing they are of opinion that the justice and equity of the case require it. *Rees's Appeal*, II. 417. *Dyott's Appeal*, II. 417.

5. On appeals from the decrees of the Courts of Common Pleas, for settlement of accounts of assignees, and distribution of moneys, the matter is not taken up *de novo* in the Supreme Court, but confined to the exceptions taken before auditors or before the court below.

No one is entitled to a hearing on an appeal but a party who enters an appeal. *Estate of J. B. & C. W. Dyott*, II. 557.

6. A defendant who succeeds in his appeal from the judgment of a justice of the peace, is not entitled to recover a counsel fee of four dollars and daily pay for his attendance upon the appeal. *Shuey v. Bitner*, III. 274.

7. In a *scire facias* against a constable to recover the amount of an execution put into his hands, the plaintiff is entitled to an appeal from the judgment of the justice of the peace. *Sott v. Kelso*, IV. 278.

8. Upon an appeal from the judgment of a justice of the peace to the Common Pleas, the names of the parties may be so transposed or changed as to adapt the legal form to the merits of the case. *Giffen v. St. Clair Township*, IV. 327.

9. If upon an appeal from the judgment of a justice of the peace, the recognizance be not in conformity with the 33d section of the Act of 12th February 1842, the appellant must be called upon by rule to perfect it, which he must do *nunc pro tunc*, so as to take effect from the date of the previous one. *Adams v. Null*, V. 363.

10. A county, against which an award of arbitrators has been made, may appeal without the payment of costs. *Robinson v. Jefferson County*, VI. 16.

11. Under the proviso of the 25th section of the Arbitration Act
IX. — 29

APPEAL.

of 16th June 1836, if the arbitrators award a nonsuit of the plaintiff and he appeals, it is not a sufficient reason to allow the plaintiff to suffer a nonsuit without consent, that the arbitrators erred in law in finding as they did, nor that the plaintiff wishes to bring another suit and have another reference. *Girard Bank v. The Schuylkill Bank*, VIII. 242.

12. Since the Act of 29th March 1832, the Supreme Court have no power to take bail on appeal from the Orphans' Court. This power is vested exclusively in the latter court. *Chew's Case*, VIII. 375.

13. The Orphans' Court may amend an order for the amount of bail on appeal while the record remains with them and the *certiorari* has not been returned. *Chew's Appeal*, IX. 151.

APPEARANCE.

1. Where the writ is served but upon one of two defendants, and there is a general appearance by attorney, and trial of the cause upon its merits, the verdict and judgment will be sustained, although the issue be by one only. *Hall & M'Kelvey v. Law*, II. 121.

2. Every intendment will be made in support of a judgment, especially in a case where no motion was made in the court below to correct an apparent irregularity in the mode of entering it. *Ibid.*

3. If an attorney appear for a defendant and plead to issue, and afterwards the appearance and pleas be withdrawn by leave of the court, the cause stands as if there had been no appearance. *Michen v. M'Coy*, III. 501.

4. A general appearance by the defendant waives the summons and service of the writ. *Zion Church v. St. Peter's Church*, V. 215.

APPLICATION.

INTEREST, 9.

APPRAISEMENT.

EVIDENCE, 56.

APPROPRIATION.

ASSIGNMENT, 2.

JUDGMENT, 8.

WARRANT AND SURVEY, 18.

1. Upon an appropriation of the proceeds of the sale of real estate by the sheriff, a lien for the balance of the purchase-money, subject to which the land was conveyed to the defendant, is entitled to priority over subsequent judgment creditors. *Barnitz v. Smith*, I. 142.

2. On a sheriff's sale of land, all liens on the land, due at the time of the sale, where they may be reduced to a certainty as to amount, are entitled to payment out of the proceeds: hence the arrears of a widow's annuity, which are due and payable, must be paid out of the proceeds of sale. *Reed v. Reed*, I. 235.

3. If a debtor give to a creditor a draft for money and direct the

APPROPRIATION

application of the proceeds to a particular liability, the creditor is bound to apply it to that liability as much as if the debtor had paid the same amount in cash with the same direction. *Moorehead v. The West Branch Bank*, III. 550.

4. Whether the debtor in making a payment to his creditor intended to apply it to one debt or another, is a matter of fact which must be ascertained by the jury from all the circumstances of the case and conduct of the parties. *Ibid.*

5. The intention of a payer to appropriate a payment to a particular debt, may be collected from the nature of the transaction, and may be referred to the jury as matter of fact. *West Branch Bank v. Moorehead*, V. 542.

6. The provision of the Roman law, which, in the application of a payment, requires the creditor, when the right has devolved on him by the laches of the debtor, to consult the debtor's interest in preference to his own, has not been adopted as a part of the common law; and the propriety of an instant and actual application, by a creditor firm, of the proceeds of a separate note transferred to it generally as collateral security, without specifying for what debt, by a partner indebted to it on joint and separate account, cannot be questioned. *Logan v. Mason*, VI. 9.

7. The commissioners under the Spanish treaty awarded a large sum of money to be paid to J. Y. for himself and others. J. Y. was the agent of certain shippers, owners of property seized in South America by the Spanish government, and the plaintiff, an attorney there, had a claim on the fund for services and advances recognised by J. Y. and others interested.

Held, 1. That it was a decree in favour of the plaintiff for the amount of his claim.

2. That all parties having acquiesced in the justice of the plaintiff's claim, it amounted to an appropriation, and equity would direct the money to be brought into court and award payment out of it first to the plaintiff.

3. That the plaintiff had constructive possession of the fund and an equitable lien on it, from his having been the efficient person by whose means the money was ultimately recovered, and having parted with the documents at the request and for the convenience of the other parties interested. *Aycinena v. Peries*, VI. 243.

8. Where a debtor directs the application of a payment to a particular debt, equity will not change that appropriation in favour of another debt. *Selfridge v. Northampton Bank*, VIII. 320.

ARBITRATION AND AWARD.

AMENDMENT, 5.

APPEAL, 10, 11.

BANKRUPT, 1.

CITIZENS OF THE UNITED STATES.

COSTS, 3.

DISTRICT COURT OF MERCER COUNTY.

ARBITRATION AND AWARD.

PRINCIPAL AND AGENT, 12, 18.

PRINCIPAL AND SURETY, 4.

REPLEVIN, 4.

SEQUESTRATOR, 1.

1. The parties to an action pending in court, by a writing under their hands and seals, agreed to refer it to three referees, and bound themselves in the penalty of \$100 to abide by the award; the referees heard the parties, and two of them made an award for the plaintiff, upon which the court entered judgment. *Held*, that the award could not be supported under the Act of 1806, the reference not having been made a rule of court; nor under the Act of 1836, having been made but by two of the referees. *Okison v. Flickinger*, I. 257.

2. An award of arbitrators in favour of a defendant for a certain sum, has the effect of a judgment, upon which an execution may issue without a *scire facias* against the plaintiff. *O'Donnell v. Lynch*, I. 283.

3. The remedy to recover the amount of an award at common law, is upon the award, and not upon the submission; the Act of Limitations is therefore no bar to the action. *Rank v. Hill*, II. 56.

4. An appeal from an award of arbitrators by one of two defendants, will not be considered an appeal by both, unless such distinctly appears to have been the intention of the party appealing. *Rice v. Foster*, II. 58.

5. A reference and award have a conclusive effect in determining a dispute about a personal right. *Speer v. M'Chesney*, II. 233.

6. After an award of referees, under a voluntary reference of a suit pending, has been set aside by the Supreme Court on a writ of error, and the case remanded for further proceeding, because the award was not according to the submission, the court below cannot, without consent of parties, send it back to the same referees, under the 7th section of the Act of 16th June 1836.

The words, "mistake in fact," there used, mean a plain and obvious one, such as in arithmetical computation, or a mere clerical error. "Mistake in law," means such as appears on the face of the award, or on facts not controverted; and these the court ought to specify.

Nor can such award be sent back, after judgment has been entered upon it. *Coleman v. Lukens*, III. 37.

7. The declaration was against M. P., administrator of C. I., deceased, and stated that the son of C. I. drew his draft on the defendant, M. P., in favour of the plaintiff, for \$300, with interest, out of any moneys he should receive on account of a legacy to C. I., by the will of P. R., deceased, or any other moneys he might receive as administrator of C. I., which the defendant accepted. *Held*, that the defendant could not appeal from the award of arbitrators against him, without paying costs and giving recognizance. *Pugh v. Ottenkirk*, III. 170.

8. Under the Act of 16th of June 1836, as well as the 20th of

ARBITRATION AND AWARD.

March 1810, it is the character of the suit that determines the right of executors and administrators to appeal without bail or recognizance, and not the naming of the party as executor or administrator. *Ibid.*

9. The Court of Common Pleas has not power to set aside an award made under the Act of 1705, and refer it back to the same referees. But upon such report being referred back, if the parties appear before the referees, and try the matters in controversy, the error will be thereby cured. *Brooke v. Bannon*, III. 382.

10. A submission is annulled by the death of one of the parties before the meeting of the referees, unless it be saved by an express stipulation that it shall survive. The appearance before the referees by the personal representative of the deceased party, and trial of the cause upon the merits, will not so far revive the agreement of submission as to charge a surety in the arbitration bond, who was also bound for the performance of the award. *Bailey v. Stewart*, III. 560.

11. If the parties to an executory contract make a provision in it, that any dispute which shall arise between them on the subject of the contract, shall be determined by an individual named, whose decision shall be final, no action will lie for a breach of the agreement by one against the other; but they must resort to the tribunal appointed by themselves, from whose award there is no appeal. *Monongahela Navigation Co. v. Fenlon*, IV. 205.

12. If parties by contract appoint an arbiter to settle their differences, they are bound by his award, although he may be interested in the contract which was the subject of reference. *Ibid.*

13. An award of arbitrators chosen by the parties is conclusive of the controversy, and has the effect of changing the right to the money or property claimed, in the same manner as a judgment. *Merrick's Estate*, V. 9.

14. If a cause be referred to arbitrators, and an award made in favour of the defendant for a certain sum, and the plaintiff appeals, and afterwards, by leave of the court, suffers a nonsuit, the award is thereby defeated, and is irrecoverable by *scire facias* against the plaintiff. *M'Kennan v. Henderson*, V. 371.

15. A submission and award under the Act of 1836, not having been entered of record and a rule of court obtained thereon, is wholly inoperative, and no action will lie for the recovery of the amount of the award. *Benjamin v. Benjamin*, V. 562.

16. A judgment opened and defendant let into a defence upon the merits, is not an action pending, such as is subject to the provisions of the compulsory arbitration Act. *Lowrey v. Tracey*, VI. 493.

17. An award of arbitrators finding no cause of action, "as they consider the action to be prematurely brought," is a finding for the defendant, and a judgment upon it is conclusive of the plaintiff's right, the latter words being rejected as surplusage, as mere reasons for the finding. *Green v. Fricker*, VII. 171.

ARBITRATION AND AWARD.

A mortgage thus situate, and due more than twenty years, forms no defence to an action to recover the purchase-money of land covered by it. *Ibid.*

18. Upon a rule to arbitrate, if but one party appear to choose the arbitrators, the number must be fixed by the prothonotary; if fixed by the prothonotary and the party, it is fatal to the award. *Feehrer v. Rudy*, VII. 183.

19. A personal service of a rule of reference is indispensable in all cases except when the party cannot be found, and has no agent or attorney. *Jackson v. Wilson*, VII. 249.

20. A question of boundary may be referred to, and settled by arbitrators, whose award, when fairly made, is final and conclusive between the parties; nor is it competent to affect the legal consequences of the award by evidence of what the arbitrators said respecting it after it was made. *Brower v. Osterhout*, VII. 344.

21. It is competent for trustees, being the owners of the legal title to land, to submit a question of boundary respecting it to the award of arbitrators, and such award, when made, is binding and conclusive upon the *cestui que trust*. *Ibid.*

22. Since the passage of the Act of 12th July 1842, abolishing imprisonment for debt, appeals from award of arbitrators are to be entered without any sort of bail. *Beers v. West Branch Bank*, VII. 365.

23. The amount of an award of arbitrators, appealed from by the defendant, is a lien upon his land, but not the costs which subsequently accrue upon the trial of the cause. *Christy v. Crawford*, VIII. 99

ARREST.

1. It is the duty of the sheriff, who arrests a debtor within the county of which he is sheriff, upon a *testatum ca. sa.*, to commit the debtor to the jail of the same, and not to the jail of the county from the court of which the writ issued.

Semble. The sheriff in such case would be chargeable with an escape, if he were to commit the debtor to the jail of the latter county.

A debtor in such case, who wishes to obtain an order for his discharge, under the Insolvent Act of the 16th of June 1836, must apply for it to a Judge or prothonotary of the Common Pleas of the county in which he has been arrested or is detained; and the condition of the bond thereby required to be given, ought to be, that he shall appear at the next term of the Court of Common Pleas of *that* county, and then and there present his petition for the benefit of the insolvent laws of this commonwealth, &c.

Semble. Where in such case the county in which the debtor was arrested and is detained, is mentioned in the obligatory part of the bond, and the county from which the writ issued, is mentioned in a recital immediately preceding the condition, and the words of the condition are, "that if the said ——— (the debtor) shall appear

ARREST.

at the next term of the Court of Common Pleas of the *said county*, and then and there, &c." the words "said county" may be construed to mean the county mentioned in the obligatory part, in order to sustain the bond and render it available. *Avery v. Seely*, III 495.

2. In trespass against a constable for arresting the plaintiff and imprisoning him, the declaration stated it to have been done without reasonable or probable cause. *Held*, 1. That the defendant might under the general issue give evidence of the contents of the plaintiff's trunk for the purpose of showing he was addicted to burglary. 2. That the character of the plaintiff could not be given in evidence in mitigation of damages. *Russell v. Shuster*, VIII. 308.

ARSON.

INDICTMENT, 4.

The burning of a barn with hay and grain in it, is felony and arson at common law. *Sampson v. The Commonwealth*, V. 385.

ARTICLES OF AGREEMENT.

1. Articles fully executed by paying part of the purchase money and giving bond, and conveyance made under them, have no bearing in a suit on such bond. *Ludwick v. Huntzinger*, V. 51.

2. *Quære*, how it would be in such suit if the defendant could show the land conveyed to be different from that contracted for. *Ibid*.

3. Articles of agreement concerning 72,000 acres of land belonging to M., N. & G., do not, without other evidence, embrace lands belonging separately to M. *Urket v. Coryell*, V. 60.

4. Where titles are held by trustees under articles, for the benefit of subscribers to the articles, the trust does not take effect until there are subscribers. *Ibid*.

ASSESSMENT.

LIMITATIONS. 5.

ASSESSOR.

Under the Acts of 15th April 1834, and 2d July 1839, in case of a contested election of an assessor or assistant assessor, the Quarter Sessions are to decide whether there is a vacancy; and if they find there is, the county commissioners are to appoint a person to fill the office: that court has no power to order a new election. *Street v. Commonwealth* VI. 209.

ASSIGNMENT.

ATTACHMENT, 3, 4, 5.

BANKRUPT, 6.

BOND, 9, 10.

DEED, 21.

FOREIGN ATTACHMENT, 11.

INTEREST, 8.

ASSIGNMENT.

JUDGMENT, 29.

LANDLORD, &c., 14.

MORTGAGE, 4.

PARTNERSHIP, 12, 31.

TRUST, &c., 17, 24, 25, 26.

VENDOR, &c., 29.

WITNESS, 16, 36, 56.

1. If after judgments are obtained against a principal and surety, a third person interposes and gives his note for the debt to obtain a stay of execution for the principal, and the surety is afterwards obliged to pay the debt, he is entitled to have an assignment of the judgment on the note of the third person, to indemnify him for such payment. *Pott v. Nathans*, I. 155.

2. One who purchases real estate which is encumbered by judgments, which he agrees to pay out of the purchase-money, and afterwards discovers another judgment which he did not agree to pay, may take an assignment of the judgments paid by him, in order to protect himself from the payment of the judgment which he did not agree to pay. And if the latter judgment creditor proceed to sell the estate by execution, and the money be brought into court for appropriation, the assignee of the first judgments will be entitled to the money. *Bryson v. Myers*, I. 420.

3. An assignee under a voluntary deed of assignment for the benefit of creditors is not required to take immediate possession of the goods assigned; he may suffer them to remain in the possession of the assignor for thirty days without subjecting them to an execution of a creditor of the assignor. *Mitchell v. Willock*, II. 253.

4. An assignee, in order to procure bail, consented to let the trust money go into the hands of the bail, and he used it in his business; the assignee is chargeable with interest from the time the money thus passed.

The funds being partly wasted by such bail, and not forthcoming when payable over, the assignee is not allowed commissions.

Quære? Where a bailee or commission merchant makes an assignment for the benefit of his creditors, and the proceeds after sale are in the hands of his assignee for distribution, whether the principal or owner of goods thus disposed of, or his assignee under the Insolvent Act, may come in as a creditor before the auditor appointed to distribute?

It is certain, however, that where no assignment has been made under the Insolvent Act, the creditors of such principal or owner cannot, though he may have been in prison. *Estate of J. B. & C. W. Dyott*, II. 557.

5. If a judgment be assigned as a security to indemnify the assignee for a liability he is under for the assignor, and the assignee assign it to another who has a knowledge of the facts, the holder of it having collected the money is a trustee, and upon the first assignee being relieved from his liability, the plaintiff is entitled to recover the money from the last assignee. And the right of action accrues

ASSIGNMENT.

when the liability of the first assignee ceases; and from that period the Statute of Limitations begins to run. *Poe v. Foster*, IV. 351.

6. Where a voluntary assignment for the benefit of creditors becomes void in consequence of not being recorded within thirty days, moneys in the hands of assignees, the proceeds of the assigned property, as well as debts outstanding and uncollected, are subject to an attachment of execution at the suit of creditors not coming in under the assignment. *Stewart v. M'Minn*, V. 100.

7. But the assignees are not liable in such attachment for moneys collected and paid over before the attachment in pursuance of the assignment. *Ibid.*

8. Assignees under a voluntary assignment for the benefit of creditors have no right as against a mortgage creditor, which could not be claimed by the assignor himself. *Luckenbach v. Brickenstein*, V. 145.

9. The board of directors of the Bank of the United States had power to assign its property and effects, in trust to pay certain preferred creditors, without the authority or consent of its stockholders. *Dana v. The Bank of the United States*, V. 223.

10. Such power belongs to a corporation, like an individual, unless it be restrained by its charter or other legal provision. *Ibid.*

11. The insolvency of the bank at the time of such assignment does not impair its powers to assign for the benefit of preferred creditors. *Ibid.*

12. Schedules to an assignment not dated, referred to in the assignment as bearing even date with the assignment, will be taken to have been executed at the same time, and that might be shown by parol evidence if it were even necessary. *Ibid.*

13. A deed of assignment for the benefit of creditors is not rendered invalid by containing a reservation to the grantor of the surplus after paying the debts of the assignor provided for, such a reservation being implied by law, though not expressed. *Ibid.*

14. Though such assignment be made by a failing bank, and the surplus is alleged to exceed by 50 per cent. the debts preferred, yet if it is assigned as a pledge with right of redemption, the other creditors may redeem, and thus avoid its being locked up for a long time from such creditors. *Ibid.*

15. A proviso in an assignment that the trust shall be closed within two years, and if not then closed, the assignees shall within six months sell remaining assets sufficient to pay the debts preferred, but stipulating also for payment and distribution among the preferred creditors from time to time, as often as there shall be moneys in hand, does not postpone the liability of the assignees to account, or protect them from being cited after a year, and is therefore no objection to the validity of the assignment. *Ibid.*

16. An assignment, good when made, cannot be affected by an Act of Assembly afterwards passed, on the ground that it was then known to the assignor that such Act was about being passed by the Legislature. *Ibid.*

ASSIGNMENT.

17. A voluntary assignment in trust for creditors stands, under our statute, on a different footing from a bill of sale; for the retention of possession by the assignor does not make it fraudulent and void when it has been duly recorded, appraisement made, and other requisitions of the law complied with. *Fitler v. Maitland*, V. 307.

18. The retention of the possession of goods by the assignor, after a voluntary assignment in trust for creditors, with the permission of the assignee or his vendee, does not make the transfer of the goods fraudulent *per se*. *Dallam v. Fitler*, VI. 323.

19. In the year 1819, L. made a voluntary assignment of his estate to F. for the benefit of his creditors. F. continued to act in the trust until 1836, when he was removed by the Common Pleas of Philadelphia, who appointed another assignee, and subsequently removed him, and appointed I. Upon the distribution of the assigned estate by an auditor, to whom I.'s accounts were referred, F. presented a claim for commissions and advances made by him for the trust estate before his removal; and the auditor reported that an issue was proper to try F.'s right thereto, and the Common Pleas of Philadelphia directed a feigned issue to try such right. Upon the trial of the issue in the court below, the jury were instructed that F. not having settled his account as assignee of L. in the proper court, and satisfied such court that there was a balance due to him from the assigned estate, had no legal or equitable claim which he could enforce against the assigned estate in the hands of the subsequently appointed assignee. *Held*, that the instruction was correct. *Fourmier v. Ingraham*, VII. 27.

20. A transfer of personal property which creates a trust, whether secret or avowed, in favour of the grantor, renders the transaction fraudulent and void in legal contemplation, even though there may be mingled with it provisions in favour of preferred creditors. *Shaffer v. Watkins*, VII. 219.

21. A general assignee for the benefit of creditors is neither a purchaser nor the representative of creditors, such as will be protected by the provisions of the statutes of the 13 and 27 Eliz., the objects of which were to avoid those transfers of property which were made with an intent to deceive creditors and purchasers. *Vandyke v. Christ*, VII. 373.

22. An assignment in trust for creditors is good, although it excludes unreleasing creditors and reserves a trust of the surplus for the debtor. *Mechanics' Bank v. Gorman*, VIII. 304.

23. An auditor appointed to adjust and settle the accounts of a voluntary assignee, under the Act of 14th April 1836, is confined to the account between the assignee and the *cestui que trust*. Third persons claiming adversely cannot interfere in the settlement, but must resort to adversary proceedings. *Okie's Appeal*, IX. 156.

24. The accountant may, however, if he chooses, pay over to adversary claimants, or claim to hold as a stakeholder for his indemnity; and if he does so, the propriety of it will be for the auditor to determine in the first instance. *Ibid*.

ASSOCIATION.

LITERARY ASSOCIATION.

ASSUMPSIT.

ACCOUNT STATED, 1.
 BILLS, &c., 49.
 COMMON CARRIER, 5.
 CONTRACT, 14.
 CONTRIBUTION, 2.
 FORBEARANCE, 1.
 PARTITION, 8.
 PARTNERSHIP, 13, 27.
 PLEADING, 5, 9.
 SCHOOL, 3.
 SET OFF, 16.
 STAKEHOLDER, 1.

1. He who has performed a special agreement to do a particular thing, may recover the stipulated price of it by an action of *indebitatus assumpsit*, and use the agreement as evidence of the amount of compensation due. But if there be but part performance by the plaintiff of his part of the contract, and he may be excused from an entire performance by the act or agreement of the defendant, the action to recover compensation must be on the special agreement, with an averment of the plaintiff's readiness to perform, as an excuse for the want of actual performance. *Harris v. Ligget*, I. 301.

2. *Indebitatus assumpsit* will lie to recover the purchase money of land sold and conveyed to the defendant. *Siltzell v. Michael*, III. 329.

3. An action for money paid, laid out and expended, can only be supported by proof of the actual payment of the money, or of the plaintiff's having given his own negotiable note for it, and not then, if it appear that the defendant is a surety on that note. *Pursel v. Ellis*, V. 525.

4. In an action to recover the price of work and labour done, in the absence of proof of a specific contract between the parties as to price, it is competent for the defendant to prove what others received for the same kind of service. *Holman v. Hesler*, VII. 313.

5. In an action of assumpsit to recover the debt of a third person, the proof of the promise must be clear, explicit and certain, leaving no room for doubt or misapprehension.

In such case a book entry of the debt and the assumption of it, cannot be given in evidence, although aided by the proof of the clerk that he would not have made the entry but by the authority of the person who made the promise. *Petriken v. Baldy*, VII. 429.

ATTACHMENT.

BILL OF DISCOVERY, 1.
 DOMESTIC ATTACHMENT.
 FOREIGN ATTACHMENT.

ATTACHMENT.

JUDGMENT, 25.

LANDLORD, &C., 20.

1. R., against whom a domestic attachment had issued, transferred to G. a check for the payment of money, which G. applied to the payment of a debt for which he was security for R. *Held*, that an action for money had and received would not lie by the trustees under the domestic attachment against G. to recover the amount of the check. *Rutter v. Gable*, I. 108.

2. A transcript of the judgment of a justice of the peace, filed in the Court of Common Pleas, in pursuance of the Act of 1810, is such a judgment of that court as an attachment may issue upon, under the provisions of the Act of 16th June 1836. *Hitchcock v. Long*, II. 169.

3. *Quære*, whether proceeds of sales made by assignees of goods transferred to them under a void assignment can be attached in their hands by execution in nature of an attachment. *Taylor v. Hulme*, IV. 407.

4. They cannot, where the interest of the debtor in the goods has been previously levied on by the plaintiff in execution, and released on a bond given by the assignees to pay their value in case the assignment is declared void, which bond is afterwards forfeited and paid. *Ibid*.

5. If, however, a second assignment be made after the sale of the goods by the assignees, passing all the claims and rights of the assignor, it is clear a subsequent attachment is too late to affect them. *Ibid*.

6. A loss incurred on a fire insurance policy, the amount of which is fixed by the award of persons mutually chosen by the insured and insurer, may be levied on by attachment in execution as a debt due to the insured. *Boyle v. The Franklin Fire Ins. Co.*, VII. 76.

7. A debt of a testator for which the executor, who was also a residuary legatee, had taken a note in his own name, may be attached by process of execution against the executor for the payment of his own debt, it appearing that a number of years had elapsed since the death of the testator, and that there was abundance of estate beside to pay all debts and legacies. *Ross v. Cowden*, VII. 376.

8. If a debt due to the estate of a testator be attached for the payment of the debt of the executor, who is also a residuary legatee under the will, it is error in the court to quash the attachment; the party should plead to it, and thus raise the question whether the debt was one of the estate, or belonged to the executor himself. *Pleasants v. Cowden*, VII. 379.

9. A proceeding by attachment in the nature of an execution to levy stock of the defendant, which stands in the name of another person, is rightly instituted in the county where the garnishee resides. *Cowden v. West Branch Bank*, VII. 432.

10. A writ of attachment in the nature of an execution may issue after the year and day has expired from the rendition of the judgment. *Ogilsby v. Lee*, VII. 444

ATTACHMENT.

11. A draft upon a particular fund in the hand of an attorney for collection, is an equitable assignment of it; and, although not accepted by the attorney, yet it is not afterwards subject to be attached for the debt of the drawer. *Nesmith v. Drum*, VIII. 9.

ATTACHMENT OF EXECUTION.

The plaintiff may issue an attachment of execution, notwithstanding an *alias fieri facias* is pending on which no levy has been made. *Tams v. Wardle*, V. 222.

ATTORNEY-IN-FACT.

It is not necessary to the proper execution of a deed by an attorney-in-fact that he should sign his name to it; the name of the principal alone is sufficient.

A special power must be strictly pursued; hence, if an attorney be authorized to convey a tract of land, after he shall have redeemed it from a sale by the treasurer as unseated, and he conveys without redemption, the power is not well executed, and the purchaser takes no title. *Devinney v. Reynolds*, I. 328.

ATTORNEY AT LAW.

ACTION, 10.

APPEARANCE, 1, 2.

ERROR, 8.

1. If the holder of a note place it in the hands of an attorney at law, with instructions to bring suit upon it, and the attorney, acting under the honest impression that he would best promote the interest of his client by not bringing suit immediately, omits to do so, and the money is afterwards lost by the insolvency of the payor, the attorney is liable in an action against him; and the measure of damages is what might have been recovered from the payor of the note, if suit had been brought when the note was placed in the hands of the attorney for collection. *Cox v. Livingston*, II. 103.

2. In an action by an attorney at law to recover an account for professional services rendered to the defendant, the plaintiff is entitled to recover interest. *Gray v. Van Amringe*, II. 128.

3. The Spanish-American colonial law enacted, that if an attorney die after he has commenced a suit, his heirs can and ought to finish what he had commenced, provided they are men fit to do it. Distinguished jurists under that law were of opinion, that the word "heirs" included executors. *Held*, that the executor was authorized to carry on and complete a business commenced by the testator, having been recognised by the Spanish tribunal, and approved of by the client. *Peries v. Aycinena*, III. 64.

4. If an attorney has power to compromise, his substitute duly appointed has the same power. *Ibid*.

5. By the death of an attorney, the power of his substitute necessarily ceases. *Ibid*

ATTORNEY AT LAW.

6. It is within the power and authority of an attorney at law to stay execution upon a judgment, in consideration of the promise of a third person to pay the debt; and such promise is binding, although not made to the creditor himself, nor expressly assented to by him at the time. *Silvis v. Ely*, III. 420.

7. An attorney employed to support the title of a defendant in an ejectment against that of the plaintiff, will not be permitted during the pendency of the action, or after judgment rendered in it against his client, but before the latter is turned out of possession under the judgment, to purchase the title of the plaintiff; and, if he does, his client, or the assignee of his client, may claim the benefit of it in a second action of ejectment brought by the latter to recover back the possession of the land from the vendee of the attorney; provided he pays or tenders before instituting his action, the amount of the money to the vendee of the attorney, which the attorney paid and was bound to pay for the title so purchased by him. *Cleavinger v. Reimar*, III. 486.

8. The Supreme Court will not grant relief to an attorney who has been stricken off the rolls of the District Court or Courts of Common Pleas, either by certiorari, appeal, mandamus, or any other form of proceeding. *Commonwealth v. District Court*, V. 272.

9. Counsel who has been consulted about a title to land, will not be permitted to purchase an outstanding one, and set it up in opposition to his client. *Hockenbury v. Carlisle*, V. 348.

10. Representations by counsel in the presence of his client, on the faith of which one has advanced money, are the representations of the client. *Gilkeson v. Snyder*, VIII. 200.

AUCTION.**PAROL EVIDENCE, 2.**

1. An auction is a sale by consecutive bidding, intended to reach the highest price of the article, by exciting competition for it; such only is prohibited by the Act of the 2d of April 1830. *Hibler v. Hoag*, I. 552.

2. A purchaser at auction "for cash before removal of goods," is liable in a suit by the vendor, unless he show an offer to pay the price and remove the goods purchased, or that the plaintiff prevented it.

In such case, if the purchaser, not having the cash, agree to meet the next day and settle, he is liable if the vendor have the goods ready at the time fixed, and the purchaser fail to meet at that time and pay for the goods; and a subsequent tender of the price is no sufficient, if it does not embrace costs subsequently incurred in removing and preserving them; but the vendor may proceed to a re-sale.

If the proceeds of the re-sale exceed the price of the first sale, but do not cover the costs of removing and preserving the goods, the vendor is liable for such costs. *Coffman v. Hampton*, II. 377.

AUCTION.

3. Where a purchase is made at auction of numerous articles of personal property, at one and the same time, and from the same vendor, the whole constitutes but one entire contract, though the articles purchased are struck off separately, at separate and distinct prices. *Ibid.*

4. If different lots of articles are sold to one person at an auction sale, and one of the lots is warranted, but turns out different from the warranty, in consequence of which the buyer refuses to take it, but the parties agree to settle for the other articles without prejudice to either, such acceptance of the other articles does not preclude the buyer from contesting his liability for the loss on a resale of the articles warranted. *Barclay v. Tracy*, V. 45.

5. Where the terms of sale and responsibility of the parties are different in the sale of different articles to one person at an auction, the contracts in respect to them may be considered as different, and not one entire contract. *Ibid.*

AUDITOR.

An auditor appointed to distribute moneys cannot inquire into a judgment rendered in court, but must take it as conclusive. He may adjourn the case to enable a party to apply to the court to open the judgment. *Estate of J. B. & C. W. Dyott*, II. 557.

BAIL.

APPEAL, 12, 13.

JUDGMENT, 23.

JUSTICE OF THE PEACE, 4

SUBSTITUTION, 5.

1. Bail for a stay of execution may be taken by the prothonotary, and perfected afterwards by the approval of the court or a judge. The approval is for the benefit of the creditor, and he may waive the necessity of it, either expressly or impliedly; but neither the debtor nor the bail can take advantage of the want of it. *Stroop v. Gross*, I. 139.

2. The obligation of a recognizance before a justice of the peace for a stay of execution is, that the defendants will pay the debt, or be surrendered in execution when called for; and such recognizance is forfeited, when the bail, being called on in the proper way, omit to surrender all the defendants. *Bombaugh v. Robinson*, I. 159.

3. Under the 16th section of the Act of 13th June 1836, when the sheriff takes a bail bond and the bail do not justify after exception taken, the proper course is to rule the sheriff as formerly to bring in the body, and compel him by attachment to procure unexceptionable bail or pay the money into court, and then the action proceeds as usual. *Fitler v. Bryson*, VI. 566.

4. By proceeding at once against the original defendant or the bail excepted to, the plaintiff waives his exception. *Ibid.*

5. "W. S. appears and enters into recognizance in double the debt and costs as special bail in the above suit, for an appeal according to the Act of Assembly of 1842." *Held* to be a sufficient

BAIL.

minute made by a Justice of the Peace upon an appeal, to support a *scire facias* reciting a recognizance in the form prescribed by the Act of Assembly. *Okeson v. Shirlock*, IX. 142.

BANK.

BILLS OF EXCHANGE, &c. 7.

BOND, 9, 10, 11.

EVIDENCE, 78, 105.

NOTICE, 6.

PAYMENT, 2.

PRINCIPAL AND AGENT, 31.

1. The cashier of a bank has a general authority to superintend the collection of notes under protest, and to make such arrangements as may facilitate that object:—to do any thing in relation thereto that an attorney might lawfully do; but his authority would not extend to justify him in altering the nature of the debt, or to change the relations of the bank from a creditor to that of an agent of its debtor. But a subsequent acquiescence of the bank in any arrangement of its cashier would be conclusive upon it. *Bank of Pennsylvania v. Reed*, I. 101.

2. The discounting of a note made payable "in the office notes of the bank," is not a violation of the 14th article of the Act of the 25th March 1824, which prohibits corporations from dealing otherwise than upon legitimate subjects of banking. *Irvine v. Lumbermen's Bank*, II. 190.

3. In February 1836, the defendant, T. W. D., set up a banking establishment called the Manual Labour Bank, and gave to certain trustees a bond and warrant of attorney, reciting, among other things, that whereas T. W. D. has already, and is about to issue his certain promissory notes for the payment of divers sums of money on their being presented at his banking-house in the city of Philadelphia, according to the tenor and effect of said notes, now the condition is such, that if the above bounden T. W. D. shall at all times hereafter pay and discharge all and every the promissory notes made payable by him as aforesaid, then the said obligation to be void. *Held*, that it embraced all notes whatever in the nature of bank-notes, whether payable on demand or post-notes payable at any future period.

Held also, that J. R., who, in May 1837, took an assignment of it from the trustees, and in May 1838 re-assigned it to them, and after the execution of the bond, and before the re-assignment, advanced a large sum of money to the obligor on an invoice of goods and glassware, as collateral security, which the obligor retained in his possession and sold in July 1837 to third persons, who removed and disposed of it, any negligence on the part of such obligor would not affect J. R., as between him and other creditors of the obligor, though it might be otherwise as between him and a surety. *In the matter of Dr T. W. Dyott's Estate*, II. 463.

4. The declarations of a cashier of a bank of his knowledge that certain stock which stood upon the books of the bank in the name of a certain individual, was a trust fund, invested for the benefit of others, may be given in evidence, under certain circumstances, to

BANK.

charge the bank with knowledge of the fact. *Harrisburg Bank v Tyler*, III. 373.

BANK OF PENNSYLVANIA.

ACTION, 8.

EQUITY JURISDICTION AND PRACTICE, 1.

By the 7th Section of the Act incorporating the Bank of Pennsylvania, the number of votes to which each stockholder should be entitled was to be according to the number of shares he should hold, in the proportions following; that is to say; for one share, and not more than two shares, one vote for each share; for every two shares above two, and not exceeding ten, one vote; for every four shares above ten, and not exceeding thirty, one vote; for every six shares above thirty, and not exceeding sixty, one vote; for every eight shares above sixty, and not exceeding one hundred, one vote; but no person, copartnership or body politic, should be entitled, either in his own right or as a proxy, to a greater number than thirty votes. By the Act of 29th March 1842, authorizing an assignment by the bank, and directing the election of assignees by the stockholders, it was provided, that in such election the State should have as many votes as though the same were held by individuals, as the law now limits in relation to the election of officers. The commonwealth owned 3750 shares, and claimed 3750 votes. The other stockholders alleged that the commonwealth was entitled to but thirty votes. *Held*, that the proviso was too uncertain for the court to interpret and decide upon, without assuming a power to control the event; and therefore an election in which the commonwealth was allowed but thirty votes, was invalid, and no election could be held without further legislation. *Commonwealth v. Bank of Pennsylvania*, III. 173.

BANK OF UNITED STATES.

ASSIGNMENT, 9, 10, 11.

BANK-NOTES.

EXECUTION, 19.

1. A payment in current bank-notes discharges the debt, although, in consequence of the previous failure of the bank, of which both parties were ignorant, the notes were of no value at the time of payment. *Bayard v. Shunk*, I. 92.

2 In an action upon a promissory note for the payment of a certain sum in bank-notes of a certain bank, the measure of damages is the amount of the note with interest, and not the specie value of the bank-notes; but in executing the judgment, the court will take care that no injustice be done. *Irvine v. Lumbermen's Bank*, II. 190.

BANKRUPT.

INSOLVENT, 3.

PRINCIPAL AND AGENT, 10, 12, 13.

WITNESS, 33.

IX. — 31

v

BANKRUPT.

1. The validity of the petitioning creditor's debt, on which a commission of bankruptcy issued in England, cannot be disputed here by the bankrupt, on the ground that the petitioning creditor was an alien enemy, in a case where the debt was settled by an award of arbitrators without taking that objection, and the bankrupt afterwards failed in an action of trespass brought in England against the commissioners, and the chancellor, on application of the bankrupt, refused to supersede the commission, and a great lapse of time afterwards occurred. *Merrick's Estate*, V. 9.

2. The rule in Pennsylvania is, that an involuntary transfer by proceeding in bankruptcy in a foreign state, of property here, will be regarded, except so far as it interferes with the claims of American creditors; and foreign assignees may sue here in the name of the bankrupt. *Ibid.*

3. But, *quære*, whether the exception embraces creditors of the bankrupt at the time of the suit, or only those at the time of the assignment? *Ibid.*

4. If an assignee of a bankrupt become bankrupt, and make an assignment as such, neither his assignees nor his personal representatives are entitled to a debt outstanding due to the original bankrupt; but it must go to a new assignee of the original bankrupt. *Ibid.*

5. The confession of a judgment to a creditor with a view to prefer him, is not invalid by reason of the provisions of the Bankrupt Law, if it be not voluntary, but the effect of measures taken by the creditor or in his power to take; and it is incumbent on the party who seeks to defeat the transaction, to show clearly that it is voluntary. *Haldeman v. Michael*, VI. 128.

6. A voluntary deed of assignment, made for the benefit of creditors, after the passage of the Bankrupt Law of the 19th August 1841, and which gives a preference to one creditor over another, is a fraud upon that law; and the assignees in bankruptcy are entitled to recover the assets thus previously transferred. *Cornwells' Appeal*, VII. 305.

7. After a petition has been presented for the benefit of the Bankrupt Law, and before the applicant has been declared a bankrupt, his goods found upon demised premises may be distrained and sold by his landlord for the payment of his rent. *Butler v. Morgan*, VIII. 53.

8. A ground-rent coming due after the discharge of the debtor as a bankrupt is not extinguished by his certificate. *Bosler v. Kuhn*, VIII. 183.

BAPTISM.

EVIDENCE, 61.

BARGAIN AND SALE.

DEED, 7, 14, 15.

BASTARD.

ACT OF ASSEMBLY, 4.

A contract of compromise between the reputed father and the mother of an illegitimate child, by which the former agreed to pay a stipulated sum for the lying-in expenses of the mother and for raising the child, is not founded upon such an illegal consideration as will avoid it: nor will the subsequent death of the child relieve the father from the payment of any part of the stipulated sum *Maurer v. Mitchell*, IX. 69.

BASTARDY.

INDICTMENT, 3.

BENEFICIAL ASSOCIATION.

A member of the "Franklin Beneficial Association of Lancaster" is entitled to relief, in case of disability or sickness, only from the date of his application for such relief, and not from the time such sickness or disability accrued. *Breneman v. The Franklin Beneficial Association*, III. 218.

BEQUEST.

A bequest of the interest of 600*l.* to C. for life, and after her death, "I give and bequeath the said principal sum to my children, hereafter named, or their heirs, to be divided among them share and share alike." *Held*, to be a vested legacy, and upon the death of either of the children, his share would go to his personal representative. *King v. King*, I. 205.

BETTING.

1. A contract made about a matter which is prohibited by statute is void, though the statute itself does not expressly declare that it shall be so. *Columbia Bank and Bridge Co. v. Haldeman*, VII. 233.

2. A bond given to a stake-holder to indemnify him for giving up to the winner money deposited as a bet upon an election, is void, and there can be no recovery upon it. *Ibid.*

BILL OF DISCOVERY.

The proceeding under the Act of the 16th June 1836, relating to executions, which authorizes a bill of discovery, is not confined to a mere discovery of the goods, chattels and effects of the defendant, so as to enable the plaintiff to proceed with his execution; but when the defendant and garnishee are brought into court by *scire facias*, and interrogatories are filed and answered, the court may, if fraud be discovered, render a joint judgment against the original defendant and the garnishee for the plaintiff's debt, upon which an execution may issue against them. *Shaffer v. Watkins* VII. 219.

BILL OF EXCEPTIONS.

1. Where the ground of objection to a witness's competency is

BILL OF EXCEPTIONS.

assigned in the bill of exception, no other can be taken on the argument in error. *Drexel v. Man*, VI. 343.

2. The Supreme Court has no power to issue a mandamus to the District Court for the city and county of Philadelphia, to compel them to sign a bill of exceptions. *Drexel v. Man*, VI. 386.

3. *It seems* the District Court may, by rule of court, require a party taking a bill of exceptions, to specify on the trial the matters of law contained in the charge to which he excepts, and that no general exception to the charge will be allowed, but only those distinctly stated. *Ibid*.

4. A bill of exception to the charge of the court, if taken after the verdict, is in time, if it be sealed by the court and sent up with the record. *Dock v. Hart*, VII. 172.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

ACTION, 15.

BANK, 2, 3.

BANK-NOTES, 2.

CERTIFICATE OF DEPOSIT.

COLLATERAL SECURITY.

EVIDENCE, 23, 55, 89, 92, 93.

EXECUTORS, &c., 13, 32.

MECHANICS' LIEN, 13.

NOTICE, 6.

PARTNERSHIP, 6, 15.

PATENT RIGHT, 2.

PLEADING, 6.

PRINCIPAL AND AGENT, 27, 31.

VENDOR, &c., 38, 40.

WITNESS, 7.

1. Where the maker of a promissory note has absconded from his usual place of residence before the time of payment, it is not necessary to prove an inquiry for him there, and an effort to obtain payment, in order to charge the endorser. But it is otherwise where the maker has inerey removed from his place of residence. *Lehman v. Jones*, I. 126.

2. A special guaranty of payment endorsed upon a negotiable note may not be treated as a blank endorsement, so as to enable any holder to sue the guarantor in his own name. It does not induce that broad mercantile responsibility which a blank endorsement does. *Snevily v. Ekel*, I. 203.

3. A note, with its blank endorsements and guaranties, in the absence of proof to the contrary, forms an entire transaction; hence, in an action upon a guaranty endorsed upon a negotiable note, it is not necessary to prove any other consideration for it, than what appears upon the paper. *Snevily v. Johnston*, I. 307.

4. A negotiable note, payable to the order of the plaintiff, need not be endorsed by him before suit brought. *Huling v. Hugg*, I 418.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

5. The addition of the word "surety" to the name of one of several signers to a note, does not change his character or liability from that of a promisor to that of a guarantor. *Kleckner v. Klapp*, II. 44.

6. The making of a negotiable note at a particular place does not make it payable there, or supersede the necessity of giving notice to the drawer where he resides, in order to charge the endorser. *Lightner v. Will*, II. 140.

7. A bank which discounts the note of several individuals cannot be affected by a fraud or misunderstanding among the drawers themselves, unless it participated in it. *Irvine v. Lumbermen's Bank*, II. 190.

8. If a note be given for an entire consideration, part of which is legal and part illegal, the whole contract fails, and there can be no recovery upon the note; but if there be several considerations, each having its own value fixed by a separate contract, some of which are legal and some illegal, it fails in part, and is good as to the residue. *Frazier v. Thompson*, II. 235.

9. If the drawee of a bill or maker of a note remove from his usual place of residence to another in the same state or kingdom, the holder must make reasonable endeavour to find out whither he has removed, and, if he succeed, present the bill or note for payment.

But if the drawee or maker has absconded, that circumstance will dispense with the necessity of making further inquiry after him.

The same rule applies when the drawee or maker removes into another jurisdiction after the execution of the instrument.

Where, after accepting a bill and making a note in Ireland, the party left Ireland for America, it was held to dispense with any effort by the holder to make presentment.

The same rule applies to the case of an endorser absconding from Ireland, under like circumstances, even though his place of residence in America becomes afterwards known to the holder.

Where the drawer and endorser of a bill and the endorser of a note is the prior debtor, and the acceptor and maker lent his name for his accommodation, he is considered a drawer without funds, and not entitled to notice.

The plaintiff may recover on a count for goods sold and delivered against the drawer and endorser of a bill and the endorser of a note, if he has not been guilty of laches. *Reid v. Morrison*, II. 401.

10. If the figure 4 in a promissory note, originally dated in 1834, be altered by the holder, without the consent or knowledge of the maker, into a 6, it avoids the note.

If a suit on a note endorsed by the payee in blank, be brought in the name of one who knew nothing of the suit till after it was brought, had no claim for the money, and had no interest in it, the jury may be directed to find a verdict for the defendant on that ground only.

If a subsequent suit be brought in the name of the real holder, such former verdict and judgment are not a bar to his recovery on the note.

It may not be error for the court below to admit or reject evi

BILLS OF EXCHANGE AND PROMISSORY NOTES.

dence, where its pertinency or materiality does not distinctly appear to a court of error. *Hocker v. Jamison*, II. 438.

11. The consideration of a note given for goods sold may be proved by a third person, without the production of the books in which the goods were charged.

Where a bill or note is made payable at a particular place, it is not necessary that the payee should aver presentation at that place.

Quere. Whether, if the maker or acceptor of a note or bill, which is made payable at a bank, pays the money into the bank to the credit of the payee, and leaves it there, it will discharge him.

A sheriff, in an action against him by the payee of a note, for allowing an escape of the maker from arrest under a *capias ad respondendum*, may set up the same defence as the maker might have done. *Fidler v. Beckley*, II. 458.

12. It is no defence to the acceptor of a bill of exchange that the holder has since received another bill from the drawer payable at a subsequent date for a part of the amount, and given time to him for the balance, though the bill was accepted for the accommodation of the drawer, and that was known to the holder when he received the bill.

Nor would a formal release of the drawer, without payment or satisfaction, be a defence in such case. *White v. Hopkins*, III. 99.

13. The endorsement of the obligor on a single bill, many years after its date, promising to pay at a certain time, is evidence to rebut the presumption of payment arising from lapse of time, though it would not revive such an instrument after being barred by a statutory provision. *Postens v. Postens*, III. 127.

14. In an action of debt upon a sealed note it is competent for the defendant to prove that it was given for the balance due upon another note, for which he received no consideration. *Geiger v. Cook*, III. 266.

15. The note of a company, though in its form of words strictly negotiable, yet if it be attested by the seal of the corporation, it is a specialty; and in an action upon it by the holder, is subject to the defence of a want of consideration. *Hopkins v. The Railroad Company*, III. 410.

16. In an action by the holder against the endorser of a negotiable note, the maker is an incompetent witness, both on the ground of interest and general policy. *Davenport v. Freeman*, III. 557.

17. In an action of debt upon a sealed note, if it be admitted by the pleadings that the note was to be paid only in the event of a certain contingency, the plaintiff must prove that the contingency has happened, or he cannot recover: it is not sufficient to rely upon the consideration which the character of the instrument imports. *Patterson v. The Juniata Bank*, IV. 42.

18. The rule of evidence which excludes a party to a negotiable instrument from testifying against its validity, is only applicable to cases where the instrument has actually been negotiated in the usual course of business. But if it be established by other proof that the

BILLS OF EXCHANGE AND PROMISSORY NOTES.

negotiation was not in the usual course of business, then a party to the instrument, not otherwise interested, is competent to testify all his knowledge of the transaction. *Parke v. Smith*, IV. 287.

19. An endorser is entitled to notice of non-payment, although he may have received from the drawer a chose in action as a collateral security to indemnify him for his endorsement. There can be no presumptive waiver of notice, where there has been no waiver of recourse to the maker; and the acceptance of security is not such unless it has been taken in satisfaction. *Kramer v. Sandford*, IV. 328.

20. The addition of the word "administrator" to the name of the acceptor of a bill of exchange, does not qualify his liability or make his acceptance a conditional one. *Tassey v. Church*, IV. 346.

21. The endorsee in a suit by him against the maker of a promissory note, cannot be called on to prove consideration until the defendant has shown it was obtained or put into circulation by fraud or undue means. *Knight v. Pugh*, IV. 445.

22. In a suit against one who passes the note of a broken bank fraudulently, or with a promise to take it back if found to be uncurrent, a demand on the maker need not be proved. *Hellings v. Hamilton*, IV. 462.

23. The notary's protest of a promissory note is *primâ facie* evidence of the fact of notice to the endorser of non-payment, when recited in it; and such notice is sufficient if duly sent, though not received by the endorser. *Jenks v. The Doylestown Bank*, IV. 505.

24. The protest of a notary is not invalidated by the fact that the seal does not conform in all respects to the Act of 1791. *Ibid.*

25. Where a note is payable at bank, and the endorsee is there ready to receive payment, no further demand is necessary to charge the endorser. *Ibid.*

26. The holder of an endorsed note, who discovers that the endorsement was forged by the maker, may take from the maker a judgment and sell all his estate by execution, and appropriate it to the payment of such note, without thereby discharging the *bona fide* endorser of another note given by such maker, and in the holder's possession, though he gave no notice to him of his proceedings, and did not arrest the maker for the misdemeanor, if there be no evidence of a composition of the offence. *Brittain v. The Doylestown Bank*, V. 87.

27. Where a note is payable at a bank, an assertion in the protest of demand at the bank is sufficient *prima facie* evidence of such demand. *Ibid.*

28. Proof of a delivery of such note by the cashier to the notary for protest on the last day of grace, and presentation by him at the bank on the day following, is sufficient. *Ibid.*

29. But in such case there need be no demand at all, if the endorser has waived notice of non-payment by a memorandum at the time of endorsing. *Ibid.*

30. Where a note is payable at a bank, it need not be shown that

BILLS OF EXCHANGE AND PROMISSORY NOTES.

the cashier was at the bank all the business hours on the day of pay ment in order to receive it; the presumption is he performed his duty. *Ibid.*

31. The husband is not liable on a negotiable note given by his wife even in a suit by a *bonâ fide* endorsee, unless it was given with his authority or approbation, and that must be shown before such note is admissible in evidence against the husband. *Reakert v. Sanford*, V. 164.

32. The husband's authority cannot be inferred from his knowledge that the wife was carrying on business, and gave the note in the course of it. *Ibid.*

33. In a suit by the holder of a negotiable note, the defendant may show fraud in obtaining it, if he offers to prove that after being protested for non-payment, it was taken up by the payee and first endorser. *Ibid.*

34. If the husband forbids his wife from dealing with a person, or giving a note to any one, an endorsee of a note given by the wife acquainted with these circumstances, cannot recover on it. *Ibid.*

35. In an action upon a sealed note by which the defendant promises to pay "without defalcation for value received," he is not thereby precluded from a defence upon the plea of set-off. *Louden v. Tiffany*, V. 367.

36. An action was commenced by summons on Saturday the 1st day of January 1842, against the drawer of a promissory note dated 30th December 1840, and payable twelve months after date. *Held*, that the action was prematurely brought, the last day of grace (which was Sunday) not having fully expired before the writ issued; and that an offer in the court below to confess judgment to the plaintiff, upon terms not accepted, did not cure the error. *Thomas v. Shoemaker*, VI. 179.

37. A month, in bills of exchange, notes and other mercantile contracts, means in all cases a calendar and not a lunar month. *Ibid.*

38. The parties to bills of exchange or promissory notes, entitled to claim the days of grace, have title to them as matter of right. *Ibid.*

39. In a suit by the holder against the maker of a negotiable note, the plaintiff cannot be called on to prove the consideration between himself and the payee, unless it be shown that the note was obtained or put into circulation by fraud or undue means. *Brown v. Street*, VI. 221.

40. If a note falls due on a Friday, and notice of non-payment is not received by the endorser until Monday following, it would be too late if the parties lived in the same town; but an affidavit of defence must in such case state the residence of the maker, so that it may appear notice could have been regularly received in a shorter time after demand there of payment. *Moore v. Somerset*, VI. 262.

41. In a suit against the endorser of a note, he must set out affir-

BILLS OF EXCHANGE AND PROMISSORY NOTES

matively in his affidavit of defence, sufficient to show negligence in the plaintiff in not giving him due notice. *Ibid.*

42. The endorser is bound to know the residence of the maker of a note, and in his affidavit of defence must state at least his belief in regard to it, and that he would be able to prove it to the satisfaction of a jury. *Ibid.*

43. Notice dated Rochester, New York, Dec. 28th 1841, of protest on that day for non-payment by drawee of a bill of exchange dated at New York, was sent to New York, where it was mailed on 3d January 1842, and on the 4th was delivered in Philadelphia, where the drawer resided, to a person of the same name, and did not reach the drawer until the 8th. *Held* sufficient notice to charge the drawer. *Jones v. Wardell*, VI. 399.

44. Reasonableness of notice to the drawer of dishonour of a bill is a question for the court. *Ibid.*

45. If a bank take a draft as so much money and agree to pay the note of the person who delivers the draft, the holder of the note assenting afterwards to such arrangement may recover the amount of the note from the bank, the indebtedness of the maker of the note being a sufficient consideration, and the holder becoming thereby the party beneficially interested and entitled to sue.

A recovery against the holder of the note will in such case discharge the bank from all responsibility to the owner of the draft on its promise to him.

The identity of the note referred to is a question of fact for the jury.

If such draft was received as money, it is of no importance that the drawer failed before the plaintiffs presented their note for payment. *Commercial Bank v. Wood*, VII. 89.

46. It is a rule of commercial law, that when the facts are ascertained and undisputed, what shall constitute due diligence in communicating notice of the dishonour of a bill or note, is matter of law to be decided by the court. *Brenzer v. Wightman*, VII. 264.

47. Although a note may not be in form negotiable, yet the payee may make it so by endorsing it payable to order, after which it becomes, as between the endorser and the holder, an inland bill of exchange, in which the endorser stands in the light of a new drawer of a bill payable to the order of the endorsee; and the holder, by taking it in this character, takes it subject to all the rules that regulate the relations between endorser and endorsee in negotiable instruments. *Ibid.*

48. If there be no time of payment mentioned in a bill, like a note payable at sight, a reasonable time is allowed to make the demand on the promiser; and if he refuse to pay, immediate notice must be given by the holder to the endorser. *Ibid.*

49. "We owe P. S. the sum of \$3454.22, it being for powder furnished us by the said P. S.; you will please accept the above and oblige yours," directed to W. R., who was at the time engineer of

BILLS OF EXCHANGE AND PROMISSORY NOTES.

a rail-road company, has no tendency to support an action of *assumpsit* against the company to recover the amount mentioned in it and should not be received in evidence. *Reading Rail Road Co v. Johnson*, VII. 317.

50. To entitle the holder of an accepted draft to recover against the acceptor, who did not receive value, he must be an innocent holder for value and without notice of the facts which would be a good defence as between the drawer and acceptor. *Boggs v. Lancaster Bank*, VII. 331.

51. The holder of a protested bill may sue the acceptor or drawer, or both; but when he has received the amount from either, he can proceed no farther against the other. *Ibid.*

52. The endorser of a protested note cannot call upon the holder to sue the drawer, and, if he refuses, thereby relieve themselves from liability. It is their duty to take it up, and bring suit themselves. *Beebe v. West Branch Bank*, VII. 375.

53. Joint owners of a bill who jointly endorse the same, do not thereby constitute themselves partners *quoad hoc*, so that notice of the dishonour of the bill to one will charge both: it is but a joint contract, and each must have notice in order to charge him. *Sayre v. Frick*, VII. 383.

54. Notice directed to an endorser may be deposited in the post-office at which he receives his letters and newspapers, if he do not live in the post-town or at any other place as convenient to the holder. *Jones v. Lewis*, VIII. 14.

55. A notice of the protest of a bill of exchange to be given by one to another who resides in the same city, must be served personally or by leaving it at his house or place of business: depositing it in the post-office directed to him, is not sufficient. *Kramer v. M'Dowell*, VIII. 138.

BILL OF SALE.

VENDOR, &c., 41, 65.

BIRTH.

EVIDENCE, 61.

BOARD OF PROPERTY.

EVIDENCE, 102, 103.

The decision of the Board of Property upon a *caveat* to a return of survey, is conclusive of the rights of the parties, unless he, against whom the decision is made, institutes an action of ejectment for the land, within six months; and this, whether he be in or out of possession.

To avoid the absolute bar of such decision by the Board of Property, it is not sufficient that an action of ejectment was instituted within six months by the party, in whose favour the decision was made, against a third person, to which the losing party caused himself to be made a co-defendant.

BOARD OF PROPERTY.

And if an ejectment, under such circumstances, be brought within the six months, it must be duly prosecuted; and if the plaintiff suffer twenty years to elapse without an effort to get the cause tried, it will be presumed that he has abandoned his action, and a patent may issue to the other party. *Wilson v. Altemus*, II 255.

BOAT.

VENDOR, &c., 65.

BOND.

AFFIDAVIT OF DEFENCE, 5.

ARREST, 1.

ARTICLES OF AGREEMENT, 1, 2.

BANK, 3.

COLLATERAL SECURITY.

CONDITIONAL VERDICT, 1.

DEBT, 2.

DEED, 20.

DOWER, 2, 3, 4, 7.

EVIDENCE, 118.

EXECUTORS, &c., 30.

EXTINGUISHMENT, 4.

GUARANTY, 4, 5, 7.

INSOLVENT BOND.

INTEREST, 7.

LEGACY, 7.

LIMITATION, 21.

MORTGAGE, 2, 5.

OFFICER, 2.

OFFICIAL BOND.

PAROL EVIDENCE, 2.

PARTNERSHIP, 26.

PRINCIPAL AND SURETY, 4

REFUNDING BOND.

REPLEVIN BOND, 2, 3.

SHERIFF, 4, 5.

SHERIFF'S SALE, 36.

SUNDAY, 2.

TAXES, 11, 12.

VENDOR, &c., 30, 31, 59, 64.

1. *Primâ facie* all the obligors in a bond are principals, and must be treated as such in the appropriation of the proceeds of a sheriff's sale, until it is made to appear otherwise by positive proof. *Bear v. Patterson*, III. 233.

2. A want of consideration furnishes a defence to each and all the bonds given for the purchase money of land, as they are successively sued, until the defendant be compensated by way of defalcation, to the full amount of the failure of consideration: and the defence being thus exhausted, the remaining bonds are recoverable. *Good v. Good*, III. 472.

BOND.

3 An agreement to pay money, signed by two, but which in the body of it provides for the payment by one of them only, is a joint and several obligation. *Klapp v. Kleckner*, III. 519.

4. It is no defence to a *scire facias* on a judgment entered up on a bond with warrant of attorney, that the mortgage given to secure the bond is not in the plaintiff's possession, or has been lost, mislaid or destroyed, and that the plaintiff refused to indemnify the defendant against its loss or destruction. *Hodgdon v. Naglee*, V. 217.

5. Payment by the obligor to the obligee of a bond accompanying a mortgage, extinguishes the mortgage even in the hands of an assignee of the mortgage for a valuable consideration, who neglects to give notice to the obligor of the assignment before payment of the bond. *Ibid.*

6. The condition of a bond of indemnity "to save harmless and indemnify against all claims of A," is broken whenever the claim is made and the obligee is under the necessity of paying it, which he may do without waiting for an action to be brought against him. *Leber v. Kauffelt*, V. 440.

7. On a bond of indemnity to A, without naming his executor or administrator, if he die before any breach of the condition, the administrator may maintain an action for a breach happening after his death. *Ibid.*

8. If one entitled to letters of administration pay a claim against an intestate's estate, and afterwards take out letters, he may maintain an action on a bond given to the intestate to indemnify him against the claim thus paid: for the benefit of the estate and to support the right, the law makes the letters relate back to the death of the intestate, making the intervening acts done by the administrator valid and binding. *Ibid.*

9. If the obligor of a bond to a bank holds the notes of the bank at the time he receives notice of the assignment of the bond, the assignee is bound to receive them as cash in payment of it; but if he obtained them after notice, they would be no defence either as payment or set-off in a suit on the bond by the assignee in the name of the bank. *Northampton Bank v. Balliet*, VIII. 311.

10. In such suit, evidence of transactions between the defendant and the bank is admissible for the defendant, where such transactions commenced before he received notice of the assignment, though the liability of the bank was not complete at the time of such notice. *Ibid.*

11. Evidence that the defendant in the suit was a man of business and in the habit of taking notes of that bank, is no proof of the time when the defendant received the notes set up as a defence. *Ibid.*

12. If the assignee of a bond fail to recover it from the obligor by reason of the consideration of it having failed before the assignment of it was made, he may recover back from the assignor the

BOND.

money he paid for the assignment, whether he hold his guaranty or not. *Kauffelt v. Leber*, IX. 93.

BOOK ENTRIES.

ASSUMPSIT, 5.

CONTRACT, 17.

EVIDENCE, 67, 68, 79, 80, 96, 115.

PARTNERSHIP, 35.

PRINCIPAL AND AGENT, 32.

1. The book of an iron-master, containing an entry of the amount of wood taken up from the chopper, and the dockage of it, is not evidence in an action by the collier against the iron-master to recover the price of coaling it. *Gamber v. Wolaver*, I. 60.

2. In an action upon a book account of a decedent, it is only necessary to prove that they are books of original entry to admit them to go to the jury as evidence; and if evidence be afterwards given as to the time when the entries were made, this must be referred with the books to the jury. *Van Sweeringen v. Harris*, I. 356.

3. When a purchaser at a store selects the articles he wants, and has them set aside to be sent for by him, or to be sent to him by the merchant, then is the time to make the entry of a charge against the purchaser; and such entry is evidence. *Parker v. Donaldson*, II. 9.

4. If a clerk who made original entries in a book be temporarily absent from the state, such entries may be given in evidence upon proof of his handwriting. *Hay v. Kramer*, II. 137.

5. The party's book of original entries is not competent evidence of the delivery of goods furnished under a special contract. *Nickle v. Baldwin*, IV. 290.

BOROUGH.

1. The first section of the Act of 15th of April 1835, does not limit the power of the inhabitants of a borough or township to assess any amount of tax for school purposes.

An action may be maintained by the legal authorities of a borough against a collector of school tax, to recover the amount of a duplicate, put into his hands for collection by the same authorities. *Wilson v. Borough of Lewistown*, I. 428.

2. An Act of Assembly empowering the Court of Quarter Sessions to incorporate any town or village containing 300 inhabitants, on the petition of a majority of the freeholders residing within the limits of the village or town, does not authorize the incorporation into a borough of two or more distinct villages, together with a tract of open farming country. *Borough of West Philadelphia*, V. 281.

3. If it did, it must appear that a majority of the whole mass joined in the petition. *Ibid.*

4. A statute authorizing an incorporation on the petition of a bare

BOROUGH.

majority, is not to be carried farther than its words absolutely require
Ibid.

5. A *certiorari* to the Quarter Sessions to remove the proceedings for incorporating a borough, may issue without a special allowance
Ibid.

BOROUGH OF HARRISBURG.

The Act of Assembly which authorizes the borough of Harrisburg to acquire land necessary for the purpose of supplying the inhabitants with water, must be construed in subordination to that provision of the constitution which prohibits the Legislature from investing any corporation or individuals with the privilege of taking private property for public use, without making compensation or giving adequate security therefor, before such property shall be taken
Borough of Harrisburg v. Crangle, III. 460.

BOUNDARY.

ARBITRATION, &c., 20, 21.

EVIDENCE, 75.

The compromise of a doubtful right is a sufficient consideration to establish the boundary line between conflicting titles, and although in making such compromise the parties act in good faith, but in a mutual mistake of the law, yet will it bind them. *M'Coy v. Hutchinson*, VIII. 66.

BREACH OF PROMISE.

In an action on the case founded on a breach of promise of marriage, no legal inference in support of the action can arise from proof that the plaintiff was got with child by the defendant.

Quære: If in an action in case, the plaintiff declare in two counts for seduction and getting the plaintiff with child, and for a breach of promise of marriage, upon which the jury find a general verdict for the plaintiff, is it competent for the court to render a judgment upon the second count in the declaration alone? *Hay v. Graham*, VIII. 27.

BRIDGES.

CONTRACT, 19.

COUNTY COMMISSIONERS, 3, 4, 5.

ROADS, 13, 14.

The re-construction of a county bridge which has been swept away by a freshet, must be by the county commissioners, with the sanction of the Court of Quarter Sessions and the grand jury.

It seems, the county commissioners alone have no authority to erect or maintain bridges. The power to repair them, as well as to erect bridges over small creeks, rivulets, &c., is given to the supervisors; but bridges of a larger class, too expensive for a township, are to be erected and repaired by the county commissioners, with the sanction of the Court of Quarter Sessions and the grand jury
Commonwealth v. Commissioners of Monroe County, II. 495.

BRIBERY.

The trial, conviction, and sentence of one who holds the office of sheriff of the offence of bribing a voter previously to his election to the office, is not such a "conviction of misbehaviour in office, or of any infamous crime," as will disqualify him from exercising the duties of his office, as provided by the 9th Section of the 6th Article of the Constitution. *Commonwealth v. Shaver*, III. 338.

BULL.

TRESPASS, 11.

CANAL.

TAXES, 4, 5.

1. Damages done to land by the construction of the Union Canal, and works appurtenant to it, must be estimated as of the time when done; and a subsequent purchaser of the land cannot maintain a proceeding to recover damages done to him. *Zimmerman v. Union Canal Co.*, I. 346.

2. Two tenants in common, owners of twelve acres of ground, through which they had dug a race or canal from the river Schuylkill, and divided the property by a boundary crossing the canal, reserving to each, his heirs and assigns, the common use and privilege of the canal or race as thereafter mentioned. By a subsequent clause, they declared the same should be and remain for the common use and privilege of the respective parties, their heirs and assigns, tenants and occupiers of the respective lots of ground through which the same passed, as a passage for scows or boats and rafts, and for the introduction of the Schuylkill water from the dam for the use of the respective premises; but neither of them, their heirs or assigns, should at any time thereafter use more than one full, equal half part of the water-power of the said river, to which they previously were jointly entitled; nor would they, their heirs, &c., put or suffer or permit to be put thereon any boat, scow, or raft, of larger dimensions than would admit another of equal dimensions freely to pass it; and that neither of them, their heirs, &c., should or would permit or suffer the water or water-power, to which they were respectively entitled as aforesaid, to be used or applied otherwise than upon their respective lots, nor carry on or permit or suffer to be carried on upon the same lots the manufacture of gunpowder, or any part of the process of the manufacture of that article.

Held, 1. That this deed did not give to a party the right to carry coal along the canal, and load it on his half of the premises for the supply of a steam-mill occupied by him, situated on another and distinct lot in the neighbourhood.

2. That the privilege of the canal under this partition was not a personal one, but appurtenant to the property divided.

3. That in a suit for a misuser of the privilege, it is no answer that the plaintiff was guilty of a similar misuser. *Jamison v. M'Creedy*, V. 129.

CANAL COMMISSIONERS.

TOLLS, 2.

The Act of 18th April 1843, authorizing the election of canal commissioners is constitutional and valid. *Commonwealth v. Clark*, VII. 127.

CANAL COMPANY.

LOAN, 1.

RIVER, 7.

WITNESS, 29, 30, 31.

CAPIAS AD SATISFACIENDUM.

ARREST, 1.

CARRIER.

COMMON CARRIER.

CARTWAY.

GRANT, 1.

CASE.

1. Case lies for a present injury to the freehold; and the law implies damage from flooding the ground of another, though it be in the least possible degree, and without actual prejudice. *Ripka v. Sergeant*, VII. 9.

2. Trespass for seizing and carrying away goods does not lie by the owner, who at the time has leased them to a tenant; case is the proper remedy. *Fittler v. Shotwell*, VII. 14.

CASE STATED.

An agreed case in the nature of a special verdict is to be considered as a special verdict found by a jury, and if it be defective in substance, the judgment rendered upon it will be reversed and a *venire de novo* awarded. *Whitesides v. Russell*, VIII. 44.

CASHIER.

NOTICE, 6.

The Cashier of a bank has a general authority to superintend the collection of notes under protest, and to make such arrangements as may facilitate that object:—to do anything in relation thereto that an attorney might lawfully do; but his authority would not extend to justify him in altering the nature of the debt, or to change the relations of the bank from a creditor to that of an agent of its debtor. But a subsequent acquiescence of the bank in any arrangement of its cashier would be conclusive upon it. *Bank of Pennsylvania v. Reed*, I. 101.

CAVEAT.

PATENT, 3.

CERTIFICATE OF DEPOSIT.

1. An instrument in writing issued by a bank, signed by the assistant cashier, "I hereby certify that C. T. has deposited in this bank, payable twelve months from 1st May 1839, with five per cent. interest till due, per ann. \$3691.63, for the use of R. P. & Co., and payable only to their order upon the return of this certificate," is not a promissory note within the statute of Anne, but a certificate of deposit on special terms. *Patterson v. Poindexter*, VI. 227.

2. Such instrument is negotiable for the purposes of transfer only, but not to make R. P. & Co. liable on their endorsement to the holder. It is a special agreement to pay the deposit to any one who should present the certificate and the depositor's order. *Ibid.*

3. Where a certificate of deposit not negotiable is issued by a bank and afterwards sold by a broker, who endorses it without recourse, and it turns out that the endorsement of the payee was forged, the broker's liability depends upon the parol circumstances attending the sale of the note. *Charnley v. Dulles*, VIII. 353.

4. It is for the jury to say whether on the evidence the plaintiff took the note subject to every risk or not. *Ibid.*

5. The question of laches in presenting a certificate of deposit to the bank for payment, is a mixed question of law and fact. *Ibid.*

6 So also is the time of giving notice to the prior endorser. *Ibid.*

CERTIORARI.

Borough, 5.

CHARGE OF COURT.

Error, 10.

1. A defect in the narr. is not matter for the court to charge upon. *Brittain v. The Doylestown Bank*, V. 87.

2. Nor the weight of evidence in regard to particular facts. *Ibid.*

CHARITABLE USES.

The conservative provisions of the statute 43 Eliz., relating to charitable uses, are in force in Pennsylvania. *Zimmerman v. Anders*, VI. 219.

CHARTER.

CORPORATION, 4, 6.

FOREIGN ATTACHMENT, 6, 7, 8.

1. A meeting of members of a society having determined to refuse a charter, held that evidence that its contents were misrepresented to them was not admissible. *Shortz v. Unangst*, III. 45.

2. Before a charter can be considered as accepted by or binding on a religious society, it must appear that they were notified of it, and that they duly met together to consult and deliberate upon it, and that they accepted it in their associated capacity.

Carrying such a charter round among the members and privately procuring their signatures without any meeting or notice, do not

CHARTER.

constitute the assent of the society, nor bind any not parties to it. *Ibid.*

CITIZENS OF UNITED STATES.

An award of money by the commissioners under the Spanish treaty, excluding such persons as are not citizens of the United States, does not exclude an attorney in a foreign country, who for advances and services there has a lien on the fund claimed and awarded. *Aycinena v. Peries*, VI. 243.

CITY LOT.

WARRANT AND SURVEY, 17, 18.

CLERICAL ERROR.

An error in the date of entering a judgment in an action of replevin, by which it appeared that it was entered before the trial, is no reason why the judgment should not be given in evidence in an action against the sheriff for taking insufficient sureties on the writ of replevin. *Myers v. Clark*, III. 535.

CLUB.

The members of a committee appointed by a political meeting to provide a free dinner for the party, are personally liable for the bill. *Eichbaum v. Irons*, VI. 67.

COAL COMPANIES.

The 2d section of the Act of 6th of April 1833, releases land sold by one of the mining companies therein mentioned, within one year after the passage of the Act. *Brick v. Coster*, IV. 494.

COLLATERAL SECURITY.

DEED, 32.

A person may relinquish a collateral security given to him by his debtor without the consent of the other creditors of the debtor, and not thereby lose his resort against the debtor's property, though he might be liable to the debtor if the security was lost by his negligence.

Although such creditor be also a nominal trustee for the creditors of the debtor, that would not affect his claim against the trust estate, if he has not violated his duty as trustee.

Nor if such creditor afterwards take the bond of the original debtor, and another bond of two others as collateral security for his advances, and then release the latter, but with a stipulation that it should not affect the liability of the original obligor, is his claim against the trust fund affected.

But it is clear, that when the money is advanced after the sale of the goods pledged, the claim of the advancing creditor is not affected by having parted with the goods.

Notes of a bank received as collateral security after such bank has suspended specie payments, but afterwards gone on for a time

COLLATERAL SECURITY.

under a specific arrangement, are embraced by a bond given to secure the notes of the bank, if the creditors on notes issued before the suspension omitted to issue process of execution under the bond when forfeited, and gave no notice to receivers of notes afterwards issued.

Nor is it any objection that such notes were taken from the obligor as collateral security for moneys advanced to the obligor after the suspension, if the transaction was *bonâ fide*, and for a debt fairly due.

Nor that it was done after the obligor had given bond to take the benefit of the Insolvent Act.

A creditor holding collateral security has a right to come in on the fund of his debtor chargeable with it, to the full amount of the notes received, provided it does not exceed his debt. *In the matter of Dr T. W. Dyott's Estate*, II. 463.

COLLECTOR OF TAXES.**OFFICER, 1.**

1. In the appointment of collectors of taxes, the county commissioners have a duty and responsibility which necessarily give the appointment absolutely to them, and they are not bound in all cases to appoint either of the persons returned by the assessors; and if the persons returned by the assessors are in all particulars competent for the office, and the commissioners refuse to appoint either, they may have a remedy to compel their appointment; but a tax-payer cannot take any advantage of a dereliction of duty on the part of the commissioners in such case. *Kingsbury v. Ledyard*, II. 37.

2. A collector of taxes is a public officer to whose official acts credit should be given; his duplicate and an entry made therein by him of the payment of a tax, is good evidence of the fact of payment, independent of the oath of the collector himself. *Overseers of Lewisburg v. Overseers of Augusta*, II. 65.

COLLECTOR OF TOLLS.**OFFICER, 4.****TAXES.****COMMISSIONS.****ASSIGNMENT, 4.****CONTRACT, 22.****PRINCIPAL AND AGENT, 4.**

The plaintiffs proposed to defendant to act as their agent at Canton for a term of years, engaging to make consignments to an amount that would insure his commissions to amount to \$25,000 per annum, at least; and subsequently they bound themselves to the fulfilment of it by the payment of the above sum annually though from unforeseen events they should not ship the amount that would produce that sum. One of the stipulations, also, was, that the defendant's commissions should be invested in return cargoes as his separate property at Canton. The defendant agreed to the proposal for a term of two years. In the first year the commission did not equal \$25,000

COMMISSIONS.

The next year they considerably exceeded it; so that, together, they exceeded the \$50,000. *Held*, that the commissions were to be charged separately for each year, and that the defendant was entitled to have his commissions, the first year, made up to \$25,000, and to retain, in addition, all he received the second year. *Jones v. Dunn*, III. 109.

COMMISSION MERCHANT

DISTRESS, 7.

COMMISSIONERS.

COUNTY COMMISSIONERS.

COMMON CARRIER.

1. The clause in a bill of lading, "he" (the consignee) "paying freight," is introduced for the benefit of the carrier, and does not exempt the consignor from liability. *Layng v. Stewart*, I. 222.

2. A wagoner who carries goods for hire, thereby contracts the responsibility of a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. *Gordon v. Hutchinson*, I. 285.

3. A common carrier is answerable for the loss of a box or parcel, though he be ignorant of the contents, or they be ever so valuable, unless he make a special acceptance. But if the consignor of goods studiously conceal from the captain of a ship, or misrepresent the value or nature of the goods shipped, the ship-owner is not liable, if the goods be purloined on the voyage, though the wrong-doer would be. *Relf v. Rapp*, III. 21.

4. Labelling a box or trunk entrusted to a carrier, as containing articles of a different nature and value from its real contents, will dispense with further inquiry as to its contents. *Ibid*.

5. For an injury done to a passenger by the upsetting of a stage-coach, the remedy of the party may be either *assumpsit* or case; if the former be adopted, the plaintiff, to entitle him to recover, must prove the liability of all the parties sued; but if the latter, he may recover against those of the defendants who are liable. *McCall v. Forsyth*, IV. 179.

6. Tender by a common carrier to a consignee of goods entrusted to his care must be reasonable in respect to time, place and manner, and this is a question for the jury. If the goods be tendered after the hours of business, or when the consignee is unable to receive them, such tender will not discharge the carrier. *Hill v. Humphreys*, V. 123.

7. In an action on the case against a common carrier for not delivering goods according to consignment, the value of the goods sent is the lowest measure of damages. *Ludwig v. Meyre*, V. 435.

8. In such action, a previous demand of the goods is not necessary to the plaintiff's right to recover. *Ibid*.

COMMON CARRIER.

9. The responsibility of a carrier upon the Ohio river, does not cease upon the delivery of the goods on the wharf, and notice given to the consignee; but it is his duty to attend to the actual delivery. *Hemphill v. Chenie*, VI. 62.

10. Common carriers may, by special contract, limit the extent of their responsibility for the safety of goods delivered to them to be carried. *Bingham v. Rogers*, VI. 495.

11. In an action against a common carrier to recover the value of goods delivered to him to be carried, the owner of the goods, being the plaintiff in the action, is not a competent witness to prove the contents of the trunk or the value of the articles which it contained. *Ibid.*

12. If a steamboat on the Ohio river run upon a stone and knock a hole in her bottom, the carrier will not be discharged from liability by virtue of the clause in his bill of lading, "The dangers of the river only excepted:" but in order to relieve himself from responsibility it is incumbent on him to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable. *Whitesides v. Russell*, VIII. 44.

13. The privilege of transhipment reserved to a common carrier in his bill of lading does not discharge him from any liability which is incident to his contract until the goods be delivered at the destined port. *Ibid.*

COMMON INFORMER.

1. Where an Act of Assembly directs a penalty to be recovered by any person suing for the same, the sum when recovered to be paid one-half to the person suing, the other to the treasurer or county commissioners, a common informer may sue in his own name. *Megargell v. Hazleton Coal Co.*, VIII. 342.

2. Where a person sues as common informer, an amendment to the declaration that he sues as well for himself as the treasurer of the county ought to be allowed. *Ibid.*

COMPANY.

PARTNERSHIP, 38.

COMPENSATION.

TENANT FOR LIFE, 4.

COMPROMISE.

AGREEMENT, 6.

BOUNDARY, 1.

CONTRACT, 23.

LEGACY, 8, 9.

1. A testator devised his real estate to his executor, to be sold, and directed the proceeds to be divided among his children; *held* that the children had such an interest in the land as justified them in compromising a question of boundary, if such compromise did not affect the rights of creditors.

COMPROMISE.

The compromise of a doubtful right is a sufficient consideration for the execution and delivery of a deed.

If an executor, having power to sell real estate for the payment of legacies, advise the legatees to compromise and settle a question of boundary, and they do so, such compromise is binding upon the executor ever afterwards, whether he claim the land as executor, or in his own right. *Rice v. Bizler*, I. 445.

2. Compromises by which money is gained or saved by executors, administrators or trustees, enure to the benefit of those for whom they act, and not of themselves. *Saeger v. Wilson*, IV. 501.

CONDITION.

An estate on condition may be forfeited by a non-performance of the condition within a reasonable time, and the estate reverts without the formality of a re-entry; but if the party once dispense with the condition, he cannot afterwards enter for a subsequent breach of it; his remedy in such case is an action of covenant for the breach of the contract. *Dickey v. M'Cullough*, II. 88.

CONDITIONAL VERDICT.

VENDOR, &c., 21.

WRIT OF ERROR, 3.

1. In an action of debt upon a bond given for the purchase money of land sold and conveyed, the jury may give a verdict for the plaintiff, with the condition annexed, that no execution shall issue for the recovery of the amount of it, until the plaintiff shall remove an encumbrance from the land which was the consideration of it. *Roland v. Miller*, III. 390.

2. When the plaintiff sues on notes given by the defendant for the purchase of land which becomes encumbered by a judgment against the plaintiff before the title is made, the proper mode is to take a conditional verdict for the whole amount due on the notes, with stay of execution for a part of the amount sufficient for the encumbrance till the title be cleared. *Jackson v. Knight*, IV. 412.

CONFISCATION.

TREASON, 1.

CONSIDERATION.

BILLS OF EXCHANGE, &c., 3, 8, 11.

BOND, 2.

BOUNDARY, 1.

CONTRACT, 23.

GUARANTY, 4, 5.

1. The expression of a valuable consideration is essential to the validity of a deed of bargain and sale, but the amount of it need not be stated. *Okison v. Patterson*, I. 395.

2. The compromise of a doubtful right is a sufficient consideration for the execution and delivery of a deed. *Rice v. Bizler*, I. 445.

CONSIDERATION.

3. Forbearance, either limited or general, is a good consideration for a promise to pay the debt of a third person. *Silvis v. Ely*, III. 420.

4. An agreement to withhold his competition in the purchase of land by one who is in possession without title, is a good consideration for a promise to convey to him a part of the land by one who purchased from the real owner. *M'Culloch v. Cowher*, V. 427.

5. A mere promise to pay the debt of another without consideration is not obligatory, and there can be no recovery upon it. *Reading Rail Road Co. v. Johnson*, VII. 317.

CONSIGNOR AND CONSIGNEE.

1. There is an implied engagement by a consignee with the public, that he will be vigilant and careful in receiving and forwarding goods intrusted to his care; and upon his refusal to receive goods consigned to him, he would be liable to an action by the owner for any loss which might be occasioned thereby. *Hemphill v. Chenie*, VI. 62.

2. A consignee, in whose hands goods are placed to be sold, may set up the consignor's want of title as a defence to an action for the price of them. *Floyd v. Bovard*, VI. 75.

CONSPIRACY.

INDICTMENT, 5.

CONSTABLE.

APPEAL, 7.

EXECUTION, 8, 15.

SUPERSEDEAS, 1.

1. If a constable, by reason of negligence, becomes liable for the amount of an execution placed in his hands, the issuing of a subsequent execution is not a relinquishment by the plaintiff of his right to recover from the constable.

In an action against a constable founded upon negligence in not returning an execution, it is competent for the defendant to prove that the judgment was paid before the execution issued. *Evans v. Boggs*, II. 229.

2. Of the sufficiency of a constable's return to an execution, the justice must judge in the first instance; but his judgment and acceptance of the return will not relieve the constable from liability, if it be erroneous. *Shover v. Funk*, V. 457.

3. A constable's return to an execution must be made in writing. *Ibid.*

4. A promise to a constable to pay the amount of an execution in his hands can only be enforced by an action in the name of the constable, and not in the name of the plaintiff in the execution. *Cummings v. Klapp*, V. 511.

5. The sureties of a constable are liable for the act of the officer in levying upon the goods of a stranger. *Brunott v. M'Kee*, VI. 513.

CONSTABLE

6. The 86th section of the Act of 13th April 1834, relative to county and township officers, which requires them to file a copy of their official oath with the town clerk, is not applicable to a constable. *Ibid.*

7. The mere omission of a constable to return his execution within twenty days, does not fix him for the amount of the debt, if he have sufficient reason for the delay. *Keller v. Clarke*, VI. 534

CONSTITUTIONAL LAW.

ACTS OF ASSEMBLY, 1.

CANAL COMMISSIONERS, 1.

DEED.

JUDGMENT, 19, 25.

PITTSBURGH, 1.

STATUTE, 4.

1. The Legislature have not the constitutional power to diminish the compensation of the President Judges of the Courts of Common Pleas fixed by law, during their continuance in office. *Commonwealth v. Mann*, V. 403.

2. An Act of the Legislature authorizing a Court of Oyer and Terminer to be held in the county by one of the Judges of the Supreme Court and two associate Judges of the county, is contrary to the provisions of the constitution. *Commonwealth v. Flanagan*, VII. 68.

CONTRACT.

ACTION, 4.

ACT OF ASSEMBLY, 8.

AUCTION, 5.

BASTARD, 1.

COMMISSIONS, 1.

CORPORATION, 3.

COURT, 1.

EVIDENCE, 37.

HUSBAND, &c. 21, 22, 23.

MECHANIC'S LIEN, 21, 26.

PAROL CONTRACT.

PARTNERSHIP, 13.

RECORDING ACT, 1.

WORK AND LABOUR, 1, 2.

VENDOR, &c. 1, 2, 9, 24, 25, 26, 34, 35, 36, 37, 43, 59.

1. In the performance of a contract to coal wood, the collier is bound to exercise ordinary skill, care, and diligence: and in an action upon it to recover the wages of his labour, it is error in the court to instruct the jury that the plaintiff is only chargeable with gross negligence, or wilful misconduct. *Gamber v. Wolaver*, I. 60.

2. All the negotiations between the parties to a contract made by a written correspondence form a part of it, and must be considered in giving it a construction. And if it appear that one of the parties was negotiating for himself as well as for others, each of whom was

CONTRACT.

to perform a separate part of the contract, and this was known and understood by the other party, he cannot look to one for damages consequent upon the failure to perform the conditions of the contract by all. *Stover v. Metzgar*, I. 269.

3. In an action on a contract for the sale of a chattel, proof by the defendant, that it was received by the vendee on Sunday, from a third person, does not raise such a presumption that the contract was made on Sunday, as will defeat the plaintiff's action. *Hadley v. Snevily*, I. 477.

4. If a plaintiff in ejectment ask for specific execution of a contract for the sale of land, he cannot recover, if it appear that he has been guilty of laches and such conduct as was calculated to induce the other party to suppose that he had abandoned his contract: and especially if he had permitted so long a time to elapse as that a legal title would have been barred by the Act of Limitations. *Zeigler v. Houtz*, I. 533.

5. A subsequent parol agreement varying the terms of a sealed contract, cannot be tacked to it, so as to make the whole a covenant between the parties. *Vaughn v. Ferris*, II. 46.

6. A and B entered into a written contract by which A agreed to procure a conveyance to be made to B for certain mills and real estate, in consideration of which B covenanted to advance money to pay the encumbrances upon the estate, and to carry on the works for a certain time until he should be reimbursed the money which he should advance, expenses, &c., and then he should re-convey one-half; by subsequent agreements, the parties modified and changed their original contract; and after the mills and works had been carried on some time, A brought an ejectment for the estate against B to compel a re-conveyance. *Held*, that the action could be maintained, and must be considered as a bill in equity, in which the court and jury must settle the account between the parties upon the principles of their own agreements, and fix the balance due by either party, and enforce the payment of it by means of a conditional verdict. *Dickey v. M'Callough*, II. 88.

7. A parol agreement by one party to a covenant to waive the performance of a certain part of the covenant by the other party, is not such an alteration of the contract as will render necessary a change in the form of action upon it.

Upon a contract to deliver a specific article at a particular time and place upon the payment of the price, if the article be delivered, and the price be not paid, the party delivering may remove it, and sell it to another, and charge the party failing to pay with the difference in price, as a measure of damages; and under such circumstances, the receipt of money after the time for delivery by the party delivering, on account of the contract, will not preclude him from recovering damages. *M'Combs v. M'Kennan*, II. 216.

8. The damages which may be recovered for the breach of a mere verbal contract to convey land, are not to the whole amount of the purchase money, as that would be to enforce specific performance

CONTRACT.

The damages should only equal the loss sustained by non-fulfilment of the contract, which, in a suit by vendor against vendee for not accepting a deed for the land, may be the difference between the value of the property at the time of the refusal, and the sum agreed on as the price. *Ellet v. Pazson*, II. 418.

9. A contract, which is fraudulent as to creditors, by reason of the Statute of 13 Elizabeth, is binding upon the parties themselves, and the one may use it against the other for any purpose whatever. *Sherk v. Endress*, III. 255.

10. A plaintiff in ejectment cannot recover upon a legal title obtained from the defendant, in pursuance of a contract, the consideration of which had entirely failed; and which if the title had not been actually made, it would have been against common justice to enforce. *Bishop v. Reed*, III. 261.

11. If parties to a contract for the delivery of materials, specify by whom the measurement of them shall be made, such measurement, if it can be obtained, must be resorted to as the evidence to govern the parties: it is error to refer it to a jury to ascertain the quantity of materials delivered from all the evidence given on the subject. *Leebrick v. Lyter*, III. 365.

12. A written contract for the purchase and sale of land may be rescinded by a subsequent parol agreement of the parties, so that the vendee cannot afterwards enforce a specific performance of the contract by an action of ejectment against a subsequent purchaser from the vendor. *Boyce v. M'Culloch*, III. 429.

13. A contract to procure or endeavour to procure the passage of an Act of the Legislature by any sinister means, or by using personal influence with the members, is void, as being inconsistent with public policy and the integrity of our political institutions. *Clippingier v. Hiphaugh*, V. 315.

14. The performance of labour by one for another raises an implied *assumpsit* that it will be compensated; but this implication is rebutted by proof of circumstances showing such a relation between the parties as repels the idea of contract. *Swires v. Parsons*, V. 357.

15. In an action to recover compensation for work and labour under a special contract, the plaintiff cannot recover for part performance upon a declaration containing a general averment of performance; but he must set out specially a default of the defendant as the ground of his failure to perform according to his contract. *Alexander v. Hoffman*, V. 382.

16. In such case, it is not the duty of the plaintiff to abandon his contract and resort to an action for damages, but he may recover on his contract for the amount of work done, upon proof of the defendant's default. *Ibid.*

17. In such action, the book of original entries of the plaintiff showing the amount of work done, is not competent evidence. *Ibid.*

18. Where a parol contract for the purchase of land has been carried on *mala fide*, there is a resulting trust implied by law, and

CONTRACT.

equity will decree a conveyance according to the terms of the contract. *M'ulloch v. Cowher*, V. 427.

19. Upon a contract to guarantee the payment of a certain sum of money, in consideration of the building of a bridge by the county at a place fixed by a report of viewers, if the location be changed, there can be no recovery. *Mercer County v. Coovert*, VI. 70.

20. A firm being large dealers in watches and jewelry, and having at all times a large stock on hand, accepted an order to pay \$100 in watches, or a watch, as may suit the purchaser. *Held* that the necessary presumption was that it was the understanding of the parties that they would satisfy the order out of their stock of watches on hand when the order should be presented, and that the holder had no right to insist on a description of watches which the firm happened not to have at the time, and could only procure by sending elsewhere. *Maule v. Pleiss*, VI. 381.

21. Where an entire contract for the sale of lands is partially within the statute of frauds, the whole is avoided by it; but it is not avoided by it when the contract is proved and partly executed. *Dock v. Hart*, VII. 172.

22. A contract which is usurious cannot be confirmed so as to make it available to either party. *Chamberlain v. M'Clurg*, VIII. 31.

23. The settlement of an existing controversy being a good consideration for a contract, a party having a good defence to the payment of his obligation may release it upon an agreement of compromise, and if he do so, he will be thereby estopped from setting it up as a defence afterwards. *Ibid.*

24. A party is not concluded, by his written agreement stipulating the terms and conditions of a loan, from showing by parol evidence that the contract was usurious. *Ibid.*

25. Defendant guaranteed to the plaintiff \$3000 commissions for transporting goods west for defendant, plaintiff covenanting to forward no goods for any other person or line for any place west of Hollidaysburg. Plaintiff cannot recover on the guaranty, if he forwarded goods by other lines as far as Hollidaysburg, if their ultimate destination was for places west of Hollidaysburg. *Martin v. Schoenberger*, VIII. 367.

26. A person cannot recover for part performance of an entire contract, where he has failed in the performance on his part. *Ibid.*

CONTRIBUTION.

LEGACY, 8, 9.

PARTNERSHIP, 27.

1. C. became the purchaser at sheriff's sale of that part of a tract of land which was in one county, subject to a mortgage upon the whole tract, which was in two counties: the mortgage having been given before the county was divided. After his purchase, he paid the amount due upon the mortgage, took an assignment of it, and sued out a writ of *scire facias* upon it in the other county, with notice to the terre-tenants of that part of the land. *Held* that the plaintiff

CONTRIBUTION.

was entitled to recover contribution out of that part of the land which was to be estimated by the proportional value of each part *Fisher v. Clyde*, I. 544.

2. A tenant in common of a tract of land, may maintain *assumpsit* against his co-tenant, to recover his share of the rent of the premises which they had demised to a third person, upon proof that the whole rent had been paid to the defendant, who promised to pay to the plaintiff his share of it. *Gillis v. M'Kinney*, VI. 78.

CONVICTS.

The expenses of removing one who is convicted of forgery to the Eastern Penitentiary, must be paid out of the State treasury, by the provisions of the Act of 23d April 1829. *Stephens v. Bradford Co.* VII. 438.

CORPORATION.

ABATEMENT, 1.

ACTION, 8.

ACT OF ASSEMBLY, 7, 8, 9.

COUNTY COMMISSIONERS, 6.

EVIDENCE, 48, 49, 50, 51, 52, 53.

FOREIGN ATTACHMENT, 6, 7, 8.

INSURANCE, 7.

JURISDICTION, 7.

MANDAMUS, 2.

MUNICIPAL CORPORATION.

OFFICER, 5

PARTNERSHIP, 38.

SOCIETY.

TOLLS, 1.

TRESPASS, 1.

WITNESS, 22.

1. After the issuing of letters patent by the governor, in compliance with the requisition of an Act of Assembly creating a corporation, a deed of conveyance to the company is good and effectual to vest the estate conveyed in it; although they may not have been so far organized as to have elected their officers; and their assent to it will be presumed. *Rathbone v. Tioga Navigation Company*, II. 74.

2. A conveyance of land to a company for the purpose of constructing a rail-road upon it, "provided the same does not interfere with buildings on said land," will be so construed as to prevent the construction of the road so near to the buildings as to endanger their safety or destroy their usefulness. *Ibid.*

3. A corporation may become bound by an express or implied contract, or with or without seal. *Ibid.*

4. An alteration in a charter of incorporation, by which additional privileges are given to the corporation, is not such an invasion of the contract of subscription as will relieve the subscriber to its stock from his liability to pay; although the additional privileges granted

CORPORATION.

may extend the liabilities of the company, and thus incidentally affect the stockholder. *Gray v. Monongahela Navigation Company*, II. 156.

5. A misnomer of the corporation, in a public notice to subscribers for stock to pay instalments of stock subscribed, is immaterial in an action by the corporation against the subscriber upon his obligation to pay. *Ibid.*

6. The violation of a charter of incorporation cannot be made the subject of judicial investigation in a collateral suit. The only evidence competent to prove the forfeiture of a charter is the judgment of a court directly on the point. *Irvine v. Lumbermen's Bank*, II. 190.

7. Merely being a stockholder in a Canal Company is not constructive notice of the claims of the company to lands. *Union Canal Company v. Loyd*, IV. 393.

8. The Arbitration Act of 16th of June 1836, does not repeal the provisions of the Act of 22d of March 1817, by which corporations appellant are required to give bail. *Morris v. The Delaware and Schuylkill Canal*, IV. 461.

9. Under the Act of 22d of March 1817, corporations appealing from an award of arbitrators must give absolute bail. *Ibid.*

10. A public municipal corporation can only be sued in the courts of the county where it is situated. *Lehigh County v. Kleckner*, V. 181.

11. In a suit by a corporation, the declaration need not contain a profert or averment of the charter. *Zion Church v. St. Peter's Church*, V. 215.

12. The want of a charter may be pleaded in abatement, or per haps in bar; but the defendant, by pleading the general issue and going to trial, waives the objection. *Ibid.*

13. In an action against a corporation, it is necessary to serve the summons at the place where the corporation is located. *Brobst v. Bank of Pennsylvania*, V. 379.

14. A plaintiff who is nonsuited after an appeal by the defendant from an award of arbitrators, must refund the costs of the appeal which the defendant had paid on appealing; and that is the case, although the plaintiff sues as administrator. *Penrose v. Pawling*, VIII. 379.

15. The franchises and corporate rights of a company, and the means vested in them which are necessary to the existence and maintenance of the object for which they were created, are incapable of being granted away and transferred by any act of the company itself or by any adverse process against it. *Susquehanna Canal v. Bonham*, IX. 27.

COSTS.

APPEAL, 6, 10.

ARBITRATION, &c. 23.

EXECUTION, 13.

JURISDICTION, 9.

COSTS.

POOR, 7.

RECOGNIZANCE, 5.

WITNESS, 39, 40.

1. Upon an indictment for forcible entry, and an acquittal of the defendants without any finding by the jury on the subject of costs, an action will not lie by a witness on behalf of the commonwealth, to recover his costs from the prosecutor who subpœnaed him. *Strein v. Zeigler*, I. 259.

2. If a defendant recover a judgment before a justice of the peace for a certain sum, and the plaintiff appeal, and the judgment of arbitrators in court be "no cause of action," neither party is entitled to recover costs. *Hoffman v. Slossan*, II. 36.

3. The rule of this court authorizing the defendant to require security for costs applies where the plaintiff resided in this state at the institution of the suit, and afterwards left it to reside in another state. *Sharp v. Buffington*, II. 454.

4. One who merely takes an active part in carrying on a suit in the name of another, is not liable to the plaintiff's witnesses for their daily pay and mileage, without an express promise to pay. But he is liable without such promise, where he projects and institutes the suit in another's name, and is the active agent in having it brought. *Utt v. Long*, VI. 175.

5. A witness may bring suit for his daily pay, &c., against the party who subpœnaed him and who lost the cause, without having the bill of costs taxed and making demand before suit brought. *Ibid.*

6. In an appeal from the judgment of a justice of the peace, the liability for costs is determined by the verdict, without regard to what was the judgment of the justice. *Holman v. Fesler*, VII. 313.

7. If a plaintiff bring several suits before a justice of the peace, founded upon several causes of action, which in the aggregate exceed in amount \$100, and for which one suit might have been brought in the Court of Common Pleas, he will not be permitted to recover more than the costs of one suit, although he himself may be liable to the officers for all the costs which accrued. *Towanda Bank v. Ballard*, VII. 434.

COUNSEL FEES.

EVIDENCE, 35.

EXECUTOR, &c. 9.

COUNTY.

APPEAL, 10.

A county can only be sued in the courts of the county itself; the courts of other counties have no jurisdiction. *Lehigh County v. Kleckner*, V. 181.

COUNTY BOARD.

MEMBER OF ASSEMBLY.

COUNTY COMMISSIONERS.

BRIDGES, 1.

COLLECTOR OF TAXES, 1.

MECHANICS' LIEN, 24.

1. A county commissioner is elected for three years, and until a successor be elected, and his official acts are binding upon the county although done after the lapse of three years, if his successor be not elected and sworn into office. *York County v. Small*, I. 315.

2. County commissioners have an unqualified power to approve or disapprove the accounts of a teacher of poor children, under the Act of the 4th April 1794, in a township which refuses to accept the provisions of the general school law. *Parker v. Lancaster County*, I. 460.

3. A county is not liable on a *quantum meruit* for the expenses incurred in the erection of a county bridge. *Lehigh County v. Kleckner*, V. 181.

4. The commissioners in erecting a county bridge must build it according to the estimate which they are directed by law to procure, and that either by contract or under their own superintendence, and can on no pretence exceed the estimate. *Ibid*.

5. If there be a change of the original plan, there must be a new estimate. *Ibid*.

6. If a county be sued, it must be by its corporate name; if the action be against "The Commissioners of the County," it is erroneous. *Wilson v. Commissioners of Huntingdon Co.* VII. 107.

COUNTY LINE.

SHERIFF'S SALE, 17.

COUNTY TREASURER.

1. By the 49th Section of the Act of the 15th of April 1834, the accounts of county treasurers of moneys received for the use of the commonwealth must be settled by the county auditors, and not by the auditor-general. *Commonwealth v. Laub*, III. 435.

2. The settlement of the account of a county treasurer by the auditors, after the time limited for an appeal, is as conclusive upon the county as it is upon the officer; and it cannot be opened for the correction of alleged errors by auditors whose duty it is to settle the account of a subsequent year. *Northumberland County v. Bloom* III. 542.

COURT.

ACT OF ASSEMBLY, 1, 2.

CRIMINAL COURT.

DISTRICT COURT OF U. STATES, 1.

EQUITY JURISDICTION, &c., 2.

ERROR, 21.

EVIDENCE, 111.

JURISDICTION, 5.

NICHOLSON COURT, 1.

COURT.

NISI PRIUS, 5.

PRACTICE, 2.

The Court of Common Pleas has jurisdiction under the Act of 31st of March 1792, for the proof and execution of all contracts for the sale of land made on a valuable consideration, whether for money or otherwise: and the decree of the court for the execution of such contract is conclusive between the parties. *Meanor v. M'Kowan*, IV. 302.

COURT OF EQUITY.

LIMITATIONS, 17.

COURT OF ERROR.

Where no exception is taken to the opinion of the court, the evidence necessary to understand it must accompany it to the court of error. *Hamilton v. Moore*, IV 570.

COVENANT.

AFFIDAVIT OF DEFENCE, 2.

AGREEMENT, 10.

CONDITION, 1.

CONTRACT, 5.

GROUND RENT DEED.

VENDOR, &c., 63.

1. In a *scire facias* upon a judgment entered on a bond conditioned for the performance of certain things mentioned in a covenant between the parties, it is not competent for the plaintiff to give in evidence a subsequent parol agreement between him and the defendant, by which the terms of the covenant were altered. *Vaughan v. Ferris*, II. 46.

2. A covenant by a vendee to pay, and of the vendor to convey upon the payment of the purchase money, are dependent covenants; and an action of covenant to compel the payment of the purchase money cannot be maintained by the vendor without proof of a tender of a conveyance before suit brought. *Adams v. Williams*, II. 227.

3. In covenant for instalments of money, former recovery between the same parties on the same instrument is not a bar, where breaches for the instalments now demanded were not specifically assigned in the former suit; and evidence is admissible to show that the instalments now demanded had not fallen due, and were not included in the former recovery.

It is otherwise where the former claim was entire, and for a sum of money *in solido*. *Sterner v. Gower*, III. 136.

4. A and B purchased an estate which was encumbered by liens to the whole amount of the purchase money: each entered into a separate covenant to the other to pay one-half of these liens, specifying which each was to pay: B failed to pay, by reason of which the property was sold by the sheriff, and purchased by A.

COVENANT.

Held, that the covenants were mutual and independent, and that A's right of action against B was not affected by the fact that he had not paid the entire amount which he had covenanted to pay, nor by the fact that B had not covenanted to pay the whole amount of the lien upon which the property was sold, a part of it having been excluded by mistake in the calculation: and that the measure of damages in such case was the difference between what A paid for the whole property, and what he and his co-vendee had agreed to give for it. *Bredin v. Agnew*, III. 300.

5. Mutual covenants are to be construed as dependent or independent, according as it may best concur with the design of the whole instrument and effectuate the intention of the parties. *Wright v. Smyth*, IV. 527.

6. Unliquidated damages for violation of a separate and independent covenant made by the plaintiff, are not a subject of defalcation or set-off in an action for breach of the defendant's covenant. *Ibid*.

CRIMINAL COURT.

The 1st section of the Act of 3d February 1843, transferring the jurisdiction of the criminal court to the court of Oyer and Terminer, General Jail Delivery and court of Quarter Sessions for the city and county of Philadelphia, is not unconstitutional. *Commonwealth v. Zephon*, VIII. 382.

CURBING.

SHERIFF'S SALE, 32, 33, 34, 35.

CURTESY.

TENANT BY CURTESY.

CUSTOM.

DIVISION LINE, 1.
LANDLORD, &c. 6.
WAY-GOING CROP.

DAM.

CASE, 1.
LIMITATION, 25.
REVERSIONER, 1.

DAMAGES.

ARREST, 2.
ATTORNEY AT LAW, 1.
BANK-NOTES, 2.
CONTRACT, 7, 8.
COVENANT, 6.
ESCAPE, 1.
MOB.
IX.—35

DAMAGES.

RAILROAD, 2.

REPLEVIN BOND, 2.

RIVER, 7.

TRESPASS, 7.

VENDOR AND VENDEE, 5, 18, 22.

1. All the negotiations between the parties to a contract made by a written correspondence form a part of it, and must be considered in giving it a construction. And if it appear that one of the parties was negotiating for himself as well as for others, each of whom was to perform a separate part of the contract, and this was known and understood by the other party, he cannot look to one for damages consequent upon the failure to perform the conditions of the contract by all. *Stover v. Metzgar*, I. 269.

2. The obstruction or deepening of the waters of a stream which is a public highway, by authority of an Act of Assembly, is not the subject of a claim of damage by the owner of the adjoining land for an injury done to or destruction of a fording across the stream.

Damages done to land by the construction of the Union Canal, and works appurtenant to it, must be estimated as of the time when done; and a subsequent purchaser of the land cannot maintain a proceeding to recover damages done to him. *Zimmerman v. Union Canal Co.*, I. 346.

3. In replevin where the property had been delivered to the plaintiff by the sheriff, the parties on the trial agreed that the jury might find the value of the property and damages in one sum, which was to settle all further claim to the property: *Held*, that the jury were rightly instructed by the court, that in assessing the damages for the defendant they were not confined to the interest on the value, but might give more, if necessary, to compensate the defendant.

When goods are delivered to the plaintiff in replevin on a claim of property, and the plea of property is found for the defendant, the damages for detention consist of interest on the value of the goods when taken, from the time of taking till judgment rendered. But when the writ of replevin is sued out fraudulently and without colour of right, the jury may give exemplary damages, as in case of a wanton and malicious trespass.

The defendant in replevin is not entitled to special damages occasioned by interruption in business, in consequence of the property being taken from him under the writ. *M' Cabe v. Moorehead*, I. 513.

4. The measure of damages occasioned by backing water on land is the difference between what the property would have sold for as affected by the injury and what it would have brought unaffected. The time of estimating the damage is when the injury is complete. *Schuylkill Navigation Company v. Farr*, IV. 362.

5. The expense of erecting a furnace is not the measure of damages, but the real value of the property. *Ibid.*

6. Damage done to a tavern stand not mentioned in the narr. cannot be compensated, though it might not have been necessary to file a narr. in the case. *Ibid.*

7. In an action founded on a breach of covenant against encum-

DAMAGES.

brances and an eviction, the measure of damages is the amount of purchase money, with interest from the time when the vendee ceased to be in perception of the profits actual or potential, which could not be recovered from him. *Patterson v. Stewart*, VI. 527.

8. One who contracts to do work for the Commonwealth is entitled to any peculiar advantage which the law provides for the Commonwealth, as if by its own agents it were doing the work; and, therefore, in estimating the damages done to the owner of land from which materials were taken, it is a legitimate inquiry, whether, upon the whole, an injury was done to the land of the plaintiff. *May v. Kornhaus*, IX. 121.

DEATH.

ARBITRATION, &c. 10.
JUDGMENT, 9.

DEBT.

LIEN, 2, 3.

1. Loose declarations of a parent that he intended an existing debt should be an advancement, not substantiated by writing, not made to the child nor assented to by him, nor accompanied by any act, are not sufficient to destroy a debt secured by a legal instrument in full force, and change it into a gift by way of advancement, whether offered by the son to defeat the recovery of the debt, or by the representatives of the father against the son to defeat his claim for a distributive share. *Haverstock v. Sarbach*, I. 390.

2. The defendants, a church, executed and delivered to the plaintiff a writing under seal, reciting that the plaintiff having loaned them a sum of money was "entitled to receive payment of the same without interest from the sales of the following pews," (enumerating them)—payment *pro rata* to be made when any sale was effected, and the purchase money received.

Held, 1. That if the loan of money was cotemporaneous with the execution of the instrument, the plaintiff could not recover in debt on the instrument without averring a sale of the pews or a refusal to sell them by the defendants.

2. But on a count in debt for money lent, the instrument may be treated as an acknowledgment of a debt previously contracted, and a pledge of a fund or of collateral security for its liquidation, and submitted to the jury. *Montgomery v. St. Stephen's Church*, IV. 542.

DEBTOR AND CREDITOR.

APPROPRIATION, 8.
GUARANTY, 6.
PRINCIPAL AND SURETY, 10, 11.

1. A lien creditor who may at law control the application of two funds, will not be suffered to use his legal advantage in a way to exclude the lien of another whose legal recourse is but to one of them; but this rule must not be so applied as to do injustice to the first lien creditor. *Bruner's Appeal*, VII. 269.

DEBTOR AND CREDITOR.

2. If one of two principal debtors binds himself to the other to pay the whole debt, and gives as security a judgment therefor, the creditor of both is entitled to the benefit of that security; and if there be a surety of the two principal debtors, who was compelled to pay the debt, he would be entitled to the benefit of that security for the purpose of reimbursing himself. But if, after the surety has paid the money, he takes a bond or other security from one of the principals therefor, he thereby releases the other principal and all rights which he might otherwise have to resort to any security which he had previously given. *Cornwell's Appeal*, VII. 305.

DECEDENT.**LIEN, 2, 3, 9.**

1. The debts of a decedent cease to be a lien after the lapse of seven years from his death, after which the lands of which he died seised cannot be made liable for their payment. *Seitzinger v. Fisher*, I. 293.

2. The Act of 31st March 1792, "to enable executors and administrators by leave of court to convey lands and tenements contracted for with their decedents," &c. is applicable to a case in which a decedent received from his debtor a conveyance in fee of certain land, absolute on its face, and at the request of the debtor, received from another person a conveyance in fee of other real estate, and afterwards wrote letters, referring to the whole as the debtor's property, which he was ready to reconvey to him upon the repayment of the debt. *Wetherill v. Seitzinger*, IX. 177.

DECLARATION.**AMENDMENT, 5, 6.****APPEAL, 8.****BREACH OF PROMISE.****CHARGE OF COURT, 1.****CONTRACT, 15.****JUDGMENT BY DEFAULT, 3.****MALICIOUS PROSECUTION, 3, 5.****RECOGNIZANCE, 6.**

1. A declaration may be amended in matter of form, after verdict and judgment and writ of error sued out, where substantial justice has been done in the trial of the cause, and the defendant was not prejudiced by the informality. *Wampler v. Shissler*, I. 365.

2. Defects in a declaration such as may be taken advantage of by special demurrer, are cured by a trial and verdict on the merits. *Insurance Co. v. Seitz*, IV. 273.

3. Where the practice is on appeal from a justice to go to trial on his transcript, and the justice orders that the penalty be paid one half to the plaintiff and the other half to the county commissioners, this is equivalent to a declaration *qui tam*. *Megargell v. Hazleton Coal Co.* VIII. 342.

DECLARATIONS.

EVIDENCE, 75, 76.

HUSBAND AND WIFE, 6.

WASTE, 1.

WILL, 8, 9.

The declarations of one under whom the party to an action of ejectment claims, made while he owned the land, that his title was not good, cannot be given in evidence to affect the title of his vendee. *Payne v. Craft*, VII. 458.

DECLARATION OF TRUST.

DEED, 7, 5.

DEED.

CORPORATION, 1, 2.

EVIDENCE, 57.

GRANT.

HUSBAND, &c., 23.

INTOXICATION, 1.

LEASE, 4, 5.

PARTNERSHIP, 25.

PLEADING, 18.

RECORDING ACT, 2.

SHERIFF'S DEED.

TITLE, 1.

TREASURER'S SALE, 4.

TRUST, &c., 17, 19, 21.

VENDOR, &c., 8, 31, 60.

WITNESS, 17, 18.

1. An acknowledgment of a deed of conveyance by a feme-covert, before one of the judges of the Circuit Court of the State of Indiana, accompanied by a certificate of the clerk of that court, under his private seal, (there being no seal of the court,) of the official character of the judge, is a sufficient authentication to admit the deed in evidence. *Creigh v. Beelin*, I. 83.

An interlineation or erasure in the acknowledgment of a deed is an objection to the proof of execution, but will not avoid the deed itself.

2. It is not necessary to the proper execution of a deed by an attorney-in-fact that he should sign his name to it; the name of the principal alone is sufficient. *Devinney v. Reynolds*, I. 328.

3. The expression of a valuable consideration is essential to the validity of a deed of bargain and sale, but the amount of it need not be stated. *Okison v. Patterson*, I. 395.

4. An agreement or deed under which land has been occupied and claimed for upwards of thirty years, may be given in evidence without proof of its execution by the subscribing witnesses. *Zeigler v. Houtz*, I. 533.

5. A deed for a lot of ground to "a school-house and congregation thereof, or employers and their heirs, for and in consideration

DEED.

of the natural love and affection which they" (the grantors) "have and bear unto the said school-house, and its congregation and employers thereof," executed by two persons, is not a deed of bargain and sale, but is operative between those who sealed it as a declaration of trust, leaving the title to rest where it was before. *Morrison v. Beirer*, II. 81.

6. A deed of husband and wife to their son for a tract of land, "excepting 21 acres for and during his natural life, bounded, &c., and also one-half of all the hay, and one-third of all the grain, that may be raised on the residue of said tract during his life; and if he should die before his wife, she then to receive one-fourth of the hay and one-sixth of the grain for and during her natural lifetime, and then the above reservation to cease, and not till then." *Ruled*, that the reservation of the 21 acres was for the joint lives of the husband and wife, and that of the survivor. *Sergeant v. Ford*, II. 122

7. Conveyance of land to the grantor's daughter E. M. and the heirs of her body, legally begotten or to be begotten, who shall survive said E. M., to be divided equally amongst them, or to such issue of such, the grandchildren of the grantor, who may survive their respective parents, to be apportioned and divided by stocks and not by heads; however, the issue of each stock to divide the parents' portion, share and share alike; *habendum* to the said E. M. during her natural life, and afterwards to her issue as above described and conditioned, to the only proper use of the said E. M. and her issue as aforesaid, their and each of their heirs and assigns, in the proportions and manner aforesaid for ever. E. M. had two daughters, who died in her lifetime, leaving, each of them, eight children surviving E. M. *Held*, that E. M. took an estate for life, and each of the children took one-sixteenth in fee-simple. *Moss v. Sheldon*, III. 160.

8. The *habendum* in a deed may enlarge, qualify, expound, or vary the estate given by the premises. *Ibid.*

9. The intent of a grantor, when legal, is a governing principle in the construction of his deed; and if it be clearly expressed by the terms of the deed itself, no extraneous facts or circumstances will be admitted to alter or change it. *Means v. The Presbyterian Church*, III. 303.

10. A conveyance "in trust for the use of the Associate Reformed Presbyterian Congregation at Shippensburg, for a place of public worship," must be interpreted to vest the estate in a congregation in connection with the "Associate Reformed Church." *Ibid.*

11. B., seised in fee of a tract of land, subject to an outstanding title to one-half of all iron ore found on the premises, conveyed the same to H., in fee, "excepting and reserving to the said B. his heirs and assigns, the one-half of all iron ore found on the premises." *Held*, to be a reservation to the grantor himself of that half of the ore which was vested in him, and not a mere notice or reservation of the other half which was outstanding. *Baker v. M' Dowell*, III. 353.

DEED.

12. "In consideration, &c., I hereby grant, bargain and sell unto the said P. one-sixth part of the said tract, or so much thereof as may be recovered in this suit," *held* to be a present conveyance, and of a life estate only. *Gray v. Packer*, IV. 17.

13. If a deed made for the purpose of barring an estate-tail be regularly acknowledged in open court and entered upon the records, it will be presumed that such entry was made upon motion, as the Act of Assembly requires. *Robb v. Ankeny*, IV. 128.

14. By a deed of bargain and sale, or any other form of conveyance duly recorded, a use may be raised in any one in whose favour it is expressly declared by the deed, without a consideration expressed. *Sprague v. Woods*, IV. 192.

15. Equity will construe a deed of bargain and sale to be a covenant to stand seised, where there is both a money consideration and a relation by blood apparent in the deed. *Ibid.*

16. An unrecorded deed from a grandfather to his daughter and son-in-law, for a consideration paid by them, in trust for their children in fee, is valid to vest the estate to the use of or in trust for the said children then living. *Ibid.*

17. The recording of a conveyance within six months from its date, is essential to the validity of the title granted by it, against a subsequent *bonâ fide* purchaser for a valuable consideration. *Poth v. Anstatt*, IV. 307.

18. Where two deeds are made of different dates from the same grantor to different persons, neither of which is recorded within six months, that which is first recorded will take priority. *Ebner v. Goundie*, V. 49.

19. It is not usual nor necessary for a witness making probate of a deed to sign the probate; the certificate of the magistrate is sufficient. *Dana v. The Bank of the United States*, V. 223.

20. Where a deed is joint, or both joint and several, the defendant, who is sued, may show that the seal of one of the obligors has been torn off. But it is otherwise where the obligation is entirely several. *Rittenhouse v. Levering*, VI. 190.

21. J. K. and J. B. executed a deed under seal, which purported to be an assignment by J. K., J. B. and J. A. K., under the firm of K., B. & Co., "J. A. K. being absent, and acting by his attorney duly appointed," of all their estates, joint and separate, for the payment of partnership and separate debts. After certain preferences, it provided for the payment of all other partnership and separate debts *pro ratâ*, stipulating for a release within 3 months by residents in the United States, and within 9 months by residents elsewhere. It empowered the assignees to appoint agents or attorneys, and dismiss or revoke them at pleasure, and exempted the assignees from liability for effects not actually coming to their hands, and for losses or defaults arising from the misconduct of agents, unless in cases of wilful neglect of duty, or want of proper care on the part of the assignees. The schedule appended, specified various real and personal estate of the firm, and of J. K. and J. B. indi

DEED.

vidually. The only separate property of J. A. K., mentioned in the deed, was a pew in the 10th Presbyterian church.

Held, 1. That the execution of the deed by only two of the firm, followed by a delivery, did not invalidate the assignment.

2. That, as it stipulated for a release, it was not valid without containing a transfer of the separate property of each of the partners; though it might not appear affirmatively, that J. A. K., who omitted to execute the deed, had separate property.

3. That the power to the assignees to appoint and dismiss agents, &c., was proper, and they would have this authority without such provision.

4. That the exemption of the assignees from liability for effects that should not come to their hands, and for losses, &c., from the misconduct of agents, &c., did not alter their responsibility.

5. That the clause giving time for a release was proper. *Hennessey v. Western Bank*, VI. 300.

22. Deed of land to H. S. and J. H. and L. his wife, and their heirs as tenants in common, and not as joint tenants, *held* to convey one moiety to H. S. and the other moiety to J. H. and his wife. *Johnson v. Hart*, VI. 319.

23. A common law conveyance given to an agent for transmission to the grantee, vests the title in the grantee forthwith, though ignorant of the transaction, and by his rejection of it the title reverts in the grantor. *Reed v. Robinson*, VI. 329.

24. A reservation in a deed of conveyance which is as large as the grant itself, is void, and the grant is valid. *Shoenberger v. Lyon*, VII. 184.

25. S. and L. being tenants in common of Huntingdon Furnace and the lands appurtenant thereto, and at the same time owners of a right to dig, take and carry away ore to be used at Huntingdon Furnace, from a tract of land which belonged to a third person, L. conveyed to S. all his right, title and interest in the said furnace-lands and ore-banks, excepting and reserving "the full undivided half part of all the iron ore which may at any time be found on any of the land now belonging to Huntingdon Furnace, as hereinafter described, within not less than the distance of two miles from said Huntingdon Furnace." *Held*, that this was not a reservation of the right to take ore from the bank on the land which then belonged to the third person, although it was not within two miles of the said furnace. *Ibid*.

26. It is no objection to the admission in evidence of a deed of conveyance, that it recites that another deed was made at the same time conveying the same land, and that the one offered was made for the purpose of being recorded in Pennsylvania. *Strawbridge v. Cartledge*, VII. 394.

27. A plaintiff in ejectment may prove by parol evidence that the consideration paid for the land was much greater than that recited in the deed under which he claims to recover it. *Ibid*.

28. A deed of conveyance executed and acknowledged in another

DEED

State before a justice of the peace and recorded in Pennsylvania, is no notice to a subsequent purchaser for a valuable consideration. *Green v. Drinker*, VII. 440.

29. The possession of land such as will dispense with the necessity of recording the deed for it, must be such an occupancy as will afford a stranger to the title an opportunity of making the necessary inquiry respecting it. *Ibid.*

30. The Act of the 16th April 1840, made to cure defects in the acknowledgment of deeds, is not to be construed retrospectively in its operation so as to affect the title of third persons not parties to it. *Ibid.*

31. The rule which requires an express limitation to heirs in a fee-simple conveyance of a legal estate, is not to be applied to an executory agreement, which is a conveyance only in equity. *Defraunce v. Brooks*, VIII. 67.

33. In an action founded upon a covenant of warranty of title in a deed of conveyance, it is competent for the defendant to prove that the deed, though absolute on its face, was executed and delivered as collateral security for the payment of a debt to a third person, and that the plaintiff had no real interest in the title. The fact of his having obtained the title without the payment of the purchase money is sufficient to put the plaintiff upon inquiry as to the circumstances under which the deed was made to him. *Parke v. Chadwick*, VIII. 96.

33. An erased deed is not such a deed as a vendor ought to furnish to a vendee in compliance with his engagement to make a title. *Markley v. Swartzlander*, VIII. 172.

34. The subscribing witnesses to an instrument are required to enable the opposite party to inquire into the circumstances attending the sealing and delivery. *Ibid.*

DEFENCE.

RECOGNIZANCE, 9.

1. M. and B. being indebted to J. K. a quantity of pig metal, for which he held their written obligation; J. K. transferred this obligation by delivery to A. K., who afterwards purchased property from A. G. E., and gave him a written promise to deliver to him at the furnace of M. and B. a quantity of pig metal; and the obligation of M. and B. came into the possession of A. G. E. In an action by A. G. E. against A. K., on his written promise, it was held that the refusal of M. and B. to deliver the pig metal to A. G. E., until he presented their obligation, was not a good defence, and that A. K. was liable on his own written promise. *Ege v. Kauffman*, I. 121.

2. It is not a good defence to the payment of a bond, that it was given to redeem an illegal issue of small notes by the obligor. *York County v. Small*, I. 315.

3. As between a vendor and vendee of land, the acceptance of a deed and execution and delivery of bonds for the purchase money, closes the question upon the agreement, merges it in the conveyance, and precludes the parties from afterwards claiming, either on the one

DEFENCE.

side an allowance for a deficiency in the land, or on the other payment for a surplus. *Cronister v. Cronister*, I. 442.

4. If, in an action of ejectment, the defendant set up such a defence as defeats the plaintiff's action, and a second ejectment be brought by the same plaintiff, the defendant may repudiate the defence which he made in the first action, and defeat the plaintiff's recovery upon other grounds. *Rice v. Bizler*, I. 445.

5. In an action of covenant by a vendor against a vendee to compel the payment of purchase money, upon the pleas of *non est factum* and covenants performed, if the defendant rest his defence upon a defective or encumbered title of the plaintiff, he must make that defence on the trial of the cause, otherwise he cannot avail himself of it upon a writ of error. *Snevily v. Egle*, I. 481.

6. Upon a trial in the Common Pleas in a proceeding which originated before two justices of the peace, by a landlord to obtain possession of demised premises, it is competent for the defendant to set up as a defence, that the title of the landlord had expired by its own limitation, or that it had been divested during the term, and that he had the right from the owner, whose title had accrued pending the lease, to remain in possession. *Newell v. Gibbs*, I. 496.

DEMURRER.

On a demurrer, the court will consider the whole record, and give judgment for the party, who, on the whole, appears entitled to it. *Murphy v. Richards*, V. 279.

DEMURRER TO EVIDENCE.

INDICTMENT, 2, 3.

DEPOSITION.

EVIDENCE, 91, 95, 106.

WITNESS, 24.

1. It is not a valid objection to the reading of a deposition taken in the county where the cause is tried, that the testimony of the same witness had been previously taken upon a commission in another state. *Hoffman v. Kissinger*, I. 277.

2. A deposition taken in pursuance of a rule of court, cannot be read in evidence unless it appear by the certificate of the justice that it was taken at the time and place mentioned in the notice. *M'Cleary v. Sankry*, IV. 113.

3. Where a party notifies a justice of the peace that a deposition is to be taken before him on behalf of the opposite party, and the justice, at his request and in his absence, puts certain questions to the witness, he shall not allege want of notice. *Barnet v. School Directors*, VI. 46.

4. The testimony of a witness taken upon a commission for the purpose of proving the execution of a paper, cannot be read in evidence unless the paper be particularly described, identified and annexed to the deposition. *Petriken v. Collier*, VII. 392.

DEPOSITION.

5. If a deposition be taken by one party, it is competent for the other to read such parts of it as tend to prove his case, leaving to the other party the right to read the other parts if they be legal evidence for him. *Calhoun v. Hays*, VIII. 127.

DEPUTY.

WITNESS, 3.

DEPUTY-SURVEYOR.

There is no law to prevent a deputy-surveyor from becoming interested in the location and appropriation of vacant lands, or for a consideration pointing them out to another for appropriation, provided he acts with good faith towards all others in his official conduct respecting the same. *Quin v. Brady*, VIII. 139.

DEVISE.

CHARITABLE USES.

LEGACY, 4, 10.

POOR, 1.

TRUST, &c. 20.

WARRANT AND SURVEY, 15, 16, 17.

1. A testator devised his real estate to his executor, to be sold, and directed the proceeds to be divided among his children: *Held* that the children had such an interest in the land, as justified them in compromising a question of boundary, if such compromise did not affect the rights of creditors. *Rice v. Bizler*, I. 445.

2. A devise "to my wife Mary and son Jonathan, share and share alike, so long as she remains my widow," charged with the performance of certain duties and payment of money by Jonathan, creates in him but an estate during the widowhood of his mother; although there be no other disposition of the estate by the will. *Dixon v. Ramage*, II. 142.

3. Testator directed the residue of his estate (after legacies) to be divided into five equal parts, in the manner afterwards directed, and gave one-fifth to each of his children and the descendants of his deceased children; and further directed, that after making a computation of his worldly substance, should it appear to his executors that each legacy, or one-fifth, shall, after paying debts, amount to the sum of £10,000, then, if the surplusage is sufficient, a legacy of £300 is to go to the plaintiffs. He then appointed certain persons to make the valuation. This valuation never was made. At the testator's death, and for 15 years after, the value of the whole estate, after debts paid, was not £50,000, and could not have been so valued: but at the time of this suit brought, in 1839, owing to judicious management, and rise in value of unimproved lands, the proceeds of the estate equalled £50,000. *Held*, the plaintiffs were not entitled to recover. *Pennsylvania Hospital v. Stewardson*, III. 93.

4. Devise of part of residue to M. S., her heirs and assigns, in trust that she shall use the rents, issues and profits thereof, and the issues and interest thence arising for the benefit of S. B. S., during

DEVISE.

life, &c., and after his death that she convey the devise to such child or children as the said S. B. S. shall have, in equal proportions in tail. In the conclusion of his will, the testator gave his executors power to sell, convey, or alter the whole, or any part of his said estate; but directed that the money or proceeds thence arising, be settled in the same manner, as the property sold would, according to the direction of his will, have been, in case it had not been sold. The personal estate proved insufficient to pay the testator's debts, and the executors sold the real estate, and converted it into money. *Held*, that the residue thereof, left after paying debts and legacies, was to be deemed money, and that the children of S. B. S., surviving him, took it absolutely. *Wharton v. Shaw*, III. 124.

5. Devise to testator's wife of "her residence during life, which is to be taken out of the premises which I now dwell on," with an annual allowance for her maintenance; then to his two sons, G. and E., subject to the payment of certain legacies, all his leasehold estate of and in all those messuages situate in the aforesaid township and county. The testator had no other real estate than the one in dispute, and his son G. was farming the land under a contract with his father in nature of a lease. *Held*, that G. and E. took a fee in the land. *Saylor v. Kocher*, III. 163.

6. Bequest to executors, and the survivor of them, in trust for R. C. H. the sum of \$30,000, to be by them invested for his use, and that of his legal representatives, either in real or personal estate, according to their best discretion—the legacy to be paid at the end of three years after decease of testator, unless in the judgment of the executors, or survivor, it may sooner be paid without injury to his estate generally, and to the interests of those to whom the residue was given. *Held*, that after the three years, action lay by the legatee to recover it. *Hemphill v. Hurford*, III. 216.

7. J. S., by his will, devised his real estate to his executors to be sold, and the proceeds thereof to be divided among his children, two of whom were married women. The legatees, together with the husbands of those who were married, entered into a written agreement that the land should not be sold, but "that each heir and devisee to hold land in proportion to the sum bequeathed them," and allotting to each legatee, by name, a particular part of the land. *Held*, that this was an election to take land instead of money, by which the fee-simple was vested in the legatee and not in her husband. *Hannah v. Swarner*, III. 223.

8. A bequest to A. of "all the residue and remainder of my estate, of whatsoever kinds the same may be, subject to the maintenance of my son J., during his natural life," that residue consisting of personal estate, creates a trust for the benefit of J., and makes A. the trustee. *Pierce v. M'Keehan*, III. 280.

9. My wife E. shall have all what I have, both real and moveable property, in her possession, to do and act as she thinks good and proper; all shall be let in her power, that is into the hands of my wife." *Held* to create an estate in fee in the lands of which the testator died seised. *Dice v. Sheffer*, III. 419.

DEVISE.

10. A testatrix, by her will, devised a part of her plantation to her son, and another part to her three daughters, and authorized her son, whom she appointed her executor, with the consent of her three daughters to sell the plantation if he thought proper. He sold the whole tract, with the assent of the daughters, for a certain price per acre. *Held*, that the devisees were entitled to the purchase money in the proportions measured by the quantity of land devised to each, without regard to value as to quality. *Elliott's Appeal*, III. 440.

11. A testator devised "to my daughter A. I give and devise the farm where I live, provided she does not get married. Should she get married, the said property shall be given up, and in lieu thereof I give and devise to her \$500. Should she die or get married, then the property willed to her to be sold, and equally divided amongst the surviving heirs; A. to be considered as one of the heirs." A. died unmarried. *Held*, that the proceeds of the sale of the farm were to be divided among the surviving children and grandchildren of the testator: and that the executor of A. was not entitled to any part of it. *Hankin's Estate*, IV. 300.

12. Devise to testator's wife of his real and personal estate, for her to be master and overseer of the whole until his son C. shall arrive at the age of 21, and then she is to be genteely maintained by his son C. during her natural life; if she married, to have only the property she possessed when married; and provided she married before his son became of age, his executors were to lease or hire out the farm, and that money to be put to interest for the use of his son C. when he became of age, when he was to enter into full possession. He also gave him other specific lands, and then declared, "and the said land is all entitled to my son C. so that he shall not sell or dispose of the same." He then gave legacies to several daughters, to be paid by C. by instalments, after he came of age. *Held*, that C. took an estate tail by the devise. *Dewitt v. Eldred*, IV. 414.

13. Wherever there is an express limitation of the interest devised, a direction that the devisee shall pay pecuniary legacies does not make his interest a fee-simple. *Ibid*.

14. A devise of estate, land and plantation, to S. S., by her freely to be possessed and enjoyed, but in case she shall happen to die without children and heirs of her body, then over, creates an estate tail. *Shoemaker v. Hufnagle*, IV. 437.

15. Testator bequeathed the sum of \$10,000 to his executors, in trust, to put the same out at interest, and pay and apply the interest and income thereof, from time to time as it should be received, unto his sister K. for and during all the term of her natural life, and from and after her decease the said sum over; and died leaving upwards of \$44,000 invested at interest. *Held*, that K. was entitled to the interest of the \$10,000 for the year after the testator's death. *Hilyard's Estate*, V. 30.

16. Where a sum of money is bequeathed by will, the legatee is not entitled to interest for the year after the death of the testator: it is otherwise where the bequest is of an income or annuity. *Ibid*

DEVISE.

17. The 10th section of the Act of 8th April 1833, which provides that real estate acquired by a testator after the date of his will shall pass by a general devise, does not apply to a will dated before its passage. *Mullock v. Souder*, V. 198.

18. Ground-rents reserved in a conveyance by the testator after the date of his will, are considered as property newly acquired after such date. *Ibid*.

19. Testator by his will ordered that of the money in his house, or due him on obligation at his decease, his executors should put the sum of £500 on interest to be well secured, and that his wife might draw the interest thereof annually during her natural life, and then over. They invested that sum in stock of the Bank of the United States, which depreciated during the life of the widow and afterwards, so that it was nearly lost. *Held*, that the executors were liable to the legatees over for the loss. *Nyce's Estate*, V. 254.

20. A guardian of minor children entitled to part of such legacy, by merely giving an opinion that it was a safe investment, and purchasing it for the executors, but not assenting thereto, does not exonerate the executors from liability for the portion of such minor children in the legacy. *Ibid*.

21. Besides the general introductory clause, the will proceeded, "As also my household furniture to be at her own disposal which I may have at my decease, and the remainder of my personal estate, if any shall be, not hereinbefore or hereinafter specified, to be equally divided to and among my grandchildren, share and share alike, excepting what is herein reserved and bequeathed." *Held*, that the surviving grandchildren after the widow's death took the £500, and the testator did not die intestate as to it. *Ibid*.

22. A testator devised to his son an estate in trust for the following purposes: "that he shall possess, occupy and manage the same, and conduct and carry on the business there, and to trade, deal, barter, buy and sell in and for all things that pertain to the said estate and its business, or its products, during his natural life; and out of the profits thereof from time to time to make such investments or purchase of other property, real or personal, for the same uses, purposes and trusts, to wit, for the use of such child or children as the said son shall have at the time of his death; and if he shall die without issue, then for the use of such person or persons as shall be his heir or heirs at law at the time; giving to the devisee the discretion and power to sell the estate, and out of the proceeds thereof to make such other investments, real or personal, or to commence, conduct and carry on such other business for the benefit of the *cestuis que trust* as he may deem most advantageous; subjecting the estate devised, or its proceeds or investments, to such debts only as shall be contracted in the execution of the trust. And in consideration that the son shall and will undertake and continue to execute personally and perform the trusts committed to him, he shall be allowed a reasonable support out of the trust fund for his personal services rendered." The testator then declares his purpose in creating this trust to be, that the creditors of the son may not

DEVISE.

deprive him of that bounty which he thus appropriates for his maintenance. *Held*, that the estate was not subject to execution for the debts of the son contracted previously to the devise. *Ashhurst v. Given*, V. 323.

23. A tenant in common of a tract of land, devised to his co-tenant his estate, upon condition that he would convey to his daughter a certain part of the land. After the death of the testator the devisees took possession and enjoyed for a long time their respective portions; but no conveyance was ever executed. *Held* to be a substantial compliance with the requisitions of the will, and that the devise was not forfeited by the omission to convey. *Plummer v. Neile*, VI. 91.

24. "Concerning my real estate, I do give, devise, demise and bequeth unto my wife all that lot of land whereon I now dwells, together with all the appurtenances, &c.; and all the residue and remainder of my real and personal estate not bequeathed, whatsoever it may be, I give and bequeath to my wife; and after her decease and funeral expenses is paid of, it is my will what is left, whatever real or personal or money, is to go to the S. society," &c. The testator's wife died before him. *Held*, that the wife took an estate for life in the lot in question, with vested remainder to the society, which became entitled to an immediate estate in possession on the testator's decease. *Zimmerman v. Anders*, VI. 218.

25. A devise to an association for religious purposes, unincorporated at the testator's death, but since incorporated, is good in Pennsylvania. *Ibid*.

26. "It is my will that all the residue of my estate, real and personal, I give and bequeath unto my wife during her natural life, to do and dispose of as she may think best," vests only a life estate in the wife. *Fisher v. Herbell*, VII. 63.

27. Devise of land to testator's son P. to have and to hold to him, his heirs and assigns forever, but reserving the rents and profits to the use of testator's daughter E. until P. shall arrive at the age of 21, bequeathing them to his daughter during said term. In case P. should die and leave no lawful issue, then devising the land to E. if she shall then be living, and to her heirs and assigns forever; and if she should die and leave no lawful issue, then over. *Held*, that P. took an estate in fee with an executory devise over to E., and as P. attained the age of 21 and married and had issue, his estate became a fee-simple absolute. *Langley v. Heald*, VII. 96.

28. "I give and bequeath unto my loving wife all my real and personal estate that I may have been found possessed of at my death, to hold and dispose of as she may think best; and that no other person is to have any claim whatsoever." *Held*, that the devisees took an estate in fee-simple. *Culbertson v. Duly*, VII. 195.

29. An heir-at-law can only be disinherited by express devise or necessary implication; hence, in the construction of a will of doubtful meaning, every fair intendment is to be made in favour of the heir-at-law. *Bender v. Dietrick*, VII. 284.

30. A testator thus devised: "I give and bequeath to my son J

DEVISE.

R. S. during his natural life, the rents and profits of my farm, and at his death to his children and their heirs, if he has any; if not, to his heirs in fee-simple for ever." *Held*, that the words "heirs in fee-simple for ever" are words of limitation and not of purchase; and by virtue of the rule in *Shelly's Case*, vested in the devisee the two estates until the intervening contingent limitation might take effect, which never did, he having died unmarried and without issue, and hence died seised of an estate in fee.

Such estate may be levied and sold without inquisition or condemnation during the life of the devisee, for when the estate is uncertain as to duration, no inquisition is necessary. *Stewart v. Kenover*, VII. 288.

31. A devise of land to A. "to be enjoyed during his life, and at his death to be enjoyed by his heirs, so on in tail for ever," creates an estate tail. *Elliot v. Pearsoll*, VIII. 38.

32. After several devises and bequests, testator proceeded as follows: "All the residue and remainder of my estate, of every description and wherever found, I order and direct to be divided into twenty-two shares, and divided as follows, to wit: S. M. four shares, &c.;" then naming thirteen others, and giving each a different number of shares, the aggregate amounting to but twenty shares. *Held*, that the remaining two shares were undisposed of by the will, and did not pass to the legatees named. *Duffield v. Morris*, VIII. 348.

33. Testator devised certain property to his wife and son T., their heirs and assigns for ever, as tenants in common, charging T. with \$100, to be paid to his daughter J., and the wife with \$100, to be paid to his grandson; and proceeded thus: "And as to the rest and residue of my estate, real or personal, &c., I give and bequeath the same to all my other children, with the exception of my daughter J and the wife of E. M., to be equally divided among them, share and share alike." The testator left, at his decease, other children besides those mentioned in the will. *Held*, that T. was entitled to a share in the residue beyond that devised to his mother and himself as tenants in common. *Leidich v. Leidich*, VIII. 363.

34. "To my nephew T. I give and bequeath all my estate, real and personal, he paying the legacies hereinafter mentioned:" *Held*, to create a charge upon the land devised; and upon a sale of it by the sheriff as the property of the devisee, the legacies are payable out of the proceeds. *Tower's Appropriation*, IX. 103.

35. A testator devised "unto my son W, all the houses and build ings of what nature and kind soever, that are situate at or about 'Peach Bottom,' on my lands there, and the land whereon they stand, and as much land adjoining as is absolutely necessary for egress and regress, and also the land occupied by the saw-mill. And the residue of all the 'Peach Bottom' lands I give and bequeath to my sons W and A, their heirs and assigns for ever, as tenants in common." *Held*, to vest a life estate in the houses and land specifically devised in W, and the remainder in fee in W and A as tenants in common: and upon a proceeding in partition between W and A

DEVISE.

whereby the said houses and land were allotted to W, he became seised of the absolute estate in fee. *Brown v. Boyd*, IX. 123.

36. A testator devised his real estate to his executors to be sold, and directed that the proceeds should be divided between his two daughters. The guardians of the legatees became the purchasers in trust for their wards, and upon their marriage made a conveyance to their husbands of the tract of land. The husbands subsequently divided the land, and mutually executed deeds to each other. *Held*, that the husbands took nothing by the deeds from the guardians to them but the naked legal title, and upon their death the fee remained in the wives. *Kaufman v. Crawford*, IX. 131.

DEVISAVIT VEL NON

EXECUTORS, &c., 9.

DISCONTINUANCE.

PRACTICE, 3.

PRINCIPAL AND SURETY, 4.

DISSEISIN.

A mere entry by a widow into the land of her deceased husband, claiming it, and taking the rents and profits for twenty-one years, is no disseisin of the heirs at law; to make it such, there must be some plain, decisive, unequivocal act or conduct on the part of the widow, amounting to an adverse and wrongful possession and disseisin of the heirs. *Hall v. Mathias*, IV. 331.

DISTRESS.

BANKRUPT, 7.

LANDLORD AND TENANT, 8.

TAXES, 7, 8, 9.

1. The remedy by distress incident to a widow's annuity, ascertained by a proceeding in the Orphans' Court, in partition under the intestate laws, is not one to which there can be any equitable subrogation. It is a personal remedy which belongs to the widow, and which she cannot use for the benefit of another, who had previously paid the annuity to her.

If land subject to a widow's annuity, be divided into several parts, by the heir who takes it at the valuation in the Orphans' Court, the widow cannot apportion her annuity, and make a several distress upon each part: she can distrain but once, and for the whole amount. *Shouffler v. Coover*, I. 400.

2. The property of a tenant holding by a renewed lease, is not subject to be distrained by the landlord for the payment of the arrears of rent for the previous year, if a third person has acquired an interest in the property. *Beltzhoover v. Waltman*, I. 416.

3. Rent payable in iron may be recovered by distress. *Jones v. Gandrim*, III. 531.

4. A distress for rent may be made by parol authority; but if the
IX. — 37

DISTRESS.

warrant be written, the law requires no set form of words, more than will express the authority of the landlord. *Ibid.*

5. Tenants in common, who make a joint lease to a tenant for years, may join in making a distress for rent. *Ibid.*

6. A landlord cannot distrain goods for rent which have been previously levied upon on an execution or foreign attachment. *Pierce v. Scott*, IV. 344.

7. Goods consigned to a commission merchant to be stored or sold are not subject to a distress for rent or execution for the debt of the consignee; but if he have not the character of a commission merchant, and it do not clearly appear on what terms or for what purpose the goods were consigned, the law is otherwise. *Bevan v. Crooks*, VII. 452.

8. The owner of a chattel in the possession of a tenant which has been distrained for rent and sold, cannot maintain trover for it against the landlord, where notice of the distress was given to the tenant *Caldcleugh v. Hollingsworth*, VIII. 302.

DISTRICT COURT.

BILL OF EXCEPTIONS, 2, 3.

ORPHANS' COURT, 6, 7.

1. The District Court of the city and county of Philadelphia had power to establish the 1st and 2d rules of February 19th 1842, requiring a defendant by his affidavit to deny the execution of the instrument on which the suit was brought, and in suits by or against partners, to deny the existence of the partnership, or otherwise the plaintiff need not prove them on the trial. *Odenheimer v. Stokes*, V. 175.

2. The District Court is a court of record, and not an inferior court. *Commonwealth v. District Court*, V. 272.

DISTRICT COURT OF MERCER COUNTY.

Under the provisions of the law establishing the District Court of Mercer county, after a cause has been referred to arbitrators, an award made and appeal by the defendant, the plaintiff cannot sign judgment for want of an affidavit of defence. *Lusk v. Garrett*, VI. 89.

DISTRICT COURT OF THE UNITED STATES.

ADMIRALTY, 1.

The District Court of the United States is a court of record, and is not to be regarded as an inferior court, so that their proceedings in causes not within their jurisdiction may be deemed void, and questioned collaterally. *Thompson v. Lyle*, III. 166.

DISTURBANCE.

The disturbance of a member of a religious congregation, while engaged in religious exercises in the church, by making loud noises

DISTURBANCE.

in singing, reading, and talking, is an injury for which no action can be maintained by him. *Owen v. Henman*, I. 548.

DIVISION LINE.

If the "summit of a mountain" be by law made the division line between counties, and the mountain be not continuous, but breaks off and the ends pass each other, forming an intervening valley between them, upon the one side of which the mountain is gradually sinking and terminating, and on the other it is commencing and rising; a line from one to the other, at or about the place where the respective mountains acquire an equal height, is the legal dividing line; and no common usage or assent of the authorities of the two counties, would alter this so as to affect a title to land older than the usage itself. *Beale v. Patterson*, III. 379.

DIVORCE.

HUSBAND, &c., 9.

The refusal by a foreigner who arrives and becomes domiciled here, to receive his wife who follows him hither, is a virtual turning her out of doors, and the Court of Common Pleas may decree her alimony. *M' Dermott's Appeal*, VIII. 251.

DOCKET.

JUDGMENT DOCKET.

DOMESTIC ATTACHMENT.

1. A domestic attachment may issue upon a debt which is not due and payable, if there be in other particulars a sufficient ground for it. *M'Cullough v. Grishobber*, IV. 201.

2. In an action for maliciously suing out a writ of domestic attachment, it is enough for the defence that the suspiciousness of the plaintiff's conduct had made recourse to an attachment a measure of reasonable precaution, irrespective of the fraudulent intention of the debtor. *Ibid.*

DONATION LAND.

1. The titles to donation land which had been located by mistake within the Triangle, and allotted to soldiers of the revolution, prior to its acquisition by the State of Pennsylvania, were confirmed by the subsequent purchase; and those lands were, therefore, not subject to appropriation by warrant and survey; but they were subject to assessment as unseated, and to be sold for the payment of taxes, and such sale confers a good title upon the purchaser. *M'Call v. Coover*, IV. 151.

2. The location of the 10th donation district, so far as the same fell within the Triangle, although prior to the acquisition of the territory by the State of Pennsylvania, was not void; but the subsequent purchase of it by the State confirmed the location and titles under it

DONATION LAND.

for all the purposes of assessment and sale of the lands as unseated for the payment of taxes. *M'Call v. Himebaugh*, IV. 164.

3. Lands embraced within the donation districts and appropriated to the officers and soldiers of the revolution, although within the Triangle and located prior to the acquisition of it by the State of Pennsylvania, were not the subject of appropriation by warrant and survey. *M'Call v. Yople*, IV. 168.

4. The number of a tract of donation land marked upon the ground, is the best evidence of designation, and must prevail where it differs from all others. *Dunn v. Ralyea*, VI. 475.

DOWER.

EVIDENCE, 32.

PARTITION, 8.

1. The acceptance by a widow of her share of her deceased husband's intestate estate, under the Statute of Distributions, is not an election such as will bar her from recovering dower out of land which her husband had aliened in his lifetime. *Leinaweaver v. Stoeper*, I. 160.

2. A suit after the widow's death to recover the principal sum of her dower charged on land sold by the administrator under the order of the Orphans' Court, one-third of the purchase money to be paid on the confirmation of the sale, one-third in one year thereafter with interest, and one-third to remain charged on the premises for the use of the widow, may be brought either by the administrator to whom the bond was given or the heir entitled. *Unangst v. Kraemer*, VIII. 391.

3. The suit ought to be brought against the purchaser at the Orphans' Court sale, who gave his bond to the administrator, or one who purchased of him by a later conveyance of the land chargeable with the money, and gave a similar bond, with notice to the terre-tenant in both cases. *Ibid.*

4. Such terre-tenant is not liable unless he took upon him the payment, and then he is personally bound. *Ibid.*

5. This case distinguished from *Pidcock v. Bye*. *Ibid.*

6. The defendant in such suit, after the first two instalments have been paid, cannot object to irregularity in the proceedings of the Orphans' Court in ordering the sale. *Ibid.*

7. It is evidence to rebut the presumption of payment in such case arising from the lapse of twenty years since the widow's death, that the bonds were not given up and some payments were made, though it does not distinctly appear they were on that account. *Ibid.*

DE AFT.

EVIDENCE, 47.

DRUNKARD.

INTOXICATION.

A person found by inquisition to be an habitual drunkard, is not

DRUNKARD.

thereby deprived of his power to perform the office of executor or administrator. *Sill v. M'Knight*, VII. 244.

EASTERN PENITENTIARY.

Criminals sentenced to confinement at labour in the Eastern Penitentiary, must be removed there at the expense of the county where they are convicted. *Lancaster Co. v. Roberts*, V. 505.

EJECTMENT.

ATTORNEY AT LAW, 7.
 BOARD OF PROPERTY, 1.
 CONTRACT, 6.
 DEED, 27.
 ERROR, 4, 21.
 EVICTION, 1.
 EVIDENCE, 75, 82, 97, 98.
 FRAUD, 6.
 IMPROVEMENT, 3.
 JOINDER IN ACTION, 2, 3.
 JUDGMENT BY DEFAULT, 1.
 JUROR, 5.
 LIMITATION, 14.
 MESNE PROFITS, 1, 2.
 SHERIFF'S SALE, 5, 14, 23.
 TENANT IN TAIL, 1.
 TITLE, 1.
 UNSEATED LAND, 5, 36.
 VENDOR, &c., 16, 58, 60, 68, 69, 70, 71.
 WARRANT AND SURVEY, 24.
 WITNESS, 39, 40.
 WRIT OF ERROR, 3.

1. An equitable right to the possession of land is sufficient to enable a plaintiff to recover in ejectment.

A *cestui que trust*, entitled to the enjoyment of the possession of land, may maintain an ejectment to recover it in his own name, either against the trustee or a stranger. *Presbyterian Congregation v Johnston*, I. 9.

2. In ejectment, the declarations of a deceased occupant of land, respecting the title, made against his interest, have always been received in evidence.

If a purchaser of land, either at sheriff's or treasurer's sale, take possession of a wrong tract, under a mistaken impression as to its location and identity, this will not preclude him, when he discovers his mistake, from asserting his right to that which he did purchase. *Hiester v. Laird*, I. 245.

3. If an action of ejectment be brought by an executor, it is competent for the defendant to give in evidence a former ejectment by the plaintiff in his individual right, to show that he claimed the land as his own, and not in his representative capacity.

If, in an action of ejectment, the defendant set up such a defence

EJECTMENT.

as defeats the plaintiff's action, and a second ejectment be brought by the same plaintiff, the defendant may repudiate the defence which he made in the first action, and defeat the plaintiff's recovery upon other grounds. *Rice v. Bizler*, l. 445.

4. In an action of ejectment, a defendant is not estopped from setting up a title under the Statute of Limitations by the fact, that he took a warrant for the land, and fixed a period for the commencement of interest within twenty-one years from the time of suit brought: it appearing also, that a previous warrant had been granted for the land to one under whom the plaintiff claimed.

If one enter upon land claiming but without title, and die in possession, leaving a widow and children, one of whom continues in possession, and conveys the land to a third person, who goes into possession and continues it to a period beyond twenty-one years, the law will tack these possessions together so as to make a good title under the Statute of Limitations, the title being out of the commonwealth. *Graffius v. Tottenham*, l. 488.

5. In an action of ejectment against one who enters without right, if the plaintiff show that the title to the land in dispute is out of the commonwealth, that taxes were assessed upon it, and that he holds a deed of the sheriff who sold it for the non-payment of taxes previously to the Act of 1815, it is such a *prima facie* title as puts the defendant to the necessity of showing a better right; which if he fail to do, the plaintiff is entitled to recover.

To recover upon a title founded upon a sale for taxes prior to the Act of 1815, the plaintiff must show a strict compliance with the requisitions of all the Acts of Assembly authorizing sales in such cases, or he must show what would amount to an abandonment of the title by the original owner; and if it appear that such original owner had not looked after the land, and had not paid any taxes for it for upwards of twenty-one years, it would amount to an abandonment, and the holder of the tax title would be entitled to recover upon it against one who showed no title, and was a mere intruder.

In an action of ejectment, upon the trial of which the defendant gave no evidence, but relied upon the insufficiency of the plaintiff's evidence in support of his title, it is not error in the court to instruct the jury that it is sufficient to entitle him to recover. *Foust v. Ross* l. 501.

6. If a plaintiff in ejectment ask for specific execution of a contract for the sale of land, he cannot recover, if it appear that he has been guilty of laches and such conduct as was calculated to induce the other party to suppose that he had abandoned his contract: and especially if he had permitted so long a time to elapse as that a legal title would have been barred by the Act of Limitations. *Zeigler v. Houtz*, l. 533.

7. Where an ejectment is served on a tenant who does not notify his landlord to appear, the court will open a judgment obtained by default and permit the landlord to be made defendant and contest the title.

But this will not be permitted on the application of one who is in

EJECTMENT.

possession, and states himself to be the agent of other persons, who have long since sold, and admits he has never paid rent; though he says he has made repairs. *Wharton v. Botham*, III. 158.

8. A recovery in our form of ejectment is conclusive of the plaintiff's right to the profits which accrued in the interval between such recovery and a subsequent recovery by the adverse party. *Postens v. Postens*, III. 182.

9. In an action of ejectment against four defendants, upon all of whom the writ had been served, and against all of whom some proof had been given, the refusal of the court to direct the jury to find a verdict for two of them, that they might be examined as witnesses for the other two, is not error. *Brotherton v. Livingston*, III. 334.

10. In an action of ejectment, a verdict "for 2 acres, 28 perches, and $\frac{1}{100}$ of a perch, with six cents damages," &c., it being but part of the lot for which the action was brought, is incurably bad. *Borough of Harrisburg v. Crangle*, III. 460.

11. If a vendor of land or real estate, after having put the vendee in possession agreeably to the terms of sale, and received part of the purchase money, take possession of it again and use it, without the consent of the vendee or his heirs, he or his assignee to whom he has sold the land a second time, is chargeable in an action of ejectment brought against either by the first vendee or his heirs, with the rents, issues and profits, as long as he holds and uses the same, to be applied to satisfy any balance that may be due and unpaid, of the purchase money at the time of retaking the possession, so far as the profits may be requisite for that purpose, when sufficient to answer it.

If the regaining the possession by the vendor in such case, be effected by means of collusion with the tenant of the first vendee or his heirs, it is not necessary that a tender of the residue of the purchase money should be made by the latter before instituting an action of ejectment to recover the possession.

The defendant in the ejectment in either case, will not be permitted to give evidence of the value of the improvements made by him on the land, which were not necessary for the profitable enjoyment of it. *Wykoff v. Wykoff*, III. 481.

12. A grantor with covenant of general warranty is not a competent witness in an action of ejectment, in which the outstanding title granted by him is set up as a defence. *Goodman v. Losey*, III. 526.

13. Where the title of the plaintiff in ejectment was to accrue on the dying of another person without issue under 21, he is bound to show in ejectment that both these events have happened; and if he give evidence only of his death under 21, it is not sufficient, though the defendant put his case on no such footing in his opening, but reserved his objection till the last. *Clark v. Trinity Church*, V. 266.

14. If a plaintiff in ejectment, after action brought, part with his title, the vendee cannot be substituted, so as to enable him to recover in that action. *M'Culloch v. Cowher*, V. 427.

15. A plaintiff in ejectment, who had no title at the commence-

EJECTMENT.

ment of the action, cannot recover, although he acquired title before the trial. *Ibid.*

16. A plaintiff in ejectment, who parts with his title after the commencement of the action to his co-plaintiff, is not entitled to recover a verdict for the land for the use of the vendee, nor can such co-plaintiff recover on the title thus conveyed to him. *Ibid.*

17. A verdict and judgment in ejectment are not evidence against one not a party or privy in another ejectment for the same land, and where the same title is in dispute. *Timbers v. Katz*, VI. 290.

18. In ejectment, one who is neither party nor privy to the action, though an occupier of the ground in dispute for a time previous to the bringing of the ejectment, cannot be affected by the judgment that may be given in it, and is therefore a competent witness for the plaintiff. *Reid v. Stanley*, VI. 369.

19. Though a recovery for mesne profits cannot be had till possession is recovered, yet a possession gained by the owner's entry is sufficient without the necessity of an ejectment. *Ibid.*

20. Though a former verdict in ejectment between the same parties ought not as a general rule to control the verdict in another, yet if the latter is delayed for more than 20 years after the facts occurred, the former verdict ought not to be disturbed. *Wilson v. Bigger*, VII. 111.

21. To give effect to two verdicts and judgments in ejectments as a bar to another, it is necessary not only that they should have been for the same land, and between the same parties or those claiming under them, but that they should have been upon the same title. *Treaster v. Fleisher*, VII. 137.

22. Upon a verdict and judgment in ejectment by a vendor against a vendee, to compel the payment of the purchase money and a conditional verdict and judgment, after the time for the performance of the condition has passed and the plaintiff has taken possession by an execution, he again becomes the absolute owner. *Ibid.*

23. In an action of ejectment by several plaintiffs, some of them may suffer a non-suit, and the trial proceed to verdict and judgment for the others. *O'Keson v. Silverthorn*, VII. 246.

24. In ejectment the verdict must be certain in its description of the premises recovered; if it be of part of a tract of land, it must describe it by reference to something of a permanent and public nature, such as a line marked upon the ground, a recorded deed, or a diagram filed of record with the verdict. A verdict for the land "which lies west of the line testified to by R. S." is bad. *Ibid.*

25. In an action of ejectment wherein the defendants set up an outstanding lease by the plaintiff to a tenant as a defence, it is competent for the plaintiff to explain by parol evidence what land was embraced in the terms of the lease, or to show a parol surrender of the lease so far as it embraced the land in dispute, by the tenant before the action was brought. *Tate v. Reynolds*, VIII. 91.

26. In an action of ejectment when either party claims by virtue of the Act of Limitations, it is competent for him to give in evidence

EJECTMENT.

his own declarations made at the time he went into possession, in order to show that his entry was adverse. *Miles v. Miles*, VIII. 135.

27. In an action of ejectment, where the question arises upon the validity of the original title of the parties, and not upon the extent of the claim or the Act of Limitations, the payment of taxes for the land by one party or the other cannot affect the title, and is therefore illegal evidence. *Quin v. Brady*, VIII. 139.

28. One who has made a lease for years of his land to a tenant in possession cannot maintain ejectment until the lease expires. *Stoffit v. Trozell*, VIII. 340.

29. To make a former verdict, and the testimony therein given, evidence in a subsequent trial of an ejectment, it must have been between the same parties or their privies, and in relation to the same title. *Sample v. Coulson*, IX. 62.

30. In an action of ejectment by a vendor against a vendee, to compel the payment of the purchase money, it is essential to the plaintiff's right to recover that he show a good title to the land vested in himself. *Creigh v. Shatto*, IX. 82.

ELECTION.

DEVISE, 7.

DOWER, 1.

LEGACY, 5.

VENDOR, &c., 19.

If land be devised to an executor, to be sold, and the proceeds to be divided among the testator's children, and the children convey the land to the executor, their deeds are evidence of an election on their part to take land instead of money. *Rice v. Bizler*, I. 445.

EMBLEMENTS.

VENDOR, &c., 8.

ENCOURAGEMENT.

IMPROVEMENT, 2.

ENCUMBRANCE.

CONDITIONAL VERDICT, 2.

PARTITION, 5.

UNSEATED LAND, 30.

VENDOR, &c., 15, 22, 27, 28, 29.

ENDORSER.

BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 2, 3, 4.

In a question between the holder and endorser of a note regarding the exoneration of the latter on the ground of the negligence of the holder, it is error to permit the endorser to give evidence of the ability of the payor at a period when it was not in the power of the holder to enforce payment. *Bank of Pennsylvania v. Reed*, I. 101.

IX. — 38

ENTRY.

DISSEISIN, I.

EQUITY.

JURISDICTION, 7.

The Act of Assembly conferring on the courts chancery power in certain cases, does not oust the jurisdiction of the common law courts exercising equity under common law forms. They are concurrent remedies, and a plaintiff may elect either. *Aycinena v. Peries*, VI. 243.

EQUITABLE TITLE.

An equitable right to the possession of land is sufficient to enable a plaintiff to recover in ejectment.

A *cestui que trust* entitled to the enjoyment of the possession of land, may maintain an ejectment to recover it in his own name, either against the trustee or a stranger. *Presbyterian Congregation v. Johnston*, I. 9.

EQUITY JURISDICTION AND PRACTICE.

TRUST AND TRUSTEE, 6.

1. The plaintiff's bill charged, that the defendants were depositors and trustees for the plaintiff of large sums of public moneys, which they threatened to apply to their own use, and that they had misapplied and converted to their own use large portions thereof, and prayed an injunction to restrain them from paying out said trust moneys, or assigning any of their effects, on which an injunction issued after notice, and without objection. Afterwards, by consent, the defendants were allowed to pay to the use of the plaintiff the amount deposited and the current expenses of the Bank, without prejudice. The defendants, some time after, filed their answer, denying that they were trustees, and that they had received the moneys otherwise than as deposits in the usual course of business, and answering the other parts of the bill, and praying a dissolution of the injunction. An Act of Assembly was then passed to enable the defendants to make an assignment, which, in the first section, enacted that such assignment should be made, if approved by the stockholders; *provided*, the Commonwealth should have a right of voting in the election of assignees proportioned to her number of shares. The other sections prescribed the duties and powers of the assignees, and the last section declared, that before any assignment should be made, the defendants should pay the debt due to the Commonwealth. The stockholders resolved to assign, and elected assignees, but the election was held void by the Supreme Court, in consequence of the imperfections of the proviso, in relation to the number of votes the plaintiff was entitled to. *Held*, that the other parts of the Act remained in force and effect, and by them the Commonwealth was secured a priority of payment, and that the injunction ought not to be dissolved. *Commonwealth v. Bank of Pennsylvania*, III. 184.

2. The equity powers of the Supreme Court are, as to individuals,

EQUITY JURISDICTION AND PRACTICE.

circumscribed within narrow limits; but over corporations they are general and unlimited, and to be exercised in the ordinary mode of a court of chancery. *Ibid.*

3. If a corporation is trustee, and the plaintiff has a priority of payment, injunction lies to restrain a misapplication of their funds. *Ibid.*

ERASURE.

DEED, 33.

VENDOR, &c., 60.

ERROR.

ABANDONMENT, 5.

CONTRACT, 11.

EVIDENCE, 2, 5, 7, 15, 72.

JUDGMENT, 5.

REVERSAL.

SLANDER, 2.

TRESPASS, 13.

TRIAL, 1, 2, 4, 5.

VENDOR, 45.

WARRANT AND SURVEY, 20.

WITNESS, 16.

1. If the court, in their charge to the jury, refer to the evidence and comment upon it, it is but right that they should bring every part of it which bears upon the point to their notice, so that they may not be misled. And if the court instruct the jury that they can see no evidence which leads to a certain conclusion, when there is such evidence, it is error. *Nieman v. Ward*, I. 68.

2. A misapprehension by the court of the construction of an agreement by reason of which in their charge they mislead the jury, is good ground of reversal. *Stroh v. Hess*, I. 147.

3. An amendment at common law is not the subject of a writ of error. *Davis v. Church*, I. 240.

4. A judgment will not be reversed for the admission of illegal evidence, which could have had no influence in the result of the cause. *Sergeant v. Ford*, II. 122.

5. A judgment will not be reversed because of a wrong direction to the jury upon a point which became immaterial, in consequence of a right direction upon another point which was fatal to the whole defence. *Chambers v. Bedell*, II. 225.

6. A writ of error does not lie to the Court of Common Pleas upon its refusing to open a judgment, or to receive the acknowledgment of a sheriff's deed. *Braddey v. Brownfield*, II. 271.

7. It may not be error for the court below to admit or reject evidence, where its pertinency or materiality does not distinctly appear to a court of error. *Hocker v. Jamison*, II. 438.

8. It is error in a suit on a promissory note or bond in which the signature of the defendant is disputed on the ground of forgery, and

ERROR.

an attorney of the court is a witness for the plaintiff, if the court charge the jury that such witness "is charged with high crimes—crimes, if true, that would drive him from the bar and disgrace him for ever," that not being the issue trying, nor necessarily connected with its determination. *Ibid.*

9. The court ought not to submit to the jury a point put by counsel, where there is no evidence to sustain it. *Urket v. Coryell*, V. 60.

10. It is no error that the court did not charge on a specified point without any prayer to that effect. *Brittain v. The Doylestown Bank*, V. 87.

11. The admission of evidence in the court below, by which the plaintiff in error could sustain no prejudice, is not material. *Hunting v. Young*, V. 188.

12. In a criminal case, the court will not pass upon an assignment of error where the allegations of fact constituting it do not appear upon the record otherwise than as a reason for a new trial and in arrest of judgment. *Sampson v. Commonwealth*, V. 385.

13. The sufficiency or insufficiency of evidence to warrant a conviction of a felony cannot be the subject of consideration upon a writ of error. *Ibid.*

14. A party is entitled to an explicit answer by the court, in their charge to the jury, to every point of law submitted by his counsel; and it is error to omit to answer. *Noble v. M'Clintock*, VI. 58.

15. In the trial of a cause depending upon the facts in evidence, if the court in their charge to the jury review those only which have a tendency to establish one side of the case, it is calculated to mislead the jury, and is error for which the judgment will be reversed. *Parker v. Donaldson*, VI. 132.

16. In answering a point put so as to meet the view of the party making it, or so as to meet only part of the facts in evidence, it is not error, but the duty of the court to frame their answer so as to be applicable to the case trying and the evidence given. *Utt v. Long*, VI. 175.

17. A plaintiff in error cannot complain of the court's not answering a point which it was bound to answer against him. *Werkheiser v. Werkheiser*, VI. 184.

18. It is error to submit evidence to a jury with instruction that they may infer a promise to pay, when no such inference can legally arise from it. *Gilchrist v. Rogers*, VI. 488.

19. A writ of error can only be sued out by one who is interested in the judgment which he seeks to review. *Steel v. Bridenbach*, VII. 150.

20. If the court be requested to charge the jury upon certain points arising out of an allegation of fraud, and the record do not sustain the allegation of fact, the court will not inquire into the correctness or incorrectness of the instruction of the court to the jury. *Strawbridge v. Cartledge*, VII. 394.

1. In an action of ejectment, when the title of the parties de-

ERROR.

pends upon written evidence, it is error in the court to submit it to the determination of a jury. *Connelllogue v. English*, VIII. 11.

ESCAPE.

In an action on the case against a sheriff for an escape, the measure of damages is the actual loss which the plaintiff has sustained; hence, it is competent for the defendant to prove that the defendant in the execution was insolvent at the time of his escape; but in an action of debt the plaintiff is entitled to recover the amount of his judgment and execution. *Shuler v. Garrison*, V. 455.

ESTATE FOR LIFE.

A testator directed his whole estate to be appraised and valued, and devised all his estate, real and personal, to his six children, adhering to subsequent conditions, in six equal parts as near as may be, share and share alike, as tenants in common, and to their heirs for ever. As to his son S., he directed he should receive the income of his share during life, and after his death to go to his three daughters, or the survivor, in fee-simple—protesting against any sale or conveyance of the same, so as to injure the principal, or deprive them, &c. To his daughter M. he bequeathed a book, &c., and added, “I repeat it again, that all that I have willed to her of my real estate is to be handed down to her children in fee-simple, as tenants in common, she only to enjoy the income during her life, under the penalty, if by any manner whatever a conveyance or sale for term or length of time should be made, then the income to be taken out of her hands, and be divided between her brothers and sisters, preserving the principal for her children, to be secured and taken care of after her death by guardians appointed by the Orphans’ Court by no means related to them in any manner whatever—my daughter M. to have the management of the same during her life, but no other person. Then, in like manner, the portion that falls to my grandchildren, S.’s three daughters, (after deducting a certain sum), is to be secured to them, S. enjoying the income. I forbid any charge being made by either S. or those who have the bringing up the children, so as to obtain a hold of the property, till after the death of my son S. and daughter M. shall not be allowed.” *Held*, that M. had only an estate for life *Ellet v. Paxson*, II. 418.

ESTATE TAIL.

DEED, 13.

DEVISE, 12, 14, 31.

ESTOPPEL.

DOWER, 6.

EJECTMENT, 3, 4.

FRAUD, 3.

SETTLEMENT, 5.

WAY, 1.

An estoppel can only be asserted or pleaded by one who was

ESTOPPEL.

affected by the act which constitutes the estoppel. *Miles v. Miles*
VIII. 135.

EVICTIION.

A judgment in ejectment without more, is not an eviction which
will sustain an action of covenant on a general warranty of title
The eviction must be laid in the declaration, and proved. *Paul v.*
Whitman, III. 407.

EVIDENCE.

ADVANCEMENT, 1.
AGREEMENT, 4, 9, 10.
ARREST, 2.
BANK, 3.
BILLS, &c., 23.
BOND, 13, 14.
BOOK ENTRIES.
CHARTER, 1.
CONTRACT, 17.
COVENANT, 1, 3.
DECLARATIONS, 1.
EJECTMENT, 11, 17, 27.
EXECUTORS, 17.
EXECUTION, 16, 18.
FRAUD, 6.
HUSBAND AND WIFE, 6.
INSURANCE, 2, 3, 4, 5, 6.
JUDGMENT, 29.
LAND OFFICE, 1, 2, 3, 4.
LIMITATION, 19.
MASTER AND APPRENTICE, 1, 2.
MECHANICS' LIEN, 5.
MOB.
OFFICER, 6.
PAROL EVIDENCE.
PARTNERSHIP, 7, 9, 16, 32, 33, 34, 35.
PLEADING, 10, 11, 13.
PRINCIPAL AND AGENT, 20, 22.
REPLEVIN, 3.
REPLEVIN BOND, 5.
SCHOOL, 5.
SHERIFF'S SALE, 14, 24.
SLANDER, 5.
TENANT FOR LIFE, 2.
TRESPASS, 8, 13.
TRUST, &c., 7, 15, 27.
UNSEATED LAND, 18, 41, 44, 46, 48.
VENDOR, 33, 47, 48.
WARRANT AND SURVEY, 15, 16.
WASTE, 1.
WILL, 8, 9, 10.

EVIDENCE.

WITNESS, 1, 10.

WORK AND LABOUR, 2.

1. The book of an iron-master, containing an entry of the amount of wood taken up from the chopper, and the dockage of it, is not evidence in an action by the collier against the iron-master, to recover the price of coaling it. *Gamber v. Wolaver*, I. 61.

2. A return of survey into the Surveyor-General's office, and a lapse of twenty-one years afterwards, without any attempt made during that time to take exception or object to it, is conclusive evidence that it was regularly made.

Reputation and hearsay is such evidence as is entitled to respect in a question of boundary, when the lapse of time is so great as to render it difficult to prove the existence of the original land-marks.

If the court, in their charge to the jury, refer to the evidence and comment upon it, it is but right that they should bring every part of it which bears upon the point to their notice, so that they may not be misled. And if the court instruct the jury that they can see no evidence which leads to a certain conclusion, when there is such evidence, it is error. *Nieman v. Ward*, I. 68.

3. An acknowledgment of a deed of conveyance by a *feme-covert* before one of the judges of the Circuit Court of the State of Indiana, accompanied by a certificate of the clerk of that court, under his private seal, (there being no seal of the court), of the official character of the judge, is a sufficient authentication to admit the deed in evidence. *Creigh v. Beelin*, I. 83.

4. It is not a valid objection to the admission of the evidence of a claim, that it is barred by the Statute of Limitations. *Finney v. Cochran*, I. 112.

5. To set aside a solemn instrument between parties, and convert it into an obligation of different purport, on the ground of fraud or mistake, the evidence of it must be what occurred at the execution of the instrument, and should be clear, precise, and indubitable. And it is error to submit the question of fraud, in such a case, to the jury, upon slight, trivial, parol evidence. *Stine v. Sherk*, I. 195.

6. An endorsement on a note, of a payment on account, in the handwriting of the holder, proved to have been made within six years from the date of the note and time of suit brought, is evidence which will prevent the operation of the Statute of Limitations. *Addams v. Seitzinger*, I. 243.

7. It is error to permit a witness to testify respecting a fact of which he has not the means of knowledge.

In the trial of a civil suit, the jury must determine facts upon the weight of evidence; and a direction from the court that they must be "*conclusively* convinced," or that "there must be no doubt resting on their minds" as to any particular point, is erroneous. *Hiester v. Laird*, I. 245.

8. It is not a valid objection to the reading of a deposition, taken in the county where the cause is tried, that the testimony of the same witness had been previously taken upon a commission in another state. *Hoffman v. Kissinger*, I. 277.

EVIDENCE.

9. Official books and papers must be proved by producing an exemplified copy from the proper office; or if circumstances require that the originals should be produced, they must be brought from the office and verified by the officer who has the keeping of them, or his clerk, or some one specially authorized by him for that purpose. They cannot be verified by one who has no connection with the office, but who happens to know them. *Hockenbury v. Carlisle*, I. 283.

10. It is competent to give parol evidence to explain a written receipt, and show that it was given for a note and not for money. *Jones v. Patterson*, I. 321.

11. A return of unseated land to the County Commissioners for taxation, and the payment of the taxes for thirty years, are *prima facie* evidence of ownership of the warrant upon which the land was surveyed: and in an action of ejectment against a naked intruder who entered with notice of the plaintiff's claim, are conclusive, without other evidence of a conveyance by the warrantee, who, under such circumstances, will be considered as having been a trustee for the owner. *Taylor v. Dougherty*, I. 324.

12. The recital in a treasurer's deed for unseated land, that a bond was given for the surplus purchase money, is *prima facie* evidence of the fact, and sufficient for the purpose unless disproved. *Devinney v. Reynolds*, I. 328.

13. In an action against partners, the declarations of any one of them, respecting the existence of the partnership, may be given in evidence to establish it. *Anderson v. Levan*, I. 334.

14. In an action upon a book account of a decedent, it is only necessary to prove that they are books of original entry to admit them to go to the jury as evidence; and if evidence be afterwards given as to the time when the entries were made, this must be referred with the books to the jury. *Van Swearingen v. Harris*, I. 356.

15. If testimony be offered by one party, the other may require the purpose for which it is offered to be stated; if this be not done, and the evidence be admitted generally, it is not error, if it was competent for any purpose.

In an action against three partners, in which the writ was served upon one only, upon the trial of which a question of fact arose as to who were the members of the firm, the record of a former action against the defendant served with process alone, in which he pleaded in abatement the non-joinder of the present defendants, is competent evidence. *M'Clelland v. Lindsay*, I. 360.

16. A commission by the register of wills, to take the testimony of witnesses, must be under seal; but if a commission issue without the official seal, and the testimony be taken and returned to the register, who receives it, and gives a certified copy of it under seal, that will be sufficient to admit the will in evidence in an action of ejectment for land devised by the will. *Loy v. Kennedy*, I. 396.

7. In an action upon a recognizance entered into to obtain a stay

EVIDENCE.

of execution upon a judgment, it is not competent for the defendant to give parol evidence to contradict, alter or explain the original judgment in which the recognizance was given.

Nor is it competent in such action for the plaintiffs to give evidence of any collateral security given to the defendants to indemnify them against their liability on the recognizance. *Withers v. Livezey*, I. 433.

18. If an action of ejectment be brought by an executor, it is competent for the defendant to give in evidence a former ejectment by the plaintiff in his individual right, to show that he claimed the land as his own, and not in his representative capacity.

If land be devised to an executor, to be sold, and the proceeds to be divided among the testator's children, and the children convey the land to the executor, their deeds are evidence of an election on their part, to take land instead of money.

If a witness, in the course of his examination, be asked to testify respecting a transaction, before the question is answered it is competent for the other party to inquire and know whether the transaction be in writing; and if it be, the witness cannot be permitted to give parol evidence on the subject. *Rice v. Bizler*, I. 445.

19. In a *scire facias* upon a mechanic's lien against the owner of a building, and the contractor who constructed it, the plaintiff may give in evidence the declarations of the contractor as to the materials received and the amount remaining due, but such admissions ought to be received with great caution, and subjected to the nicest scrutiny; but his declarations that the lumber was received on the credit of the building, are not evidence.

In such case, it is competent for the defendant to give evidence to prove that the amount of the lumber charged in the plaintiff's account is greatly more than could have been put into the building. *Dickinson College v. Church*, I. 462.

20. A sheriff's deed, with a certificate endorsed upon it under the hand and official seal of the prothonotary, that it was duly acknowledged in open court, and entered of record, is *prima facie* evidence without showing the record. *Foust v. Ross*, I. 501.

21. An agreement or deed under which land has been occupied and claimed for upwards of thirty years, may be given in evidence without proof of its execution by the subscribing witnesses. *Zeigler v. Houtz*, I. 533.

22. A copy of the laws published annually by the authority of the legislature, is evidence of the statutes contained in it, whether they be public or private. *Gray v. The Monongahela Navigation Company*, II. 156.

23. In an action upon a note, preliminary proof of the handwriting of the drawers is all that is required for its admission in evidence; all else as to the time, manner, and circumstances under which it was signed, must be the subject of subsequent investigation by the jury. *Irvine v. Lumbermen's Bank*, II. 190.

24. Where the merits were tried in a former suit, but the verdict was against the plaintiff solely on the ground of his incapacity to

EVIDENCE.

recover for want of interest in the note sued upon, the evidence given by witnesses then examined is admissible, if they are out of the State. *Hocker v. Jamison*, II. 438.

25. The defendant cannot cross-examine the plaintiff's witnesses to matter entirely new, in order to introduce his defence untrammelled by the rules of a direct examination. *Castor v. Bavington*, II. 505.

26. Rules agreed upon by two congregations, Lutheran and Reformed, reciting that they had taken up land and built a church, and regulating their respective titles to and rights in the same, and also the modes of conducting worship, of electing trustees, and ministers, and rights in the burial ground, are within the recording Act of 1775, and with a subsequent deed from a third person, assigning the legal title to trustees for the use of the congregations, accompanied with ancient possession, are evidence to show title. *Shortz v. Unangst*, III. 45.

27. Evidence not apparently material may be admitted or rejected, without necessarily being error. *Ibid.*

28. A nominal plaintiff in a suit having disclaimed and being in an adverse position, was notified to produce a bond of indemnity given to him by the person who had used his name in the suit; he admitted in court that he had burnt it: *held*, a copy was admissible in evidence. *Ibid.*

29. Declarations of the grantor, after parting with his title, are not evidence to support or impeach it in the hands of the grantee, but if part of a conversation is given by one party, the other may inquire into the whole. *Postens v. Postens*, III. 127.

30. Declarations, part of the *res gestæ*, are evidence to show the relations of parties towards each other. *Ibid.*

31. A court of error will not reverse for the admission of irrelevant evidence, when no prejudice appears to have been done by it. *Ibid.*

32. In an issue involving the validity of a release of cower, in which the want of sufficient consideration is alleged to be an evidence of its invalidity, the value of the estate is legal and material evidence. *Parks v. Dunkle*, III. 291.

33. It is not competent to give parol evidence of the contents of a written paper without first giving positive proof of its destruction, or of a diligent search by which its loss has been ascertained. *Ibid.*

34. In an action to recover the purchase money of land sold and conveyed by the plaintiff to the defendant, it is not competent for the defendant to give evidence of tortious acts done by the plaintiff, by which his possession of the property was disturbed.

In such action, it is not a good objection to the evidence of the deed, that it contains a recital of the plaintiff's title, especially if he proceed afterwards to show a good title by other evidence. *Siltzell v. Michael*, III. 329.

35. In an action to recover the purchase money of land sold and conveyed, it is not competent for the defendant to give in evidence

EVIDENCE.

judgments obtained against the vendor after the delivery of the conveyance; nor can the defendant give evidence of counsel fees paid and expenses incurred in prosecuting an ejectment against the plaintiff to recover the possession of part of the land sold. *Ibid.*

36. A certificate of proof by a subscribing witness to an agreement concerning lands, or an acknowledgment of it by the party before a magistrate, is enough to dispense with the common law evidence of execution. *Brotherton v. Livingston*, III. 334.

37. It is not a good objection to the admission in evidence of an agreement for the sale of land, which is the subject matter of the action, that it does not particularly specify its location; especially if the party offering it, propose to follow it by proof of possession taken under it. *Ibid.*

38. If facts offered to be proved by one party are *prima facie* evidence, it would be irregular to interfere with the course of such evidence, by the introduction of the evidence of the other party, in support of an objection to its admissibility. *Roland v. Miller*, III. 390.

39. An original paper in the hands of a person who cannot be reached by the process of the court, so as to compel its production, may be proved by parol. *Ralph v. Brown*, III. 395.

40. In an action of covenant upon a general warranty contained in a deed of conveyance, an eviction by a paramount title is *prima facie* evidence for the warrantee: and if the warrantor be notified of the ejectment and required to defend, the recovery in ejectment is conclusive: but such notice must be unequivocal, certain and explicit. *Paul v. Whitman*, III. 407.

41. In an action of *assumpsit*, founded upon the promise of the defendant to pay the debt of a third person, it is competent to give in evidence the declarations and acts of the defendant corroborative of the plaintiff's allegation. *Silvis v. Ely*, III. 420.

42. When the testimony of witnesses is irreconcilable, it is proper that the court should explain to the jury the rules by which the testimony of witnesses is to be weighed. *Farley v. Ranck*, III. 554.

43. The charge of the court to the jury in one cause cannot be given in evidence in another, as proof that that suit was prosecuted for a particular use. *Lazarus v. Follmer*, IV. 9.

44. Where testimony is overruled by the court merely as being out of order, the reason for doing so ought to be stated, to prevent misconception and surprise on the party. *Schuylkill Navigation Co. v. Farr*, IV. 362.

45. Testator in 1728 devised his plantation to his son J. W., provided it should be valued, and he to pay the value to his daughters within 12 months after the valuation, and appointed his brothers trustees of his daughters' legacies. One daughter survived, and the trustees were appointed her guardians. A receipt, dated in 1730, by the trustees, to T. W., grandfather and guardian of J. W., of the amount of the valuation of the plantation, found after the lapse o.

EVIDENCE.

100 years among the papers of J. W., in the drawer of a desk known for 36 years to contain his papers, and remaining in the possession of the descendants of the person in whose house he died in 1760, was held to be evidence to show title. *Lewis v. Lewis*, IV. 378.

46. So a lease by J. W., dated in 1740, found under the same circumstances, was held to be evidence. *Ibid.*

47. And also a draft, purporting to have been made in 1717, and handed down through the office of his successors, the handwriting being proved by some of his descendants, who had seen much of his handwriting, to be the same with other official papers written by him. *Ibid.*

48. After the lapse of many years, the minute books of a corporation proved to have been found in their proper place, produced by the proper officer, and sworn to be the books or records of the company, are evidence in favour of the company in an ejectment by them against persons claiming under one who was proved at the date of the entry in the minutes to have been their president. *Union Canal Co. v. Loyd*, IV. 393.

49. Corporation books are not generally evidence against a stranger, but are so against a corporator present and assenting to the entry made in them and against those claiming under him. *Ibid.*

50. Checks purporting to have been drawn by the President of a Canal Company on their treasurer, in favour of contractors, are evidence to show that such person acted as their president, and are also *prima facie* evidence they were paid, if the work was done under the contract, and they are produced from the archives of the company or by their treasurer. *Ibid.*

51. Surveys made under a resolution of the company, passed whilst R. M. was their president, and assented thereto, are evidence in a suit against persons claiming under R. M.; but a survey made under other circumstances is not evidence without other proof. *Ibid.*

52. R. M., by articles of agreement, conveyed to a Canal Company an equitable title to a small part of a large tract of land which he held under an equitable title, on which he had paid a part of the purchase money, and was in possession. The whole tract was afterwards purchased at sheriff's sale as the property of R. M. by S. C., who subsequently procured a release of the legal title. R. M. afterwards became bankrupt. Held, in ejectment by the company against persons claiming from S. C., that the answer of R. M. on oath, on his examination before the commissioners of bankruptcy, stating that the land remained with the company to answer calls for his shares in the company, with a reference to his ledger entry, was, after the death of R. M., admissible in evidence as an entry by a third person against his interest. *Ibid.*

53. Letters and acts of third persons, and minutes of a Canal Company claiming land by equitable title, and occupation as a canal for many years, are evidence to show recognition of their right and the exercise of ownership by them. *Ibid.*

EVIDENCE.

54. Proof of a sale of personal property under a judgment and execution between other persons, and that it was bought in and held for six years and then sold again, is admissible. *Taylor v. Hulme*, IV. 407.

55. A witness, after having stated that certain notes were discounted at bank, and the proceeds applied to pay a mortgagee who assigned to the bank, may be asked whether one of them was paid, though it is not produced, nor evidence given what became of it. *Kinley v. Hill*, IV. 426.

56. Where an authority to appraisers to make a list of debts is doubtful on the face of an agreement, acts of the party inducing them to exercise such authority are evidence. *Wright v. Smyth*, IV. 527.

57. A deed from the warrantee of land conveying the warrant to another is evidence, even though the land be misdescribed in it. *Urket v. Coryell*, V. 60.

58. An ancient deed is evidence where there is proof of the handwriting of the grantor and subscribing witness, who died many years ago. *Ibid.*

59. A memorandum made by one who had been a deputy-surveyor, not signed by him as such, it not appearing whence it came or when it was made, is not evidence. *Ibid.*

60. Evidence is not admissible to show that the land in dispute had been reputed and represented for twenty or thirty years as the property of a party litigant, when offered to be given by a witness who never was on the land, or lived near it. *Ibid.*

61. An entry in 1811 in the handwriting of the pastor of a church in a book kept in the church as a registry of baptisms and births, the object of which entry was to register the baptism of a person and not his birth, and in which the time of the birth is introduced merely by way of description, is not evidence of the date of the birth. *Clark v. Trinity Church*, V. 266.

62. To prove the full age of a person, evidence of the assessor of a ward that he was a resident there in a certain year and as such assessed with a tax, is not admissible. *Ibid.*

63. Nor is the evidence of an inspector of a general election admissible, that at an election such person was qualified on oath that he was between 21 and 22 years of age, and voted thereat. *Ibid.*

64. The inference of a witness, drawn from facts and circumstances within his knowledge, is inadmissible as evidence. *Given v. Albert*, V. 333.

65. A paper purporting to have been made at a certain place, is not admissible as evidence of the fact that the person who executed it was at that place at the date of the paper. *Ibid.*

66. In an action of debt against two defendants, charging them as partners in merchandising, an agreement between them, made prior to the time when the plaintiff's cause of action arose, by which

EVIDENCE.

the merchandise was sold by one to the other, is competent evidence to disprove the partnership. *Ibid.*

67. When goods are sold to be delivered at a distance, the proper time to make the entry in the book is when they are loaded and started; and entries thus made are competent evidence to prove the sale and delivery. *Keim v. Rush*, V. 377.

68. The books of an iron-master are not competent evidence to disprove the fact of a sale and delivery of iron to him. *Ibid.*

69. The opinion of a witness, whether a piece of land is included within the description contained in a levy, is not competent evidence. *Woodburn v. Farmers' Bank*, V. 447.

70. In an action to recover the amount of money which the defendant received upon an assignment obtained by misrepresentation and fraud, the repetition of the misrepresentations made after the date of the assignment are competent evidence of the defendant's bad faith from the beginning. *Cummings v. Cummings*, V. 553.

71. It is also competent in such case to prove that the plaintiff, in making the assignment, acted in confidence of the truth of the defendant's misrepresentations. *Ibid.*

72. The practice of excluding evidence by the force of counter-acting evidence is erroneous. *Ibid.*

73. The testimony of a deceased witness, which has been taken on the trial of another action between the same parties or those under whom they claim, about the same subject matter, may, if proved by the notes taken of it at the trial, be given in evidence to establish the facts then testified to. *Moore v. Pearson*, VI. 51.

74. Upon an objection to evidence, the court will not stop to hear the testimony of the objecting party as a ground to sustain their objection. *Ibid.*

75. In an action of ejectment, it is competent for the plaintiff to give evidence of the declarations of one who was a joint claimant of the land in dispute with the ancestor or alienor of the defendant respecting the boundary of it, that being a point material to the issue. And upon such evidence being given, it is not competent for the defendant to prove the declarations of the same person made at a subsequent period, and after suit brought, having a different tendency. *Ibid.*

76. If a witness be out of the State, notes of his testimony proved to have been correctly taken upon a former trial of the cause, may be read in evidence. But if it appear that the witness absented himself from that trial before he was fully examined, his testimony given cannot be read in evidence. *Noble v. M'Clintock*, VI. 58.

77. In an action of *assumpsit* for goods sold and delivered, the plaintiff having read in evidence the deposition of a witness, it is competent for the defendant to read the testimony of the same witness taken upon a former trial of the cause and made part of the record by a bill of exception, not only to contradict the facts stated in the deposition, but to prove other facts material to the issue. *Parker v. Donaldson*, VI. 132.

EVIDENCE.

78. In an action against a bank, declarations by the cashier or teller respecting the genuineness of certain checks purporting to have been drawn by the plaintiff, made at a period subsequent to their representation, are inadmissible to affect the defendants. *Bank Northern Liberties v. Davis*, VI. 285.

79. Book entries of the whole number of pieces of paper delivered by a paper-hanger to his journeymen, made at the time of such delivery, and of the number of pieces actually consumed, the price of each, with the price of hanging it, and the gross amounts, made when the quantity was ascertained by hanging, though three or four days after the first entry, are evidence. *Koch v. Howell*, VI. 350.

80. An account or book in writing signed by the testator and referred to in the will, is evidence on the issue of *devisavit vel non*, though it was copied from a paper which was destroyed. *Hauberger v. Root*, VI. 431.

81. Evidence is admissible to show that the holder of a bond of the testator's produced it at the appraisal of the testator's effects, and had it inserted in the inventory, and said it had been given to him for collection, to rebut an imputation on his honesty in relation to the bond, which a witness on the other side had testified as proceeding from the testator. *Ibid*.

82. In an action of ejectment, where the defendant claims against a prior and unrecorded title, he may give evidence of valuable improvements made upon the land before notice of the plaintiff's title, in order to entitle him to the character of a *bona fide* purchaser for a valuable consideration. *Boggs v. Varner*, VI. 469.

83. A recital in a deed is evidence of notice to the purchaser of the fact recited, and he will be affected by it so far as it concerns the title to the land purchased; but it will not affect him with notice in regard to the title of any other land than that which is conveyed by it. *Ibid*.

84. The title of a *bona fide* purchaser for a valuable consideration is not to be affected by loose, vague and uncertain evidence of the existence of a prior title. If a former owner neglects to record his title, every presumption is to be made in favour of a subsequent purchaser. *Ibid*.

85. Upon the second trial of a cause, in which a former judgment has been reversed, the counsel of either party has a legal right to read the opinion of the Supreme Court to the jury. *Noble v. M^r Clin- tock*, VI. 58.

86. In a suit by the sheriff against a purchaser at sheriff's sale to recover damages for breach of the contract of sale, the writs of *alias* and *pluries venditioni exponas* are not evidence without the record of the judgment.

But if they are admitted, the error is cured by afterwards reading the record in evidence. *Gaskell v. Morris*, VII. 32.

87. Parol evidence may be given of a written notice delivered to a party to pay money, and the contents thereof, without showing notice to produce the notice on the trial. *Ibid*.

EVIDENCE.

88. Written conditions of sheriff's sale *held* evidence where they were read aloud by the sheriff's agent at the opening of the sale, and some evidence was given that the defendant was present before and during the sale, and there was proof that he signed a written acknowledgment that he had become the purchaser. *Ibid.*

89. An endorser of a draft is a witness for the plaintiff to prove its appropriation by the owner to the payment of a note to the plaintiff and its receipt by the defendant for that purpose, as he swears against his own interest, being liable to the defendant on his endorsement if the plaintiff recover, unless he was released by neglect of notice, in which case he has no interest at all. *Commercial Bank v. Wood*, VII. 89.

90. In a suit against a bank, a letter addressed to the plaintiff and signed by a third person, but written for him by the president of the bank, stating a deposit of money with the defendants on the plaintiff's account, is evidence for the plaintiff. *Ibid.*

So also is a letter written by a different person, but mentioned and referred to in the letter to the plaintiff. *Ibid.*

91. A witness may in his deposition, after setting forth the terms and conditions of a contract for payment of money by the defendant, go on to state that these several payments were agreed to without any contingency or condition, the same having been absolute and certain. *Ibid.*

92. To show the value of an eastern draft at Cincinnati, testimony of a witness that at the date in question eastern drafts payable at sight in Philadelphia were selling in Cincinnati for a premium, as this deponent was informed and believes, is admissible, where the subsequent evidence of the witness shows the defendant took the draft without discount, though it had then some time to run, and the witness would not allow a discount on the ground he had stated. *Ibid.*

93. A witness for the plaintiff may state that he received no value as endorser of a note, and that no measures had been taken against him on it, though the plaintiff gave no evidence on that point, where the witness previously testified that if he endorsed the note, it was merely as agent. *Ibid.*

94. To receive evidence of the contents of a written paper in the possession of the opposite party, without previous notice to produce it, is illegal; but the illegality is cured by subsequent proof by the objecting party that no such paper ever existed. *Reading Railroad Co. v. Johnson*, VII. 317.

95. A deposition taken upon a notice not signed by any one, but regularly served upon the opposite party, cannot be read in evidence. *M'Donald v. Adams*, VII. 371.

96. If a plaintiff in an action brought to recover the amount of a book-account be sworn to prove the character of his book which contains the account, it is competent for the defendant to give evidence of his character for truth, and to discredit his books by showing them to be unworthy of confidence. *Barber v. Bull*, VII. 391.

EVIDENCE.

97. In an action of ejectment, a connected draft of adjoining lands, certified from the surveyor-general's office, is competent evidence to show location and boundary. So also are the field notes of the deputy-surveyor. *Payne v. Croft*, VII. 458.

98. In an action of ejectment against one who claims title under an intestate upon a judgment against his administrators, and a sheriff's sale thereupon, it is not competent for the plaintiff to give evidence to prove that the administrators had assets in their hands sufficient to pay the judgment and avoid the sale. *Ibid*.

99. Notes of evidence, taken by the judge in the course of a trial, are no part of the record, and they cannot be received, in a subsequent trial of the cause, as evidence of what an absent witness then testified, unless their accuracy be established by other proof. *Livingston v. Cox*, VIII. 61.

100. In an action against an attorney at law, for negligence in conducting and prosecuting the claim of his client, the opinion of a witness as to the discretion exercised by the defendant cannot be given in evidence. *Ibid*.

101. A party may cross-examine as to the *res gestæ* given in evidence, though it be new matter. *Markley v. Swartzlander*, VIII. 172.

102. The proceedings in a suit before the Board of Property between R. and B., are not evidence in an ejectment by K. against R. *Rose v. Klinger*, VIII. 178.

103. Facts stated by the Board of Property are not even *prima facie* evidence of their truth, in the trial of an ejectment. *Ibid*.

104. Recitals of title in a deed more than 30 years old, where possession accompanied the deed, are *prima facie* evidence against persons claiming by title under the grantor previous to such deed. *James v. Letzler*, VIII. 192.

105. Evidence that a bank did not execute and issue certain of its notes until two years after their date, is admissible to show the time of their coming into the hands of a debtor to the bank. *Selfridge v. Northampton Bank*, VIII. 320.

106. A mere service of a subpoena on a witness residing within 40 miles of the court will not authorize his deposition to be read in evidence in the cause; the party must bring him in by attachment if he can. *Whitesell v. Crane*, VIII. 369.

107. Parol evidence is admissible to show the contents of a hand-bill put up in a stage-office four years before, containing a notification of limited responsibility. *Ibid*.

108. Evidence of the usual course of a stage-office for passengers to call there and have their names registered in the stage-book, and where they were to be called for, is evidence to affect a party with notice. *Ibid*.

109. The printed conditions of a line of public coaches are sufficiently made known to passengers by being pasted up at the place where they book their names. *Ibid*.

EVIDENCE.

110. In a suit against a physician for mal-practice, whereby the plaintiff lost his leg, *Held*,

1. It being shown that other medical men had been called in for a consultation without invitation or notice to the defendant, a medical witness for the plaintiff might be asked by the defendant as to the practice of physicians in regard to consultations.

2. The witness could not be asked as to the measure of the defendant's responsibility for his patient, not being a subject of professional skill.

3. Nor is testimony admissible on the part of the defendant as to his general skill.

4. The nature and properties of the powders employed by the defendant in the case, were proper questions to medical witnesses called by the plaintiff.

5. The declarations of a prochein amy for the plaintiff, made before the writ purchased, are not admissible on behalf of the defendant. *Mertz v. Detweiler*, VIII. 376.

111. The court may instruct the jury to disregard evidence which is afterwards discovered to have been improperly admitted. If it appear that the jury have not followed this instruction, the proper course is a motion for a new trial. *Unangst v. Kraemer*, VIII. 291.

112. The admissions of one who is jointly sued with others are competent evidence against himself. *Spencer v. Campbell*, IX. 32.

113. The evidence necessary to establish a sale of land by parol must be clear and positive. *Ludwig v. Leonard*, IX. 44.

114. The return of a sheriff found in the office purporting to have been made by the officer, must be taken to have been regularly made; it cannot be disproved. *Sample v. Coulson*, IX. 62.

115. The rule of the common law with regard to the admission in evidence of books of original entry is greatly relaxed: such book of a plaintiff who is dead may be given in evidence upon proof of his handwriting. *Odell v. Culbert*, IX. 66.

116. In order to the admission of secondary evidence of the contents of a paper, its loss must be proved; but slight evidence is required for that purpose, of the sufficiency of which the court must judge. *Flinn v. M'Gonigle*, IX. 75.

117. An *ex parte* affidavit made to lay the ground for a rule to show cause why a judgment should not be opened and the defendant let into a defence, may be given in evidence in a trial of an issue between other parties, where the record of that judgment itself is pertinent evidence, for the mere purpose of showing the grounds upon which it was opened. *Kaufilt v. Leber*, IX. 93.

118. A suit erroneously brought in the name of A, upon a bond of indemnity, cannot be given in evidence in a suit rightly brought upon the same instrument in the name of B. *Ibid*.

EXECUTION.

ATTACHMENT, 3, 4, 5.

EXECUTION.**ATTACHMENT OF EXECUTION.**

CONSTABLE, 2, 3, 4, 7.

DISTRESS, 6, 7.

GROUND-RENT, 3.

HUSBAND AND WIFE, 20.

JUDGMENT, 12.

LANDLORD, &c. 13, 20.

LIEN, 10.

PARTNERSHIP, 29.

SHERIFF'S SALE, 18.

STAY OF EXECUTION, 1.

STATUTE, 4.

RECOGNIZANCE, 2.

1. There being no form prescribed by the Act of Assembly in which security shall be given for a stay of execution upon a judgment, an obligation under the hand and seal of the surety entered upon the record of the judgment, binding himself for the payment of the debt, interest, and costs, is sufficient to entitle the defendant to the stay provided by the Act. *Bank of Pennsylvania v. Reed*, I. 101.

2. Bail for a stay of execution may be taken by the prothonotary, and perfected afterwards by the approval of the court or a judge. The approval is for the benefit of the creditor, and he may waive the necessity of it, either expressly or impliedly; but neither the debtor nor the bail can take advantage of the want of it. *Ickes v. Smith*, I. 139.

3. The obligation of a recognizance before a justice of the peace for a stay of execution is, that the defendants will pay the debt, or be surrendered in execution when called for; and such recognizance is forfeited, when the bail, being called on in the proper way, omit to surrender all the defendants. *Bombaugh v. Robinson*, I. 159.

4. A sheriff's sureties are not liable upon their bond for the amount of an execution placed in the hands of the sheriff, which he agreed to pay to the plaintiff in consideration of his indebtedness to the defendant, if it appear that the defendant's personal property, which had been levied upon the execution, had been sold and the proceeds applied to prior levies. And this although the sheriff may have given a receipt to the defendant in the execution for the amount of the money, stating how the money had been paid. *Juniata Bank v. Beale*, I. 227.

5. A levy, upon an execution, of personal property to an amount sufficient to pay the judgment upon which it issued, is a satisfaction of the debt, if the levy be released by the plaintiff, and becomes lost to the defendant; but if the release by the plaintiff be at the instance and request of the defendant, it does not amount to satisfaction. *Porter v. Boone*, I. 251.

6. It is not a good cause to set aside an execution because it was levied upon lands for which the defendant had no title; or because the lien of the judgment had been lost from lapse of time. *Seitzinger v. Fisher*, I. 293.

EXECUTION.

7. Upon a written waiver of an inquisition by a defendant whose real estate is seized in execution, the sheriff shall proceed to sell upon the *feri facias* before the return day thereof, without any further writ: but a sale made after the return day, although continued by adjournment from a day prior, is void, and vests no title in the purchaser. *Cash v. Tozer*, I. 519.

8. A sale of personal property by a constable upon an execution, gives a good title to the purchaser, although the same property had been levied by a prior execution in the hands of the sheriff. The controversy between the execution creditors must be determined by an appropriation of the proceeds of sale. *Duncan v. M'Cumber*, II. 264.

9. The plaintiff has a right to sell by execution the interest of his debtor, although the land on which the levy was made be in the adverse possession of another claiming under a paramount title; and, therefore, it is error in the court to stay the proceedings on that account. *Jarrett v. Tomlinson*, III. 114.

10. An execution put into the hands of the sheriff and levied upon personal property, with any other than the *bonâ fide* intention of selling the property and making the money, is fraudulent as to subsequent judgment creditors.

In order to postpone an execution under such circumstances, to subsequent executions, it is not necessary that the plaintiff should have given the sheriff notice to stay proceedings; but any arrangement with the defendant, or other conduct of the plaintiff, evincing his intention not to have a sale of the property, will have that effect. *Weir v. Hale*, III. 285.

11. The proceeds of the sale of personal property levied and sold upon three writs of *feri facias*, must be appropriated to the first which came to the hands of the sheriff; although the property sold was acquired by the debtor after the first two executions, and before the third came to the sheriff's hands. *Shafner v. Gilmore*, III. 438.

12. If money be made upon an execution in favour of two or more plaintiffs, a payment to any one of them is good, and discharges the sheriff, and he cannot afterwards maintain an action against the one whose receipt he took for it, for the use of the other. *Lazarus v. Follmer*, IV. 9.

13. In the action against a sheriff to recover the amount which he collected upon an execution, the plaintiff is not entitled to recover the officer's costs which accrued in obtaining the judgment upon which the execution issued. *Pontius v. Commonwealth*, IV. 52.

14. Under the Act of 16th of June 1836, relating to executions, a copy of the writ must be served on the defendant in the judgment; a return of *non est inventus* is not equivalent to a service. *Corbyn v. Bollman*, IV. 342.

15. Money collected upon an execution by a constable cannot be recovered back again from the officer upon the allegation of its having been paid a second time. *Herring v. Adams*, V. 459.

16. The sheriff having in his hands two executions, one issued

EXECUTION.

21st September, the other the 26th October 1842, returned the latter levied subject to a prior levy, and the former levied as per inventory and sold for \$508.23. *Held* this return was conclusive as to the rights of the former execution, and parol evidence was not admissible to show that the latter execution creditor was entitled to the money.

But parol evidence may be given in such case to show a private arrangement between the first execution creditor and the defendant, unknown to the sheriff, not to have a sale of the defendant's goods, and this is not inconsistent with the sheriff's return. *Flick v. Trozsell*, VII. 65.

17. If two executions be placed in the hands of the sheriff at different times, and he make a levy of the defendant's personal property and a sale upon that which came to his hands last, he must appropriate the money to it, and not to the first, upon which he had endorsed or attached no levy. *McClelland v. Slingluff*, VII. 134.

18. In an action against the sheriff for misappropriating money made upon a *feri facias* which he had in his hands, and which he had returned without a levy, it is not competent for him to prove by parol that a levy was actually made upon it; nor to give in evidence a written levy of the property, out of which the money was made, which had remained in his possession until the time of the trial. *Ibid.*

19. A sheriff's acceptance of bank-notes in payment of an execution discharges it; and if the notes afterwards become worthless, he must account to the party in cash. *Harper v. Fox*, VII. 142.

20. If the owner of a tract of land purchase a small piece of land adjoining it for the purpose of using it in connection with the larger tract, he thereby makes it a part of the whole; and a levy and sale by the sheriff of the tract of land, without any description of the part purchased, will convey the whole to the purchaser. *Buckholder v. Sigler*, VII. 154.

21. Lands cannot be levied or sold by virtue of a writ of execution in the nature of a *feri facias* issued out of the Orphans' Court in pursuance of the 13th section of the Act of 29th March 1832, but personal property only. *Orphans' Court v. Woodburn*, VII. 162.

22. A *feri facias* and *alias feri facias* cannot legally issue and be made returnable to the same term. *Shaffer v. Watkins*, VII. 219.

23. If a *feri facias* be issued and levied upon personal property, and the defendant give a bond to entitle him to a stay of the execution for one year, in pursuance of the provisions of the Act of the 12th July 1842, and the same is so returned by the sheriff, and within the year an execution issue at the suit of another plaintiff, and the same property is levied and sold, the first execution will be entitled to the proceeds of the sale. *Sedgwick's Appeal*, VII. 261.

24. In the case of the proceeds of a sheriff's sale of land, brought into court for appropriation, any creditor, having a claim upon the fund, who alleges there are facts in dispute, has a right to an issue and trial by jury, of which the court cannot deprive him. *Reigart's Appeal*, VII. 267.

EXECUTION.

25. The neglect of the sheriff to levy upon the personal property of a defendant in an execution, and suffering the same to be carried away and disposed of by the defendant himself, will not prejudice the claim of the plaintiff founded upon his judgment as a lien upon the defendant's real estate. *Moore's Appeal*, VII. 298.

26. In the distribution of moneys raised by a sheriff's sale of goods, no other person than the defendant in the execution or his legal representatives will be permitted to object that a judgment on which another execution has been levied on the same goods, was erroneously entered, or the execution erroneously issued thereon. *Louber and Wilmer's Appeal*. *Wilson, Jones & Co.'s Appeal*, VIII. 387.

27. Nor will the defendant or his representatives be permitted to do so in a collateral action or other manner than by suing out a writ of error, or by making a direct application to the court in which the judgment is entered or from which the execution has been issued, to vacate it or set it aside. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

ARBITRATION AND AWARD, 7, 8.

ATTORNEY AT LAW, 1.

BILLS OF EXCHANGE, 20.

BOND, 7, 8.

COMPROMISE, 2.

COSTS, 8.

DECEDENT, 2.

DEVISE, 20.

DRUNKARD.

GUARANTY, 4, 5.

GUARDIAN AND WARD, 6, 7.

HUSBAND AND WIFE, 10.

INTESTATE, 3, 4.

JUDGMENT, 26, 27.

LIMITATION, 19, 27.

NOTICE, 1.

ORPHANS' COURT, 3, 4, 7.

PRACTICE, 14.

PRINCIPAL AND AGENT, 13, 33, 34, 35.

SET-OFF, 10.

STAKEHOLDER, 2.

TRUST AND TRUSTEE, 12, 13.

WITNESS, 34, 40.

1. An administrator may not be permitted to settle an account in the Orphans' Court, for the mere purpose of charging the estate with a debt due to himself by the intestate in his lifetime.

An administrator having a debt by bonds against the estate of his intestate, is not exempt from the requisitions of the 4th section of the Act of 1797, to file a copy or written statement thereof, in the office of the prothonotary, within seven years after the decease of the debtor; and if he neglect to do so, the lien of the debt is gone, and he cannot

EXECUTORS AND ADMINISTRATORS.

afterwards charge the real estate with its payment. *Clauser's Estate*, I. 208.

2. If an administrator *de bonis non*, with a will annexed, whose wife is a legatee in the will, receive assets of the estate sufficient to pay the legacies, and die without settling any account of his administration, leaving his wife surviving him, it is such a reducing to possession of the choses in action of the wife, as will preclude a recovery by her after his death. *Ellis v. Baldwin*, I. 253.

3. Each of several co-administrators has a right to settle a separate account of his administration, but this will not affect his joint liability on his official bond for the acts of his co-administrator. *Patterson's Estate*, I. 291.

4. If an executor, having power to sell real estate for the payment of legacies, advise the legatees to compromise and settle a question of boundary, and they do so, such compromise is binding upon the executor ever afterwards, whether he claim the land as executor, or in his own right. *Rice v. Bizler*, I. 445.

5. It is a general principle that a plaintiff cannot join in the same declaration a demand as executor or administrator, with another which accrued in his own right; but if the money recovered in each of the counts will be assets, the counts may be joined in the same declaration. *Peries v. Aycinena*, III. 64.

6. In a suit by an executor in assumpsit, a count for work and labour may be joined with a count for work done by the testator, where it appears that the money recovered in the suit will be assets in the executor's hands.

Therefore, such counts may be joined in a suit by an executor to recover compensation for services rendered by the testator in his lifetime, as attorney for the defendant, and afterwards by the executor as attorney in completing the same business: the duty of so doing being thrown upon the executor by the laws of the country, and acquiesced in by the client.

In such case it is not necessary to set out the contract specially; common counts are sufficient, especially after verdict. *Ibid.*

7. An administrator has no power to deliver a deed executed by his intestate in his lifetime, in pursuance of a contract for the sale of land; he must first apply to the Orphans' Court for leave to prove the contract and execute and deliver a deed. *Karman v. Huober* III. 253.

8. When executors are dismissed, and an administrator *de bonis non*, with the will annexed, is appointed, it is the duty of the court to take a bond from the person appointed, with sureties in an amount commensurate with the powers and trusts contained in the will; and such sureties are liable for the faithful performance of the trusts, and payment of the money which shall come to the hands of the administrator, whether it arise out of the sale of the goods and chattels, or lands of the testator. But they are not liable beyond the amount of the penalty of the bond. *Commonwealth v. Forney*, III. 353.

EXECUTORS AND ADMINISTRATORS.

9. An executor is not entitled to a credit in his administration account for the amount of fees paid to counsel for their professional services in trying an issue of *devisavit vel non*, involving the validity of the will of his testator. *Mumper's Appeal*, III. 441.

10. A husband who administers upon the estate of his deceased wife, is not accountable to her heirs for the same, although he settle an administration account, and the Orphans' Court decree that there is a balance in his hands. *Clay v. Irvine*, IV. 232.

11. Administrators may in some cases recover back from a distributee to whom too much has been given, though no refunding bond has been taken, but not while they have funds of the estate in their hands to more than the amount. *Saeger v. Wilson*, IV. 501.

12. If land be conveyed for the purpose that the grantee shall sell the same and reimburse himself for certain moneys paid for the grantor, who afterwards dies and makes the grantee his executor, who receives his personal estate, there is no legal presumption, in the absence of positive proof, that there was any other fund applied to the payment of the debt of the grantee than the one specially created for the purpose. *Bracken v. Miller*, IV. 102.

13. The promissory notes of a testator found among the papers of his executor many years after his death afford a reasonable presumption that they were paid by the executor, without any other proof of the fact, especially when no claim had ever since been made by the creditor. *Ibid.*

14. One of two executors was dismissed for refusing to give security—the other gave bond with security in \$5000. They afterwards, in September, 1834, settled a joint account, showing a balance due them of \$352.45. In January 1838, the acting executor filed an account which was audited, and report made, of \$1135.87 in his hands. In December 1840, a transcript was filed in the Common Pleas. Two of the heirs recovered judgment by *scire facias* on this transcript. To April 1841, a suit was brought on the bond, and judgment recovered. The acting executor then petitioned for a rehearing of his accounts, stating that the credit of \$352.45 to both executors was a mistake, and that if the accounts were settled separately, the balance then due him was \$1719.76. *Held*, the original account of September 1834 was a final account, and could not be opened after five years, and after the different proceedings and judgments which had taken place. *Bunting's Appeal*, IV. 469.

15. A. having the legal title to a tract of land, promised, for a sufficient consideration, to sell it and pay all the purchase money over a certain sum to B., but died, having made his will, by which he devised the land to his executors to be sold, and directed the proceeds to be divided among his children. *Held*, that upon such sale being made by the executors, the action upon the promise must be against them in their representative capacity for a breach of it by the testator; and that an action for money had and received would not lie against them personally. *Sedam v. Shaffer*, V. 529.

16 The moneys paid to the distributees or the advancement to one

EXECUTORS AND ADMINISTRATORS.

or more children of the intestate, form no part of an administration account. *Rittenhouse v. Levering*, VI. 190.

17. The decree of the Orphans' Court confirming an administration account which admits a balance in the hands of the administrators for distribution, and in which, as well as in the inventory filed, one of the distributees is charged as a debtor, is *prima facie* but not conclusive evidence of such debt; and in an action by such distributee to recover his share of the estate, he may prove that he owed the estate nothing. *Ibid.*

18. A father devised a tract of land to his two sons, J. and D., at a certain price, which was to form a part of his estate and be divided between his other children, and appointed J. one of his said devisees to be his executor. One of the legatees brought an action for his legacy against J., as executor, but in the declaration charged him personally and obtained a judgment, issued an execution and levied upon the land devised as the estate of the testator, and sold it: in an action of ejectment by the purchaser, it was *held*, that he was entitled to recover that moiety of the land which was devised to J., but not the other. *Bowen v. Bowen*, VI. 504.

19. An administrator cannot become the purchaser of real estate, directly or indirectly, at a sale made by himself in pursuance of an order of the Orphans' Court. *Chronister v. Bushey*, VII. 152.

20. It is irregular for a register to grant letters of administration to himself, and to take his bond with sureties; but having done so, he and his sureties are liable upon such bond to any one interested in the estate upon which the letters were granted. *Zeigler v. Sprenkle*, VII. 175.

21. An administrator *de bonis non cum testamento annesso* and his sureties are liable, and may be sued upon their administration bond, for money which arose out of the sales of the real estate of the testator, made in pursuance of the directions of his will. *Ibid.*

22. The reasons for which the Orphans' Court may dismiss executors, or require them to give security, besides those of lunacy and drunkenness, are prescribed by the Act of 29th March 1832; and that they sold the real estate of their testator, and became themselves the purchasers, is not one of them. *Webb v. Dietrich*, VII. 401.

23. What things are assets in the hands of an administrator. *Wiley's Appeal*, VIII. 244.

24. Tenant from year to year of a tavern; on his decease his administrator takes possession: he is chargeable with the leasehold interest and good-will as assets, at the price offered him for them by others and refused. *Ibid.*

25. A *fiery facias* returnable first Monday in August was placed in the sheriff's hands July 25th, and the defendant's goods sold under it on the 12th October. It did not appear when the goods were seized. *Held* the presumption was that the seizure was made before the writ was returnable. *Fitler v. Patton*, VIII. 455.

26. It is not requisite that the sheriff should specify in his return
IX. — 41

EXECUTORS AND ADMINISTRATORS.

to a *fiery facias* the particular goods taken, the sum for which each article sold, or the time of their seizure. *Ibid.*

27. An action against the executor or administrator of a decedent, without making the heirs or devisees parties to it, does not release the real estate from the lien of the debt; but they may be brought in afterwards by a writ of *scire facias* upon the judgment when obtained; but in such case the heir or devisee may make any defence which he could have made to the original action. *Benner v. Phillips*, IX. 13.

28. Under the provisions of the Act of 24th February 1834, if suit be brought against the executor or administrator within five years after the death of the decedent, and a *scire facias* to bring in the heirs be issued within five years from the rendition of the judgment in the original suit, the lien of the debt upon the real estate will be preserved. *Ibid.*

29. Upon a *scire facias* against the administrator *de bonis non* with the will annexed of a decedent, with notice to the devisees of the land to appear and show cause why the plaintiff should not have execution against the land devised to them, it is competent for such devisees to prove that, by an order of the Orphans' Court, the lands of the testator were sold by the administrator to an amount sufficient to pay all his debts; and if this be established, although the plaintiff may be entitled to judgment *quod recuperet* against the administrator, he cannot recover against the devisees of the land. It is the duty of the creditor in such case to look to the appropriation of the proceeds of the sale of a decedent's lands made by an order of the Orphans' Court. *Ibid.*

30. An administrator having sold the real estate of his intestate by an order of the Orphans' Court, gave a bond to the purchaser, to indemnify him against an outstanding incumbrance or defect in the title: and it was held that he was bound by his obligation. *Kauffelt v. Leber*, IX. 93.

31. An executor is entitled to a credit in his administration account for fees paid to counsel for their professional services in establishing the validity of the will and the bequests therein contained, when the legatees entitled to the estate are the parties in interest. *Scott's Estate*, IX. 98.

32. If the administrators of an estate take a note, with security, payable in six months, for the assets of the intestate sold at vendue, and the payors fail before it becomes due, they will be exonerated from liability for it: but if the payors are able to pay when the note becomes due, and the administrators make no effort to collect it, and it becomes lost by the subsequent insolvency of the payors, they will be chargeable with the loss. *Johnston's Estate*, IX. 107.

EXECUTORY AGREEMENT.

LEASE, 5.

EX POST FACTO.

LEGISLATURE, 1.

EXTINGUISHMENT.

BOND, 5.

PARTNERSHIP, 15, 26.

PRINCIPAL AND AGENT, 18.

SET-OFF, 5.

1. The acceptance of a specialty from one partner, or obtaining a judgment against one partner for the debt of the firm, whether the other be a known or dormant partner, is an extinguishment of the claim against him. *Anderson v. Levan*, I. 334.

2. A higher security for a debt given by different parties or for a different sum, will, in the absence of proof of the intention of the parties, be presumed to have been accepted only as a collateral security, and not in satisfaction of the debt. *Jones v. Jackson*, III. 276.

3. A merger takes place only where the debt is one, and the parties to the securities are identical, which works a dissolution, not of the debt, but of the original security. Extinguishment or satisfaction of the debt, depends upon the agreement and intention of the parties, which is rightly referred to the jury as a question of fact. *Ibid.*

4. The acceptance of the bond of an executor by a legatee for the amount of his legacy, is an extinguishment of it. *Stewart's Appeal*, III. 476.

FACTOR.

PRINCIPAL AND AGENT.

FALSE IMPRISONMENT.

ARREST, 2.

FEE BILL.

ACTION, 10.

1. By the fee-bill of 1821, the prothonotary is entitled to the fee of 75 cents for a writ of replevin. *Baldwin v. Cash*, VII. 425.

2. For a rule to take depositions under the seal of the court, the prothonotary is entitled to receive only the fee of 25 cents. *Cash v. Baldwin*, VII. 426.

3. The Act of the 29th March 1827, which requires the prothonotary to keep a docket in which all judgments shall be entered, does not impose any penalty upon the officer for receiving the fee provided by the Act to be paid, before the service is performed. *Baldwin v. Cash*, VII. 427.

4. The fee-bill is a penal statute. The dictum in 3 *P. R.* 523, that it is a remedial statute, corrected. *Aechternacht v. Watmough*, VIII. 162.

5. Amendments of the fee-bill suggested to prevent extortion. *Ibid.*

6. To recover the penalty in the fee-bill, the narr. should state the particular service for which the officer took an illegal fee. *Ibid.*

7. On a narr. charging generally that the defendant, for services

FEE BILL.

done in his office of sheriff, on a writ of *feri facias*, took other and greater fees than were allowed by Act of Assembly, the judgment was arrested. *Ibid.*

8. The prothonotary can receive a fee of 75 cents for issuing a *venire* only for the term at which the cause is tried, though it may have been repeatedly before on the trial list. *Pairo v. The American Insurance Company*, VIII. 374.

9. A prothonotary is not entitled to a separate attachment fee for every witness whose name is inserted in the writ. *Payran v. M'Williams*, IX. 154.

IFLONY.

ARSON, 1.

ERROR, 13.

INDICTMENT, 4.

JOINDER, 1.

FEME SOLE.

There is no feme sole trading in Pennsylvania, but such as falls within the Act of 1718. *Jacobs v. Featherstone*, VI. 347.

FIERI FACIAS.

LEASE, 3.

SHERIFF'S SALE, 9.

1. The issuing of an *alias fieri facias* by the plaintiff upon his judgment, will not release the sheriff from a liability which he had incurred upon the *feri facias*. *Myers v. The Commonwealth*, II. 60

2. If a sheriff, by reason of neglect of duty, become liable for the amount of a *feri facias*, a subsequent rule granted by the court, to show cause why the judgment upon which it issued should not be opened, and the defendant let into a defence, will not release the sheriff from such liability. *Ibid.*

FIXTURE.

1. The criterion of a fixture in a mansion-house or dwelling, is actual and permanent fastening to the freehold; but this is not the criterion of a fixture in a manufactory or a mill. *Voorhis v. Freeman*, II. 116.

2. Machinery, which is a constituent part of the manufactory, to the purposes of which the building has been adapted, without which it would cease to be such manufactory, is part of the freehold, though it be not actually fastened to it; and this criterion has a place in questions between vendor and vendee, heir and executor, as well as debtor and execution creditor; but not between tenant and landlord, and remainder-man. *Ruled*, therefore, that a mortgage and sale of a lot and iron-rolling mill, with the buildings, apparatus, steam-engine, boilers, and bellows attached to the same, passed the entire set of rolls used in the mill, whether actually in place, or temporarily detached to make room for such as were; and that such rolls could

FIXTURE.

not be seized and sold as chattels, on a *feri facias* against the mortgagor. *Ibid.*

3. The rolls of an iron rolling-mill, as well as the iron plates with which the floor of such mill is covered, and which are an indispensable part of it, though not manufactured for that purpose, are part of the realty, and pass by a sale of the rolling-mill. *Pyle v. Pennock*, II. 390.

FLATS.

RIVER, 3, 4, 5, 6.

FOREIGN ATTACHMENT.

DISTRESS, 6.

SHERIFF'S SALE, 3.

1. The pendency of a foreign attachment, as matter of defence, can only be made available by a plea in abatement: if judgment has been rendered upon it, and executed against the garnishee, who is afterwards sued for the original debt, he may plead it in bar. *Irvine v. Lumbermen's Bank*, II. 190.

2. The pendency of a foreign attachment in another State, upon which judgment has been rendered and an injunction granted by the Court of Chancery upon the garnishee, forbidding him to pay to the defendant in the attachment, is not the subject of a plea in bar in this State, in an action by the original creditor against the debtor: the defendant can only avail himself of it by plea in abatement. Under such circumstances, nothing short of an actual payment of the money by the garnishee, or levy of his goods upon an execution, can be pleaded in bar. *Lowry v. Lumbermen's Bank*, II. 210.

3. Interrogatories put to the garnishee in foreign attachment must concern the estate and effects of the defendant in his hands, or debts due from him to the defendant. Therefore, a judgment against a garnishee, who is a justice of the peace, for not answering interrogatories as to the number, amount and time of entry of judgments on his docket in favour of the defendant in the attachment, and the names of the defendants therein, is erroneous. *Corbyn v. Bollman*, IV. 342.

4. *Seem*, that a justice of the peace cannot be made a garnishee in foreign attachment, in respect of money received by him on judgments rendered before him. *Ibid.*

5. A judgment against the garnishee in foreign attachment for not answering interrogatories, that he has in his possession goods and effects of the defendant to an amount to satisfy the demand of the plaintiff, together with all legal costs and charges, is good. *Ibid.*

6. In foreign attachment against a corporation as defendant, the civil death of the corporation before judgment against it, produced by the decree of forfeiture of its charter by a judicial tribunal, dissolves the attachment. *Farmers' and Mechanics' Bank v. Little*, VIII. 207.

7. The garnishee may take advantage of this by pleading it, not

FOREIGN ATTACHMENT.

withstanding judgment had been entered against the defendant for default of appearance. *Ibid.*

8. Such decree of a court forfeiting a charter, made before judgment signed in the foreign attachment, appealed from by a devolutive appeal, which had not the effect by the law of the State to suspend proceedings, afterwards reversed by the appellate tribunal because the reasons given by the court below were erroneous, but making a like decree, does not restore the corporation as to intermediate acts done in pursuance of the prior forfeiture, so as to render the judgment by default in foreign attachment valid. *Ibid.*

9. Any debt due by the garnishee in a foreign attachment to the defendant at the time of the answer to interrogatories is embraced by the attachment. *Franklin Fire Insurance Company v. West*, VIII. 350.

10. A claim uncertain at the time of the attachment, but rendered certain at the time of the answer to the interrogatories, is embraced. *Ibid.*

11. An assignment after the attachment is subject to its lien, and will not convey as against the plaintiff in the attachment a claim uncertain at the time of the attachment, but fixed and ascertained when the answers to the interrogatories are put in. *Ibid.*

FORBEARANCE.

GUARANTY, 7, 8.

In *assumpsit* on a promise to pay the debt of another in consideration of forbearance, the fact that the debt was not due at the time of the promise, or that it was voidable in consequence of the infancy of the debtor, or that it was barred by the Act of Limitation, furnishes no defence to the action. *Hesser v. Steiner*, V. 476.

FORFEITURE.

ACT OF ASSEMBLY, 3.

FOREIGN ATTACHMENT, 6, 7, 8.

FORGERY.

BILLS OF EXCHANGE, &c. 6.

FRAUD.

EVIDENCE, 70, 71.

PRINCIPAL AND AGENT, 4, 19.

SHERIFF'S SALE, 7, 22.

TRESPASS, 5.

VENDOR, &c. 43, 46.

1. Lien creditors, as well as others, may purchase jointly at sheriff's sale, if all be open and fair. A combination of interests for that purpose is not necessarily corrupt. It is the end to be accomplished which makes such a combination lawful or otherwise. If it be to depress the price of the property by artifice, the purchase will be void; if it be to raise the means of payment by contribution,

FRAUD.

or to divide the property for the accommodation of the purchasers, it will be valid.

If a purchaser at sheriff's sale participate in a fraudulent contrivance, by which he was enabled to become the purchaser, in an action of ejectment against him for the property purchased, it is not necessary that the plaintiff should offer to refund the amount which was bid at the sheriff's sale and paid for the title. *Smull v. Jones*, I. 128.

2. To set aside a solemn instrument between parties, and convert it into an obligation of different purport, on the ground of fraud or mistake, the evidence of it must be what occurred at the execution of the instrument, and should be clear, precise, and indubitable. And it is error to submit the question of fraud, in such a case, to the jury, upon slight, trivial, parol evidence. *Stine v. Sherk*, I. 195.

3. A fraudulent vendee gains no title to the land by a sheriff's sale, nor interest in it, notwithstanding an innocent creditor may by that very sale obtain a good title to the money. It shall be a good sale as to the creditor, to entitle him to receive the money, and yet no sale as to the fraudulent vendee, to enable him to shelter the land against pursuit. *Foulk v. M'Farlane*, I. 297.

4. If an agreement of settlement between partners be set aside, in an action upon it, on the ground of fraud in obtaining it, the parties are thereby restored to their original rights and liabilities, and an action of account render will afterwards lie by one against the other. *Leonard v. Leonard*, I. 342.

5. The purchaser of a chattel for a valuable consideration will not be prejudiced in his title by the fraud of him from whom he purchased, of which he had no notice. *Thompson v. Lee*, III. 479.

6. In an action of ejectment, where the plaintiff's right to recover is founded upon an allegation of fraud in a sheriff's sale of the property as the estate of the plaintiff, all the proceedings by which the sale was made, and the exceptions to it, and confirmation of it by the court, are competent evidence. *Smull v. Jones*, VI. 122.

FRAUDULENT CONVEYANCE.

A conveyance by a father to his sons in consideration of an agreement on their part to pay his debts, is not fraudulent or void as to the creditors of the father. *Pattison v. Stewart*, VI. 72.

FRAUDS AND PERJURIES.

CONTRACT, 21.

PAROL CONTRACT, 2.

TRUST, &c., 27.

1. 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 within a limited period, it is a contract resting in parol merely, and not transferring any title in the land. *Fox v. Heffner*, I. 372.

FRAUDS AND PERJURIES.

2. The delivery of possession of part of the property in compliance with a parol contract for the sale of land, is not such an execution of it as will take it out of the operation of the statute of frauds and perjuries. *Allen's Estate*, I. 383.

3. A vendor cannot maintain an action to recover the purchase-money of land, upon a parol agreement of sale, and proof of performance of the contract on his part; but he may recover damages from the vendee on the parol agreement. *Wilson v. Clarke*, I. 554

FREIGHT.

COMMON CARRIER, 1.

GENERAL ASSEMBLY.

TRUST AND TRUSTEE, 1.

GIFT.

HUSBAND, &c., 7.

GOOD WILL.

EXECUTORS, &c., 24

GRAND JURY.

MOB, 2.

GRANT.

WAY, 1.

Grant of a cartway "of eight feet wide at least," agreeable to a plan and draft endorsed, *held* to entitle the grantee to more than eight feet, if necessary for its use as a cartway. *Roberts v. Wilcock*, VIII. 464.

GROUND-RENT.

BANKRUPT, 8.

DEVISE, 18.

SHERIFF'S SALE, 33, 34, 35.

1. One owning a ground-rent and bound by covenant to release it on being paid the principal, died, leaving an executor and devising his estate, one-half in trust for the wife of the executor, the other half to another person, and the ground-rent was subject to a general lien for the testator's debts, and to a mortgage by and judgments against the testator. Decreed that the executor and wife should join in a release on the executor's receiving the amount due, he first giving bond as directed by the Act of Assembly. *Ex Parte Peneveyre*, VI. 447.

2. Ground-rent created by deed with a clause of re-entry is payable out of the proceeds of a sheriff's sale of the property under a judgment by a stranger in preference to such judgment. *Pancoast's Appeal*, VIII. 381.

3. Under the Act of 1772, a ground-rent landlord is not entitled

GROUND-RENT.

to be paid his ground-rent out of goods on the premises sold by the sheriff on execution against the owner of the ground in possession. *Pattison v. M'Gregor*, IX. 180.

4. An amount of ground-rent, the arrears of several years, is payable out of the proceeds of a sale by the sheriff of the premises out of which the rent is payable, although during all the time the rent was accruing there was property on the premises which might have been distrained; but it does not follow that interest will be allowed upon such arrearages. *Dougherty's Estate*, IX. 189.

GROUND-RENT DEED.

Articles of agreement to let land on a certain ground-rent forever, with covenant for its payment free of taxes, the grantor to execute a deed or deeds when the ground is improved by buildings. The land not being improved, nor the rent paid, the grantor obtains judgment against the grantee in an action of covenant, and sells the ground on an execution, and becomes the purchaser. *Held*, that the grantee was discharged from his covenant. *Huston v. Davidson*, VIII. 181.

GUARANTY.

AGREEMENT, 13.

BILLS OF EXCHANGE, &c., 5.

CONTRACT, 19, 25.

DEBTOR AND CREDITOR, 2.

LETTER OF CREDIT, 1.

PRINCIPAL AND SURETY, 1.

VENDOR, &c. 37.

1. A special guaranty of payment endorsed upon a negotiable note may not be treated as a blank endorsement, so as to enable any holder to sue the guarantor in his own name. It does not induce that broad mercantile responsibility which a blank endorsement does. *Snevily v. Ekel*, I. 203.

2. A note with its blank endorsements and guaranties, in the absence of proof to the contrary, forms an entire transaction; hence, in an action upon a guaranty endorsed upon a negotiable note; it is not necessary to prove any other consideration for it than what appears upon the paper. *Snevily v. Johnston*, I. 307.

3. M. as the administrator of E. had a judgment and execution against B., which, in consideration of forbearance, S. agreed to pay: S. cannot avail himself of the defence, that the judgment which he agreed to pay was given to E. as an indemnity for endorsements which he made for B., and that he, S., had, since the death of E., paid the notes which he had endorsed. *Silvis v. Ely*, III. 420.

4. Eight days after the execution of an administration bond by A. as security for B. the administrator, C. wrote to A. that at the request of B. he promised and agreed to indemnify A. against all loss or injury he might sustain in consequence of having become security for B. in that business. *Held*, that the consideration was a continuing one, and sufficient to sustain an action of *assumpsit* by A. against

GUARANTY.

C. for indemnity against a loss that afterwards happened to him *by* reason of the default of B. the administrator. *Carroll v. Nizon*, IV. 577.

5. Whether in such case the promise was not made in consequence of a precedent request, ought to be submitted to the jury to judge from the circumstances given in evidence, as such precedent request may necessarily arise out of those circumstances without being expressly proved. *Ibid.*

6. If a promise be made to pay the debt of another if the creditor will take the debtor's note payable at a distant day, the promisor must have notice that the proposition is acceded to, and the note accepted, otherwise he will not be liable on his guaranty. *Patterson v. Reed*, VII. 144.

7. The issuing of a writ of summons, although returned not served, is a suit brought; and would release the guarantor of a bond who had stipulated in consideration of total forbearance. *Caldwell v. Heitshu*, IX. 51.

8. "Further forbearance" as the consideration of a guaranty is construed to mean forbearance for a convenient or reasonable time, taking into view in its computation, as one element, the period which had theretofore been permitted to elapse without enforcing payment; and what is a reasonable or convenient time, the court must determine. *Ibid.*

GUARDIAN AND WARD.

DEVISE, 20.

INFANT, 3.

LIMITATION, 18, 19.

SCHOOL TAX, 1.

TAXES, 3.

TRUST, &c., 22.

1. A guardian stands in relation to his ward *in loco parentis*, and may maintain an action on the case and recover damages for her seduction. *Fernsler v. Moyer*, III. 416.

2. An action of *indebitatus assumpsit* will not lie against a guardian for necessities supplied to his ward without his consent. *Call v. Ward*, IV. 118.

3. If a guardian refuses to supply his ward with necessities, the remedy is by application to the Orphans' Court to have him discharged; or the ward may purchase them himself, or have them purchased for him, for the recovery of the price of which an action would lie against the minor, but not against his guardian personally. *Ibid.*

4. After the marriage of a female ward, any money received, if any such could be received by the guardian for her, would be received, not as guardian, but to be paid over to her husband; could be sued for in a court of law, and is barred in six years. *Bull v. Towson*, IV. 557.

5. After a ward comes of age, the fiduciary relation of guardian

GUARDIAN AND WARD.

ceases; they stand as debtor and creditor; and the claim of the ward is clearly within the Statute of Limitations. *Ibid.*

6. Where twenty-two years had elapsed since a ward came of age and her marriage; the Orphans' Court would have done right to have refused a citation to the administrators of her deceased guardian to settle an account. *Ibid.*

7. A man who had ceased to be guardian could not be made answerable for the neglect of an administrator, on whom he had no right to call, and whom he could not sue. *Ibid.*

8. It is a bad practice for guardians to settle with their wards after they come of age and take a release; they ought to settle their account in court and have it approved.

Yet if the ward receives the amount due to him and releases the guardian, he ought not to trouble him afterwards without pointing out some mistake or fraud to his prejudice, especially after a lapse of four years and other circumstances.

Notwithstanding such release, however, if the ward accepted bank-stock from the guardian at the price he gave for it, which was above its then market value, the guardian is bound to make good the difference. *Lukens's Appeal*, VII. 48.

9. It is wrong in a guardian to invest his ward's money in stock in his own name; if he does, equity would give the ward the right to the stock if it rose in value, and, if it fell, make the guardian pay with legal interest. *Ibid.*

10. If a guardian trade with his ward's money, or use it so as to make compound interest, he will be charged with compound interest. So, if he be expressly directed by will, or be guilty of misfeasance or negligence; but the general rule is in favour of simple interest only. *Ibid.*

11. Where ejectment for the whole of a tract of land was brought by a guardian on behalf of his ward, who claimed it as conveyed to his father by his grandfather, and the verdict and judgment were for the defendant, and on the application of the guardian and one of the five heirs of the grandfather, the Orphans' Court decreed a sale, because it could not be divided, and the tract was sold to a purchaser, and the guardian received the minor's share of the purchase money and paid the balance, deducting expenses of maintenance, to the minor on his arrival at 21, it was *held*, that the minor was concluded from contesting the title of the purchaser. *Wilson v. Bigger*, VII. 111.

12. A promise "to the guardians of the minor children of A. B," is a promise to the minors, and should be sued in their name. *Carskadden v. M'Ghee*, VII. 140.

HABEAS CORPUS.

The relator on a writ of *habeas corpus* had been bound over by the Court of Quarter Sessions during its session to answer thereat a charge of *malemeanor*, &c. *Held*, that the case came under the provision in the 6th section of the Act of February 8th 1785, and

HABEAS CORPUS.

the writ, if returnable at all, must be to the Judges of the Court of Quarter Sessions, who alone have jurisdiction until after the end of the term or session. *Commonwealth ex. relat. Jack v. The Sheriff*, VII. 108.

HAND-BILL.

EVIDENCE, 107, 109.

HIGHWAY.

RIVER, 1.

The obstruction or deepening of the waters of a stream, which is a public highway, by authority of an Act of Assembly, is not the subject of a claim of damage by the owner of the adjoining land for an injury done to or destruction of a fording across the stream. *Zimmerman v. Union Canal Co.*, I. 346.

HUSBAND AND WIFE.

BILLS, 31, 32, 34.

DEVISE, 36.

EXECUTORS, &c., 10.

LEGACY, 7.

MORTGAGE, 3.

SET-OFF, 7.

SLANDER, 4.

1. If an administrator *de bonis non*, with a will annexed, whose wife is a legatee in the will, receive assets of the estate sufficient to pay the legacies, and die without settling any account of his administration, leaving his wife surviving him, it is such a reducing to possession of the choses in action of the wife, as will preclude a recovery by her after his death. *Ellis v. Baldwin*, I. 253.

2. The compensation of a wife for owelty of partition already made, is subject to the control of the husband, who may submit it to arbitrators; and upon the subsequent death of the husband, the wife's rights will stand as if she had entered into the submission when sole, and remained so. *Strawbridge v. Funstone*, I. 517.

3. A husband who takes the bond of an executor for the legacy of his wife, and obtains a judgment upon it, thereby reduces it into possession, so that upon his death it will go to his personal representatives. *Stewart's Appeal*, III. 476.

4. If partition be made between tenants in common, who are *femes covert*, and mutual releases be executed to the husbands, they do not vest absolute estates in them, but only in trust for their wives. But if such releases do not recite the partition, but a moneyed consideration only, a purchaser without notice would take an absolute estate. *Weeks v. Haas*, III. 520.

5. A parol antenuptial settlement by which the husband and wife agreed that the wife's chattels should continue hers notwithstanding the marriage and they were so treated by him during the marriage, is binding at the decease of either or both; and the husband has no

HUSBAND AND WIFE.

right of survivorship, nor does the intestate law affect them. *Gackebach v. Brouse*, IV. 546.

6. Declarations by the husband before and after marriage, are evidence to show an antenuptial agreement for the wife's chattels. *Ibid.*

7. Where a gift by a husband to his wife is reasonable and not in fraud of creditors, equity sustains it as a provision for her, to which the interposition of a trustee is not indispensable; but such gift must be established by clear and convincing proof, not only of the act of donation and delivery, but of her separate custody of it. *Herr's Appeal*, V. 494.

8. The declaration and separate examination of a married woman, required by the Act of 27th March 1832, to entitle her husband to the share of her intestate father's estate secured by recognizance in the Orphans' Court, must be *filed* during the lifetime of the wife; otherwise, at her death, it will go to her heirs at law. *Beyer v. Reesor*, V. 501.

9. Arrears of alimony due at the death of the wife in the case of a divorce *a mensâ et thoro*, are not recoverable from the husband by the personal representatives of the wife. But if, during the life of the wife, the husband unjustly avoids the payment, by reason of which the wife contracts debts, and her representatives sue for the use of her creditors, then they may recover. *Clark v. Clark*, VI. 85.

10. A husband is entitled to letters of administration upon his wife's estate; and if they issue to a third person, he will be a trustee for the husband; but in an action by him against the husband, the regularity of the letters of administration cannot be impeached. *Ibid.*

11. Where land is bought by and conveyed to a daughter, whose mother assists her to pay for it with money paid on a bond of her own, the proceeds of her land, such money is not necessarily to be taken to have been reduced into possession by the husband of the mother, merely because he joined her in the receipt given to the obligor, if the husband never exacted the payment of the bond, and the money did not pass through his hands, and he exercised no act of ownership over it. *Timbers v. Katz*, VI. 290.

12. Between the husband and wife, his possession of a chose in action may be qualified by his intention, and the ownership follows his will; and it is the same even against creditors or their trustees under the Insolvent Act. *Ibid.*

13. Where the husband lives in the same city as the wife, and the wife contracts debts for shopkeeping, and the husband and wife are living separate, the husband and wife are not suable. *Jacobs v. Featherstone*, VI. 346.

14. Even if they were necessities furnished, and the husband were liable, the wife cannot be joined as defendant in the suit. *Ibid.*

15. Where the husband disagreed with his wife and separated from her, and the state of feeling between them was hostile, and he was absent in a distant State, the mere circumstance of the wife's

HUSBAND AND WIFE.

having possession of the husband's bond d- ϵ . not cause a presumption that he delivered it to her with authority to receive the interest upon it.

Nor is such presumption raised by the husband's having turned her away without reasonable cause, and without providing the means of support. *Walker v. Simpson*, VII. 83.

16. The husband is not liable for money lent to the wife to procure necessities, unless at his request; and it is the same as to an infant.

But in equity, if a debtor to the husband has paid money to the wife and she used it for necessities, where the husband turned her away without cause, the debtor is permitted to stand in the place of the creditor, and defalk the money advanced in a suit for the debt. *Ibid.*

17. Unless it be shown the husband turned away his wife without cause, he will not be liable for necessities furnished her. *Ibid.*

18. If a husband and wife join in the sale and conveyance of the real estate of the wife, and the husband receive the purchase money, he receives it as his own, and the law does not raise any implied trust in favour of the wife. And if the purchase money be applied to the purchase of other real estate, and the conveyance be to the husband and his heirs, upon his death the wife has no peculiar equity arising out of the circumstances. *Benedict v. Montgomery*, VII. 238.

19. Upon the sale by a husband and wife of the wife's lands, and a subsequent separation, an agreement between them that one-half of the unpaid purchase money shall be paid to the attorney of the wife for her sole use and maintenance, upon her giving security to indemnify the husband against any debts which she might contract, is binding between the parties; and upon the money having been paid by the purchaser to the attorney of the wife, the husband cannot maintain assumpsit for money had and received against him, although the wife had not given the indemnity against her debts, which the agreement required: he could only sue and declare specially upon the agreement, setting out a breach; and the damages then recoverable would be measured by the amount of debts of the wife which the husband had been obliged to pay. *Lehr v. Beaver*, VIII. 102.

20. A husband and wife, seised in right of the wife of an estate of inheritance, "granted, demised, leased, set and to farm let the same unto A. B., to have and to hold to the said A. B., his heirs and assigns, from the day of the date hereof, for and during the existence of the world, he yielding and paying therefrom and thereout yearly and every year hereafter to the said grantors, their heirs and assigns, the yearly rent of \$100;" and in the same deed the grantees covenanted to erect a house upon the premises of the value of \$100: and upon their failure so to do, a right to the grantors to re-enter was reserved: *Held*, that upon the death of the wife the husband was seised of the whole estate created by the deed in fee, and it was subject to a levy and sale for the payment of his debts. *Robb v. Beaver*, VIII. 107.

HUSBAND AND WIFE

21. A post-nuptial contract between husband and wife, though declared void at law, is held good and carried into effect in equity. *Duffy v. The Insurance Company*, VIII. 413.

22. If made without a valuable consideration, it will be deemed fraudulent in law against creditors; but if a valuable consideration is received by the husband from his wife for a settlement to her separate use, it is valid. *Ibid.*

23. Where, therefore, the husband had a life-estate in his wife's land, and in consideration of \$4000 paid them, they joined in a conveyance of the fee in trust to collect the rents and apply one-half of them to its repayment, and to pay the other half to such persons as the wife should direct, and afterwards in trust to convey as she should direct, and subsequently made another conveyance to the assignees of that deed, in consideration of \$12,000 advanced to the wife to enable her to pay off the \$4000, in trust to sell, mortgage or let the premises; and after repaying the \$12,000, to pay off certain creditors of the husband to the amount of \$5509.25, which sum greatly exceeded the value of the husband's life-estate (the property consisting of unproductive lots), and there being no ground to presume fraud or collusion, the conveyances were held to be valid. *Ibid.*

IMPROVEMENT.

UNSEATED LAND, 6, 12, 36.

VENDOR, 72.

WARRANT AND SURVEY, 23.

1. A defendant in ejectment who is in actual possession, claiming title by warrant and survey, is not entitled to compensation for improvements made upon the land, by reason of his having purchased a treasurer's title, which he had previously annulled by redemption. *Orr v. Cunningham*, IV. 294.

2. Where a man encourages another to settle upon and improve land, and expend his money and labour upon it, he will not afterwards be permitted to take it from him, although he has an older and better title for it, and although his encouragement was given in ignorance of his own rights. *M'Kelvey v. Truby*, IV. 323.

3. If one in possession of land makes large and valuable improvements upon it, with notice of an outstanding title in another, it clothes him with no equity with which he can defend himself in an ejectment founded upon that title. *Paden v. Akin*, VII. 456.

INCUMBRANCE.

VENDOR, &c., 62.

Merger depends generally upon the intention of the parties to be affected by it; and an intent to prevent it will be presumed, whenever it is the interest of the party that the incumbrance should not sink in the inheritance. *Richards v. Ayres*, I. 485.

INDEMNITY.

ASSIGNMENT, 5.
BOND, 1, 6, 7, 8

INDICTMENT.

ACTION, 11.
PRACTICE, 10.

1. Upon an indictment for forcible entry, and an acquittal of the defendants without any finding by the jury on the subject of costs, an action will not lie by a witness on behalf of the commonwealth, to recover his costs from the prosecutor who subpoenaed him. *Strein v. Zeigler*, I. 259.

2. Upon the trial of a defendant charged with a criminal offence, he may demur to the evidence, but the Commonwealth will not be compelled to join in the demurrer. *Commonwealth v. Parr*, V. 345.

3. In an indictment for fornication and bastardy, the witness testified, "He forced me; he worked himself under me, and in that way forced me: I did not give my consent." Upon a demurrer to this evidence it was *held*, that it was not such as would merge the offence charged in the crime of rape, but that the defendant might be legally convicted. *Ibid*.

4. An indictment against a principal and accessory in a felony, contained two counts against the principal, laying the barn burnt in one as the property of R., and in the other as the property of N., and a third count against the accessory that he did "aid, abet, &c. the said B. to do and commit the said felony and arson, &c." *Held*, that the word "said" referred to the count which was its next antecedent, and the offence was thereby well laid. *Sampson v. The Commonwealth*, V. 385.

5. A confederacy to assist a female infant to escape from her father's control, with a view to marry her against his will, is indictable as a conspiracy at the common law. *Mifflin v. The Commonwealth*, V. 461.

6. If murder be committed in the perpetration of arson, rape, burglary or robbery, it is not necessary that it should be so set out in the indictment. *Commonwealth v. Flanagan*, VII. 415.

INFANT.

FORBEARANCE, 1.
INDICTMENT, 5.
JUDGMENT, 22.
MASTER AND SERVANT, 3.

1. An over-supply of an infant's wants, though the articles might in other respects be ranked as necessities, gives a demand against him only for so much as was actually needed; and it is the tradesman's duty to acquaint himself with the infant's circumstances and necessities, as well as to take notice of supplies by other tradesmen. *Johnson v. Lines*, VI. 80.

2. The rule that no one may deal with an infant, is subject to the exception that a stranger may supply him with necessities; but to

INFANT

bring the contract within it, the burthen of proving the existence of an actual necessity lies on the tradesman, who, in regard to that, acts at his peril. *Ibid.*

3. Though the permission of a guardian, in a doubtful case, may excuse the unfitness of a supply for the infant's degree, yet no permission to deal for what is manifestly improper in quantity or sort, can subject the infant to liability in favour of one who has dealt with him *malâ fide*; but the guardian may make himself personally liable by a permission which amounts to an order. *Ibid.*

4. What are necessities, is a question mixed of fact and law; but where an excessive supply has manifestly been so gross as to shock the senses, the court may declare it to be inordinate in point of law *Ibid.*

INJUNCTION.

1. An injunction will not be granted to restrain an individual from exercising the office of school director, who has accepted the office of commissioner of an incorporated district. The question of his right to exercise the duties of the office must be tried by proceedings on a writ of *quo warranto*, which affords an ample legal remedy *Hagner v. Heyberger*, VII. 104.

2. Equity has no jurisdiction with regard to the election or amotion of corporators, nor in case of a public officer *de facto* of a municipal character. *Ibid.*

3. The English chancery can by injunction restrain the commission of acts contrary to equity. The limited chancery powers of the courts of Pennsylvania extend only to prevent acts contrary to law *Ibid.*

INSOLVENT.

ARREST, 1.

HUSBAND AND WIFE, 12.

JUROR, 5.

TRUST, &c. 14.

1. A voluntary surrender of himself by one who has given bond to take the benefit of the Insolvent Laws, will not relieve his bail from the obligation contained in his bond. *Wolfram v. Strickhouser*, I. 379.

2. After a report of auditors has been made and confirmed, marshalling the assets among the creditors of an intestate dying insolvent, it is too late for a creditor, who has not used due diligence, to come in for a *pro rata* share of the assets. *Stæver's Appeal*, III. 154.

3. The Act of the 16th of June 1836, directing appeals to the Supreme Court to be determined according to the principles of justice and equity, extends only to appeals from the Orphans' Court, and does not touch the case of a report of auditors on an insolvent estate; nor in such case can there be a review, as the rights of the creditors are fixed by law, and equity follows the law. *Ibid.*

INSOLVENT.

4. A defendant arrested upon a *ca. sa.* gave bond for his appearance to take the benefit of the Insolvent Law, and upon his bearing his application was rejected; whereupon he surrendered himself in discharge of his bail, and while thus in custody executed another insolvent bond to the same plaintiff, which was approved by one of the associate Judges, and he was discharged: he again made application for the benefit of the Insolvent Laws, and was again rejected. *Held*, that although the second bond was illegal, in an action upon it, the defendants were estopped from asserting its illegality, and the plaintiff was entitled to recover. *Egbert v. Darr*, III. 517.

5. The discharge of one who gives bond for his appearance to take the benefit of the Insolvent Law, by a Judge or the prothonotary, is binding upon the sheriff who has the debtor in custody, whether the bond given be legal or illegal. *Frick v. Kitchen*, IV. 30.

6. A petitioner for the benefit of the Insolvent Law, whose application has been rejected, in order to relieve his security, must surrender himself upon the day of his rejection; a subsequent surrender is ineffectual, and an escape from it would not charge the sheriff with the debt. *Ibid.*

7. The pending application of an insolvent debtor to be discharged, relieves him from the necessity of making a second application, in pursuance of a bond given to another creditor upon a subsequent arrest. *M'Clure v. Foreman*, IV. 279.

8. An insolvent debtor, whose application to be discharged is pending in one county, need not make a second application in another county where he has been arrested and given bond. *Caldcleugh v. Carey*, V. 155.

9. If the petition of an insolvent for discharge be rejected because he had made the accompanying affidavit before the prothonotary who had no power to administer the oath, and he is immediately surrendered to jail, the condition of his bond to take the benefit of the Act is forfeited. *Detwiler v. Casselberry*, V. 179.

10. The discharge of an insolvent is a matter of record, and when pleaded in an action on an insolvent bond, should conclude with a *prout patet per recordum*. *Murphy v. Richards*, V. 279.

11. Insolvent bond dated 11th January, conditioned for appearance on the third Monday of March ensuing, (21st), to present petition, &c., for the benefit of the Insolvent Laws. On the 18th March the debtor applied for the benefit of the Bankrupt Law of the United States, under which, on the 17th August, he obtained his discharge. *Held*, that the application and discharge under the Bankrupt Law excused him from complying with the condition of the insolvent bond. *Nesbit v. Greaves*, VI. 120.

12. The discharge and assignment of an insolvent debtor vests in his assignees the distributive share of an intestate estate to which he is entitled in right of his wife after the death of the widow. *Shuman v. Reigart*, VII. 168.

13. If one who is exempt from arrest by reason of his having taken the benefit of the Insolvent Law suffers himself to be sued,

INSOLVENT.

judgment to be entered, and execution to issue against him, upon which he is arrested and gives a bond to take the benefit of the Insolvent Law, and the condition of the bond is broken by his failure to make an application for that purpose, he cannot, in an action brought on that bond, avail himself of the fact that his arrest was illegal. *Johnston v. Coleman*, VIII. 69.

14. If one illegally arrested give bond with surety, conditioned for his appearance to take the benefit of the Insolvent Law, instead of suing out a *habeas corpus*, the surety will be bound by his obligation. *Ibid*.

15. One who has been arrested for debt prior to the passage of the Act of 12th July 1842, and given bond and filed his petition for the benefit of the Insolvent Laws, is not relieved from his obligation to appear and prosecute his application at the time appointed by the court, by the passage of that Act before that time arrived; and upon his failure to appear, he and his surety are liable upon their insolvent bond. *Lilley v. Torbet*, VIII. 89.

INSOLVENT BOND.

1. In an action upon an insolvent bond, the judgment is not for the penalty of the bond, but for the damages under it for breaches incurred at the suing out of the writ. *O'Neal v. O'Neal*, IV. 130.

2. A condition in an insolvent bond that the obligor shall appear and make application for the benefit of the Insolvent Laws at the next term of the court, is performed by a discharge at an adjourned court between the date of the bond and the time fixed in it for his appearance. *Johnson v. Turner*, IV. 465.

3. J. S. and G. S. brought an action against W. F. K., L. K. and W. H. W., and obtained judgment therein, and on the 21st May 1841, issued a *pluries capias ad satisfaciendum* thereon, upon which W. H. W. was arrested, and gave bond to take the benefit of the Insolvent Laws, and was thereupon discharged from custody. At the time of his arrest, W. H. W. was possessed of considerable personal property, had more money on deposit in bank than would have paid the amount of the execution, and was the owner of a large real estate. He forfeited his bond, and an action of debt was brought against him and his surety upon it, to which he pleaded that by reason of the possession and ownership of the real and personal above mentioned, the arrest amounted to duress, and the bond was void. *Held*, that since the Act of 16th June 1836, exemption from arrest is a privilege, and that submitting to it and giving bond is a waiver of the privilege. *Winder v. Smith*, VI. 424.

INSURANCE.

AGREEMENT, 10.

ATTACHMENT, 6.

1. The first insurance by a fire office was upon "merchandise generally, including liquors and groceries contained in store No. 37, South Wharves, for the use of whom it may concern; say merchandise without exception." A second was made in another office on coffee and other merchandise without exception, either on board the

INSURANCE.

J. S. in this port, or in the brick store, No. 37, South Wharves, in the city of Philadelphia. A loss happened, by fire, on goods in the store not brought in the J. S., or landed therefrom. *Held*, 1. That facts and circumstances out of the instrument are inadmissible to show the intention of the parties as to the second policy being a specific insurance on other goods not covered by the first. 2. That, as thus explained, there was not necessarily a double insurance, but the first might be on goods generally in the store, and the second on specific goods merely, brought in the J. S. or landed therefrom.

Where there is a clause in a policy of insurance, that persons at that office must give notice of any insurance *made* on their behalf by the same, and shall cause such other insurance to be endorsed on their policy, in which case each office shall be liable to the payment only of a rateable proportion of any loss or damage which may be sustained, and unless such notice is given the assured will not be entitled to recover in case of loss, the condition applies to a subsequent as well as to a prior insurance.

If the second policy contain a clause that such insurance shall not be binding if the assured has made, or shall make, any other insurance on the same, unless the same be allowed of by said company, and specified in their policy, and then to pay rateably, such clause does not affect the first insurance, if the assured could not at any time recover on the second policy.

The assured's informing the second underwriter that there was a former policy at another office, but adding it was on other property, would not, of itself, bring the case within this clause, nor would it be sufficient to make the second company responsible in an action.

Quære? Whether, in case of an insurance against fire on goods, with a clause to pay rateably in case of another insurance, if the assured procures a second or double insurance on the same risk, and the loss is less than the whole amount insured, he may recover the whole loss from the first underwriter, leaving him to his remedy against the other for contribution, or is only entitled to a *pro rata* payment from each underwriter? *Stacey v. The Franklin Fire Insurance Company*, II. 506.

2. In order that a protest may be evidence for the insured, it must be made within twenty-four hours after the vessel is moored on her arrival at her port of destination, or certainly before the goods have been landed, or the condition of the cargo ascertained.

If the extension of the protest be delayed till afterwards, the mere noting the protest within the twenty-four hours would not make it evidence. *Fleming v. The Marine Insurance Company*, III. 144.

3. The naked fact shown by the insured that the goods after arrival were found damaged by sea-water, is not evidence of a loss from a peril of the sea. *Ibid.*

4. Insurance, November 10th 1837, on vessel for and during the term of twelve calendar months, commencing that day at noon, with liberty of the globe, and if at sea at the expiration of said twelve months, the risk to continue at the same rate of premium until her arrival at her port of destination in the United States. *Held* that

INSURANCE.

evidence was admissible to prove that the voyage described in the policy was known among merchants and underwriters as a trading voyage, and that on such a voyage, under such a policy, it is the usage of trade that the vessel insured should sail for any part of the globe to which she can get freight at any time during the continuance of the said twelve months; and that by the usage of trade she continued to be covered by such policy during such voyage after the expiration of the said twelve months; and that such usage was well known to, and acted on by the underwriters of this port. *Eyre v. The Marine Insurance Company*, V. 116.

5. But evidence is not admissible to show that, on the voyage next preceding the one for which the said policy was effected, a different contract was made by the defendant with the plaintiff, and stating reasons for the present one, but not offering to prove anything which occurred at the making of the present policy, or was alleged by the defendant. *Ibid.*

6. Nor that the order for insurance was drawn by the secretary of the defendant, and the plaintiff objected to the insertion of the words "at her port of destination" after the word "arrival," and was told by the secretary that it was immaterial, and the meaning was the same. *Ibid.*

7. It is one of the principles of a mutual insurance company that a party insured shall, *ipso facto*, be a member of the corporation, and, as such, bound by all its by-laws: hence, one which makes the surveyor of the company the agent of the insured, relieves the company from responsibility in consequence of the inaccuracy of the survey, or its want of compliance with the requisitions of the by-laws. *Susquehannah Insurance Co. v. Perrine*, VII. 348.

8. If the particulars of description which are required by the by-laws of a mutual insurance company to be stated in the application be omitted, the policy granted upon it creates no liability on the part of the company. *Ibid.*

INTEREST.

ADVANCEMENT, 4.

AGREEMENT, 8.

ASSIGNMENT, 4.

ATTORNEY AT LAW, 2.

DAMAGES, 3.

EJECTMENT, 4.

GROUND-RENT, 4.

JUDGMENT, 8.

SET-OFF, 16.

SHERIFF'S SALE, 36

1. In an action against a sheriff to recover the amount of a lien upon land sold by him, where it appeared the sheriff had paid over the money to other lien creditors, and taken their refunding receipts, the plaintiff is as well entitled to recover interest as principal. *Reed v. Reed*, I. 235.

2. The amount of interest is to be determined by the law of the
IX. — 2 D *

INTEREST.

place where the contract is to be executed. It may be expressly reserved, though it exceed the rate allowed by the law of domicile or the law of the forum; and where no rate is stipulated, the parties are presumed to have contracted with reference to the law of the place of performance, whether statutory or customary. If the contract is to be executed in China, the measure of damages for the breach of it is the customary rate of Chinese interest. *Archer v. Dunn*, II. 327.

3. A vendee, under articles of agreement, who enters and continues in possession, must pay interest on the purchase money; but where he has been harassed or disturbed in his possession, or there has been wilful and vexatious delay, or gross or criminal laches on the part of the vendor, or where there are well-founded doubts of the title, or from neglect or otherwise for a length of time no administrator has been appointed to receive payment, it is for the jury to determine whether the vendee is to pay interest. *Kester v. Rockel*, II. 365.

4. Upon an account current between a wholesale merchant in the city and his customer in the country, upon which partial payments have been made, interest is chargeable from the end of each six months after the sale and delivery. *Koons v. Miller*, III. 271.

5. In an action upon a note given in the State of New York, the plaintiff is entitled to recover interest at the rate of seven per cent. per annum, according to the law of that State. *Ralph v. Brown*, III. 395.

6. Whether a widow be entitled to recover interest upon a sum secured to her by recognizance, in a proceeding in partition in the Orphans' Court, may, under particular circumstances, be referred to a jury. *Smyser v. Smyser*, III. 437.

7. Bond dated in 1830 conditioned for the payment of money on the 1st of April 1832, with 3 per cent. interest from the date; the plaintiff is entitled to recover interest at 3 per cent. till the time of payment, and after that legal interest at the rate of 6 per cent. *Ludwick v. Huntzinger*, V. 51.

8. An assignment in trust for a preferred creditor, to pay and satisfy in full the sum of \$5178, to be paid to her or whoever may be entitled to receive it for her; *held*, under the circumstances, not to carry interest from the date of the assignment. *Murphy's Appeal*, VI. 223.

9. If an unconditional payment be made upon a bond bearing interest, which is not yet due, it must be applied first to the extinguishment of the interest up to the time when the payment is made; then to the principal, *pro tanto*. *Spires v. Hamot*, VIII. 17.

INTESTATE.

- AGREEMENT, 11.
- HUSBAND AND WIFE, 8.
- LIEN, 5.
- LIMITATION, 10.

INTESTATE.

PARTITION, 6, 7.

SET-OFF, 10.

1. In the distribution of the personal assets of an intestate, under the Act of 19th April 1794, the judgments of the courts of another State will rank in the same grade and be entitled to like preference with judgments of the courts of our own State. *Coll's Estate*, IV. 314.

2. A person who has received bonds and other personal property from an intestate during his lifetime, cannot be proceeded against in the Orphans' Court under the Acts of Assembly as a trustee, at the instance of a child of the intestate, to make him account for their value. *Fretz's Appeal*, IV. 433.

3. Such person is answerable at law to the intestate in his lifetime, and to his administrators after his decease. *Ibid.*

4. The lien of the debts of an intestate upon his real estate is subject to the same limitation in the hands of an administrator, who has paid them out of his own funds, as they are in the hands of the original creditor; and after the lapse of five years, the Orphans' Court will not decree the sale of real estate to pay a balance found to be due to an administrator upon the final settlement of his account. *M'Curdy's Appeal*, V. 397.

5. Father seised of land died intestate, leaving two children, infants, one of whom soon after died, and afterwards the other, unmarried and without issue, the mother living. *Held*, that the brothers of the father took the estate by descent under the 9th section of the Act of 8th April 1833, and not the mother. *Maffit v. Clark*, VI. 258.

6. A creditor of an intestate does not release the real estate of the decedent from liability by suing and obtaining judgment against the administrator alone, without joining the widow and heirs under the 34th section of the Act of 24th February 1834, where the sale of the real estate for the payment of debts takes place by order of the Orphans' Court on the application of the administrator. *Murphy's Appeal*, VIII. 165.

7. The 34th section of that Act means that the judgment obtained shall not be paid by force of an execution issued thereon. *Ibid.*

8. After judgment obtained against the executor or administrator, the plaintiff may issue a *scire facias* thereon against such executor or administrator, and the heirs or devisees, to recover the same out of the real estate, and such heirs or devisees may make the same defence which they could have made if originally joined in the suit. *Ibid.*

9. But where such judgment is obtained against the administrator alone, and a sale is about being ordered by the Orphans' Court, that court ought to allow the heirs to show, if they can, that the creditors' claim is unfounded as fully as they could in an action in which they were joined as parties. *Ibid.*

10. Upon a sale by the sheriff of the real estate of one who died intestate, and after the payment of liens entered in his lifetime, the

INTESTATE.

residue must be paid to the administrator, to be paid and distributed according to law, upon his giving such security as the court may decree. *Morrison's Case*, IX. 116.

11. Upon a sale of the real estate of an intestate by an order of the Orphans' Court for the payment of debts, the title remains in the heir until the contract of sale be executed by the payment of the purchase money and execution of the deed: hence, upon the death of the heir subsequently to the confirmation of the sale by the court, and prior to the execution and delivery of the deed, his interest will descend as land and not as money. *Erb v. Erb*, IX. 147.

INTOXICATION.**DRUNKARD.**

One reduced to such extreme debility by intoxication as to be unable to rise or sit up in bed unless supported, and to hold a pen or make a mark unless the pen and hand are held for him, can no more execute a conveyance of his property than if intoxicated. *Wilson v. Bigger*, VII. 111.

JOINT ACTION.**ACTION, 7.****EVIDENCE, 112.**

1. If a joint suit be brought against two obligors, one of whom dies pending the action, and the plaintiff takes a judgment against the survivor, the estate of the deceased obligor is thereby discharged from liability. *Finney v. Cochran*, I. 112.

2. If a joint suit against two be referred to arbitrators, and an award made against both, from which one appeals, the judgment remains against him who does not appeal, and the cause is tried as to the other alone. *Anderson v. Levan*, I. 334.

3. In an action against three partners, in which the writ was served upon one only, upon the trial of which a question of fact arose as to who were the members of the firm, the record of a former action against the defendant, served with process alone, in which he pleaded in abatement the non-joinder of the present defendants, is competent evidence. *M'Clelland v. Lindsay*, I. 360

JOINDER.**PARTNERSHIP, 21.**

A principal and accessory in a felony may voluntarily appear, plead and go to trial jointly, and the finding is conclusive upon them. Whether they shall be so tried, is discretionary with the court. *Sampson v. The Commonwealth*, V. 385.

JOINT DEFENDANT.**SCIRE FACIAS, 8.****JOINT GUARDIAN.****TRUST, &c. 22.**

JOINDER IN ACTION.

COMMON CARRIER, 5.

PLEADING, 9.

1. Though a deed of land is to K. alone, yet F. may have such an equitable interest therein by agreement with K., as to authorize both to sue for damages done to a building erected at the expense of both. *Schuylkill Navigation Co. v. Farr*, IV. 362.

2. If the legal estate in land is in A. and the equitable estate in B., they may, in Pennsylvania, join in ejectment, or in any action for damage done to the property, though their interest be in unequal proportions. *Ibid.*

3. In a joint suit, such equitable interest, if alleged, must be proved, and it is incumbent on the party to produce any writing relating to it, and to show the respective rights in the property. *Ibid.*

JOINT AND SEVERAL.

A recognizance binding three persons in a certain sum, "to be levied of their goods and chattels, lands and tenements *respectively*," is joint and several. *Wampler v. Shissler*, I. 365.

JUDGES.

ACTION, 11.

CONSTITUTIONAL LAW, 1.

JUDGMENT.

AFFIDAVIT OF DEFENCE, 3, 4.

AGREEMENT, 8, 9.

APPEARANCE, 1, 2.

ATTACHMENT, 2.

AUDITOR, 1.

CLERICAL ERROR, 1.

EJECTMENT, 7.

ERROR, 4.

EVIDENCE, 117.

EXECUTION, 26, 27.

INTESTATE, 1.

PRACTICE, 10.

SCIRE FACIAS, 2, 8.

SHERIFF'S SALE, 25, 38.

SUBSTITUTION, 4.

TERRE-TENANT, 1, 2.

TRESPASS, 3.

VENDOR, &c., 61.

1. An award of arbitrators in favour of a defendant for a certain sum has the effect of a judgment, upon which an execution may issue without a *scire facias* against the plaintiff. (*Donnell v. Lynch*, I. 283.

2. An amicable *scire facias post annum et diem*, in order to its
IX. — 44

JUDGMENT.

validity, must be docketed : it is not sufficient that it be filed among the papers of the original judgment, and noted upon the docket entry of it. *M'Cleary's Appeal*, I. 299.

3. A partner has no power to bind his co-partner by a confession of judgment against the firm ; but if such a judgment be confessed, it will bind the partner who did it, and be void as to the other. *Bitzer v. Shunk*, I. 340.

4. One who purchases real estate which is incumbered by judgments, which he agrees to pay out of the purchase money, and afterwards discovers another judgment which he did not agree to pay, may take an assignment of the judgments paid by him, in order to protect himself from the payment of the judgment which he did not agree to pay. And if the latter judgment creditor proceed to sell the estate by execution, and the money be brought into court for appropriation, the assignee of the first judgments will be entitled to the money. *Bryson v. Myers*, I. 420.

5. After a trial upon the merits, a judgment will not be reversed because there was neither a declaration nor replication to the defendant's plea : and this principle is as applicable to a trial upon the plea of *nul tiel record* as upon one of fact. *Glenn v. Copeland*, II. 261.

6. Though a judgment against a defendant by default for want of appearance, without filing a declaration, is erroneous, it is not a nullity, but must be deemed a judgment on the issue of *nul tiel record* in a *scire facias* upon it.

It is not a variance on a *nul tiel record* pleaded to a *scire facias* reciting a judgment for £90, where the summons was for a debt of £90, and the judgment and execution are for the same sum, though the execution is endorsed only for a debt of \$110.94, and it does not appear that a declaration was filed. *Hersch v. Groff*, II. 449.

7. In *assumpsit* against several, if some are served with process and appear and plead to issue, and some who are served make default, the plaintiff takes judgment by default against the latter ; and under the 27th section of the Act of 1722, the jury which tries the issue against the former, may assess damages against all, and execution issues against all. *Ridgely v. Dobson*, III. 118.

8. The appropriation by the court of a fund raised by the sale of real estate to a judgment, if not available immediately to the party, in consequence of an appeal from the decree to the Supreme Court, is not such a payment or discharge of the judgment as will relieve a surety for the same debt from the payment of subsequently accruing interest. *Carlisle Bank v. Barnett*, III. 248.

9. The confession of a judgment by a defendant in a pending suit, after the death of the plaintiff, and before substitution of his representatives, is void, both as regards the representatives of the plaintiff, and any third person who may be collaterally interested in the payment of the same. *Finney v. Ferguson*, III. 413.

10. If a plaintiff recover a judgment for the amount claimed in his statement, a part of which he was not legally entitled to, the

JUDGMENT.

court will not affirm the judgment, upon the plaintiff entering a *remititur* for the excess. *Pontius v. Commonwealth*, IV. 52.

11. There can be but one final judgment in any personal action, whether founded in contract or in tort. *O'Neal v. O'Neal*, IV. 130.

12. The judgment of a justice of the peace cannot be inquired into collaterally upon any other ground than that of collusion. Hence an action of trespass will not lie against a plaintiff who recovered a judgment, and collected it by execution and sale of defendant's goods, on the ground that the defendant in the judgment was never served with process. *Baird v. Campbell*, IV. 191.

13. A judgment will be reversed, when it is apparent from the record that the plaintiff had no right to recover. *Clay v. Irvine*, IV. 232.

14. The lien of a judgment is not discharged by the plaintiff's agreement in writing to release the defendant from imprisonment on a *capias ad satisfaciendum* issued on the judgment, on his paying the costs and jail fees, without prejudice to the future liability from the debt and interest of the judgment, which is to remain in full force and unimpaired. *Jackson v. Knight*, IV. 412.

15. A judgment for want of appearance in an action on the case, without declaration filed or anything to indicate the amount, is interlocutory in the first instance, and becomes final when the amount is settled and entered on the record. *Phillips v. Hellings*, V. 44.

16. Where between signing such judgment and the settling and entering the amount by agreement of the parties, other judgments intervene, they are entitled to a priority. *Ibid.*

17. The revival of a judgment by agreement to which a terre-tenant is not a party, will not continue the lien as to him, although the deed by which he became terre-tenant was not recorded; and his judgment creditors may avail themselves of the objection. *Armstrong's Appeal*, V. 352.

18. A judgment entered in the District Court, by virtue of a warrant of attorney authorizing the entry of a judgment in the Court of Common Pleas, cannot be set aside as erroneous, at the instance of a subsequent judgment creditor. *Hauer's Appeal*, V. 473.

19. The Legislature may alter the period of limitation of the lien of a judgment then existing; but the power being of an extraordinary nature, the court will not infer such an intention unless clearly expressed. *Miller v. Commonwealth*, V. 488.

20. A former decision between the same parties cannot be collaterally questioned in another suit, although it proceeded upon a mistake of law. *Bower v. Tallman*, V. 556.

21. Under the Act of 26th March 1827, the five years from the day of entry of a judgment, within which it must be revived by *scire facias*, are exclusive of the day on which the judgment was entered. *Green's Appeal*, VI. 327.

22. In an action of debt founded upon a judgment confessed before

JUDGMENT.

a justice of the peace, the defendant may plead that he was an infant when the judgment was obtained, and avail himself of it as a defence. *Etter v. Curtis*, VII. 170.

23. If the plaintiff in a judgment become the bail of the defendant in a subsequent judgment to entitle him to a stay of execution, he does not thereby postpone the lien of his own judgment to the subsequent one, nor is he thereby prevented from assigning his judgment to another, with all its right to priority. *Gardner's Appeal*, VII. 295.

24. It is the duty of a plaintiff to see that his judgment is rightly entered; for if the officer, in entering it, omits the initial letter in the defendant's name, which distinguishes him from others of the same name, whereby a purchaser of the defendant's real estate was deceived, although the judgment would be binding as between the original parties to it, there could be no recovery from the purchaser as a terre-tenant. *Wood v. Reynolds*, VII. 406.

25. The Act of Congress made to carry out the 4th article and 1st section of the federal constitution, which declares that judicial records proved in the manner prescribed "shall have such faith and credit given to them in any court within the United States, as they have by law or usage in the courts of the State from whence they are or shall be taken," does not preclude inquiry into the jurisdiction of the court, or the right of the State to confer it.

Held, therefore, that a judgment on foreign attachment, affecting to bind, not only the property attached, but the persons of defendants not citizens of the State or within its precincts at the time, is to be treated as a nullity by a court in another State, which is called on to enforce it by action, though it would bind the persons of the defendants in the courts and by the laws of the State in which it was rendered. *Steel v. Smith*, VII. 447.

26. A judgment obtained against the administrators of an intestate within seven years after his death, and revived by a note made upon the record of the original judgment, of the agreement of the parties for that purpose, made within every five years, is such a due prosecution of the claim as will preserve the lien of the debt upon the lands of the intestate, according to the provisions of the Act of 1797. *Payne v. Craft*, VII. 458.

27. The Acts of Assembly of 1798, 1827 and 1828, limiting and regulating the liens of judgments, are not applicable to such as are originally obtained against the representatives of deceased debtors. *Ibid.*

28. Previously to the Act of 24th February 1834, a suit and judgment against the administrators of a deceased debtor, whether adverse or by confession, bound the lands of the intestate without notice to the heirs, and a sheriff's sale upon such judgment conferred a good title upon the purchaser. *Ibid.*

29. To affect land in the hands of a purchaser, a judgment must have been not merely simultaneous with but anterior to the conveyance; and the precise time at which the judgment was entered

JUDGMENT.

may be shown by less than record proof. *Mechanics' Bank v. Gorman*, VIII. 304.

JUDGMENT BY DEFAULT.

1. A judgment by default in an action of ejectment, without an affidavit of the service of the writ, is erroneous. *Michew v. M' Coy*, III. 501.

2. In a joint action against two where one pleads to issue, and judgment by default is rendered against the other, for want of appearance and plea, the judgment is interlocutory; and the damages are assessed by the subsequent trial of the issue. *O'Neal v. O'Neal*, IV. 130.

3. To entitle a party to judgment by default under the Act of the 13th June 1836, he must have his declaration filed at the time prescribed by the Act. *Foreman v. Schricon*, VIII. 43.

JUDGMENT DOCKET.

In the appropriation of the proceeds of the sale of real estate, the amount of a judgment shall be ascertained from the "Lien or judgment" docket; and if this amount differs, being less than the amount for which judgment was actually rendered and entered upon the appearance or continuance docket, the amount for which the judgment is entered in the "Lien docket" will limit the claim of the party. *Bear v. Patterson*, III. 233.

JURISDICTION.

ADMIRALTY COURT, 1.

CORPORATION, 10.

COUNTY, 1.

CRIMINAL COURT.

ORPHANS' COURT, 6, 7, 8.

REGISTER'S COURT, 1, 2.

SCIRE FACIAS, 9.

SOCIETY.

STAKEHOLDER, 2.

TRUST, &c., 13.

1. One who has a demand exceeding \$100, cannot give jurisdiction to a justice of the peace for its recovery, by allowing a set-off or counter demand of the defendant, so as to reduce his claim below one hundred dollars. And if, in such case, the defendant appears before the justice, and obtains a judgment against the plaintiff, from which he appeals to the Common Pleas, the defendant may institute a new suit in court to recover his own claim; and the pendency of the first suit and proceedings before the justice are no bar to the plaintiff's recovery. *Stroh v. Ulrich*, I. 57.

2. A trustee appointed by will, is amenable to the jurisdiction of the Court of Common Pleas, unless it appear that the trust is annexed to the office of executor, quasi executor, or *ratione officii*, in which

JURISDICTION.

case, the Orphans' Court alone has jurisdiction. *Baird's Case*, I 289.

3. An action upon a bond given by the commissioners of York county for the redemption of small notes may be removed from the jurisdiction of the Common Pleas of York county to that of Adams county, under the provisions of the Act of 6th June 1839. *York County v. Small*, I. 315.

4. Any justice of the peace has jurisdiction, upon the delivery of a transcript to him, to recover the amount of a judgment rendered by another justice who has resigned his office but retains his docket; and he may proceed by summons. *Ingle v. Hommann*, I. 414.

5. Where the jurisdiction of a court is limited by the amount in controversy between the parties, and that is indefinite, recourse must be had to the demand as laid in the plaintiff's declaration. *Forrester v. Alexander*, IV. 311.

6. The Court of Common Pleas of Allegheny county has jurisdiction to try a cause which originated in the District Court, and which was certified by the Judges into the Common Pleas, on the ground that one of them was related to one of the parties, and the other had been counsel in the cause. *Spoul v. Ihmsen*, VI. 525.

7. The Supreme Court has not jurisdiction to issue an injunction to a corporation situate in Montgomery county, as the supervisor and control of corporations is included in that class of subjects in which they are prohibited from issuing process beyond the limits of the city and county of Philadelphia. *Cassel v. Jones*, VI. 552.

8. The demand of a plaintiff as set forth in his declaration is to be considered the sum in controversy in a question of jurisdiction which is limited by statute. *Odel v. Culbert*, IX. 66.

9. Although a plaintiff recover an amount below the jurisdiction of the court, yet if it be reduced by evidence of set-off, the plaintiff will be entitled to his costs. *Ibid.*

JUROR.

1. That a person called as a juror had formed and expressed an opinion, from the statement of others, of a general state of indebtedness by one party to the other, without any particular knowledge of the facts of the case which he is called to try, does not amount to a good cause of challenge. *Irvine v. Lumbermen's Bank*, II. 190.

2. It is not error to allow the challenge of a juror for cause, upon its appearing that he is interested in the result of the trial, although it becomes manifest in the further progress of the trial that the juror had no interest. *Silvis v. Ely*, III. 420.

3. The waiver of the first challenge of a juror by each party cannot be construed to be a waiver of the second also. *Kennedy v. Dale*, IV. 176.

4. The 150th section of the Act of 14th April 1834, authorizing each party peremptorily to challenge two jurors in civil cases, does not extend to viewers provided for by the 159th section of the same Act. *Schuylkill Navigation Co. v. Farr*, IV. 362

JUROR

5. In an action of ejectment by the heirs-at-law of an insolvent debtor, the executor of a deceased creditor is not a competent juror, and may be challenged for that cause. *Smull v. Jones*, VI. 122.

6. The expression of an opinion by a juror, with regard to the guilt or innocence of a defendant, before he is called to the box, is a good cause of challenge, but after trial it is not a sufficient cause for granting a new trial. If the juror had prejudged the case, leaving his mind unopen to conviction, it would be a good cause to set the verdict aside. *Commonwealth v. Flanagan*, VII. 415.

JURY

If the jury be irregularly sworn by the inadvertence or fault of both parties, and the verdict rendered without objection against two, one of whom had not appeared, this court will correct the irregularity without ordering another trial, where they can do it consistently with the merits. *Haas v. Evans*, V. 252.

JUSTICE OF THE PEACE.

APPEAL, 6.

ATTACHMENT, 2.

CONSTABLE, 2.

COSTS, 2, 6, 7.

BAIL, 5.

FOREIGN ATTACHMENT, 3, 4.

JUDGMENT, 12, 22.

LIEN, 10.

NUL TIEL RECORD, 1.

POOR, 2, 4.

PRACTICE, 5.

SET-OFF, 10.

SUPERSEDEAS, 1.

TRESPASS, 11.

1. One who has a demand exceeding one hundred dollars cannot give jurisdiction to a justice of the peace for its recovery, by allowing a set-off or counter demand of the defendant, so as to reduce his claim below one hundred dollars. And if, in such case, the defendant appears before the justice, and obtains a judgment against the plaintiff, from which he appeals to the Common Pleas, the defendant may institute a new suit in court to recover his own claim; and the pendency of the first suit and proceedings before the justice are no bar to the plaintiff's recovery. *Stroh v. Uhrich*, I. 57.

2. Any justice of the peace has jurisdiction, upon the delivery of a transcript to him, to recover the amount of a judgment rendered by another justice who has resigned his office but retains his docket; and he may proceed by summons. *Ingle v. Hommann*, I. 414.

3. The docket of a justice of the peace is the best evidence to show the cause of action before him; and parol evidence is inadmissible to contradict or vary it. *Coffman v. Hampton*, II. 377.

4. A justice of the peace may discharge from prison one committed by him for a bailable offence, whether felony or misdemeanor,

JUSTICE OF THE PEACE.

taking a recognizance for his appearance at court to answer. *Moore v. Commonwealth*, VI. 314.

5. A notice to a justice of the peace that he may tender amends before suit brought, must specify the nature and circumstances of the injury to be redressed; but a circumstance unnecessarily set out, as the date of an Act of Assembly, which he violated and thereby incurred the penalty, must be as set out, otherwise the plaintiff cannot recover. *Stansbury v. Bertron*, VII. 362.

JUSTIFICATION.

SLANDER, 3.

LAND.

AGREEMENT, 4.

LANDLORD AND TENANT.

1. After a lease has expired by its own limitation, the lessee becomes a tenant at will, whom the landlord may enter upon and dispossess, and in so doing use as much force as is necessary for that purpose. Under such circumstances, the landlord would only be liable for unnecessary violence and injury to the personal property of the tenant. *Overdeer v. Lewis*, I. 90.

2. The property of a tenant holding by a renewed lease is not subject to be distrained by the landlord for the payment of the arrears of rent for the previous year, if a third person has acquired an interest in the property. *Beltzhoover v. Waltman*, I. 417.

3. Upon a trial in the Common Pleas in a proceeding which originated before two justices of the peace, by a landlord to obtain possession of demised premises, it is competent for the defendant to set up as a defence, that the title of the landlord had expired by its own limitation, or that it had been divested during the term, and that he had the right from the owner, whose title had accrued pending the lease, to remain in possession. *Newell v. Gibbs*, I. 497.

4. The way-going crop to which a tenant is entitled upon his leaving demised premises, includes as well the straw as the grain, which he may remove and dispose of as he pleases, being subject only to the terms of his contract, and not to any supposed custom of the country on that subject. *Craig v. Dale*, I. 509.

5. An action of account-render will lie upon a contract of lease by the landlord against the tenant to recover that portion of the profits of the property leased, which by his contract he was bound to render as rent.

If a tenant sell the share of the profits of the demised premises which the landlord is entitled to, without his consent, he thereby becomes personally liable for the price, although the person to whom he sells becomes insolvent; and this may be recovered in the action of account-render.

So if the tenant of a mill, leased on the shares, do the work so badly for a customer as to deprive himself of the right to recover

LANDLORD AND TENANT.

compensation for it, yet he must account to the landlord for his portion of the price which he would have been entitled to, if the work had been well done.

If there be no stipulation between the parties to a lease, on the subject of repairs, the tenant is bound to keep the premises in repair. *Long v. Fitzimmons*, I. 530.

6. A lease between a landlord and tenant is to be construed by those rules which govern the construction of contracts, and not by evidence of the custom of the country. A tenant is entitled to the straw which grew upon the land, or not, as his contract may provide. *Iddings v. Nagle*, II. 22.

7. If one having a good title finds another in possession of his land, who, under threats of a suit, agrees to accept a lease for the premises, he cannot afterwards, in an ejectment against him, divest himself of the relation of landlord and tenant; but if one having no right induces him in possession to accept a lease and become a tenant, the presumption is, it was by misrepresentation of fact or law, or both; and it will require but slight proof on this ground to dissolve the relation of landlord and tenant, and permit the defendant to avail himself of the merits of his title. *Hockenbury v. Snyder*, II. 240.

8. The assignee of a lease stands, as to his liability for the rent, in the same situation as the lessee; and if his goods be clandestinely removed from the premises, they may be followed and distrained for the rent. *Jones v. Gundrim*, III. 531.

9. If an inquest, summoned by the authority of two justices, under a proceeding by a landlord to dispossess his tenant, cannot agree, they may be discharged, and another venire issued to summon a new jury. *Cunningham v. Gardner*, IV. 120.

10. No other proof is necessary to found a proceeding by a landlord to dispossess his tenant, than the affidavit of the landlord himself. *Ibid.*

11. In a proceeding under the landlord and tenant law, there is no right of appeal given to the tenant by reason of anything which he may allege to exist in the contract of lease; it is only given to a third person or the tenant claiming by descent or purchase from the lessor since the date of the lease. The tenant cannot appeal by reason of any allegation of title existing in a third person, although created since the date of the lease. *Ibid.*

12. An adverse claimant who gets into possession of land by tampering with his adversary's tenant, stands in the tenant's place, and cannot resist the landlord's title where the tenant himself could not; and this whether the possession is surrendered by the mere consent of the tenant, or by means of a collusive recovery. *Stewart v. Roderick*, IV. 188.

13. A purchaser at sheriff's sale under a judgment on a mortgage, by giving notice to quit to a tenant holding under a lease subsequent to the mortgage, disaffirms the lease and determines the tenancy; and the relation of landlord and tenant cannot be renewed

LANDLORD AND TENANT.

by the tenant's remaining in possession, or any act short of a mutual contract for a new lease. *Hemphill v. Tevis*, IV. 535.

14. Where there is a lease of a lot of ground from year to year, with a covenant not to assign, and if an assignment be made that the lessor may enter and hold, paying for the buildings and improvements thereon erected, and the lessee mortgages to the lessor such buildings and improvements, the mortgage is good, though not accompanied or followed by possession. *Luckenbach v. Brickenstein*, V. 145.

15. Where, by the terms of a lease, the lessor is to receive as rent a share of the grain raised, deliverable in the bushel, he has no interest in it until it is severed and delivered to him. *Rinehart v. Olwine*, V. 157.

16. *Quære*, whether the manure made on a farm is the property of the tenant. *Ibid.*

17. A landlord is not entitled out of the sales of the goods of the tenant by execution during the term of one lease, to rent agreed to be paid in advance on another lease not yet commenced. *Martin's Appeal*, V. 220.

18. If a landlord to whom rent is due takes from his tenant personal property of greater value, which the sheriff has levied in execution, and appropriates it to pay a debt due to him by the tenant, he cannot afterwards receive the amount of his rent out of the proceeds of the sheriff's sale. *Ibid.*

19. If, in a lease for a year, no time be mentioned for the payment of the rent, it is by law payable at the end of the year; and if before that time the land be sold by the sheriff upon a judgment prior in date to the lease, the rent will go to the purchaser, although the landlord may have assigned it to a third person before the sale. *Menough's Appeal*, V. 432.

20. The landlord is entitled to his rent where the tenant's goods are removed from the premises by the constable, under attachments issued pursuant to the 27th and 28th sections of the Act of 12th July 1842, and are afterwards sold by execution on the judgments of the plaintiffs. *Morgan v. Moody*, VI. 333

21. The Act of 3d April 1830, does not apply to the case of a landlord and tenant, where the tenant refuses to pay rent under a claim of right to the reversion, which, being a denial of the landlord's title, gives him an immediate right of entry and action at the common law. *Clark v. Everly*, VIII. 226.

LAND OFFICE.

PATENT, 5.

1. An ancient receipt of the Receiver General for the price of lands, proved to be in the handwriting of his son, who did business in the office for his father, and occasionally signed his father's name, is evidence. *Urket v. Coryell*, V. 60.

2. A certificate under the seal of the Land Office, signed by the deputy-secretary, is evidence. *Ibid.*

LAND OFFICE.

3. There is such an office in the State as the Land Office, and it is known by that name. *Ibid.*

4. A certificate of the proper officer that "the above is a true copy of the proceeding had in the above case as recorded in minute-book remaining in the office of the Secretary of the Land Office," &c., is sufficient evidence of its being a true copy of the whole record, unless it appear otherwise from the record itself. *Harper v The Farmers' and Mechanics' Bank*, VII. 204.

LEASE.

EJECTMENT, 25.

EVIDENCE, 4.

LANDLORD, &c., 5.

1. After a lease has expired by its own limitation, the lessee becomes a tenant at will, whom the landlord may enter upon and dispossess, and in so doing use as much force as is necessary for that purpose. Under such circumstances, the landlord would only be liable for unnecessary violence and injury to the personal property of the tenant. *Overdeer v. Lewis*, I. 90.

2. If there be no stipulation between the parties to a lease, on the subject of repairs, the tenant is bound to keep the premises in repair. *Long v. Fitzimmons*, I. 530.

3. A lease for a term of years is the subject of levy and sale upon a *feri facias*, without inquisition and condemnation. *Dakell v. Lynch*, IV. 255.

4. Whether an informal instrument transferring an interest in real estate shall be construed a conveyance, or only an agreement, depends not on any particular words and phrases, but on the intention of the parties derived from the instrument itself, and, when that is doubtful, from the circumstances attending it. *Kenrick v. Smick*, VII. 41.

5. Where an instrument purported to lease lots to the trustees of a church and their successors for ever, on condition of paying a certain semi-annual sum to the grantor, his heirs, &c., besides taxes, &c., with condition to be null and void on neglect to pay for three months when due and ten days' written notice; and authorized them to lease in any manner not inconsistent with the conditions, and to collect all rents due or to accrue; and by a memorandum shortly after attached, if within seven years they paid the principal money, with all rent and expenses, the grantor would give them a deed in fee-simple of the aforesaid leased property; held to be an executory agreement only. *Ibid.*

6. Lease for years granted on condition to be null and void, becomes so *ipso facto* by the breach of the condition, and cannot be set up by recognition. *Ibid.*

LEGACY.

ATTACHMENT, 7, 8.

DEVISE, 3, 6, 15, 16, 19, 20, 21, 32, 33, 34.

LEGACY.

EXTINGUISHMENT, 4.

HUSBAND AND WIFE, 1, 3.

WILL, 11.

1. A bequest of the interest of £600 to C. for life, and after her death "I give and bequeath the said principal sum to my children, hereafter named, or their heirs, to be divided among them share and share alike." *Held* to be a vested legacy, and upon the death of either of the children his share would go to his personal representative. *King v. King*, I. 205.

2. Where there is no distinct gift of a legacy charged on real estate, but the time of payment is annexed to the gift and postponed on account of the minority of the legatee, the legacy lapses by the death of the legatee before the time of payment; but where it is postponed for the benefit of the devisee of the estate charged, the legacy is vested.

A testator devised to his son land which he charged with a sum of money in yearly payments, three of which were directed to be paid as follows, viz: "The seventh payment to be paid to my daughter J. when she arrives at the age of 21 years; the eighth payment also to be paid unto my said daughter J. when she arrives at the age of 22 years; the ninth payment also to be paid to my said daughter J. when she arrives at the age of 23 years." J. died before the age of 18. *Held*, that this was a vested legacy. *Donner's Appeal*, II. 372.

3. A legacy lapses where the legatee, not being a lineal descendant of the testator, dies in his lifetime, notwithstanding the testator knew of his death and intended his children should have the benefit of the legacy.

The legal construction of a will cannot be explained or altered by parol declarations of the testator of his understanding of its meaning, or his intention to do something else. *Comfort v. Mather*, II. 450.

4. To make a legacy a charge upon land devised, it is necessary that it should be declared to be so by express words, or that it may be inferred from the whole will that such was the intention of the testator. "I give and devise to my daughter S, one-third part of my plantation; but in case she should have no heir of her body at my decease, then her share of my plantation shall go to her sisters, they paying her in lieu thereof the sum of \$800, to be paid between them equally." *Held*, that upon the happening of the contingency, the legacy of \$800 was not a charge upon the land. *Montgomery v. M'Elroy*, III. 370.

5. Land devised to executors to be sold and the proceeds to be divided amongst the legatees, is not the subject of a lien or execution against the legatees, but they may elect to take the land instead of the proceeds of the sale of it, and after such election it becomes the subject of lien, and may be sold upon a judgment and execution against the legatee. *Stuck v. Mackey*, IV. 196.

6. It seems a simple bequest of a legacy to be paid by a devisee of land, without more, does not amount to a charge of the legacy on

LEGACY.

the land. In the absence of something to that effect, it is a charge on the devisee personally. *Dewitt v. Eldred*, IV. 414.

7. If a legacy to a *feme sole* be charged on land, and she marries, and her husband takes a bond for it from the devisee to himself, it extinguishes the charge. *Ibid.*

8. The widow and heirs (who are also legatees) confirm a doubtful will, and under a mistaken supposition that one of the legacies has lapsed by death, compromise together with the administrators by the heirs releasing to the widow, and the widow conveys lands not named in the will to the administrators who settle with the legatees. Afterwards the legatee appears and recovers of the administrators. *Held*, they could not recover contribution against the widow to whom they had paid over half the assets, if they still have more than the sum recovered in their hands of the personal property of the testator, and they have sold the lands at an advance, unless an express contract be proved. *Saeger v. Wilson*, IV. 501.

9. In such case, parol evidence is admissible to show all that passes. *Ibid.*

10. "I direct that the nett proceeds of my estate heretofore ordered by me to be disposed of, shall be equally divided between my remaining children share and share alike, and at the times of their severally arriving at the age of twenty-one years." *Held* to be a vested legacy. *Reed v. Buckley*, V. 517.

11. A legacy which the testator directed to be paid "out of his estate" is not thereby made a charge upon his lands devised, although at the time of his death there are no other assets out of which it might be paid. *Brookhart v. Small*, VII. 229.

12. If a legatee, being the executrix, prove the will and accept a bequest under it, she will thereby be equitably estopped from asserting a claim in hostility to other provisions of the will. *Benedict v. Montgomery*, VII. 238.

13. A testatrix bequeathed a legacy to her daughter under the following contingency: "And in case she lives unmarried to the age of twenty-five years, then the whole amount, principal and interest, to be paid to her; or the whole amount to be paid to her on the birth of issue. But in case she dies before the age of twenty-five, or without issue born, then to be divided equally between my sister H. and brothers W. and G." The daughter married and died without issue after the age of twenty-one, and before she arrived at twenty-five: *Held*, that the limitation over to the sister and two brothers was not too remote, but took effect: the word "*or*" being construed *and*, the contingency must happen within a life or lives in being, and twenty-one years afterwards; and it is therefore good by way of executory devise. *Held* also, that such legacy was so vested in the sister and brothers of the testatrix, as to be transmissible to their personal representatives in the event of their death before the daughter of the testatrix. *Kelso v. Dickey*, VII. 279.

14. A testator, after giving several specific devises and pecuniary legacies to his children and grandchildren, devised and bequeathed

LEGACY.

all the remainder of his estate, real and personal, to his son, "he to pay all my debts; to pay my daughter E., and all my other bequests." *Held*, that the legacies were charged upon the real estate thus devised to his son, and were entitled to be paid out of the proceeds of the sale of the land by the sheriff, as the property of the son, in preference to his lien creditors. *Bank v. Donaldson*, VII. 407.

15. If a legatee connives at or becomes a party to a transaction which constitutes a *devastavit* on the part of an executor, he will not afterwards be permitted to take the amount of his legacy out of the assets of the estate to the prejudice of creditors, legatees, or persons interested, who are likely to suffer by such *devastavit*. *Ibid*.

16. Where the corpus of a legacy is interest accruing on a residue after payment of debts, and not the residue itself, unless a contrary intent is collectable from the tenor of the will, the legatee is entitled to all that is made from the death of the testator. *Spangler's Estate*, IX. 135.

LEGISLATURE.

ROADS, 15.

STATUTE, 1.

The Legislature may pass laws altering, modifying, or even taking away remedies for the recovery of debts, without incurring a violation of the provisions of the constitution which forbid the passage of *ex post facto* laws, or laws impairing the obligation of contracts. *Evans v. Montgomery*, IV. 218.

LETTER OF CREDIT.

"P. having informed me that he is making some purchases from you, and not being acquainted with you, that you wish some reference. Though not personally acquainted, yet I would say from my knowledge of P., that you might credit him with perfect safety, and that anything he might purchase from you I would see paid for." *Held*, to be a letter of credit, limited in its extent to the purchases then being made. *Anderson v. Blakely*, II. 237.

LIEN.

APPROPRIATION, 7.

ARBITRATION, &c., 23.

CITIZEN OF UNITED STATES.

COVENANT.

DEBTOR AND CREDITOR, 1.

EXECUTORS, 27, 28.

GROUND-RENT, 2.

INTESTATE, 4.

JUDGMENT, 17, 19, 23, 27.

MECHANICS' LIEN.

MORTGAGE, 7, 8, 10.

PARTITION, 7.

TAXES, 6, 7, 8, 9.

VENDOR, &c., 61, 67.

LIEN.

1. Upon an appropriation of the proceeds of the sale of real estate by the sheriff, a lien for the balance of the purchase money, subject to which the land was conveyed to the defendant, is entitled to priority over subsequent judgment creditors. *Barnitz v. Smith*, I. 142.

2. An administrator having a debt by bonds against the estate of his intestate, is not exempt from the requisitions of the 4th section of the Act of 1797, to file a copy or written statement thereof, in the office of the prothonotary, within seven years after the decease of the debtor; and if he neglect to do so, the lien of the debt is gone, and he cannot afterwards charge the real estate with its payment. *Clawser's Estate*, I. 208.

3. The debts of a decedent cease to be a lien after the lapse of seven years from his death, after which the lands of which he died seised cannot be made liable for their payment. *Seitzinger v. Fisher*, I. 293.

4. A. was engaged by B. to do the carpenter-work of a house, and employed C. to make a number of doors for it; the material for the doors being furnished by B. to A., and delivered by A. to C. When the doors were finished, A. notified C. that he was ready to pay him the balance coming to him for making the doors, and required their delivery. A. brought replevin against C. for the doors, and afterwards A. paid C. the amount in full for his work. *Held*, that the defendant had a lien on the doors at time of suit brought, and might retain them till he was paid for his work; and that the plaintiff could not recover, as he had not tendered the price before suit brought.

Every bailee who has by his labour or skill conferred value on specific chattels bailed to him, has a particular lien on them; but such lien does not exist in favour of a journeyman or day-labourer *M'Intyre v. Carver*, II. 392.

5. The debts of a decedent cease to be a lien on his real estate after five years, although, in his life-time, he made a voluntary conveyance of it for the purpose of defrauding his creditors. *Shorman v. The Farmers' Bank of Reading*, V. 373.

6. The debts of a decedent not secured by matter of record, cease to be a lien on his real estate in the possession of the heirs after the lapse of seven years; and a judgment obtained against the personal representative, and a levy and sale of the land after that period, confer no title upon the purchaser. *Bailey v. Bowman*, VI. 118.

7. A warehouse-man has a specific, not a general lien; but he may deliver a part, and retain the residue for the price chargeable on all the goods received by him under the same bailment, provided the ownership of the whole is in the same person. *Steinman v. Wilkins*, VII. 466.

8. Where one owns both land and the money due upon it, there is no lien on it for the money. *Gilkeson v. Snyder*, VIII. 200.

9. The 24th section of the Act of the 24th February 1834, which limits the lien of the debts of a decedent upon his real estate to five years, is not applicable to the estates of those who died previously to

LIEN.

the time when that Act took effect, which was the 1st October 1834. *Beaner v. Phillips*, IX. 13.

10. A levy of personal property, upon an execution issued by a Justice of the Peace, does not take away the lien upon real estate created by a transcript of the judgment upon which it issued, filed in the Common Pleas, if the goods levied were not removed or sold by the constable. *Cummins's Appeal*, IX. 73.

LIEN DOCKET.

The Act of 3d April 1843 was intended to remedy the evil of the *omission or failure* of the prothonotary to enter judgments upon the lien or judgment docket, and not to cure any defective or erroneous entry: hence, in the appropriation of the proceeds of the sale of real estate by the sheriff, the liens must be paid, as to amount, as they appear upon the lien docket, although it be erroneous, and the real amount is exhibited by the appearance docket. *Mehaffy's Appeal*, VII. 200.

LIMITATION.

ARBITRATION AND AWARD, 3

ASSIGNMENT, 5.

BILLS OF EXCHANGE, 13.

DOWER, 7.

EXECUTORS, &c., 28.

FORBEARANCE, 1.

GUARDIAN AND WARD, 4, 5.

INTESTATE, 4.

LIEN, 9.

PARTNERSHIP, 10, 27.

PRINCIPAL AND SURETY, 5, 6.

SHERIFF, 1, 2.

UNSEATED LAND, 2, 4, 8, 31, 33

1. It is not a valid objection to the admission of the evidence of a claim, that it is barred by the Statute of Limitations.

Trusts which are not affected by the Statute of Limitations are those technical and continuing trusts which are not cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of a court of equity. *Finney v. Cochran*, I. 112.

2. It is essential to the validity of a title founded upon a warrant and survey as against an intervening right, that the survey shall have been returned within seven years; for otherwise, notwithstanding the property which was unseated may have been assessed and the taxes paid by the owner; that he used it as woodland for the purpose of supplying the farm on which he resided with fire-wood, rails and timber; that he claimed title, and this with the knowledge of the improver; yet after the lapse of seven years his right is for ever postponed. *Strauch v. Shoemaker*, I. 166.

3. An entry upon the whole of the land by one tenant in common, who takes possession, as if it had been his own exclusively, and receives the rents, issues, and profits thereof, without accounting

LIMITATION.

to his co-tenant for any part thereof, or proof of any demand upon him to do so, for twenty-one years, amounts to an actual ouster, and will bar the other tenant in common of his right. *Laro v. Patterson*, I. 184.

4. An endorsement on a note, of a payment on account, in the handwriting of the holder, proved to have been made within six years from the date of the note and time of suit brought, is evidence which will prevent the operation of the Statute of Limitations. *Addams v. Seitzinger*, I. 243.

5. When there are mutual accounts between parties, the items of credit and charge in such accounts, within six years before the commencement of the action, are deemed equivalent to a subsequent promise reviving the debt. *Van Swearingen v. Harris*, I. 356. *Thomson v. Hopper*, I. 467.

6. In an action of ejectment, a defendant is not estopped from setting up a title under the Statute of Limitations by the fact, that he took a warrant for the land, and fixed a period for the commencement of interest within twenty-one years from the time of suit brought; it appearing also, that a previous warrant had been granted for the land to one under whom the plaintiff claimed.

If one enter upon land claiming but without title, and die in possession, leaving a widow and children, one of whom continues in possession, and conveys the land to a third person, who goes into possession and continues it to a period beyond twenty-one years, the law will tack these possessions together so as to make a good title under the Statute of Limitations, the title being out of the Commonwealth. *Graffius v. Tottenham*, I. 488.

7. A widow who remains in the possession of land of which her husband died seised and possessed, will not be permitted to claim title adversely to her children by the Statute of Limitations; her possession, under such circumstances, is that of her children; and if she marry again, the possession of her and her husband will be as well for the children as themselves. *Cook v. Nicholas*, II. 27.

8. An admission by a defendant that the debt for which he is sued was not paid, accompanied by the declaration that he would plead the Statute of Limitations, will not take the case out of the operation of the Act. *Hay v. Kramer*, II. 137.

9. Where the items of an account are all on one side, the Statute of Limitations is a bar to all claims above six years' standing. *Ibid.*

10. The 18th section of the Act of 19th April 1794 is applicable only to the personal estate of an intestate, and does not present any bar to the right of an heir to recover the real estate of his ancestor, after the lapse of seven years. *Blackmore v. Gregg*, II. 182.

11. An assessment in his name, and payment of taxes, is not essential to the validity of the title of one who claims by the Statute of Limitations: it is but evidence of the fact of his claim, and the extent of it. *Hockenbury v. Snyder*, II. 240.

12. A promise made on Sunday to pay a debt which was barred by the Statute of Limitations, without making proof of the original

LIMITATION.

debt, is not sufficient evidence to maintain an action. *Haydock v. Tracy*, III. 507.

13. The Statute of Limitation, in New York, is not an available defence for one who had been beyond the jurisdiction of their courts, during the time which had elapsed; and the same construction will be given to their statute here. *Case v. Cushman*, III. 544.

14. In an action of ejectment, upon the plea of the Statute of Limitations, a declaration of the defendant, that he was willing to purchase from the plaintiff, made more than 21 years before suit brought, will not prevent the operation of the statute. *Bell v. Hartley*, IV. 32.

15. An actual adverse possession of land for 21 years, gives title not only to that part of it which was cleared and cultivated, but to all that was included within marked lines during that period. *Ibid.*

16. The Statute of Limitations protects the title of the claimant not only to the land enclosed and cultivated, but also to the woodland embraced within his designated boundaries. *M'Call v. Coover*, IV. 151.

17. In equity courts, twenty years is a positive bar to any claim. *Bull v. Towson*, IV. 557.

18. Even a promise by guardian, after such lapse of time, without proof that he had funds, would seem to be void. *Ibid.*

19. In such a case, where the testimony of the only witness is contradictory, after this lapse of time, every paper, statement, account, receipt, anything in the handwriting of the administrator or guardian relative to the matter in issue, if proved to have been made in the course of settling the estate by those whose duty it was to watch and check each other as administrator and guardian, is evidence. *Ibid.*

20. A stranger without title cannot, by merely claiming land and paying taxes upon it, without showing he ever exercised any acts of ownership upon it, oust the owner, or divest his title by limitation of time. *Urket v. Coryell*, V. 60.

21. Endorsements of payments upon a bond, in the handwriting of the obligee, furnish no evidence of the fact of payment such as will avoid the effect of the lapse of time, which raises a presumption of payment of the bond, unless such endorsements must necessarily have been made before the lapse of that time which raises the presumption of payment. *Cremer's Estate*, V. 331.

22. The acknowledgment of a debt is evidence of a promise; but to avoid the Statute of Limitations it ought to be plain and express, and beyond all doubt. It is not sufficient if it is merely an inferential promise not to plead the statute made without consideration; nor where it is a disclaimer after suit brought and judgment recovered of an intention to plead the statute, accompanied by an allegation that the judgment entered was for too much. *Gilkysen v. Larue*, VI. 213.

23. A person in possession of land, and continuing so for 21 years, claiming it as his own, is within the prohibition of the Limitation

LIMITATION.

Act as well against a claim never made or heard of, as against a claimant with whom there is a dispute. *Leeds v. Bender*, VI. 315.

24. *Quære*, whether a non-resident disseisor acquires title by the Act of Limitations to more land than is actually enclosed and cultivated. *Porter v. M'Ginnis*, VI. 502.

25. If a small piece of land be purchased with the intention of overflowing it by the erection of a dam, and it remains in the enclosure of the vendor for a period of more than 21 years, without any other positive act of adverse possession, the non-user of the vendee will not deprive him of his title and vest it in the vendor by force of the Statute of Limitations. *Buckholder v. Sigler*, VII. 154.

26. Nothing but an unequivocal admission of indebtedness is such evidence of a promise to pay as will take a case out of the operation of the Statute of Limitations. *Allison v. Pennington*, VII. 180.

27. The Act of Limitations is not a bar to an action against an administrator founded upon a *devastavit*. *Williams v. Freeman*, VII. 359.

LITERARY ASSOCIATION.

WITNESS, 12.

The members of an association are liable for goods furnished on the order of an agent of the association, if furnished with their concurrence or approbation.

If members of a literary association agree to subscribe a certain sum annually for books, to be paid to the treasurer, and books are ordered, a bookseller furnishing them cannot sue on such subscription.

In a suit against members of an association, in which one only is served with process, and proceeds to issue and trial, if his subscription to the articles of association be proved, it is not necessary for the plaintiff to prove the signatures of the rest. *Ridgely v. Dobson*, III. 118.

LOAN.

DEBT, 2.

Certificate of loan issued in the year 1830, by an incorporated company, that there was due from them to A. or her assigns a certain sum, bearing an interest of 6 per cent. per annum, payable quarterly on certain days, the principal to be redeemable, in the option of the company, at any time after the 1st of January 1840; and further stating it was issued under a resolution of the company, and the holder will be entitled to convert the whole of said sum into shares of the capital stock of the company at any time previous to the 1st of January 1840. *Held* that it created an annuity coupled with a power to redeem after the 1st of January 1840, the company alone having the power after that period to determine when the loan shall be repaid, and that action will not lie to compel payment of the principal against the will of the company. *Union Canal Co. v. Antilla*, IV. 553.

LOTTERY

1. A claim which is founded upon a transaction which is either *malum prohibitum* or *malum in se*, cannot be enforced by an action of any kind.

2. A contract of purchase of a prize lottery-ticket, the sale of which was prohibited by law, cannot be enforced by action, nor will the purchaser be entitled to recover in an action for money had and received upon proof that the seller of the ticket received the amount of the prize-money. *Eberman v. Reitzel*, I. 181.

LUNATIC.

WITNESS, 39, 40.

Upon a traverse of the inquisition found upon a commission of lunacy, the question is whether the mind is deranged to such an extent as to disqualify the traverser from conducting himself with personal safety to himself and others, and from managing and disposing his own affairs and discharging his relative duties. *M'Elroy's Case*, VI. 451.

MACHINERY.

FIXTURE.

MALICIOUS PROSECUTION.

1. In an action for a malicious prosecution, the question of probable cause should be submitted to the jury, not upon the fact of the guilt or innocence of the plaintiff, but upon the defendant's belief of his guilt or innocence. *Seibert v. Price*, V. 438.

2. In such action, it is proper to send out with the jury the information made by the defendant, upon which the plaintiff was arrested. *Ibid.*

3. In an action for malicious prosecution, the want of an averment in the narr. that the prosecution was carried on without probable cause, is cured by verdict, especially where it appears that evidence was given tending to prove a want of probable cause, and the court charged the jury that they should find for the defendant, unless they should believe that the prosecution had not only been carried on maliciously but likewise without probable cause. *Weinberger v. Shelly*, VI. 336.

4. Probable cause is, perhaps, a mixed question of fact and law; and where the facts are contested, the court should leave them to the jury with instructions as to what in law is probable cause. *Ibid.*

5. The verdict cures the want of an allegation in the narr. that the prosecution was at an end, where it states an indictment returned "ignoramus." *Ibid.*

MALUM PROHIBITUM.

LOTTERY, 1.

MANDAMUS.

ATTORNEY AT LAW, 8.
BILL OF EXCEPTIONS, 2.
NICHOLSON COURT.
SOCIETY.

1. There is no other remedy for the recovery of a salary fixed by law and payable by the State Treasurer, than by writ of *mandamus*. *Commonwealth v. Mann*, V. 403.

2. Under the Act of 14th June 1836, giving the Courts of Common Pleas within their respective counties power to issue writs of *mandamus* "to all corporations being or having their chief place of business within such county," a Court of Common Pleas cannot issue a *mandamus* to a railroad company, whose office and chief place of business is not in such county, although their road may pass through the same. *Whitemarsh Township v. The Philadelphia, Germantown and Norristown Railroad Co.*, VIII. 365.

3. Supervisors of a township may apply for a writ of *mandamus* commanding a railroad company to make a road for public accommodation, required by their charter. *Ibid*.

MANURE.

LANDLORD, &c. 16.

MARKET.

The Act of 12th February 1795, authorizing the extension of the market in High street, Philadelphia, is not repealed by subsequent laws, and therefore under its 4th section the city corporation had a right to pass an ordinance prohibiting the sale of beef in the western moiety of the market-house between Seventh and Eighth streets. *Mayor v. Davis*, VI. 269.

MARRIAGE ACT.

A father who turns his daughter out of his house upon the world to shift for herself, thereby relinquishes his paternal rights in relation to her person, absolves her from filial allegiance, and deprives himself of a right of action under the statute against marrying minors without the consent of their parents. *Stansbury v. Bertron*, VII. 362.

MASTER AND APPRENTICE.

1. An indenture dated November 1823, bound the apprentice for 14 years and 23 days from that date. *Held*, it was *prima facie* evidence that the apprentice continued a minor in 1836. *Bonnel v. Brotzman*, III. 178.

2. The relation of master and apprentice, until dissolved by the Quarter Sessions, cannot be questioned in a suit by the master for harbouring his apprentice under the Act of 29th September 1770. *Ibid*.

3. Where the father is living with the mother, to make a valid indenture of apprenticeship of their son, the assent of the father

MASTER AND APPRENTICE.

before the magistrate at the time of the binding, expressed in writing, is necessary: the assent of the mother is not sufficient. *Commonwealth v. Crommie*, VIII. 339.

MASTER AND SERVANT.

1. Faithful service is a condition precedent to the right of a servant to his wages; and if, during the term for which he has agreed to serve, he commit a criminal offence, although not immediately injurious to the person or property of his master, he will not be entitled to recover any part of his wages. *Libhart v. Wood*, I. 265.

2. Faithful service is a condition precedent to the right of a servant to recover wages; misconduct inconsistent with the relation of master and servant will justify the master in putting an end to the contract of service at any time. *Singer v. M'Cormick*, IV. 265.

3. A child is not entitled to recover wages for services rendered, from the estate of his deceased parent, unless upon clear and unequivocal proof, leaving no doubt that the relation between the parties was not the ordinary one of parent and child but of master and servant. *Cundor's Appeal*, V. 513.

MECHANIC'S LIEN.

AGREEMENT, 10.

LIEN, 4.

PAYMENT WITH LEAVE, 1, 2.

1. The registry of a mechanic's lien is no record, and to a *scire facias* upon it, the plea of *nul tiel record* is a nullity. *Davis v. Church*, I. 240.

2. In a *scire facias* upon a mechanic's lien against the owner of a building, and the contractor who constructed it, by him who furnished the lumber, in which it appeared that the contractor had been fully paid for his work and materials, he is not a competent witness for the owner. But he may be made competent by a release from the owner for his liability over to him for costs, to which he might be subjected in the event of a recovery against him.

In a *scire facias* upon a mechanic's lien against the owner of a building, and the contractor who constructed it, the plaintiff may give in evidence the declarations of the contractor as to the materials received and the amount remaining due, but such admissions ought to be received with great caution, and subjected to the nicest scrutiny, but his declarations that the lumber was received on the credit of the building, are not evidence.

In such case, it is competent for the defendant to give evidence to prove that the amount of the lumber charged in the plaintiff's account, is greatly more than could have been put into the building.

If part of an account filed as a mechanic's lien be for lumber furnished to the contractor before he entered into the contract, which could not be a lien, and a part afterwards which was used in the building, and there be a credit in the account of the lumber-man for a payment, it may be referred to the jury to determine whether the

MECHANIC'S LIEN.

payment shall be applied to that part of the account which was a lien, or that which was not. *Dickinson College v. Church*, I. 462.

3. The use of the firm name in a mechanic's lien filed, is a sufficient designation of the party claimant, without the use of the individual name of each member of the firm. *Black's Appeal*, II. 179.

4. In a *scire facias* upon a mechanic's lien against the owner and contractor, the latter may be made a competent witness by a release from his sureties and the owner from all personal liability for the sum claimed by the plaintiff.

If, in such case, the sureties of the contractor be making the defence for their own protection, and they procure the release from the owner to the contractor, and use it to make him a competent witness, it is tantamount to a release by themselves; and the witness is thereby made competent, without a direct release by the sureties. *Church v. The College*, III. 221.

5. In a *scire facias* upon a mechanic's lien, the book-entries of the lumber furnished, although kept in ledger form, accompanied by parol proof that the entries were fairly made and the lumber was delivered, are competent evidence to go to the jury. *Rehrer v. Zeigler*, III. 258.

6. The time when the materials were furnished or the work was done, is essential to the validity of a mechanic's lien filed. If the year be omitted in which the lumber was sold and delivered, there can be no recovery in a *scire facias* upon the lien. *Ibid.*

7. In an issue directed by the court between judgment and mechanic's lien creditors, under the Act of 16th June 1836, it is the province of the jury to ascertain and determine by their verdict, what part of the ground is necessary for the convenient use of the building for the purposes for which it was intended, and to which the lien of the mechanic is to extend. *Keppel v. Jackson*, III. 320.

8. The Act of the 28th of April 1840, so modifies the remedy for the recovery of a mechanic's lien, that no greater estate in the premises charged with the lien can be sold, than was vested in the person in possession at the time the building was erected; and this whether the lien was created before or since the passage of that Act. *Evans v. Montgomery*, IV. 218.

9. The Act of 28th of April 1840, so explains the mechanic's lien law of the 16th of June 1836, that a sheriff's sale upon a lien created by that Act, confers no other or greater title in the premises, than that which was vested in the person in possession at the time the building was erected. *O'Conner v. Warner*, IV. 223.

10. A terre-tenant of a house sought to be affected by the lien of a mechanic, is not a competent witness for the defendant upon the trial of a *scire facias* upon the lien. *Jones v. Shanhon*, IV. 257.

11. A mechanic is not bound to file his lien against one who was not the owner, when the building was commenced, but became so before the lien filed. *Ibid.*

MECHANIC'S LIEN.

12. When the time at which materials were furnished is not set out in the lien filed, it may be shown by proof on the trial. *Ibid.*

13. The acceptance of a note for the amount of the account of the mechanic, is not such a satisfaction as will prevent the filing of it as a lien; but if a receipt be given at the foot of the bill for the note "in full of the above," it is evidence of satisfaction, which should be left to the jury. *Ibid.*

14. One, who furnishes nothing but his superintendence and skill as an undertaker, has no right to file a lien for anything in pursuance of his contract as such. *Ibid.*

15. A *scire facias* upon a mechanic's lien cannot be maintained for a claim apportioned among several buildings. *Ibid.*

16. A mechanic's claim against a building "situate in Clinton street on the north side thereof, and 130 feet east of Eleventh street, containing in front on Clinton street 20 feet," is not inconsistent with a deed describing a building as "situate on the north side of Clinton street, beginning at the distance of 116 feet eastward from the east side of Eleventh street, and containing in front on Clinton street 20 feet." *Ewing v. Barras*, IV. 467.

17. Certainty to a common intent is sufficient in a description of property in a mechanic's claim. *Ibid.*

18. Whether the descriptions of a building in a deed and in a mechanic's claim agree, is a question for the jury. *Ibid.*

19. The court may strike from the record an irregular mechanic's claim, on petition and answer or demurrer. *Lehman v. Thomas*, V. 262.

20. A claim by a material-man recited that it was "filed within six months, according to Act of Assembly," &c. *Held*, that the time of furnishing the materials was too loosely stated. *Ibid.*

21. One who by special contract undertakes to furnish all the materials and erect a house or other building for a certain sum, cannot recover a balance due to him upon the completion of the work by filing his claim therefor under the provisions of the Mechanic's Lien Law. *Hoatz v. Patterson*, V. 537.

22. The *levari facias* given to mechanics and material-men by the 21st section of the Act of 16th June 1836, is an execution, and comes within the provisions of the 6th section of the Act of 13th October 1840, relating to the appointment of a sequestrator. *Pentland v. Kelly*, VI. 483.

23. An undertaker who contracts to furnish materials and build a steamboat for another, is not entitled to the benefits of the Act of Assembly giving liens to mechanics and material-men. *Walker v. Anshutz*, VI. 519.

24. There cannot be a recovery against a county upon a mechanic's lien filed for materials furnished for the erection of a public building. *Wilson v. Commissioners of Huntingdon Co.*, VII. 197.

25. Under the Mechanic's Lien Law of the 16th June 1836, the material-man, who has a claim for materials furnished for several

MECHANIC'S LIEN.

buildings, must designate, in his claim filed, the amount which he claims to be due to him on each of such buildings: otherwise such claim will be postponed to liens subsequently entered. *Thomas v. James*, VII. 381.

26. Where there is a special contract between a mechanic and the owner or builder of a house for the work which the former is to do in constructing the house, he must look to his contract alone for his security, and cannot resort to the remedy which the Mechanics' Lien Law provides. *Haley v. Prosser*, VIII. 133.

27. One who furnishes lumber, at the instance of a contractor, for a building on the ground of a stranger, must provide for his security by the terms of his bargain: hence a house rebuilt by an insurance company, in discharge of their liability upon a policy, is not liable to a lien for materials furnished to the contractor. *Bruner v. Sheik*, IX. 119.

28. Under the Act of 16th June 1836, relating to the lien of mechanics, &c., the time at which the work was done, or the materials were furnished, must be stated in the claim or bill appended to it; otherwise the claim is defective. *Witman v. Walker*, IX. 183.

29. A contractor who furnishes the whole or part of the work and materials at a certain price is not entitled to a lien against the building. *Ibid.*

MEMBER OF ASSEMBLY.

Under the resolution of the Legislature of the 27th March 1839, the members of the County Board are entitled to be paid wages for their attendance out of the funds of the county of Philadelphia, notwithstanding they are members of the Legislature.

Such a provision does not conflict with the clause of the constitution directing that members of the Legislature shall be paid a compensation for their services out of the treasury of the Commonwealth *County of Philadelphia v. Sharswood*, VII. 16.

MERCER COUNTY.

DISTRICT COURT OF MERCER COUNTY.

MERGER.

1. Merger depends generally upon the intention of the parties to be affected by it, and an intent to prevent it will be presumed, whenever it is the interest of the party that the encumbrance should not sink in the inheritance. *Richards v. Ayres*, I. 485.

2. A deed of conveyance of real estate does not merge in a second deed between the parties for the same estate, but one agreement may merge in a second if such was the intention. *Kenrick v. Smick* VII. 41.

MESNE PROFITS.

EJECTMENT, 8, 19.

WITNESS, 42.

IX. — 47

MESNE PROFITS.

1. A plaintiff in ejectment will not be permitted to recover the mesne profits in the same action, unless he give previous notice of such claim. *Cook v. Nicholas*, II. 27.

2. In an action of trespass to recover mesne profits, after a recovery of the land by ejectment, if the plaintiff give evidence of profits received by the defendant anterior to the time of the issuing of the writ of ejectment, then the verdict and judgment in that action are not conclusive, and the defendant may give evidence to show that the title was then in him.

In such action, the plaintiff may recover more than the rent or yearly value of the land; he may charge all actual damage and injury to the premises. *Huston v. Wickersham*, II. 308.

MILLS.

CONTRACT, 6.

FIXTURE, 1, 2, 3

MILL-DAM.

TRESPASS, 6.

MINISTER.

TAXES, 2.

MISNOMER.

ABATEMENT, 1.

CORPORATION, 5

MISTAKE.

RELEASE, 3.

VENDOR, &c. 53, 54.

MOB.

1. In an action of trespass for pulling down a building, evidence that the building was peaceably taken down and its materials preserved in conformity with the directions of the commissioners of the township during a period of great public excitement and disorder, with a view of saving the neighbourhood from threatened violence, is admissible in mitigation of damages. *Reed v. Bias*, VIII. 189.

2. In such action evidence that the commissioners had by law the power to abate and remove nuisances, and that a grand jury after instructions by a competent court presented the building as a public nuisance and recommended its abatement, is not admissible in mitigation of damages. *Ibid.*

MONEY PAID.

ASSUMPSIT, 3.

MORTGAGE.

ARBITRATION, &c. 17.

MORTGAGE.

ASSIGNMENT, 8.

BOND, 4, 5.

CONTRACT, 6.

EVIDENCE, 55.

FIXTURE, 2.

LANDLORD, &c. 14.

PAYMENT, PRESUMPTION OF, 1.

PRINCIPAL AND SURETY, 3, 12.

RELEASE, 2.

SHERIFF'S SALE, 15, 17, 20, 37.

SHIP, 1.

TRUST, &c. 23.

VENDOR, &c. 29.

1. C became the purchaser at sheriff's sale of that part of a tract of land which was in one county, subject to a mortgage upon the whole tract, which was in two counties: the mortgage having been given before the county was divided. After his purchase, he paid the amount due upon the mortgage, took an assignment of it, and sued out a writ of *scire facias* upon it in the other county, with notice to the terre-tenants of that part of the land. *Held* that the plaintiff was entitled to recover contribution out of that part of the land, which was to be estimated by the proportional value of each part. *Fisher v. Clyde*, I. 544.

2. The recorder, on recording a mortgage, endorsed the 15th of November 1836 on the mortgage as the time of its being left for record, and also made an entry in a book kept by him for that purpose, mentioning the date of the mortgage, the parties, and dating this entry the 15th of December 1836. After recording it he gave a certificate on the back of the mortgage, stating it was recorded the 15th of November 1836. *Held*, that the entry in the recorder's book must be considered the true date of the deed's being left for record, and that the certificate was of no avail against it.

Held, also, that parol evidence was not admissible to alter the time mentioned in the book, where it tended to affect the right of a purchaser acquired on the faith of the entry in the book.

Though notice to an agent is sufficient in law to affect his principal, yet this principle does not apply where the same person who is intrusted by a holder of a warrant of attorney to have judgment entered by the prothonotary, is at the same time intrusted as the agent of a mortgagee to have a mortgage recorded, but without the knowledge of the holder of the judgment withholds the warrant from the prothonotary for one day, to favour the mortgagee by giving priority to the mortgage. Such conduct is a fraud, and the mortgagee can receive no benefit from it. *Musser v. Hyde*, II. 314.

3. A mortgage in fee by a husband and wife of land devised to the wife "for her own and sole use for ever," and if her husband survive her for life to him, with remainder in fee to her children, or such other person as she by her last will and testament may order and direct, is void as to the estate of the wife, and all else, except the life estate of the husband. *Cochran v. O'Hern*, IV. 95.

4. Mortgages of real or personal estate, given to secure the pay-

MORTGAGE.

ment of money or debts, are not within the 5th section of the Act of 24th of March 1818, requiring deeds of assignment to be recorded within 30 days. *Ridgway v. Stewart*, IV. 383.

5. A recorder of deeds and mortgages, giving a certificate that he has searched and could find no mortgage, and charging and receiving the fee allowed by law, is liable on his bond, if it afterwards appear there was then a mortgage on record by which the party obtaining the search is prejudiced. *M'Caraher v. The Commonwealth*, V. 21.

6. A judgment on a mortgage rendered in a county where the land does not lie, cannot be given in evidence to support a title predicated upon it. *Treaster v. Fleisher*, VII. 137.

7. In the appropriation of the proceeds of sale of land by the sheriff, the assignee of a mortgage which has priority of lien will be preferred to a subsequent judgment creditor who holds the guarantee of the mortgagee for the security of his judgment, although it be prior in date to that of the assignment. *Moore's Appeal*, VII. 298.

8. An absolute deed of conveyance of land with a separate defeasance delivered to the grantor, compose a mortgage; and if the deed be recorded and the defeasance not, it is void as an unrecorded mortgage against subsequent liens; but it is good and effectual as a lien against a subsequent lien creditor who had actual notice of the true state of the case. *Manufacturers and Mechanics' Bank v. Bank of Pennsylvania*, VII. 335.

9. A mortgage limited to a trustee, with power to sell for the payment of the debt secured by it, is not a voluntary assignment for the benefit of a creditor or creditors, such as must be recorded within the period prescribed by the statute provided for such a case. *Ibid.*

10. A mortgage imperfectly recorded is ineffectual as a lien against subsequent judgment creditors; but if there be a second mortgage between the first and the judgments in point of time, to whom the proceeds of the mortgaged premises when sold would be paid, and this mortgagor had actual notice of the first mortgage when he took his own, the first mortgage is good as to him, and therefore entitled to have the money appropriated to it. *Ibid.*

MUNICIPAL CORPORATION.

Where a municipal corporation act under an authority to regulate and grade the ascents and descents of streets, it is error in an action on the case against them for obstructing the flow of water, to submit to the jury whether their object was to benefit the private property of the corporation: the only question is, whether they possessed the authority which they exercised. *The Mayor v. Randolph*, IV. 514.

NATIONAL ROAD.

1. A toll-gate keeper upon that part of the National Road which passes through Pennsylvania, would not be justified by the Act of the 13th June 1836, in stopping a coach carrying the United States

NATIONAL ROAD.

Mail, for the refusal to pay toll : if toll be recoverable, it can only be by action. *Hopkins v. Stockton*, II. 163.

2. If tolls be recoverable from a contractor for carrying the United States Mail upon that part of the National Road which passes through Pennsylvania, by reason of the Act of 13th June 1836, it can only be by action, and in the name of the commissioner appointed in pursuance of the provisions of that Act. *Ibid*.

NEGLIGENCE.

In the performance of a contract to coal wood, the collier is bound to exercise ordinary skill, care, and diligence : and in an action upon it to recover the wages of his labour, it is error in the court to instruct the jury that the plaintiff is only chargeable with gross negligence, or wilful misconduct. *Gamber v. Wolaver*, I. 60.

NEWSPAPER.

VENDOR, &c., 43.

NEW TRIAL.

1. The refusal of a new trial by the court below is not inquirable into on a writ of error. *Werkheiser v. Werkheiser*, VI. 184.

2. Upon a conviction for murder, it is not good ground for a new trial, that there was a great excitement in the public mind against the accused. *Commonwealth v. Flanagan*, VII. 415.

3. After-discovered testimony which is but cumulative or corroborative of evidence given on the trial, is not a sufficient reason for a new trial. *Ibid*.

NICHOLSON COURT.

An Act of Assembly authorized the judge of the Nicholson Court to appoint as commissioner, a person to be nominated " by a majority of the creditors whose claims have been reported and filed with the present commissioner, or any person authorized by them." The number of such creditors was 126 : of these, 51 nominated a person, and the judge appointed and commissioned him. *Held*, that the appointment was unauthorized and void, and that a mandamus would not be granted to restore him to office, after having been removed by the judge. *Commonwealth v. Anthony*, IV. 511.

NISI PRIUS.

1. Under the Act of 26th of July 1842, both an affidavit and security are indispensable conditions to be performed by a party appealing to the court in banc on an order of the judge and certificate from the court of *Nisi Prius*. *Dawson v. Ryan*, IV. 403.

2. Where more than twenty-one days intervene between the judgment and the next term, the party is entitled to his appeal, when the order is in due form certified by the judge, (with affidavit and security), though the twenty-one days have expired ; but he cannot have the benefit of a *supersedeas* to execution unless the order is

NISI PRIUS.

taken and perfected by affidavit and security entered before the expiration of that time. *Ibid.*

3. To entitle a party to a review of the proceedings of the *Nisi Prius* court, he must take a bill of exceptions, and in other respects have his cause prepared for a hearing at the next term of the Supreme Court after judgment rendered; but the appeal is in time if entered before 10 o'clock A. M. of the first day of the next term. *Ibid.*

4. It seems, though the Act speaks only of security for damages and costs, its intention is to include judgments in debt and *assumpsit*, and whether for plaintiff or defendant. *Ibid.*

5. The court of *Nisi Prius* is a distinct and independent court. *Ibid.*

6. Under the *Nisi Prius* Act of the 26th July 1842, where the judge directs a nonsuit on the trial of a cause, it comes up to the Supreme Court by certificate in the same manner as it does by writ of error from the District Court under the 7th section of the Act of 11th March 1836; and therefore it is to be considered as if it were a demurrer to evidence, except that the Judge is not at liberty to give judgment for the plaintiff should he think the case made out, but should refuse the nonsuit. *Bevan v. Insurance Co.*, IX. 187.

7. If, therefore, there be some evidence, though slight, from which a jury might draw an inference favourable to the plaintiff, the case should be left to the jury. *Ibid.*

NONSUIT.

APPEAL, 11.

ARBITRATION, &c., 14.

NISI PRIUS, 6.

PRACTICE, 12.

A prayer for nonsuit under the 7th Section of the Act of 11th March 1836, amounts to a demurrer to evidence, except that the judge cannot give judgment for the plaintiff, though he should think the nonsuit not grantable, but the case must then go to the jury. *Smyth v. Craig*, III. 14.

NOTE.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

It is not a good defence to the payment of a bond, that it was given to redeem an illegal issue of small notes by the obligor. *York County v. Small*, I. 315.

NOTES.

EVIDENCE, 99.

NOTICE.

BILLS OF EXCHANGE, &c., 6, 19, 46, 48, 54, 55.

BOND, 5.

CERTIFICATE OF DEPOSIT, 6.

CORPORATION, 7.

NOTICE.

DISTRESS, 8.
 EVIDENCE, 107, 108, 109.
 JUSTICE OF THE PEACE, 5.
 MESNE PROFITS, 1.
 MORTGAGE, 2.
 PARTNERSHIP, 23.
 PATENT, 5.
 PLEADING, 6, 14, 15, 16.
 PRINCIPAL AND AGENT, 5.
 SHERIFF'S RECOGNIZANCE, 1.
 SHERIFF'S SALE, 16.

1. A notice requiring the defendant to plead is tantamount to a notice of a rule to plead, under the rules of court. *Ickes v. Smith*, I. 139.

2. Notice to creditors signed by the administrator, dated at a certain place, shows that to be his place of residence. *Staver's Appeal*, III. 154.

3. A direction to advertise for six successive weeks is complied with, though one of the notices be published the 20th of May, and the next on the 1st of June. *Ibid.*

4. Vague information by one not interested in the land, is not notice to a purchaser that another claim exists. *Miller v. Cresson*, V. 284.

5. The possession of land is notice of every title under which the occupant claims it, unless he has put on record a title inconsistent with his possession. *M'Culloch v. Cowher*, V. 427.

6. Notice to the cashier of a bank that a draft will not be paid, is sufficient notice to the bank itself. *Boggs v. Lancaster Bank*, VII. 331.

7. Notice affecting the title to land or acts to be done upon it need only be given to the tenant in possession. *Paden v. Akin*, VII. 456.

NUISANCE.

MOB, 2.

One whose ark is obstructed by a dam in Penn's Creek cannot use the common law remedy of abatement; but must resort to that provided by the statute. *Spigelmoyer v. Walter*, III. 541.

NUL TIEL RECORD.

JUDGMENT, 5.

Upon a plea of *nul tiel record* to a *scire facias* upon a recognizance of bail, on appeal from the judgment of a Justice of the Peace, the issue must be tried by inspection of the transcript and recognizance filed, and not of the docket of the justice. *Bell v. Murphy*, VI. 50.

NUNCUPATIVE WILL.

WILL, 6.

A nuncupative will is good only when made in such extremity of the last sickness as precludes a written one. *Boyer v. Frick*, IV. 357.

OFFICER.

DEPUTY SURVEYOR, 1.

1. An officer who performs public duty by the authority of process issued by those who have jurisdiction of the subject, is not a trespasser, although his appointment and qualification may not be in all respects according to law. *Kingsbury v. Ledyard*, II. 37.

Quære. Is a collector of taxes such an officer as must be qualified by an oath to support the constitution? *Ibid*.

2. If an Act of Assembly prescribe the form of the condition of a bond, and specify the nature of the acts and duties which the officer shall be bound to perform, it may be considered as directory; and notwithstanding it may designate acts and things to be done beyond those specified in the Act, it is good as to those which are specified, and recovery may be had upon it against the sureties; unless the Act prescribes the form of the bond, and provides that it shall be taken in that form, and no other. *Speck v. The Commonwealth*, III. 324.

3. An action may be brought against the sureties of a public officer immediately upon the settlement of his accounts, notwithstanding the provision in the 9th and 10th Sections of the Act of 1811; the State treasurer is not bound to wait six months after the settlement before bringing suit. *Ibid*.

4. A collector of tolls, who held his office for several successive years, and gave a bond each year, with different sureties, made payments throughout the whole time, which the Commonwealth applied to the discharge of those debts which were first due by him, without regard to the date of the payment; *held*, to be rightly appropriated. *Ibid*.

5. In a suit against a corporation for a penalty for illegally issuing notes, evidence is admissible to show that the officer representing the corporation was an officer *de facto*. *M'Gargell v. Hazleton Coal Co.*, IV. 424.

6. A settlement of the account of a public officer, made by the accounting officers of the government, in pursuance of the Act of the 30th March 1811, is conclusive evidence of the amount due, in an action upon the official bond, as well against the sureties as the principal, if that account purports to embrace only the moneys received and paid by the officer during the time the defendant was a surety: but it is competent for the surety to prove that the moneys charged in that settlement were received before the time when he became the surety. *Commonwealth v. Reitzel*, IX. 109.

7. In an action against the surety of a receiving officer of the government upon his official bond, the defendant is entitled to have the moneys received and paid by the officer, during the year he was the surety, appropriated to his relief, although it may appear that the officer was a defaulter for several preceding years. *Ibid*.

8. In an action by the Commonwealth against the surety of a defaulting officer, the principal becomes a competent witness by being released by the defendant from his liability for the costs of the action. *Ibid*.

OFFICIAL BOND.

MORTGAGE, 5.

OFFICER, 2, 3, 4, 6, 7, 8.

PROTHONOTARY, 1.

SHERIFF, 4, 5.

SURETY, 1.

1. A variance between a statutory bond and the requisitions of the law, is fatal only when the condition would impose a greater burden on the obligor than the law allows.

Where a statute requires the approval of an official bond by the Judges of the Court of Quarter Sessions, it is enough to give it authenticity, that it was done actually by the persons designated in the statute, although styling themselves Judges of the Court of Common Pleas. *Commonwealth v. Laub*, I. 261.

2. Though the penalty of an official bond exceeds that directed by Act of Assembly, it is bad only for the surplus; and judgment may be rendered on such bond for the penalty directed by the Act, and damages assessed for the party aggrieved within that sum. *M'Caraher v. The Commonwealth*, V. 21.

3. The 74th section of the Act of 15th April 1834 does not apply to the official bond of a sheriff executed before its passage. Such bond must be sued according to the provisions of the Act of 28th March 1803. *Miller v. The Commonwealth*, V. 488.

4. The limited time within which an action may be brought against the sureties of a sheriff upon his official recognizance is to be computed from its date, and not from the date of its approval by the governor. *Wilson v. The Commonwealth*, VII. 181.

OFFICIAL PAPERS.

Official books and papers must be proved by producing an exemplified copy from the proper office; or if circumstances require that the originals should be produced, they must be brought from the office and verified by the officer who has the keeping of them, or his clerk, or some one specially authorized by him for that purpose. They cannot be verified by one who has no connection with the office, but who happens to know them. *Hockenbury v. Carlisle*, I. 282.

OHIO RIVER.

COMMON CARRIER, 9.

OPINION.

EVIDENCE, 100.

ORPHANS' COURT

ACT OF ASSEMBLY, 2.

APPEAL, 12, 13.

DOWER, 6.

EXECUTORS, &c., 10, 17.

PRINCIPAL AND AGENT, 13.

IX. — 48

26*

ORPHANS' COURT.

RECOGNIZANCE, 9.

STAKEHOLDER, 2.

TRUST, &c., 13.

WITNESS, 24.

1. A trustee appointed by will, is amenable to the jurisdiction of the Court of Common Pleas, unless it appear that the trust is annexed to the office of executor, *quasi* executor, or *ratione officii*, in which case, the Orphans' Court alone has jurisdiction. *Baird's Case*, I. 288.

2. A purchaser of lands sold by order of the Orphans' Court, holds the lands free and discharged from debts due by the deceased. *Custer v. Detterer*, III. 28.

3. A confirmation by the Orphans' Court of a sale of real estate by an executor made in pursuance of its authority, is not complete until the purchase money be paid and a deed delivered. A sale and confirmation alone, is not such a parting with the title as would defeat a pending action of ejectment by the executor. *Leshey v. Gardner*, III. 314.

4. A sale of real estate by an administrator in pursuance of an order of the Orphans' Court, is a judicial sale, to which the rule of "*caveat emptor*" applies, and no defence can be made to the payment of the purchase money on the ground of defect of title. *Fox v. Mensch*, III. 444.

5. It seems that the Orphans' Court has power to direct as to future proceedings, after the reversal of a judgment on a feigned issue sent by that court to the Common Pleas. *Bull v. Towson*, IV. 557.

6. In relation to distribution of an estate, the District Court have concurrent jurisdiction with the Orphans' Court. *Rittenhouse v. Levering*, VI. 190.

7. The District Court have jurisdiction on a suit by a distributee against the administrators for his share of the estate, where a final settlement has been made of their accounts in the Orphans' Court, showing a balance in their hands for distribution. *Ibid*.

8. The Act of 1840 extends the jurisdiction of the Orphans' Court in partition to estates held jointly or in common which have been created by will, when the parties, or any of them, are minors, and to cases where the descent has not been altered or interrupted, though the decedent did not die absolutely intestate; but where the estate is devised to executors to be sold, the statute is wholly inapplicable to it. *Selfridge's Appeal*, IX. 55.

CUSTER.

DISSEISIN, 1.

TENANT IN COMMON, 2, 3.

An entry upon the whole of the land by one tenant in common, who takes possession, as if it had been his own exclusively, and receives the rents, issues, and profits thereof, without accounting to his co-tenant for any part thereof, or proof of any demand upon him to

OUSTER.

do so, for twenty-one years, amounts to an actual ouster, and will bar the other tenant in common of his right. *Law v. Patterson*, I. 184.

OVERSEERS OF THE POOR.

Overseers of the poor are not jointly liable for money collected by each other in their official capacity; but if they be charged jointly by the auditors with a balance, and they acquiesce in that settlement, they both become liable to an action for the whole amount of the balance so found to be in their hands. *Huling v. The Overseers*, III. 367.

OWNER.

SHIP, 1.

OYER AND TERMINER.

CRIMINAL COURT.

PARDON.

The governor may annex to a pardon any condition, whether precedent or subsequent, not forbidden by law, and it lies on the grantee to perform it.

If he does not, in case of a condition precedent, the pardon does not take effect—in case of a condition subsequent, the pardon becomes null; and if the condition is not performed, the original sentence remains in full force, and may be carried into effect. *Flavell's Case*, VIII. 197.

PARENT AND CHILD.

MASTER AND SERVANT, 3.

PAROL AGREEMENT.

AGREEMENT, 10.

PAROL CONTRACT.

FRAUDS AND PERJURIES.

PRINCIPAL AND AGENT, 15, 16.

VENDOR, &c. 23.

1. The delivery of possession of part of the property in compliance with a parol contract for the sale of land, is not such an execution of it as will take it out of the operation of the statute of frauds and perjuries. *Allen's Estate*, I. 383.

2. The doctrines of the English chancellors, concerning part performance of parol contracts for land, have been adopted as the law of Pennsylvania, under our Act of Assembly against frauds and perjuries, notwithstanding the omission in the latter of the 4th section of the English statute. *Pugh v. Good*, III. 56.

PAROL EVIDENCE.

AGREEMENT, 9.

PAROL EVIDENCE.

CERTIFICATE OF DEPOSIT, 3.
 CONTRACT, 24.
 EJECTMENT, 25.
 EVIDENCE, 5, 10, 17, 18, 120.
 LEGACY, 9.
 MORTGAGE, 2.
 PARTNERSHIP, 36.

1. Parol evidence to vary a written agreement concerning lands, or to pass an interest in them in fee-simple without writing, is inadmissible. *Seitzinger v. Ridgway*, IV. 472.

2. Though the terms of a sale of land by auction were in writing, and the bonds for the purchase money were executed in pursuance of them, yet in an action upon such bond it is competent for the defendant to prove that the written terms were altered by parol, and that the parties agreed when the bond was given, that upon the happening of a certain event the bond was not to become payable at the time expressed in it. *Morrison v. Morrison*, VI. 316.

PAROL EXCHANGE.

It is not essential to the efficacy of a parol exchange of land that each party should take immediate possession of the property exchanged. *Miles v. Miles*, VIII. 135.

PAROL SALE.

EVIDENCE, 113.

PARTITION.

ORPHANS' COURT, 8.
 WATERCOURSE.
 WIDOW, 2.
 WITNESS, 23.

1. An adverse holding by one tenant in common, for any length of time, however short, previously to the institution of an action of partition, will bar a recovery in such form of action. *Law v. Patterson*, I. 184.

2. If land subject to a widow's annuity be divided into several parts, by the heir who takes it at the valuation in the Orphans' Court, the widow cannot apportion her annuity and make a several distress upon each part: she can distrain but once and for the whole amount. *Shouffler v. Coover*, I. 400.

3. The compensation of a wife for owelty of partition already made, is subject to the control of the husband, who may submit it to arbitration; and upon the subsequent death of the husband, the wife's rights will stand as if she had entered into the submission when sole and remained so. *Strawbridge v. Funstone*, I. 517.

4. Under the Act of 29th March 1832, the Orphans' Court, on the return of the inquest of partition, may make at once a complete partition of the whole estate, by assigning a share to each of the parties in the order of choice prescribed by the 37th section, if he

PARTITION.

will choose; and if not, by assigning a share not selected by any one, and ordering the payment of owelty or security for its payment to be given by those to whom shares subject to it shall be assigned. *Sampson's Appeal*, IV. 86.

5. An encumbrance upon an inheritance, created by the ancestor, is a good defence against the payment of the valuation money by the heir, to whom the estate was allotted in a proceeding in partition; and this, whether that proceeding be in the Orphans' Court or Common Pleas, and without regard to the mode in which the valuation money was secured. *Seaton v. Barry*, IV. 183.

6. If a man die intestate, leaving a widow and one child, there may be a partition between them, if it can be made without prejudice to the estate. *Bishop's Appeal*, VII. 251.

7. A proceeding in partition under the intestate laws, by which the estate is sold by order of the Orphans' Court, creates a lien upon the land for the unpaid purchase money, independent of a mortgage or any other security which may have been taken; and such lien can only be discharged by payment to the heir. A payment to the administrator, to whom the order was directed to sell the land, and to whom a bond and mortgage was given, will not discharge the lien which the law creates in favour of the heir; and this rule is equally applicable to the purchaser and his alienee. *Hise v. Geiger*, VII. 273.

8. A. bought land from an heir who took it at the appraisement, subject to one-third to the widow, to be paid on the death of the widow. Under the 41st section of the Act of 29th March 1832, the heir may recover his portion of this after the widow's death in *assumpsit* against A.

The suit, if against the heir taking the land at the appraisement, must be on the recognizance.

When an heir takes land at an appraisement, his own share of the price is merged in his fee.

Qu. How it would be if his wife were the heir?

But even if this were so in that case, yet his vendee may agree with him otherwise; and if such vendee give a bond for his wife's share, payable on the death of the widow, and sell the land to another subject to that bond, the obligee, or his administrator, if dead, may recover in *assumpsit* against such vendee. *Shelly v. Shelly*, VIII. 153.

PARTNERSHIP.

ACTION, 7.

BILLS OF EXCHANGE, &c., 53.

DEED, 21.

EVIDENCE, 66.

FRAUD, 4.

PRINCIPAL AND AGENT, 28.

RELEASE, 4.

WITNESS, 7, 38, 44.

1. Upon the death of a partner, the claims of the firm survive to

PARTNERSHIP.

the survivor, and may be prosecuted in his own name. *Davis v. Church*, I. 240.

2. The acceptance of a specialty from one partner, or obtaining a judgment against one partner for the debt of the firm, whether the other be a known or dormant partner, is an extinguishment of the claim against him.

In an action against partners, the declarations of any one of them, respecting the existence of the partnership, may be given in evidence to establish it. *Anderson v. Levan*, I. 335.

3. A partner has no power to bind his co-partner by a confession of judgment against the firm; but if such a judgment be confessed, it will bind the partner who did it, and be void as to the other. *Bitzer v. Shunk*, I. 340.

4. A judgment entered upon a warrant sealed by a partner in the name of his firm, binds no one but himself; but a subsequent revival of it, by the attorney of all the partners, cures the irregularity. *Cash v. Tozer*, I. 519.

5. A partner has no power to bind the firm for his own private debts without the assent of his co-partners; but if that assent be given, it is the province of the jury to judge of the extent of it; and it is error if the court instruct the jury on this point as a question of law. *Noble v. M'Clintock*, II. 152.

6. After the dissolution of a partnership, one of the partners cannot bind the others by using the name of the firm; but if by the agreement and terms of the dissolution, it be provided that the firm name shall be used in winding up the business, and for the renewal of any notes given in banks, then all the partners will be bound by the use of it in a transaction connected with their business. *Whitehead v. The Bank of Pittsburgh*, II. 172.

7. In a suit against partners on a promissory note, alleged to be the note of the defendants, and proved to have been executed by one of them, the plaintiff may read the note to the jury, and afterwards proceed to prove that the others were bound by it as partners.

It is no answer to evidence that it does not prove the plaintiff's whole case: if it is a link in the chain of the evidence afterwards to be given, it is admissible.

The successive acts and declarations of each of several defendants, showing their partnership, are equivalent to a joint declaration to that effect by all, and may be given in evidence separately.

In a suit against partners on notes given by one for lumber furnished them to erect a bridge for a company, *held*, that the minutes of the company were admissible to show an allotment of the bridge to the defendants by the company, in connexion with proof that they went on with the construction of the bridge in pursuance of such allotment. *Haughey v. Strickler*, II. 411.

8. Articles of co-partnership between S. Y. and two others, stipulated that the latter should furnish \$6000, that is to say, each of the two \$3000, the profits and losses to be divided equally among the three co-partners, share and share alike. *Held*,

PARTNERSHIP.

1. That as the consideration of S. Y.'s being entitled to one-third of the profits did not appear, it was matter of fact for the jury to determine, on oral evidence, of what it consisted; whether it was merely that he was to contribute one-third of the labour, or was to furnish skill, credit, attention and services, in carrying on the business.

2. If the two, under such agreement, besides capital, were to furnish their skill, attention and services, and S. Y. only to give his attention, skill and services, the question whether, if a loss of capital occurred in the business, S. Y. is not bound to pay one-third of the deficiency, is also a matter of fact for the jury, and it is error for the court to decide it.

Query, whether on the face of such agreement merely, each partner, in case of a loss of capital, is not bound to contribute his proportion to make it good to the others. *Yohe v. Barnett*, III. 81.

9. In a suit by one partner against another to recover contribution to a loss in the concern, a statement in the defendant's handwriting of an account showing a balance due to the plaintiff from the firm, is evidence for the plaintiff.

So a statement by the plaintiff in the possession of the defendant, showing how their matters of account stood between them, is evidence for the defendant.

So, also, an account by the defendant of cash paid for the firm, and of credits given, produced by him before arbitrators, and given in evidence to them by the consent of the plaintiff, who said he did not know whether the charges were right or not, but he would not object to them, is evidence for the defendant. *Ibid*.

10. A partnership, dissolved for future operations, remains in force for closing the business of the concern; and the liquidating partner retains his former power to bind the firm in things within the scope of the business committed to him. A payment by him on account of a simple contract debt of the firm, is such an acknowledgment as will take the claim out of the operation of the Act of Limitations. *Houser v. Irvine*, III. 345.

11. After a dissolution of partnership, one of the firm has not power to make a voluntary assignment of the effects of the partnership, for the benefit of creditors, against the express consent of his copartner. *Deckert v. Filbert*, III. 454.

12. However general the terms of a contract may be, it only comprehends those things in respect to which it appears the parties proposed to contract. Hence, after the dissolution of a partnership, one of the firm assigns all his interest in the effects, for a valuable consideration, and takes a covenant of indemnity against all debts due by the firm. *Held*, that such indemnity will not cover a debt which did not appear upon the partnership books, and was not made known to the assignee at the time of the contract of indemnity. *Case v. Cushman*, III. 544.

13. *Assumpsit* will not lie by one partner to recover from the other a balance due upon the settlement of their partnership account, without proof of an express promise to pay. *Killam v. Preston*, IV. 14.

PARTNERSHIP.

14. A partnership account stated by one partner after the dissolution, and presented to the other, who retains it in his possession for more than a year without objection to it, is not sufficient evidence, upon which a recovery of the balance appearing to be due upon it, may be had. Nor is the copy of such account retained by the plaintiff evidence at all, without notice to produce the original. *Ibid.*

15. A note given by one partner, after dissolution, for a debt of the firm, is not an extinguishment or satisfaction of the original debt, so as to discharge the other partner, unless such was the agreement when the note was given; and this is a fact for the determination of a jury. *Mason v. Wickersham*, IV. 100.

16. The acts and declarations of a partner after the dissolution of partnership cannot be given in evidence to affect any one but himself; but if he be both plaintiff and defendant by virtue of the Act of Assembly of the 14th April 1838, they may be given in evidence for that purpose, and to affect his co-defendant who acted with him. *Tassey v. Church*, IV. 141.

17. The death of one partner does not discharge the firm from subsisting contracts with an agent of the firm for a period of time not then expired; and if he be dismissed without cause before the death of the partner, the survivors are liable for his wages during the period contracted for. *Fereira v. Sayres*, V. 210.

18. *Quære*, whether the old firm would be liable for services rendered in pursuance of the contract to a new firm which succeeded it. *Ibid.*

19. A partnership, though dissolved, may be considered as subsisting for many purposes. *Ibid.*

20. All the members of a firm are liable for goods sold to either for the use of the firm, although the existence of the partnership were not known to the vendor. So also would they be liable if they induced the vendor to believe a partnership existed, and he sold the goods on the faith of their assertions, although in fact there was no such partnership. But a direction to the vendor by one, to charge the goods either to him or another at his option, does not amount to an assertion of partnership such as will charge them jointly. *Given v. Albert*, V. 333.

21. Upon the death of a joint defendant, the cause must be tried against the survivor; there can be no joinder of the personal representatives of the deceased and the survivor. *Ibid.*

22. A bill in chancery, or an action of account render, is the only remedy by which one partner can recover the amount due to him by the firm; but there can be no recovery in any form of action in which one of the firm is both plaintiff and defendant. *M'Fadden v. Hunt*, V. 468.

23. A sale of goods on credit to one partner, in the course of the business of the partnership, is a sale to the firm, unless it be made contrary to an express notice by the other partner not to trust the firm on his account; in which case, he alone will be liable who

PARTNERSHIP.

made the purchase, and an action to recover the price cannot be maintained against the firm. *Feigley v. Sponeberger*, V. 564.

24. The rule, that all who participate in profits are liable as partners, is subject to many exceptions. If three enter into an agreement, by the terms of which one is to do certain things and the other two certain things, each at their own expense, and each to be entitled to an equal share of the profits arising out of the subject matter of the contract, this does not constitute them all partners and make them all liable for expenses incurred by either in the performance of their part of the contract. *Heckert v. Feigley*, VI. 139.

25. A partner may bind his copartner by a contract under seal in the name and for the use of the firm in the course of its business, provided the copartner assents to the contract previously to its execution, or afterwards ratifies and adopts it; and this assent or adoption may be by parol. *Bond v. Aitkin*, VI. 165.

26. The bond of one partner taken at the time money is loaned to the firm, and as the consideration for such loan, is an extinguishment of the debt, and not a collateral security. *Ibid.*

27. One partner may maintain *assumpsit* against his copartner for contribution, where he pays a partnership debt more than six years after a general assignment by the firm in trust for creditors, and the defendant gives no evidence to show that the partnership accounts are open and unsettled. *Brown v. Agnew*, VI. 235.

28. A judgment obtained by one firm against another, each of which is constituted in part of the same members, some of them being both plaintiff and defendant, cannot be executed by a levy upon the separate property of an individual member of the defendant firm. *Tassey v. Church*, VI. 465.

29. One of a firm confessed a judgment against himself and his co-partners, upon which an execution issued, and the money was paid to the sheriff by the partners after a levy upon their personal property: after which the judgment was set aside as to the partner who was not a party to it: in an action against the sheriff by the plaintiff in the execution, it was held that he was entitled to recover. *Harper v. Foz*, VII. 142.

30. One of several partners, who are plaintiffs in an action, if he be willing to testify, is a competent witness for the defendant. *Moddewell v. Kever*, VIII. 63.

31. A general assignment for the benefit of creditors by one who is a member of a partnership, gives to his assignee no control over the partnership funds or claims, so as to enable him to receive or release them. *Ibid.*

32. The existence of a partnership may be proved by the separate admissions of all who are sued, or by the acts, declarations, and conduct of the parties, the act of one, the declarations of another, and the acknowledgment or conduct (when the firm consists of three persons) of the third. *Welsh v. Speakman*, VIII. 257.

33. It cannot be proved by the act of one only, if the plaintiff

PARTNERSHIP.

fails as to the rest ; but the whole testimony taken together may show it, if each and every one is connected together by their own admissions or acknowledgments. *Ibid.*

34. To effect this, the plaintiff has a right to prove one thing at a time, to add fact to fact, from which the jury may infer the partnership. *Ibid.*

35. *Held*, therefore, that where the plaintiff showed a store existing, packages sent there marked W. S. & Son, that W. S. was frequently there so as to be likely to see the goods so marked, and other grounds for inferring partnership :

1. The plaintiff might give in evidence as against the son the admissions of the son that he was a partner, and proof that bills of goods furnished for the store were rendered in the name of both.

2. It made no difference that the father being dead and the son insolvent, the suit was against the executors of the father.

3. The day-book, ledger, and books of account of the defendant, were evidence.

4. And if the court has first rejected evidence of books, but afterwards admits them, the proper course is for the party who offered it, if a witness who was to give explanatory evidence has since been discharged, to move to dismiss the jury, or for a postponement of the case ; he cannot go on and take the chance of a verdict, and then assign the rejection as error.

5. The defendants might show the course and manner of doing business at the store before the controversy—as that the sign was in the name of the son—that the bills were made out in his name, and that suits were brought before a justice in his name.

6. The defendants might show that the son procured an insurance against fire on goods in the store in the name of the firm, and that a fire having taken place, it was settled by compromise after suit brought, and the son recovered the money. *Ibid.*

36. Partnership by written articles : the act by which the plaintiff was alleged to have retired, and that by which the defendants were alleged to have continued the firm, was reduced to writing : parol proof is inadmissible to show that the defendants only were partners when the plaintiff performed services. *Cochran v. Perry*, VIII. 262.

37. A partnership is dissolved when one of the partners sells his share to a stranger, or one of the firm, unless otherwise provided by agreement. *Ibid.*

38. Where articles of partnership provided for the transfer of shares by members, subject to restrictions, that a shareholder, after such transfer, should cease to be a member, that the company should keep books, and the persons becoming members by transfer on the books should be entitled to receive a certificate in a particular form, the plaintiff executed an agreement to transfer, not entered on the books, to two of his co-partners. *Held*, that this was either a present transfer, which dissolved the partnership, or an executory agreement, which left him standing as a member. *Ibid.*

39. A subsequent ratification of a transfer by the other partner on

PARTNERSHIP.

a condition not performed, makes no difference in the relations of the partners towards each other. *Ibid.*

40. After a transfer not completed, no action lies by the party transferring against the other partners, but account render. *Ibid.*

41. And to make such ratification binding, all the partners must join in it. *Ibid.*

PARTY.

PLEADING, 3.

PASSENGER.

EVIDENCE, 107, 108, 109.

WITNESS, 9.

PATENT.

WARRANT AND SURVEY, 23, 24.

1. A patent enures to the benefit of him who has the title though issued to another. *Urket v. Coryell*, V. 60.

2. If a man wrongfully obtain a patent for land, and pay the taxes, the real owner may recover it from him without reimbursing to him the costs of patenting and the taxes. *Ibid.*

3. Caveat by E. against patent to W. & D., afterwards withdrawn as to W., does not withdraw or concede anything as to D.; especially if D., two years afterwards, enters a caveat against E.'s title, under a claim of an opposite title. *Ibid.*

4. If land be vacant when a return of survey is accepted at the Land Office, and patent granted, and no intervening title exists in a third person, one whose claim from the Commonwealth originates after the patent cannot dispute the right of the patentee on the ground that the survey and return were unduly accepted. *Balliot v. Bauman*, V. 150.

5. The patent merges irregularities in former proceedings, and is notice to a subsequent claimant that the land is not vacant. *Ibid.*

PATENT RIGHT.

1. Although an implement may have been long in use, yet an invention of a mode of making it in a different manner, which produces a new and useful result by a new combination of old materials, entitles the inventor to a patent for the new implement, and not alone for an improvement of an old one. *Geiger v. Cook*, III. 266.

2. In an action upon a note given for a patent right, the plaintiff cannot recover, if it appear upon the trial that the invention for which the patent was granted was not new or useful, although both parties acted in good faith in giving and receiving the note. *Ibid.*

PAVING

SHERIFF'S SALE, 32, 33, 34, 35.

PAYMENT.

APPROPRIATION, 5, 6.

BOND, 9.

DOWER, 7.

INTEREST, 3.

PLEADING, 13.

PRINCIPAL AND AGENT, 33.

TRUST, &c., 23.

1. A payment in current bank-notes discharges the debt, although, in consequence of the previous failure of the bank, of which both parties were ignorant, the notes were of no value at the time of payment. *Bayard v. Shunk*, I. 92.

2. Payment into court, or tender in notes of a bank, as between the bank itself and its debtors, is equivalent to payment in specie. *Northampton Bank v. Balliet*, VIII. 311.

PAYMENT, PRESUMPTION OF.

PRESUMPTION OF PAYMENT.

In a suit on a bond, the plaintiff, to rebut the presumption arising from the lapse of more than 20 years, may give in evidence an ejectment against the mortgagor for a portion of the lands mortgaged, an agreement to refer all matters in variance between the parties, a claim for the balance of the mortgage, and an award for a sum of money and judgment; a *scire facias* issued on this judgment and revival, and an *alias scire facias* against the mortgagor and heirs and terre-tenants, and a conditional verdict.

But he cannot give evidence of an ejectment brought more than 20 years before the present suit. *Levers v. Van Buskirk*, VII. 70.

PAYMENT WITH LEAVE.

PLEADING, 14, 16.

1. Generally speaking, the plea of payment admits the cause of action, and supersedes the production of proof of it. *Gilinger v. Kulp*, V. 264.

2. The only exception is in the case of a bond of which profert has been made and oyer demanded, which must be produced to show there is no variance. *Ibid.*

PENAL STATUTE.

FEE BILL, 14.

PENALTY.

COMMON INFORMER, 1.

DECLARATION, 3.

FEE BILL, 6, 7.

PENITENTIARY.

EASTERN PENITENTIARY.

PENNSYLVANIA CANAL.

ACTION, 16.

PENN TOWNSHIP.

SCHOOLS, 7.

PHYSICIAN.

EVIDENCE, 110.

PITTSBURGH.

ROADS, 1.

1. The mere laying out streets, &c., for a city, under the Act of 16th of June 1836, and its supplement, or under the general road law, is not of itself a taking of the property of individuals by the right of eminent domain recognised in the constitution; and it is only when they are actually opened and applied to public use, that the owners are entitled to receive compensation.

Therefore, the legislature had authority to pass the Act of 16th of June 1836, to lay off a district of country adjoining the city of Pittsburgh, and to direct a survey and location of the streets in anticipation of the future increase of its population.

They could, also, direct such streets, &c., to be opened on the petition of thirty lot-holders. *In the matter of the district of the City of Pittsburgh*, II. 320.

2. That portion of Pitt township which adjoins the city of Pittsburgh, and which by Act of Assembly is created a city district, is subject to the general road laws until it is admitted into the city according to the provisions of the 11th section of the Act of 16th June 1836. *The Pitt Township Road Case*, VIII. 74.

PLEADING.

ABATEMENT, 1, 2.

AGREEMENT, 10.

AGREEMENT OF PARTIES, 1.

APPEARANCE, 3.

BILLS OF EXCHANGE, &c., 35.

COVENANT, 3.

DECLARATION, 2.

ESTOPPEL, 1.

EXECUTORS, &c., 5, 6.

FOREIGN ATTACHMENT, 1, 2, 7.

INSOLVENT, 10.

JUDGMENT, 5.

REPLEVIN, 3.

SCIRE FACIAS, 3.

SUNDAY, 2.

1. The registry of a mechanic's lien is no record, and to a *scire facias* upon it, the plea of *nul tiel record* is a nullity. *Davis v Church*, I. 240.

2. The forms of pleading must be adapted to the cause of action

IX. — 2 H *

PLEADING.

with the same strictness, whether the cause originate by writ, or be brought into court by appeal from the judgment of a justice of the peace. *Harris v. Ligget*, I. 301.

3. The death of a plaintiff before suit brought, may be taken advantage of by a plea in abatement, or in bar; and if a judgment in such case be inadvertently rendered, it will be reversed on a writ of error *coram nobis*. *Hurst v. Fisher*, I. 438.

4. After the evidence is closed, and counsel have addressed the jury, and witnesses have been dismissed, it is too late for the defendant to add a plea requiring new evidence on the part of the plaintiff to repel it. *Ridgely v. Dobson*, III. 118.

5. In an action of *indebitatus assumpsit*, the plaintiff is not bound to set out in his declaration the exact sum which he is entitled to recover; he may recover a less sum, but not greater. *Siltzell v. Michael*, III. 329.

6. In an action of debt upon a note in which the defendant has pleaded "payment, with leave to give the special matter in evidence," the plaintiff may require notice of the special matter which the defendant intends to give in evidence; and that notice must specify the particular matters relied upon: it is not sufficient that it states that "the note was obtained from the defendant without legal or sufficient consideration, and by undue means, and that the defendant is not liable to pay the same." It must specify how it was obtained, and what are the particular matters to be proved. *Hale v. Fenn*, III. 361.

7. A plea in abatement may be set aside or treated as a nullity, if pleaded out of time, or if it be otherwise irregular, but not for insufficiency; the proper course, in such case, is to demur. *Ralph v. Brown*, III. 395.

8. The pendency of a bill in equity in another State, to have a discovery of the debtor's effects, under a statute of that State, and an injunction to prevent him from disposing of them, is not the subject of a plea in abatement of a subsequent action for the same cause here. *Ibid*.

9. In *indebitatus assumpsit* as well as in an action on a bond or special contract, the defendant can only take advantage of a non-joinder of another who is jointly liable with him, by a plea in abatement. *Grubb v. Foltz*, IV. 548.

10. In an action of *assumpsit* the defendant cannot, under the plea of payment, give evidence tending to disprove the cause of action set forth in the plaintiff's statement. *Hamilton v. Moore*, IV. 570.

11. *Quære*, if he can even under the plea of payment with leave, if no notice of such defence has been given according to the rules of court. *Ibid*.

12. The plea of payment confesses the cause of action set forth in the plaintiff's statement. *Ibid*.

13. Under the plea of payment the evidence may be of payment in other things than money. *Ibid*.

14 On the plea of payment to let in a set-off, or of payment with

PLEADING.

leave to introduce an equitable defence, there must be notice of particulars under the rules of court. *Erwin v. Leibert*, V. 103.

15. Such notice is requisite whenever anything but direct payment is meant to be proved. *Ibid.*

16. The deposit of notice in the prothonotary's office is not a compliance with a rule requiring it to be given to the party: nor a reference in the plea of payment with leave to the affidavit of defence filed. *Ibid.*

17. If a cause of action be defectively stated, the defendant must demur to it; the error is cured by going to trial upon the merits. *Sedam v. Shaffer*, V. 529.

18. A party defendant cannot avail himself of the effect of interlineations or erasures in the bond upon which he is sued on the plea of *nil debet*, but only upon the plea of *non est factum*. *Zeigler v. Sprenkle*, VII. 175.

POOR.

**OVERSEERS OF THE POOR, I.
SCHOOL.**

1. A devise to A upon condition that he becomes a sober man, if the devisee does not comply with the condition, will not vest in him such an estate as will make him chargeable as a pauper upon the township where the land devised is situate. *Overseers of Lewisburg v. Overseers of Augusta*, II. 65.

2. Justices of the peace are incompetent, on the ground of interest, to grant an order for removal of a pauper from their own township to another. *Overseers of Washington v. Overseers of Beaver*, III. 548.

3. Where a son becomes independent of his father's family, or emancipated from it, he will not acquire a settlement where his father goes to reside; but if he remains a part of his father's family, he will acquire a derivative settlement from the settlement of his father. *Ibid.*

4. A justice of the peace is incompetent to grant an order for the removal of a pauper from his own township to another. *M'Vey-town v. Union Township*, V. 434.

5. The overseers of a township are bound to maintain every poor person within their district, not having a settlement therein, who shall apply to them for relief, until he can be removed to the place of his last settlement; and if in an attempt to remove him to the place of his last settlement, they leave him on the way in a township not legally chargeable with him, he may be returned to them by an order of removal. *Kelly Township v. Union Township*, V. 535.

6. Aldermen of the city of Pittsburgh have jurisdiction to hear and determine the rights and liabilities of the townships of Allegheny county, respecting the support of paupers.

7. If an appeal from the order of two aldermen removing a pauper

POOR.

from one township to another, be quashed by the Court of Quarter Sessions for want of jurisdiction of the aldermen, it is error in the court to make any decree between the parties as to the payment of costs. *Overseers of St. Clair v. Overseers of Moon*, VI. 522.

8. Directors of the Poor are authorized and required to pay the funeral expenses of a destitute person upon the order of two justices granted after the death and burial of such person. *Directors of Poor v. Wallace*, VIII. 94.

POSSESSION.

DEED, 29.

NOTICE, 5.

VENDOR, &c., 65.

Possession follows title, unless there be adverse occupancy. *Lewis v. Lewis*, IV. 378.

POST-NOTES.

BANK, 3.

POST-NUPTIAL CONTRACT.

HUSBAND AND WIFE, 21, 22, 23.

POWER.

1. A special power must be strictly pursued; hence, if an attorney be authorized to convey a tract of land, after he shall have redeemed it from a sale by the treasurer as unseated, and he conveys without redemption, the power is not well executed, and the purchaser takes no title. *Devinney v. Reynolds*, I. 328.

2. When powers are granted to several persons to transact private business, all must join in the execution of it. And the rule applies in all cases, whether the duty be ministerial or judicial. *Johnston v. Bingham*, IX. 56.

POWER OF ATTORNEY.

A power of attorney, coupled with an interest, is irrevocable; and such is the case of a power given to a third person to fix the price of goods sold in discharge of a debt. *Smyth v. Craig*, III. 14.

PRACTICE.

BAIL, 1.

DEPOSITION, 3.

NISI PRIUS, 6, 7.

1. If a witness, in the course of his examination, be asked to testify respecting a transaction, before the question is answered it is competent for the other party to inquire and know whether the transaction be in writing; and if it be, the witness cannot be permitted to give parol evidence on the subject. *Rice v. Bizler*, I. 445.

2. The court is not bound to answer points proposed on a trial

PRACTICE.

which, according to the rules of court, are out of time. *Kintey v. Hill*, IV. 426.

3. A discontinuance can only be entered by leave of the court, and though the practice is to do it without such leave first granted, yet the court on cause shown will refuse leave after it has been entered. *Schuylkill Bank v. Macalester*, VI. 147.

4. A Court of Common Pleas, when it opens a judgment on affidavit of the defendant, ought to prescribe terms so as to confine the party to the grounds of defence set forth in his affidavit. *Gilkysen v. Larue*, VI. 213.

5. If by the transcript of a magistrate's judgment, filed in the Court of Common Pleas, it appears that execution was issued and returned "no goods and defendant not found," it is sufficient to warrant a *feri facias* without filing a certificate. *Drezel v. Man*, VI. 343.

6. The court ought not to answer questions propounded by counsel, which are not necessary to the decision of the cause. *For v. The Union Academy*, VI. 353.

7. A plaintiff cannot have judgment for want of a plea, where no rule to plead has been entered on the docket. *Bisbing v. Albertson*, VI. 450.

8. There is discretion to be exercised by a court as to the time when evidence may be given, but it should not be entirely rejected on slight grounds. *Devall v. Burbridge*, VI. 529.

9. Writ issued at the suit of C. S. and J. P., trading under the firm of S. & P., against G. P. & J. P., trading under the firm of G. & J. P., J. P. being a member of both firms, and was returned next day "summoned personally on G. P." In the declaration filed the day the writ issued, the plaintiffs "complain of G. P., who has been summoned, &c.; for that, &c., the defendant and J. P. (who was joined as defendant in the writ in this suit, but who was not summoned, as appears by the record,) &c., were indebted, &c." G. P. pleaded and verdict for plaintiffs. On a writ of error taken by G. P. the proceedings were reversed as irregular and illegal, and such as could not be cured by verdict. *Pennock v. Swayne*, VI. 239.

10. Upon an indictment for a misdemeanor, and a demurrer by the Commonwealth to a plea in bar of the defendant, which contains no confession of facts which constitute guilt, a judgment against the defendant is that of *quod respondeat ouster*. *Foster v. The Commonwealth*, VIII. 77.

11. If a judgment be opened, and the defendant let into a defence upon the merits and pleads to issue, and the plaintiff afterwards issues a *scire facias quare executio non*, to which the defendant appeared and confessed judgment of revival, and pleaded the proceedings on the original judgment, whereupon a judgment was entered for want of a sufficient plea, a writ of inquiry of damages issued and was returned finding the amount due, which was collected by execution: *Held*, that the original suit was no longer pending. *Eby's Case*, IX. 145

PRACTICE.

12. The jury, after the charge of the court, retired to deliberate, and returned into court to give their verdict. After they had entered the jury-box, and nine of them had been called, the plaintiff requested to take a nonsuit. *Held*, that he was entitled to do so. *Easton Bank v. Coryell*, IX. 153.

13. After a plea in bar, it is in the discretion of the court to allow a defendant to withdraw his plea and demur. *Payran v. M'Williams*, IX. 154.

14. It is not regular to issue an execution on a judgment after the death of plaintiff, in the name of his executor, without previously suggesting the death of the plaintiff, and substituting the executor upon the record. Where it was done, however, and the money levied, this court, on writ of error, remitted the record, with direction to suggest the death and substitute the name of the executor upon the record *nunc pro tunc*. *Darlington v. Speakman*, IX. 182.

PRESBYTERIAN CHURCH.

DEED, 10.

PRESENTMENT.

CERTIFICATE OF DEPOSIT, 5.

PRESUMPTION.

EXECUTORS, &c. 12, 13.

PAYMENT, PRESUMPTION OF.

1. There is no presumption that a party who died under 21 died without issue. *Clark v. Trinity Church*, V. 266.

2. A long-continued claim of title, with acts of ownership, uncontested by adverse pretension on the part of him who is supposed to have conveyed, will be sufficient to supply the place of an absent link in a chain of title. The law will presume a conveyance to have been made. *Hastings v. Wagner*, VII. 215.

PRESUMPTION OF PAYMENT.

DOWER, 7.

LIMITATION, 21.

UNSEATED LAND, 31.

PRINCIPAL AND ACCESSARY

JOINDER, 1.

PRINCIPAL AND AGENT.

APPROPRIATION, 7.

MORTGAGE, 2.

VENDOR, &c. 51, 52.

1. If an agent exceed his authority in making a contract, ~~so~~ thereby binds himself individually, but his principal is not bound. *Layng v. Stewart*, I. 222.

PRINCIPAL AND AGENT.

2. If a factor sell goods in his own name, without the buyer's knowledge of the capacity in which he is acting, the owner may maintain an action for the price of the goods in his own name; and in such case the purchaser may set-off a debt due to him by the factor. *Parker v. Donaldson*, II. 9.

3. If, in such case, the purchaser knew of the capacity in which the seller acted, then, in an action by the principal against him for the price of the goods, he cannot set-off a debt due to him by the factor. *Ibid.*

4. Where a contract for commissions to an agent abroad is uncertain in its terms, containing blanks to be filled by the other party, which never is done, the amount of charge for commissions must be collected from the letters and acts of the parties; and if the agent charges commissions in the accounts sent to his principals during several years, and is suffered to run through a succeeding contract without measures being taken to undeceive him until his return home, the interpretation of the contract, where it is doubtful, ought to be in his favour. *Archer v. Dunn*, II. 327.

5. In order to visit a principal with constructive notice of a fact known to his agent, it is necessary that such knowledge should have been gained by the agent in the course of the same transaction. *Bracken v. Miller*, IV. 102.

6. An agreement to place goods in the hands of an agent who at the time was insolvent, for the purpose of sale, upon the terms of his paying to his principal the invoice price of the goods and retaining the overplus for himself, is not fraudulent; nor does it vest in the agent such an interest in the goods as is the subject of levy and sale. *M'Cullough v. Porter*, IV. 177.

7. The acts of an agent or attorney done after the death of his principal, of which he was ignorant, are binding upon the parties. *Cassiday M'Kenzie*, IV. 282.

8. It is the duty of an agent to give his principal timely notice of every fact or circumstance which may make it necessary for him to take measures for his security; and if he fail to do so, it is a dereliction of duty for which he is chargeable. *Devall v. Burbridge*, IV. 305.

9. On sales made by a factor, the principal may recover the price due by the vendee, subject to the equities which the vendee has acquired by dealing with the agent as principal, or which the agent may have acquired from the course of dealing between him and the vendee. *Merrick's Estate*, V. 9.

10. But this rule does not apply to a sale made by a factor here, for a principal in a foreign country, where exclusive credit is given to and by such factor; nor can a suit be sustained by the principal, except through and by the factor; and on the bankruptcy of both principal and factor, the assignee of the latter is entitled to the price of the goods sold. *Ibid.*

11. It seems, that where such factor is insolvent, a court of equity

PRINCIPAL AND AGENT.

might compel payment of the debt to the principal, in a proper case. *Ibid.*

12. But such case does not exist where the principal has sued the factor for the value of the goods, and obtained an award of arbitrators for his claim, and prosecuted him to bankruptcy for the debt, and became himself assignee of the bankrupt, and no account appears of the assets received. *Ibid.*

13. If funds are due to an agent, and on his death they come into the hands of his administrators separate and distinct from the assets of his estate, and are claimed by an assignee in bankruptcy; *quære*, whether the Orphans' Court has jurisdiction to compel their payment by the administrator, or the claimant must sue at common law. *Ibid.*

14. On the hiring of an agent for a year, the principal is liable to him for the wages of the year, if he dismiss the agent before its termination. *Fereira v. Sayres*, V. 210.

15. In an action of trespass *quare clausum fregit*, the defendant cannot justify by proof of a parol authority derived from an agent of the plaintiff, unless he can also show that the power of the agent extended to the granting of such authority. One who contracts with an agent, must look to his power. *Baring v. Peirce*, V. 548.

16. An agent constituted for the purpose of procuring the settlement and sale of lands, and who by his written authority is specially instructed to enter into written contracts for that purpose, has no power to enter into any parol agreement for the sale or settlement of the lands: and such parol agreement will furnish no defence to an action of trespass *quare clausum fregit* by the owner of the land. *Ibid.*

17. A factor who sells the goods of his principal, consigned to him for that purpose, and takes the notes of the vendee, which he has discounted for his own accommodation, thereby becomes responsible for the amount of the sales in the event of the insolvency of the purchaser. *Myers v. Entriken*, VI. 44.

18. An agent having undertaken gratuitously to collect a note and book-account, surrendered them to the debtor, from whom he took a new note to himself for their amount: *held*, that this was an extinguishment of the original debt, and the agent was liable for its amount to his principal. *Opie v. Serrill*, VI. 264.

19. If one is applied to as agent to investigate the title of another to a lot which he has an interest in purchasing, and he undertakes the duty, he cannot use the information thus acquired to the injury of his principal. He is bound to disclose to him any material information obtained concerning the title, and if he conceals it and buys himself, it is a fraud; and he cannot hold the property without reimbursing to the principal any loss he may sustain by failing in the purchase. *Reid v. Stanley*, VI. 369.

20. In a suit by a principal abroad against his factor here, seeking to charge him with losses occasioned by his negligence, the defendant cannot, to show he had kept the plaintiff informed of his doings,

PRINCIPAL AND AGENT.

give in evidence a deposition stating that the defendant gave the witness particular instructions to see the plaintiff and inform him of the state of his consignment particularly, and the sales made, when the witness states he had no copy of account sales, and showed none to the plaintiff, and sales had long before been made of which no account had been sent. *Brown v. Arrott*, VI. 402.

21. A factor is liable for a loss arising from his neglect to keep his principal informed of matters material to his interests. *Ibid.*

22. Evidence is not admissible on the part of a factor, in a suit by the principal against him founded on the factor's negligence, to show that it is not usual for factors to transmit to their principals moneys received by them as long as any part of the consignment remained unsold, or, if sold, as long as any part of the moneys remained unpaid, though the honesty of the agent is not disputed, and there is no ground to believe the moneys might thereby be lost. *Ibid.*

23. A factor is bound to remit to his principal the moneys received from sales of a consignment, unless there be an agreement or custom of trade; and if the latter be himself the factor of a principal abroad, he is bound to call on his factor in this country to transmit moneys received when he is informed of it, and if the money is lost by neglect to do so, he is answerable. *Ibid.*

24. In October or November 1822, the defendant was apprised of a sale by his agent in Boston, payable in February or March. In May the defendant wrote, stating he expected an account and remittance. Six days after he wrote that he need not make a partial remittance, but to push the sales to a close, and remit the whole at once. In March the agent acknowledged to him his inability to meet a note to the defendant, payable in a few days; and no advice was sent by the defendant to the principal abroad till the agent became insolvent. *Held*, that the defendant was responsible for the loss of the goods and moneys. *Ibid.*

25. Where, on the facts presented, the defendant is liable for a loss occasioned by his negligence as a factor, the onus of proving what the actual loss was lies upon him, and not on his principal; and in the absence of such proof, the full value of the goods, or at least of the money produced by their sale, is the measure of damages. *Ibid.*

26. The factor sold goods to J. F. on a credit of six months, taking a note payable to himself, including in it a debt owing to himself, and afterwards released to J. F., and came in under his assignment. *Held*, that he made the debt his own by blending it with his own money, and releasing J. F. without authority. *Ibid.*

27. The relation which exists between a notary and the holder of a negotiable note, with regard to the protest of the note and notice to the endorsers, is that of principal and agent; and no more strict performance of duty is required of the former than is indicated by the uniform practice of the place where the note was protested. *Parke v. Lowrie*, VI. 507.

28. Partners must act with good faith towards each other, and if

PRINCIPAL AND AGENT.

one of them be served with process in action against the firm, and judgment be obtained and execution levied upon the partnership property, it is his duty to give notice of it to his co-partners; and neglect to do so subjects him to an action. *Devall v. Burbridge*, VI. 529.

29. The authority of an agent to assume the payment of the debt of a third person for his principal should be clearly proved, or no recovery can be had upon such promise against the principal. *Reading Rail-road Co. v. Johnson*, VII. 317.

30. Separate judgments against a principal and surety do not extinguish the relation between them. Hence, if, after judgment, the creditors agree for a sufficient consideration to give time to the principal, the surety will be thereby discharged. *Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania*, VII. 335.

31. If an agent procure the note of his principal to be discounted, and deposit the proceeds in bank to his own credit, the principal may maintain an action therefor against the bank in his own name, notwithstanding the bank, after notice, had paid the money on the check of the agent. *Frazier v. The Erie Bank*, VIII. 18.

32. If the books of a factor exhibit a balance due to his principal, and this be communicated to him, it is conclusive upon the factor, and he cannot afterwards alter or in any way impair it. But if the state of the account be not communicated to the principal, so that he may have acted upon the supposition that such balance was in his favour, he may afterwards show that the entries were made by fraud or mistake. *Vantries v. Richey*, VIII. 87.

33. Where goods are sold by a factor here for a principal abroad, and the factor dies before payment, his authority is revoked, and a payment to his administrator by the purchaser is a mispayment. *Merrick's Estate*, VIII. 402.

34. If such administrator receives the money, it ought not to be involved in his accounts in the settlement of the intestate's estate, either as general or special assets; nor can the Orphans' Court or the Supreme Court on appeal make any order in favour of the principal on such settlement of accounts. *Ibid.*

35. Money so received by the administrator is trust estate, and can be followed in his hands or those of his representatives only by a bill in equity, or perhaps here by an action for money had and received. *Ibid.*

PRINCIPAL AND SURETY.

ACTION, 15.

SUBSTITUTION, 1.

1. If one of several joint guarantors pays the debt for which all were bound, he has thereby a separate right of action against the principal for whom he paid the money, which cannot be defeated by evidence of payment to another of the guarantors. *Lowry v. Lumhermen's Bank*, II. 210.

2. A surety who pays the debt of the principal is not entitled to

PRINCIPAL AND SURETY.

substitution to the rights and remedies of the creditor as against his co-surety, by reason of any consideration which existed between the principal debtor and the co-surety for his entering into the original obligation; especially when there are intervening creditors whose rights would be affected by making the substitution. *Himes v. Keller*, III. 401.

3. If a surety pays the creditor, he has a right to a mortgage formerly given to the creditor as collateral security; but if it be paid by the principal debtor, or out of a trust fund belonging to him, the mortgage is extinguished, and an assignment of it by the surety to secure moneys borrowed on his individual account is invalid, especially if the lender knew before such assignment that the mortgage was paid off. *Kinley v. Hill*, IV. 426.

4. Sureties in a bond of indemnity have a right to require the obligee to bring suit on the bond in case of a breach; and if such suit is begun and there is a fund of the principal's to pay the debt, the court will refuse leave to discontinue, where a rule of reference has been taken out by the defendant, though the arbitrators had not been appointed when the discontinuance was entered. *Schuykill Bank v. Macalester*, VI. 147.

5. Where a surety has done no act before his claim is barred at law, manifesting his intention to put himself in the place of the original creditor, and thereby subrogating himself to his rights, such as bringing suit on the bond within the six years, or taking an assignment of it, his remedy is not on the bond, but for money paid; and a court of equity will not, after the six years, subrogate him to the rights of the obligee. *Rittenhouse v. Levering*, VI. 190.

6. A surety will be subrogated within the six years, where he has paid the money and the original security remains intact; and the fact that there was no assignment or actual substitution within that time will be disregarded; for while the legal right remains, it draws to itself all the consequences of an actual substitution in a court of equity. *Ibid.*

7. A surety is not *ipso facto*, on payment of the debt of his principal, subrogated to the creditor's rights: his remedy is not *primâ facie* on the bond, but for money paid. *Ibid.*

8. A surety of a surety, who has paid and discharged the obligation, has the same equity of subrogation as the surety to whom he was bound. *Ibid.*

9. Upon an appropriation of the proceeds of a sale by the sheriff of the real estate of A., a judgment against him as security of B. must be paid, although it may appear that the same judgment is a lien upon the real estate of B., which is sufficient security for its payment; the remedy of the subsequent judgment creditors of A. is by subrogation. *Neff's Appeal*, IX. 36.

10. A creditor who releases any security which he holds for the payment of his debt, thereby releases a surety *pro tanto*. *Ibid.*

11. A creditor having a judgment against his debtor and his surety, which was a lien upon the real estate of the principal, agreed

PRINCIPAL AND SURETY.

to release a part of the said real estate in order to make a title to one who purchased it for its full value, upon condition that the purchase money should be applied to the extinguishment of a mortgage which was a prior lien upon the whole estate: *Held*, that the surety was not thereby released. *Ibid*.

12. A mortgage given to a surety to indemnify him against loss, will pass to a third person who paid the money for the surety on the faith of an agreement that the mortgage should be assigned to him. *Brien v. Smith*, IX. 78

PRIVATE PROPERTY.

PITTSBURGH, 1.

PRIVILEGE.

CANAL, 1.

PROBATE.

DEED, 19.

PROCESS.

When process issued is legal, the plaintiff is answerable only for a malicious abuse of it; and where the circumstances afford no inference of malice, actual malice must be proved. *M'Cullough v Grishobber*, IV. 201.

PROFERT.

CORPORATION, 11.

PROTEST.

INSURANCE, 2.

PROTHONOTARY.

FEE-BILL, 8.

Money, for the amount of which a judgment was recovered by a proceeding in court, being claimed by different persons, the defendant, without any rule or order of court, paid it to the prothonotary, to be disposed of by the court. *Held*, that such payment was to the officer in his official capacity, and the sureties in his official bond were liable for the faithful application of it. *Deckert's Appeal*, V. 342.

PUBLIC SCHOOLS.

SCHOOL TAX, 1.

QUO WARRANTO.

The writ of *quo warranto* averred that the office was not vacant, the relator not being legally removed, when the defendant was appointed to fill it. The defendant pleaded that it was vacant, and the

QUO WARRANTO.

plaintiff demurred, because the plea by not denying admitted that the vacancy was created by the removal of the relator as set forth in the writ, and in no other manner. *Held*, that this was an admission that the office was vacant when the respondent was appointed, and the demurrer overruled.

Where a relator designs to draw into question the legality of his own expulsion from office, the proper mode of proceeding is by *mandamus* and not by *quo warranto*. *Commonwealth v. Primrose*, II. 407.

RAFT.

ACTION, 14.

RAIL-ROAD.

CORPORATION, 2.

TOLLS, 1.

MANDAMUS, 2, 3.

1. In a proceeding by inquest to recover damages for an injury done to land by the location and construction of a rail-road through it, the plaintiff's title is a subject of inquiry before the jury; and upon exceptions to the inquisition in the absence of proof on the subject, it will be presumed that it was rightly decided by the jury. *Directors of the Poor v. Rail-road Co.* VII. 236.

2. Under the 15th section of the Act of 17th February 1831, incorporating the Philadelphia, Germantown and Norristown Rail-road Company, if there be a report made by viewers ascertaining the damages to the owner by the occupation of land for the rail-road, and appeal therefrom and verdict and judgment thereon, the company is bound to pay the amount fixed by the verdict and judgment, before they can become seised in fee of the land. *Levering v. The Philadelphia, Germantown and Norristown Rail-road Co.* VIII. 459.

3. After report of viewers and during the pendency of the appeal, the company have a qualified right to enter upon and use the land in the meanwhile and until the final result; but unless they pay the amount found by the verdict and judgment, the owner may recover the land in ejectment. *Ibid.*

4. "Or" in the first proviso of that Act should be read "on." *Ibid.*

RAPE.

INDICTMENT, 3.

RATIFICATION.

PARTNERSHIP, 39, 41.

RECITAL.

DEED, 26

EVIDENCE, 104.

IX. — 51

21*

RECOGNIZANCE.

APPEAL, 9.

ARBITRATION, &c., 7, 8.

SHERIFF'S RECOGNIZANCE.

STAY OF EXECUTION, 1, 2, 3.

NUL TIEL RECORD.

1. A recognizance binding three persons in a certain sum, "to be levied of their goods and chattels, lands and tenements *respectively*," is joint and several. *Wampler v. Shissler*, I. 365.

2. In an action upon a recognizance entered into to obtain a stay of execution upon a judgment, it is not competent for the defendant to give parol evidence to contradict, alter or explain the original judgment in which the recognizance was given.

Nor is it competent in such action for the plaintiffs to give evidence of any collateral security given to the defendants to indemnify them against their liability on the recognizance. *Withers v. Livezey*, I. 433.

3. In a *scire facias* upon a recognizance of bail, the defendant cannot, under the plea of payment, take advantage of any want of form or substance in the recognizance given in evidence to support the writ which recited one in due and proper form. *Abbott v. Lyon*, IV. 38.

4. Where a cause is remitted from the Common Pleas of one county to a special court in another county, the latter court may discharge a recognizor from his recognizance and receive another surety, for the purpose of making the original one a witness. *Schuyllkill Navigation Co. v. Farr*, IV. 362.

5. Such subsequent recognizor is bound only for subsequent costs, and the first remains liable for costs up to that time, and is therefore interested, unless the recognizance be specially worded. *Ibid*.

6. After verdict a narr. on a recognizance stating an obligation to pay and a refusal, is a sufficient breach where no objection was before taken that the recognizance was on condition. *Kirkner v. Commonwealth*, VI. 557.

7. The court on the trial may allow an amendment to a narr. on a recognizance, by adding the words "Judge of the Common Pleas," as the person before whom the recognizance was taken. *Ibid*.

8. In an action upon a recognizance, which originated before a justice of the peace, the validity of it cannot be questioned either by proof that it was illegally taken by the justice, or that it was fraudulently taken. The only remedy for the recognizor is an application to the justice to reform or to set it aside. *Clark v. M^cComan*, VII. 469.

9. In an action upon a recognizance taken by the Orphans' Court, in the name of the Commonwealth, to secure the payment of money, brought for the use of another, proof by the defendant that the person for whose use the suit is brought is not entitled to the money, furnishes no defence to the recovery by the legal party. The right to the money will be determined when it is recovered from the defendant. *Commonwealth v. Lightner*, IX. 117.

RECORD.

INSOLVENT, 10.
MECHANIC'S LIEN, 1.

RECORDING ACT.

DEED, 29.

1. The terms of the recording Acts do not restrain their operation to specialties, but embrace all contracts concerning lands, provided they be in writing. *Brotherton v. Livingston*, III. 334.

2. The recording Acts relate only to such instruments of writing as concern lands, tenements and hereditaments, and do not extend to a bill of sale or other writing respecting personal property. *Fidler v. Shotwell*, VII. 14.

RECORDER OF DEEDS.

MORTGAGE, 2, 5.
SURETY, 1.

RE-ENTRY.

CONDITION, 1.

REFERENCE.

ARBITRATION AND AWARD, 1.

REFUNDING BOND.

EXECUTORS, &c. 11.

REGISTER.

A register is a judge; and admitting a will to probate is a judicial act; and for an error committed, the only remedy to the party aggrieved is an appeal to the Register's Court: the decree cannot be impaired in a collateral issue. *Loy v. Kennedy*, I. 396.

REGISTER'S COURT.

1. This court will not inquire whether an issue was properly directed by the Register's Court to the Common Pleas on a writ of error to the latter court; they can only do this on an appeal from the Register's Court. *Werkheiser v. Werkheiser*, VI. 184.

2. The Common Pleas may try such issue, though the defendant resist the making of the issue and refuse to plead. *Ibid.*

RELATION.

BOND, 8.

RELEASE.

AGREEMENT, 7.
HUSBAND AND WIFE, 4.
JUDGMENT, 14.
WITNESS, 35.

RELEASE.

1. The release of a specialty debt by simple contract and without consideration, is void. *Miller v. Hemler*, V. 486.

2. S. owed M. \$800, secured by mortgage. After the mortgage was recorded, G. obtained judgment against S. S. made an assignment in trust for his creditors, preferring among others M. for a debt due to him of \$300, and after the preferences, then in trust for such of his creditors as should release him within sixty days. M. executed a release under the assignment of all his demands within the time limited, and afterwards S. took the benefit of the Insolvent Act, returning the mortgage as due. *Held*, that the mortgage was released, and G. was entitled to be paid first from the money raised on sale of the mortgaged premises by execution. *Matlack's Appeal*, VII. 79.

3. Equity will not interfere for the relief of a party who claims on the ground of a mistake of law. Hence, distribution having been made of the estate of an intestate among those who were supposed to be his collateral heirs-at-law, and all of whom joined in a release to the payer, one of them cannot afterwards recover a greater amount, on the ground of their mutual mistake of the law as to who were the heirs-at-law of the intestate. *Good v. Herr*, VII. 253.

4. A release of all actions and causes of action against J. S. is not a release of a cause of action against a firm of which J. S. is a member. *Reading Rail-road Co. v. Johnson*, VII. 317.

RELIGIOUS SOCIETY.

CHARTER, 2.

DEVISE, 24, 25.

REMAINDER.

TENANT FOR LIFE, 3.

REMITTITUR.

JUDGMENT, 5.

RENT.

AFFIDAVIT OF DEFENCE, 2.

BANKRUPT, 7, 8.

DISTRESS.

TRESPASS, 10.

REPLEVIN.

1. In replevin where the property had been delivered to the plaintiff by the sheriff, the parties on the trial agreed that the jury might find the value of the property and damages in one sum, which was to settle all further claim to the property: *Held*, that the jury were rightly instructed by the court, that in assessing the damages for the defendant they were not confined to the interest on the value, but might give more, if necessary, to compensate the defendant.

When goods are delivered to the plaintiff in replevin on a claim

REPLEVIN.

of property, and the plea of property is found for the defendant, the damages for detention consist of interest on the value of the goods when taken, from the time of taking till judgment rendered. But when the writ of replevin is sued out fraudulently and without colour of right, the jury may give exemplary damages, as in case of a wanton and malicious trespass.

The defendant in replevin is not entitled to special damages occasioned by interruption in business, in consequence of the property being taken from him under the writ. *M' Cabe v. Moorehead*, I. 513.

2. Chattels delivered to the plaintiff after a claim of property by the defendant in a replevin issued out of the Supreme Court of New York, cannot be counter-replevied in Pennsylvania—at least before the question of property has been determined in favour of the defendant in the prior replevin. *Lowry v. Hall*, II. 129.

3. The record of such prior replevin may be given in evidence on the plea of property, and need not be specially pleaded. *Ibid.*

4. In trover to recover the value of certain rails, an award of arbitrators in a replevin brought by the same plaintiff against the same defendant for the same rails, finding for the plaintiff a portion of the rails described as lying on the ground, is a bar to the recovery of damages for the rest, although the plaintiff prove that the defendant took the rest of the rails at the same time and built them up into a fence, and forbade the sheriff from taking them on the writ of replevin as being real estate, and gave security in a replevin bond for the whole, and the arbitrators found damages for the plaintiff for the rails lying on the ground only. *Bower v. Tallman*, V. 556.

5. The plaintiff may recover in replevin where the sheriff is prevented by the conduct of the defendant from replevying the property mentioned in the writ, and delivering it to the plaintiff. *Ibid.*

6. Replevin is not, in Pennsylvania, altogether a proceeding *in rem*, but against the defendant in the writ personally, with a summons to appear. *Ibid.*

REPLEVIN BOND.

1. The condition of a replevin bond requires a continued prosecution of the action of replevin from its commencement, and a successful termination. If the plaintiff prosecute his action to a successful termination in the Common Pleas, and the judgment be reversed in the Supreme Court and no *venire de novo* awarded, the condition of the bond is broken, and a right of action accrues upon it. *Gibbs v. Bartlett*, II. 29.

2. Upon a writ of inquiry of damages upon a judgment by default, or on demurrer, for the plaintiff, in an action upon a replevin bond, the value of the property as set out in the writ of replevin, is *prima facie* the measure of damages, subject, however, to parol evidence by either party of the actual value. *Ibid.*

3. The assignment of a replevin bond by the sheriff to the defendant in replevin, and a suit and judgment and execution by him against the sureties in it, is not a bar to an action against the sheriff for taking insufficient securities. *Myers v. Clark*, III. 535.

REPLEVIN BOND.

4. After judgment against the surety in a replevin bond, he is a competent witness in an action against the sheriff for taking insufficient sureties. *Ibid.*

5. A return of *nulla bona* to an execution upon a judgment against a surety in a replevin bond, is not conclusive evidence, in an action against the sheriff, of the insufficiency of the surety. *Ibid.*

6. A release of the surety in a replevin bond by the defendant in replevin, would be a release of the sheriff; although after the release a judgment had been obtained against the surety. *Ibid.*

RESALE.

AUCTION, 2.

RESERVATION.

DEED, 6, 11.

RETROSPECTIVE ACT.

ACT OF ASSEMBLY, 3.

REVERSAL.

This court will not reverse for an error which does no injury to the party complaining. *Unangst v. Kraemer*, VIII. 391.

REVERSIONER.

EJECTMENT, 28.

The reversioner of the freehold after a tenancy for years may maintain an action on the case against one who erects a dam on the adjacent ground, and backs the water of the stream into the plaintiff's race. *Ripka v. Sergeant*, VII. 9.

REVIEW.

ROADS, 7, 8, 9, 10, 11, 12.

RIVER.

1. The license allowed by the statute of 1803, to the owners of lands adjoining navigable streams declared by law to be highways, to erect dams in them for mills or other water-works, provided they do not injure the navigation or prevent the fish from passing, is not indefeasible, but subordinate to the right of the Commonwealth. *Monongahela Navigation Company v. Coons*, VI. 101.

2. The legislature may constitutionally incorporate a company to make a lock and slackwater navigation, without requiring it to make compensation for consequential damage to private property in the execution of the work: *held*, therefore, that the Monongahela Navigation Company, incorporated to make such a navigation from Pittsburgh to the line between Pennsylvania and Virginia, by dams and locks in the Monongahela river, was not liable in an action on the case, for obstructing the water in the Youghiogony river by a dam in the Monongahela, to the injury of the plaintiffs' mill. *Ibid*

RIVER.

3. Lands bordering on the flats of a river and the flats in front naturally go together, and therefore the flats pass in a conveyance of the land described as running by the course of the river. *Jones v. Janney*, VIII. 436.

4. An express exception is required in the grant or some unequivocal declaration or certain immemorial usage, to limit the title to the edge of the river. *Ibid.*

5. The nature of the right to flats on a river. *Ibid.*

6. One having land in front of a river by conveyance from the proprietary, out of which the flats were reserved, but afterwards claiming the flats under an office right of dubious validity, and making a settlement of the land on the river on certain of his children together with the flats, and afterwards confirming such settlement by his will, shall be considered as intending to pass the flats to such children, in preference to his residuary devisees under a general clause in his will. *Ibid.*

7. The State is never presumed to have parted with one of its franchises, in the absence of conclusive proof of such an intention; hence, a license accorded by a public law to a riparian owner to erect a dam in the Susquehanna river, and conduct the water upon his land for his own private purposes, is subject to any future provision which the State may make with regard to the navigation of the river; and if the State authorize a company to construct a canal which impairs the right of such riparian owner, he is not entitled to recover damages from the company. *Susquehanna Canal Co. v. Wright*, 9.

ROADS.

PITTSBURGH, 1, 2.

1. A *certiorari* to the Court of Quarter Sessions to remove road cases lies without any special allowance or cause shown, on which the court may affirm the proceedings or remit them for further proceedings. And the same principle applies to a proceeding in that court for laying out streets and squares in a proposed city district. *In the matter of the district of the City of Pittsburgh*, II. 320.

2. The omission of the Court of Quarter Sessions to fix the width of a public road, is fatal to the proceedings. *Road Case*, III. 559.

3. It is fatal to the confirmation of a public road that no order was made by the court respecting the width of it. *Road Case*, IV. 39.

4. A public road cannot be located alongside of and adjoining another public road so as to increase the width of both exceeding 50 feet. *Ibid.*

5. A dedication of property as a highway need not always be plenary: it may be partial where the circumstances distinctly show it was so intended. *Gowen v. The Philadelphia Exchange Co.* V. 141.

6. A space left open in private property bordering on the highway

ROADS.

for the accommodation, not of the public, but of the owner, is not thereby dedicated to public use, but may be resumed at pleasure. *Ibid.*

7. The Quarter Sessions has no authority to grant a review to widen, straighten and fix the limits of a road already laid out and used for many years. Its power is only to lay out, to vacate and alter or change an established route. *Church Road*, V. 200.

8. The petition for a review of a road must state specifically the object; and that must appear to be clearly within the purview of the Act giving the court jurisdiction, otherwise the proceedings are irregular. *Ibid.*

9. A re-review of a road can only be ordered on a petition presented to the court for that purpose, as the expenses of re-reviews must be borne by the petitioners. *Hellertown Road*, V. 202.

10. The objection that a re-review was granted whilst previous proceedings were pending and undetermined, should be taken into the court below; if omitted there, it cannot be taken on a *certiorari* to the Supreme Court. *Ibid.*

11. A re-review need only be of the ground between two certain points: it need not be of the whole route before reviewed. *Ibid.*

12. Reviewers are restricted to the space between certain points; and it is error to begin the road at a different point. *Ibid.*

13. An Act of Assembly requiring a canal company to erect and keep in repair a bridge wherever the canal crosses a public or private laid out road, does not apply to a road merely dedicated to public use, and over which the supervisors have not exercised any authority. *Union Canal Company v. Pinegrove Township*, VI. 560.

14. If a bridge, which a canal company is bound to keep in repair as crossing a public road, becomes a state road, the company is thereby absolved from any further charge in respect to it. *Ibid.*

15. Neither the State nor a person, artificial or natural, acting by its authority, under a law which the Legislature is competent to make, is answerable for consequential damages, occasioned by the construction of a highway, further than is specially provided by the law itself. *Henry v. The Pittsburgh and Allegheny Bridge Co.*, VIII. 85.

ROLLING MILL.

FIXTURE, 2, 3.

RULES OF COURT.

DISTRICT COURT, 1.

SALARIES.

CONSTITUTIONAL LAW, 1.

MANDAMUS, 1.

SATISFACTION.**MECHANIC'S LIEN, 13.**

A levy, upon an execution, of personal property to an amount sufficient to pay the judgment upon which it issued, is a satisfaction of the debt, if the levy be released by the plaintiff, and becomes lost to the defendant; but if the release by the plaintiff be at the instance and request of the defendant, it does not amount to satisfaction. *Porter v. Boone*, I. 251.

SCHOOL.**TAXES.**

1. County Commissioners have an unqualified power to approve or disapprove the accounts of a teacher of poor children, under the Act of the 4th April 1794, in a township which refuses to accept the provisions of the general school law. *Parker v. Lancaster County*, I. 460.

2. Under the Act of 16th April 1840, a rated inhabitant of a township is a competent witness in a suit to which the school directors of the township are a party. *Barnet v. School Directors*, VI. 46.

3. Such directors may maintain assumpsit for money had and received against a delinquent collector of the school tax. *Ibid.*

4. Where the declaration set forth their individual names, it was held they might be struck out as surplusage. *Ibid.*

5. In such suit, where the appointment of the defendant as collector is lost, it is competent for the plaintiffs to prove that he represented himself as collector, received the school-tax as such, and was, in fact, collector of the township for a certain year. *Ibid.*

6. Under the 11th section of the Act of 12th April 1838, and the 33d and 36th sections of the Act of 7th March 1840, the remaining school directors have the power and it is their duty to declare the seat of a director vacant whenever the cases contemplated in those sections arise, as well in the county of Philadelphia as in other parts of the State. *Felton v. The Commonwealth*, VIII. 267.

7. But in Penn Township this power and duty are expressly vested by the 33d section of the Act of 7th March 1840, in the remaining directors respectively of each of its election districts of North and South Penn. *Ibid.*

SCHOOL TAX.

Minor children resided with their mother in E. Bradford township, Chester county, where their father died, the mother being married to a second husband, living with her in E. Bradford township; held, that, notwithstanding they had a guardian living in the borough of West Chester, their personal property in the hands of the guardian was not taxable for the benefit of the W. Chester school district.

The domicile of a guardian is not necessarily the domicile of his ward. *School Directors v. James*, II. 568.

SEDUCTION.

BREACH OF PROMISE.
GUARDIAN AND WARD, 1.

SEQUESTRATOR.

MECHANIC'S LIEN, 22.
TOLLS, 1.

In an action by a Turnpike Company, a sequestrator may appeal from an award of arbitrators against the company, and make the oath and enter into the recognizance required by law. *Turnpike Co. v. M'Anulty*, IV. 293.

SERVICE.

JUDGMENT BY DEFAULT, 1.

SCIRE FACIAS.

EXECUTORS, 27, 28, 29.
INTESTATE, 8.
RECOGNIZANCE, 3.
TERRE-TENANT, 1.

1. An amicable *scire facias post annum et diem*, in order to its validity, must be docketed: it is not sufficient that it be filed among the papers of the original judgment, and noted upon the docket entry of it. *M'Cleary's Appeal*, I. 299.

2. Each successive writ of *scire facias* to revive a judgment or to recover damages for the breach of the condition of a bond on which the judgment has been rendered, must be founded upon the judgment which immediately preceded it. A recovery upon a writ of *scire facias* is a bar to any subsequent recovery upon the original judgment. *Collingwood v. Carson*, II. 220.

3. A *scire facias* to revive a judgment, and a judgment thereon for the plaintiff, is a good plea in bar to another *scire facias* on the original judgment. *Custer v. Detterer*, III. 28.

4. A judgment of a revival upon a *scire facias quare executio non* is erroneous; such judgment can only be obtained upon a *scire facias post annum et diem*. *Gasche v. Peterman*, III. 351.

5. It is not necessary that the widow and heirs should be made parties to a writ of *scire facias*, to revive a judgment and continue its lien upon the land of the decedent. The 34th section of the Act of 24th of February 1834, is not applicable to such cases. *M'Millan v. Red*, IV. 237.

6. A *scire facias* answers the purpose both of a writ and a declaration; and where a legal title to have execution of the original judgment is not set out in it, judgment may be arrested as for want of a cause of action. *M'Kinney v. Mehaffey*, VII. 276.

7. A writ of *scire facias* to revive a judgment can only be maintained in the name of the original plaintiff, or, after his death, in the name of his personal representative. *Ibid.*

8. A *scire facias* will not lie against the personal representative

SCIRE FACIAS.

of a deceased defendant in a joint judgment, although it may be suggested in the writ that a surviving defendant in the same judgment is utterly insolvent. *Stoner v. Stroman*, IX. 85.

9. A *scire facias* will lie in the Common Pleas of Alleghany county, and may be there prosecuted to judgment, after the original jurisdiction of that court was transferred to the District Court. *Dougherty's Estate*, IX. 189.

10. A substantial variance between the recital in a writ of *scire facias* and the judgment to be revived, would break the continuity of the lien; but if the objection be formal and technical only, it will not affect the lien of the original. *Ibid.*

11. A judgment upon a writ of *scire facias quare executio non* has the effect of a judgment to continue the lien. *Ibid.*

12. Informalities in a writ of *scire facias* to revive a judgment cannot be taken advantage of by a stranger to the judgment. *Ibid.*

SET-OFF.

ACTION, 7.

AGREEMENT, 10.

BILLS, &c., 35.

BOND, 9.

COVENANT, 6.

JURISDICTION, 9.

PARTITION, 5.

PRINCIPAL AND AGENT, 2, 3.

1. The pendency of a suit is no objection to a set-off of the debt upon which it is founded in another action between the same parties. *Stroh v. Uhrich*, I. 57.

2. In an action by a widow against a sheriff to recover the arrears of an annuity, which was due and payable out of land sold by him on an execution, the defendant cannot set up as a defence or set-off that the plaintiff had received out of another fund of her husband's estate more than she was entitled to. *Reed v. Reed*, I. 235.

3. A set-off can only be made of a debt or demand which existed at the time of the commencement of the action: and the defendant must be able to show that it was then his. *Huling v. Hugg*, I. 418.

4. A public officer cannot blend his public duties with his private transactions; hence, if a collector be sued by a borough for the amount of a duplicate put into his hands for collection, he will not be permitted to set-off a debt due to him by the plaintiff. *Wilson v. Borough of Lewistown*, I. 428.

5. Mutual debts do not *per se* extinguish each other: to effect such extinguishment, there must be some act of the parties, whilst debtor and creditor, by which they determine that one shall go in satisfaction of the other; which act must be of binding efficacy, so as to accompany the claims into whosoever hands they may pass. *Post v. Carmalt*, II. 70.

6. A purchaser at constable's sale cannot, in a suit against him by

SET-OFF.

the constable to recover the amount of his bid, set-off a claim for rent due him as landlord, nor *vice-versa*. *Coffman v. Hampton*, II. 377.

7. In a proceeding in the Orphans' Court by a husband to recover a legacy to his wife, the executor may set-off a bond of the husband given to the testator in his lifetime. *Lowman's Appeal*, III. 349.

8. Set-off is only allowable in favour of a defendant; consequently there can be no such thing as set-off against set-off. *Ulrich v. Berger*, IV. 19.

9. In an action brought before a justice of the peace to recover the price of goods sold and delivered, the defendant may give in evidence as a set-off a special contract between him and the plaintiff by which the plaintiff promised to do certain work for the defendant, and did not, whereby the defendant is entitled to recover damage for the non-feasance. *Nickle v. Baldwin*, IV. 290.

10. A father being surety for his son, died intestate leaving real estate, which was sold by his administrators for the payment of debts; upon a question of distribution of the balance after the payment of debts, it was held that a judgment creditor of the son was not entitled to any part of the fund by reason of his lien on the land; the liability of the intestate for his son being greater than his distributive share. *Munifold's Estate*, V. 340.

11. One sued before a justice of the peace must set-off any claim not exceeding \$100, which he may have against the plaintiff, or be forever barred from its recovery elsewhere. *Herring v. Adams*, V. 459.

12. A set-off is in the nature of a cross-action, and may be withdrawn, in analogy to suffering a nonsuit, where the evidence is found to be too weak to support it; but, like a nonsuit, the withdrawal of it ought to be explicit. *Muirhead v. Kirkpatrick*, V. 506.

13. Damages arising from a breach of warranty of goods sold may be set-off in an action on a note given in a different transaction. *Phillips v. Lawrence*, VI. 150.

14. The defendant under the Act of Assembly, may not only defalcate a claim founded on the contract on which the plaintiff sues, but one arising from breaches of other contracts. *Carman v. The Franklin Fire Insurance Company*, VI. 155.

15. Breach of a contract by the plaintiff, producing loss to the defendant, is sufficient consideration to sustain the defence of set-off or defalcation. *Ibid*.

16. An action for money had and received will lie to recover back the excess of interest taken from one to whom an usurious loan has been made; and, in Pennsylvania, the defendant who is sued as the drawer of a promissory note, made by him to the order of the plaintiff, may, under the "Act for Defalcation," defalk an excess of interest taken from him by the plaintiff upon other and prior loans of money. *Thomas v. Shoemaker*, VI. 179.

17. An unliquidated cross-demand arising from a distinct and in

SET-OFF.

dependent contract may be set-off. *Ellmaker v. Franklin Fire Insurance Company*, VI. 439.

18. When money is raised by sheriff's sale of land and brought into court for distribution, the court has an equitable jurisdiction to set-off one judgment against another, independently of the statutes or Defalcation Act. *Coates's Appeal*, VII. 99.

19. The right of subrogation rests on principles of pure equity, and will not be allowed to a party who is indebted to the judgment debtor against whom he asks to be substituted as plaintiff, without first satisfying such debt. *Ibid.*

20. Judgment against principal and surety. The surety became insolvent, and his land was sold and the money brought into court, and the judgment paid out of it. The principal had a subsequent judgment against the surety; and moreover the surety had covenanted with the principal to pay off a judgment against land conveyed to him by the principal, which he had failed to perform, and the lien of the judgment had expired as against the surety. Other subsequent judgments existed against the surety. *Held*, that these subsequent creditors were not entitled to set-off the amount paid out of the moneys in the first-mentioned judgment against the claim of the principal on his judgment, but that the principal had a right to the amount of his judgment out of the moneys in court. *Ibid.*

21. In the appropriation of the proceeds of a sheriff's sale, the court will not exercise its equitable power to set-off the mutual claims of individuals, unless they have judgments against each other for their respective claims. *Cornwell's Appeal*, VII. 305.

SETTLEMENT.

WARRANT AND SURVEY, 7, 8, 11.

1. Whether an actual settlement has been made, duly prosecuted or abandoned, must necessarily be a matter of fact referrible to the jury. The interruption of the settlement for a period of six months would not of itself amount to an abandonment, unless accompanied by acts or declarations indicative of such an intention. *Goodman v. Losey*, III. 526.

2. To acquire title by actual settlement, under the Act of 22d of September 1794, it is necessary that grain should be raised: this is not to be construed as meaning grain in its confined sense, but every esculent which may be and frequently is used as a means of supporting a family, and which may be derived from the cultivation of the soil. *Ibid.*

3. If a settler acquires a right to 400 acres by improvement, and after wards sells 180 acres part thereof by courses and distances and boundaries, such conveyance does not divest his title to the remainder of the tract, nor does it thereby become vacant, so as to be liable to be taken up on a warrant to a third person. *Miller v. Cresson*, V. 284.

4. A settler may circumscribe his boundaries; and when he does so in good faith, the residue becomes vacant land; but his vendee

SETTLEMENT.

of part cannot, by circumscribing that part, deprive the settler of his right to the remainder. *Ibid.*

5. If a settler entitled to 400 acres gives to one who is purchasing 180 acres thereof from a third person, a written declaration that he had no right to the improvement, though such declaration may be an estoppel as to the 180 acres, yet it cannot be used as such by one claiming the remaining 220 acres without any consideration paid to the settler, or evidence that a purchaser was deceived by it, so as to purchase or expend his money on the faith of it. *Ibid.*

SHERIFF.

BILLS, &c., 11.

BRIBERY, 1.

ESCAPE, 1.

FEE-BILL, 7.

FIERI FACIAS, 1, 2.

OFFICIAL BOND, 3.

TRESPASS, 10.

1. Any one who is not a party to a suit on the record is presumed to be free from interest and competent to testify, until the contrary be made to appear by proof. Hence, in an action against a sheriff's sureties to recover the amount of a writ of *feri facias* which came to the hands of the sheriff's deputy for execution, the deputy is a competent witness for the defendant, unless it be proved by the plaintiff that he, in consequence of negligence or misfeasance, had made himself liable to his principal for the amount of the writ.

A sheriff's sureties are not liable upon their bond for the amount of an execution placed in the hands of the sheriff, which he agreed to pay to the plaintiff in consideration of his indebtedness to the defendant, if it appear that the defendant's personal property, which had been levied upon the execution, had been sold and the proceeds applied to prior levies. And this although the sheriff may have given a receipt to the defendant in the execution for the amount of the money, stating how the money had been paid. *Juniata Bank v Beale*, I. 227.

2. In an action against a sheriff to recover the amount of a lien upon land sold by him, where it appeared the sheriff had paid over the money to other lien creditors, and taken their refunding receipts, the plaintiff is as well entitled to recover interest as principal.

In an action by a widow against a sheriff to recover the arrears of an annuity which was due and payable out of land sold by him on an execution, the defendant cannot set up as a defence or set-off that the plaintiff had received out of another fund of her husband's estate more than she was entitled to. *Reed v. Reed*, I. 235.

3. A writ of *renditioni exponas* is directed generally to the sheriff of the county; and if the sheriff who receives the writ goes out of office before it is executed, his successor may proceed upon it to sell the property, and make a deed to the purchaser. *Leshey v. Gardner* III 314.

SHERIFF.

4. The proviso contained in the 4th section of the Act of 1803, which limits the liability of a sheriff's sureties to five years, is not altered or supplied by the Act of 1834. *Commonwealth v. Rainey*, IV. 186.

5. If a cautionary judgment be obtained against a sheriff and his sureties for the amount of the penalty of his official bond, within five years, a *scire facias* upon that judgment, issued after the five years have elapsed, by one who was a stranger to the first judgment, will not entitle him to recover against the sureties. *Ibid.*

SHERIFF'S BOND.

SHERIFF, 4, 5.

1. The Act of the 14th of June 1836, which provides a remedy upon the official bond of a sheriff, is not applicable to bonds which bear date prior to the passage of that Act; they must be sued according to the provisions of the Act of the 28th of March 1803, whereby the plaintiff recovers alone the amount of damage which he has sustained by the official misconduct of the officer. *Myers v. The Commonwealth*, II. 60.

2. But if, in such case, a general judgment be rendered for the plaintiff, the Supreme Court will direct such judgment to be rendered on the verdict, as the court below should have done. *Ibid.*

SHERIFF'S DEED.

1. A party who claims title to land through a sale by the sheriff, must show the authority upon which such sale was made; and it is not sufficient that authority to the predecessor of the sheriff who conveys be shown, unless it be accompanied by the record of the special order of the court, founded on the statute authorizing the sheriff's successor to convey. The existence of such an order is not to be inferred from the acknowledgment of the deed by the succeeding sheriff. *Seechrist v. Baskin*, VII. 403.

2. The mode of authentication prescribed for a sheriff's deed is not such as to bring it within the purview of the recording Acts; and an exemplification of such a record of it will not be received in evidence. *Ibid.*

SHERIFF'S RECOGNIZANCE.

1. The sheriff's recognizance of record is notice to the whole world, and no special notice need be given of its lien to a terretenant. *Miller v. Commonwealth*, V. 488.

2. The purchaser from the sheriff of land bound by the sheriff's recognizance is not to be considered as a surety; but stands in the same situation as to the lien with his vendor. *Ibid.*

SHERIFF'S RETURN.

EVIDENCE, 114.

The sheriff's return of service of the writ is conclusive; if defective on its face, the defendant should rule the sheriff to amend it,

SHERIFF'S RETURN.

and cannot take the objection on the trial. *Zion Church v. St. Peter's Church*, V. 215.

SHERIFF'S SALE.

AGREEMENT, 10.
 APPROPRIATION, 1, 2.
 BOND, 1.
 CONTRIBUTION.
 EVIDENCE, 86, 88.
 EXECUTION, 16.
 FRAUD, 6.
 GROUND-RENT, 2, 4.
 INTESTATE, 10.
 LANDLORD, &c., 13, 17, 18, 19.
 PARTNERSHIP, 29.
 PRINCIPAL AND SURETY, 9.
 SET-OFF, 18, 21.
 SUBSTITUTION, 6.
 TENANT IN TAIL, 2.
 TRUST, 3.
 TRUST AND TRUSTEE, 14.
 VENDOR, 67.

1. Lien creditors, as well as others, may purchase jointly at sheriff's sale, if all be open and fair. A combination of interests for that purpose is not necessarily corrupt. It is the end to be accomplished which makes such a combination lawful or otherwise: if it be to depress the price of the property by artifice, the purchase will be void; if it be to raise the means of payment by contribution, or to divide the property for the accommodation of the purchasers, it will be valid.

If a purchaser at sheriff's sale participate in a fraudulent contrivance, by which he was enabled to become the purchaser, in an action of ejectment against him for the property purchased, it is not necessary that the plaintiff should offer to refund the amount which was bid at the sheriff's sale and paid for the title. *Smull v. Jones*, I. 129.

2. On a sheriff's sale of land, all liens on the land, due at the time of the sale, where they may be reduced to a certainty as to amount, are entitled to payment out of the proceeds: hence the arrears of a widow's annuity, which are due and payable, must be paid out of the proceeds of sale. *Reed v. Reed*, I. 235.

3. A fraudulent vendee gains no title to the land by a sheriff's sale, nor interest in it, notwithstanding an innocent creditor may by that very sale obtain a good title to the money. It shall be a good sale as to the creditor, to entitle him to receive the money, and yet no sale as to the fraudulent vendee, to enable him to shelter the land against pursuit. *Foulk v. M'Farlane*, I. 297.

4. A sheriff's deed, with a certificate endorsed upon it under the hand and official seal of the prothonotary, that it was duly acknow-

SHERIFF'S SALE.

ledged in open court, and entered of record, is *prima facie* evidence without showing the record. *Foust v. Ross*, I. 501.

5. Upon a written waiver of an inquisition by a defendant whose real estate is seized in execution, the sheriff shall proceed to sell upon the *feri facias* before the return day thereof, without any further writ: but a sale made *after* the return day, although continued by adjournment from a day prior, is void, and vests no title in the purchaser. *Cash v. Tozer*, I. 519.

6. A levy and sale of a tract of land as being in the possession of a certain person, containing a particular number of acres, will vest the whole tract in the purchaser, although it be found to contain a much greater number of acres. *Zeigler v. Houtz*, I. 533.

7. Loose conversation at a sheriff's sale respecting the estate levied and offered for sale, cannot affect the amount of interest which the purchaser takes under his deed, unless there be fraudulent misrepresentations, with a view of buying at a price less than the value, and it is purchased under such influence. *Sergeant v. Ford*, II. 122.

8. The acknowledgment of a sheriff's deed is not such a *res adjudicata* as precludes an inquiry into the legality of the proceedings by which the sale was made.

A writ of error does not lie to the Court of Common Pleas upon its refusal to open a judgment, or in its receiving the acknowledgment of a sheriff's deed. *Braddee v. Brownfield*, II. 271.

9. The sheriff is bound, on the delivery of a writ of *venditioni exponas*, to sell the whole interest of the debtor in the land, without stipulation or restriction, and can reserve nothing for him in the land, or in the price of it.

Money levied by the sheriff upon a *feri facias*, and either actually or potentially in his hands, cannot be attached.

If the debtor's land is charged with a sum of money to raise an interest for the widow during her life, and after her death to be divided among several, of whom the debtor is one, the sheriff, on a sale of the land under an execution against the debtor, should not reserve his interest in the money payable on the death of the widow: if he does, the judgment creditor cannot attach it in the hands of the purchaser as garnishee. *Fretz v. Heller*, II. 397.

10. On a conveyance of land to one, his heirs and assigns, at a certain rent payable annually, after the expiration of seven years, for 100 years, with a clause of distress, the arrears of rent due at the time of a sheriff's sale of the land on a judgment on mortgage against the terre-tenant, are not payable by the sheriff out of the purchase money, but the landlord may distrain for them. *Sands v. Smith*, III. 9.

11. A judgment or other definite lien must be taken from the funds produced by the sheriff's sale on an execution; and if that is omitted, the lands sold cannot be resorted to in the hands of the purchaser. *Custer v. Detterer*, III. 28.

12. A sheriff has no power to impose conditions of sale by which the estate sold shall be incumbered in the hands of the purchaser

SHERIFF'S SALE.

and although a sale and conveyance be made of land by the sheriff subject to terms imposed by him, they are not obligatory upon the purchaser. *Umbehauer v. Aulenbaugh*, III. 259.

13. The recital in a sheriff's deed that the sale was made by a former sheriff, is not conclusive evidence of the fact; but the party claiming under it may show by other proof that it was in fact made by the same sheriff who made the deed. *Leshey v. Gardner*, III. 314.

14. A trust as to real estate purchased at sheriff's sale, cannot be established by parol evidence; nor is it competent for the defendant, in an action of ejectment against him or one holding under him, to prove a fraudulent combination between him and the purchaser to defraud creditors. *Ibid.*

15. At a sheriff's sale of land, the plaintiff and defendant in the execution agreed that the property should be struck down and conveyed to the plaintiff, and that he should reconvey to the defendant upon the payment of the amount due upon the execution within a specified time, and that upon failure to pay within that time, the title should be absolute. *Held*, that this arrangement created a title in the plaintiff in the nature of a mortgage, and that upon a sale of the land by him after a specified time, the defendant was entitled to recover from him the amount, after deducting the amount of his debt due on the execution. *Hiester v. Maderia*, III. 384.

16. Written notice given to purchasers at a sheriff's sale may be proved by parol, without the production of the paper, there being no presumption that it was in the party's power to produce it. *Weeks v. Haas*, III. 520.

17. A sheriff's sale upon a mortgage confers no title on the purchaser to that part of the land which lies beyond the line of the county where the sale was made; nor does it aid the title that the mortgagor was present at the sale, and made no objection, but on the contrary encouraged it, by bidding himself, and after the deed was acknowledged, surrendered the possession, and looked to the payment and satisfaction of the mortgage and other liens covered by the purchase money. *Menges v. Oyster*, IV. 20.

18 The amount of money realized by the plaintiff in a judgment, by means of a sheriff's sale of land, must be credited to the defendant, whether it be procured by a private contract with the purchaser or bid at the public sale; and if a sum be procured for the land by means of a private contract between the plaintiff and the purchaser, and the land be bid in for a smaller sum for the purpose of making the sale, the larger sum must be considered for all purposes the price at which the land was sold; as well between the plaintiff and defendant as third persons interested in the price. *Young v. Stone*, IV. 45.

19. There is nothing illegal in two or more persons agreeing together to purchase a property at sheriff's sale, and fixing a certain price which they are willing to give, and appointing one of their number to be the bidder. *Smull v. Jones*, VI. 122.

SHERIFF'S SALE.

20. A sheriff's sale of land before the Act of 6th April 1830, extinguished all prior mortgages, and it was not in the power of the sheriff or purchaser or parties to keep them alive as mortgages so as to affect third persons subsequently buying, by any memorandum in the conditions of the sheriff's sale or bargain amongst themselves of which such subsequent purchaser had notice. *Mode's Appeal*, VI. 281.

21. It is not error for the court to charge, where a notice was given at a sheriff's sale, that if only one notice was given, and that was given by another person without the knowledge, direction or interference of the plaintiff's grantor, (who was the purchaser), he could not be affected by it. *Drezel v. Man*, VI. 343.

22. Where land is sold by the sheriff, and a person who claims title to it in good faith gives notice that the defendant in the execution, as whose property it is sold, has no title to it, and he afterwards becomes the purchaser, he is not thereby estopped from setting up the title thus purchased to protect himself from an action of trespass *quare clausum fregit*. *Porter v. M'Ginnis*, VI. 502.

23. In an action of ejectment by a purchaser at sheriff's sale to recover the property purchased, the defendant cannot avail himself of any informality in the judgment and executions under which it was sold; especially if he was also the defendant in the judgment. *Bowen v. Bowen*, VI. 504.

24. The report of an auditor appointed to distribute monies raised by a sheriff's sale of real estate, is not evidence in a subsequent ejectment for the land brought by the sheriff's vendee. *Leeds v. Bender*, VI. 315.

25. Such auditor can in no case set aside a judgment of a court brought before him. He must either allow its amount according to its date, or suspend his decision till its validity is decided. *Ibid*.

26. On a resale, the sheriff is not bound to give the first purchaser notice of the time and place of the second sale: it is sufficient to notify him that unless he pays his money, the property will be resold.

And *quære*, whether even this is requisite. *Gaskell v. Morris*, VII. 33.

27. The sheriff ought to resell the property where the first purchaser fails in his contract; and the sheriff is the proper person to sue for the diminution of price that may happen by the resale.

The damages in such case given by the jury cannot be complained of, if they do not exceed the difference between the first and second sale. *Ibid*.

28. In an action of ejectment in which the defendant claims by virtue of a sheriff's sale, and the question being, whether the levy embraced the land in dispute, it is competent for the party to give in evidence the return of survey for an adverse claimant, exhibiting an interference with the land in controversy, the appearance of the parties before the board of property, and their decision, for the purpose of showing that at that time, and before the judgment upon

SHERIFF'S SALE.

which the sale was made had been obtained, the defendant, as whose property the land was sold, claimed it as his own. *Harper v. The Farmers' and Mechanics' Bank*, VII. 204.

29. An award of money to a lien creditor who has no lien, cannot be questioned in a collateral proceeding depending in the same court. *Yerkes's Appeal*, VII. 224.

30. G. purchased lot No. 1 on the 14th December 1835. On the 24th March 1836 B. obtained judgment against G., which was revived on the 18th May 1840. On the 21st March 1838 G. purchased lot No. 2. Y. obtained judgment against G. on the 3d December 1838. On a sheriff's sale in 1842 of No. 2, the proceeds were decreed to B.'s judgment. No. 1 was afterwards sold by the sheriff. *Held*, that the equitable right of substitution did not apply so as to give Y. the amount of his judgment out of the proceeds of No. 1. *Ibid*.

31. A judicial sale divests all liens definite and certain in their amount. *Commissioners of Spring Garden's Appeal*, VIII. 444.

32. Therefore the lien of the Commissioners of Spring Garden for curbing and paving in 1836 and 1837 under the Act of 3d March 1818, is divested by a subsequent sheriff's sale in 1841. *Ibid*.

33. And this is the case though the property be sold subject to the ground-rent then existing and created before such lien. *Ibid*.

34. *Quære*, if the contest were between the owner of the ground-rent and the commissioners as to the appropriation of the proceeds of sale, to whom the money would go. *Ibid*.

35. *Quære*, whether a different case would not be presented if the claim of the commissioners had been filed of record under the Act of 16th April 1840; and whether the whole estate, ground-rent and all, does not pass to the sheriff's vendee by a judicial sale in pursuance of the provisions of that Act. *Ibid*.

36. If a sheriff take a bond for the amount of the purchase money of a tract of land sold upon an execution, he is not entitled to recover interest upon it from the purchaser, who was a judgment creditor of the defendant, as whose property the land was sold, and who ultimately was entitled to and received the money by a decree of the court. *Gardner v. Klinefelter*, IX. 59.

37. Land may be sold subject to a mortgage, although it be not the first incumbrance, if it be so understood and agreed to by the purchaser at the time of sale. *Tower's Appropriation*, IX. 103.

38. On an appropriation of the proceeds of a sale of real estate by the sheriff, judgment creditors may avail themselves of a right to set aside a judgment given and obtained by collusion for the purpose of defrauding them; but they cannot thus attack a judgment on the ground that the defendant in it was overreached or taken advantage of by the plaintiff with regard to its consideration. *Dougherty's Estate*, IX. 189.

SHIP.

The owner of a vessel, such as is responsible for supplies or necessities, furnished for her use by the orders of the master, is the person who, having some kind of claim or title, has the control and management of the vessel and the right to receive her freight and earnings and direct her destination. One who has the mere legal title, whether by bill of sale, mortgage or pledge, is not liable for debts contracted by the master for supplies. *Duff v. Bayard*, IV. 240.

SINGLE BILL.

BILLS OF EXCHANGE, &c., 13.

SLANDER.

1. No action lies for words importing a cheat which does not affect the public, and may be guarded against by common care and prudence; such cheat not being indictable. *Weierbach v. Trone*, II. 408.

2. In an action of slander, the falsity of the words spoken implies malice; and if there be a plea of justification by the defendant, it is error in the court to refer to the jury as matter of fact whether the words were not spoken without malice. *Farley v. Ranck*, III. 554.

3. It is incompetent to a defendant in an action of slander to give evidence, in mitigation of damages, of facts and circumstances which induced him to suppose the charge true at the time it was made, if such facts and circumstances tend to prove the charge, or form a link in the chain of circumstances to establish a justification, even though he expressly disavows a justification. *Petrie v. Rose*, V. 364.

4. In an action of slander against a husband and wife for words spoken by the wife, it is not competent for the defendant to prove that circumstances relating to the plaintiff's conduct were communicated to the husband before the slanderous words were uttered. *Ibid.*

5. When, in an action of slander, the defendant's evidence casts an imputation on the character of the plaintiff for honesty, it may be rebutted by testimony as to his general good character. *Ibid.*

SOCIETY.

1. Where a charter of a society provides for an offence, directs the mode of proceeding and authorizes the society, on conviction of a member, to expel him, his expulsion, if the proceedings are not irregular, is conclusive, and cannot be inquired into collaterally by *mandamus*, action, or any other mode. *Commonwealth v. The Pike Beneficial Society*, VIII. 247.

2. The courts have jurisdiction to keep such tribunals in the line of order, and to prevent abuses. *Ibid*

SPANISH-AMERICAN COLONIAL LAW

ATTORNEY AT LAW, 3.

SPANISH TREATY.

APPROPRIATION, 7.

CITIZENS OF U. STATES.

SPECIAL COURT.

RECOGNIZANCE, 4.

SPECIAL VERDICT

CASE STATED.

SPECIALTY.

BILLS OF EXCHANGE, 15.

SPRING GARDEN.

SHERIFF'S SALE, 32, 33, 34, 35.

STAGE COACH.

EVIDENCE, 107, 108, 109.

WITNESS, 7, 57.

STAKEHOLDER.

WAGER, 1, 2.

1. A defendant holding funds in his hands as a stakeholder, or for the benefit of others, may be sued in *assumpsit* for money had and received, and a special judgment and execution had on equity principles applied in Pennsylvania in common law forms of proceeding, and the court will control the execution of the process by ordering the money to be brought into court or otherwise. *Aycinena v. Peries*, VI. 243.

2. One having funds in his hands as stakeholder or agent for others, may be sued, though he has never been called on to settle his accounts in the Common Pleas, and though he is administrator *de bonis non* of one from whom the funds passed; such property forming no part of the estate of the testator, and not being within the jurisdiction of the Orphans' Court to settle and distribute. *Ibid.*

3. Bringing suit against the personal representatives of such testator does not conclude the party interested from proceeding against the fund, inasmuch as he has two remedies, *in rem* and *in personam*, and may pursue both till satisfaction. *Ibid.*

STATUTE.

BETTING, 1.

BOROUGH, 4.

1. Until the Judiciary has fixed the meaning of a doubtful law, upon which rights have become vested, it may be explained by legislative enactment. *O'Conner v. Warner*, IV. 223.

2. In construing penal statutes, the words descriptive of an

STATUTE.

offence or its punishment are not to be bent on the one side or on the other; and statutes *in pari materia* are to be construed together, and the legislative meaning of words followed. *Mayor v. Davis*, VI. 269.

3. If a statute which gives a remedy to recover damages be repealed, and afterwards the repealing statute be repealed, it revives the remedy under the original statute. *Directors of the Poor v. The Railroad Co.*, VII. 236.

4. A local statute which suspends, for a reasonable time, execution of a judgment on a previous contract, is not prohibited by the tenth section of the first article in the constitution of the United States.

Therefore the statute enacted by the Legislature of Pennsylvania in 1842, and suspending for a year a sale on execution for less than two-thirds of the appraised value, is not unconstitutional in respect of its retrospective operation. *Chadwick v. Moore*, VIII. 49.

STAY OF EXECUTION.

Upon a judgment on a recognizance to obtain a stay of execution, the defendant is entitled to a stay of execution. *Wolfe v. Nesbit*, IV. 312.

STEAMBOAT.

MECHANIC'S LIEN, 23.

STEAM-ENGINE.

ACTION, 12, 13.

SUBROGATION.

SUBSTITUTION.

SUBSTITUTION.

ASSIGNMENT, 1, 2.

PRINCIPAL AND SURETY, 2, 3, 5, 6, 7, 8, 9.

SET-OFF, 19.

SHERIFF'S SALE, 30.

1. If after judgments are obtained against a principal and surety, a third person interposes and gives his note for the debt to obtain a stay of execution for the principal, and the surety is afterwards obliged to pay the debt, he is entitled to have an assignment of the judgment on the note of the third person, to indemnify him for such payment. *Pott v. Nuthans*, I. 155.

2. The remedy by distress incident to a widow's annuity, ascertained by a proceeding in the Orphans' Court, in partition under the intestate laws, is not one to which there can be any equitable subrogation. It is a personal remedy which belongs to the widow, and which she cannot use for the benefit of another, who had previously paid the annuity to her. *Shouffler v. Coover*, I. 400.

SUBSTITUTION.

3. The purchase of a debt entitles the purchaser to all the creditor's securities for it. *Foster v. Fox*, IV. 92.

4. A vendor having brought an ejectment to enforce the payment of a balance of purchase money, obtained a judgment; after which a creditor of the vendee paid the money due, and took a transfer of the debt: *held*, that he was also entitled to the judgment, and might revive it for his own use, and thus enforce the payment of the money against the purchaser of the vendee's interest at sheriff's sale, although he had subsequently received a conveyance from the vendor. *Ibid*.

5. One who becomes surety of a defendant in a judgment to entitle him to a stay of execution, and by reason of such liability afterwards pays the judgment, is not entitled to be substituted as plaintiff, and have priority to subsequent judgment creditors. *Armstrong's Appeal*, V. 352.

6. H. obtained judgment against R., then owner of three lots, Nos. 1, 2, and 3. Afterwards R. by deed conveyed lot No. 3 for \$400 to S., who paid \$100 and gave his note for \$300 payable to R.'s order, "on account of the lien on his (R.'s) property in favour of A." &c. After this there were three judgments obtained against R. by B., W. and P. At the time W.'s and P.'s judgments were entered there were no judgments against S.; but subsequently there were twelve entered against him. Out of the proceeds of lots Nos. 1 and 2, sold under H.'s judgment, the court allowed H. and B. the amount of their judgments, W. the balance of the fund towards his judgment, and subrogating W. and P. to the rights and interest of H. as to the lien of his judgment against the real estate of S., decreed them the amount, with interest, of the note given by S. to R. No notice was given S.'s creditors of the application for this decree of distribution, and but one appeared to contest the subrogation. Subsequently to the decree, lot No. 3 was sold by the sheriff as S.'s property, and W. and P. claimed the amount of the note out of the proceeds. Exceptions afterwards taken to the decree by two of S.'s creditors were dismissed, and, on an appeal by them to this court, the decree of substitution was reversed. *SERGEANT, J., dissenting. Ebenhardt's Appeal*, VIII. 327.

SUMMONS AND SERVICE.

ACTION, 8.

APPEARANCE, 4.

CORPORATION, 13.

GUARANTY, 7.

SUNDAY.

LIMITATIONS, 12.

1. In an action on a contract for the sale of a chattel, proof by the defendant, that it was received by the vendee on Sunday, from a third person, does not raise such a presumption that the contract was made on Sunday, as will defeat the plaintiff's action. *Hadley v. Snevily*, I. 477.

SUNDAY.

2. A bond executed on Sunday is not void at common law, but by reason of the statute: the fact, therefore, must be specially pleaded or notice given of it: it cannot be taken advantage of under the plea of *non est factum*. *Fox v. Mensch*, III. 444.

SUPERSEDEAS.

The *supersedeas* of an execution issued by a justice and delivered to the constable stays the execution and dissolves the contract of bail for the delivery of the property levied, whether the full amount of costs be paid to the constable or not. *Ludwig v. Britton*, III. 447.

SUPERVISOR.

MANDAMUS, 3.

Upon the settlement of the account of a supervisor, whose term of office has expired, by the township auditors, he may maintain an action against the township for the amount ascertained upon such settlement to be due to him. *Carney v. Wheatfield Township*, IV 215.

SUPREME COURT.

EQUITY JURISDICTION, &c., 2.

SURETY.

BILLS OF EXCHANGE, &c., 5.

COLLECTOR OF TAXES.

DEBTOR AND CREDITOR, 2.

LIMITATIONS, 11.

OFFICER, 2, 3, 4, 5, 6, 7.

OFFICIAL BOND, 4.

PRINCIPAL AND AGENT, 30.

PRINCIPAL AND SURETY.

REPLEVIN BOND, 6.

SCHOOL TAX.

SHERIFF'S RECOGNIZANCE 2.

SUBSTITUTION, 5.

UNSEATED LAND.

The sureties are liable on the bond for all that the principal is. *M'Caraher v. The Commonwealth*, V. 21

SURRENDER.

A voluntary surrender of himself by one who has given bond to take the benefit of the insolvent laws, will not relieve his bail from the obligation contained in his bond. *Wolfram v. Strickhouser*, I. 379

TACKING.

LIMITATION, 6.

TAVERN.

EXECUTORS, &c. 24.

IX. — 54

2 L *

TAXES.

CONSTITUTIONAL LAW 1.

DONATION LAND.

EJECTMENT, 27.

EVIDENCE, 62.

LIMITATION, 20.

PATENT, 2.

UNSEATED LAND.

1. The first section of the Act of 15th April 1835, does not limit the power of the inhabitants of a borough or township to assess any amount of tax for school purposes. *Wilson v. Borough of Lewistown* I. 428.

2. The salaries of ministers of incorporated congregations and teachers in the common schools are not taxable under the Act of 30th April 1841, or that of 11th June 1840. *Commonwealth v. Cuyler*, V. 275.

3. One who, as attorney in fact and guardian of the heirs of an estate, manages and directs the same, and receives for his services a fixed compensation, has such an employment or business as is taxable for State purposes. *Commissioners v. Reynolds*, VII. 329.

4. The bed, berm-bank and tow-path of an incorporated canal are not taxable as land or real estate under the Acts of 15th April 1833 and 29th April 1844. *Lehigh Company v. Northampton County*, VIII. 334.

5. Nor are the toll-houses and collectors' offices belonging to the canal and incident thereto. *Ibid.*

6. Under the Act of 3d February 1824, the taxes, rates and levies assessed on real estate in the city and county of Philadelphia, are a lien on such estate from the date of their assessment, and have priority to mortgages and other incumbrances charged on such estate prior to their assessment. *Parker's Appeal. Mayor, Aldermen, and Citizens of Philadelphia's Appeal*, VIII. 449.

7. A relinquishment of a distress made by a collector for taxes assessed under that Act, on the goods of a tenant lying on the premises charged with the tax, does not release the priority of the lien of the tax in favour of other lien creditors. *Ibid.*

8. *It seems* it would, if the goods were the property of the owner of the estate charged with the tax. *Ibid.*

9. *Quære*, whether in the latter case, it would not entirely discharge the estate from the lien of the tax. *Ibid.*

10. The provisions of the Act of 3d February 1824 do not apply to State taxes assessed under the Act of 11th June 1840. *Ibid.*

11. Upon the erection of a new county out of part of an old one, the latter may enforce the payment of taxes due before the separation by a treasurer's sale; and upon such sale being made and a purchase by the county, it is bound to pay the taxes which accrue subsequent to the division; and if they be not paid, the new county may collect them by a treasurer's sale of the land, and the purchaser will have a

TAXES.

title superior to one made by the commissioners of the old county.
Devor v. M'Clintock, IX. 80.

12. A bond given to the treasurer for the surplus money "arising from the sale of a tract of unseated land to the said J. M., situate in Rye township, in the county of Perry, containing twenty acres," is sufficiently descriptive of the land. *Ibid.*

TEACHER.

TAXES, 2.

TENANT IN COMMON.

ACCOUNT RENDER, 3.

CANAL, 2.

CONTRIBUTION, 2.

DEVISE, 23.

DISTRESS, 5.

UNSEATED LAND, 20.

VENDOR, &c., 70, 71, 72.

1. An adverse holding by one tenant in common, for any length of time, however short, previously to the institution of an action of partition, will bar a recovery in such form of action. *Lao v. Patterson*, I. 184.

2. Whether one tenant in common entered upon the estate in hostility to, and ousted his co-tenant, is a matter of fact to be determined by the jury. *Blackmore v. Gregg*, II. 182.

3. The mere exclusive receipt of profits by one tenant in common for a period exceeding twenty-one years, is not sufficient evidence upon which to found a legal presumption of actual ouster of his co-tenant: but it raises a natural presumption of it, which will operate upon the minds of the jury so far as it happens to produce actual conviction of the fact. *Bolton v. Hamilton*, II. 294.

4. If two own adjoining lots and agree to build three houses, the middle one to be built partly on each lot by one of the parties, who is to repay himself the cost out of the rents, they are not tenants in common of such house, but the title to the house follows the title to the soil. *M'Adam v. Orr*, IV. 550.

5. In an action of ejectment between two of several tenants in common, between whom, as alleged by the defendant, there had been an amicable partition, it is competent for him to give in evidence a release of the other parties to the partition in order to establish the fact in issue. *Calhoun v. Hays*, VIII. 127.

6. A parol partition of lands between tenants in common who derive their title by descent, when fair and equal, and followed by a due execution of it, is binding upon all, whether they be *femes-covert*, their husbands joining them, or minors, with the assent of their guardians or not. *Ibid.*

TENANT BY CURTESY.

ALIEN, 1.

TENANT BY CURTESY.

A husband is not entitled to an estate by the curtesy, out of land conveyed to a trustee for the sole and separate use of the wife in fee simple. *Cochran v. O'Hern*, IV. 95.

TENANT FOR LIFE.

WASTE, 1, 2, 3.

1. Where a life estate is vested in one person, and the remainder in fee in another, compensation or security must be made or given to both. *Borough of Harrisburg v. Crangle*, III. 460.

2. The declarations of a tenant for life in possession cannot be given in evidence to affect the title of one who claims, not through him, but paramount to him. *Hill v. Roderick*, IV. 221.

3. A tenant for life can make no agreement affecting the estate which will bind him in remainder, nor will he with whom the agreement is made, or his privy, be bound by it; for a contract binds both parties or neither. *Ibid.*

TENANT IN TAIL.

1. If tenant in tail institutes ejectment for land, and dies pending the suit, the child and next heir in tail is such "person next in interest" as may be substituted under the Act of 13th of April 1807. *Shoemaker v. Huffnagle*, IV. 437.

2. A sheriff's sale of the estate of a tenant in tail does not so divest him of the inheritance that he may not afterwards execute a deed, in pursuance of the Act of Assembly, for the purpose of barring the issue in tail. *Elliot v. Pearsoll*, VIII. 38.

TENDER.

FRAUD, 1.

TERRE-TENANT.

DOWER, 3, 4.

JUDGMENT, 17.

1. In a *scire facias* to revive a judgment and *quare executio non*, it is improper to bring the terre-tenants on the record to try paramount title; and if they are improperly introduced, the court on the trial ought to discharge the jury from giving a verdict as to them, as it would be of no effect on their title.

Discharging the jury as to the terre-tenants, is not a discharge as to such persons in the capacity of heirs, and does not prevent their making defence as such. *Jarrett v. Tomlinson*, III. 114.

2. A judgment may be revived against terre-tenants at any time within the period of five years, notwithstanding there may have been an intermediate revival by *scire facias* without notice to the terre-tenant. *Fursht v. Overdeer*, III. 470.

TIPPLING-HOUSE.

A person convicted in the Quarter Sessions of Philadelphia county

TIPPLING-HOUSE.

for keeping a tippling-house, and sentenced to pay a fine of \$50 and stand committed, is not entitled to be discharged at the end of one month without paying the fine. *Mertz's Case*, VIII. 374.

TITLE.

In an action of ejectment where a plaintiff has shown a regular chain of title to himself except one deed, it is competent for him to prove that such deed could not be found, and then give in evidence accounts, papers and documents tending to show that the grantee had paid the purchase money, and thereby establish an equitable title in him. *M'Donald v. Adams*, VII. 371.

TOLLS.**NATIONAL ROAD.****TURNPIKE COMPANY.**

1. Tolls received on a rail-road after a judgment rendered against the company, and after the appointment of a sequestrator, are not bound by such judgment so as to give it a preference of payment out of them. *Leedom v. Plymouth Rail-road*, V. 265.

2. The canal commissioners have power so to regulate the tolls and discriminate between the different modes of transporting goods and passengers, as will best promote the interest of the State. *Commonwealth v. Canal Commissioners*, V. 388.

TOLL-HOUSE.**TAXES, 5.****TOWNSHIP.****SUPERVISOR, 1.**

1. An action on the case will lie against a township to recover damages for an injury sustained by reason of the negligence of the supervisors to keep the road in repair. *Dean v. New Milford Township*, V. 545.

2. Upon a petition of the inhabitants to divide a township, the court have not power to adopt any other line of division than that prayed for in the original petition. *Case of Green Township*, IX. 22.

TRANSCRIPT.**ATTACHMENT, 2.****JURISDICTION, 4.****TREASON.**

When lands were actually confiscated because of the treason of their owners, in pursuance of the Act of 6th March 1778, there is no legal presumption that the traitor returned and surrendered himself according to the requisitions of the proclamation of the 8th of May 1778. If he did, it is the subject of proof.

TREASON.

Lands thus confiscated were not restored by the treaty of peace, but the title of the Commonwealth remained. *Ash v. Ashton*, III. 510.

TREASURER'S SALE.**UNSEATED LAND.**

1. When unseated land is sold for the payment of taxes, the title of the real owner, whatever it may be, passes to the purchaser, whether it be assessed and sold in his name, the name of a warrantee, or a stranger, and whether the person in whose name it is taxed and sold has or has not any title. *Strauch v. Shoemaker*, I. 166.

2. An assessment of a tax by some proper authority is essential to the validity of a sale of unseated land by the treasurer. *Bratton v. Mitchell*, I. 310.

3. A return of unseated land to the county commissioners for taxation, and the payment of the taxes for thirty years, are *primâ facie* evidence of ownership of the warrant upon which the land was surveyed; and in an action of ejectment against a naked intruder who entered with notice of the plaintiff's claim, are conclusive, without other evidence of a conveyance by the warrantee, who under such circumstances will be considered as having been a trustee for the owner. *Taylor v. Dougherty*, I. 324.

4. The omission of the commissioners to bid for a tract of unseated land the whole amount of taxes and costs which may have been assessed upon it, will not avoid the title in the hands of a *bona fide* purchaser.

The recital in a treasurer's deed for unseated land, that a bond was given for the surplus purchase money, is *primâ facie* evidence of the fact, and sufficient for the purpose, unless disproved.

It is not necessary to give a surplus bond when the amount of it would not exceed the cost of giving the bond. *De minimis non curat lex*.

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 assessor. *Devinney v. Reynolds*, I. 328.

TRESPASS.**CASE, 2.****OFFICER, 1.****PRINCIPAL AND AGENT, 15, 16.****TURNPIKE CO. 4, 5.**

1. One whose chattel has been wrongfully taken from him may enter upon the land of the taker, for the purpose of retaking it, without subjecting himself to even nominal damages as a trespasser *Chambers v. Bedell*, II. 225.

2. An incorporated district is not liable in trespass for the illegal seizure of the plaintiff's horse by one of its officers, for an alleged violation of its ordinances, when in fact no such violation took place.

TRESPASS.

unless the corporation previously authorized or subsequently ratified the seizure. *Fox v. The Northern Liberties*, III. 103.

3. It seems that where there is a joint trespass by two, a recovery of judgment against one in trespass without satisfaction, will not bar a subsequent action of trover against the other.

But it is otherwise where one commits a trespass by seizing personal property, and then sells it to another, and the owner recovers judgment against the trespasser for the value of the property and for the tortious taking, as such judgment changes the property, and the former owner cannot seize or claim it. *Ibid.*

4. It is not a good objection to a proceeding to ascertain the value of land taken for public use by authority of law and the constitution, that it had been previously taken possession of without authority; but notwithstanding the proceeding and result of it, it leaves the party exposed to answer for the trespass. *Borough of Harrisburg v. Crangle*, III. 460.

5. One who obtains the possession of the property of another surreptitiously, or otherwise wrongfully, cannot support an action of trespass against a third person, who, by virtue of a judgment and execution against the owner, levied and carried it away, although that judgment and execution may have been obtained from the defendant for the fraudulent purpose of hindering and delaying creditors, of whom the plaintiff in the action of trespass was one. *Costenbader v. Shuman*, III. 504.

6. In an action of trespass for destroying a mill-dam *et alia enormia*, it is competent for the plaintiff to give evidence of the amount of loss which he sustained by reason of the stoppage of his mills. *Spigelmoyer v. Walter*, III. 541.

7. A plaintiff in an action of trespass is not entitled to recover damages for an injury done to him which was the consequence of his own negligence as well as that of the defendant. *Wynn v. Allard*, V. 524.

8. In an action of trespass for an injury done to the plaintiff by running against him with a sleigh and horses, it is competent for him to prove that the defendant was intoxicated. *Ibid.*

9. Constructive possession is sufficient to maintain trespass. *Dallam v. Fittler*, VI. 323.

10. In trespass against a sheriff, for seizing and selling the plaintiff's goods under a judgment against another person, the amount paid out of the proceeds of sale for rent of the premises, cannot be received in evidence to abate the damages. *Ibid.*

11. If a bull break into an enclosure of a neighbour, and there gore a horse so that he die, his owner is liable to an action of trespass *quare clausum fregit*, of which a justice of the peace has jurisdiction, and in which the value of the horse would be a just measure of damages. *Dolph v. Ferris*, VII. 367.

12. In an action of trespass against two or more defendants, if there be no evidence given against one of them, the court may direct

TRESPASS.

a verdict to be rendered for him, and he may be sworn as a witness for the other defendants. *Over v. Blackstone*, VIII. 71.

13. When, in an action of trespass which involves a question as to the right to personal property, a witness testified that when he had sold and delivered the property to the plaintiffs he had told them that he had previously made a sale of the same property to the defendant, it is error to refuse to permit the plaintiffs to ask the witness whether he had not at the same time told them that the previous sale was but a conditional one, and the condition had been complied with. *Ibid.*

TRIAL.

APPEAL, 2.

ERROR, 1.

1. A misapprehension by the court of the construction of an agreement, by reason of which in their charge they mislead the jury, is good ground of reversal. *Stroh v. Hess*, I. 147.

2. In the trial of a civil suit, the jury must determine facts upon the weight of evidence; and a direction from the court that they must be "*conclusively* convinced," or that "there must be no doubt resting on their minds" as to any particular point, is erroneous. *Hiestler v. Laird*, I. 245.

3. If there be competent evidence given on the trial of a cause which is conclusively fatal to the plaintiff's action, the court will not inquire into the alleged incompetency of other evidence, to the admission of which exception was taken. *O'Donnell v. Lynch*, I. 283.

4. If testimony be offered by one party, the other may require the purpose for which it is offered to be stated; if this be not done, and the evidence be admitted generally, it is not an error, if it was competent for any purpose. *M'Clelland v. Lindsay*, I. 360.

5. In an action of ejectment, upon the trial of which the defendant gave no evidence, but relied upon the insufficiency of the plaintiff's evidence in support of his title, it is not error in the court to instruct the jury that it is sufficient to entitle him to recover. *Fbust v. Ross*, I. 501.

TRIAL LIST.

It seems, the refusal of the court below to give a preference of trial to a cause lower on the list, is not assignable for error where there is no violation of a plain legal right. *Postens v. Postens*, III. 182.

TROVER.

DISTRESS, 8.

TRUNK.

WITNESS, 57.

TRUST AND TRUSTEE.

ACT OF ASSEMBLY, 2, 7, 8, 9.

TRUST AND TRUSTEE.

ARBITRATION, &c. 21.

ARTICLES OF AGREEMENT, 4.

COMPROMISE, 2.

CONTRACT, 18.

DEED, 14, 15, 16.

DEVISE, 19, 22.

EQUITY JURISDICTION, &c.

EQUITABLE TITLE.

HUSBAND, &c. 23.

INTESTATE, 2.

ORPHANS' COURT, 1.

SHERIFF'S SALE, 14.

WASTE, 1, 2, 3.

1. It is not an implied condition of the grant in trust for the unincorporated congregation by the style of "The Society of English Presbyterians and their successors in and near the Borough of York," that it shall remain connected with any particular church judicatory: therefore *ruled*, that when the General Assembly of the Presbyterian Church in the United States was divided into two distinct fragments each declaring itself to be the true General Assembly, the persons composing the majority of this congregation did not forfeit their interests in the trust by refusing to acknowledge the authority of either of the conflicting judicatories. *Presbyterian Congregation v Johnston*, I. 9.

2. Trusts which are not affected by the Statute of Limitations are those technical and continuing trusts, which are not cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of a court of equity. *Finney v. Cochran*, I. 112.

3. 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 within a limited period, it is a contract resting in parol merely, and not transferring any title in the land. *Fox v. Heffner*, I. 372.

4. Where there is a deed of land to trustees, their heirs and assigns, the surviving trustee may assign, in the absence of any proceeding to restrain him. *Shortz v. Unangst*, III. 45.

5. The conversion of a trust fund into money, and from money into land, does not divest the trustee of his fiduciary character; and a Court of Chancery will follow the fund for the benefit of the *cestui que trust*, wherever it can be identified. *Pierce v. M'Keehan*, III. 280.

6. The equity powers of our courts over cases of trust are sufficient for the protection of the *cestui que trust*, and when the amount of the fund is uncertain, it may be ascertained through the medium of a jury. *Ibid*.

7. The declarations of a trustee that an investment made by him was of the trust fund, after his death, may be given in evidence as proof of the fact; it being the confession of one whose sacrifice, by the narration, is an equivalent for his oath. *Harrisburg Bank v Tyler*, III. 373.

TRUST AND TRUSTEE.

8. A trust will be enforced, not only against those who are rightfully possessed of the fund as trustees, but also against all others who have obtained it without consideration or with notice of the trust. *Ibid.*

9. The heir at law of a trustee of real estate becomes a trustee only prospectively, and is accountable only for his own management of the estate: he has no concern with the accounts of his ancestor, which can be settled only by his personal representative. He has nothing to do with the execution of the trust so far as it regards personal estate. *Baird's Appeal*, III. 459.

10. A purchaser of land charged with a trust, of which he had no notice, takes it discharged of such trust; and a purchaser from him will also take it discharged of the trust, although he had notice of it prior to the first purchase. *Bracken v. Miller*, IV. 102.

11. Where the purchase money of land is paid by one and the title taken in the name of another, there is a resulting trust, which the law implies in favour of him who pays the money; and this may be established by parol evidence. But where the purchase is made and the money paid by the same person, and the transaction involves nothing more than the violation of a parol agreement to purchase for another, equity will not decree the purchaser to be a trustee. *Jackman v. Ringland*, IV. 149.

12. The Act of 14th of April 1828 does not authorize the Court of Common Pleas to appoint a trustee under a will by which the trust is annexed to the office of the executors; on their decease, the trust must be exercised by an administrator *de bonis non*. *Olwine's Appeal*, IV. 492.

13. If such trustee commence proceedings in that character in the Orphans' Court, and they are carried on till a decree, that court has not jurisdiction then to decree in favour of such trustee as administrator *de bonis non*. *Ibid.*

14. The assignee of an insolvent debtor is not capable, by reason of his fiduciary character, of becoming the purchaser of the debtor's real estate when sold by the sheriff upon a mortgage which encumbered it before the time of the assignment. *Fisk v. Sarber*, VI. 18.

15. If one procure a deed of conveyance of land to be made to him upon the promise and assurance that he will hold it in trust for another, that trust may be established by the parol testimony of the grantor; and if the land be sold by the grantee, the *cestui que trust* may maintain an action against him to recover the price. *Miller v. Pearce*, VI. 97.

16. Ordinarily chancery executes only a trust sufficiently formed to put the legal estate out of the grantor, or an agreement for a trust founded on a valuable consideration and not a mere voluntary one, and creditors are but volunteers. *Read v. Robinson*, VI. 329.

17. Where one executed a voluntary assignment in Montgomery county, for the benefit of creditors, with preferences, and handed it to his son to take to Philadelphia, to a third person, who called with it on the assignee in Philadelphia and desired him to take it, but he

TRUST AND TRUSTEE.

refused to have anything to do with it; *held*, that a presumption arose from the nature of the case ~~that~~ the deed was tendered by authority of the grantor. *Ibid*.

18. In such case the Court of Common Pleas has power to substitute another trustee under the 23d section of the Act of 24th June 1836. *Ibid*.

19. A deed of trust may be taken to be recorded by creditors for whose use the estate is conveyed by it, or any party interested in the trust. *Ibid*.

20. Devise by a father to his son of a house and lot in fee simple: by a subsequent clause he gave it to trustees in fee in trust during the life of the son to pay over the moneys, &c., into his proper hands, or to such persons as he may appoint, and after his death to convey according to the son's appointment by will, or, in default, to such as would be his heirs if he died intestate, with power to the trustees and son to alter the property and reinvest, provided that if the son should become so relieved from embarrassment as in the opinion of the trustees to render it expedient, they should convey to him in fee. *Held*, that the son had no estate in the land, legal or equitable, which could be seized and sold by execution on a judgment obtained against him. *Vaux v. Parke*, VII. 19.

21. The rule of equity which prohibits a trustee from purchasing the trust property is not founded on the assumption that he is thereby guilty of fraud; but it is a rule of public policy which applies in all cases, whether there be fraud or not. *Webb v. Dietrich*, VII. 401.

22. It is not universally or even generally true that money which has come to the hands of a trustee by the act or consent of his colleague, without positive negligence on the part of the latter, is chargeable indifferently to either.

The diligence required of a trustee in the care of the trust estate is precisely the diligence which a man of ordinary prudence would practise in the care of his own.

Held, therefore, that where joint guardians in affluent circumstances and in good repute apportion the custody and management of the property to suit the peculiar capacity and qualifications of each, but without surrendering the right of either to intermeddle with the whole, each is chargeable with no more than he received, unless he stood supinely by while his colleague was manifestly impairing the estate. *Jones's Appeal*, VIII. 143.

23. Mortgagee assigns his mortgage and accompanying bond and warrant to two trustees in trust for the use of his daughter and her children. Payment by the debtor to one of these trustees discharges the debt. *Bowes v. Seeger*, VIII. 222.

24. In matters of discretion, in contradistinction to ministerial acts, co-trustees cannot act separately in discharging their trust; their receipts and their signing certificates of bankruptcy must be joint. *Vandever's Appeal*, VIII. 405.

25. A case of urgent necessity might be an exception to the rule; but if the other trustee might be consulted, such necessity does not exist. *Ibid*.

TRUST AND TRUSTEE.

26. Nor does it exist where the acting trustee might have secured an equal benefit to the estate by due vigilance, which he omits to exercise. *Ibid.*

27. It would be a violation of the Act of Frauds and Perjuries to permit the establishment of a trust in lands by the proof of parol declarations, made by the purchasers at or after the sale; there being no allegation of the payment of money by the *cestui que trust* or fraud, whereby a resulting trust would be established. *Sample v. Coulson*, IX. 62.

TURNPIKE COMPANY.

1. The Ridge Turnpike Company have the right, under their incorporating Act of the 30th of March 1811, to erect toll-houses at their gates for the accommodation of their toll-gatherers within the limits of the road. *Ridge Turnpike v. Stoecker*, II. 548.

2. To determine whether a toll-house, erected by a turnpike company under their charter, within the limits of the road, be authorized, the only question is whether it was built and has been and is still used for that purpose; if that be the case, they are not responsible to the owner of the adjacent soil. *Ridge Turnpike Co. v. Stoecker*, VI. 379.

3. It is otherwise if they put it up or have used it for any purpose not connected with the road or the collection of tolls. *Ibid.*

4. *Quære*, whether the action by the adjacent owner should be in trespass or case. *Ibid.*

5. An action of trespass would lie, *Per Kennedy, J. Ibid.*

UNITED STATES.**NATIONAL ROAD.**

In a case of doubtful solution, involving a question of conflict between a statute of the state and of the United States, this court will so decide as that the judgment may come in review before the highest judicial tribunal, the Supreme Court of the United States, without the expression of their own opinion, which might conclude the party. *Hopkins v. Stockton*, II. 163.

UNITED STATES MAIL.**NATIONAL ROAD.****UNSEATED LAND.****DONATION LAND, 1, 2.****TAXES, 11, 12.**

1. When unseated land is sold for the payment of taxes, the title of the real owner, whatever it may be, passes to the purchaser, whether it be assessed and sold in his name, the name of the warrantee or a stranger, and whether the person in whose name it is taxed and sold has or has not any title. *Strauch v. Shoemaker*, I. 166.

UNSEATED LAND.

2. An assessment of a tax by some proper authority, is essential to the validity of a sale of unseated land by the treasurer. *Bratton v. Mitchell*, I. 310.

3. 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 assessor.

The omission of the commissioners to bid for a tract of unseated land the whole amount of taxes and costs which may have been assessed upon it, will not avoid the title in the hands of a *bonâ fide* purchaser. *Devinney v. Reynolds*, I. 328.

4. In an action of ejectment against one who enters without right, if the plaintiff show that the title to the land in dispute is out of the Commonwealth, that taxes were assessed upon it, and that he holds a deed of the sheriff who sold it for the non-payment of taxes previously to the Act of 1815, it is such a *primâ facie* title as puts the defendant to the necessity of showing a better right; which if he fail to do, the plaintiff is entitled to recover.

To recover upon a title founded upon a sale for taxes prior to the Act of 1815, the plaintiff must show a strict compliance with the requisitions of all the Acts of Assembly authorizing sales in such cases, or he must show what would amount to an abandonment of the title by the original owner; and if it appear that such original owner had not looked after the land, and had not paid any taxes for it for upwards of twenty-one years, it would amount to an abandonment, and the holder of the tax title would be entitled to recover upon it against one who showed no title, and was a mere intruder. *Foust v. Ross*, I. 501.

5. A defendant in ejectment claiming title under a treasurer's sale for the payment of taxes, is not entitled to recover compensation for the value of his improvements, if his title be defeated on the ground that the land was not unseated at the time the taxes were assessed upon it, and for the payment of which it was sold. Nor is a subsequent purchaser in any better situation than the vendee of the treasurer. *M'Kee v. Lamberton*, II. 107.

6. If a purchaser at a treasurer's sale knew when he purchased that the land was not unseated when the tax was assessed upon it, and he afterwards enters upon the land and makes improvements, upon a recovery against him in ejectment, he is not entitled to compensation for his improvements. *Hockenbury v. Snyder*, II. 240.

7. The occupation of part of an unseated tract of land which is defined by lines marked upon the ground, and held under an independent and adverse title, will not affect a treasurer's sale of the residue of the tract for the payment of taxes. *Harper v. M'Keehan*, III. 238.

8. Two adjoining tracts or pieces of unseated land, which the owner purchased at different times, and had a survey made including both, may be assessed, taxed, and sold by the treasurer as one tract for the payment of taxes. *Ibid.*

9. It is not essential to the validity of a treasurer's sale of un-

UNSEATED LAND.

seated land, that it was assessed and sold in the name of the true owner, if it be clearly designated by any other mark. *Ibid.*

10. If unseated land of minors be selling for taxes, and a friend of the family buys it with his own money, and takes a deed to himself in trust for the minors, and gives his own bond for the surplus purchase money, the title thereby made is as good and effectual as if no such trust had been expressed in the deed. *Ibid.*

11. The 3d Section of the Act of 3d April 1804, and the Act of 13th of March 1815, are to be construed as being *in pari materia*, and to limit the right of action by the owner of unseated land against a purchaser to five years. *Ash v. Ashton*, III. 510.

12. A sale of land by the treasurer, which was seated at the time the taxes were assessed, is void; and upon a recovery of possession by the owner, the purchaser is not entitled to compensation for his improvements. *Cranmer v. Hall*, IV. 36.

13. A treasurer's or commissioners' title for unseated land, does not confer upon the purchaser a possession upon which he may count in claiming title by the Act of Limitation: there must be actual possession. *Ibid.*

14. After an entire tract of land has been assessed as a seated tract, and returned by the competent authority to the commissioners as the triennial assessment, it is not lawful for the assessor and supervisor subsequently upon the representation of a person in possession claiming part of the land to change the assessment and give part of the land the character of an unseated tract without notice to the owner; and a sale made upon such assessment is void. *Larimer v. M'Call*, IV. 133.

15. A plaintiff in ejectment, who claims under a sale by the treasurer, made in pursuance of the Act of 1804, must show the original title to be out of the Commonwealth: the lapse of five years, and the limitation contained in the third section of that Act, does not so perfect his title as to enable him to recover against one in the actual possession of the land. *Bigler v. Karns*, IV. 137.

16. A treasurer's sale of unseated land is void, when it appears that the tax for which it was sold was actually paid, although the county commissioners misunderstood the payment and applied it to another object. The error of the officer will not deprive the owner of his land. *Dougherty v. Dickey*, IV. 146.

17. The Act of 1815, on the subject of the sale of unseated lands for the payment of taxes, is not a repeal of the Act of 1804, but only of so much of it as is altered or supplied: the limitation, therefore, of five years, contained in the third section of the Act of 1804, is in full force. *M'Call v. Himebaugh*, IV. 164.

18. The recital in a treasurer's deed for unseated land of the amount for which the land was sold, is not conclusive evidence of the fact; but the purchaser, in support of his title, may show, by the sale-book and parol evidence, that it sold for a different sum; and that the surplus bond given by him corresponded with the actual amount for which the land was sold. *Turner v. Waterson*, IV. 171.

UNSEATED LAND.

19. One who, without title or colour of title, enters into unseated land which has been appropriated by warrant and survey to another, acquires a right, under the Statute of Limitations, only to so much as he actually cultivates or encloses. *M'Caffrey v. Fisher*, IV. 181.

20. The title to a tract of unseated land purchased by the commissioners at a treasurer's sale, after the lapse of five years, is absolute and unqualified; and a subsequent purchase of it by one of several tenants in common, who were the owners before the sale of it by the treasurer, will not enure to the benefit of his co-tenants in common. *Kirkpatrick v. Mathiot*, IV. 251.

21. The Act of 1815 on the subject of the sale of unseated land for the payment of taxes was designed to give effect to the title without regard to irregularities in the mode of assessment or sale: and if a surplus bond was given, although for an amount which did not precisely correspond with the actual surplus, it will be attributed to the mistake of the officer, and will not vitiate the title. *Frick v. Sterrett*, IV. 269.

22. If several unseated lots of ground be jointly assessed by the proper officer, and the tax afterwards apportioned among them by the commissioners, who order each to be sold separately, and they are so sold, this is but an irregularity which will not affect the title. *Ibid.*

23. The right to redeem land sold at treasurer's sale is exclusively in the owner; but if actually redeemed by another, it will enure to the benefit of the owner, and vest no title in him who redeems it, although he may have been a claimant of the land at the time. *Orr v. Cunningham*, IV. 294.

24. A town-lot cannot be assessed and sold by the treasurer when either the person of the owner or his property might have been taken for the payment of the taxes. *Smith v. M'Grew*, IV. 338.

25. A return of unseated lands to the County Commissioners for taxation is not evidence to show title in the party making such return. *Urket v. Coryell*, V. 60.

26. The doctrine in *Frost v. Ross*, (1 *Watts & Serg.* 506), explained and applied to the case of a title under a sale for taxes. *Bunting v. Young*, V. 188.

27. The improvement and occupation of part of a tract of land by the owner of an adjoining survey which interferes with it, will not exempt the residue of the tract from assessment and sale for taxes as unseated land. *Forster v. M'Divit*, V. 359.

28. If interfering tracts of unseated land be severally assessed with taxes and sold by the treasurer, the respective titles of the purchasers will be governed by the superiority of the original title. *Hunter v. Albright*, V. 423.

29. If the commissioners of the county become the purchasers of an unseated tract of land, which in its original location and survey interferes with another warrant and survey, and they afterwards assess a tax upon this other tract of land and issue a warrant to the

UNSEATED LAND.

treasurer to sell it, such sale will confer a good title upon the purchaser to the whole tract as originally surveyed. *Ibid.*

30. If unseated land be encumbered by the lien of a judgment, and the debtor suffer it to be sold at treasurer's sale and purchased for his use, such sale confers no title upon the purchaser, and it may be recovered from him by a purchaser at sheriff's sale under the judgment, without refunding to him the purchase money paid by him to the treasurer. *Woodburn v. Farmer's Bank*, V. 447.

31. A presumption of payment from lapse of time arises against the claim for taxes assessed upon unseated lands. *Ibid.*

32. If one enter upon and take possession of part of a tract of unseated land, with or without title, and designate his claim by marks on the ground, such part of the tract thus claimed and occupied thereby becomes seated, and the residue of it still remains unseated and liable to be sold as such for the payment of taxes. *Mitchell v. Bratton*, V. 451.

33. The Act of 1815 on the subject of the sale of unseated lands does not repeal the 3d section of the Act of 1804: so that a purchaser at treasurer's sale who enters into the actual possession of the land and continues it for five years, making improvements, cannot be disturbed by the former owner or any one claiming under him. *Bayard v. Inglis*, V. 465.

34. Two tracts of unseated land having been assessed in the name of the same owner, but for different amounts of tax, the one upon which the greater amount was assessed, was sold by the treasurer for the lesser amount, and the surplus bond regulated accordingly: *Held* that this was an irregularity which did not vitiate the purchaser's title. *Ibid.*

35. The fact, that the purchaser of unseated land did not give a bond for the surplus at the time of the sale and execution of the deed to him, does not vitiate the title, if it appear that the bond was executed and delivered to the treasurer during the two years while the title remained inchoate and subject to redemption: nor does it affect the title that the bond was not filed in the prothonotary's office. *Ibid.*

36. In an ejectment for unseated land sold by the treasurer for taxes, where the defendant claims to recover for improvements, the jury cannot take into the account the mesne profits of the land, unless they be claimed in the plaintiff's declaration: and this is the proper practice in all such cases. *Ibid.*

37. Respecting the sale of and the payment of taxes assessed upon unseated lands, the county treasurer, as well as the owner of the lands, has duties to perform; and if the taxes be not paid and the land be sold in consequence of the neglect of the one or the other, it must be referred to the jury to determine to which the neglect is attributable. *Baird v. Cahoon*, V. 540.

38. It is essential to the validity of a sale of unseated land for taxes, that it should be so designated in the assessment as to lead the owner to a knowledge of the fact that it is his land which is assessed *Dunn v. Ralyea*, VI. 475.

UNSEATED LAND.

39. After the lapse of two years from the date of a treasurer's sale of unseated land, there is no title in the original owner which is the subject of a sheriff's sale, nor will such sale entitle the purchaser to recover the amount of the surplus bond given to the treasurer. *Church v. Riddle*, VI. 509.

40. The identity of a tract of unseated land sold for the payment of taxes, is a matter of fact which cannot be made to depend alone upon the name in which it is sold, or any other particular matter of description; it is error, therefore, to reject the evidence of such a title because the name in which it was sold does not correspond precisely with that of the warrantee or any subsequent owner. *Thompson v. Fisher*, VI. 520.

41. In ejectment by a purchaser of unseated land, proof is not admissible by the oath of the treasurer that a bond for the surplus had been given and filed in the proper office, without preliminary evidence of search for the bond and its loss. *Driesbach v. Berger*, VI. 564.

42. It is the duty of the owners of unseated lands to make a descriptive return of them to the commissioners of the county, for the purpose of taxation; and the omission to do so will subject the owner to the assessment of a four-fold tax upon them, and the land may be sold for its payment. But the owner may elect to consider the land as seated, and return it to the assessor as such, and pay the tax accordingly; and if he does so, his land will not be subject to assessment as unseated, nor to the penalty of a four-fold tax. *Harper v. The Farmers' and Mechanics' Bank*, VII. 204.

43. A tract of land ceases to be unseated as soon as it is actually occupied with a view to permanent use; and that occupation may be said to commence with the moment of entry for the purpose of clearing the land. *Wallace v. Scott*, VII. 248.

44. A paper found in the commissioners' office, purporting to be an assessment of unseated land, is *prima facie* evidence of an assessment sufficient to support a sale of the land for the payment of taxes. *Bratton v. Mitchell*, VII. 259.

45. If a tract of land be sold for the payment of the taxes of several years, and there be a sufficient assessment for any one of the years, the title will be good. *Ibid.*

46. In an action of ejectment in which the party claims under a treasurer's deed made in pursuance of a sale of the land as unseated he may give in evidence a patent for the land in the name of the person as whose it was taxed and sold, without previously showing a regular chain of title to him from the warrantee. The patent is such evidence of ownership and identity of the land as will justify the commissioners in taxing and selling it in the name of the patentee. *M'Co v. Michew*, VII. 386.

47. It is not a good objection to a commissioners' deed for unseated land sold for taxes, that it does not set out how the land was sold, whether at public or private sale; the presumption is, until the contrary be shown, that it was sold according to law. Nor is it a good

UNSEATED LAND.

objection that it was acknowledged before a Judge of the Court of Common Pleas. *Ibid.*

48. A draft of the unseated lands of a county, made under the authority of the commissioners, partakes of the nature of a public document, and may be given in evidence in an action of ejectment to identify the land taxed and sold. *Ibid.*

49. If a tract of land held upon a warrant and survey be covered by two or more warrants and surveys of a later date, and the land be assessed, taxed and sold by the treasurer at different times in the names of the later warrantees, such sale will confer a good title upon the purchaser for such portion of the land as is thus taxed and sold. *Ibid.*

50. It is not essential to the validity of a sale of unseated lands for taxes, that they should be sold two years after the tax was assessed: if not then sold or offered for sale, they may be sold at any subsequent biennial sale. *Paden v. Akin*, VII. 456.

USAGE.

INSURANCE, 4.

USURY.

CONTRACT, 22, 24.

SET-OFF, 16.

1. The receipt of money on account of an usurious contract is a consummation of the offence, from the consequences of which the party cannot relieve himself by a subsequent release of the excess which was usurious. *Kirkpatrick v. Houston*, IV. 115.

2. Under the Act of 2d of March 1723, the offence of taking usurious interest is committed by every successive receipt of such interest, and under the 6th section of the Act of 26th of March 1785, a suit to recover the penalty may be brought within a year after the last successive receipt of such interest. *Lamb v. Lindsey*, IV. 449.

VALUATION.

EVIDENCE, 45

VARIANCE.

SCIRE FACIAS, 10.

A variance between a statutory bond and the requisitions of the law, is fatal only when the condition would impose a greater burden on the obligor than the law allows. *Commonwealth v. Lash*, I. 261

VENDOR AND VENDEE.

AUCTION, 2.

CONSIDERATION, 4.

CONTRACT, 12.

COVENANT, 2.

DAMAGES, 7.

EJECTMENT, 11, 30.

VENDOR AND VENDEE.

FRAUD, 5.
 INTEREST, 3.
 LETTER OF CREDIT, 1.
 PARTITION, 8.
 PARTNERSHIP, 20.
 SUBSTITUTION, 4.
 WITNESS, 5.

1. Articles of agreement for the purchase of land become merged in the conveyance, and thenceforth null and void, there being no allegation of fraud or mistake in the execution of the conveyance. *Creigh v. Beelin*, I. 83.

2. As between a vendor and vendee of land, the acceptance of a deed, and execution and delivery of bonds for the purchase money, closes the question upon the agreement, merges it in the conveyance, and precludes the parties from afterwards claiming, either on the one side an allowance for a deficiency in the land, or on the other payment for a surplus. *Cronister v. Cronister*, I. 443.

3. In an action of covenant by a vendor against a vendee to compel the payment of purchase money, upon the pleas of *non est factum* and covenants performed, if the defendant rest his defence upon a defective or incumbered title of the plaintiff, he must make that defence on the trial of the cause, otherwise he cannot avail himself of it upon a writ of error. *Snevily v. Egle*, I. 480.

4. A sale and delivery of personal property by one in possession contains an implied warranty of title; and on the issue of property between two persons claiming as vendees of the same goods, the vendor cannot be called as a witness, by one, to prove he sold and delivered the goods to him, and not to the other. *M'Cabe v. Morehead*, I. 513.

5. A vendor cannot maintain an action to recover the purchase money of land, upon a parol agreement of sale, and proof of performance of the contract on his part; but he may recover damages from the vendee on the parol agreement. *Wilson v. Clark*, I. 554.

6. To constitute a valid assignment of personal property against a judgment creditor, there must be a delivery to, accompanied and followed by a continuing possession in, the assignee; and where property levied upon in the hands of A., and sold under an execution against him, is claimed by B. under a previous transfer, it is incumbent on B., in a suit by him against the officer making the execution, to prove that possession accompanied and followed the alleged transfer. *Young v. M'Clure*, II. 147.

7. Where the possession does not follow as well as accompany a transfer, it is a fraud in law, without regard to the intent of the parties, and becomes a question for the court, and not for the jury *Ibid*.

8. A written agreement for the sale of land, described as "the premises as it now stands, with all the improvements of whatever kind it is in possession of, either houses or lands of whatever kind," by the terms of which a conveyance is to be made at a future day, is

VENDOR AND VENDEE.

such an equitable transfer of the grain growing upon the land, as vests the title to it in the vendee, and enables him to recover it from a subsequent purchaser from the vendor, who had notice of the agreement for the sale of the land. *Burnside v. Weightman*, II. 268.

9. Where the vendor is in possession of land, and makes improvements on it, and afterwards the vendee enters into a contract to buy with full knowledge of all the circumstances, the jury are bound to believe it was the property of the vendor in the absence of counter-vailing proof, particularly when the vendee takes possession under the agreement, and enjoys it, and never offered to restore the possession, and shows no outstanding adverse title.

Where, by articles of agreement, the vendor is to give a good right and a free deed, and, if the purchaser should make the land free, the costs are to be deducted from the purchase money, and the purchaser afterwards takes out a warrant and patent, the administrator of the vendor may sue for the value of the purchase money due, without previously tendering a deed.

The vendee in such case has a right to an allowance for the sum paid for the patent, without regard to any change subsequently made in the price of obtaining the patent. *Kester v. Rockel*, II. 365.

10. S., the defendant, bought and received from C., B. & Co., flour; to be paid one-half in cash, one-half in notes at sixty days. Being pressed for payment, he consented to let molasses, in his distillery, stand either as their property or as collateral security, on condition they would take his notes at sixty and ninety days, in lieu of the former terms. He pointed out the molasses, consisting of 400 hogsheads, to be ascertained by counting them off in rows from a particular place, and in a particular manner. He agreed to send them the rum to be distilled from the molasses, to be sold by them, and applied to his debt. *Held*, that on this state of facts, C., B. & Co. could not recover the molasses in replevin, as there was no delivery of possession or pawn.

The defendant subsequently failed, and then agreed to deliver to C., B. & Co. 350 hogsheads of molasses, and 25 hogsheads of rum, distilled from the other 50, and set apart in a shed; the whole to be gauged at C., B. & Co.'s warehouse by S., a grocer, and then the notes to be delivered up to the defendant. Next morning he repeated the conditions to them, and told them to go to the yard and mark the hogsheads accordingly, and directed them to haul them away, should he fail to attend, as he promised. They accordingly marked the rum and molasses with the initials of their firm; the notes were withdrawn from bank and handed to the plaintiff, who had taken the place of the firm. They were then tendered to the defendant, who refused to receive them or deliver up the goods. The plaintiff issued his replevin. *Held*, the plaintiff was entitled to recover. *Smyth v. Craig*, III. 14.

11. If rum and molasses in the vendor's possession are sold in discharge of an antecedent debt, and are specifically ascertained and marked by the vendee, and the agreement is that they are to be

VENDOR AND VENDEE.

gauged, and the price fixed, at the purchaser's warehouse by a third person, named, and afterwards the vendor refuse to permit them to be taken to the warehouse, this prevention may be taken for performance; and the jury may give the vendee a reasonable price for the articles in damages in replevin. *Ibid.*

12. Whether goods marked and separated are actually delivered to the vendee, is a question of intention, to be determined by the jury on a trial, or by the court on a demurrer to evidence. *Ibid.*

13. Delivery of possession of land, in pursuance of a parol contract, amounts to part performance; and the vendee, as well as the vendor, may insist on specific execution of the contract.

Therefore, if in such case one authorized by the vendor to deliver the possession to the vendee, takes a lease of the land from the vendee, and enters into actual possession, there is an equitable estate in the lessor, which is bound by a judgment against him. *Pugh v. Good*, III. 56.

14. If by a contract of sale of portable articles neither time nor place of performance be stipulated, the rule is, that the articles sold are to be delivered at the place where they are at the time of sale. But, when the time of delivery is fixed by the contract, the vendor must seek the vendee at his residence, and there tender the articles; and in the case of cumbersome articles, when the delivery is to be to the vendee, the vendor must seek the vendee a reasonable time before the day of delivery, and ask him to appoint a place of delivery. *Barr v. Myers*, III. 295.

15. An encumbrance upon land, not known to the vendee when he accepted the conveyance of it, may be set up as a defence to the payment of a bond given for the purchase money, although the deed contains a covenant of general warranty. *Roland v. Miller*, III. 390.

16. The vendor of land, who has sold his claim or title merely, which, whether it be bad or good, the vendee agreed to take at his own risk, is a competent witness for the vendee in an ejectment by him to recover possession of the land upon such title, though part of the purchase money remains unpaid. *Cleavinger v. Rymar*, III. 486.

17. A covenant to make a *clear deed*, when the title is equally well known by the vendor and the vendee, is performed by the delivery of a deed conveying such title as the vendor hath, although it may be but a life estate; for he who purchases a tract of land, knowing the title to be defective, takes the risk upon himself. *Rohr v. Kindt*, III. 563.

18. If the consideration of a covenant to convey land be the performance of an act by the vendee, and it be done, the measure of damages for the non-performance of the vendor is the value of the land; but if before the act be done by the vendee, the vendor give notice, *bonâ fide*, of his inability to perform and his determination to rescind the contract, and the vendee afterwards performs the act which he stipulated to do, then the measure of damages is not the value of the land, but the amount of injury sustained under all the circumstances. *Ibid.*

VENDOR AND VENDEE.

19. If a vendor covenant to convey land in fee, in which he has only a life estate, the vendee may elect to take the conveyance in satisfaction of the covenant. The vendor cannot refuse to convey what estate he has, because he cannot convey it as fully as he covenanted to do. *Ibid.*

20. A vendor of land, who has performed so much of his part of the agreement that he cannot be put in *statu quo*, and there is no default on his part in performing the residue, or he is prevented from completing it by the default of the vendee, is entitled to specific performance. *Larison v. Burt*, IV. 27.

21. Where the case requires it, specific performance of an agreement for the sale of land may be enforced by means of a conditional verdict in an action of ejectment. *Ibid.*

22. If a vendee of land covenant to pay an encumbrance upon it out of the amount of the purchase money, which he fails to do, by reason of which the land is sold for the payment of the encumbrance and sells for a price exceeding it, he is liable to the vendor for damages, the measure of which is the difference between the amount for which the land sold and the price which he agreed to pay for it. *Young v. Stone*, IV. 45.

23. To enforce the specific performance of the parol contract of a decedent for the sale of land, it is indispensable that the precise terms and nature of it be clearly and distinctly proved: that the vendee had taken the exclusive possession of the land sold in pursuance of the contract and in the lifetime of the vendor. *Sage v. M'Guire*, IV. 228.

24. A contract for the purchase and sale of land which provides that a clause of general warranty shall be inserted in the deed which the vendor shall finally make to the vendee; that the purchase money shall be paid in four annual instalments at specified times; and without specifying any time at which the deed is to be made, shall be thus construed:—that the vendor is to convey a good and sufficient title, free from all reasonable doubt, and clear of encumbrances; that the deed is to be made on or before the payment of the last instalment; that the vendor may sue for the first three instalments as they become due, but not for the last, without the tender of such a conveyance as the contract provides for. Under such contract, the payment of the last instalment and the tender of a deed become simultaneous and dependent acts, and neither party could sue the other without averring and proving a performance of or offer to perform his part of the agreement, unless discharged by the acts of the other: and if the vendor sue for the purchase money, he must show that he tendered a good title before suit brought; if he perfect his title after suit brought, he cannot recover. *Mugao v. Lothrop*, IV. 316.

25. Whether a contract for the sale of land was rescinded by the vendee, is a matter of fact which can only be determined by the jury. *Ibid.*

26. When a contract between a vendor and vendee stipulates for the payment of interest upon the instalments of the purchase money,

VENDOR AND VENDEE.

the vendee is bound to pay according to his contract, unless he can show that it was the fault of the vendor that he did not pay. *Ibid.*

27. One who purchases expressly subject to an encumbrance, makes the debt due on the encumbrance his own debt as between him and the vendor. *Blunk v. German*, V. 36.

28. But that is not the case where there is no promise to pay the encumbrance, nor anything in the nature and circumstances of the transaction to imply it; but merely a transfer of encumbered property to creditors in consideration of their agreeing to release their debts. *Ibid.*

29. Therefore, where the plaintiff, being indebted to several persons, proposed to convey to them his house and lot subject to a mortgage to a third person not party to the arrangement, in consideration of receiving from them a release of their debts, and the defendants agreed at the foot of a consolidated statement of his liabilities, to release their claims and take a conveyance to two of them "for the use of the above debt," and he conveyed accordingly, held to be not a sale, but an ordinary assignment to trustees for the use of creditors, the plaintiff having still a resulting interest in the surplus; and that the defendants were not liable to refund to him the amount he had been obliged to pay on account of the encumbrance. *Ibid.*

30. In an action on a bond for the purchase money of land conveyed by the plaintiff to the defendant, the defendant may give evidence to show that the plaintiff had no title to the land conveyed, unless the vendee was to take the title such as it was. *Ludwick v. Huntzinger*, V. 51.

31. To rebut the presumption arising from acceptance of a deed and giving bond, the defendant must in such suit show the title positively bad by proving a superior and indisputable title in another person asserting such title. *Ibid.*

32. But where the action is merely on a contract of purchase, it is sufficient for the defendant to show the title doubtful, unless he has agreed to take such title. *Ibid.*

33. Where a party to the suit advised another to buy the land in dispute, engaging, if he did not like the title, to take it off his hands, which eventually took place, evidence by the first of these that between the vendor and him the risk was with him, and that the bond for the purchase money was still outstanding, is immaterial and inadmissible. *Urket v. Coryell*, V. 60.

34. The value of the article at or about the time it is to be delivered is the measure of damages in a suit by the vendee against the vendor for a breach of a contract of sale and delivery of personal chattels. *Smethurst v. Woolston*, V. 106.

35. And the rule is not different though the purchase money has been advanced by the vendee, where the suit is on the contract itself and not grounded on a rescision of the contract. *Ibid.*

36. In the latter case the plaintiff may recover back the purchase money advanced, in a count for money had and received. *Ibid.*

VENDOR AND VENDEE.

37. But if the vendee elects to rescind the contract, his resort on the guaranty given by the vendor is gone; and therefore a suit against the guarantor must necessarily be founded on the affirmance of the contract of sale. *Ibid.*

38. Where goods are sold on credit, the vendee to give his note, which he refuses to do after the goods are delivered to him, an action may be maintained for a breach of the contract before the expiration of the credit, in which the measure of damages is the price of the goods. *Rinehart v. Ohlwe,* V. 157.

39. *It seems* a recovery in such action would be pleadable in bar to an action brought to recover the price of the goods. *Ibid.*

40. Where goods are sold on credit, the vendee to give his note, a delivery of part of the goods, without a demand of the note, is not a waiver of the vendor's right to demand it, where he acted in good faith, and fully complied with the contract. *Ibid.*

41. It is the secrecy that attends the retention of possession by the vendor in a bill of sale, that makes it fraudulent against his creditors, and not the giving of false credit. *Fittler v. Maitland,* V. 307.

42. A vendee will not be compelled to accept a doubtful title; and the vendor cannot, therefore, recover in an action for the purchase money, when his title depends upon an Act of the Legislature, which authorizes him to sell and convey the estate in fee-simple, in which, before the passage of the Act, he had but a life estate. *Bumberger v. Clippinger,* V. 311.

43. A misrepresentation by a vendor of an occult quality in land, although it may be made in ignorance of the truth, and although the vendee agrees to run the risk of this, is, in an action to recover specific performance of the contract of sale, a decisive objection to the plaintiff's recovery. *Fisher v. Worrall,* V. 478.

44. In a contract for the sale of a press, type and stock, the vendor agreed and undertook to procure for the vendee four hundred responsible subscribers for the paper to be issued from the press. *Held,* that these were not to be in addition to those on the subscription-list which passed as an accessory of the establishment; nor exclusive of such subscribers as the vendee might himself procure. *Wilson v. Davis,* V. 521.

45. Upon a contract of sale reserving to the vendee the right to rescind within a given time and be relieved from the purchase money, after the time has elapsed the sale has become absolute, and the vendee liable for the purchase money: and it is error to submit to the jury whether the sale was rescinded by the parties after the time had elapsed, when there was no evidence of the fact. *Ibid.*

46. A symbolical, constructive or temporary delivery of personal property is not sufficient to change the ownership as to creditors; there must be an actual delivery at the time of the transfer, and a continuing possession; otherwise the sale, although *bonâ fide*, as between the parties themselves, is fraudulent in law. *M' Bride v. M' Clelland,* VI. 94.

VENDOR AND VENDEE.

47. Where a draft on the vendor was presented in payment for goods to his clerk, who refused it, but by the vendee's direction showed it afterwards to the vendor, the declarations of the latter that he did not know the drawer and would not do the work on it, but that he would see the vendee, are evidence in an action for the goods. *Koch v. Howell*, VI. 350.

48. The retention of such order by the vendor until the trial, is not conclusive evidence of his acceptance of it. *Ibid.*

49. Property in a chattel is not changed by a sale and delivery on conditions to be afterwards performed, if they are not performed; but where the delivery is absolute and the bargain is perfect or capable of being made so by reference to something else or an arbiter, the ownership is transferred. *Scott v. Wells*, VI. 357.

50. It is certain enough when the price can be obtained by mere computation; therefore a sale of a large raft at so much per 1000 feet and delivery to the buyer changed the property, though it was to be counted and that was not done, there being nothing more to be done by the seller. *Ibid.*

51. A general agent selling a chattel may, with the assent of the vendee, rescind the contract and make a different bargain. *Ibid.*

52. An agent to sell a chattel is a witness for the owner in a suit for its price, unless his negligence or misfeasance be proved, and the presumption is against these: *Ibid.*

53. Equity will relieve a party from the effect of an act done or contract made under a mistake or ignorance of a material fact. *Jenks v. Fritz*, VII. 201.

54. A vendor and vendee of land appoint an artist to ascertain the number of acres in the tract, which was sold by the acre, and upon his report the deed was executed and delivered, and bonds given for the purchase money. *Held*, that in an action on the bond, the vendee may make defence on the ground of a mistake made by the artist in measuring the land. *Ibid.*

55. In an action of debt upon a bond given for the purchase money of land, in which a defective title is set up as a defence, the plaintiff may give evidence of acts done by himself to perfect the title after suit brought. *Dickinson v. Voorhees*, VII. 353.

56. V. sold and conveyed to D. several tracts of land, describing each tract particularly, in the deed, and as containing so many acres, amounting in the whole to 3235 acres, and took his bond for the purchase money. Upon actual survey it was subsequently ascertained that one of the tracts was deficient in quantity 445 acres. *Held*, that this did not furnish the vendee with a defence against the payment of his bond. *Ibid.*

57. A vendee who has received his deed and given bonds for the payment of the purchase money, before they become due suffers the land to be sold by the sheriff for the payment of encumbrances which existed before he purchased, and he becomes the purchaser. *Held*, that although his purchase money was not due when he purchased at the sheriff's sale, yet in an action to recover it he has a

VENDOR AND VENDEE.

defence only to the amount of the money paid to the sheriff in discharge of the encumbrances. *M'Ginnis v. Noble*, VII. 454.

58. Upon a parol sale of land which is in the actual possession of a tenant under a parol lease, and the agreement of the vendor that the rent should be paid to the vendee and the attornment of the tenant to him; this is such a delivery of possession to the vendee as, with proof of the payment of the purchase money, will enable him to maintain ejectment upon his title. *Williams v. Landman*, VIII. 55.

59. If bonds and a mortgage be given by a vendee to secure the payment of the purchase money of the land sold, it is competent, in an action upon the bond, for the vendee to prove that it was a part of the contract of sale that the vendor was to look alone to the property sold as a security for the payment of the purchase money. This proof, when made, constitutes no defence to the recovery of a judgment upon the bond, but the court will so control the execution of it, that it shall not be levied upon any other estate or property of the vendee. *Irwin v. Shoemaker*, VIII. 75.

60. In an action of ejectment brought to enforce the payment of the purchase money, where the plaintiff retains the legal title, it is not requisite that the plaintiff should have tendered a deed before suit brought, where he claims a conditional verdict: it is sufficient if done on the trial.

If the deed filed be erased, a court of error will allow the plaintiff to execute a new one in its stead. *Markley v. Swartzlander*, VIII. 172.

61. On the 21st November 1835, A. purchased at auction the land of B. Both signed conditions of sale stipulating that one-third of the purchase money was to be paid on the 1st April 1836, when title would be executed and possession given. On the 8th April 1836, C. obtained a judgment against A. On the next day a deed was executed in pursuance of the conditions of sale, and the first instalment was paid. On the 10th April 1837, D. obtained a judgment against A. The land was afterwards sold by the sheriff as the property of A. *Held*, that C.'s judgment was entitled to the proceeds in preference to that of D. *Stephen's Appeal*, VIII. 186.

62. Where, by articles of agreement for the purchase of land, part of the money is to be paid when the agreement is executed, and the articles are executed, but instead of money, the vendor takes the promissory note of the vendee for such sum, the vendee cannot object to its payment on the ground of encumbrances on the title then existing. *Roland v. Tiernan*, VIII. 193.

63. His remedy is in such case by action of covenant to recover damages. *Ibid*.

64. If one purchase land of which the title fails, yet if a third person advance money to the vendor in part payment, on the representation of the purchaser that he would be safe in so doing, and the purchaser gives a bond to such third person for the amount, he cannot, in a suit on the bond, bar a recovery on the ground of defect of title. *Gilkeson v. Snyder*, VIII. 200.

VENDOR AND VENDEE.

65. Agreement between a Coal and Navigation Company and an individual for the purchase of a boat by the latter of the former, on terms expressed in the company's printed regulations, one condition of which was, that the company will furnish its carriers with boats for cash at cost or on credit with interest, but that the ownership shall remain with the company till all the instalments of the price be paid, with a clause providing for a bill of sale at the close. The company was to pay the tolls, and the contractor to take freight from no other quarter. The boat retained its place in the company's register, having its number painted in letters and figures on its stern, not distinguishable from the other boats of the company. *Held*, that the boatman was merely the servant of the company till the boat was paid for, and that the delivery of possession of it during this agreement to the boatman did not make the boat his so as to be levied on by his creditors. *Leligh Company v. Field*, VIII. 232.

66. When the covenants between a vendor and vendee of land for the payment of the purchase money and delivery of the deed are mutual and dependent, the vendor must, at the time fixed by the contract, have in him such a title as he covenanted to make, otherwise the vendee may elect to rescind the contract; but when these covenants are independent, and by their terms the payment of the purchase money in part precedes the execution and delivery of the deed, it is not a good defence in an action for that part of the purchase money that the vendor had not then power to make a good title. *Stitzel v. Kopp*, IX. 29.

67. A sheriff's sale of land as the property of a vendee who has not paid the whole amount of his purchase money or received a deed of conveyance, will not divest the lien of a judgment against the vendor. *Creigh v. Shatto*, IX. 82.

68. If the vendor of lands, holding them under warrants and surveys, without patents, agrees by articles of agreement made with the vendee, to give the vendee immediate possession of them, which is done, and agrees also well and sufficiently, on or before a certain future day, to convey them in fee, by such deed or deeds as the counsel of the vendee shall reasonably advise and devise, on the vendee paying the one-half of the purchase money, and securing the other half, by giving bonds and mortgage on the lands, to be paid in two annual instalments, with the interest thereon semi-annually; and upon the vendee failing to pay, and secure the purchase money, the vendor or his heirs or devisees take possession of the lands again without legal process or the consent of the vendee, or those claiming from him, they cannot retain the possession until the vendee or those claiming from him tender or pay the purchase money due; but the vendee or those claiming from him may recover in ejectment the possession without tendering or paying the purchase money, or bringing it into court. *Gregg v. Patterson*, IX. 197.

69. But if the vendor or those claiming from him recover the possession by legal process, or by the consent of the vendee or of those claiming under him, he or they may retain the possession until they are paid the purchase money due or it is tendered, which must be

VENDOR AND VENDEE.

done before the institution of an ejectment to recover the possession *Ibid.*

70. Also, if after the vendor, or his heirs or devisees, have recovered possession by ejectment after failure to pay the purchase money, and the claim of the vendee has become vested by successive mesne conveyances, in two persons, as tenants in common, one of whom conceiving himself entitled to the whole claim of the original vendee exclusively, pays the whole of the purchase money, which had become payable, to the heirs or devisees of the original vendor, and takes conveyances from them, whereby he acquires their possession and right to the land, he may retain the possession of the whole against the other tenant in common, or his heirs, until they pay or tender the one-half of the purchase money paid by him, which must be paid or tendered before they can maintain an ejectment to recover the possession. *Ibid.*

71. So if the tenant in common, after paying the whole of the purchase money, is compelled to bring an action of ejectment against persons in possession and claiming a portion of the land under an adverse title, for the purpose of recovering the possession thereof, in which he succeeds, but has been obliged to expend about \$400 in prosecuting the suit and effecting a recovery of the possession, he will not be compelled to let the heirs of the other tenant in common into the possession of their undivided moiety until they pay or tender him the one-half of such expense, which if it cannot be agreed on, as to amount, by the parties, may be ascertained and fixed by the jury who try the cause; and the court, though the verdict be in favour of the plaintiffs, will take care that execution shall not be had until one-half of such expense be paid. *Ibid.*

72. But where such tenant in common, in possession of the land, erects buildings and makes substantial and valuable improvements thereon, without the consent of the heirs of the other tenant in common, though done under the impression, most probably, that he was sole owner of the land, and the heirs of the other tenant in common most probably ignorant of their right and claim to it, he cannot claim to be reimbursed one-half of the cost and expense of erecting such buildings and making such improvements, by the heirs of the other tenant in common. For this he is without a remedy, further than the rents, issues and profits received by him from the property may reimburse him.

VENIRE.

FEE BILL, 8.

VERDICT.

CONDITIONAL VERDICT.

EJECTMENT, 10.

JURY, 1.

TRESPASS, 12.

WRIT OF ERROR, 5.

VOTER.

EVILENCE 63.

WAGER.**BETTING.**

1. A notice to a stakeholder not to pay over money deposited in his hands upon an illegal wager, must come from the owner of the money; a notice from the person who made the bet and deposited the money on behalf of the owner, is ineffectual to enable the owner to recover it back. *Reichly v. Maclay*, II. 59.

2. Money contributed by individuals and deposited in the hands of a stakeholder as a wager upon the result of an election, cannot be recovered back in a joint action by the contributors. *Mytinger v. Springer*, III. 405.

3. Money lost by a wager upon an election, and paid over to the winner, cannot be recovered back from him by means of a foreign attachment at the suit of a creditor of the loser. *Speise v. M' Coy*, VI. 485.

WAGES.

MASTER AND SERVANT, 1, 2, 3.

WAGONER.

A wagoner who carries goods for hire, thereby contracts the responsibility of a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. *Gordon v. Hutchinson*, I. 285.

WAREHOUSE-MAN.

LIEN, 7.

WARRANT AND SURVEY.

ABANDONMENT, 1.

DONATION LAND, 3.

EVIDENCE, 57.

IMPROVEMENT, 1.

VENDOR AND VENDEE, 68, 69, 70, 71, 72.

1. A return of survey into the Surveyor-General's office, and a lapse of twenty-one years afterwards, without any attempt made during that time to take exception or object to it, is conclusive evidence that it was regularly made.

Reputation and hearsay is such evidence as is entitled to respect in a question of boundary, when the lapse of time is so great as to render it difficult to prove the existence of the original landmarks. *Nieman v. Ward*, I. 68.

2. It is essential to the validity of a title founded upon a warrant and survey as against an intervening right, that the survey shall have been returned within seven years; for otherwise, notwithstanding the property, which was unseated, may have been assessed and the taxes paid by the owner; that he used it as wood-land for the purpose of

WARRANT AND SURVEY.

supplying the farm on which he resided with fire-wood, rails, and timber; that he claimed title, and this with the knowledge of the improver; yet after the lapse of seven years, his right is for ever postponed. *Strauch v. Shoemaker*, I. 166.

3. A survey which has never been returned to the land-office, is not evidence of an adverse title without a warrant, or other evidence of one besides its recital in the survey. *Kester v. Rockel*, II. 365.

4. If several undescriptive warrants, granted to one individual, be located upon adjoining lands, the deputy-surveyor may return one general draft of the whole quantity of land, without running the division lines on the ground, or marking them upon the return of survey; and such return vests a good title in the purchaser. *Stevens v. Hughes*, III. 465.

5. A warrant taken for land in August 1776, in the name of R. M., whereon a survey was made in 1787; a settlement made on it in 1825 by the lessee of H. G. & H. W., claiming to be the owners of the warrant and land, which was assessed with county taxes from 1805 till 1817 inclusive, and sold by the commissioners of the county on account of the taxes not being paid, in 1820, at which sale the commissioners bought the land and sold it again in 1830, and after passing through the hands of three persons, the land was purchased and redeemed in 1831 by the lessors of the tenant, who was still residing thereon, cannot be considered as abandoned.

Such warrant would seem to be good and rendered available by the Acts of Assembly of the 9th April 1781 and the 5th April 1782, notwithstanding it was granted by the Penns, former proprietaries of the State, as a province, after the 4th July 1776, when it ceased to belong to the Penns, and became an independent State. *Clearinger v. Rymar*, III. 486.

6. If A., believing himself to be the owner of land under a warrant and survey, which happen to be void, leases it for a term of years to a tenant, who, according to the terms of his lease, erects a dwelling-house and makes other improvements, and resides with his family thereon until the expiration of the lease, when he obtains a warrant for the land in his own name, founded on his personal residence while he was a lessee to A., the latter will be entitled to the benefit of such improvement. *Ibid.*

7. A settler who makes his residence, by mistake or otherwise, on land previously appropriated, obtains no title by settlement to the adjoining land, over which he has cleared and cultivated and extended his enclosures. *Adams v. Jackson*, IV. 55.

8. But if he builds a house on the opposite side of the 400 acres of vacant land to his improvements and enclosures, which he lets to tenants, who reside therein with their families, so as to keep up a continuous residence, such residence may be connected with the vacant land cleared, enclosed, and cultivated by him, so as to give him a pre-emption right to the same, including 400 acres, if there be so much. *Ibid.*

9. A survey made in 1807, in pursuance of a warrant dated the

WARRANT AND SURVEY.

same year, upon land described therein, for which the whole of the purchase money was paid to the State, and the surveying fees paid to the deputy-surveyor, who in the same year made out and forwarded a return thereof to the Surveyor-General by a private person, who, as he testified, delivered the same to the Surveyor-General, who, upon the receipt thereof, said it would not close, but no communication was made to the deputy-surveyor or the owner of the warrant of any objection to its acceptance, and in 1830 the deputy-surveyor being advised by one, who happened to inquire for the survey in the Surveyor-General's office, that none was to be found there, made out immediately a second return, similar to the first, which was forwarded and accepted: *Held*, that the owner of the warrant was not to blame, and that his right to the land was not affected by the failure to have the survey returned and accepted. *Ibid*.

10. If a deputy-surveyor, either through mistake or design, in returning a survey made by him, excludes part of the land included by him in running and marking the lines on the ground agreeably to the wish of the owner of the warrant, but returns it, without the knowledge of the owner, according to other lines actually *run and marked on the ground*, it is the duty of the owner to apply for redress to the Surveyor-General or the Board of Property within a reasonable time after he discovers the mistake or fraud of the deputy; otherwise he will be taken to have acquiesced in and be concluded by it, and not be permitted to controvert a right, acquired by another from the State, to the excluded land, whether acquired before or after his return. *Ibid*.

11. A defendant in ejectment having proved a title by actual settlement, it is not competent for the plaintiff to show that the defendant had purchased and claimed under another title by warrant and survey; for, even if true, the prior title would not merge in the latter. *Turner v. Waterson*, IV. 171.

12. Superintending a survey, or paying the fees, is sufficient evidence of ownership of the application or warrant upon which it is made, unless rebutted by evidence of ownership in the person in whose name the application was entered or the warrant was issued. *Ibid*.

13. The superintendence and payment of the expenses of the execution of a warrant are presumptive evidence of ownership; but it may be rebutted by proof of the actual ownership, and then the execution of it will enure to the benefit of the real owner. *Orr v. Cunningham*, IV. 294.

14. In making an official survey intended to adjoin an old survey, if by mistake it does not adjoin, the error may be corrected at any time before the survey be returned; and a settler or warrantee making a survey and marking a line, if he find he has not a sufficient quantity, may abandon that line and take more at any time before another person acquires right to the adjoining land. *Maris v. Hanna*, IV. 348.

WARRANT AND SURVEY.

15. Warrant granted in 1683 by the proprietary, at the request of Richard Wall, Sen., and partners, late purchasers of 1100 acres, to survey a lot in the back street of the city of Philadelphia. A will in 1697-8, signed Richard Wall, devising his estate, land, plantation, &c., in Cheltenham township, to his granddaughter in tail, without survey, patent, &c. of the 1100 acres, is no evidence that they are the same lands. *Shoemaker v. Huffnagle*, IV. 437.

16. The warrant being to Richard Wall, Sen., and partners, and the will by Richard Wall, the tendency of the proof is, that the warrantee and the testator were different persons. *Ibid.*

17. A warrant for a city lot granted in 1683, and remaining unlocated, is not capable of being entailed by devise in tail of a man's land and plantation. *Ibid.*

18. Such lot cannot be considered appurtenant to country land, unless the owner of the country land were a first purchaser; nor can it be so considered, where, on the face of the warrant, it was granted on special request. *Ibid.*

19. Surveys are presumed to be made for him who is the owner of the warrants at the time, though there be no evidence that they were made for him; and they are his, though made at the instance and for the benefit of another, who had no right to the warrants. *Urket v. Coryell*, V. 60.

20. Where warrants were obtained from the Commonwealth in 1793, on which the purchase money was paid at the time, surveys made in the next month, embracing the land in dispute, and returned into the Land Office and accepted in February 1794, there can be no such thing as abandonment by which the title can be lost; and if there be nothing else on the subject, it is error to leave it to the jury to say whether there has been an abandonment or not. *Bunting v. Young*, V. 188.

21. A warrant surveyed on land which has been improved by another, is not absolutely void, but may be avoided at the instance of the improver, unless he has abandoned his right before or after the survey. *Miller v. Cresson*, V. 284.

22. If a warrant for vacant land be put into the hands of the deputy-surveyor, and the land is bounded by older surveys made, marked upon the ground and returned, the deputy may execute such warrant by adopting the old lines and returning the survey accordingly, without actually going upon the ground. *Quin v. Brady*, VIII. 139.

23. K., by connecting his warrant with R.'s improvement, when it otherwise would have been void, got a warrant and survey and patent for 350 acres of land. *Held*, that it was error to instruct the jury that R. could not hold against K. without paying his proportion of the expenses of the warrant, survey and patent, when there was evidence that R., by K.'s agreement at the time, was to get 50 acres, clear of all expenses, and R. held possession and paid the taxes for that portion. *Rose v. Klinger*, VIII. 178.

24. Strictly and properly speaking, a warrant and survey thereon although the purchase money be paid to the State, does not consti

WARRANT AND SURVEY.

tute a *legal* in contradistinction to an *equitable* title for the land embraced by it. The warrant is a mere authority to survey the land for the benefit of the warrantee or owner thereof. It contains no grant or conveyance of the land. This is effected by the execution of a patent-deed on the part of the State, after the survey shall have been made and returned on the warrant. But a patent does not give the patentee any superior advantage, in respect to the land, unless he be legally entitled to it. For a warrantee without a patent, if he be legally and equitably entitled to a patent, may recover the land in ejectment from the patentee, who is not entitled thereto, as he had no right to obtain it. *Gregg v. Patterson*, IX. 197.

WARRANTY.

DEED, 32.

EVICITION, 1.

EVIDENCE, 40.

The heirs or devisees of the grantee in a deed may maintain a joint action upon a covenant of warranty. *Paul v. Whitman*, III. 407.

WASTE.

1. A testator's declarations of intention in his lifetime as to the relative powers of those beneficially entitled under a trust created by his will, are inadmissible in an action for waste by the trustee against the equitable tenant for life. *Woodman v. Good*, VI. 169.

2. An equitable tenant for life is liable to an action of waste at the suit of the trustee-in-fee of the legal estate. *Ibid.*

3. In such suit, the plaintiff need not name himself trustee. *Ibid.*

WATERCOURSE.

CASE, 1.

Where several persons unite in the purchase of a piece of ground, and divide the same into smaller lots, upon each of which a house is built, and then partition is made between them, each must so regulate and grade his own lot as that the water that falls or accumulates upon it shall not run upon the lot of his neighbour. *Bentz v. Armstrong*, VIII. 40.

WAY.

CANAL, 2.

GRANT.

It is a question of law for the court whether a party demanding and receiving from an adjoining lot-holder the payment of money towards laying down water-pipes in an alley, is estopped from denying a subsequent purchaser's right to the use of the alley. Whether the facts raise a presumption of a grant is a question of fact for the jury. *Lewis v. Carstairs*, V. 205.

IX. — 58

20

WAY-GOING CROP.

The way-going crop to which a tenant is entitled upon his leaving demised premises, includes as well the straw as the grain, which he may remove and dispose of as he pleases, being subject only to the terms of his contract, and not to any supposed custom of the country on that subject. *Craig v. Dale*, I. 509.

WEST PHILADELPHIA.

BOROUGH, 2.

WIDOW.

DISSEISIN, 1.

DISTRESS, 1.

INTEREST, 6.

INTESTATE, 6.

LIMITATION, 7.

1. The acceptance by a widow of her share of her deceased husband's intestate estate, under the Statute of Distributions, is not an election such as will bar her from recovering dower out of land which her husband had aliened in his lifetime. *Leinaweaver v. Stoeber*, I. 160.

2. The interest which a widow has in the estate of her deceased husband is realty; and upon a proceeding in partition in the Orphans' Court under the intestate law, and the confirmation of the estate to the heir, the widow's interest still remains realty, and not subject to the control of a husband, unless by deed duly executed and acknowledged by the wife as provided by law. *Miller v. Leidig*, III. 456.

WILL.

EVIDENCE, 80.

DEVISE, 32.

NUNCUPATIVE WILL.

RIVER, 6.

WASTE, 1.

1. It is not necessary to the legal probate of a will, that the witness should be able to say, that the testator expressly acknowledged the instrument to be his will: it is sufficient that he declared the execution of it to be his *act and deed*. *Loy v. Kennedy*, I. 396.

2. An instrument, limited by a condition as to its operation, cannot be admitted to probate as a will after failure of the contingency, on the happening of which it was to have taken effect. *Case of Todd's Will*, II. 145.

3. One, in contemplation of a journey, thus begins an informal testamentary paper: "My wish, desire, and intention now is, that if I should not return, (which I will, no preventing Providence,) what I own shall be divided as follows."—*Held*, that upon his return and subsequent death, the instrument ought not to be admitted to probate. *Ibid*.

4. The legal construction of a will cannot be explained or altered

WILL.

by parol declarations of the testator of his understanding of its meaning, or his intention to do something else. *Comfort v. Mather*, II. 450.

5. The word "obsolete" written by a testator on the margin of his will, but not signed by him, or any person for him, in the mode prescribed by the sixth section of the Act of 8th April 1833, does not operate as a revocation of the will under the thirteenth section of that Act.

Parol declarations of a testator, as to his intention of dying intestate, are inadmissible to show a revocation of his will. *Lewis v. Lewis*, II. 455.

6. Where a decedent was able to come down stairs to receive and converse with visitors, and to walk in the street, and died the next day from a rupture of the lungs; *held* not to be such extremity of last sickness as authorized a nuncupative will under the 6th section of the Act of 8th April 1833. *Werkheiser v. Werkheiser*, VI. 184.

7. It is no reason for not admitting a will to probate that its provisions may be obscure and uncertain. *Ibid.*

8. Declarations or admissions of one of several devisees or legatees named in a supposed will, tending to prove that the alleged testator was not of sufficiently sound mind at the time to make it, or being very weak in mind was improperly influenced to make it contrary to what he would otherwise have done, are not admissible on the trial of a feigned issue directed by the Register's Court, to try its validity. *Hauberger v. Root*, VI. 431.

9. Whether made before or after the will, or by one who was a party to the feigned issue, where they may affect others not in privity with him, is not material. *Ibid.*

10. Nor is evidence admissible on such issue to prove that the testator some fourteen years before furnished a son with money to buy a farm, so that he would receive more than his share. *Ibid.*

11. Testator desired his executors to pay a certain sum of money to a benevolent society, if any existed, to alleviate the suffering of the most prudent poor, but not the intemperate, in procuring food, clothing and other necessities which such persons want in winter. A society whose objects were the promotion of the temperance cause by the diffusion of temperance knowledge, the circulation of the pledge of total abstinence from all intoxicating liquors, and the dispensation of the charity of the association to the suffering poor of Philadelphia and its districts, of good moral character, who do not use intoxicating liquors as a beverage, *held* not entitled to the legacy *Grandom's Estate*, VI. 537.

12. It is not important that a list of charities referred to by the testator in his will, was no part of the will, and that it was not admitted to probate as testamentary. A chancellor would regard it as controlling the discretion of the executors in the dispensation of the charities. *Ibid.*

13. It is essential to the probate of a will, to which the alleged testator did not sign his name but made his mark, that it should be

WILL.

proved by two witnesses that he was so infirm as to be unable to write his name: it is not sufficient that it should have been testified by one witness that he was unable to write, and by the two subscribing witnesses that he acknowledged the instrument to be his last will and testament after he had put his mark to it. *Cavett's Appeal*, VIII. 21.

14. Will made 16th April 1837: the defendants alleged another will made about the 17th June 1837, different in its dispositions, revoking former wills, and that it was destroyed or suppressed by fraud.

Held, 1. That if such destruction or suppression is shown expressly or by circumstances, and that the dispositions of the second will are inconsistent with those of the first, it amounts to a revocation.

2. When the second will cannot be found, and the question is what became of it, the first presumption is that it was in the possession of the testator, and that he cancelled it; but if it was in the possession practically of the wife or executor whose interests are adverse to it, proof ought to be given on the subject, and the absence of proof is an argument against the presumption.

3. In case of spoliation or fraud in respect to the second will, it is not necessary to show its contents, or in what respect it revoked the first, as must be done in ordinary cases. *Jones v. Murphy*, VIII. 275.

WITNESS.

BILLS OF EXCHANGE, &c., 16.

COMMON CARRIER, 11.

COSTS, 4, 5.

DEED, 34.

EJECTMENT, 12, 18.

EVIDENCE, 100, 106, 110.

MECHANIC'S LIEN, 4.

OFFICER, 8.

PARTNERSHIP, 30.

REPLEVIN BOND, 4.

SCHOOL, 2.

TRESPASS, 12, 13.

VENDOR, &c., 16, 52.

1. In a question between the holder and endorser of a note regarding the exoneration of the latter on the ground of the negligence of the holder, it is error to permit the endorser to give evidence of the ability of the payor at a period when it was not in the power of the holder to enforce payment. *Bank of Pennsylvania v. Reed*, I. 101.

2. In an action of debt upon a written obligation in the name of the obligee for the use of another, where the defence made is that the obligation was paid to the obligee before his transfer of it to him for whose use the suit is brought, the obligee is not made a compe-

WITNESS.

tent witness by the payment of all the costs which have and may accrue in the action. *Stroh v. Hess*, I. 147.

3. Any one who is not a party to a suit on the record is presumed to be free from interest and competent to testify, until the contrary be made to appear by proof. Hence, in an action against a sheriff's sureties to recover the amount of a writ of *feri facias* which came to the hands of the sheriff's deputy for execution, the deputy is a competent witness for the defendant, unless it be proved by the plaintiff that he, in consequence of negligence or misfeasance, had made himself liable to his principal for the amount of the writ. *Juniata Bank v. Beale*, I. 227.

4. It is error to permit a witness to testify respecting a fact of which he has not the means of knowledge. *Hiestor v. Laird*, I. 245.

5. In an action of ejectment by a vendor against one who purchased the land as the property of the vendee at sheriff's sale, the vendee is not a competent witness. *Jones v. Patterson*, I. 321.

6. In a *scire facias* upon a mechanic's lien against the owner of a building, and the contractor who constructed it, by him who furnished the lumber, in which it appeared that the contractor had been fully paid for his work and materials, he is not a competent witness for the owner. But he may be made competent by a release from the owner for his liability over to him for costs, to which he might be subjected in the event of a recovery against him. *Dickinson College v. Church*, I. 462.

7. In an action against partners, upon a note signed with the name of the firm after it was dissolved, the one who signed being willing to testify, and having been first released by the plaintiff from any other action on the note, is a competent witness. *Whitehead v. The Bank of Pittsburgh*, II. 172.

8. An indirect and contingent liability of a witness is not sufficient to exclude his testimony on the ground of interest: it affects only his credibility. *Irvine v. Lumbermen's Bank*, II. 190.

9. In an action by a passenger against a stage-owner to recover the value of a trunk and its contents cut and carried away from the stage, the plaintiff is not a competent witness to prove that there was money in the trunk, or the amount. *David v. Moore*, II. 230.

10. The true test of a witness's competency on the ground of his religious principles is, whether he believe in the existence of a God who will punish him if he swear falsely: and within this rule are comprehended those who believe future punishments not to be eternal. *Cubbison v. M'Creary*, II. 262.

11. Merely being one of a church council, without any concern in a suit brought for the use of the church, or personal interest in the result, does not disqualify a witness. *Shortz v. Unangst*, III. 45.

12. Although a member of an association, not served with process, cannot ordinarily be a witness to prove the liability of those

WITNESS

who are served, and plead to issue, yet if such member was the agent of the association to make the contract, the plaintiff may examine him to prove the contract and his authority. *Ridgely v Dobson*, III. 118.

13. No definite rule can be expressed to control the necessity of having the personal attendance of a witness, or what degree of inability to attend will enable the party to read his deposition. This must, in some measure, depend upon the sound discretion of the court, and the circumstances of each particular case. But the exercise of such discretion may be the subject of review on a writ of error. *Parks v. Dunkle*, III. 291.

14. A party to a suit is a competent witness to prove the service of notice on the opposite party. *Siltzell v. Michael*, III. 329.

15. It is not a good objection to the competency of a witness produced by a defendant, that he has an interest in the plaintiff's recovery. *Ralph v. Brown*, III. 395.

16. If a legal plaintiff be admitted to testify by reason of his having assigned his claim to another, for whose use the suit is brought, it is error afterwards to admit evidence of another claim, which the plaintiff had not assigned. *Finney v. Ferguson*, III. 413.

17. The objection to the competency of the grantor to give evidence to invalidate his deed is founded on interest, not on the supposed rule that being a party he is estopped, like the party to a negotiable instrument. *Kronk v. Kronk*, IV. 127.

18. Conveyance to A. and his heirs, the grantor is a competent witness to prove that the deed as given and received at the time of its execution, was to A. for life, remainder to B. in fee. *Ibid*.

19. If one who is interested that the plaintiff shall recover, be called by the defendant and examined as a witness as to a particular fact, he is thereby made a competent witness for the plaintiff as to other facts. *Turner v. Waterson*, IV. 171.

20. It is not a good objection to the competency of a witness, that he believes himself to be interested in the event of the suit, when in fact he is not so. *Cassiday v. M'Kenzie*, IV. 282.

21. In a suit against a Canal Company for raising a dam whereby the plaintiff's ground was overflowed and damage done to a furnace there being erected, the defendants may, on a cross-examination, ask the plaintiff's witness whether a manager of the company did not inform him of their intention to raise the dam, he being then owner, the defendants stating at the same time their intention to prove the plaintiff's knowledge of this notice; and such notice materially affects the plaintiff's right to recover. *Schuylkill Navigation Co. v. Farr*, IV. 362.

22. A stockholder in a company is a witness in an ejectment by the company to prove service of a notice on defendant's agent, and the admission of such person that he was agent, and that notice was served on him. *Union Canal Co. v. Loyd*, IV. 393.

WITNESS.

23. In a suit in partition, a judgment creditor of the plaintiff who swears that he has a slim chance of getting the amount of his judgment, unless the plaintiff can establish his right to the lands in suit, is incompetent to be a witness for the plaintiff. *Seitzinger v. Ridgway*, IV. 472.

24. On the trial of an issue directed by the Orphans' Court, where a witness testifies differently from what he had done before, the opposite party should be permitted to contradict him, by reading his deposition in the same case, filed in the court which directed the issue. *Bull v. Towson*, IV. 557.

25. It is always competent for a party to show that the witness has related the facts trying, in a different manner, whether under oath or not. *Ibid.*

26. The application of the rule in Starkie as to cross-examining upon collateral matters, explained. *Ibid.*

27. A release under seal to an interested witness imports a sufficient consideration to make it valid; but if without seal, and no consideration is expressed or proved, it must be regarded as without consideration, and insufficient. *Schuykill Navigation Company v. Harris*, V. 28.

28. The hands employed by the master of a boat are competent witnesses for the owner, in an action by him to recover damages for an injury to the boat. *Ibid.*

29. In a suit against a Canal Company to recover damages for an injury to the plaintiff's boat, occasioned by the misconduct of or of the defendants' lock-keepers, the master of the boat is not a witness for the plaintiff, without a release, where it is alleged the injury arose from the master's mismanagement. *Ibid.*

30. *Quære*, whether the plaintiff's calling and examining the master on the trial, as a witness, would not remove the objection that his evidence tended to exculpate himself. *Ibid.*

31. However that may be, it would not make his deposition, previously taken, evidence in the cause. *Ibid.*

32. The court before whom a witness is examining, must be left to exercise its own discretion to say how far irrelevant questions may be asked on a cross-examination in order to test the accuracy of the witness. *Clark v. Trinity Church*, V. 266.

33. A defendant is not made a competent witness by the fact of his having been discharged as a bankrupt after the suit was brought, especially if sued as an executor. *Given v. Albert*, V. 333.

34. An administrator who voluntarily pays money on account of a claim against the estate which he represents, is not thereby rendered an incompetent witness in an issue between the claimant and another creditor of the estate to try the validity of the claim *Christman v. Siegfried*, V. 400.

35. The nominal plaintiff in a suit brought for the use of another, who had assigned the cause of action before suit brought, is an incompetent witness to rebut a defence to the original cause of action,

WITNESS.

unless he be first released by the assignee from the implied warranty which arises in all cases of assignment for a valuable consideration, that the debt is due. *Ludwig v. Meyre*, V. 435.

36. An assignment of a cause of action, which is merely colourable, shall not divest the title of the plaintiff so as to make him a competent witness, whatever its legal effect between the parties may be; and every assignment is to be deemed colourable, when no other motive for it can be made to appear. *Post v. Avery*, V. 509.

37. If a witness be erroneously rejected by the court, the error is cured by the party's subsequently withdrawing his objection to his competency and agreeing to his examination. *Smull v. Jones*, VI. 122.

38. One of the co-defendants, upon whom the process was not served, may be a competent witness for the plaintiff to prove particular facts material to the issue; but he is not competent for the purpose of establishing the fact of a partnership between himself and his co-defendants. *Heckert v. Fegely*, VI. 139.

39. In an action to recover daily pay and mileage as a witness for the plaintiff in an ejectment by a lunatic in the name of his committee, against one who was alleged to have brought and carried on the ejectment, the committee is not a competent witness for the plaintiff. *Utt v. Long*, VI. 174.

40. In such action, the executor of the lunatic is a competent witness for the plaintiff, where it appears the estate of the lunatic was sufficient to pay the costs of the ejectment. *Ibid*.

41. Where a witness gives evidence against the party calling him, and is an unwilling witness, or in the interest of the opposite party, he may be asked by the party calling him, at the discretion of the court, whether he has not on a former occasion given different testimony as to a particular fact. *Bank Nor. Liberties v. Davis*, VI. 285.

42. A grantor is not entitled to mesne profits after conveyance, and therefore there is no objection on that ground to his competency as a witness for the plaintiff, his grantee. *Drexel v. Man*, VI. 343.

43. A mere possibility of being sued is a contingent interest that goes only to the credibility of a witness. *Scott v. Wells*, VI. 357.

44. In an action of *assumpsit* by three partners, in which the defendant pleads *non assumpsit*, payment and set-off, one of the plaintiffs cannot be made a competent witness by releasing after suit brought all his interest in the claim to his co-plaintiff, and paying into court all the costs of the suit which have accrued, or may accrue, to the final termination of the action. *Church v. Hampton*, VI. 514.

45. A colourable assignment to make the legal plaintiff a witness does not divest his interest; and every such assignment is deemed colourable until the contrary appears. *Leiper v. Peirce*, VI. 555.

46. Where, therefore, the cause of action was an account stated by the plaintiff himself, without a voucher or scrap of paper to sup-

WITNESS.

port it, and could only be recovered by the force of the plaintiff's testimony, and the consideration was not named, and there was no attempt to explain or rebut the presumption of collusion, it was *held*, that the plaintiff was not a competent witness. *Ibid.*

47. The cross-examination of a witness must be confined to the subject-matter about which he was called to testify; if he be acquainted with other facts material to the issue, he may be recalled by the other party, who thereby makes him his own witness, and is subject to all the rules which govern his examination. *Floyd v. Bovard*, VI. 75.

48. If a witness be called and examined by the plaintiff, he may, at any subsequent stage of the trial, be called and examined by the defendant, as to any fact within his knowledge material to the defence, although he may be directly interested in defeating the plaintiff's recovery. *Ibid.*

49. The assignor of a chose-in-action is not a competent witness for the plaintiff in an action to recover the claim assigned. *Patterson v. Reed*, VII. 144.

50. One who becomes interested in the prosecution and recovery of a claim after suit brought, and divests himself of that interest before the trial of the cause, is a competent witness. *Orphans' Court v. Woodburn*, VII. 162.

51. If the act of an attorney be set up as a defence against the claim of his client, his contingent liability to his own client by reason of that act, is not sufficient to render him an incompetent witness. *Ibid.*

52. A nominal plaintiff on the record, who, before suit brought, transferred his claim to a third person, is not thereby made competent to testify as a witness, on the trial of the cause, on behalf of the plaintiff. *Reading Rail-road Co. v. Johnson*, VII. 317.

53. The vendor of chattels under whom both parties to an action of trover claim, is a competent witness for the defendant. *Miller v. Fitch*, VII. 366.

6. In an action of ejectment, one who has been in the possession of the land after suit brought, or during the existence of the plaintiff's title, is not a competent witness for the defendant. *Strawbridge v. Cartledge*, VII. 394.

55. A terre-tenant is incompetent to testify on the trial of an issue which may affect the estate which he occupies. *Kuester v. Keck* VIII. 16.

56. A creditor who assigns his claim a few months before the commencement of suit upon it, for the purpose of being a witness for the assignee, is incompetent. *Cochran v. M' Teague*, VIII. 272.

57. In a suit to recover the value of a trunk lost from a stage-coach, the plaintiff is competent to prove the contents of his trunk, and the value of the articles composing them. *Whitesell v. Crane*, VIII. 369.

58. As the credibility of a witness must be judged of by the jury.

WITNESS.

any evidence which tends to affect it is competent. *Mageham v Thompson*, IX. 54.

WORK AND LABOUR.

1. If a contract requires the performance of an entire work by one party, yet if the other party dispense with the performance of portions of it, the plaintiff may recover, in an action on the contract, the sum he is entitled to for the work actually done. *Wilhelm v. Caul*, II. 26.

2. An action upon a written contract to recover the price of certain labour and services performed, will not be defeated by proof that the plaintiff failed in some slight particulars in his performance, if it appear that he acted with a *bona fide* intention of fulfilling his whole contract, and the other contracting party received the fruit of his labour as performed. *Preston v. Finney*, II. 53.

WRIT OF ERROR.

NEW TRIAL, I.

WITNESS, 13.

1. An amendment at common law is not the subject of a writ of error. *Davis v. Church*, I. 240.

2. The death of a plaintiff before suit brought may be taken advantage of by a plea in abatement, or in bar; and if a judgment in such case be inadvertently rendered, it will be reversed on a writ of error *coram nobis*. *Hurst v. Fisher*, I. 438.

3 The suing out of a *feri facias*, and the collection of the costs upon a judgment in ejectment, is inconsistent with the prosecution of a writ of error by the same party, which, under such circumstances, will be dismissed on motion of the defendant in error. *Smith v. Jack*, II. 101.

4. Where a charge misleads the jury, by inducing them to believe there is but one point of defence, when there are two, and the part omitted the most uncertain, the cause will be remanded on writ of error. *Relf v. Rapp*, III. 21.

5. The reasons of the court below, or depositions there read, on a rule to show cause why an execution should not be set aside, on the ground that a conditional verdict rendered in the case had been complied with, cannot be inquired into by this court on a writ of error. *Moyer v. The Germantown Rail-road Company*, III. 91.

6. On a writ of error, the Supreme Court inquires judicially only into points raised by the record. *Drexel v. Man*, VI. 343.

YORK COUNTY.

An action upon a bond given by the commissioners of York county for the redemption of small notes may be removed from the jurisdiction of the Common Pleas of York county to that of Adams county, under the provisions of the Act of 6th June 1839.

A county commissioner is elected for three years, and until a successor be elected; and his official acts are binding upon the county although done after the lapse of three years, if his successor be not elected and sworn into office. *York County v. Small*, I. 315.

GENERAL TABLE OF CASES

IN THE

NINE VOLUMES OF WATTS AND SERGEANT'S REPORTS.

	Page
Abbott v. Lyon	IV. 38
Adams, Herring v.	V. 459
Adams v. Jackson	IV. 55
Adams, M'Donald v.	VII. 371
Adams v. Null	V. 363
Adams v. Williams	II. 227
Adams v. Seitzinger	I. 243
Aechternacht v. Watmough	VIII. 162
Agnew, Bredin v.	III. 300
Agnew, Brown v.	VI. 235
Agnew, Commonwealth v.	V. 275
Aitkin, Bond v.	VI. 165
Akin, Paden v.	VII. 456
Albert, Given v.	V. 333
Albertson, Bisbing v.	VI. 450
Albright, Hunter v.	V. 423
Alexander, Forrester v.	IV. 311
Alexander v. Hoffman	V. 382
Allard, Wynn v.	V. 524
Allen's Estate	I. 383
Allison v. Pennington	VII. 180
Altamus, Wilson v.	II. 255
American Fire Insurance Co., Pairo v.	VIII. 374
Anders, Zimmerman v.	VI. 218
Anderson v. Blakely	II. 237
Anderson v. Levan	I. 334
Ankeny, Robb v.	IV. 128
Anshutz, Walker v.	VI. 519
Anstatt, Poth v.	IV. 307
Anthony, Commonwealth v.	IV. 511
Antillo, Union Canal Co. v.	IV. 553
Archer v. Dunn	II. 327

(467)

Armstrong, Bentz v.....	VIII. 40
Armstrong's Appeal	V. 325
Arrott, Brown v.....	VI. 402
Ash v. Ashton.....	III. 510
Ashhurst v. Given.....	V. 323
Ashton, Ash v.....	III. 510
Aulenbaugh, Umbehauer v.....	III. 259
Avery, Post v.....	V. 509
Avery v. Seely.....	III. 494
Aycinena, Peries v.....	III. 64
Aycinena v. Peries	VI. 243
Ayres, Richards v.....	I. 485
Bailey v. Bowman.....	VI. 119
Bailey v. Stewart	III. 560
Baird's Appeal.....	III. 459
Baird v. Cahoon.....	V. 540
Baird v. Campbell.....	IV. 191
Baird, Elizabeth, Case of,	I. 288
Baker v. M'Dowell	III. 358
Baldwin v. Cash.....	VII. 425
Baldwin, Cash v.....	VII. 426
Baldwin v. Cash.....	VII. 427
Baldwin, Ellis v.....	I. 253
Baldwin, Nickle v.....	IV. 290
Baldy, Petriken v.....	VII. 429
Bullard, Towanda Bank v.....	VII. 435
Balliet, Northampton Bank v.....	VIII. 311
Balliot v. Bauman.....	V. 150
Bank v. Donaldson	VII. 407
Bank, Lumbermen's, Irvine v.....	II. 190
Bank, Lumbermen's, Lowry v.....	II. 210
Bank, Northern Liberties, v. Davis	VI. 285
Bank of Pennsylvania, Probst v.....	V. 379
Bank of Pennsylvania, Commonwealth v.....	III. 173
Bank of Pennsylvania, Commonwealth v.....	III. 184
Bank of Pennsylvania v. Reed.....	I. 101
Bank of United States, Dana v.....	V. 223
Bank of United States v. Lockhart	II. 443
Bank of United States v. Thayer.....	II. 445
Bank of Pittsburgh, Whitehead v.....	II. 173
Bannon, Brooke v.....	III. 382
Barber v. Bull	VII. 391
Barclay v. Iracy.....	V. 45
Baring v. Peirce.....	V. 548
Barnet v. School Directors.....	VI. 46
Barnet, Yohe v.....	III. 81
Barnett, Carlisle Bank v.....	III. 248
Barnitz v. Smith	I. 142
Barr v. Myers.....	III. 295
Barras, Ewing v.....	IV. 467
Barry, Seaton v.....	IV. 183

Bartlett, Gibbs v.....	II.	29
Baskin, Seechrist v.....	VII.	403
Bauman, Balliot v.....	V.	150
Bavington, Castor v.....	II.	505
Bayard, Duff v.....	IV.	240
Bayard, Inglis v.....	V.	465
Bayard v. Shunk.....	I.	92
Beale, Juniata Bank v.....	I.	227
Beale v. Patterson.....	III.	379
Bear v. Patterson.....	III.	233
Beaver, Lehr v.....	VIII.	102
Beaver, Robb v.....	VIII.	107
Beckley, Fidler v.....	II.	458
Rodell, Chambers v.....	II.	225
Boebe v. West Branch Bank.....	VII.	375
Beelin, Creigh v.....	I.	83
Beers v. West Branch Bank.....	VII.	365
Beirer, Morrison v.....	II.	81
Bell v. Hartley.....	IV.	32
Bell v. Murphy.....	VI.	50
Beltzhoover v. Waltman.....	I.	416
Bender v. Dietrick.....	VII.	284
Bender, Leeds v.....	VI.	315
Benedict v. Montgomery.....	VII.	238
Benner v. Phillips.....	IX.	13
Benjamin v. Benjamin.....	V.	562
Bentz v. Armstrong.....	VIII.	40
Berger, Dreisbach v.....	VI.	564
Berger, Ulrich v.....	IV.	19
Bertron, Stansbury v.....	VII.	362
Bevan v. Crooks.....	VII.	452
Bevan v. Insurance Co.....	IX.	187
Beyer v. Reesor.....	V.	501
Bias, Reed v.....	VIII.	189
Bigger, Wilson v.....	VII.	111
Bigler v. Karns.....	IV.	137
Billings, Fidler v.....	VI.	566
Bills, Monongahela Navigation Co. v.....	IV.	205
Bingham, Johnston v.....	IX.	56
Bingham v. Rogers.....	VI.	495
Bisbing v. Albertson.....	VI.	450
Bishop v. Reed.....	III.	261
Bishop's Appeal.....	VII.	251
Bitner, Shuey v.....	III.	274
Bitzer v. Shunk.....	I.	340
Bixler, Rice v.....	I.	445
Black's Appeal.....	II.	179
Blackmore v. Gregg.....	II.	182
Blackstone, Over v.....	VIII.	71
Blakely, Anderson v.....	II.	287
Blank v. German.....	V.	36
Bloom, Northumberland Co. v.....	III.	542

Boggs, Evans v.	II. 229
Boggs v. Lancaster Bank.....	VII. 331
Boggs v. Varner.....	VI. 469
Boker v. Hazard	VI. 227
Bollman v. Corbyn.....	IV. 342
Bolton v. Hamilton	II. 294
Bombaugh v. Robinson.....	I. 159
Bond v. Aitkin.....	VI. 165
Bonham, Susquehannah Canal Co. v.....	IX. 27
Bonnel v. Brotzman	III. 178
Boone, Porter v.	I. 251
Bosler v. Kuhn	VIII. 183
Botham, Wharton v.	III. 158
Bovard, Floyd v.	VI. 75
Bowen v. Bowen	VI. 504
Bower v. Tallman.....	V. 556
Bowes v. Seeger.....	VIII. 222
Bowman, Bailey v.	VI. 118
Boyce v. M'Culloch.....	III. 429
Boyd, Brown v.	IX. 123
Boyer v. Frick.....	IV. 357
Boyle v. Franklin Insurance Co.....	VII. 76
Bracken v. Miller.....	IV. 102
Braddee v. Brownfield.....	II. 271
Bradford County, Stephens v.	VII. 483
Brady, Quin v.	VIII. 139
Bratton v. Mitchell	I. 310
Bratton, Mitchell v.....	V. 451
Bratton v. Mitchell.....	VII. 259
Bream v. Spangler	I. 378
Bredin v. Agnew	III. 300
Breneman v. Franklin Beneficial Association.....	III. 218
Brenzer v. Wightman.....	VII. 264
Brick v. Coster	IV. 494
Brickenstein, Luckenbach v.....	V. 145
Bridenbach, Steel v.	VII. 150
Brien v. Smith.....	IX. 78
Brittain v. Doylestown Bank.....	V. 87
Britton, Ludwig v.....	III. 447
Brobst v. Bank of Pennsylvania.....	V. 379
Brooke v. Bannon	III. 382
Brookhart v. Small	VII. 229
Brooks, Defraunce v.	VIII. 67
Brotherton v. Livingston	III. 334
Brotzman, Bonnel v.....	III. 178
Brouse, Gackenbach v.....	IV. 546
Brower v. Osterhout.....	VII. 344
Brown v. Agnew	VI. 235
Brown v. Arrott.....	VI. 402
Brown v. Boyd	IX. 123
Brown, Ralph v.....	III. 395
Brown v. Street.....	VI. 221

Brownfield, Braddee v.II. 271
Bruner v. Sheik	IX. 119
Bruner's Appeal	VII. 289
Brunott v. M'Kee	VI. 513
Bryson v. Myers	I. 420
Bryson, Fitler v.	VI. 566
Buckholder v. Sigler	VII. 154
Buckley, Reed v.	V. 517
Buffington, Sharp v.II. 454
Bull, Barber v.	VII. 391
Bull v. Towson	IV. 557
Bumberger v. Clippinger	V. 311
Bunting v. Young	V. 188
Bunting's Appeal	IV. 469
Burbridge, Devall v.	IV. 305
Burbridge, Devall v.	VI. 529
Burkhart v. Parker	VI. 480
Burnside v. WeightmanII. 268
Burt, Larison v.	IV. 27
Bushey, Cronister v.	VII. 152
Butler v. Morgan	VIII. 53
Cahoon, Baird v.	V. 540
Caldcleugh v. Carey	V. 155
Caldcleugh v. Hollingsworth	VIII. 302
Caldwell v. Heitshu	IX. 51
Calhoun v. Hays	VIII. 127
Call v. Ward	IV. 118
Campbell, Baird v.	IV. 191
Campbell, Spencer v.	IX. 32
Canal Commissioners, Commonwealth v.	V. 388
Candor's Appeal	V. 513
Carey, Caldcleugh v.	V. 155
Carlisle, Hockenbury v.	I. 282
Carlisle, Hockenbury v.	V. 348
Carlisle Bank v. Barnett	III. 248
Carmalt, Post v.II. 270
Carman v. Franklin Fire Insurance Co.	VI. 155
Carney v. Wheatfield Township	IV. 215
Carroll v. Nixon	IV. 517
Carskadden v. M'Ghee	VII. 140
Carson, Collingwood v.II. 220
Carstairs, Lewis v.	V. 205
Cartledge, Strawbridge v.	VII. 394
Carver, M'Intyre v.II. 392
Case v. Cushman	III. 544
Cash, Baldwin v.	VII. 425
Cash v. Baldwin	VII. 426
Cash, Baldwin v.	VII. 427
Cassel v. Jones	VI. 552
Casselberry, Detwiler v.	V. 179
Cassiday v. M'Kenzie	IV. 282

Castor v. Bavington.....	II.	505
Caul, Wilhelm v.....	II	26
Cavett's Appeal.....	VIII.	21
Chadwick v. Moore.....	VIII.	49
Chadwick, Parke v.....	VIII.	96
Chamberlain v. M'Clurg.....	VIII.	81
Chambers v. Bedell.....	II.	225
Charnley v. Dulles.....	VIII.	353
Chenie, Hemphill v.....	VI.	62
Chew's Appeal.....	IX.	151
Chew's Case.....	VIII.	375
Chew v. Young.....	II.	107
Christ, Vandyke v.....	VII.	373
Christman v. Siegfried.....	V.	400
Christy v. Crawford.....	VIII.	99
Chronister v. Bushey.....	VII.	152
Church v. The College.....	III.	221
Church, Davis v.....	I.	240
Church, Dickinson College v.....	I.	462
Church v. Hampton.....	VI.	513
Church v. Riddle.....	VI.	509
Church, Tussey v.....	IV.	141
Church, Tassey v.....	IV.	346
Church, Tassey v.....	VI.	463
Church Road.....	V.	200
Clark v. Clark.....	VI.	85
Clark, Commonwealth v.....	VII.	127
Clark v. Everly.....	VIII.	226
Clark, Maffit v.....	VI.	258
Clark v. M'Comman.....	VII.	469
Clark, Myers v.....	III.	535
Clark v. Trinity Church.....	V.	266
Clarke, Keller v.....	VI.	534
Clarke, Wilson v.....	I.	554
Clauser's Estate.....	I.	208
Clay v. Irvine.....	IV.	232
Cleavinger v. Rymar.....	III.	480
Clippinger, Bumberger v.....	V.	311
Clippinger v. Hepbaugh.....	V.	315
Clyde, Fisher v.....	I.	544
Coates's Appeal.....	VII.	99
Cochran v. M'Teague.....	VIII.	272
Cochran v. Perry.....	VIII.	262
Cochran, Finney v.....	I.	112
Cochran v. O'Hern.....	IV.	95
Coffman v. Hampton.....	II.	377
Coleman, Johnston v.....	VIII.	69
Coleman v. Lukens.....	III.	37
College, The Church v.....	III.	221
Collier, Petriken v.....	VII.	392
Collingwood v. Carson.....	III.	220
Colt's Estate.....	IV.	314

Columbia Bank, &c., v. Haldeman.....	VII. 233
Comfort v. Mather.....	II. 450
Commercial Bank v. Wood.....	VII. 89
Commissioners of Monroe County, Commonwealth v.....	II. 495
Commissioners v. Reynolds.....	VII. 329
Commonwealth v. Agnew.....	V. 275
Commonwealth v. Anthony.....	IV. 511
Commonwealth v. Bank of Pennsylvania.....	III. 173
Commonwealth v. Bank of Pennsylvania.....	III. 184
Commonwealth v. Canal Commissioners.....	V. 388
Commonwealth v. Clark.....	VII. 127
Commonwealth v. Crommie.....	VIII. 339
Commonwealth v. Cuyler.....	V. 275
Commonwealth v. District Court.....	V. 272
Commonwealth, Felton v.....	VIII. 267
Commonwealth v. Flanagan.....	VII. 68
Commonwealth v. Flanagan.....	VII. 415
Commonwealth v. Forney.....	III. 353
Commonwealth, Foster v.....	VIII. 77
Commonwealth, Kirkner v.....	VI. 557
Commonwealth v. Laub.....	I. 261
Commonwealth v. Laub.....	III. 435
Commonwealth v. Lightner.....	IX. 117
Commonwealth v. Mann.....	V. 403
Commonwealth, M'Caraher v.....	V. 21
Commonwealth, Moore v.....	VI. 314
Commonwealth, Myers v.....	II. 60
Commonwealth, Mifflin v.....	V. 461
Commonwealth, Miller v.....	V. 488
Commonwealth v. Commissioners of Monroe County.....	II. 495
Commonwealth v. Parr.....	V. 345
Commonwealth v. Pike Beneficial Society.....	VIII. 247
Commonwealth, Pontius v.....	IV. 52
Commonwealth v. Primrose.....	II. 407
Commonwealth v. Rainey.....	IV. 186
Commonwealth v. Reitzel.....	IX. 109
Commonwealth, Sampson v.....	V. 385
Commonwealth v. Shaver.....	III. 338
Commonwealth v. Sheriff.....	VII. 108
Commonwealth, Speck v.....	III. 324
Commonwealth, Street v.....	VI. 209
Commonwealth v. Wilson.....	VII. 181
Commonwealth v. Zephon.....	VIII. 382
Connellologue v. English.....	VIII. 11
Cook, Geiger v.....	III. 266
Cook v. Nicholas.....	II. 27
Coons, Monongahela Navigation Co. v.....	VI. 101
Coover, M'Call v.....	IV. 151
Coover, Shouffler v.....	I. 400
Coovert, Mercer County v.....	VI. 70
Copeland, Glenn v.....	II. 261
Corbyn v. Bollman.....	IV. 342

Cornwell's Appeal	VII. 305
Coryell, Easton Bank v.	IX. 153
Coryell, Urket v.	V. 60
Coryell, Wasser v.	V. 60
Costenbader v. Shuman	III. 504
Coster, Brick v.	IV. 494
Coulson, Sample v.	IX. 62
Cowden, Pleasants v.	VII. 379
Cowden, Ross v.	VII. 376
Cowden v. West Branch Bank	VII. 433
Cowher v. M'Culloch	V. 427
Cox v. Livingston	II. 103
Cox, Livingston v.	VIII. 61
Craft, Payne v.	VII. 458
Craig v. Dale	I. 509
Craig, Smyth v.	III. 14
Crane, Whitesell v.	VIII. 369
Crangle, Borough of Harrisburg v.	III. 460
Cranmer v. Hall	IV. 36
Crawford, Christy v.	VIII. 99
Crawford, Kaufman v.	IX. 131
Creigh v. Beelin	I. 83
Creigh v. Shatto	IX. 82
Cremer's Estate	V. 331
Cresson, Miller v.	V. 284
Crommie, Commonwealth v.	VIII. 339
Cronister v. Cronister	I. 442
Crooks, Bevan v.	VII. 452
Cubbison v. M'Creary	II. 262
Culbert, Odell v.	IX. 66
Culbertson v. Duly	VII. 195
Cummings v. Cummings	V. 553
Cummings v. Klapp	V. 511
Cummings's Appeal	IX. 73
Cunningham v. Gardner	IV. 120
Cunningham, Orr v.	IV. 294
Curtis, Etter v.	VII. 170
Cushman, Case v.	III. 544
Custer v. Detteler	III. 28
Cuyler v. Commonwealth	V. 275
Dale, Craig v.	I. 509
Dale, Kennedy v.	IV. 176
Dallam v. Fidler	VI. 323
Dalzell v. Lynch	IV. 255
Dana v. Bank United States	V. 223
Darr, Egbert v.	III. 517
Darlington v. Speakman	IX. 181
Davenport v. Freeman	III. 557
David v. Moore	V. 230
Davis, Bank Northern Liberties v.	VI. 285
Davis v. Church	I. 240

Davis v. Dawes.....	IV. 401
Davis, Mayor v.....	VI. 269
Davis, Wilson v.....	V. 521
Davidson, Huston v.....	VIII. 181
Dawes, Davis v.....	IV. 401
Dawson v. Ryan.....	IV. 403
Dean v. New Milford Township.....	V. 545
Deckert v. Filbert.....	III. 454
Deckert's Appeal.....	V. 342
Defraunce v. Brooks.....	VIII. 67
Delaware and Schuylkill Canal, Morris v.....	IV. 461
Detterer, Custer v.....	III. 28
Detwiler, Mertz v.....	VIII. 376
Detwiler v. Casselberry.....	V. 179
Devall v. Burbridge.....	IV. 305
Devall v. Burbridge.....	VI. 529
Devinney v. Reynolds.....	I. 328
Devor v. M'Clintock.....	IX. 80
Dewey v. Dupuy.....	II. 553
Dewitt v. Eldred.....	IV. 414
Dice v. Sheffer.....	III. 419
Dickey, Dougherty v.....	IV. 146
Dickey, Kelso v.....	VII. 279
Dickey v. M'Cullough.....	II. 288
Dickinson College v. Church.....	I. 462
Dickinson v. Voorhees.....	VII. 353
Dietrich, Webb v.....	VII. 401
Dietrich, Bender v.....	VII. 284
District Court, Commonwealth v.....	V. 272
Dixon v. Ramage.....	II. 142
Dobson, Ridgely v.....	III. 118
Dock v. Hart.....	VII. 172
Dolph v. Ferris.....	VII. 367
Donaldson, Bank v.....	VII. 407
Donaldson v. Parker.....	II. 9
Donaldson, Parker v.....	VI. 132
Donner's Appeal.....	II. 372
Dougherty v. Dickey.....	IV. 146
Dougherty, Taylor v.....	I. 324
Dougherty's Estate.....	IX. 189
Doylestown Bank, Britain v.....	V. 87
Doylestown Bank, Jenks v.....	IV. 505
Dreisbach v. Berger.....	VI. 564
Drexel v. Man.....	VI. 343
Drexel v. Man.....	VI. 386
Drinker, Green v.....	VII. 440
Drum, Nesmith v.....	VIII. 9
Duff v. Bayard.....	IV. 240
Duffield v. Morris.....	VIII. 348
Duffy v. The Insurance Co.....	VIII. 413
Dulles, Charnley v.....	VIII. 353
Duly, Culbertson v.....	VII. 196

Dunkle, Parks v.....	III. 291
Dunn, Archer v.....	II. 327
Dunn, Jones v.....	III. 109
Dunn v. Ralyea.....	VI. 475
Dupuy, Dewey v.....	II. 553
Dyott's Appeal.....	II. 417
Dyott, T. W.'s, Estate.....	II. 463
Dyott, J. B. & C. W.'s, Estate.....	II. 557
Duncan v. M'Cumber.....	II. 264
Easton Bank v. Coryell.....	IX. 153
Ebenhard's Appeal.....	VIII. 327
Eberman v. Reitzel.....	I. 181
Ebner v. Goundie.....	V. 49
Eby's Case.....	IX. 145
Egbert v. Darr.....	III. 517
Ege v. Kauffman.....	I. 120
Egle, Snevily v.....	I. 480
Eichbaum v. Irons.....	VI. 67
Ekel, Snevily v.....	I. 203
Ekel v. Snevily.....	III. 272
Eldred, Dewitt v.....	IV. 414
Ellet v. Paxson.....	II. 418
Elliott v. Pearsoll.....	VIII. 36
Elliott's Appeal.....	III. 449
Ellis v. Baldwin.....	I. 253
Ellis, Pursel v.....	V. 525
Ellmaker v. Franklin Fire Insurance Co.....	VI. 439
Ely, Silvis v.....	III. 420
Endress, Sherk v.....	III. 255
English, Connellogue v.....	VIII. 11
Entriiken, Myers v.....	VI. 44
Erb v. Erb.....	IX. 147
Erie Bank, Frazier v.....	VIII. 18
Erwin v. Leibert.....	V. 103
Etter v. Curtis.....	VII. 170
Evans v. Boggs.....	II. 229
Evans, Haas v.....	V. 252
Evans v. Montgomery.....	IV. 218
Everly, Clark v.....	VIII. 226
Ewing v. Barras.....	IV. 467
Ex Parte Peneveyre.....	VI. 446
Eyre v. Marine Insurance Co.....	V. 116
Farley v. Ranck.....	III. 554
Farmers' Bank of Reading, Shorman v.....	V. 373
Farmers and Mechanics' Bank, Harper v.....	VII. 204
Farmers and Mechanics' Bank v. Little.....	VIII. 207
Farmers and Mechanics' Bank, Woodburn v.....	V. 447
Farr, Schuylkill Navigation Co. v.....	IV. 362
Featherstone, Jacobs v.....	VI. 346
Fechrer v. Rudy.....	VII. 183

Fegely, Heckert v.	VI. 189
Feigley v. Sponeberger.	V. 584
Felton v. Commonwealth.	VIII. 267
Fenlon, Monongahela Navigation Co. v.	IV. 205
Fenn, Hale v.	III. 361
Ferreira v. Sayres.	V. 210
Ferguson, Finney v.	III. 413
Fernsler v. Moyer.	III. 416
Ferris, Dolph v.	VII. 367
Ferris, Vaughn v.	II. 46
Fesler, Holman v.	VII. 313
Field, Lehigh Co. v.	VIII. 232
Filbert, Deckert v.	III. 454
Finney v. Cochran.	I. 112
Finney v. Ferguson.	III. 413
Finney, Preston v.	II. 53
Fisher v. Clyde.	I. 554
Fisher v. Herbell.	VII. 63
Fisher, Hurst v.	I. 438
Fisher v. Maitland.	V. 307
Fisher, M'Caffrey v.	IV. 181
Fisher, Seitzinger v.	I. 293
Fisher, Thompson v.	VI. 520
Fisher v. Worral.	V. 478
Fisk v. Sarber.	VI. 18
Fitch, Miller v.	VII. 366
Fitler, Beckley v.	II. 458
Fitler v. Billings.	VI. 566
Fitler v. Bryson.	VI. 566
Fitler, Dallam v.	VI. 323
Fitler v. Maitland.	V. 307
Fitler v. Patton.	VIII. 455
Fitler v. Shotwell.	VII. 14
Fitzimmons, Long v.	I. 530
Flanagan, Commonwealth v.	VII. 68
Flanagan, Commonwealth v.	VII. 415
Flavell's Case.	VIII. 197
Fleming v. Marine Insurance Co.	III. 144
Fleisher, Treaster v.	VII. 137
Flick v. Troxell.	VII. 65
Flickinger, Okeson v.	I. 257
Flinn v. M'Gonigle.	IX. 75
Floyd v. Bovard.	VI. 75
Follmer, Lazarus v.	IV. 9
Foltz, Grubb v.	IV. 548
Ford, Sergeant v.	II. 122
Foreman, M'Clure v.	V. 279
Foreman v. Schricon.	VIII. 43
Forney, Commonwealth v.	III. 353
Forrester v. Alexander.	IV. 311
Forster v. M'Divitt.	V. 359
Forayth, M'Call v.	IV. 179

Foster v. Commonwealth	VIII. 77
Foster v. Fox	IV. 92
Foster, Poe v.	IV. 351
Foster v. Rice	II. 58
Foulk v. M'Farlane	I. 297
Fournier v. Ingraham	VII. 27
Foust v. Ross	I. 501
Fox, Foster v.	IV. 92
Fox, Harper v.	VII. 142
Fox v. Heffner	I. 372
Fox v. Mensch	III. 444
Fox v. Northern Liberties	III. 103
Fox v. The Union Academy	VI. 353
Franklin, Reitzel v.	V. 33
Franklin Beneficial Association, Breneman v.	III. 218
Franklin Fire Insurance Co., Boyle v.	VII. 76
Franklin Fire Insurance Co., Carman v.	VI. 155
Franklin Fire Insurance Co., Ellmaker v.	VI. 439
Franklin Fire Insurance Co. v. West	VIII. 350
Franklin Fire Insurance Co., Stacey v.	II. 505
Frazier v. Erie Bank	VIII. 18
Frazier v. Thompson	II. 235
Freeman, Davenport v.	III. 557
Freeman, Voorhis v.	II. 116
Freeman, Williams v.	VII. 359
Fretz v. Heller	II. 397
Fretz's Appeal	IV. 433
Frick, Boyer v.	IV. 357
Frick v. Kitchen	IV. 30
Frick, Sayre v.	VII. 393
Frick v. Sterrett	IV. 269
Fricke, Green v.	VII. 171
Fritz, Jenks v.	VII. 201
Funk, Shover v.	V. 457
Funstone, Strawbridge v.	I. 517
Fursht v. Overdeer	III. 470
Gable, Rutter v.	I. 108
Gackenbach v. Brouse	IV. 546
Gamber v. Wolaver	I. 60
Gardner's Appeal	VII. 295
Gardner, Cunningham v.	IV. 120
Gardner v. Klinefelter	IX. 59
Gardner, Leshey v.	III. 314
Garrett, Lusk v.	VI. 89
Garrison, Shuler v.	V. 455
Gasche v. Peterman	III. 351
Gaskell v. Morris	VII. 32
Geiger v. Cook	III. 266
Geiger, Hise v.	VII. 273
German, Blank v.	V. 36
Germantown Rail Road, Moyer v.	III. 91

Gibbs v. Bartlett	II. 29
Gibbs, Newell v.	I. 496
Giffen v. St. Clair Township.....	IV. 327
Gilchrist v. Rogers	VI. 488
Gilinger v. Kulp	V. 264
Gilkeson v. Snyder	VIII. 200
Gilkyson v. Larue.....	VI. 213
Gillis v. M'Kinney.....	VI. 78
Gilmore, Shafner v.....	III. 438
Girard Bank v. Schuylkill Bank	VIII. 242
Given v. Albert	V. 333
Given, Ashhurst v.	V. 323
Glenn v. Copeland.....	II. 261
Good v. Good	III. 472
Good v. Herr	VII. 253
Good, Pugh v.....	III. 56
Good, Woodman v.....	VI. 169
Goodman v. Losey.....	III. 526
Gordon v. Hutchinson.....	I. 285
Gorman, Mechanics' Bank v.....	VIII. 304
Goundie, Ebner v.	V. 49
Gowen v. Philadelphia Exchange Co.....	V. 141
Gower, Sterner v.	III. 136
Graffius v. Tottenham	I. 488
Graham, Hay v.....	VIII. 27
Grandom's Estate.....	V. 37
Gray v. Monongahela Navigation Co.....	II. 156
Gray v. Packer.....	IV. 17
Gray v. Van Amringe	II. 128
Greaves, Nesbit v.....	VI. 120
Green's Appeal	VI. 327
Green v. Drinker.....	VII. 440
Green v. Fricker	VII. 171
Green v. Howell	VI. 203
Green Township, Case of	IX. 22
Gregg, Blackmore v.	II. 182
Gregg v. Patterson	IX. 197
Grishobber, M'Cullough v.	IV. 201
Groff, Hersch v.	II. 449
Gross, Stroop v.....	I. 139
Grubb v. Foltz.....	IV. 548
Gundrim, Jones v.....	III. 531
Haas v. Evans	V. 252
Haas, Weeks v.....	III. 520
Hadley v. Snevily.....	I. 477
Hagner v. Heyberger.....	VII. 104
Haldeman, Columbia Bank, &c., v.....	VII. 233
Haldeman v. Michael.....	VI. 128
Hale v. Fenn	III. 361
Hale, Weir v.....	III. 285
Haley v. Prosser.....	VIII. 33

Hall, Cranmer v.....	IV.	36
Hall, Law v.....	II.	121, 135
Hall, Lowry v.	II.	129
Hall v. Matthias.....	IV.	331
Hamilton, Bolton v.....	II.	294
Hamilton, Hellings v.....	IV.	562
Hamilton v. Moore.	IV.	570
Hamot, Spires v.....	VIII.	17
Hampton, Church v.....	VI.	513
Hampton, Coffman v.	II.	377
Hankin's Estate	IV.	306
Hanna, Maris v.....	IV.	348
Hannah v. Swarner.....	III.	223
Harper v. Fox	VII.	142
Harper v. Farmers and Mechanics' Bank.....	VII.	204
Harper v. M'Keehan	III.	238
Harris v. Ligget	I.	301
Harris, Van Swearingen v.....	I.	356
Harris, Schuylkill Navigation Co. v.....	V.	28
Harrisburg Bank v. Tyler.....	III.	373
Harrisburg, Borough of, v. Crangle	III.	460
Hart, Dock v.....	VII.	172
Hart, Johnson v.....	VI.	319
Hartley, Bell v.....	IV.	32
Hastings v. Wagner.....	VII.	215
Hauberger v. Root.....	VI.	431
Hauer's Appeal	V.	473
Haughey, Strickler v.....	II.	411
Haverstock v. Sarbach.....	I.	390
Hay v. Graham	VIII.	27
Hay v. Kramer.....	II.	137
Haydock v. Tracy.....	III.	507
Hays, Calhoun v.....	VIII.	127
Hazard, Boker v.....	VI.	227
Hazleton Coal Co., M'Gargell v.	IV.	424
Hazleton Coal Co., M'Gargell v.	VIII.	342
Heald, Langley v.....	VII.	96
Heckert v. Fegely	VI.	139
Heffner, Fox v.....	I.	372
Heist, Norman v.	V.	171
Heitshu, Caldwell v.....	IX.	51
Heller, Fretz v.....	II.	397
Hellertown Road.....	V.	202
Hellings v. Hamilton.....	IV.	462
Hellings, Phillips v.	V.	44
Hemler, Miller v.....	V.	486
Hemphill v. Chenie.....	VI.	62
Hemphill v. Hurford	III.	216
Hemphill v. Tevis	IV.	534
Henderson, M'Kennan v.....	V.	370
Henman, Owen v.	I.	548
Hennessy v. Western Bank.....	VI.	300

Henry v. Pittsburgh and Alleghany Bridge Co.....	VIII. 85
Hepbaugh v. Clippinger.....	V. 315
Herbell, Fisher v.....	VII. 63
Herring v. Adams	V. 459
Herr, Good v.....	VII. 253
Herr's Appeal.....	V. 494
Hersch v. Groff.....	II. 449
Hess, Stroh v.....	I. 147
Hesser v. Steiner.....	V. 476
Hester's Case	II. 416
Heyberger, Hagner v.	VII. 104
Hibler v. Hoag.....	I. 552
Hiester v. Laird	I. 245
Hiester v. Maderia.....	III. 384
Hill v. Humphreys.....	V. 123
Hill, Kinley v.....	IV. 426
Hill, Rank v.....	II. 56
Hill v. Roderick.....	IV. 221
Hilyard's Estate.....	V. 30
Himebaugh, M'Call v.....	IV. 164
Himes v. Keller.....	III. 401
Hise v. Geiger	VII. 273
Hitchcock v. Long	II. 169
Hoag, Hibler v.	I. 552
Hoatz v. Patterson.....	V. 537
Hockenbury v. Carlisle.....	I. 282
Hockenbury v. Carlisle.....	V. 348
Hockenbury v. Snyder	II. 240
Hocker v. Jamison	II. 438
Hodgdon v. Naglee	V. 217
Hoffman, Alexander v.....	V. 382
Hoffman v. Kissinger.....	I. 277
Hoffman v. Slossan.....	II. 36
Hollingsworth, Caldcleugh v.....	VIII. 302
Holman v. Fesler.....	VII. 313
Homman, Ingle v.....	I. 414
Hoover, Karmane v.	III. 253
Hopkins v. Rail-road Co.	III. 410
Hopkins v. Stockton	II. 163
Hopkins, White v.	III. 99
Hopper, Thompson v.....	I. 467
Horbach v. Knox	VIII. 30
Houser v. Irvine	III. 345
Houston, Kirkpatrick v.....	IV. 115
Houtz, Zeigler v.	I. 533
Howell, Green v.....	VI. 203
Howell, Koch v.....	VI. 350
Huffnagle, Shoemaker v.....	IV. 437
Hugg, Huling v.	I. 418
Hughes, Stevens v.....	III. 465
Huling v. Hugg	I. 418
Huling v. The Overseers.....	III. 367

Hulme, Taylor v.	IV. 407
Humphreys, Hill v.	V. 123
Hunt, M'Fadden v.	V. 468
Hunter v. Albright.	V. 423
Huntingdon County, Commissioners of, Wilson v.	VII. 197
Huntzinger, Ludwick v.	V. 51
Hurford, Hemphill v.	III. 216
Hurst v. Fisher.	I. 438
Huston v. Davidson.	VIII. 181
Huston v. Wickersham.	II. 308
Hutchinson, Gordon v.	I. 285
Hutchinson, M'Coy v.	VIII. 66
Hyde, Musser v.	II. 314
Ickes v. Smith.	I. 139
Iddings v. Nagle.	II. 22
Ihmsen, Spoul v.	VI. 525
Ingersoll, Park v.	II. 141
Ingle v. Homman.	I. 414
Inglis, Bayard v.	V. 465
Ingraham, Fournier v.	VII. 27
Insurance Co., Duffy v.	VIII. 413
Insurance Co. v. Seitz.	IV. 273
Insurance Co., Bevan v.	IX. 187
Irons, Eichbaum v.	VI. 67
Irvine, Clay v.	IV. 232
Irvine, Houser v.	III. 345
Irvine v. Lumbermen's Bank.	II. 190
Irwin v. Shoemaker.	VIII. 75
Jack, Smith v.	II. 101
Jackman v. Ringland.	IV. 149
Jackson, Adams v.	IV. 55
Jackson, Keppel v.	III. 320
Jackson v. Knight.	IV. 412
Jackson v. Wilson.	VII. 249
Jacobs v. Featherstone.	VI. 346
James v. Letzler.	VIII. 192
James, School Directors v.	II. 568
James, Thomas v.	VII. 381
Jamison, Hocker v.	II. 438
Jamison v. M'Credy.	V. 129
Janney, Jones v.	VIII. 436
Jarrett v. Tomlinson.	III. 114
Jefferson County, Robinson v.	VI. 16
Jenks v. Doylestown Bank.	IV. 505
Jenks v. Fritz.	VII. 201
Johnson v. Hart.	VI. 319
Johnson, Jones v.	III. 276
Johnson v. Lines.	VI. 80
Johnson, Reading Rail-road Co. v.	VII. 317
Johnson v. Turner.	IV. 465

Johnston v. Bingham.....	IX.	56
Johnston v. Coleman.....	VIII.	69
Johnston's Estate.....	IX.	107
Johnston, Presbyterian Congregation v.....	I.	9
Johnston, Snevely v.....	I.	307
Jones's Appeal.....	VIII.	143
Jones, Cassel v.....	VI.	552
Jones v. Dunn.....	III.	109
Jones v. Gundrim.....	III.	531
Jones v. Janney.....	VIII.	436
Jones v. Johnson.....	III.	276
Jones, Lehman v.....	I.	126
Jones v. Lewis.....	VIII.	14
Jones v. Murphy.....	VIII.	275
Jones v. Patterson.....	I.	321
Jones v. Shawhan.....	IV.	257
Jones, Smull v.....	I.	128
Jones, Smull v.....	VI.	122
Jones v. Wardell.....	VI.	398
Juniata Bank v. Beale.....	I.	227
Juniata Bank, Patterson v.....	IV.	42
Karmane v. Hooper.....	III.	253
Karns, Bigler v.....	IV.	137
Katz, Timbers v.....	VI.	290
Kauffelt, Leber v.....	V.	440
Kauffelt v. Leber.....	IX.	93
Kauffman, Ege v.....	I.	120
Kaufman v. Crawford.....	IX.	131
Keck, Kuester v.....	VIII.	16
Keever, Moddewel v.....	VIII.	63
Keim v. Rush.....	V.	377
Keller v. Clarke.....	VI.	584
Keller, Himes v.....	III.	401
Kelly, Pentland v.....	VI.	483
Kelly Township v. Union Township.....	V.	535
Kelso v. Dickey.....	VII.	279
Kelso, Sott v.....	IV.	278
Kennedy v. Dale.....	IV.	176
Kennedy, Loy v.....	I.	396
Kenower, Stewart v.....	VII.	288
Kenrick v. Smick.....	VII.	42
Keppel v. Jackson.....	III.	320
Kester v. Rockel.....	II.	365
Killam v. Preston.....	IV.	14
King v. King.....	I.	205
Kingsbury v. Ledyard.....	II.	37
Kinley v. Hill.....	IV.	426
Kindt, Rohr v.....	III.	563
Kirkner v. Commonwealth.....	VI.	557
Kirkpatrick v. Houston.....	IV.	115
Kirkpatrick v. Mathiot.....	IV.	251

Kirkpatrick, Muirhead v.	V. 506
Kissinger, Hoffman v.	I. 277
Kitchen, Frick v.	IV. 30
Klapp, Cummings v.	V. 511
Klapp, Kleckner v.	II. 44
Klapp v. Kleckner	III. 519
Kleckner v. Klapp	II. 44
Kleckner, Klapp v.	III. 519
Kleckner, Lehigh County v.	V. 181
Klinefelter, Gardner v.	IX. 59
Klinger, Rose v.	VIII. 178
Knight, Jackson v.	IV. 412
Knight v. Pugh	IV. 445
Knox, Horbach v.	VIII. 30
Koch v. Howell	VI. 350
Kocher, Saylor v.	III. 163
Koons v. Miller	III. 271
Kopp, Stitzell v.	IX. 29
Kornhaus, May v.	IX. 121
Kraemer, Unangst v.	VIII. 391
Kramer, Hay v.	II. 127
Kramer v. M'Dowell	VIII. 138
Kramer v. Sandford	IV. 328
Kronk v. Kronk	IV. 127
Kuester v. Keck	VIII. 16
Kuhn, Bosler v.	VIII. 183
Kulp, Gilinger v.	V. 264
Laird, Hiester v.	I. 245
Lamb v. Lindsey	IV. 449
Lamberton, M'Kee v.	II. 107
Lancaster Bank, Boggs v.	VII. 331
Lancaster County, Parker v.	I. 460
Lancaster County v. Roberts	V. 505
Landman, Williams v.	VIII. 55
Langley v. Heald	VII. 96
Larimer, M'Call v.	II. 107
Larimer v. M'Call	IV. 133
Larison v. Burt	IV. 27
Larue, Gilkyson v.	VI. 213
Laub, Commonwealth v.	I. 261
Laub, Commonwealth v.	III. 435
Law v. Hall and M'Kelvey	II. 121, 135
Law v. Patterson	I. 184
Lawrence, Phillips v.	VI. 150
Layng v. Stewart	I. 222
Lazarus v. Follmer	IV. 5
Leber v. Kauffelt	V. 440
Leber, Kauffelt v.	IX. 93
Ledyard, Kingsbury v.	II. 37
Lee, Thompson v.	III. 479
Lee, Ogilsby v.	VII. 444

Leebrick v. Lyter.....	III.	365
Leedom v. Plymouth Rail-road Co.....	V.	265
Leeds v. Bender.....	VI.	315
Lehigh County v. Field.....	VIII.	232
Lehigh County v. Kleckner.....	V.	181
Lehigh Coal Co. v. Northampton County.....	VIII.	334
Lehman v. Jones.....	I.	126
Lehman v. Thomas.....	V.	262
Lehr v. Beaver.....	VIII.	102
Leidich v. Leidich.....	VIII.	363
Leidig, Miller v.....	III.	456
Leibert, Erwin v.....	V.	103
Leinaweaver v. Stoever.....	I.	160
Leiper v. Peirce.....	VI.	555
Leonard v. Leonard.....	I.	342
Leonard, Ludwig v.....	IX.	44
Leshey v. Gardner.....	III.	314
Letzler, James v.....	VIII.	192
Levan, Anderson v.....	I.	334
Levering v. Philadelphia, Germantown and Norristown Rail-road, VIII.		459
Levering, Rittenhouse v.....	VI.	190
Levers v. Van Buskirk.....	VII.	70
Lewis v. Carstairs.....	V.	205
Lewis, Jones v.....	VIII.	14
Lewis v. Lewis.....	IV.	378
Lewis v. Lewis.....	II.	455
Lewis, Overdeer v.....	I.	90
Lewistown Borough, Wilson v.....	I.	428
Libhart v. Wood.....	I.	265
Ligget, Harris v.....	I.	301
Lightner, Commonwealth v.....	IX.	117
Lightner v. Will.....	II.	141
Lilley v. Torbet.....	VIII.	89
Lindsay, M'Clelland v.....	I.	360
Lindsey, Lamb v.....	IV.	449
Lines, Johnson v.....	VI.	80
Little, Farmers and Mechanics' Bank v.....	VIII.	207
Livezey, Withers v.....	I.	433
Livingston, Brotherton v.....	III.	334
Livingston v. Cox.....	VIII.	61
Livingston, Cox v.....	II.	103
Lockhart, Bank United States v.....	II.	443
Logan v. Mason.....	VI.	9
Long v. Fitzimmons.....	I.	530
Long, Utt v.....	VI.	174
Losey, Goodman v.....	III.	526
Lothrop, Magaw v.....	IV.	316
Louden v. Tiffany.....	V.	367
Lowber and Wilmer's Appeal.....	VIII.	387
Lowman's Appeal.....	III.	349
Lowrey v. Tracey.....	VI.	493
Lowrie, Parke v.....	VI.	507

Lowry v. Hall.....	II. 129
Lowry v. Lumbermen's Bank.....	II. 210
Loy v. Kennedy.....	I. 396
Loyd, Union Canal Co. v.....	IV. 393
Luckenbach v. Brickenstein.....	V. 145
Ludwick v. Huntzinger.....	V. 51
Ludwig v. Britton.....	III. 447
Ludwig v. Leonard.....	IX. 44
Ludwig v. Meyre.....	V. 435
Lukens's Appeal.....	VII. 48
Lukens, Coleman v.....	III. 37
Lumbermen's Bank, Irvine v.....	II. 190
Lumbermen's Bank, Lowry v.....	II. 210
Lusk v. Garrett.....	VI. 89
Lyle, Thompson v.....	III. 166
Lynch, Dalzell v.....	IV. 255
Lynch, O'Donnell v.....	I. 283
Lyon, Abbott v.....	IV. 38
Lyon, Shoenberger v.....	VII. 184
Lyter, Leebrick v.....	III. 365
Macalester, Schuylkill Bank v.....	VI. 147
Mackey, Stuck v.....	IV. 196
Maclay, Reichly v.....	II. 59
Maderia, Hiester v.....	III. 384
Maffit v. Clark.....	VI. 258
Mugaw v. Lothrop.....	IV. 316
Magehan v. Thompson.....	IX. 54
Maitland, Fitler v.....	V. 307
Man, Drexel v.....	VI. 343
Man, Drexel v.....	VI. 386
Manifold's Estate.....	V. 340
Mann, Commonwealth v.....	V. 403
Manufacturers and Mechanics' Bank v. Bank of Pennsylvania..	VII. 335
Marine Insurance Co., Eyre v.....	V. 116
Marine Insurance Co., Fleming v.....	III. 144
Maris v. Hanna.....	IV. 348
Markley v. Swartzlander.....	VIII. 172
Martin's Appeal.....	V. 220
Martin v. Schoenberger.....	VIII. 367
Mason, Logan v.....	VI. 9
Mason v. Wickersham.....	IV. 100
Mather, Comfort v.....	II. 450
Mathias, Hall v.....	IV. 331
Mathiot, Kirkpatrick v.....	IV. 251
Matlack's Appeal.....	VII. 79
Maule v. Pleiss.....	VI. 331
Maurer v. Mitchell.....	IX. 69
May v. Kornhaus.....	IX. 121
Mayor v. Randolph.....	IV. 514
Mayor, Davis v.....	VI. 268
McAdam v. Orr.....	IV. 550

M'Anulty, Turnpike Co. v.....	IV. 293
M'Bride v. M'Clelland.....	VI. 94
M'Cabe v. Morehead.....	I. 513
M'Caffrey v. Fisher.....	IV. 181
M'Call v. Coover.....	IV. 151
M'Call v. Forsyth.....	IV. 179
M'Call v. Himebaugh.....	IV. 164
M'Call v. Larimer.....	II. 107
M'Call, Larimer v.	IV. 133
M'Call v. Yople.....	IV. 168
M'Callmont, Nixon v.	VI. 159
M'Caraher v. Commonwealth.....	V. 21
M'Chesney, Speer v.....	II. 233
M'Cleary's Appeal.....	I. 299
M'Cleary v. Sankey.....	IV. 113
M'Clelland v. Lindsay.....	I. 360
M'Clelland, M'Bride v.	VI. 94
M'Clelland v. Slingluff.....	VII. 134
M'Clintock, Noble v.....	II. 152
M'Clintock, Noble v.....	VI. 58
M'Clintock, Devor v.....	IX. 80
M'Clure v. Foreman.....	IV. 279
M'Clure, Young v.	II. 147
M'Clurg, Chamberlain v.	VIII. 31
M'Combs v. M'Kennan.....	II. 216
M'Comman, Clark v.	VII. 469
M'Cormick, Singer v.	IV. 265
M'Coy v. Hutchinson.....	VIII. 66
M'Coy, Michew v.	III. 501
M'Coy v. Michew.....	VII. 386
M'Coy, Speise v.	VI. 485
M'Creary, Cubbison v.	II. 262
M'Credy, Jamison v.	V. 129
M'Culloch, Boyce v.	III. 429
M'Culloch v. Cowher.....	V. 427
M'Cullough, Dickey v.	II. 88
M'Cullough v. Grishobber.....	IV. 201
M'Cullough v. Porter.....	IV. 177
M'Cumber, Duncan v.....	II. 264
M'Curdy's Appeal.....	V. 397
M'Dermott's Appeal.....	VIII. 251
M'Divit, Forster v.	V. 359
M'Donald v. Adams.....	VII. 371
M'Dowell, Baker v.	III. 358
M'Dowell, Kramer v.	VIII. 138
Meanor v. M'Kowan.....	IV. 302
Means v. Presbyterian Church.....	III. 303
Mechanics' Bank v. Gorman.....	VIII. 304
Megargell v. Hazleton Coal Co.....	VIII. 342
Mehaffey, M'Kinney v.....	VII. 276
Mehaffey's Appeal.....	VII. 200
M'Elroy's Case.....	VI. 451

M'Elroy, Montgomery v.....	III.	370
Menges v. Oyster	IV.	20
Menough's Appeal	V.	432
Mensch, Fox v.	III.	444
Mercer County v. Coovert.....	VI.	70
Merrick's Estate	VIII.	402
Merrick's Estate	V.	9
Mertz's Case	VIII.	374
Mertz v. Detwiler	VIII.	376
Metzgar, Stover v.	I.	269
Meyre, Ludwig v.	V.	435
M'Fadden v. Hunt.....	V.	468
M'Farlane, Foulk v.....	I.	297
M'Gargell v. The Hazleton Coal Co.	IV.	424
M'Ghee, Carskadden v.	VII.	140
M'Ginnis v. Noble	VII.	454
M'Ginnis, Porter v. ...	VI.	502
M'Gonigle, Flinn v.....	IX.	75
M'Grew, Smith v.	IV.	338
M'Gregor, Pattison v.	IX.	180
M'Guire, Sage v.....	IV.	228
Michael, Siltzell v.	III.	329
Michael, Haldeman v.....	VI.	128
Michew, M'Coy v.	VII.	386
Michew v. M'Coy	III.	501
Mifflin v. Commonwealth	V.	461
Miles v. Miles	VIII.	135
Miller, Bracken v.	IV.	102
Miller v. Commonwealth.....	V.	488
Miller v. Cresson	V.	284
Miller v. Fitch	VII.	366
Miller v. Hemler.....	V.	486
Miller, Koons v.	III.	271
Miller v. Leidig	III.	456
Miller v. Pearce	VI.	97
Miller, Roland v.	III.	390
M'Intyre, Carver v.....	II.	392
Mitchell, Bratton v.	VII.	259
Mitchell, Bratton v.	I.	310
Mitchell v. Bratton	V.	451
Mitchell, Maurer v.	IX.	69
Mitchell, M'Kinney v.....	IV.	25
Mitchell v. Willock.....	II.	253
M'Kee, Brunott v.....	VI.	513
M'Kee v. Lamberton	II.	107
M'Keehan, Harper v.....	III.	238
M'Keehan, Pierce v.	III.	280
M'Kelvey v. Truby.....	IV.	323
M'Kelvy, Law v.	II.	121, 135
M'Kennon v. Henderson.....	V.	370
M'Kennon, M'Combs v.	II.	216
M'Kenzie, Cassidy v	IV.	282

M'Kinney, Gillis v.....	VI. 78
M'Kinney v. Mehaffey.....	VII. 276
M'Kinney v. Mitchell.....	IV. 25
M'Knight, Sill v.	VII. 244
M'Kowan, Meanor v.	IV. 302
M'Millan v. Red.....	IV. 237
M'Minn, Stewart v.....	V. 100
M'Veytown v. Union Township.....	V. 434
Moddewel v. Keever.....	VIII. 63
Mode's Appeal.....	VI. 280
Monongahela Navigation Co. v. Bills.....	IV. 205
Monongahela Navigation Co. v. Coons.....	VI. 101
Monongahela Navigation Co. v. Fenlon.....	IV. 205
Monongahela Navigation Co., Gray v.....	II. 156
Monroe County Commissioners, Commonwealth v.....	II. 495
Montgomery, Evans v.....	IV. 218
Montgomery, Benedict v.....	VII. 238
Montgomery v. M'Elroy.....	III. 370
Montgomery v. St. Stephen's Church.....	IV. 542
Moody, Morgan v.....	VI. 333
Moon, Overseers of, Overseers of St. Clair v.....	VI. 522
Moore's Appeal.....	VII. 298
Moore, Chadwick v.....	VIII. 49
Moore v. Commonwealth.....	VI. 314
Moore, David v.....	II. 230
Moore, Hamilton v.....	IV. 570
Moore v. Pearson.....	VI. 51
Moore v. Somerset.....	VI. 262
Moorehead v. West Branch Bank.....	III. 550
Moorehead v. West Branch Bank.....	V. 542
Morehead, M'Cabe v.....	I. 513
Morgan, Butler v.....	VIII. 53
Morgan v. Moody.....	VI. 333
Morris v. Delaware and Schuylkill Canal.....	IV. 461
Morris, Duffield v.....	VIII. 348
Morris, Gaskell v.....	VII. 32
Morrison's Case.....	IX. 116
Morrison v. Beirer.....	II. 81
Morrison v. Morrison.....	VI. 516
Morrison, Reid v.....	II. 401
Moss v. Sheldon.....	III. 160
Moyer, Fernsler v.....	III. 416
Moyer v. Germantown Rail-road.....	III. 91
M'Teague, Cochran v.....	VIII. 272
Muirhead v. Kirkpatrick.....	V. 506
Mullock v. Souder.....	V. 198
Mumper's Appeal.....	III. 441
Murphy's Appeal.....	VI. 223
Murphy's Appeal.....	VIII. 165
Murphy, Bell v.....	VI. 50
Murphy, Jones v.....	VIII. 275
Murphy v. Richards.....	V. 279

Musser v Hyde.....	II.	314
M'Williams, Payran v.....	IX.	154
Myers, Barr v.....	III.	295
Myers, Bryson v.....	I.	420
Myers v. Clark.....	III.	535
Myers v. Commonwealth.....	II.	60
Myers v. Entriiken.....	VI.	44
Mytinger v. Springer.....	III.	405
Nagle v. Iddings.....	II.	22
Naglee, Hodgdon v.....	V.	217
Nathans, Pott v.....	I.	155
Neff's Appeal.....	IX.	36
Neile, Plummer v.....	VI.	91
Nesbit v. Greaves.....	VI.	120
Nesbit, Wolfe v.....	IV.	312
Nesmith v. Drum.....	VIII.	9
Newell v. Gibbs.....	I.	496
New Milford Township, Dean v.....	V.	545
Nicholas, Cook v.....	II.	27
Nickle v. Baldwin.....	IV.	290
Nieman v. Ward.....	I.	68
Nixon, Carroll v.....	IV.	517
Nixon v. M'Callmont.....	VI.	159
Noble v. M'Clintock.....	VI.	58
Noble v. M'Clintock.....	II.	152
Noble, M'Ginnis v.....	VII.	454
Norman v. Heist.....	V.	171
Northampton Bank v. Balliet.....	VIII.	311
Northampton Bank, Selfridge v.....	VIII.	320
Northampton County, Lehigh Coal, &c., Co. v.....	VIII.	334
Northern Liberties, Fox v.....	III.	103
Northumberland County v. Bloom.....	III.	542
Null, Adams v.....	V.	363
Nyce's Estate.....	V.	254
O'Conner v. Warner.....	IV.	223
Odell v. Culbert.....	IX.	66
Odenheimer v. Stokes.....	V.	175
O'Donnel v. Lynch.....	I.	283
Ogilsby v. Lee.....	VII.	444
O'Hern, Cochran v.....	IV.	95
Okeson v. Shirlock.....	IX.	142
Okeson v. Silverthorn.....	VII.	246
Okie's Appeal.....	IX.	156
Okison v. Flickinger.....	I.	257
Okison v. Patterson.....	I.	395
Olwine's Appeal.....	IV.	492
Olwine, Rinehart v.....	V.	157
O'Neal v. O'Neal.....	IV.	130
Opie v. Serrill.....	VI.	264
Orphars' Court v. Woodburn.....	VII.	162

Orr v. Cunningham.....	IV. 294
Orr, M'Adam v.....	IV. 550
Osterhout, Brower v.....	VII. 344
Ottenkirk, Pugh v.	III. 170
Over v. Blackstone.....	VIII. 71
Overdeer, Fursht v.....	III. 470
Overdeer v. Lewis	I. 90
Overseers of Beaver, Overseers of Washington v.....	III. 548
Overseers, Huling v.	III. 367
Overseers of Lewisburgh v. Overseers of Augusta	II. 65
Overseers of Washington v. Overseers of Beaver	III. 548
Owen v. Henman.....	I. 548
Oyster, Menges v.....	IV. 20
Packer, Gray v.	IV. 17
Paden v. Akin	VII. 456
Pairo v. American Fire Insurance Co.....	VIII. 374
Pancoast's Appeal.....	VIII. 351
Park v. Ingersoll	II. 140
Parke v. Chadwick	VIII. 96
Parke v. Lowrie	VI. 507
Parke v. Smith	IV. 287
Parke, Vaux v.	VII. 19
Parker's Appeal.....	VIII. 449
Parker, Burkhart v.....	VI. 480
Parker v. Donaldson	II. 9
Parker v. Donaldson	VI. 132
Parker v. Lancaster County.....	I. 460
Parks v. Dunkle	III. 291
Parr, Commonwealth v.....	V. 345
Parsons, Swires v.....	V. 357
Patterson, Beale v.....	III. 379
Patterson, Bear v.	III. 233
Patterson's Estate	I. 291
Patterson, Gregg v.....	IX. 197
Patterson, Hoatz v.	V. 537
Patterson, Jones v.....	I. 321
Patterson v. Juniata Bank.....	IV. 43
Patterson, Law v.....	I. 184
Patterson, Okison v.....	I. 395
Patterson v. Poindexter	VI. 227
Patterson v. Reed.....	VII. 144
Patterson v. Stewart	VI. 527
Pattison v. M'Gregor.....	IX. 180
Pattison v. Stewart	VI. 72
Patton, Fitler v.	VIII. 455
Paul v. Whitman.....	III. 407
Pawling, Penrose v.	VIII. 379
Paxson, Ellet v.	II. 418
Payne v. Craft	VII. 458
Payran v. M'Williams.....	IX. 154
Pearce, Miller v.	VI. 97

Pearson, Moore v.	VI. 51
Pearsoll, Elliott v.	VIII. 36
Peirce, Baring v.	V. 548
Peirce, Leiper v.	VI. 555
Pennington, Allison v.	VII. 180
Pennock, Pyle v.	II. 390
Pennock v. Swayne.	VI. 239
Pennsylvania Hospital v. Stewardson	III. 93
Pennsylvania Bank, Manufacturers and Mechanics' Bank v.	VII. 335
Penrose v. Pawling.	VIII. 379
Pentland v. Kelly.	VI. 483
Peries v. Aycinena.	III. 64
Peries, Aycinena v.	VI. 243
Perrine, Susquehanna Insurance Co. v.	VII. 348
Perry, Cochran v.	VIII. 262
Peterman, Gasche v.	III. 351
Petrie v. Rose.	V. 364
Petriken v. Baldy.	VII. 429
Petriken v. Collier.	VII. 392
Philadelphia Exchange Co., Gowen v.	V. 141
Philadelphia County v. Sharswood.	VII. 16
Philadelphia, Germantown and Norristown Rail-road Co., Whitemarsh Township v.	VIII. 365
Philadelphia, Germantown and Norristown Rail-road Co., Levering v.	VIII. 459
Philadelphia Mayor, Aldermen and Citizens' Appeal.	VIII. 449
Phillips, Benner v.	IX. 13
Phillips v. Hellings.	V. 44
Phillips v. Lawrence.	VI. 150
Pierce v. M'Keehan.	III. 280
Pierce v. Scott.	IV. 344
Pike Beneficial Society, Commonwealth v.	VIII. 247
Pinegrove Township, Union Canal Co. v.	VI. 560
Pitt Township Road Case.	VIII. 74
Pittsburgh, District of,	II. 320
Pittsburgh and Allegheny Bridge Co., Henry v.	VIII. 85
Pleasants v. Cowden.	VII. 379
Pleiss, Maule v.	VI. 331
Plummer v. Neile.	VI. 91
Plymouth Rail-road Co., Loedom v.	V. 265
Poe v. Foster.	IV. 351
Poindexter, Patterson v.	VI. 227
Pontius v. Commonwealth.	IV. 52
Poor, Directors of, Wallace v.	VIII. 94
Poor, Directors of, v. Rail-road Co.	VII. 235
Porter v. Boone.	I. 251
Porter, M'Cullough v.	IV. 177
Porter v. M'Ginnis.	VI. 502
Post v. Avery.	V. 509
Post v. Carmalt.	II. 70
Postens v. Postens.	III. 127
Postens v Postens.	III. 189

Poth v. Anstatt	IV. 307
Pott v. Nathans	I. 155
Presbyterian Congregation v. Johnston	I. 9
Presbyterian Church, Means v.	III. 303
Preston v. Finney	II. 53
Preston, Killam v.	IV. 14
Price, Seibert v.	V. 438
Primrose, Commonwealth v.	II. 407
Prosser, Haley v.	VIII. 133
Pugh v. Good	III. 56
Pugh, Knight v.	IV. 445
Pugh v. Ottenkirk	III. 170
Pursell v. Ellis	V. 525
Pyle v. Pennock	II. 390

Quin v. Brady	VIII. 139
---------------------	-----------

Rail-road Co., Hopkins v.	III. 410
Rail-road Co., Directors of Poor v.	VII. 236
Rainey v. Commonwealth	IV. 186
Ralph v. Brown	III. 395
Ralyea, Dunn v.	VI. 475
Ramage, Dixon v.	II. 142
Ranck, Farley v.	III. 554
Randolph, Mayor v.	IV. 514
Rank v. Hill	II. 56
Rapp, Relf v.	III. 21
Rathbone v. Tioga Navigation Co.	II. 74
Reakert v. Sanford	V. 164
Read v. Robinson	VI. 329
Red, M'Millan v.	IV. 237
Reed, Bank of Pennsylvania v.	I. 101
Reed v. Bias	VIII. 189
Reed, Bishop v.	III. 261
Reed v. Buckley	V. 517
Reed, Patterson v.	VII. 144
Reed v. Reed	I. 235
Reed, Shaw v.	IX. 72
Reese's Appeal	II. 417
Reese v. Waters	IV. 145
Reesor, Beyer v.	V. 501
Reichly v. Maclay	II. 59
Reid v. Morrison	II. 401
Reid v. Stanley	VI. 369
Reigart's Appeal	VII. 267
Reigart, Shuman v.	VII. 168
Rehrer v. Zeigler	III. 258
Reitzel, Commonwealth v.	IX. 109
Reitzel, Eberman v.	I. 181
Reitzel v. Franklin	V. 33
Relf v. Rapp	III. 21
Reynolds, Commissioners v.	VII. 329

Reynolds, Devinney v.....	I.	328
Reynolds, Tate v.....	VIII.	91
Reynolds, Wood v.....	VII.	406
Rice v. Bixler	I.	445
Rice v. Foster	II.	58
Richards v. Ayres.....	I.	485
Richards, Murphy v.....	V.	279
Richey, Vantries v.....	VIII.	87
Riddle, Church v.....	VI.	509
Ridge Turnpike Co. v. Stoevers.....	II.	548
Ridge Turnpike Co. v. Stoevers.....	VI.	378
Ridgely v. Dobson.....	III.	118
Ridgway, Seitzinger v.	IV.	472
Ridgway v. Stewart.....	IV.	383
Rinehart v. Olwine	V.	157
Ringlund, Jackman v.	IV.	149
Ripka v. Sergeant.....	VII.	9
Rittenhouse v. Levering.....	VI.	190
Road Case	IV.	39
Road Case	III.	559
Robb v. Ankeny	IV.	128
Robb v. Beaver.....	VIII.	107
Roberts, Lancaster County v.....	V.	505
Roberts v. Wilcock.....	VIII.	464
Robinson, Bombaugh v.....	I.	159
Robinson v. Jefferson County	VI.	16
Robinson, Read v.....	VI.	329
Rockel, Kester v.....	II.	365
Roderick, Hill v.	IV.	221
Roderick, Stewart v.	IV.	188
Rogers, Bingham v.	VI.	495
Rogers, Gilchrist v.....	VI.	488
Rohr v. Kindt	III.	563
Roland v. Miller	III.	390
Roland v. Tiernan	VIII.	193
Root, Hauberger v.	VI.	431
Rose v. Klinger.....	VIII.	178
Rose, Petrie v.....	V.	364
Ross v. Cowden	VII.	376
Ross, Foust v.	I.	501
Rush, Keim v.....	V.	377
Rutter v. Gable.....	I.	108
Rudy, Fcehrer v.....	VII.	183
Russel v. Shuster	VIII.	308
Russel, Whitesides v.....	VIII.	44
Ryan, Dawson v.	IV.	403
Rymar, Cleavinger v.	III.	486
Saeger v. Wilson.....	IV.	501
Sage v. M'Guire	IV.	228
Sample v. Coulson.....	IX.	62
Sampson's Appeal	IV.	86

Sampson v. Commonwealth	V. 385
Sanford, Reakert v.	V. 164
Sandford, Kramer v.	IV. 328
Sands v. Smith	III. 9
Sankey, M'Cleary v.	IV. 113
Sarbach, Haverstock v.	I. 390
Sarber, Fisk v.	VI. 18
Saylor v. Kocher.	III. 163
Sayre v. Frick	VII. 383
Sayres, Ferreira v.	V. 210
Schoenberger, Martin v.	VIII. 367
Schricon, Foreman v.	VIII. 43
School Directors, Barnet v.	VI. 86
School Directors v. James	II. 568
Schuylkill Bank, Girard Bank v.	VIII. 242
Schuylkill Bank v. Macalester	VI. 147
Schuylkill Bank v. Wager	VI. 147
Schuylkill Navigation Co. v. Farr	IV. 362
Schuylkill Navigation Co. v. Harris	V. 28
Scott's Estate	IX. 98
Scott, Pierce v.	IV. 344
Scott, Wallace v.	VII. 248
Scott v. Wells	VI. 357
Seaton v. Barry	IV. 183
Sedam v. Shaffer	V. 529
Sedgwick's Appeal	VII. 260
Seechrist v. Baskin	VII. 403
Seeger, Bowes v.	VIII. 222
Seely, Avery v.	III. 494
Seibert v. Price	V. 436
Seitz, Insurance Co. v.	IV. 273
Seitzinger, Adams v.	I. 243
Seitzinger v. Fisher	I. 293
Seitzinger v. Ridgway	IV. 472
Seitzinger, Wetherill v.	IX. 177
Selfridge v. Northampton Bank	VIII. 320
Selfridge's Appeal	IX. 55
Serrill, Opie v.	VI. 264
Sergeant v. Ford	II. 122
Sergeant, Ripka v.	VII. 9
Shaffer, Sedam v.	V. 529
Shaffer v. Watkins	VIII. 219
Shafner v. Gilmore	III. 438
Sharp v. Buffington	II. 454
Sharswood, Philadelphia County v.	VII. 16
Shatto, Creigh v.	IX. 82
Shaver, Commonwealth v.	III. 338
Shaw v. Reed	IX. 72
Shaw, Wharton v.	III. 124
Shawhan, Jones v.	IV. 257
Sheffer, Dice v.	III. 419
Sheldon, Moss v.	III. 160

Shelly v. Shelly	VIII. 153
Shelly, Weinberger v.....	VI. 336
Sheik, Bruner v.....	IX. 119
Sheriff, Commonwealth v.....	VII. 108
Sherk v. Endress.....	III. 255
Sherk, Stine v.....	I. 195
Shirlock, Okeson v.....	IX. 142
Shissler, Wampler v.....	I. 365
Shoemaker v. Huffnagle	IV. 437
Shoemaker, Irwin v.....	VIII. 75
Shoemaker, Strauch v.....	I. 166
Shoemaker, Thomas v.....	VI. 179
Shoenberger v. Lyon.....	VII. 184
Shorman v. Farmers' Bank of Reading.....	V. 373
Shortz v. Unangst.....	III. 45
Shotwell, Fittler v.	VII. 14
Shouffler v. Coover.....	I. 400
Shover v. Funk.....	V. 457
Shuey v. Bitner	III. 274
Shuler v. Garrison	V. 455
Shuman, Costenbader v.	III. 504
Shuman v. Reigart.....	VII. 168
Shunk, Bayard v.....	I. 92
Shunk, Bitzer v.....	I. 340
Shuster, Russell v.	VIII. 308
Siegfried, Christman v.....	V. 400
Sigler, Buckholder v.....	VII. 154
Sill v. M'Knight.....	VII. 244
Siltzell v. Michael	III. 329
Silverthorn, Okeson v.....	VII. 246
Silvis v. Ely.....	III. 420
Simpson, Walker v.....	VII. 83
Singer v. M'Cormick	IV. 265
Slingluff, M'Clelland v.....	VII. 134
Slossan, Hoffman v.	II. 36
Small, Brookhart v.	VII. 229
Small, York County v.....	I. 315
Smethurst v. Woolston	V. 106
Smick, Kenrick v.....	VII. 41
Smith, Barnitz v.....	I. 142
Smith, Brien v.....	IX. 78
Smith, Ickes v.....	I. 139
Smith v. Jack	II. 101
Smith v. M'Grew.....	IV. 338
Smith, Parke v.....	IV. 287
Smith, Sands v.....	III. 9
Smith, Steel v.....	VII. 447
Smith, Winder v.	VI. 424
Smull v. Jones	I. 128
Smull v. Jones.....	VI. 122
Smyser v. Smyser.....	III. 437
Smyth v. Craig	III. 14

Smyth, Wright v.	IV. 527
Snevily v. Egle	I. 480
Snevily v. Ekel	I. 203
Snevily, Ekel v.	III. 472
Snevily, Hadley v.	I. 477
Snevily v. Johnston	I. 307
Snyder, Gilkeson v.	VIII. 200
Snyder, Hockenbury v.	II. 240
Somerset, Moore v.	VI. 262
Sott v. Kelso	IV. 278
Souder, Mullock v.	V. 198
Spangler, Bream v.	I. 378
Spangler's Estate.	IX. 135
Speakman, Darlington v.	IX. 131
Speakman, Welsh v.	VIII. 257
Speck v. Commonwealth.	III. 324
Speer v. M'Chesney	II. 233
Speise v. M'Coy	VI. 485
Spencer v. Campbell	IX. 32
Spigelmoyer v. Walter.	III. 540
Spires v. Hamot.	VIII. 17
Sponeberger, Feigley v.	V. 564
Spoul v. Ihmsen	VI. 525
Sprague v. Woods	IV. 192
Sprenkle, Zeigler v.	VII. 175
Spring Garden Commissioners' Appeal.	VIII. 444
Springer, Mytinger v.	III. 405
Stacey v. Franklin Fire Insurance Co.	II. 506
Stanley, Reid v.	VI. 369
Stansbury v. Bertron.	VII. 362
Steel v. Bridenbach	VII. 150
Steel v. Smith.	VII. 447
Steiner, Hesser v.	V. 476
St. Clair Township, Giffen v.	IV. 327
St. Clair, Overseers of, Overseers of Moon v.	VI. 522
St. Stephen's Church, Montgomery v.	IV. 542
Steinman v. Wilkins.	VII. 466
Sterner v. Gower.	III. 136
Stephens' Appeal.	VIII. 444
Stephens v. Bradford County	VII. 438
Sterrett, Frick v.	IV. 269
Stevens v. Hughes.	III. 465
Stewardson, Pennsylvania Hospital v.	III. 93
Stewart's Appeal	III. 476
Stewart, Bailey v.	III. 560
Stewart v. Kenower.	VII. 288
Stewart, Layng v.	I. 222
Stewart v. M'Minn	V. 100
Stewart, Patterson v.	VI. 527
Stewart, Pattison v.	VI. 72
Stewart, Ridgway v.	IV. 383
Stewart v. Roderick.	IV. 188

Stiles v. The West Chester Rail-road Co.....	IV. 403
Stine v. Sherk.....	I. 195
Stitzell v. Kopp.....	IX. 29
Stockton, Hopkins v.	II. 163
Stoever's Appeal	III. 154
Stoever, Leinaweaver v.....	I. 160
Stoever, Ridge Turnpike Co. v.	II. 548
Stoever, Ridge Turnpike Co. v.....	VII. 378
Stoffit v. Troxell.....	VIII. 340
Stokes, Odenheimer v.	V. 175
Stone, Young v.....	IV. 45
Stoner v. Stroman	IX. 85
Stover v. Metzgar.....	I. 269
Strauch v. Shoemaker	I. 166
Strawbridge v. Funstone... ..	I. 517
Strawbridge v. Cartledge.....	VII. 394
St Peter's Church, Zion Church v.	V. 215
Street, Brown v.....	VI. 221
Street v. Commonwealth	VI. 209
Strein v. Zeigler.....	I. 259
Strickhouser, Wolfram v.....	I. 379
Strickler, Haughey v.	II. 411
Stroh v. Hess	I. 147
Stroh v. Uhrich.....	I. 57
Stroman, Stoner v.....	IX. 85
Stroop v. Gross.....	I. 139
Stuck v. Mackey	IV. 196
Susquehannah Canal Co. v. Bonham.....	IX. 27
Susquehannah Canal Co. v. Wright	IX. 8
Susquehannah Insurance Co. v. Perrine	VII. 348
Swarner, Hannah v.	III. 225
Swartzlander, Markley v.....	VIII. 172
Swayne, Pennock v.....	VI. 239
Swires v. Parsons	V. 357
Tallman, Bower v.	V. 556
Tams v. Wardle	V. 222
Tassey v. Church	IV. 141
Tassey v. Church.....	IV. 346
Tassey v. Church	VI. 465
Tate v. Reynolds.....	VIII. 91
Taylor v. Dougherty.....	I. 324
Taylor v. Hulme	IV. 407
Tevis, Hemphill v.....	IV. 534
Thayer, Bank United States v.....	II. 443
Thomas v. James.....	VII. 381
Thomas, Lehman v.....	V. 262
Thomas v. Shoemaker.....	VI. 179
Thompson v. Fisher	VI. 520
Thompson, Frazier v.....	II. 235
Thompson v. Lee.....	III. 479

Thompson v. Lyle.....	III. 166
Thompson, Magehan v.....	IX. 54
Thomson v. Hopper.....	I. 467
Tiernan, Roland v.....	VIII. 193
Tiffany, Loudon v.....	V. 367
Timbers v. Katz.....	VI. 290
Tioga Navigation Co., Rathbone v.....	II. 74
Todd's Will.....	II. 145
Tomlinson, Jarrett v.....	III. 114
Torbet, Lilley v.....	VIII. 89
Tottenham, Graffius v.....	I. 488
Towanda Bank v. Ballard.....	VII. 434
Tower's Appropriation.....	IX. 103
Towson, Bull v.....	IV. 557
Tozer, Cash v.....	I. 519
Tracey, Lowrey v.....	VI. 493
Tracy, Barclay v.....	V. 45
Tracy, Haydock v.....	III. 507
Treaster v. Fleisher.....	VII. 137
Trinity Church, Clark v.....	V. 266
Trone, Weierbach v.....	II. 408
Troxell, Stofflit v.....	VIII. 340
Troxsell, Flick v.....	VII. 65
Truby, M'Kelvey v.....	IV. 323
Turner, Johnson v.....	IV. 465
Turner v. Waterson.....	IV. 171
Turnpike Co. v. M'Anulty.....	IV. 293
Tyler, Hamsburgh Bank v.....	III. 373
Uhrich, Stroh v.....	I. 57
Ulrich v. Berger.....	IV. 19
Umbehauer, Aulenbaugh v.....	III. 259
Unangst v. Kraemer.....	VIII. 391
Unangst, Shortz v.....	III. 45
Union Academy, Fox v.....	VI. 353
Union Canal Co. v. Antillo.....	IV. 553
Union Canal Co. v. Loyd.....	IV. 393
Union Canal v. Pinegrove Township.....	VI. 560
Union Canal Co., Zimmerman v.....	I. 346
Union Township, Kelly Township v.....	V. 535
Union Township, M'Veytown v.....	V. 434
Urket v. Coryell.....	V. 60
Utt v. Long.....	VI. 174
Van Amringe, Gray v.....	II. 128
Van Buskirk, Levers v.....	VII. 70
Vandever's Appeal.....	VIII. 405
Vandyke v. Christ.....	VII. 373
Van Swearingen v. Harris.....	I. 356
Vantries v. Richey.....	VIII. 87
Varnier, Boggs v.....	VI. 469

Vaughn v. Ferris	II. 46
Vaux v. Parke	VII. 19
Voorhees, Dickinson v.	VII. 353
Voorhis v. Freeman	II. 116
Wager, Schuylkill Bank v.	VI. 147
Wagner, Hastings v.	VII. 215
Walker v. Anshutz	VI. 519
Walker, Simpson v.	VII. 83
Walker, Witman v.	IX. 183
Wallace, Poor Directors v.	VIII. 94
Wallace v. Scott	VII. 248
Walter, Spigelmoyer v.	III. 540
Waltman, Beltzhoover v.	I. 416
Wampler v. Shissler	I. 365
Ward, Call v.	IV. 118
Ward, Nieman v.	I. 68
Wardell, Jones v.	VI. 398
Wardle, Tams v.	V. 222
Warner, O'Conner v.	IV. 223
Wasser v. Coryell	V. 60
Waters, Reese v.	IV. 145
Waterson, Turner v.	IV. 171
Watkins, Shaffer v.	VII. 219
Watmough, Aechternacht v.	VIII. 162
Webb v. Dietrich	VII. 401
Weeks v. Haas	III. 520
Weightman, Burnside v.	II. 268
Weierbach v. Trone	II. 408
Weinberger v. Shelly	VI. 336
Weir v. Hale	III. 285
Wells, Scott v.	VI. 357
Welsh v. Speakman	VIII. 257
Werkheiser v. Werkheiser	VI. 184
West Branch Bank, Beebe v.	VII. 375
West Branch Bank, Beers v.	VII. 365
West Branch Bank, Cowden v.	VII. 432
West Branch Bank, Moorehead v.	III. 550
West Branch Bank v. Moorehead	V. 542
West, Franklin Fire Insurance Co. v.	VIII. 350
West Chester Rail-road Co., Stiles v.	IV. 403
West Philadelphia, Borough of,	V. 281
Western Bank, Hennessy v.	VI. 300
Wetherill v. Seitzinger	IX. 177
Wharton v. Botham	III. 158
Wharton v. Shaw	III. 124
Wheatfield Township, Carney v.	IV. 215
White v. Hopkins	III. 99
Whitehead v. Bank of Pittsburg	II. 172
Whitemarsh Township v. Philadelphia, Norristown and Germantown Rail-road Co.	VIII. 365

Whitesell v. Crane	VIII. 369
Whitesides v. Russell	VIII. 44
Whitman, Paul v.	III. 407
Wickersham, Huston v.	II. 308
Wickersham, Mason v.	IV. 100
Wightman, Brenger v.	VII. 264
Wilcock, Roberts v.	VIII. 464
Wiley's Appeal	VIII. 244
Wilhelm v. Caul	II. 26
Wilkins, Steinman v.	VII. 466
Will, Lightner v.	II. 141
Williams, Adams v.	II. 227
Williams v. Freeman	VII. 359
Williams v. Landman	VIII. 55
Willock, Mitchell v.	II. 253
Wilson, Jones and Co.'s Appeal	VIII. 387
Wilson v. Altemus	II. 255
Wilson v. Bigger	VII. 111
Wilson v. Clarke	I. 554
Wilson v. Commonwealth	VII. 181
Wilson v. Davis	V. 521
Wilson v. Commissioners of Huntingdon County	VII. 197
Wilson, Jackson v.	VII. 249
Wilson v. Borough of Lewistown	I. 428
Wilson, Saeger v.	IV. 501
Winder v. Smith	VI. 424
Withers v. Livezey	I. 433
Witman v. Walker	IX. 183
Wolaver, Gamber v.	I. 60
Wolfe v. Nesbit	IV. 312
Wolfram v. Strickhouser	I. 379
Wood, Commercial Bank v.	VII. 89
Wood, Libhart v.	I. 265
Wood v. Reynolds	VII. 406
Woodburn v. Farmers and Mechanics' Bank	V. 447
Woodburn, Orphans' Court v.	VII. 162
Woodman v. Good ...	VI. 169
Woods, Sprague v.	IV. 192
Woolston, Smethurst v.	V. 106
Worrall, Fisher v.	V. 478
Worrall's Accounts	V. 111
Wright v. Smith	IV. 527
Wright, Susquehanna Canal Co. v.	IX. 9
Wykoff v. Wykoff	III. 481
Wynn v. Allard	V. 524
Yerkes's Appeal	VIII. 224
Yohe v. Barnet	III. 81
Yople, M'Call v.	IV. 168
York County v. Small	I. 315
Young, Bunting v.	V. 188

Young, Chew v.	II. 107
Young v. M'Clure.....	II. 147
Young v. Stone	IV. 45
Zeigler v. Houtz.....	I. 533
Zeigler, Rehner v.	III. 258
Zeigler v. Sprengle.....	VII. 175
Zeigler, Strein v.	I. 259
Zephon, Commonwealth v.....	VIII. 382
Zimmerman v. Anders	VI. 218
Zimmerman v. Union Canal Co.....	I. 346
Zion Church v. St. Peter's Church	V. 215

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